

File No.: 04-1000-20-2024-563

December 18, 2024

s.22(1)

Dear s.22(1)

**Re: Request for Access to Records under the Freedom of Information and Protection of Privacy Act (the "Act")**

I am responding to your request of September 12, 2024 under the *Freedom of Information and Protection of Privacy Act* for:

**Record of the current contract between Cactus Club and the Vancouver Park Board (or COV) for their English Bay location. Date range: January 1, 2010 to September 11, 2024.**

All responsive records are attached. Some information in the records has been severed (blacked out) under s.17(1) and s.21(1) of the Act. You can read or download these sections here: [http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/96165\\_00](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96165_00).

Under Part 5 of the Act, you may ask the Information & Privacy Commissioner to review any matter related to the City's response to your FOI request by writing to: Office of the Information & Privacy Commissioner, [info@oipc.bc.ca](mailto:info@oipc.bc.ca) or by phoning 250-387-5629.

If you request a review, please provide the Commissioner's office with: 1) the request number (2024-563); 2) a copy of this letter; 3) a copy of your original request; and 4) detailed reasons why you are seeking the review.

Yours truly,

[Signed by Cobi Falconer]

**Cobi Falconer, MAS, MLIS, CIPP/C**  
**Director, Access to Information & Privacy**

If you have any questions, please email us at [foi@vancouver.ca](mailto:foi@vancouver.ca) and we will respond to you as soon as possible. You may also contact 3-1-1 (604-873-7000) if you require accommodation or do not have access to email.

Encl. (Response package)

:pm

LEASE

Reference Date August 9, 2011

AMONG:

CITY OF VANCOUVER, represented by its  
BOARD OF PARKS AND RECREATION  
2099 Beach Avenue  
Vancouver, British Columbia  
V6G 1Z4

(the "Landlord")

AND:

CACTUS CAFÉ ENGLISH BAY LTD., Incorporation number BC0871518  
1600 - 925 West Georgia Street  
Vancouver, British Columbia  
V6C 3L2

(the "Tenant")

AND:

CACTUS RESTAURANTS LTD.  
200 - 604 West Broadway,  
Vancouver BC  
V5Z 1G1

(the "Indemnifier")

Premises:

English Bay Bistro

Term:

Five (5) years, from November 1, 2011 to October 31, 2016

Option to Renew:

Five options to renew each for an additional term of five (5) years.

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**WITNESSES THAT WHEREAS:**

- A. The Landlord is the owner of certain lands situate in the City of Vancouver, in the Province of British Columbia, which are legally described as:

Parcel Identifier: 006-579-329  
Lot A District Lots 185, 3567, 4599, 5322, 5323, 5324 and 5427 Plan 20533  
Part Derived from District Lot 4599, Plan 19067  
Subject to Provisos, See Crown Grant M36750 (the "Lands")

which Lands are part of a larger area generally known as English Bay Beach Park, a 38.25 acre park which the City of Vancouver has designated as a permanent park over which the Vancouver Board of Parks and Recreation has exclusive jurisdiction and control;

- B. In response to a request for proposals issued by the Landlord the Tenant submitted a proposal to construct a building on the Lands and the Landlord accepted the Tenant's proposal, modified as agreed by the Landlord and Tenant;
- C. Pursuant to a licence agreement (the "**Licence Agreement**") between the Landlord and the Tenant, the Tenant is constructing or has constructed a two-storey building, without a basement, (the "**Building**") on the Lands, as shown on the plan attached as Schedule A hereto (the "**Premises**") which has been constructed for use as a restaurant and take-out concession on the lower level including sit down restaurant and bar service on both levels with indoor and outdoor seating. The Building will be or was given to the Park Board at the end of the term of said Licence Agreement;
- D. The Landlord has agreed to lease the Premises to the Tenant (and to grant a licence to the Tenant to use the outside Terrace seating area adjacent to the Premises as shown hatched on Schedule A attached hereto (the "**Licensed Area**")) for an initial term of five (5) years with five options to renew each for an additional term of five (5) years, as hereinafter provided;
- E. The Tenant has agreed to supply all furniture, furnishings and equipment required for the proper and efficient operation of the Premises as a restaurant in conjunction therewith; and
- F. The Landlord's Board of Parks and Recreation, by resolution made at its meeting on March 22, 2010, resolved to lease the Premises to the Tenant upon the terms and conditions hereinafter set out.

NOW THEREFORE in consideration of the rents, covenants and agreements hereinafter reserved and contained on the part of the Tenant to be paid, observed and performed, the Landlord by these presents does demise and lease the Premises unto the Tenant and the Tenant does hereby take and rent the Premises upon and subject to the conditions set out hereunder.

## ARTICLE 1

### Section 1.01 Term

In consideration of the rents, covenants and conditions herein on the part of the Tenant to be performed and observed, the Landlord hereby leases the Premises to the Tenant to have and to hold the same for and during a term of five (5) years commencing on November 1, 2011 (the "Commencement Date") and expiring at 11:59 p.m. on October 31, 2016 (the "Term").

### Section 1.02 Licence to Use Licenced Area

The Landlord hereby grants to the Tenant a licence to use the Licenced Area, provided that the Tenant has no interest in the land in the Licenced Area, which licence will be appurtenant to the lease and will be concurrent with the term of this lease and any renewals of this lease, provided that all the terms and conditions of this lease will apply to the Licenced Area as it was a part of the Premises except that the Licenced Area will not be included in the calculation of the square footage of the Premises for the purpose of calculating the Property Taxes.

### Section 1.03 Rent

The Tenant hereby covenants and agrees with the Landlord that the Tenant will pay to the Landlord during the Term, without prior demand or any deduction or set off whatsoever, the following:

- (a) basic rent (the "Basic Rent") for each lease year of the Term (the "Lease Year") from November 1, 2011 as follows:
  - (i) commencing on November 1, 2011 and thereafter payable on the 1<sup>st</sup> day of each and every next succeeding 60 months to and including October 31, 2016, the sum of ~~s.17(1), s.21(1)~~;
  - (ii) if the first option to renew the lease is exercised then commencing on November 1, 2016 and thereafter payable on the 1<sup>st</sup> day of each and every next succeeding 60 months to and including October 31, 2021, the sum of ~~s.17(1), s.21(1)~~
- (b) sales rent (the "Sales Rent") for each Lease Year which will be the amount by which ~~s.17(1), s.21(1)~~ for each Lease Year exceeds the sum of ~~s.17(1), s.21(1)~~ provided that:
  - (i) "Gross Revenue" means the entire amount of the total sale prices whether for cash or credit of all sales of food, beverages (including alcoholic beverages) and merchandise and the entire amount of all other receipts from all of the food service operations including any take out service operations, and includes all receivables whatsoever of all business conducted at, in, on or from the Premises by the Tenant and any affiliate of the Tenant, including receipts and receivables in respect of services provided at the Premises even though the orders for such services are not made at or through the Premises, but excluding:
    - (1) income derived from meals provided to staff;

- (2) gratuities from patrons;
- (3) all sums collected and paid out for any direct retail sales tax imposed by any government authority, including HST and PST;
- (4) the "free" food portion of any bona fide coupon promotion, public relations or promotional program applicable to the food services operations, including Entertainment Book, Solid Gold, Gastronomic, Budget Rent-A-Car or any other discount promotion applicable to the food services operations; and
- (5) proceeds of insurance in reimbursement of any losses, damages or claims suffered by the Tenant, except for reimbursement for loss of revenue which will be included in Gross Revenue;
- (6) sales or rentals for which credit has been made to a charge card or cash has been refunded
- (7) transfers between locations of affiliates of the Tenant or other related restaurant locations;
- (8) staff gratuities or tips;
- (9) sales of coupons or certificates unless such coupons or certificates are redeemed at the Premises;
- (10) sales of excess equipment or fixtures or inventory in the ordinary course;
- (11) delivery charges;
- (12) cost of any complimentary or promotional items, including the cost of any items provided to satisfy customer complaints;

less:

- (13) refunds to patrons or returns from patrons or suppliers, excluding refunds to patrons for parking validation, which will not be deducted from Gross Revenue;
  - (14) any credit card fees, including charges for rejected credit cards; and
- (ii) the Sales Rent will be paid annually based on the Gross Revenue for each Lease year, which payment will be accompanied by a Revenue Report prepared and submitted in accordance with Section 2.01.

The Basic Rent and the Sales Rent (collectively the "Rent") together with any additional rent payable by the Tenant is referred to as "rent" in this lease.

Notwithstanding the foregoing, the Landlord will reimburse the Tenant for costs of site improvements conducted outside of the Premises pursuant to the Licence Agreement (as defined in Clause C of this lease) by way of annual payments in the amount of s.17(1), s.21(1) for

the Term plus financing costs. For greater certainty, outside the Premises means the area beyond the building footprint and the terrace areas. The Tenant will deduct the said amounts from their rent payable monthly amortised over the first five years of the Term including interest at the ~~s 17(1), s 21(1)~~

#### **Section 1.04 Payments Generally**

All payments by the Tenant to the Landlord of whatsoever nature required or contemplated by this lease will be:

- (a) paid to the Landlord by the Tenant in lawful currency of Canada;
- (b) made when due hereunder, without prior demand therefor and without any setoff, compensation or deduction whatsoever at the office of the Vancouver Board of Parks and Recreation specified in Section 16.01 or such other place as the Landlord may designate from time to time in writing to the Tenant, provided that upon the request of the Landlord, the Tenant will deliver to the Landlord a series of post-dated cheques, each in the amount of the additional rent as reasonably estimated by the Landlord, for the next ensuing twelve (12) months, and the Tenant will continue to do so upon each yearly anniversary thereafter during the Term. The failure of the Tenant to comply in any way with the provisions of this subsection will be deemed to be default under this lease and will entitle the Landlord to exercise any and all remedies available to the Landlord under this lease;
- (c) applied towards amounts then outstanding hereunder, in such manner as the Landlord may see fit;
- (d) deemed to be rent, in partial consideration for which this lease has been entered into, and will be payable and recoverable as rent, such that the Landlord will have all rights and remedies against the Tenant for default in making any such payment which may not be expressly designated as rent as the Landlord has for default in payment of rent; and
- (e) deemed to accrue from day to day, and if for any reason it becomes necessary to calculate for irregular periods of less than one (1) month or at some other interval, an appropriate pro-rata adjustment will be made on a daily basis in order to compute rent for such irregular period.

#### **Section 1.05 Utilities**

The Tenant will pay all charges, rates and levies on account of utilities including heat, electricity, gas, water, garbage collection, telephone and cablevision and all other expenses and outgoings relating to the Premises when due and, upon request, the Tenant will provide the Landlord with receipts evidencing such payments. Invoicing of those utilities for which separate meters have been installed for the Premises will be based on actual consumption plus applicable taxes.

#### **Section 1.06 Use of Premises**

The Tenant will not use or occupy, nor suffer or permit the use of the Premises or any part thereof for any purpose other than for a restaurant with a liquor licence (the "Permitted

Use"). Without limiting the generality of the foregoing, the Tenant will not at anytime suffer, permit or allow any person to:

- (a) use the Premises and the Tenant's equipment on the Premises in connection with any operations not deemed by the Landlord, acting reasonably, to be part of the on-site operation of the restaurant; or
- (b) occupy the Premises for residential purposes.

The Tenant will not use, or suffer or permit the use of, any part of the Premises in such a manner as to cause, suffer or permit any annoying noises or offensive odours to emanate from any part of the Premises.

By agreeing to the Tenant using the Premises for the Permitted Use, the Landlord is agreeing as the owner of the Premises only and is not in any way (either in its capacity as landlord or as a regulatory public body) stating, warranting or representing that the Permitted Use is a permitted use under the City of Vancouver Zoning and Development By-law No. 3575 and amendments thereto and other relevant by-laws. Nothing in this Section 1.06 affects the Tenant's obligations to comply at its sole expense with all such by-laws pursuant to Section 10.01 of this lease.

#### **Section 1.07 Use of Licenced Area**

The Tenant will not use or occupy, nor suffer or permit the use of the Licenced Area or any part thereof for any purpose other than for outdoor seating for the restaurant operated on the upper and lower level of the Premises, subject to the requirements of the Liquor Licensing and Control Branch and any approval of the Landlord will be subject to the requirements of the Liquor Licensing and Control Branch.

#### **Section 1.08 Conduct of Business**

The Tenant agrees that the following will apply to the conduct of the business at the Premises:

- (a) the Tenant will manage and operate the restaurant in an efficient and professional manner, including maintaining an inventory of food, goods and supplies as may be necessary and appropriate for the efficient operation of the restaurant and supplying all necessary working capital for the effective operation of all services and in a manner consistent with the Cactus Club restaurant chain;
- (b) the Tenant will operate the restaurant in a manner that caters to people of all ages, and will obtain the prior written approval of the Landlord for any change to the style of service to customers;
- (c) the Tenant will not apply for nor request any change to any liquor licence for the restaurant without the consent of the Landlord, such consent not to be unreasonably withheld;
- (d) the Tenant will operate the restaurant year round with hours of operation consistent with other similar restaurants in the downtown Vancouver area;

- (e) the Tenant will ensure that its employees will be at all times of neat, clean and professional appearance;
- (f) at the reasonable request of the Landlord, the Tenant will attend any meeting requested by the Landlord to deal with concerns of the surrounding neighbourhood; and
- (g) upon written request from the Landlord, within six (6) months of the third anniversary of the commencement date of the Term and within six (6) months of every third anniversary thereafter, the Tenant, at its cost, will engage a professional inspection company approved by the Landlord, acting reasonably, to conduct a maintenance inspection of the Premises to determine the condition of the Premises, including without limitation, the structural, mechanical and electrical elements of the Premises and the finishes inside and outside of the Premises, and the Tenant will promptly provide to the Landlord a copy of that company's report, will promptly substantially implement all of the reasonable recommendations as agreed to between the Landlord and Tenant contained in such report, and in any event will have implemented all of such recommendations within six (6) months of the Tenant's receipt of such report, with the cost of such repairs being paid by the Tenant in accordance with its repair and maintenance obligations as set out in Article 3 of this lease.

#### **Section 1.09 Prohibited Activities/Products**

The Tenant acknowledges and agrees that its business in the Premises is being conducted within a city park and that therefore the Tenant must conduct its business in and from the Premises in a manner consistent with the best interests of English Bay Beach Park as a whole, as determined from time to time by the Landlord, and the following will apply:

- (a) the Tenant will not enter into any sponsorship agreements without obtaining the Landlord's prior written consent. The Tenant acknowledges that the Landlord has entered into or may enter into certain corporate sponsorship and supply agreements with various third parties for certain Vancouver parks, including English Bay Beach Park. The Tenant acknowledges that the existing corporate sponsorship and supply agreement is a Supply Agreement (the "Coca-Cola Agreement") dated December 1, 2006 with Coca-Cola Bottling Ltd. with respect to all cold beverage products, including without limitation soda, juice and bottled water. As required by the Coca-Cola Agreement, the Tenant confirms and agrees that it will not sell or advertise cold beverage products contrary to such agreement. The Landlord will make reasonable efforts to ensure that the Tenant is provided with similar price advantages and levels of service that the Landlord receives from the sponsor for the product or service, excluding commissions, royalties, bonuses or other incentives which the Landlord receives as part of the Coca-Cola Agreement. On any extension or renewal of the Coca-Cola Agreement, the Landlord will exclude the Premises from the application of such extended or renewed Coca-Cola Agreement.
- (b) the Tenant will not permit the use of the Premises for any of the following businesses or activities:
  - (i) sale of firecracker or fireworks of any kind;

- (ii) any gambling device or game of chance or gambling whatsoever;
- (iii) an auction, flea market, pawn shop, bulk sale, liquidation sale, distress sale, going-out-of-business sale, bankruptcy sale, sheriff's sale, receivership sale, or any other sale which in the Landlord's opinion suggests that business operations are to be discontinued in the Premises; and
- (iv) the sale or supply of any service which would, in the Landlord's opinion reasonably held:
  - (1) tend to lower the high quality character of the Building;
  - (2) constitute unethical, deceptive or fraudulent advertising, dishonest procedures or practices;
  - (3) be objectionable; or
  - (4) be a nuisance; and
- (c) except for the Premises, the Tenant will not, without the prior written consent of the Landlord, use any part of English Bay Beach Park, including any other area outside the Premises, for merchandising displays, decorations, signs, entertainment and structures (including, without limitation, kiosks, carts and other installations), permanent or otherwise, including for example, catering or special features of non-commercial or commercial activities.

#### **Section 1.10 Install Tenant's Furniture, Furnishings, Equipment and Continuously Operate**

The Tenant will install all furniture, furnishings and equipment required for the proper and efficient operation of the Premises, so that such furniture, furnishings and equipment will be installed and operational on the Commencement Date. The Tenant will occupy the Premises from and after the Commencement Date and will continuously, actively and diligently operate the restaurant in the Premises during the Term. Provided the Tenant may close for substantial renovations with the prior written approval of the Landlord.

#### **Section 1.11 Interest on Arrears**

Whenever and so long as the rent or any other amounts payable hereunder by the Tenant to the Landlord will be in arrears, such amounts will bear interest at the rate of three percent (3%) per annum above the "prime rate" (hereinafter defined), per annum calculated monthly not in advance, from the date due until paid irrespective of whether or not the Landlord has demanded payment. In this lease, "prime rate" means the floating annual percentage rate of interest established from time to time by the Bank of Montreal, 595 Burrard Street, Vancouver, British Columbia as the base rate that will be used to determine rates of interest charged by it for Canadian dollar loans to customers in Canada and designated by the Bank of Montreal as its prime rate; provided that if a court declares or holds the prime rate to be void or unenforceable for any reason including uncertainty, then the rate of interest payable on amounts in arrears hereunder will be fourteen percent (14%) per annum calculated monthly not in advance from the date due until paid. The Landlord will have all the remedies for the collection of such interest as in the case of rent in arrears, but this provision for interest will

not prejudice or affect any other remedy of the Landlord under this lease. The Tenant will also pay the Landlord's standard charge levied on N.S.F. cheques.

#### Section 1.12 Security Deposit

Deleted

#### Section 1.13 Taxes

Notwithstanding the preceding terms of this lease, in addition the Tenant will pay monthly as additional rent in each and every month of the Term a sum on account of the annual general, school and local improvement charges and taxes and any charges and taxes levied under or by virtue of the *Hospital District Finance Act*, R.S.B.C. 1996, c. 203, as amended or substituted from time to time, the *Municipal Finance Authority Act*, R.S.B.C., 1996, c. 325, as amended or substituted from time to time, and any and all other statutes, laws, enactments, regulations and ordinances of the federal or provincial governments or other competent authority, or any modifications or re-enactments thereof which, except for any exemption allowed by law, would in the ordinary course have been lawfully imposed against the Premises excluding the Licenced Area, and against all machinery in and about the Premises for each year of the Term (the "Property Taxes"), as follows:

- (a) for the period between November 1, 2011 and October 31, 2016 at the rate of ~~s.17(1), s.21(1)~~ of the Premises estimated at 5,467 square feet, prorated for the portion of the calendar year;
- (b) for the next 4 calendar years of the Term and the portion of the remaining calendar year until the expiry of the Term, the Landlord will review and, if necessary, revise effective January 1st in each such calendar year the rate for calculation of Property Taxes to reflect any change in property tax assessments for businesses in Vancouver;
- (c) Property Taxes will be paid monthly and the Tenant will, for each month of the Term, pay to the Landlord an amount equal to one-twelfth of the Property Taxes for the calendar year, such amount to be paid on or before the 1<sup>st</sup> day of the month;
- (d) at the option of the Landlord, the Landlord may require that the Property Taxes be paid semi-annually in two lump sums on dates to be specified by the Landlord; and
- (e) the parties agree that the square footage of the Premises for the purpose of calculation of the Property Taxes will be 5,467 square feet.

Should the Premises or any portion thereof or any trade fixtures or chattels for any reason become subject to taxation, then the Tenant will pay all such taxes, provided that the Tenant will not be required to pay any portion of such taxes in addition to the Property Taxes if such portion is included in the calculation of the Property Taxes.

#### Section 1.14 Harmonized Sales Tax

The Tenant will pay when due all harmonized sales taxes, value-added taxes, sales taxes and consumption based taxes, rates, levies and assessments which are from time to time payable



by the Tenant or the Landlord as a result of or that would not be payable but for the rights and obligations contained in this lease, including but without derogating from the generality of the foregoing, such taxes, rates, levies and assessments payable as a result of any payment obligations herein of the Tenant to the Landlord, but excluding any taxes personal to the Landlord or dependant on the income or capital of the Landlord. Any loss, costs, charges and expenses which relate to such taxes, rates, levies and assessments suffered by the Landlord may be collected by the Landlord as additional rent with all rights of distress and otherwise as reserved to the Landlord in respect of rent in arrears.

## ARTICLE 2

### Section 2.01 Revenue Report

The Tenant will deliver to the Landlord the following Revenue Reports during the Term:

- (a) a Revenue Report for each Lease Year, to be delivered on or before ninety (90) days after the end of the Lease Year, together with the balance of the Rent payable if such Revenue Report indicates that, based on the Gross Revenue for the Lease Year, the amount owing on account of the Sales Rent exceeds that paid for that Lease Year pursuant to Section 1.03;
- (b) within sixty (60) days of the date of the expiry or earlier termination of this lease, a Revenue Report for the period between the most recently submitted Revenue Report for a Lease Year and the date of expiry or earlier termination, together with the balance of the Sales Rent payable if such Revenue Report indicates that, based on the Gross Revenue for that period, the amount owing on account of the Sales Rent exceeds that paid for such period pursuant to Section 1.03; and
- (c) "Revenue Report" means a report on revenue collected by the Tenant from the business at the Premises, provided by the Tenant to the Landlord, which report must:
  - (i) be in writing and certified by its author who will be an authorized signatory of the Tenant as set out below as being complete and true as to its contents;
  - (ii) indicate both the actual revenue and the Gross Revenue collected by the Tenant from the business at the Premises for all of the reporting period and separately indicate:
    - (1) the value of all meals and other products and services at the Premises provided to staff of the Tenant;
    - (2) the value of all meals and other products and services at the Premises provided for promotional purposes;
    - (3) all refunds to patrons;
    - (4) the Gross Revenue derived from the sit down restaurant service (if any); and
  - (iii) the Gross Revenue derived from the take out service; and

- (iv) indicate the Rent for the reporting period based on the Gross Revenue from the business at the Premises.

### **Section 2.02 Accounting Procedures and Controls**

The Tenant will maintain a commercially reasonable standard of internal accounting procedures and controls over all revenues collected by the Tenant in the operation of the business at the Premises and will ensure that all revenues collected with respect to the business at the Premises are clearly and accurately accounted for in accordance with the terms of this lease and Cactus Club Restaurant standard systems. The Tenant will maintain records for the business at the Premises which are separate from the records which the Tenant maintains for other businesses conducted by the Tenant.

### **Section 2.03 Audited Revenue Reports**

The Tenant will, at its expense, prepare and submit to the Landlord Revenue Report for each Lease Year during the Term signed and verified by the Tenant and certified by a financial officer of the Tenant so long as the Tenant is Cactus Café English Bay Ltd, and otherwise by the auditor of the Tenant who will be a qualified accountant acceptable to the Landlord acting reasonably) and the following will apply:

- (a) such certified Revenue Report must be submitted on or before ninety (90) days after the end of the Lease Year and for any partial Lease Year to the expiry or earlier termination of this lease, within ninety (90) days of such expiry or earlier termination;
- (b)
- (c) the Tenant will retain possession of all documents pertaining to the business at the Premises or at the Tenant's head office in the Province for not less than seven (7) years;
- (d) the Landlord reserves the right to:
  - (i) audit the books, records and accounts of the Tenant with respect to the business at the Premises at any reasonable time and the Tenant will make available to the Landlord, at any reasonable time, all documents pertaining to the operation of the business at the Premises; and
  - (ii) require that the Tenant submit financial statements of the Tenant for each Lease Year during the Term, and the requirements with respect to the Revenue Reports set out in this Section 2.03 will apply to such financial statements;
- (e) if any audit conducted by the Landlord discloses that the actual Gross Revenue for any Lease Year is greater by two percent (2%) or more than that disclosed by the financial statements provided by the accountant for the Tenant, the Tenant will pay the cost of such audit forthwith on demand by the Landlord; and
- (f) if any audit conducted by the Landlord discloses that the actual Gross Revenue for any Lease Year is greater by five percent (5%) or more than that disclosed

by the financial statements provided by the accountant for the Tenant, the Tenant will pay to the Landlord an amount equal to TWO TIMES any additional Percentage Rent.

### ARTICLE 3

#### Section 3.01 No Damage

The Tenant will not suffer, cause nor permit any damage or injury to the Premises other than reasonable wear and tear.

#### Section 3.02 Snow Removal

The Tenant covenants that it will keep the Licenced Area clear of snow and ice and will keep the adjacent sidewalks, if any, clear of snow and ice to comply with the requirements of the Street and Traffic By-law of the City of Vancouver and that it will indemnify and save harmless the Landlord from all costs, loss, damages, compensation and expenses suffered by the Landlord and sustained or caused by the Tenant's failure to remove snow and ice as required herein Licenced Area PROVIDED THAT if the Tenant does not remove snow and ice as required by the Street and Traffic By-law, the Landlord may clear the sidewalks and the cost of such removal will be paid by the Tenant to the Landlord.

#### Section 3.03 Alterations

The Tenant will not carry out or cause to be carried out any additions, renovations or alterations to the structure, roof or base building systems of the Premises ("Alterations") without the Landlord's prior written consent not to be delayed unreasonably and in the giving of such consent the Landlord may attach conditions, directions, stipulations, prohibitions or deadlines as it deems appropriate and the same will be conditions of this lease, provided that the Tenant will not require the consent of the Landlord to redecorate the interior of the Premises from time to time if the Tenant does not carry out any Alterations. All such works will be wholly at the Tenant's expense but will be the Landlord's absolute property except to the extent that the same may be reasonably categorized as trade fixtures.

By consenting to any Alterations, the Landlord is not in any way (either in its capacity as landlord or as a regulatory public body) stating, warranting or representing that the Alterations are permitted under the City of Vancouver Zoning and Development By-law No. 3575 and amendments thereto, the City of Vancouver Building By-law No. 6134 and amendments thereto, and other relevant by-laws. No consent given by the Landlord (and no failure to enforce this Section of this lease) will affect the Tenant's obligations to comply at its sole expense with all such by-laws pursuant to Section 10.01 of this lease.

#### Section 3.04 Maintenance

The Tenant will maintain the Premises in a sanitary, neat, tidy and safe condition and free from nuisance at all times and will clean the Premises daily and will redecorate the interior of the Premises at reasonable intervals, and the following will apply:

- (a) the Tenant will not obstruct the hallways, entrances, stairways and driveways leading to the Premises or suffer same to be used by the Tenant's employees or invitees for any purpose other than ingress to and egress from the Premises, and the Tenant agrees not to place in the hallways, entrances, stairways and

driveways any waste paper, dust, garbage, refuse or anything whatsoever that would tend to make such areas appear untidy or filthy;

- (b) the Tenant will employ the services of a commercial garbage and refuse removal company or that service provided by the City and will ensure that refuse, garbage and solid waste is removed as required in order to maintain the cleanliness of the Premises; and
- (c) the Tenant will follow good environmental practices whenever possible and conform to the Landlord's policies in use at other similar operations.

### Section 3.05 Repairs to Premises

The Tenant will, at the Tenant's sole expense, keep and maintain the Premises including all structural elements of the Building (including, without limitation the foundation, load-bearing walls and the roof) in good repair as would a reasonable and prudent owner of such premises (including, without limitation, wiring, piping, lighting and plumbing fixtures, operating equipment, as well as the electrical, plumbing, sprinkler, sewage, heating, ventilating and air-conditioning systems within the Premises), reasonable wear and tear excepted and the Landlord will have access to the Premises for purpose of inspection during normal business hours and the Tenant will repair according to notice. Without limiting the generality of the foregoing, the Tenant will, at its sole expense, maintain and repair all materials and finishes in the interior of the Premises (excluding landscaping) and the building envelope, including without limitation painting, sealing, staining and weather-proofing the exterior of the Premises and promptly replace all damaged glass, plate glass, doors and windows (whether exterior or interior) within the Premises unless such damage is caused by the negligence of the Landlord. If the Tenant fails to promptly commence repairs and diligently prosecute same to completion after receipt of notice from the Landlord requiring repairs, then the Landlord may carry out or cause to be carried out such repairs, the costs of which will be payable by the Tenant, and the Landlord and its employees, agents, contractors and subcontractors will not be liable to the Tenant for any inconvenience, annoyance, disruption, loss of income or liability suffered or incurred by the Tenant by reason of the Landlord effecting such repairs unless caused by the negligence of the Landlord or those for whom the Landlord is responsible in law.

### Section 3.06 Landlord Not Obligated to Repair

Pursuant to this lease, the Landlord will not be obliged to make any repairs or alterations to the Premises and the Tenant hereby assumes the full and sole responsibility for the condition, operation, repair, replacement, maintenance and management of the Premises and all expenses related thereto.

### Section 3.07 Liens and Encumbrances

In connection with all labour performed in, or materials supplied for, the making, erection, installation or alteration of any work or installations made by or for the Tenant in the Premises, the Tenant will comply with all the provisions of the *Builders Lien Act*, as amended or substituted from time to time, and other statutes from time to time applicable thereto, including any provision requiring or enabling the retention of any sum as a holdback.

The Tenant will be entitled to grant in favour of a Mortgagee a security interest in this lease and the Tenant's leasehold improvements, inventory, fixtures, equipment and trade fixtures, in accordance with Article 8.

If and whenever any builders lien or other lien for work, labour, services or materials supplied to or for the Tenant or for the cost of which the Tenant may be in any way liable, or claims therefor arise or are filed against title to the Premises, the Tenant will, within thirty (30) days after receipt of notice thereof, procure the discharge thereof, including any certificate of pending litigation or other notation or charge registered in respect of any lien, by payment or giving security or in such other manner as may be required or permitted by law. Provided however, that in the event of a bona fide dispute by the Tenant of the validity or correctness of any claim for any such lien, the Tenant will not be bound by the foregoing, but will be entitled to defend against the same in any proceedings brought in respect thereof after first paying into a court of competent jurisdiction the amount claimed or sufficient security therefor, and such costs as the court may direct, or otherwise posting security as may be satisfactory to the Landlord. This Section will not prevent the Tenant mortgaging or encumbering its chattels, inventory, trade fixtures or equipment which are not fixtures.

Pursuant to Section 3(2) of the *Builders Lien Act*, the Landlord may file in the Land Title Office notice of its fee simple interest in the land on which the Premises are located, as is required by law to ensure that the Landlord's title does not become charged with liens related to this lease.

#### **Section 3.08 Signage**

The Tenant will not erect on the outside of the Building or, in English Bay Beach Park (other than the inside of the Premises), any sign, picture, device, photograph, marking, pole, tower or other structure without first having obtained the consent in writing of the Landlord, which consent may be unreasonably withheld. Notwithstanding the foregoing the Tenant shall be entitled to place signage as shown on the plans attached hereto as Schedule B.

### **ARTICLE 4**

#### **Section 4.01 Limitation of Liability**

The Landlord and its officials, officers, employees and agents will not be responsible in any way for:

- (a) any personal injury, death or consequential damage of any nature whatsoever, however caused, that may be suffered or sustained by the Tenant or by any other person who may be in or about the Premises; or
- (b) any loss or damage of any nature whatsoever, however caused, to the Premises, any property belonging to the Tenant or to any other person while such property is in or about the Premises,

whether in the course of the performance of the Landlord's obligations under this lease or otherwise, unless resulting from the negligence of the Landlord or those for whom the Landlord is responsible at law.

## Section 4.02 Exclusion of Liability

The Landlord and its officials, officers, employees and agents will not under any circumstances be liable or responsible in any way for:

- (a) any personal injury, death or consequential damage of any nature whatsoever, that may be suffered or sustained by the Tenant or by its officers, employees or agents or any other person who may be in or about the Premises, or any loss or damage of any nature whatsoever to the Premises or to any property belonging to the Tenant or to its officers, employees or agents or to any other person while such property is in or about the Premises,
  - (i) caused by failure, by reason of breakdown or any other cause, to supply adequate drainage, or by interruptions for any reason of any utility or other services, including without limitation heating, plumbing and electrical services, or by steam, water, rain, snow, or other substances leaking, entering, issuing or flowing onto or into any part of the Premises or by reason of breakage or want of repair of any pipes, plumbing, equipment or other machinery serving the Premises; or
  - (ii) however caused, if the Landlord or its officials, officers, employees or agents enter upon the Premises in the case of an emergency;
- (b) any loss or damage of any nature whatsoever, however caused, to books, records, files, money, securities, negotiable instruments, papers or other valuables of the Tenant or its officers, employees or agents;
- (c) any business, economic or indirect loss or damage suffered or sustained by the Tenant or its officers, employees or agents of any nature whatsoever, however caused; or
- (d) any loss which the Tenant is obligated to insure against hereunder or has insured against.

## Section 4.03 Indemnification

The Tenant agrees to indemnify and save harmless the Landlord and its officials, officers, employees and agents in respect of all claims for bodily injury or death, property damage or other loss or damage arising from the conduct of any work by, or any act or omission of, or relating to or arising from the occupation or possession of the Premises by the Tenant, and in respect of all costs, expenses and liabilities incurred by the Landlord in connection with or arising out of all such claims, including the expenses of any action or legal proceeding pertaining thereto and the liabilities or obligations incurred or sustained by or imposed upon the Landlord or in respect of any of its officials, officers, employees or agents, and in respect of any loss, cost, expense or damage suffered or incurred by the Landlord arising from any breach by the Tenant of any of its covenants and obligations under this lease, PROVIDED HOWEVER the Tenant's covenant to indemnify and save harmless the Landlord and its officials, officers, employees and agents will not apply to the extent that the loss or damage is caused by negligence on the part of the Landlord or its officials, officers, employees and agents.

## ARTICLE 5

## Section 5.01 Definitions

In this lease, the following words and expressions will have the following meanings:

- (a) "Environment" has the meaning given to it in the *Canadian Environmental Protection Act, 1999* (Canada) as of the date of this lease;
- (b) "Hazardous Substances" means any Substance capable of creating harm to people, property and/or the Environment including, without limitation, any flammable liquids, flammable or reactive solids, oxidizers, poisons, gases (compressed, liquefied or dissolved), explosives, radioactive materials, urea formaldehyde, asbestos materials, underground tanks, compounds known as chlorobiphenyls or polychlorinated biphenyls (PCBs), Pollutants, contaminants, hazardous, corrosive or toxic Substances, Waste or waste of any kind, including, without limitation, any Substance the storage, manufacture, disposal, treatment, generation, use, transport, remediation or Release into the Environment of which is prohibited, controlled, regulated or licensed by any federal, provincial or municipal authority;
- (c) "Medium" means any land, water or air and includes the Premises;
- (d) "Pollute" is a verb which means to Release into or onto any Medium any Substance that:
  - (i) alters the physical, biological or chemical nature of that Medium;
  - (ii) alters the capacity of the Medium to support any living thing, whether animal or plant life;
  - (iii) injures or is capable of injuring the health or safety of a person in, on or near the Medium;
  - (iv) injures or is capable of injuring property or any life form in, on or near the Medium;
  - (v) interferes with or is capable of interfering with visibility or the dispersion of light or any photochemical activity within the Medium;
  - (vi) interferes with or is capable of interfering with the normal conduct of business in, on, near or from the Medium;
  - (vii) causes or is capable of causing physical discomfort to a person in, on or near the Medium;
  - (viii) damages or is capable of damaging the Environment; or
  - (ix) is Waste,

and "Polluted" is an adjective, and "Pollution" and "Pollutant" are nouns, which have meanings that correspond to the meaning contained in this paragraph;

- (e) "Release" includes release, spill, leak, pump, pour, dump, abandon, emit, empty, discharge, spray, inoculate, deposit, seep, throw, place, exhaust, inject, escape, leach, dispose, infuse or introduce;
- (f) "Substance" has the meaning given to it in the *Canadian Environmental Protection Act, 1999* (Canada) as of the date of this lease; and
- (g) "Waste" has the meaning given to it in the *Environmental Management Act, S.B.C. 2003, c. 53*, as amended or substituted from time to time.

#### **Section 5.02 Suitability of the Premises**

The Tenant acknowledges and agrees that the Landlord, either itself or through its officials, officers, employees or agents, has not made and the Tenant has not relied upon any representations or warranties from the Landlord or its officials, officers, employees or agents as to:

- (a) the state of repair of the Premises;
- (b) the suitability of the Premises for any business, activity or purpose whatever;
- (c) the suitability of the Premises for use by the Tenant;
- (d) the existence, nature or extent of any Pollution on or of the Premises; or
- (e) the need to take any remedial action in relation to any Pollution on or of the Premises.

#### **Section 5.03 Tenant's Inspection of the Premises**

The Tenant acknowledges and agrees that it has been afforded all reasonable opportunity to inspect the Premises and all relevant documentation in respect thereof and to carry out such audits, investigations, tests and surveys as it considers reasonably necessary to ascertain:

- (a) the state of repair of the Premises; and
- (b) the suitability of the Premises for use by the Tenant;

and the Tenant has independently made all such inspections, investigations, and surveys as it regards as being necessary for the above purposes. It is understood and agreed that the Premises are being leased to the Tenant, and the permission is being granted to the Tenant, on an "as is" basis. Notwithstanding the foregoing, the Tenant is not responsible for any Hazardous Substances on the Premises prior to the Tenant occupying the Premises pursuant to the Licence Agreement.

The Tenant hereby assumes any and all duties, obligations or liabilities under any relevant law in respect of the Premises, including but not limited to any costs, expenses or liabilities for any remedial action for any Pollution of the Premises caused by the Tenant during the Term.



#### Section 5.04 Release and Indemnification

The Tenant hereby releases the Landlord and its officials, officers, employees and agents from any and all costs, expenses, damages, losses or liabilities that may be incurred or suffered by the Tenant by reason of or resulting from or in connection with or arising in any manner whatsoever out of:

- (a) the Premises not being suitable for use by the Tenant;
- (b) the Premises being Polluted after the Tenant occupies the Premises pursuant to the Licence Agreement; or
- (c) the need to take any remedial action and the taking of such action as a result of such Pollution on or off the Premises except for any Hazardous Substances on the Premises prior to the Tenant occupying the Premises pursuant to the Licence Agreement.

The Tenant will indemnify, defend and save harmless the Landlord in respect of all claims for bodily injury (including death), property damage or other loss or damage, including damage to property outside the Premises, arising out of or in any way connected with the manufacture, storage, transportation, handling and discharge of Hazardous Substances on or from the Premises by the Tenant or any one for whom the Tenant is responsible in law.

#### Section 5.05 Removal of Hazardous Substances

The Tenant will not bring upon the Premises or any part thereof, or cause or suffer the bringing upon the Premises or any part thereof, any Hazardous Substances, except those that are required by the Tenant for day to day maintenance of the Premises, and then only in reasonable quantities, only if such Hazardous Substances are not prohibited by any federal, provincial or municipal authority, and only if such use is in compliance with all statutes, by-laws, regulations or orders relating to Hazardous Substances. If at any time there is any Hazardous Substances upon the Premises or a part thereof in breach of this covenant, the Tenant will, at its own expense:

- (a) immediately give the Landlord notice to that effect and thereafter give the Landlord from time to time written notice of the extent and nature of the Tenant's compliance with the following provisions of this Article;
- (b) promptly remove the Hazardous Substances from the Premises in a manner which conforms with all laws and regulations governing the movement of the same except for any Hazardous Substances on the Premises prior to the Tenant occupying the Premises pursuant to the Licence Agreement; and
- (c) if requested by the Landlord, obtain at the Tenant's cost and expense from an independent consultant designated or approved by the Landlord verification of the complete and proper removal of the Hazardous Substances from the Premises except for any Hazardous Substances on the Premises prior to the Tenant occupying the Premises pursuant to the Licence Agreement or, if such is not the case, reporting as to the extent and nature of any failure to comply with the foregoing provisions of this Section 5.05.

### **Section 5.06 Breach of Laws Relating to Hazardous Substances**

Without limiting the generality of Section 5.05, the Tenant will immediately give written notice to the Landlord of the occurrence of any event on the Premises constituting an offence under or a breach of any statutes, by-laws, regulations or orders from time to time enforced relating to Hazardous Substances, and at its own cost and expense, comply with all laws and regulations from time to time in force relating to the Landlord, the Tenant, the activities carried out on the Premises relating to Hazardous Substances and the protection of the Environment and will immediately give written notice to the Landlord of the occurrence of any event on the Premises constituting an offence thereunder or a breach thereof and, if the Tenant will, either alone or with others, cause or suffer the happening of such event, the Tenant will, at its own expense:

- (a) immediately give the Landlord notice to that effect and thereafter give the Landlord from time to time written notice of the extent and nature of the Tenant's compliance with the following provisions of this Section 5.06;
- (b) promptly remove the Hazardous Substances from the Premises in a manner which conforms with all laws and regulations governing the movement of the same; and
- (c) if requested by the Landlord, obtain at the Tenant's cost and expense from an independent consultant designated or approved by the Landlord a report verifying the complete and proper removal thereof from the Premises or, if such is not the case, a report as to the extent and nature of any failure to comply with the foregoing provisions of this Section 5.06.

The Tenant will, at its own expense, remedy any damage to the Premises caused by such event within the Premises or by the performance of the Tenant's obligations under this Section 5.06 as a result of such occurrence.

If any governmental authority having jurisdiction will require the cleanup of any Hazardous Substances held, Released, spilled, abandoned or placed upon the Premises or Released into the Environment from the Premises during the Term, then the Tenant will, at its own expense, prepare all necessary studies, plans and proposals and submit the same for approval, provide all bonds and other security required by governmental authorities having jurisdiction and carry out the work and will keep the Landlord fully informed and provide to the Landlord full information with respect to proposed plans and comply with the Landlord's requirements with respect to such plans. AND the Tenant agrees that if the Landlord determines, in its sole discretion, that the Landlord, its property or its reputation is placed in any jeopardy by the requirement for any such work, the Landlord may itself undertake such work or any part thereof at the cost and expense of the Tenant, pursuant to Section 11.07 of this lease.

Notwithstanding the foregoing, the Tenant is not responsible for any Hazardous Substances on the Lands prior to September 20, 2010.

### **Section 5.07 Enquiries Pertaining to Hazardous Substances**

The Tenant hereby authorizes the Landlord to make enquiries from time to time of any government or governmental agency with respect to the Tenant's compliance with any and all laws and regulations pertaining to the Tenant, the Tenant's activities on the Premises and the

Premises including without limitation laws and regulations pertaining to Hazardous Substances and the protection of the Environment; and the Tenant covenants and agrees that the Tenant will from time to time provide to the Landlord such written authorization as the Landlord may require in order to facilitate the obtaining of such information.

#### **Section 5.08 Landlord's Inspection of Goods**

The Landlord may at any time and from time to time upon 24 hours notice inspect the Tenant's goods upon the Premises and the Tenant's records relating thereto for the purpose of identifying the nature of the goods and the existence or absence of any Hazardous Substances and the Tenant will assist the Landlord in so doing.

#### **Section 5.09 Ownership Remains With Tenant**

If the Tenant will bring or create upon the Premises any Hazardous Substances or suffer the bringing or creation upon the Premises of any Hazardous Substances or if the conduct of the Tenant's business will cause there to be any Hazardous Substance upon the Premises then, notwithstanding any rule of law or equity to the contrary, such Hazardous Substance will be and remain the sole and exclusive property of the Tenant and will not become the property of the Landlord and notwithstanding the degree of affixation of the Hazardous Substance or the goods containing the Hazardous Substance to the Premises and notwithstanding the expiry or earlier termination of this lease.

#### **Section 5.10 Environmental Covenants Survive Termination**

The obligations of the Tenant in this Article 5 will survive the expiry or earlier termination of this lease save only that, to the extent that the performance of those obligations requires access to or entry upon the Premises or any part thereof the Tenant will have such entry and access only at such times and upon such terms and conditions as the Landlord may from time to time specify; and the Landlord may, at the Tenant's cost and expense, undertake the performance of any necessary work in order to complete such obligations of the Tenant; but having commenced such work, the Landlord will have no obligation to the Tenant to complete such work.

### **ARTICLE 6**

#### **Section 6.01 Tenant's Insurance**

The Tenant will, without limiting any of its obligations or liabilities under this lease, obtain and continuously carry during the Term, at its own expense and cost, insurance coverage with minimum limits of not less than those specified, as follows:

- (a) Commercial General Liability insurance with limits of not less than five million dollars (\$5,000,000) per occurrence or such higher limit of coverage as the Landlord's Director of Risk Management may reasonably require from time to time and the policy will:
  - (i) indemnify and protect the Tenant, its employees, agents and contractors against all claims for loss, damage, injury or death to any person or persons and for damage to the Premises or to any public or private property occurring within or about the Premises or arising by virtue of the Tenant's occupation or possession of the Premises;

- (ii) contain a cross liability clause insuring the Tenant, the Landlord and their respective officers, employees and agents in the same manner and to the same extent as if separate policies had been issued to each and apply with respect to any action brought against one party by the other or by any officer, employee or agent of one party and any breach of a condition of the policy by any party or by any officer, employee or agent of one party will not affect the protection given by the policy to any other party or to any officer, employee or agent of any party;
- (iii) add the Landlord, its officials, officers, employees and agents as additional insureds;
- (iv) include blanket contractual liability covering liability arising directly or indirectly out of the performance of this lease; and
- (v) provide for a limit of deductibility not greater than ~~s.17(1), s.21(1)~~ ~~s.17(1), s.21(1)~~ or such other limit as the Landlord's Director of Risk Management may sanction from time to time.

#### Section 6.02 Tenant's All Risk (Broadform) Property Insurance

##### (a) Building Insurance

The Tenant will, at its cost, on terms and to limits as would a prudent owner of similar property, obtain and continuously carry during the Term a separate commercial broadform policy of insurance on the Building (the "Building Insurance") up to its full replacement value without a co-insurance clause, protecting the Landlord and the Tenant as herein provided for any loss or damage to the Building against perils that are customarily included in an all risk property insurance policy, which may include without limitation earthquake, flood, tidal wave and by-law insurance. Such policy will name the Landlord and the Tenant as joint named insureds and the Tenant's lender as Loss Payee with a standard mortgage endorsement. Coverage to include replacement of all glass in the Premises for any damage howsoever caused.

##### (b) Tenant's Contents and Improvements Insurance, etc.

The Tenant will, at its cost, obtain and continuously carry during the Term All Risk (Broadform) insurance on:

- (i) property of every description and kind owned by the Tenant or for which the Tenant is legally liable or installed by or on behalf of the Tenant (and which is located in the Premises), including without limitation furniture, fittings, installations, alterations, additions, partitions, fixtures, trade fixtures and any display model, project, prototype, tool, instrument or device within the Premises in an amount not less than ninety percent (90%) of the full replacement cost thereof;
- (ii) Boiler and Machinery Insurance protecting the Landlord and the Tenant against accidental damage to all boilers, pressure vessels (fired and unfired), refrigerating and air conditioning systems, piping and accessory equipment; and

- (iii) Business Interruption Insurance providing all risk coverage for loss of profits with a period of indemnity of not less than twelve (12) months;

and these insurance policies will:

- (iv) provide for a limit of deductibility not greater than ~~s.17(1), s.21(1)~~ ~~s.17(1), s.21(1)~~ per occurrence with respect to all perils, except earthquake, and the deductible for any claim will be paid by the Tenant; and
- (v) carry a loss payable clause stating that the proceeds of any claim against the insurer will be payable to the Landlord and the Tenant as their interests appear.

### Section 6.03 General Requirements of Insurance

The following will apply to all insurance policies:

- (a) the policies will be with insurers duly authorized to carry on business in the Province of British Columbia, in a form and in amounts satisfactory from time to time and acceptable to the Landlord's Director of Risk Management and will provide the Landlord with sixty (60) days prior written notice of material change or cancellation. Notice will be given to the Board of Parks and Recreation, Attention: Insurance Administrator. Notice must identify the name of the Tenant as set out in this lease and the location or address of the Premises;
- (b) neither the providing of insurance by the Tenant in accordance with the requirements hereof, nor the insolvency, bankruptcy or the failure of any insurance company to pay any claim accruing will be held to relieve the Tenant from any other provisions of this lease with respect to liability of the Tenant or otherwise;
- (c) the insurance coverage will be primary insurance as respects the Landlord and any insurance or self-insurance maintained by or on behalf of the Landlord, its officials, officers, employees or agents will be excess of this insurance and will not contribute with it; and
- (d) subject to the provisions of this Article 6, the Tenant will provide at its own cost any additional insurance which the Tenant is required by law to provide or which the Tenant considers necessary to protect its own interest or such further other insurance as deemed to be necessary and required by the Landlord's Director of Risk Management.

### Section 6.04 Evidence of Insurance

Prior to the commencement of the Term, and from time to time during the Term within ten (10) days after demand by the Landlord, the Tenant will deliver to the Landlord, for each insurance policy the Tenant must obtain under this lease, a certificate of insurance, satisfactory to the Landlord, and a certified copy of the policy. If the Tenant fails to deliver to the Landlord any such certificate or policy of insurance within the stipulated time, the Landlord may obtain such insurance, and the Tenant will pay to the Landlord the cost of the premiums on demand by the Landlord from time to time.

## **Section 6.05 Workers Compensation Coverage**

At all times during the Term, the Tenant will, and will cause its directors, as applicable, officers, employees, servants and agents and all others engaged in or upon any work on the Building or the Lands to, comply with the *Workers Compensation Act* (British Columbia) (the "WCA") and the requirements and regulations of WorkSafeBC in respect of the Building and the Lands. Without limiting the generality of the foregoing, the Tenant will:

- (a) require as a condition of any agreement made with respect to construction, repair, renovation or demolition of the Building, whether with contractors, materialmen or otherwise, that there is full workers compensation insurance coverage in place in respect of all workmen, employees, servants and others engaged in or upon any work, and that all workmen, contractors or other workers require the same of their workmen and subcontractors. The Tenant will immediately notify the Landlord of any dispute involving third parties that arises in connection with obtaining and maintaining the workers compensation insurance coverage required hereby if such dispute results or may result in the required insurance coverage not being in place, and the Tenant will take all reasonable steps to ensure resolution of such dispute forthwith. The Tenant will further ensure that no amount payable pursuant to the WCA is left unpaid so as to create a lien on the Lands or the Building. If the workers compensation insurance coverage required by this section 6.05 is not in place, the Landlord will be entitled to have recourse to all remedies specified in this lease or at law or equity; and
- (b) be deemed to be, and is hereby designated and appointed by the Landlord as, the "Prime Contractor" as that term is defined in section 118 of the WCA for the purposes of the WCA and related regulations, including the Occupational Health and Safety Regulation (the "OHS Regulation"), and the requirements and regulations of WorkSafeBC, and will in that capacity strictly comply with all requirements applicable to that designation, including without limitation those set forth in Division 3 of Part 3 of the WCA and in sections 20.2 and 20.3 of the OHS Regulation, as they may be amended from time to time. Notwithstanding the foregoing, with the prior written consent of the Landlord, a contractor hired by the Tenant to perform work on the Premises on its behalf may be designated as the Prime Contractor instead of the Tenant.

## **ARTICLE 7**

### **Section 7.01 Rent Not to Abate**

Subject to the provisions of Section 7.05, the partial destruction or damage or complete destruction by fire or other casualty of the Building will not result in the termination of this lease or entitle the Tenant to surrender possession of the Premises or to demand any abatement or reduction of the Rent, additional rent or other charges payable under this lease, notwithstanding any law or statute now or in the future to the contrary.

### **Section 7.02 Tenant's Obligation When Building Partially Damaged or Destroyed**

Subject to the provisions of section 7.05, the Tenant covenants and agrees with the Landlord that in the event of partial damage to or partial destruction of the Building, the Tenant will either:

- (c) replace any part of the Building damaged or destroyed with a new structure in accordance with any agreement which may be made by the Tenant with the Landlord; or
- (d) in the absence of any such agreement, repair or replace such damage or destruction to a standard comparable to the standard of the structure being repaired or replaced.

#### **Section 7.03 Tenant's Obligations When Building Completely or Substantially Destroyed**

Subject to the provisions of section 7.05, the Tenant covenants and agrees with the Landlord that in the event of complete or substantially complete destruction of the Building, the Tenant will either:

- (a) reconstruct or replace the Building with a new structure or structures in accordance with any agreement which may be made by the Tenant with the Landlord; or
- (b) in the absence of any such agreement, replace the Building with a new structure or structures comparable to the structure or structures being replaced.

#### **Section 7.04 Replacement, Repair or Reconstruction**

Any replacement, repair or reconstruction of the Building or any part thereof pursuant to the provisions of section 7.02 or 7.03 will be made or done in compliance with this lease including without limitation section 3.03, section 3.05 and section 3.06.

#### **Section 7.05 Destruction or Damage During Last Two Years of Term**

- (a) In the event of the complete or substantially complete destruction of the Building during the last two (2) years of the Term or any Renewal Term, the Tenant may, at its option, either reconstruct or replace the Building so destroyed or damaged in accordance with section 7.03 or decline to do so, and instead elect to terminate this Lease, provided that the Tenant makes such election within sixty (60) days after the date on which the Building was so destroyed and notifies the Landlord in writing of its election forthwith after making it;
- (b) As soon as reasonably possible, but not later than one hundred and eighty (180) days following the date of termination of this Lease by the Tenant pursuant to section 7.05(a), the Tenant will demolish and completely remove the Building and all foundations and debris from the Lands and restore the Lands to a neat and level condition in a good and workmanlike manner. Any insurance money payable by reason of any fire or other casualty causing such destruction will, notwithstanding the provisions of Article 6, be distributed as follows:
  - (i) firstly, to reimburse the Tenant for all costs and expenses necessarily incurred by the Tenant in the demolition and removal of the Building and all foundations and debris from the Lands and the restoration of the Lands as aforesaid;

- (ii) secondly, to pay and satisfy the Mortgage, if any;
- (iii) thirdly, to pay the balance of the insurance monies, if any, as follows:
  - (1) to the Landlord the amount calculated as follows:
 

amount payable = (balance of insurance monies) x (days in expired portion of the Term ÷ total days in Term); and
  - (2) to the Tenant the amount calculated as follows:
 

amount payable = (balance of insurance monies) x (days remaining in the Term ÷ total days in Term);
- (c) Notwithstanding anything contained herein, in the event the Tenant terminates this Lease in accordance with this section 7.05, this section 7.05 will nevertheless survive such termination and remain in full force and effect and be binding upon the parties and their respective successors and assigns so long as any obligations of the parties under this section 7.05 or any part thereof remains unperformed.

**Section 7.06 No Effect on Repair Obligations**

Nothing in this Article 7 will alter the Tenant's repair obligations as set out in Article 3 of this lease.

**Section 7.07 Tenant to Notify Promptly**

The Tenant will give immediate notice to the Landlord in the event of fire or accident or other damage or destruction to the Building.

**ARTICLE 8**

**Section 8.01 Assignment**

The Tenant shall be entitled to assign or sublet the Premises or any part thereof with the consent of the Landlord not to be unreasonably withheld or delayed. Notwithstanding the foregoing, the Tenant shall have the right to assign or sublet the Premises or any part thereof to a purchaser of a substantial part of the Cactus restaurant chain or a shareholder or other entity having an interest in the Tenant or Cactus Restaurants Ltd. or an entity which is a parent, subsidiary or affiliate of the Tenant or Cactus Restaurants Ltd., or to a franchisee of the Tenant or Cactus Restaurants Ltd., without the Landlord's consent, provided that the Tenant delivers to the Landlord copies of the assignment or sublease (which shall include a covenant by the Assignee to perform all the obligations and covenants of the Tenant pursuant to this Lease). Such an assignment or sublease shall not release the Tenant from any of its obligations under this Lease.

Any change in the control of the Tenant to any entity not having an interest in the Tenant or Cactus Restaurants Ltd. shall require the consent of the Landlord not to be unreasonably withheld or delayed.



held or delayed. Notwithstanding the foregoing a change in control of the Tenant as part of the sale of a substantial part of the Cactus restaurant chain; or a change in control of the Tenant to a franchisee or shareholder or other entity having an interest in the Tenant or Cactus Restaurants Ltd.; or a change in control of the Tenant to an entity which is a parent, subsidiary or affiliate of the Tenant or Cactus Restaurants Ltd. will not require the Landlord's consent, provided that the Tenant delivers to the Landlord notice of that change of control.

#### **Section 8.02 Subleasing**

Deleted

#### **Section 8.03 Assignment of Lease Rent**

Notwithstanding Section 8.02 hereof, the Tenant hereby assigns to the Landlord all rents and fees payable to the Tenant under any lease, license or occupation agreement with any third party, which assignment will supersede any provisions regarding the Tenant in bankruptcy and any claims of the creditors of the Tenant whether by execution, attachment, garnishing order or otherwise PROVIDED HOWEVER the Landlord agrees to refrain from enforcing the said assignment so long as the Tenant will not be in default in the payment of rent or the performance or observance of its covenants hereunder. Upon the Tenant falling into default in the payment of its rent or the performance or observance of its other covenants hereunder, the Landlord may forthwith direct the sublessee, licensee or such other third party to pay to the Landlord the lease rent, license fees or other monies as would otherwise be owing to the Tenant from time to time and the payment of such monies to the Landlord will pro tanto discharge the sublessee's, licensee's or other third party's obligations to the Tenant and the Landlord will apply such monies to the rent and the performance and observance of the Tenant's covenants hereunder notwithstanding any claims on the part of the Tenant's trustee in bankruptcy or the Tenant's creditors, whether by execution, attachment, garnishing order or otherwise. If the sublessee, licensee or other third party fails to abide by the Landlord's directions in this behalf then, at the Landlord's election, the lease, license or other third party agreement will cease and determine and the Landlord may forthwith re-enter the leased, licensed or occupied portion of the Premises and arrange for new occupants thereof whose occupation will be subject to the provisions of this paragraph.

#### **Section 8.04 Mortgaging by Tenant**

Subject to Sections 8.05 and 8.06 and subject to the Landlord's prior written consent, which consent may be unreasonably or arbitrarily withheld, the Tenant may mortgage its leasehold interest in the Premises to a Mortgagee for the purpose of financing or refinancing the costs of designing, developing, constructing, repairing, or replacing the Premises, but not otherwise. For the purposes of this lease and in particular this Article 8, the following definitions will apply:

- (a) "Mortgage" means a mortgage or mortgages upon or in respect of the interest of the Tenant in the Premises or any part thereof and the lease and includes any deed of trust and mortgage to secure any bonds or debentures issued thereunder; and
- (b) "Mortgagee" means an institutional mortgagee or mortgagees under a Mortgage and includes any trustee for bondholders or debenture holders under a deed of trust and mortgage to secure any bonds or debentures issued thereunder.

### **Section 8.05 Tenant Liable for Rent, Property Taxes Notwithstanding Mortgage**

Nothing contained in this lease will be construed to prevent or prohibit the assignment or subletting by the Tenant of this lease or the leasehold interest of the Tenant in the Premises by way of Mortgage as provided in Section 8.04, subject to the prior written consent of the Landlord, provided however that in the event of and notwithstanding any such assignment or subletting, the Tenant will be and remain liable for the payment of all Rent, additional rent and Property Taxes and the performance of all the terms, covenants and conditions of this lease which are the Tenant's responsibility to perform.

### **Section 8.06 Mortgage Subject to Landlord's Rights under Lease**

Subject to the provisions of Section 8.07, every Mortgage will be made expressly subject to the rights of the Landlord under this lease.

### **Section 8.07 Notice to and Remedies of Mortgagee**

- (a) No re-entry, termination or forfeiture of this lease by the Landlord will be valid against the Mortgagee who has filed with the Landlord notice of Mortgage in favour of the Mortgagee and specified an address for notice under Article 16, unless the Landlord has given to the Mortgagee prior written notice of the default or contingency entitling the Landlord to re-enter, terminate or forfeit this lease, specifying the nature of that default or contingency, and stating the Landlord's intention to take such proceedings and requiring the Mortgagee:
  - (i) to cure the default or contingency specified in the notice within a period of thirty (30) days from the date of receipt of that notice by the Mortgagee; or
  - (ii) if the default or contingency is other than the failure to pay Rent or additional rent or Property Taxes or any other sums required to be paid to the Landlord by any provision of this lease, and if the default or contingency cannot reasonably be cured within such thirty (30) day period, then to immediately commence to cure the same and to diligently prosecute to conclusion all acts necessary to cure the default or contingency,

and the Landlord hereby grants the Mortgagee access to the Premises for that purpose. If the default or contingency is cured within the period specified, the Mortgagee will be entitled to continue as tenant of the Premises and licensee of the Licenced Area for the balance of the Term remaining at the date of the notice of default or contingency, providing that the Mortgagee attorns as tenant to the Landlord and undertakes to be bound by and to perform the covenants and agreements of this lease until such Mortgagee as Tenant assigns its leasehold estate as permitted by this lease and delivers to the Landlord an agreement from the assignee which is enforceable and binding on the assignee and its heirs, executors, successors, administrators and assigns as of the effective date of the assignment and by which the assignee agrees with the Landlord to attorn as tenant to the Landlord and to be bound by and to perform the covenants and agreements of this lease. If the Mortgagee consists of more than one mortgagee each having a separate charge upon the Tenant's interest in this lease, and more than one of them wishes to cure the default or contingency specified in the notice aforesaid, then the Landlord hereby agrees to permit curing of the default or contingency specified as aforesaid, by that mortgagee which is willing to cure the default or contingency

and attorn as tenant as aforesaid and whose charge ranks in priority over the charge or charges held by the other mortgagee or mortgagees willing to cure and assume as aforesaid; except that in the event any Mortgagee has commenced a foreclosure action, the provisions of Section 8.07(b) will apply.

In the event the Mortgagee commences foreclosure proceedings against the Tenant, whether or not the Tenant is in default of the performance of its covenants and agreements with the Landlord under this lease at the time such foreclosure proceedings are commenced, the Landlord will not re-enter, terminate or forfeit this lease after the commencement of foreclosure proceedings on the ground of any default or contingency entitling the Landlord to re-enter, terminate or forfeit this lease if the Mortgagee:

- (i) first gives to the Landlord written notice of the foreclosure proceedings;
- (ii) is actively prosecuting the foreclosure proceedings without undue delay;
- (iii) cures the default or contingency within a period of thirty (30) days from the date of receipt of notice from the Landlord specifying the nature of the default or contingency, or if the default or contingency is other than the failure to pay Rent or additional rent or Property Taxes or any other sums required to be paid to the Landlord by any provision of this lease and if such default or contingency cannot reasonably be cured within such thirty (30) day period, immediately commences to cure the same and to diligently prosecute to conclusion all acts necessary to cure the default or contingency; and
- (iv) performs and observes all of the Tenant's covenants and agreements under this lease and without undue delay diligently prosecutes to a conclusion the foreclosure proceedings commenced by the Mortgagee.

In the event that the Mortgagee acquires the Tenant's leasehold interest in the Premises pursuant to the foreclosure proceedings, the Mortgagee will thereupon become subrogated to the rights of the Tenant under this lease, provided it attorns to the Landlord as tenant and undertakes to be bound by and perform the covenants and agreements of this lease until such Mortgagee as Tenant assigns its leasehold estate as permitted by this lease and delivers to the Landlord an agreement from the assignee which is enforceable and binding on the assignee and its heirs, executors, successors, administrators and assigns as of the effective date of the assignment and by which the assignee agrees with the Landlord to attorn as tenant to the Landlord and to be bound by and to perform the covenants and agreements of this lease. If the Mortgagee consists of more than one mortgagee and more than one of them commences foreclosure proceedings, the right to cure any default or contingency granted by this Section 8.07(b) to a foreclosing Mortgagee will be deemed granted to them in the order of priority of the charges held by the foreclosing Mortgagees.

If this lease is subject to termination or forfeiture pursuant to Article 9 by reason of the bankruptcy or insolvency of the Tenant and the Mortgagee has filed with the Landlord a notice of Mortgage in favour of the Mortgagee and specified an address for notice under Article 16, the Landlord will give to the Mortgagee notice of the bankruptcy or insolvency of the Tenant entitling the Landlord to terminate or forfeit this lease and stating the Landlord's intention to take such proceedings and requiring the Mortgagee to cure the Tenant's default and the Tenant's default will be deemed to have been sufficiently cured if the Mortgagee:

- (i) takes possession and control of the Premises, or causes a receiver to be appointed under the terms of the Mortgagee's charge or by a court of competent jurisdiction, who takes possession and control of the Premises, and the Landlord hereby grants the Mortgagee or such receiver access to the Premises for that purpose;
- (ii) cures every default within a period of thirty (30) days from the date of receipt by the Mortgagee of the notice from the Landlord of the bankruptcy or insolvency of the Tenant, or if such default or defaults are other than the failure to pay Rent or additional rent or Property Taxes or any other sums required to be paid to the Landlord by any provision of this lease and if such default or defaults cannot reasonably be cured within such thirty (30) day period, immediately commences to cure the same and to diligently prosecute to conclusion all acts necessary to cure the default or defaults;
- (iii) attorns as tenant to the Landlord and undertakes to be bound by and to perform the covenants and agreements of this lease until such Mortgagee as Tenant assigns its leasehold estate as permitted by this lease and delivers to the Landlord an agreement from the assignee which is enforceable and binding on the assignee and its heirs, executors, successors, administrators and assigns as of the effective date of the assignment and by which the assignee agrees with the Landlord to attorn as tenant to the Landlord and to be bound by and to perform the covenants and agreements of this lease.

If the Mortgagee consists of more than one mortgagee, the right to take possession and control, to cure any default and to assume the lease as aforesaid will be deemed granted to them in the order of the priority of their respective charges.

Any re-entry, termination or forfeiture of this lease made in accordance with the provisions of this lease as against the Tenant will be valid and effectual against the Tenant even though made subject to the rights of any Mortgagee to cure any default of the Tenant and to continue as tenant under this lease.

No entry into the Premises by the Mortgagee pursuant to this Section 8.07 for the purpose of curing any default or defaults of the Tenant will release or impair the continuing obligations of the Tenant.

## ARTICLE 9

### Section 9.01 Bankruptcy

If during the Term, substantially all of the goods or chattels of the Tenant are at any time seized or taken in execution by any creditor of the Tenant, or if the Tenant makes a general assignment for the benefit of creditors, or if the Tenant institutes proceedings to have the Tenant adjudicated as bankrupt or insolvent, or if the Tenant becomes the subject of bankruptcy or insolvency proceedings, or if a judgment, decree or order be entered by a court of competent jurisdiction adjudging the Tenant bankrupt or insolvent, or if the Tenant is unable to meet all debts as they fall due for a period of not less than three (3) months, or if the Tenant or its directors will pass any resolution authorizing the dissolution or winding-up of the Tenant, or if a receiver, interim receiver, manager, receiver-manager, trustee or

liquidator of all or any part of the Tenant's property will be appointed or applied for by the Tenant or by one or more of the Tenant's creditors, then the Landlord will be so notified and the then current rent plus an additional three (3) months current rent will immediately become due and be paid and the Landlord may immediately claim the same together with any arrears of rent and, at the option of the Landlord, the Term is subject to termination forthwith. If the Tenant becomes defunct then at the option of the Landlord the Term will forthwith terminate. If the Tenant surrenders up its certificate of incorporation or otherwise ceases to exist the Term terminates as of such surrender or dissolution. If the Tenant is a natural person, at any time after the Tenant's death the Landlord may terminate the Term upon sixty (60) days notice to any executor or administrator of his estate.

## ARTICLE 10

### Section 10.01 Statutes and By-laws

The Tenant covenants to promptly and faithfully observe and comply with all federal, provincial or civic statutes, by-laws, regulations and orders now or hereafter which are in force and in effect which touch and concern the Premises or the Tenant's activities within the Premises, including, without limitation any applicable environmental guidelines, and any amendments thereto, which deal with environmental protection and safety and/or Hazardous Substances. If any such statutes, by-laws, regulations, orders or guidelines are directed at owners, the Tenant will perform and observe same at its own expense in the place and stead of the Landlord.

### Section 10.02 Quiet Enjoyment

Subject to the provisions of this lease and subject to the provision that nothing contained or implied herein will prejudice or affect the Landlord's rights and powers in the exercise of its functions pursuant to the *Vancouver Charter*, S.B.C. 1953, c.55, as amended or substituted from time to time, and the rights and powers of the Landlord under all of its public and private statutes, by-laws and regulations, all of which may be as fully and effectively exercised in relation to the Premises as if this lease had not been executed and delivered by the Landlord and the Tenant, the Landlord covenants with the Tenant for quiet enjoyment.

### Section 10.03 Performance of Obligations

The Tenant covenants with the Landlord to faithfully and promptly pay the rent and perform and observe its obligations herein.

### Section 10.04 Registration of Lease

The Tenant, at its cost, may register its leasehold interest (which will, if requested by the Landlord, be a short form of lease showing only financial terms reasonably acceptable to the Landlord) in all relevant registries and subject to first obtaining the consent of the Landlord which consent will not be unreasonably withheld or delayed and may, subject to Section 8.04 of this lease, mortgage its leasehold interest in the Premises to a bona fide lender as part of its financing activities with respect to the business carried on from the Premises and in compliance with the terms of this lease. The Tenant will be responsible for the costs of registering the lease including the preparation of any required plans (including without limitation any plans to subdivide the Lands by way of lease) and will obtain any approvals required including the approval of the Approving Officer of Vancouver.

### **Section 10.05 Landlord's Rules and Regulations**

The Tenant will at all times comply with all reasonable rules and regulations made by the Landlord in respect to the Tenant's use and occupation of the Premises which are not inconsistent with the terms of this lease.

## **ARTICLE 11**

### **Section 11.01 Breach of Covenants**

The Landlord and Tenant agree that subject to the provisions of Section 8.07, if and whenever:

- (a) any Rent payment or any part thereof is not made on the day appointed for payment thereof; or
- (b) the Tenant is in default in the payment of any money, other than Rent, required to be paid by the Tenant under the terms of this lease and such default continues for ten (10) days following any specific due date on which the Tenant is to make such payment or, in the absence of such specific due date, for ten (10) days following notice requiring the Tenant to pay the same; or
- (c) the Tenant defaults in performing or observing any of the provisions of this lease other than those requiring payment of money to the Landlord and such default continues for a period of twenty (20) days after notice thereof to the Tenant, except for a default which to be cured with all due diligence would require a longer period, then after such longer period, or if the Tenant fails to proceed promptly and diligently and continuously after the service of such notice to cure same; or
- (d) the Premises are vacated or unoccupied for ten (10) or more consecutive days while the Premises can be used for the Permitted Use, without the consent of the Landlord, provided the Tenant may close for renovations with the Landlord's prior written consent; or
- (e) the Premises are abandoned by the Tenant; or
- (f) this lease is terminated;

then and in every such case, it will be lawful for the Landlord at any time thereafter without notice or demand, with or without process of law and by forceable entry if necessary, to re-enter into and upon the Premises, and to terminate this lease by leaving upon the Premises notice in writing of such termination. If the Landlord terminates this lease pursuant to this Section, or otherwise as a result of default of the Tenant, there will immediately become due and owing to the Landlord, in addition to any other sums payable to the Landlord hereunder as damages suffered by the Landlord as a result of the Tenant's breach, the then current month's rent, together with the rent accruing for the remainder of the Term. This provision for notice and termination will not be construed so as to delay or supersede any specific remedy to which the Landlord may have recourse in this lease.

### **Section 11.02 Distraint**

The Tenant waives and renounces the benefit of any present or future law taking away or limiting the Landlord's rights against the property of the Tenant and, notwithstanding any such law, the Landlord may seize and sell all the Tenant's goods and property, whether within the Premises or not, and apply the proceeds of such sale towards any arrears of rent (including amounts deemed to be rent under this lease) and the costs of the seizure and sale. The Tenant further agrees that if it abandons the Premises and any arrears of rent remain unpaid, the Landlord, in addition to any remedy otherwise provided by law, may seize and sell the goods and property of the Tenant at any place to which the Tenant or any other person may have removed them from the Premises, in the same manner as if such goods and property had remained in, about or upon the Premises.

### **Section 11.03 Right to Re-let**

If the Landlord becomes entitled to re-enter the Premises the Landlord will have the right, if it thinks fit, to enter the Premises as the agent of the Tenant either by force or otherwise without being liable for any prosecution therefor, and as agent of the Tenant to re-let the Premises or any part or parts thereof at the risk of the Tenant and, as agent for the Tenant, to receive the rent therefor and, as agent for the Tenant, to take possession of any furniture, equipment and other property therein and sell the same at public or private sale without notice. Such rent and proceeds from the sale of the furniture, equipment and other properties will be allocated first to the Landlord's cost of so entering and re-letting, then to interest on amounts due by the Tenant to the Landlord hereunder and unpaid, and then to the payment of such unpaid sums. The balance of such rent and proceeds, if any, may be applied by the Landlord on account of the rent due hereunder to the Landlord.

### **Section 11.04 Forfeiture**

The Tenant hereby expressly waives any and all rights of redemption granted by or under any present or future laws in the event the Tenant will be evicted or dispossessed from the Premises for any cause, statutory or otherwise, or if the Landlord re-enters the Premises following the occurrence of any default by the Tenant hereunder, or if this lease is terminated before the expiration date thereof originally fixed herein.

### **Section 11.05 Remedies Generally**

Mention in this lease of any particular right or remedy of the Landlord in respect of the default by the Tenant will not preclude the Landlord from any other right or remedy in respect thereof, whether available at law or in equity or by statute or expressly provided for in this lease. No right or remedy will be exclusive or dependent upon any one or more of such rights or remedies independently or in combination. such rights or remedies being cumulative and not alternative. Whenever the Tenant seeks a remedy in order to enforce the observance or performance of any of the terms, covenants and conditions contained in this lease on the part of the Landlord to be observed or performed, the Tenant's only remedy (except where another remedy is expressly provided herein, in which event the Tenant will be restricted to that remedy) will be for such damages as the Tenant will be able to prove in a court of competent jurisdiction that the Tenant has suffered as a result of a breach (if established) by the Landlord in the observance and performance of any of the terms, covenants and conditions contained in this lease on the part of the Landlord to be observed and performed. The parties hereby waive trial by jury in any action, proceeding or counterclaim brought by either party against the other on any matter whatsoever arising out of or in any way

connected with this lease, the relationship of the Landlord and the Tenant created hereby, the Tenant's use or occupancy of the Premises or any claim for any injury. In the event the Landlord commences any action or proceeding for non-payment of rent, the Tenant agrees not to interpose any counterclaim of any nature or description in any such action or proceeding. In the event of any breach or threatened breach by the Tenant of any of the terms and provisions of this lease, the Landlord will have the right to injunctive relief as if no other remedies were provided herein for such breach. The Tenant hereby expressly waives any right to assert a defense based on merger and agrees that neither the commencement of any action or proceeding, nor the settlement thereof, nor the entry of judgment therein will bar the Landlord from bringing any subsequent action or proceeding from time to time. If the Tenant will default hereunder prior to the date fixed as the commencement of any renewal or extension of this lease, whether by a renewal or extension option herein contained or by separate agreement, the Landlord may cancel such option or agreement for renewal or extension of this lease, upon written notice to the Tenant.

### Section 11.06 Expenses

If any legal proceeding is brought for recovery of possession of the Premises, for the recovery of rent or because of the breach of any other terms, covenants or conditions herein contained on the part of the Tenant to be kept or performed, the Tenant will pay to the Landlord as additional rent, upon demand, all costs and expenses incurred therefor (including without limitation, all professional and consultant fees, and all legal fees on a solicitor and his own client basis, disbursements, and all court costs and expenses of any legal proceeding; and the term "proceeding" will include, without limitation, any arbitration, administrative, governmental, quasi-governmental or any other mediation proceeding and the term "costs" will include the pro-rata portion of the wages, salaries and all other remuneration of the Landlord's officers and employees reasonably attributed to the matter).

Without limiting the generality of the immediately preceding paragraph or any other provisions of this lease, the Tenant will pay to the Landlord, as additional rent upon demand, all costs and expenses (including, without limitation, those fees, disbursements, costs and expenses set out in the bracketed insert in the immediately preceding paragraph of this Section 11.06) which the Landlord may incur or pay out by reason of, or in connection with:

- (a) any proceeding by the Landlord to terminate this lease or for the recovery of possession of the Premises or for the recovery of rent;
- (b) any other proceeding by the Landlord against the Tenant or any indemnitor;
- (c) any distress levied by the Landlord against the Tenant's goods, chattels and inventory or any of them on the Premises for the recovery of rent;
- (d) any default by the Tenant in the observance or performance of any obligations of the Tenant under this lease whether or not the Landlord commences any proceeding against the Tenant or any indemnitor;
- (e) any proceeding brought by the Tenant against the Landlord (or any officer, employee or agent of the Landlord) in which the Tenant fails to secure a final judgment against the Landlord;
- (f) any other appearance by the Landlord (or any officer, employee or agent of the Landlord) as a witness or otherwise in any proceeding whatsoever involving or



affecting the Landlord, the Tenant, this lease, the indemnity agreement (if any) or the Premises;

- (g) any amendment, modification or change in any of the terms of this lease or the indemnity agreement, if any (and any request or negotiations pertaining thereto, whether or not such amendment, modification or change is finally agreed on);
- (h) any renewal, extension, surrender, or release of this lease or the indemnity agreement, if any (and any request or negotiations pertaining thereto, whether or not such renewal, extension, surrender or release becomes effective);
- (i) any transfer of this lease (and any request or negotiations pertaining thereto, whether or not such transfer is approved and finally agreed on); and
- (j) any Alterations of or to the Premises (and any request or negotiations pertaining thereto, whether or not such Alterations are approved and finally agreed on).

The Tenant's obligations under this Section 11.06 will survive the expiration or earlier termination of this lease.

#### **Section 11.07 Landlord May Remedy Tenant's Default**

If the Tenant fails to pay, when due and prior to the expiration of any curative period provided for in this lease, any amount required to be paid by the Tenant pursuant to this lease, the Landlord, after giving two (2) days' notice in writing to the Tenant, may, but will not be obligated to, pay all or any part of it. If the Tenant is in default in the performance of any of its covenants or obligations hereunder (other than the payment of rent required to be paid by the Tenant pursuant to this lease) and the applicable curative period has expired, the Landlord may from time to time after giving such notice as it considers sufficient (or without notice in the case of an emergency) having regard to the circumstances applicable, perform or cause to be performed any of such covenants or obligations, or any part thereof, and for such purpose may do such things as may be required, including, without limitation, entering upon the Premises and doing such things upon or in respect of the Premises or any part thereof as the Landlord considers requisite or necessary. All expenses incurred and expenditures attributable to or made (including all employee, overhead and other internal costs) pursuant to this Section 11.07, will be paid by the Tenant to the Landlord as additional rent upon demand. The Landlord will have no liability to the Tenant or any other person for any claims resulting from any such action, entry or performance of any work by the Landlord upon the Premises.

## **ARTICLE 12**

#### **Section 12.01 Vacant Possession**

Upon termination of the Term, whether by the passage of time or otherwise, the Tenant will deliver up vacant possession of the Premises and will leave the Premises in a sanitary, neat, tidy, safe and empty condition free from all nuisance, debris, rubbish and stock-in-trade and will ensure that the Premises are to the standard of repair and decoration required of the Tenant pursuant to Article 2 hereof.

### Section 12.02 Trade Fixtures

- (a) If the Tenant is not in default hereunder at the expiration of the Term, the Tenant will have the right to remove its trade fixtures from the Premises but will make good any damage caused to the Premises resulting from the installation or removal thereof.
- (b) If the Tenant fails to remove any of its trade fixtures and restore the Premises as provided in Section 12.02(a), all such trade fixtures will become the property of the Landlord except to the extent that the Landlord requires removal thereof pursuant to Section 12.02(d).
- (c) If the Tenant abandons the Premises or this lease is terminated before the proper expiration of the Term due to a default on the part of the Tenant, as of the moment of such default by the Tenant, all trade fixtures and furnishings of the Tenant (whether or not attached in any manner to the Premises) will, except to the extent the Landlord requires the removal thereof pursuant to Section 12.02(d), become and be deemed to be the property of the Landlord, without compensation to the Tenant but without prejudice to any other right or remedy of the Landlord at law or in equity.
- (d) Notwithstanding that any trade fixture is or may become the property of the Landlord, the Tenant will forthwith remove all or part of the same and will make good any damage caused to the Premises resulting from the installation or removal thereof, all at the Tenant's expense, should the Landlord so require by notice to the Tenant.
- (e) If the Tenant, after receipt of a notice from the Landlord pursuant to Section 12.02(d), fails to promptly remove any trade fixture in accordance with such notice, the Landlord may enter into the Premises and remove therefrom all or part of such trade fixture and make good any damage caused to the Premises resulting from the installation or removal thereof, without any liability accruing against the Landlord and at the expense of the Tenant, which expense will forthwith be paid by the Tenant to the Landlord.

### Section 12.03 Overholding

If the Tenant continues to occupy the Premises after the expiration of the Term, and the Landlord will accept rent, the new tenancy thereby created will be a tenancy from month to month and not from year to year, and will be subject to the covenants and conditions herein contained so far as may be applicable to a tenancy from month to month, and will be determined by one (1) month's prior notice in writing.

## ARTICLE 13

### Section 13.01 For Showings/Inspections

The Landlord or its agents have the right to enter the Premises at any reasonable time (and upon not less than forty-eight (48) hours written notice to the Tenant) to examine them (or within the last sixty (60) days of the Term if not renewed or any renewal term if not further renewed, to show them to prospective purchasers or tenants) and to enter the Premises at times mutually agreed between the Landlord and the Tenant (or on reasonable prior notice

but except in the case of emergency not less than forty-eight (48) hours notice) to make such repairs as the Landlord may deem necessary or desirable and the Landlord will be allowed to take all required material into and upon the Premises without such entry constituting an eviction of the Tenant in whole or in part nor a breach of the Landlord's obligations and the rent reserved will in no way abate by reason of loss or interruption of the business of the Tenant or otherwise while the repairs are being made, provided the Landlord takes all commercially reasonable steps to perform the work outside of the normal operating hours of the Tenant's business on the Premises and expeditiously and with as little inconvenience to the Tenant as is possible in the circumstances.

#### **Section 13.02 Landlord's Access to Records**

The Landlord may at any reasonable time and upon forty-eight (48) hours written notice to the Tenant enter (or permit governmental authorities to enter) the Premises or any other office of the Tenant's for the purpose of ensuring the Tenant's compliance with this lease, including without limitation, by auditing the Tenant's environmental and financial records as to the Premises and by conducting soil, water and other tests, provided that the Landlord takes reasonable steps to avoid interfering with the Tenant's use and occupation of the Premises.

#### **Section 13.03 Emergency Access**

If and when for any reason an emergency exists or is reasonably contemplated, the Landlord or its agents may enter the Premises by a master key, or may forcibly enter them, provided reasonable care is exercised, without rendering the Landlord or such agent liable, and without in any manner affecting the Tenant's obligations under this lease. However, despite the above, the Landlord has no obligation, responsibility or liability, for the care, maintenance or repair of the Premises except as otherwise specifically provided.

### **ARTICLE 14**

#### **Section 14.01 Options to Extend the Term**

- (a) If the Tenant, during the Term, duly and regularly pays the rent, and performs each and every one of the covenants in this lease to be performed and observed by the Tenant, the Tenant will have the option (the "First Extension Option") to extend the Term for a period (the "First Extension Period") of five years on the same terms and conditions as in this lease with the exception of this First Extension Option and any provisions for free rent, leasehold improvements or tenant allowances or inducements of any kind whatsoever. The Tenant will give notice of exercise of the First Extension Option to the Landlord not later than twelve (12) months prior to the end of the Term. The Basic Rent and Sales Rent payable during the First Extension Period will be as set out in Section 1.03.
- (b) If the Tenant, during the First Extension Period, duly and regularly pays the rent, and performs each and every one of the covenants in this lease to be performed and observed by the Tenant, the Tenant will have the option (the "Second Extension Option") to further extend the Term for a period (the "Second Extension Period") of five years on the same terms and conditions as in this lease with the exception of the Basic Rent and Sales Rent payable, the

First Extension Option, this Second Extension Option and any provisions for free rent, leasehold improvements or tenant allowances or inducements of any kind whatsoever. The Tenant will give notice of exercise of the Second Extension Option to the Landlord not earlier than eighteen (18) months and not later than twelve (12) months prior to the end of the First Extension Period. The Basic Rent and Sales Rent payable during the Second Extension Term will reflect the fair market rental value of the Premises based on the criteria set out in Section 14.01(g). If the Landlord and the Tenant have not agreed upon the Basic Rent and Sales Rent payable during the Second Extension Period on or before the date which is 60 days prior to the expiry of First Extension Period, then the Basic Rent and Sales Rent to be paid during the Second Extension Period will be determined in accordance with Section 14.01(f). If the Basic Rent and Sales Rent for the Second Extension Period have not been determined by the date of the commencement of the Second Extension Period, the Tenant will continue to pay Rent as herein provided until the Basic Rent and Sales Rent for the Second Extension Period has been determined in accordance with Section 14.01(f). Basic Rent and Sales Rent will be applied retroactively to the commencement of the Second Extension Period and any amount owing by either party to the other by virtue of this retroactive application will be paid within 14 Days of the determination of the Basic Rent and Sales Rent for the Second Extension Period in accordance with Section 14.01

- (c) If the Tenant, during the Second Extension Period, duly and regularly pays the Rent, and performs each and every one of the covenants in this lease to be performed and observed by the Tenant, the Tenant will have the option (the "Third Extension Option") to further extend the Term for a period (the "Third Extension Period") of five years on the same terms and conditions as in this lease with the exception of the First Extension Option, the Second Extension Option, this Third Extension Option and any provisions for free rent, leasehold improvements or tenant allowances or inducements of any kind whatsoever. The Basic Rent and Sales Rent payable during the Third Extension Period will be the same as the Rent payable during the Second Extension Period. The Tenant will give notice of exercise of the Third Extension Option to the Landlord not earlier than eighteen (18) months and not later than twelve (12) months prior to the end of the Second Extension Period.
- (d) If the Tenant, during the Third Extension Period, duly and regularly pays the Rent, and performs each and every one of the covenants in this lease to be performed and observed by the Tenant, the Tenant will have the option (the "Fourth Extension Option") to further extend the Term for a period (the "Fourth Extension Period") of five years on the same terms and conditions as in this lease with the exception of the Basic Rent and Sales Rent payable, the First Extension Option, the Second Extension Option, the Third Extension Option and this Fourth Extension Option and any provisions for free rent, leasehold improvements or tenant allowances or inducements of any kind whatsoever. The Tenant will give notice of exercise of the Fourth Extension Option to the Landlord not earlier than eighteen (18) months and not later than twelve (12) months prior to the end of the Third Extension Period. The Basic Rent and Sales Rent payable during the Third Extension Term will reflect the fair market rental value of the Premises based on the criteria set out in Section 14.01(g). If the Landlord and the Tenant have not agreed upon the Basic Rent

and Sales Rent payable during the Fourth Extension Period on or before the date which is 60 days prior to the expiry of the Third Extension Period, then the Basic Rent and Sales Rent to be paid during the Fourth Extension Period will be determined in accordance with Section 14.01(f). If the Basic Rent and Sales Rent for the Fourth Extension Period are not determined by the date of the commencement of the Fourth Extension Period, the Tenant will continue to pay Rent as herein provided until the Basic Rent and Sales Rent for the Fourth Extension Period has been determined in accordance with Section 14.01(f). Basic Rent and Sales Rent will be applied retroactively to the commencement of the Fourth Extension Period and any amount owing by either party to the other by virtue of this retroactive application will be paid within 14 Days of the determination of the Basic Rent and Sales Rent for the Fourth Extension Period in accordance with Section 14.01(f).

- (e) If the Tenant, during the Fourth Extension Period, duly and regularly pays the Rent, and performs each and every one of the covenants in this lease to be performed and observed by the Tenant, the Tenant will have the option (the "Fifth Extension Option") to further extend the Term for a period (the "Fifth Extension Period") of five years on the same terms and conditions as in this lease with the exception of the First Extension Option, the Second Extension Option, the Third Extension Option, the Fourth Extension Option and this Fifth Extension Option and any provisions for free rent, leasehold improvements or tenant allowances or inducements of any kind whatsoever. The Basic Rent and Sales Rent payable for the Fifth Extension Term will be the same as the Rent payable during the Fourth Extension Period. The Tenant will give notice of exercise of the Fifth Extension Option to the Landlord not earlier than eighteen (18) months and not later than twelve (12) months prior to the end of the Fourth Extension Period.
- (f) If the parties fail to agree upon the fair market rental value of the Basic Rent and Sales Rent for the Premises payable during the Second Extension Period or the Fourth Extension Period, as the case may be, within the time limit set out in Section 14.01(b) and Section 14.01 (d), respectively, then each party will forthwith appoint one (1) arbitrator and the two (2) arbitrators so appointed will appoint a third arbitrator and the three (3) arbitrators will determine the fair market rental value of the Premises based on the criteria set out in Section 14.01 (g), which will be the Rent payable by the Tenant for the applicable extension period and the provisions of the *Commercial Arbitration Act*, R.S.B.C. 1996, c.55, as amended or substituted from time to time, will apply to the selection of the arbitrators and the arbitration PROVIDED HOWEVER if the parties can agree upon a single arbitrator then the arbitration will be conducted by a single arbitrator.
- (g) For the purpose of this Section 14.01 "fair market rental value" with respect to Basic Rent will mean the basic rent that a willing tenant would pay and a willing landlord would accept in arm's length bona fide negotiations for a lease of the Premises for the specified period of time taking into consideration, without limitation, the size and location of the Premises having regard to comparable improved premises in the vicinity of the Premises and the Sales Rent payable will reflect the fair market rental of the Premises where the rent payable is a fixed percentage of the gross revenue. For greater certainty, the

Tenant agrees that it cannot claim that the Landlord's net effective rent for any extension term should be lowered as a result of the Tenant's investment in the tenant improvements.

- (h) The Landlord and the Tenant acknowledge and agree that pursuant to Section 14.01(a), Section 14.01(b), Section 14.01(c), Section 14.01(d) and Section 14.01(e), the Tenant is given the option of extending the Term only for five extension periods of five years each, and at the expiration of the Fifth Extension Period there will be no further option to extend the Term.
- (i) The exercise of the Options to Extend is solely within the control of the Tenant, and nothing contained in this lease obligates or requires the Landlord to remind the Tenant to exercise any Option to Extend. The Landlord's acceptance of any future Rent for either the First Extension Period, the Second Extension Period, the Third Extension Period, the Fourth Extension Period or the Fifth Extension Period, as the case may be, will in no way be deemed a waiver of the Tenant's requirement to give notice within the time limit set out in Section 14.01(a), Section 14.01(b), Section 14.01(c), Section 14.01(d) and Section 14.01(e), respectively, for extending the Term.
- (j) The extension of the Term for the First Extension Period, the Second Extension Period, the Third Extension Period, the Fourth Extension Period and the Fifth Extension Period, as the case may be, is deemed to incorporate all of the terms and provisions of the lease except as expressly excluded by this Section 14.01 and the Parties ratify and confirm all such terms and conditions of this lease. The Parties will not be obliged to enter into a separate extension of lease to give effect to this Section 14.01 but the Tenant will, at the Tenant's sole cost and expense, execute a separate extension of lease if required by the Landlord to do so for one or more of the First Extension Period, the Second Extension Period, the Third Extension Period, the Fourth Extension Period and the Fifth Extension Period.
- (k) Provided always that the Basic Rent and Sales Rent payable by the Tenant during the preceding Term or the immediate preceding Extension Period, as the case may be, will not be relevant in determining the fair market rental value.

## ARTICLE 15

### Section 15.01 Landlord Released

In the event of the sale or lease by the Landlord of the Premises or the assignment by the Landlord of its interest in this lease, the Landlord will without further written agreement be released and relieved of and from such liabilities and obligations.

### Section 15.02 Tenant's Covenant

The Landlord may sell, transfer or otherwise dispose of the Lands or Premises, or any portion of the Lands containing the Premises, to any party and upon the conveyance to such party of the Premises or any portion of them, the Tenant will, upon receipt of written acknowledgement from such party of this lease and the Tenant's rights under this lease, attorn to and become the Tenant of such party under the terms of this lease and the Tenant will provide such party with an acknowledgment in writing binding upon the Tenant that it

will perform the obligations and satisfy the liabilities of the Tenant, and any indemnifier or covenantor will execute and deliver a new covenant or indemnity agreement to such party on the same terms as any existing agreement with the Landlord.

#### **Section 15.03 Status Statement**

The Landlord and the Tenant will provide to the other, within three (3) days of such party's request, a status statement confirming the particulars of the lease, addressed to the other and any potential buyer or mortgagee, binding upon the Tenant or the Landlord, as the case may be, confirming:

- (a) in the case of the Tenant, that the Tenant has accepted possession of the Premises;
- (b) whether or not any party hereto has carried out all of its obligations pursuant to this lease;
- (c) that this lease constitutes the whole of the agreement between the parties (or setting out such other agreements);
- (d) that this lease is in full force and effect and that there are no defences or set offs which the Tenant claims against the Landlord (or setting out any such claims) or vice versa; and
- (e) such other matters as may be reasonably required by the requesting party or any potential or actual purchaser or mortgagee of the Premises.

### **ARTICLE 16**

#### **Section 16.01 Delivery of Notices**

Any notice required to be given hereunder must be in writing and the sender must deliver it by hand or by telecopier or by mail to the party to which it is to be given, as follows:

- (a) to the Tenant:

Cactus Café English Bay Ltd.  
Suite 1600 Cathedral Place  
925 West Georgia Street  
Vancouver, BC  
V6C 3L2

with a copy to :

Cactus Café English Bay Ltd.  
200 - 604 West Broadway  
Vancouver BC,  
V5Z 1G1

Attention: Anna Grolle

with a copy to:

(Tenant's solicitor)  
Richards Buell Sutton LLP (attn Randy Klarenbach)  
700-401 West Georgia Street  
Vancouver BC,  
V6B 5A1

to the Landlord:

- (b) Board of Parks and Recreation  
2099 Beach Avenue  
Vancouver, British Columbia V6G 1Z4

Attention: Director, Stanley District

Fax No.: 604-257-8501

- (c) to the Indemnifier:

**CACTUS RESTAURANTS LTD.**  
200 - 604 West Broadway,  
Vancouver BC  
V5Z 1G1

or to such other address or telecopier number as the party may designate and will be deemed to have been received on the day of delivery or telecopying if within business hours on a business day and otherwise on the next succeeding business day and, if mailed, the 5<sup>th</sup> day after mailing, provided that if there is between the time of mailing and the actual receipt of the notice a mail strike, slow-down or other labour dispute which might affect delivery of such notice then such notice will only be effective if actually delivered.

#### **Section 16.02 Administration of Lease**

Where this agreement requires or permits on the part of the Landlord any authority, reservation, discretion, disallowance, approval or other act of supervision or the giving of any notice, such act or action will be well and truly performed on the part of the Landlord when performed by the Director, Stanley District of the Vancouver Board of Parks and Recreation or his nominee.

#### **Section 16.03 Covenants Survive Termination**

The covenants herein on the part of the Landlord and the Tenant which, as of termination of this lease or the Term whether by passage of time or otherwise, remain unfulfilled, undischarged or otherwise outstanding will nevertheless survive such termination and remain in full force and effect and be binding upon the parties and their respective successors and assigns so long as there is any liability or indebtedness by either party to the other or so long as any such covenant remains unfulfilled, undischarged or otherwise outstanding, whether in whole or in part, notwithstanding anything herein to the contrary.



#### **Section 16.04 Time is of the Essence**

Time will be of the essence of this lease, save as herein otherwise specified.

#### **Section 16.05 Captions and Headings**

The captions and headings throughout this lease are for convenience and reference only and the words and phrases contained therein will in no way be held or deemed to define, limit, describe, explain, modify, amplify or add to the interpretation, construction or meaning of any provision of or the scope or intent of this lease nor in any way affect this lease.

#### **Section 16.06 Interpretation**

Words herein importing the singular number or the masculine gender only will include more persons, parties or things of the same kind than one, and females or corporations as well as males, and the converse whenever the context requires; these presents will extend to, be binding upon and enure to the benefit of the Landlord and the Tenant and the successors and assigns of the Landlord and the heirs, executors, administrators, successors and permitted assigns of the Tenant.

#### **Section 16.07 Joint and Several**

Any covenant, agreement, condition or proviso made by two (2) or more persons will be construed as several as well as joint.

#### **Section 16.08 Waiver**

No waiver of or neglect to enforce any provision of this lease upon a default by the Tenant will be deemed to be a waiver of any such right upon any subsequent similar default. Without limiting the generality of this Section 16.08, the acceptance by the Landlord of part payment of any sums, including rent, required to be paid under this lease will not constitute a waiver or release of the Landlord's right to payment in full of such sums.

#### **Section 16.09 Entire Agreement**

The Tenant acknowledges that there are no covenants, representations, warranties, agreements, terms or conditions expressed or implied relating to this lease or the Premises except as expressly set out in this lease, and that this lease may not be modified except by an agreement in writing executed by both the Landlord and the Tenant.

#### **Section 16.10 Governing Law**

This lease will be governed by and interpreted in accordance with the laws of British Columbia and the parties irrevocably attorn to the jurisdiction of the courts of British Columbia.

#### **Section 16.11 Severability**

If any provision or provisions of this lease are determined by a court to be illegal or not enforceable, it or they will be considered separate and severable from this lease and the remaining provisions of this lease will remain in full force and be binding upon the parties.

### **Section 16.12 Relationship between Landlord and Tenant**

Nothing contained in this lease nor any acts of the Landlord or the Tenant will be deemed to create any relationship between the Landlord and the Tenant other than the relationship of landlord and tenant, and the Tenant will throughout the Term take all reasonable steps to inform the public that the Tenant is the operator of the Premises as an independent contractor and not as employee or agent of the Landlord.

### **Section 16.13 Force Majeure**

Despite anything contained in this lease to the contrary, if the Landlord or the Tenant is, in good faith, delayed or prevented from doing anything required by this lease because of a strike, labour trouble, inability to get materials or services, power failure, restrictive governmental laws or regulations, riots, insurrection, sabotage, rebellion, war, act of God, or any other similar reason, that is not the fault of the party delayed or of its officers, employees or agents, the doing of the thing is excused for the period of the delay and the party delayed will promptly do what was delayed or prevented within the appropriate period after the delay. The preceding sentence does not excuse the Tenant from payment of rent or the Landlord from payment of amounts, if any, that it is required to pay, in the amounts and at the time specified in this lease.

### **Section 16.14 Permanent Public Park**

Notwithstanding anything contained in this lease, if the Building is part of a permanent public park within the meaning of section 490 of the *Vancouver Charter*, S.B.C. 1953, C. 55, as amended, and ceases to be part of such a permanent public park, then this lease will be terminable at the option of the Landlord but all obligations of the Tenant up to the date of any such termination will survive such termination. Upon termination pursuant to this Section 16.14, at the option of the Tenant, subject to the approval of Council, the City of Vancouver will enter into a lease with the Tenant on the same terms and conditions of this lease, including Rent and the right of renewal, for the balance of the Term or renewal term, as the case may be, that was remaining on this lease immediately prior to the effective date of termination.

### **Section 16.15 No Derogation**

Nothing contained or implied in this Agreement will derogate from the obligations of the Owner under any other agreement with the City of Vancouver or, if the City so elects, prejudice or affect the City of Vancouver's rights, powers, duties or obligations in the exercise of its functions pursuant to the *Vancouver Charter* as amended from time to time and the rights, powers, duties and obligations of the City under all public and private statutes, by-laws, orders and regulations, which may be, if the City so elects, as fully and effectively exercised in relation to the Lands as if this Agreement had not been executed and delivered by the Owner and the Park Board.

### **Section 16.16 City's Costs**

In any action to enforce this Agreement in which any Court determines that the position of the Park Board will prevail, the Park Board will be entitled to court costs on a solicitor/client basis.

**Section 16.17 No Promotion**

The Tenant must not disclose or promote its relationship with the City of Vancouver, including by means of any verbal declarations or announcements and by means of any sales, marketing or other literature, letters, client lists, press releases, brochures or other written materials, without the express prior written consent of the City of Vancouver (except as may be necessary for the Tenant to perform the Tenant's obligations under the terms of this lease).

**Section 16.18 Trade and Domain Names**

The Tenant will not use any trade names for the Restaurant in any medium, including, without limitation, print, radio, internet or television advertisements, or register any internet domain names for the Restaurant, without the prior written approval of such trade or domain names by the Landlord, which approval will not be unreasonably withheld. If, at any time, the Landlord requests that the adopted trade or domain name for the restaurant be changed, the Tenant will promptly submit a detailed estimate of the costs of changing the trade or domain name to the Landlord for approval. Once the Landlord has approved the estimate, the Tenant will promptly comply with such request and will submit an invoice the Landlord for the actual costs of the change, which invoice will be paid by the Landlord within sixty (60) days of receipt. The Landlord reserves the right to refuse to reimburse for any actual costs that exceed the approved estimate by an amount equal to or greater than ten percent (10%) of the approved estimate.

**Section 16.19 Indemnity**

For good and valuable consideration the Indemnifier will observe and perform, and will cause the Tenant to observe and perform all obligations of the Tenant under this agreement, and will indemnify and hold harmless the Landlord from all loss or damage howsoever resulting from non-performance for the initial term of five years only.

**Section 16.20 Parking**

The Tenant will be entitled to the use of 5 parking stalls as shown on Schedule A hereto.

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

CITY OF VANCOUVER as represented by its  
BOARD OF PARKS AND RECREATION

By:

\_\_\_\_\_  
Authorized Signatory

By:


\_\_\_\_\_  
Authorized Signatory

**CACTUS CAFÉ ENGLISH BAY LTD.**

By:   
Authorized Signatory

By: \_\_\_\_\_  
Authorized Signatory

**CACTUS RESTAURANTS LTD.**

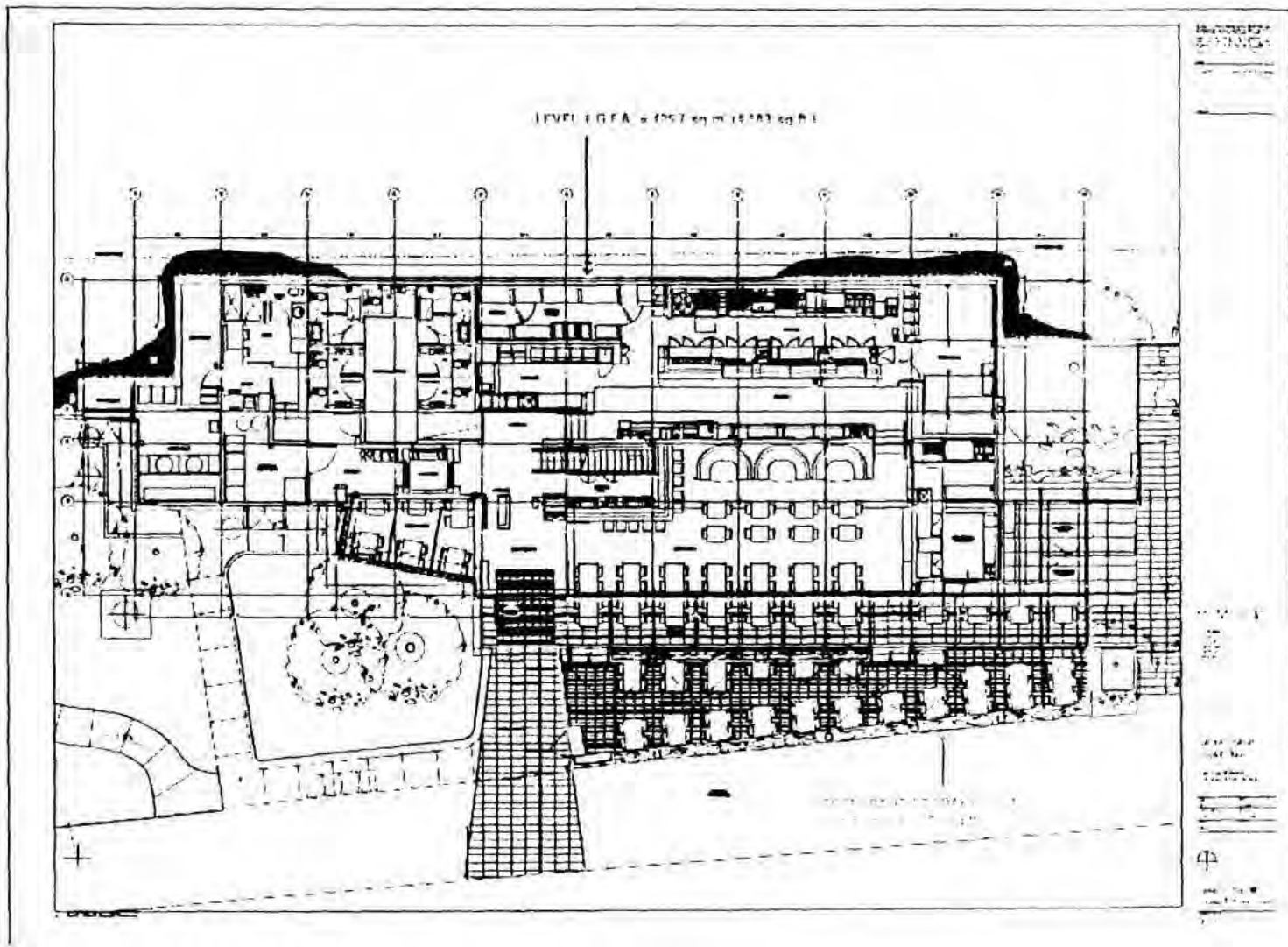
By:   
Authorized Signatory

By: \_\_\_\_\_  
Authorized Signatory

Approved by resolution of the Landlord's Board of Parks and Recreation on March 22, 2010.

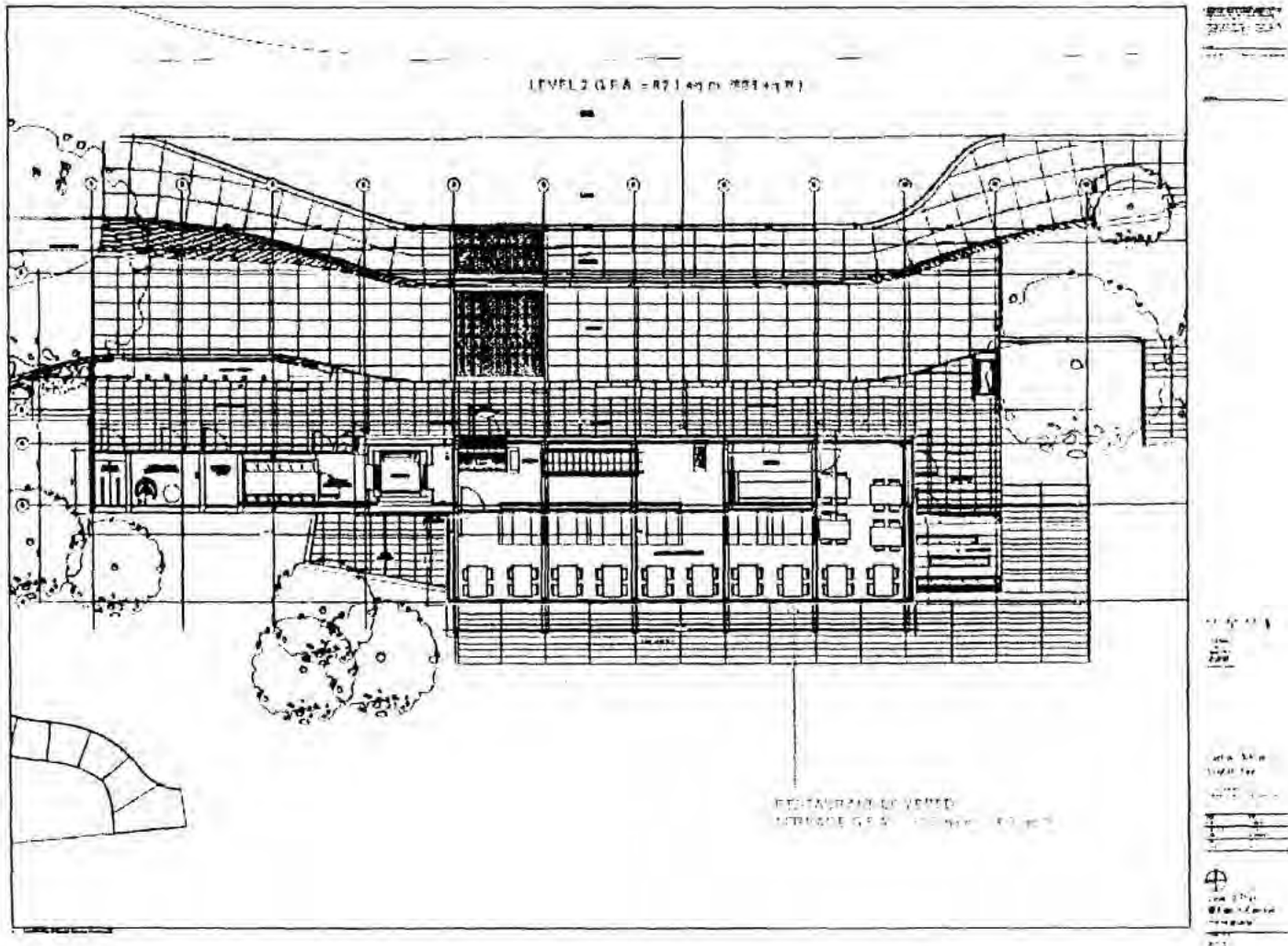
This is the signatory page of a lease between the City of Vancouver as represented by its Board of Parks and Recreation as Landlord and Cactus Café English Bay Ltd. as Tenant concerning the English Bay Beach Park Restaurant (the Premises).

SCHEDULE A  
EXPLANATORY PLAN OF LEASEHOLD OF THE PREMISES



1870310.1

SCHEDULE



1870310.1

LE B  
SIGNAGE



August 5, 2015

**BY EMAIL & COURIER**

Board of Parks and Recreation  
2099 Beach Avenue  
Vancouver, British Columbia  
V6G 1Z4

Attention: Director, Stanley District

**RE: Lease between City of Vancouver, represented by its Board of Parks and Recreation and Cactus Café English Bay Ltd. dated August 9, 2011 in respect of the premises located in English Bay Beach Park, British Columbia (collectively the "Lease")**

Dear Sirs and Mesdames,

In accordance with Section 14.01(a) of the Lease, we hereby provide written notice of our exercise of the option to renew the Lease for First Extension Period, being a term of five (5) years commencing on November 1, 2016 and expiring on October 31, 2021. We confirm that the Basic Rent to be paid during the First Extension Period shall be **s.17(1), s.21(1)** plus applicable taxes.

We confirm that all terms and conditions of the Lease will remain in effect during the First Extension Term, except with our exercise of the option to renew for the First Extension Term hereunder there will remain four (4) further extension options in accordance with Section 14.01 of the Lease.

Please sign in the space indicated below and return a fully executed copy of this letter to us.

Yours very truly,

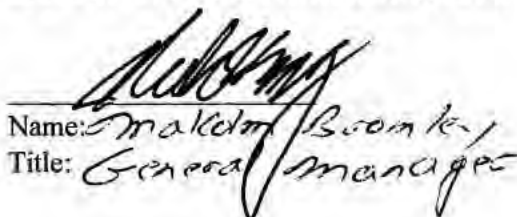
**CACTUS CAFE ENGLISH BAY LTD.**



Richard Jaffray  
President

The undersigned hereby acknowledges receipt of this notice and confirms the information set out above the 10 day of August, 2015.

**CITY OF VANCOUVER**  
as represented by its  
**BOARD OF PARKS AND RECREATION**



Name: Malcolm Boonker  
Title: General Manager

## SECOND RENEWAL LEASE

This Second Renewal Lease is made effective October 31, 2021,

BETWEEN:

**CITY OF VANCOUVER**, as represented by its  
Board of Parks and Recreation  
2099 Beach Avenue  
Vancouver, BC V6G 1Z4

(the “**Landlord**”)

AND:

**CACTUS CAFE ENGLISH BAY LTD.** (Incorporation No. BC0871518)  
1600 - 925 West Georgia Street  
Vancouver BC V6C 3L2

(the “**Tenant**”)

WHEREAS:

- A. Pursuant to a Lease dated August 9, 2011 (the “**Original Lease**”), made between the Landlord and Tenant and the indemnifier Cactus Restaurants Ltd. (the “**Indemnifier**”), a lease was granted for those premises described therein (the “**Premises**”) expiring on October 31, 2016, subject to the terms and conditions set forth in the Original Lease;
- B. Pursuant to a letter dated August 5, 2015 (the “**First Renewal**”), the Tenant exercised the option to renew contained in Section 14.01(a) of the Original Lease such that the Original Lease was renewed for a further term of five (5) years expiring on October 31, 2021, subject to the terms and conditions set forth in the Original Lease and the First Renewal;
- C. The Original Lease and the First Renewal are hereinafter together referred to as the “**Lease**”; and
- D. The Tenant has exercised one of its options to renew the lease for a further term of five (5) years commencing on November 1, 2021 and expiring October 31, 2026 (the “**Second Renewal**”). The parties wish to enter into this Second Renewal Lease to evidence the terms and conditions of that renewal and to amend the terms of the Lease.

NOW THEREFORE in consideration of the sum of \$10.00 paid by each party to each of the other parties and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each party, the Landlord and the Tenant covenant and agree that:

### 1. Second Renewal Term

The Landlord hereby leases to the Tenant the Premises for a further term of five (5) years commencing effective November 1, 2021 to and including the 31st day of October, 2026 (the “**Second Renewal Term**”) on the same terms and conditions as in the Lease with the

exception of any provisions for free rent, leasehold improvements or tenant allowances or inducements of any kind whatsoever.

## 2. Rent For Second Renewal Term

The Tenant will pay to the Landlord during the Second Renewal Term, the Basic Rent and Sales Rent payable in accordance with Section 1.03 and 14.01(b) of the Lease.

## 3. Modification of Lease

The Lease is hereby modified as follows:

a) by deleting Section 14.01(b) and replacing it with the following:

“(b) If the Tenant, during the First Extension Period, duly and regularly pays the rent, and performs each and every one of the covenants in this lease to be performed and observed by the Tenant, the Tenant will have the option (the **“Second Extension Option”**) to further extend the Term for a period (the **“Second Extension Period”**) of five years on the same terms and conditions as in this lease with the exception of the Basic Rent and Sales Rent payable, the First Extension Option, this Second Extension Option and any provisions for free rent, leasehold improvements or tenant allowances or inducements of any kind whatsoever. The Basic Rent and Sales Rent payable for the Second Extension Term will be the same as the Rent payable during the First Extension Period. The Tenant will give notice of exercise of the Second Extension Option to the Landlord not earlier than eighteen (18) months and not later than twelve (12) months prior to the end of the First Extension Period.”

b) by deleting Section 14.01(c) and replacing it with the following:

“(c) If the Tenant, during the Second Extension Period, duly and regularly pays the Rent, and performs each and every one of the covenants in this lease to be performed and observed by the Tenant, the Tenant will have the option (the **“Third Extension Option”**) to further extend the Term for a period (the **“Third Extension Period”**) of five years on the same terms and conditions as in this lease with the exception of the First Extension Option, the Second Extension Option, this Third Extension Option and any provisions for free rent, leasehold improvements or tenant allowances or inducements of any kind whatsoever. The Tenant will give notice of exercise of the Third Extension Option to the Landlord not earlier than eighteen (18) months and not later than twelve (12) months prior to the end of the Second Extension Period. The Basic Rent and Sales Rent payable during the Third Extension Term will reflect the fair market rental value of the Premises based on the criteria set out in Section 14.01(g). If the Landlord and the Tenant have not agreed upon the Basic Rent and Sales Rent payable during the Third Extension Period on or before the date which is 60 days prior to the expiry of the Second Extension Period, then the Basic Rent and Sales Rent to be paid during the Third Extension Period will be determined in accordance with Section 14.01(f). If the Basic Rent and Sales Rent for the Third Extension Period have not been determined by the date of the commencement of the Third Extension Period, the Tenant will continue to pay

Rent as herein provided until the Basic Rent and Sales Rent for the Third Extension Period has been determined in accordance with Section 14.01(f). Basic Rent and Sales Rent will be applied retroactively to the commencement of the Third Extension Period and any amount owing by either party to the other by virtue of this retroactive application will be paid within 14 Days of the determination of the Basic Rent and Sales Rent for the Third Extension Period in accordance with Section 14.01(f).”

c) by deleting Section 14.01(d) and replacing it with the following:

“(d) If the Tenant, during the Third Extension Period, duly and regularly pays the Rent, and performs each and every one of the covenants in this lease to be performed and observed by the Tenant, the Tenant will have the option (the **"Fourth Extension Option"**) to further extend the Term for a period (the **"Fourth Extension Period"**) of five years on the same terms and conditions, in this lease with the exception of the Basic Rent and Sales Rent payable, the First Extension Option, the Second Extension Option, the Third Extension Option and this Fourth Extension Option and any provisions for free rent, leasehold improvements or tenant allowances or inducements of any kind whatsoever. The Basic Rent and Sales Rent payable for the Fourth Extension Term will be the same as the Rent payable during the Third Extension Period. The Tenant will give notice of exercise of the Fourth Extension Option to the Landlord not earlier than eighteen (18) months and not later than twelve (12) months prior to the end of the Third Extension Period.”

d) by deleting Section 14.01(e) and replacing it with the following:

“(e) If the Tenant, during the Fourth Extension Period, duly and regularly pays the Rent, and performs each and every one of the covenants in this lease to be performed and observed by the Tenant, the Tenant will have the option (the **"Fifth Extension Option"**) to further extend the Term for a period (the **"Fifth Extension Period"**) of five years on the same terms and conditions as in this lease with the exception of the First Extension Option, the Second Extension Option, the Third Extension Option, the Fourth Extension Option and this Fifth Extension Option and any provisions for free rent, leasehold improvements or tenant allowances or inducements of any kind whatsoever. The Tenant will give notice of exercise of the Fifth Extension Option to the Landlord not earlier than eighteen (18) months and not later than twelve (12) months prior to the end of the Fourth Extension Period. The Basic Rent and Sales Rent payable during the Fifth Extension Term will reflect the fair market rental value of the Premises based on the criteria set out in Section 14.01(g). If the Landlord and the Tenant have not agreed upon the Basic Rent and Sales Rent payable during the Fifth Extension Period on or before the date which is 60 days prior to the expiry of the Fourth Extension Period, then the Basic Rent and Sales Rent to be paid during the Fifth Extension Period will be determined in accordance with Section 14.01(f). If the Basic Rent and Sales Rent for the Fifth Extension Period are not determined by the date of the commencement of the Fifth Extension Period, the Tenant will continue to pay Rent as herein provided until the Basic Rent and Sales Rent for the Fifth Extension Period has been determined in accordance with Section 14.01(f). Basic Rent and Sales Rent will be applied retroactively to

the commencement of the Fifth Extension Period and any amount owing by either party to the other by virtue of this retroactive application will be paid within 14 Days of the determination of the Basic Rent and Sales Rent for the Fifth Extension Period in accordance with Section 14.01(f).”

e) by deleting Section 14.01(f) and replacing it with the following:

“(f) If the parties fail to agree upon the fair market rental value of the Basic Rent and Sales Rent for the Premises payable during the Third Extension Period or the Fifth Extension Period, as the case may be, within the time limit set out in Section 14.01(c) and Section 14.01(e), respectively, then each party will forthwith appoint one (1) arbitrator and the two (2) arbitrators so appointed will appoint a third arbitrator and the three (3) arbitrators will determine the fair market rental value of the Premises based on the criteria set out in Section 14.01(g), which will be the Rent payable by the Tenant for the applicable extension period and the provisions of the *Arbitration Act*, R.S.B.C. 2020, c.2 as amended or substituted from time to time, will apply to the selection of the arbitrators and the arbitration PROVIDED HOWEVER if the parties can agree upon a single arbitrator then the arbitration will be conducted by a single arbitrator.”

#### **4. Terms and Conditions of Lease Will Apply**

The parties agree that this Second Renewal Lease will be deemed to incorporate all of the terms and provisions of the Lease, as amended by this Second Renewal Lease, save and except for this option to renew. For greater certainty, the Tenant has the option to renew the Lease for three (3) further terms of five (5) years each.

#### **5. Continuing Effect**

This Agreement as and from the date hereof will be read and construed along with the Lease and treated as a part thereof and the Lease, as hereby modified, will continue to be of full force and effect and the Landlord and Tenant confirm and ratify the Lease as hereby amended.

#### **6. Capitalized Terms**

Capitalized Terms will have the meaning described in the Lease unless modified herein.

#### **7. Enurement**

This Agreement will enure to the benefit of and be binding upon each of the Landlord and the Tenant and their respective successors and permitted assigns.

#### **8. Counterparts**

This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original and all of which, taken together, will be deemed to constitute one and the same instrument. Delivery of an executed copy of this Agreement by any party by

electronic transmission will be as effective as personal delivery of an originally executed copy of this Agreement by such party.

**CACTUS CAFE ENGLISH BAY LTD.**

Per:   
Authorized Signatory

**CITY OF VANCOUVER**, represented by its  
Board of Parks and Recreation

Per:   
Authorized Signatory

August 31, 2023

**DELIVERED**

CITY OF VANCOUVER as represented by its  
Board of Parks and Recreation  
2099 Beach Avenue  
Vancouver, BC V6G 1Z4

Dear Sirs and Mesdames:

**Licence Agreement dated January 1, 2023 (the “Licence Agreement”) between CITY OF VANCOUVER as represented by its Board of Parks and Recreation (the “Park Board”), and CACTUS CAFE ENGLISH BAY LTD. (the “Licensee”), in respect of the premises located at the Lands and known as the English Bay Bathhouse Change Rooms, (the “Licence Area”)**

All capitalized terms herein shall have the same meaning ascribed to them in the Licence Agreement unless otherwise defined herein.

In accordance with Section 3.1 of the Licence Agreement, we hereby provide written notice of our exercise of the option to renew the Licence Agreement for the first Renewal Term, being a term of two (2) years commencing on November 1, 2023 and expiring on October 31, 2025. Pursuant to Section 3.1 (c) of the Licence Agreement, we confirm that the Licence Fee payable for the Renewal Term for the Licence Area shall be the fair market rental value.


We hereby propose that the Licence Fee for the Renewal Term of November 1, 2023 to October 31, 2025 shall remain at **s.17(1), s.21(1)** plus GST, per month.

We confirm that all terms and conditions of the Licence Agreement will remain in effect during the Renewal Term, except that with our exercise of the option to renew for the first Renewal Term hereunder, there will remain one (1) further option to renew for a further term of two (2) years.

If you are in agreement with the proposed, please sign in the space indicated below and return a fully executed ink original of this letter to us.


Yours very truly,

**CACTUS CAFÉ ENGLISH BAY LTD.**

Per:   
Andrew Latchford, President

The undersigned hereby acknowledges receipt of this notice and confirms the information set out above the \_\_\_\_ day of \_\_\_\_\_, 2023.

**CITY OF VANCOUVER as represented by its Board of Parks and Recreation**

Per:   
Name: Steve Jackson, Acting GM  
Title: