

8 February 2024

File Ref: OIAPR-1274023063-2578

[REDACTED]

By email: [REDACTED]

Tēnā koe [REDACTED]

Request for information 2024-008

I refer to your request for information dated 22 January 2024, which was received by Greater Wellington Regional Council (Greater Wellington) on 22 January 2024. You have requested the following:

“A copy of the MOA (or copies if more than one Agreement) in respect of this acquisition of both the freehold and leasehold interests of 84 Pharazyn St. (Your file refs. are 713903 and 713904)”

Greater Wellington’s response follows:

Attachment 1 contains the requested Memorandum of Agreement.

If you have any concerns with the decision(s) referred to in this letter, you have the right to request an investigation and review by the Ombudsman under section 27(3) of the Local Government Official Information and Meetings Act 1987.

Please note that it is our policy to proactively release our responses to official information requests where appropriate. Our response to your request will be published shortly on Greater Wellington’s website with your personal information removed.

Nāku iti noa, nā



Lian Butcher

Kaiwhakahaere Matua Taiao | Group Manager Environment

PROACTIVE RELEASE

Memorandum of Agreement Pursuant to the Public Works Act 1981

Dated the 12th day of May 2022

Parties

1. Wellington Regional Council (**Council**)
2. Camellia Investments Limited (**Owner**)
3. Little Footprints Care and Education Centre Limited (**Lessee**)

Background

- A. The Owner is the registered owner of 84 Pharazyn Street, Melling being 1758 square metres more or less being Lot 3 and Part Lot 2 Deposited Plan 10668 comprised in Record of Title WN475/5 (**Land**).
- B. By virtue of an undated Agreement to Lease (**Lease**) from the Owner, the Lessee leases the Land and operates a childcare centre from the Land (**Business**). The Lease has a final expiry date of 30 September 2036.
- C. The Owner and the Lessee are "related companies" as those words are defined in s2 Companies Act 1993 and have blended practical interests in the Land.
- D. The Council requires part of the Land for Soil Conservation and River Control Purposes and part of the Land for Public Transport Purposes (RiverLink Project) (**Works**). The Works are a public work for the purposes of the Public Works Act 1981 (**PWA**) and this agreement is entered into pursuant to s17(1) PWA.
- E. As a result of the Council's requirement for the Land, the Lease will need to be surrendered and the Business will need to be relocated.
- F. The Owner is the registered owner of 79 Marsden Street being 1012 square metres more or less being Lot 35-36 Deposited Plan 2153 comprised in Record of Title WN312/134 (**Replacement Property**).
- G. The Owner intends to construct a childcare centre facility at the Replacement Property (**Replacement Facility**) into which the Lessee can relocate and re-establish the Business under and by virtue of a new lease, on reasonably comparable terms with the Lease, to be granted by the Owner to the Lessee.
- H. The parties have agreed terms to give effect to the proposed re-establishment of the Business at the Replacement Facility and to provide for the Council's acquisition of the Land and the Lessee's assignment of the Lease to Council as hereafter provided.


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Agreement

The Owner

1. The Owner offers to sell the Land to the Council for Soil Conservation and River Control Purposes for the Works for the consideration of Three Million Nine Hundred and Fifty Thousand Dollars (\$3,950,000.00) plus GST, if any (**Compensation**) discharged from all encumbrances and requisitions and free of all leases and tenancies, on and subject to the conditions set out below and in Schedule A to this agreement.
2. The Owner agrees to:
 - a. give to the Council on settlement an executed and valid conveyance or other assurance of the Land; or, at the option of the Council, to the acquisition of the Land by Declaration under the PWA; and to
 - b. accept the Compensation together with the other payments detailed in Schedule A to this agreement in full and final settlement of all claims under the PWA.
3. The Owner acknowledges the Council may retain and pay (if demanded) to the persons entitled the whole or a sufficient portion of the Compensation to release the Land from all encumbrances securing money.
4. The Owner further agrees to adduce a good title to the Land and to comply with the requirements set out in the Schedules to this agreement.

The Lessee

5. The Lessee offers to assign the Lease to the Council for the consideration of Nine Thousand Four Hundred and Eighty-Three (\$9,483.00) plus GST, if any (**Lessee Compensation**) on and subject to the conditions set out in Schedule B.
6. The Lessee accepts the Lessee Compensation and the other payments made by Council in Schedule B in full settlement of compensation for the Lessee's interest in the Land and of all claims and demands in respect of the Lessee's interest in the Land.
7. The Lessee further agrees to comply with the requirements set out in the Schedules to this agreement.


Signed for and on behalf of **Camellia Investments Limited**
by its directors:


.....
Esther Mary LEWIS


.....
Seth Jonathan LEWIS


ER


Signed for an on behalf of **Little Footprints Care and Education Centre Limited**
by its directors:


.....
Esther Mary LEWIS


.....
Seth Jonathan LEWIS

I accept the above offer to sell/confirm the above agreement.

Signed by the **WELLINGTON REGIONAL COUNCIL** by its
authorised signatory:


.....

in the presence of


.....
Signature of witness


.....
Name of witness


.....
Address of witness


.....
Occupation of witness

PROACTIVE RELEASE


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SCHEDULE A: CONDITIONS RELATING TO THE LAND

Compensation Certificate

1. The Council will register a compensation certificate pursuant to section 19 of the PWA against the Record of Title to the Land as soon as practicable following the date that this agreement is signed by all parties. The Council will notify the Owner as soon as the compensation certificate has been registered.

Deposit

2. a. The Council will pay the sum of Two Million Nine Hundred and Sixty-Three Thousand Dollars (\$2,963,000) plus GST, if any (**Deposit**) to the Owner on the date being 10 working days from the date of confirmation of registration of the compensation certificate which will be promptly lodged following the Council's execution of this agreement.
b. The Deposit is paid in part payment of the Compensation.

Settlement Date

3. Subject to clause 31 of this Schedule A the date of settlement will be 30 June 2023 (**Settlement Date**).

Additional Compensation

4. In addition to the Compensation to be paid on the Settlement Date, the Council will pay the Owner the sum of \$25,000, being the Owner's entitlement pursuant to section 72C PWA (**Additional Compensation**). Payment of the Additional Compensation is subject to the Lessee providing vacant possession of the Land on the Settlement Date. The Additional Compensation is not subject to the imposition of GST.

Insurance and Prior Inspection

5. Insurance premiums payable in connection with the buildings and other improvements (**Fixtures**) on the Land will not be apportioned on the Settlement Date and will remain at the sole risk of the Owner until possession is given and taken.
6. Until settlement and the giving and taking of possession the Owner will at the Owner's expense maintain the Land, including the Fixtures, in the same order and condition as at the date of this agreement, fair wear and tear excepted.
7. If any damage (excluding fair wear and tear) is done to the Land and Fixtures prior to settlement other than by the Council, such damage will be made good by the Owner prior to settlement or the reasonable cost of making good such damage will be deducted from the Compensation. The provisions in this clause 7 apply until settlement, notwithstanding that an inspection of the Land and Fixtures may have been made under clause 8 before the Settlement Date.
8. The Owner agrees to a duly authorised representative of the Council entering onto the Land on one occasion on or before the Settlement Date to inspect the Land and Fixtures and warrants that it has the authority of the Lessee to agree to this inspection and any subsequent inspection under clause 11 following.


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9. The Council will, as soon as reasonably practicable after the inspection, notify the Owner of any defect in, or damage to the Land and Fixtures that has occurred in the period between the date of this agreement and the date of inspection (fair wear and tear excepted).
10. If any damage or defect to the Land and Fixtures is identified by the Council on the date of inspection, such damage or defect is to be made good by the Owner prior to settlement or, at the Council's election, the cost of making good such damage may be deducted from the Compensation.
11. Should the Owner be required to make good the damage or defect, the Council may inspect the Land and Fixtures one further time before settlement to ensure compliance with any requirement.

Possession, Payment and Transfer

12. The Council will tender settlement by way of electronic transfer of cleared funds pursuant to the protocol for remote settlement under the New Zealand Law Society's Property Transactions Guidelines (July 2020) or pursuant to any protocol subsequently agreed between the parties.
13. On the Settlement Date:
 - a. the Land is sold subject to the Lease on the basis that the Lessee will assign the Lease to the Council with effect from the Settlement Date and the Council will accept such assignment as set out at clauses 1-4 Schedule B;
 - b. subject to clause 10, the Council will pay to the Owner the balance of the Compensation, being Nine Hundred and Eighty-Seven Thousand Dollars (\$987,000.00) plus GST (if any), together with the Additional Compensation (subject to the requirements of clause 4 being met);
 - c. the Owner will transfer the Land to the Council (unless the Council has elected to acquire the Land by Declaration in which case clauses 15 to 17 will not apply);
 - d. net rates will be apportioned;
 - e. the Owner and the Lessee will as applicable provide the Council with any keys and remote door openers for the Fixtures on the Land; and
 - f. the Owner will deliver to the Council's solicitor any documents that the Owner is required to provide to the Council on settlement in terms of this agreement.
14. To facilitate settlement, the Owner's solicitor will provide to the Council, a reasonable time before the Settlement Date, a settlement statement showing the Compensation, Additional Compensation and any rates to be apportioned pursuant to this agreement.
15. To facilitate the transfer of the Land to the Council under clause 13c the Council's solicitor will, a reasonable time before the Settlement Date:
 - a. create a Landonline Workspace for the transaction;



- b. notify the Owner's solicitor of the dealing number allocated by Land Information New Zealand;
 - c. prepare in that workspace a transfer instrument in respect of the Land;
 - d. lodge in the Landonline Workspace the tax information contained in the Council's tax statement; and
 - e. sign and certify the transfer instrument.
16. The Owner's obligation under clause 13c will be met by the Owner's Solicitor, a reasonable time on or before the Settlement Date:
- a. preparing, certifying, signing and pre-validating in the Landonline Workspace created under clause 15, the transfer instrument and all other electronic instruments required to confer title on the Council in terms of the Owner's obligations under this agreement;
 - b. lodging in the Landonline Workspace the tax information contained in the Owner's tax statement; and
 - c. releasing the same upon settlement so that the Council's solicitor can then submit them immediately after settlement for registration.
17. For the purposes of clause 15 and clause 16, the terms "tax information" and "tax statement" have the meanings ascribed to them by the Land Transfer Act 2017.
18. As soon as practicable after the Settlement Date the Owner will forward a notice to the relevant territorial local authorities advising of the change of owner of the Land. The Council is to provide the notice at its expense and forward it to the Owner within a reasonable time prior to the Settlement Date.

GST

19. The Owner and Council agree that the supply of the Land pursuant to this agreement is subject to the provisions of the Goods and Services Tax Act 1985 (**GST Act**), and zero rated by virtue of Section 11(1)(mb) of the GST Act.
20. The Owner warrants that it is a registered person as required by the GST Act in respect of the supply of the Land and it will still be a registered person at the Settlement Date.
21. The Council warrants that at the date of this agreement:
- a. it is a registered person as required by the GST Act;
 - b. it is acquiring the Land for the purpose of making taxable supplies;
 - c. the Land will not be used as a principal place of residence by the Council or a person associated with it under Section 2A(1)(c) of the GST Act; and
 - d. that the warranties provided in clause 21(a) to (c) will remain correct up until and including the Settlement Date.



22. The Owner and Council reserve their rights to seek compensation from the other party and reserve all their remedies at common law and equity if the other party breaches any warranty granted in clause 20 and clause 21.

Other payments and reimbursements

23. The Council will reimburse in accordance with section 66 PWA:
- a. the Owner's reasonable legal and valuation costs and property consultancy fees incurred in the negotiation and settlement of this agreement on production of accounts or receipts in accordance with the provisions of section 66(1)(a)(ii) PWA.
 - b. the Owner's reasonable legal fees and reasonable valuation fees incurred in respect of the acquisition of the Replacement Property acquired in substitution for the Land on production of accounts or receipts in accordance with the provisions of section 66(1)(a)(iii) of the PWA.
 - c. the Owner's reasonable costs incurred in arranging an architect, and to procure necessary associated advice from secondary consultants, to prepare plans and specifications for the Replacement Facility, such facility to be of a standard reasonably comparable to the standard currently enjoyed on the Land.
 - d. the Owner's actual and reasonable costs to obtain building consent for the Replacement Facility (**Building Consent**).
 - e. the Owner's actual and reasonable development contribution costs required to be paid pursuant to conditions of resource consent granted by Hutt City Council for operation of the Business at the Replacement Property (**Resource Consent**).
24. The Owner acknowledges that the disturbance payments payable in accordance with clause 23 are part of the total compensation payable under this agreement. The Owner must provide a tax invoice with respect to such payments in accordance with section 24 of the GST Act, and the Council agrees to reimburse such costs as soon as reasonably practicable on receipt of such invoice. Council will implement internal protocols and processes to facilitate monthly payment of invoices received for costs incurred by the Owner under clause 23(c).

Replacement Childcare Facility

25. The Owner and the Council record their mutual intention that construction of the Replacement Facility be completed with all reasonable expediency to enable reinstatement of the Business at the Replacement Property on or prior to the Settlement Date to a standard as near as possible to the standard currently enjoyed on the Land.
26. The parties acknowledge and agree that, to meet Ministry of Education (MoE) requirements, the Replacement Facility will need to be ready for inspection to evidence MoE certification requirements at least 30 working days prior to the date the Business can commence operating from the Replacement Facility.
27. The parties acknowledge and agree that the Council has at its sole cost applied for and obtained the Resource Consent on the Owner's behalf. The Owner will, with all due speed from



the date of this agreement use all reasonable endeavours to obtain all other necessary permits and consents required for construction of the Replacement Facility. For the avoidance of doubt the Council is to pay the actual and reasonable costs of obtaining such necessary permits and consents to meet any statutory or regulatory requirements for the Replacement Facility, on receipt of a valid tax invoice.

28. The Owner will, with all due speed from the date all required permits and consents have been obtained, complete construction of the Replacement Facility in accordance with all permits and consents and all statutory and regulatory requirements (including any Ministry of Education requirements) to enable the Business to be reinstated to as near as possible to the standard currently enjoyed at the Land.
29. Subject to the terms of this agreement the Owner acknowledges and agrees that construction of the Replacement Facility and reinstatement of the Business at the Replacement Property is at its own risk and the Owner is responsible for all associated costs except as otherwise provided in this agreement. For the avoidance of doubt and by way of example only the Owner will be responsible for:
 - a. all costs to demolish existing improvements at the Replacement Property; and
 - b. all costs of physical works to construct the Replacement Facility including all materials, fittings and labour required for the same.
30. The Owner will keep the Council updated as to progress of construction of the Replacement Facility and will additionally advise the Council with all expediency of any delays to anticipated completion of the same.
31. As soon as it is practicable to do so the Owner will provide notice in writing to the parties advising of the date that the Lessee will be able to commence operating from the Replacement Facility (allowing for prior MoE certification as provided for at clause 26; called **Opening Date**). If the Opening Date is:
 - a. Later than the Settlement Date then Council may elect at its sole discretion to defer settlement until the Opening Date; or
 - b. More than twenty (20) working days prior to the Settlement Date then settlement will be brought forward to the Opening Date.

Duty to Mitigate Loss

32. The Owner acknowledges it has a duty to mitigate any loss caused by the Council's land requirement and will take reasonable steps to mitigate any such losses.

Warranties

33. The Owner warrants and undertakes that at the date of this agreement:
 - a. The Owner has no knowledge of any requirement and has not received any notice from any tenant or any local or government authority which affects the Land in any way, and which has not been disclosed to the Council, other than the Riverlink Project; and

[Handwritten signature]
[Handwritten initials]

- b. The Owner has not given any consent or waiver under the Resource Management Act 1991, which directly or indirectly affects the Land.
34. The Owner warrants and undertakes that at the Settlement Date:
- a. The Owner has delivered to the Council all notices and requirements received after the date of the agreement from any local or government authority unless the Owner has satisfied the notice or requirement, except relating to the Riverlink Project. If the Owner has failed to deliver to the Council or to satisfy the notice or demand, then the Owner will be liable for any costs or penalties arising from such failure; and
- b. The Owner has not given any consent or waiver in relation to any application under the Resource Management Act 1991 which directly or indirectly affects the Land.
35. The Owner warrants to the best of its knowledge that there is no contamination on the Land.
36. The provisions of clauses 33 and 34 shall be of no application to any requirement issued in respect of the Works.
37. Settlement will not be deferred, but the Council reserves its rights to seek compensation from the Owner and reserves all its remedies at common law and equity if the Owner breaches any warranty granted in Schedule A, clauses 33 to 35 (inclusive) above.

Dispute Resolution

38. Any dispute which may arise between the Council and the Owner concerning the interpretation of this agreement or relating to any other matter arising under this agreement, will be actively and in good faith negotiated by both parties with a view to a speedy resolution of such dispute.
39. If the Council and the Owner cannot resolve a dispute within 15 business days of any dispute arising then, unless otherwise expressly provided in this Agreement, they will without prejudice to any other right, explore whether such dispute can be resolved by agreement between them using informal dispute resolution techniques such as mediation. The rules governing any such technique if adopted will be agreed between the Council and the Owner or as selected by the organisation known as Resolution Institute.
40. If the Council and the Owner cannot agree on any dispute resolution technique within a further 15 business days of any dispute being considered for referral by both parties to any informal dispute resolution technique under the above clause, then the dispute shall be settled by reference to arbitration. Except as otherwise expressly provided in this Agreement the reference shall be to a single arbitrator if one can be agreed upon, or to two arbitrators (one to be appointed by each party) and their umpire (appointed by the arbitrators prior to their arbitration), such arbitration to be carried out in accordance with the Arbitration Act 1996 and the substantive law of New Zealand.
41. The Council and the Owner will co-operate to ensure the expeditious conduct of any arbitration. In particular, each party will comply with any reasonable time limits sought by the other for settling terms of reference, interlocutory matters and generally all steps preliminary and incidental to the hearing and determination of the proceedings.

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42. For the avoidance of doubt nothing in clauses 38 to 41 will apply to any dispute as to the quantum of compensation payable to the Owner for the reimbursement of fees and costs to the Owner pursuant to section 66 PWA.
43. The costs reasonably incurred by the Owner in any dispute or mediation arising under this agreement will be reimbursed by the Council in accordance with clauses 23 and 24 of Schedule A of this agreement on receipt of a valid tax invoice.

No Objection

44. The Owner will not lodge any proceedings in any court or tribunal in relation to any designation or resource consents in respect of the Project or any alteration of the designation of the Project in the future, or participate in any proceedings, or take, participate in or fund any other action or make any claim that may have the effect of preventing or interfering with the Council's plans in relation to the Required Land or the Project. These requirements will not merge on settlement.

Lowest Price

45. The Owner and the Council acknowledge that:
- a. despite any deferred or extended date for settlement or the giving and taking of possession under this agreement, the Compensation for the Land is the lowest price at which the Land could be purchased;
 - b. the Compensation for the Land does not include any capitalised interest; and
 - c. the "lowest price" for the purposes of section EW 32(3) of the Income Tax Act 2007 is equal to the Compensation for the Land set out in this agreement.

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SCHEDULE B: CONDITIONS RELATING TO THE LEASE AND THE BUSINESS

Assignment and Merger of Lease

1. In consideration of the sum of One Dollar (\$1.00) plus GST if any (receipt of which is hereby acknowledged), the Lessee offers to assign the Lease to the Council with effect from the Settlement Date. The Council accepts the assignment of the Lease.
2. On the Settlement Date:
 - a. the Council will pay the Lessee Compensation to the Lessee;
 - b. the Lessee will provide in favour of the Council an executed assignment of the Lease or other assurance of the Lessee's interest in the Land free from encumbrances, such document to be prepared by and at Council's expense and to be given to the Lessee for execution not less than seven (7) days before the Settlement Date.
3. The assignment of Lease to be executed by the Lessee will include a provision that on assignment the term of the Lease will merge in the reversion then held by the Council so that the Lease will be extinguished, and each party will be released from any further liability arising pursuant to the Lease with effect from the Settlement Date but without prejudice to either party's rights arising before the Settlement Date.
4. The Lessee agrees to vacate the Land on the Settlement Date and to leave the Land in a similar condition as at the date of this agreement. In the event of any default by the Lessee, the Council shall immediately give written notice to the Lessee of such items or condition that it considers is in default and will provide the Lessee with a minimum of 72 hours (time being of the essence) in which to remove or reinstate such items. If the Lessee fails to comply with the notice the Council may enter the Land and remove any of the Lessee's possessions remaining on the Land and complete any other work as may be reasonably required and recover its reasonable costs in doing so from the Lessee as a debt. The Council will deliver any possessions removed under this clause to the Replacement Premises.

Council to Meet Relocation Costs

5. In addition to the payment of the Lessee Compensation the Council will compensate the Lessee by meeting the actual and reasonable costs pursuant to section 66 Public Works Act 1981 incurred in relocating the Business to the Replacement Property should this occur.

Lessee's Chattels

6. The parties acknowledge and agree that:
 - a. The Lessee owns certain chattels located on the Land comprising carpets, drapes light fittings and outdoor playground equipment fixtures comprising Numat playground surface covering, sand pit covers, shade sails and canvas coverand two play huts (**Lessee's Chattels**).
 - b. The Lessee's Chattels are unable to be easily relocated to the Replacement Property so as to permit a seamless transition of the Business from the Land to the Replacement Property.



- c. The Lessee will surrender ownership of the Lessee's Chattels to Council on the Settlement Date on the basis that Council will reimburse the Lessee's actual and reasonable costs to secure and install replacement chattels and playground fixtures at the Replacement Property in accordance with clause 16(e) of this Schedule B.
- d. For the avoidance of doubt the Lessee Compensation excludes the value of the Lessee's Chattels.
7. The Lessee warrants and undertakes that at the Settlement Date, the Lessee's Chattels will be:
- a. located on the Land;
- b. in the same state of repair as they were at the date of this agreement (fair wear and tear excepted); and
- c. the unencumbered property of the Lessee, and ownership of the Lessee's Chattels will pass from the Lessee to the Council on the Settlement Date.

GST

8. The Lessee and Council agree that the supply of the Lessee's interest in the Lease pursuant to this agreement is subject to the provisions of the GST Act, and zero rated by virtue of Section 11(1)(mb) of the GST Act.
9. The Lessee warrants that it is a registered person as required by the GST Act and will still be a registered person at the Settlement Date.
10. The Council warrants that at the date of this agreement:
- a. it is a registered person as required by the GST Act;
- b. it is acquiring the Lessee's interest in the Lease and/or the Business (as applicable) for the purpose of making taxable supplies;
- c. the Lessee's interest in the Lease and/or the Business (as applicable) will not be used as a principal place of residence by the Council or a person associated with the Council under section 2A(1)(c) of the GST Act; and
- d. that the warranties provided in this clause 10 will remain correct up until and including the Settlement Date.
11. The Lessee and the Council reserve their rights to seek compensation from the other party and reserve all their remedies at common law and equity if the other party breaches any warranty granted in clauses 9 and 10 of this Schedule B.

Warranties

12. The Lessee warrants and undertakes that the Lessee is not in breach of any condition of the Lease at the date of this agreement and that on the Settlement Date:



- a. It will not be in breach of the Lease; or
- b. If the Lessee is in breach of the Lease, it will remedy such breach at the Lessee's cost in all things and indemnifies Council accordingly.
13. The Lessee warrants and undertakes at the Settlement Date that:
- a. The Lessee has no knowledge of any requirement and has not received any notice from any tenant or any local or government authority which affects the Land in any way, and which has not been disclosed to the Council; and
- b. The Lessee has not given any consent or waiver in relation to any application under the Resource Management Act 1991 which directly or indirectly affects the Land.
14. Clause 13 shall be of no application to any requirement issued in respect of the Works.
15. Council reserves its rights to seek compensation from the Lessee and reserves all its remedies at common law and equity if the Lessee breaches any warranty granted under clauses 12 and 13 of this Schedule B.

Other Payments and reimbursements

16. The Council will reimburse, on production of accounts or receipts, in accordance with section 66 PWA the Lessee's:
- a. reasonable legal, accounting and valuation costs and property consultancy fees incurred in the negotiation, preparation, execution and settlement and performance of this agreement, including in relation to the Deed of Assignment relating to the Lease and other attendances reasonably required after the Settlement Date.
- b. reasonable legal and valuation costs incurred in the negotiation, preparation and execution of any new Lease with the Owner in respect of the Replacement Property.
- c. reasonable costs to procure MoE certification of the Replacement Facility.
- d. reasonable costs incurred in relocating the Business from the Land to the Replacement Property on completion of construction of the Replacement Facility.
- e. reasonable costs to secure and install at the Replacement Property, replacement chattels and playground equipment reasonably equivalent to that enjoyed by the Lessee on the Land (as generally itemised in clause 6(a) of this Schedule B.
- f. reasonable costs of recommencing the Business at the Replacement Property.
- g. reasonable costs of any interim storage solution or other reasonable interim measures required to be taken by the Lessee during any period of temporary closure pursuant to the terms of this agreement.
17. The Lessee acknowledges that all sums payable under clause 16 Schedule B are part of the total compensation payable to the Lessee under this agreement. The Lessee will provide a tax invoice with respect to all such payments in accordance with section 24 of the GST Act.



Temporary Business Loss

18. The parties acknowledge that the Lessee may suffer temporary business loss:
- a. because of and during relocation of the Business to the Replacement Property; and
 - b. in the event clause 31(a) of Schedule A applies and Council elects not to defer the Settlement Date until the Opening Date and this causes business loss to the Lessee arising from temporary business closure (**Temporary Closure**).
19. The Council agrees to compensate the Lessee as provided in section 66 of the PWA for the losses described in clause 18 of this Schedule B but without prejudice to the right to reply to any such claim.

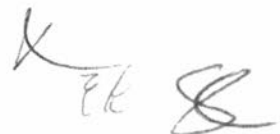
Temporary business losses attributable to relocation of the Business

20. The Lessee, in addition to claiming shifting costs, may submit a claim for temporary business loss described at clause 18(a) of this Schedule B and otherwise as provided for in section 68(1)(a) and section 66(1) of the PWA, subject always to the provisions of clause 19 of this Schedule B. Such claim will be determined as the difference between:
- a. net profits the Business would ordinarily have received over the relevant period but for the Works; and
 - b. net profits actually received by the Business over the period.
21. The net profits the Business would ordinarily have received will be based on the three previous years accounts for the period certified correct for tax purposes by the Lessee's accountants and having regard to any elements of business loss not directly attributable to the Works but such accounts shall include any Covid-19 related top ups provided that such top ups yielded in each affected year a net profit figure representative of what the Business would otherwise reasonably have expected to receive but for the effects of Covid-19 (to be established, if necessary, with reference to accounts for previous years unaffected by Covid-19).
22. The Lessee will allow full access to its accounts and all primary information sources upon which the accounts are based to the Council's accountants. The Lessee's accountants will agree to any reasonable audit requirements proposed by the Council's accountants.
23. The Council agrees that both it and its accountancy advisers, and their agents (The Property Group Limited) will not disclose any accounts or audit information received from the Lessee pursuant to this agreement to any third party as such information is strictly confidential.

Business losses attributable to Temporary Closure

24. If the Lessee submits a claim for business losses attributable to Temporary Closure the parties agree to work together in good faith through their respective accountants to set up agreed valuation and accounting procedures to calculate, with reference to the accounts obtained under clause 21, temporary business losses resulting from Temporary Closure.

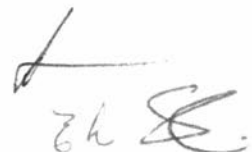
Permanent Business Loss Due to MoE Requirements



25. The parties acknowledge and agree that MoE is investigating new rules, regulations and requirements for operating childcare centres, which may impact on the viability and profitability of the Business operating at the Replacement Facility if the changes to MoE requirements come into effect prior to the Opening Date. The proposals may, among other things, require an increase in floor area per child from 2.5 sqm to 3sqm, which may result in the Lessee having to reduce its licence by 16 children on the basis of the floor area of the Existing Facility.
26. The Lessee reserves the right to make a claim for permanent business loss arising from any change to MoE requirements as set out in clause 25 and the Council reserves the right to reply to any such claim.

Final Determination of Business Loss

27. Where the amount of any business loss claim cannot be agreed between the parties and their respective advisors:
- a. The Council will pay as advance compensation its estimate (if any) of business loss to the Lessee within 15 working days of the Council and the Lessee establishing that they cannot agree on the amount as advance compensation (**Temporary Business Loss Advance**).
 - b. In the first instance the Council and the Lessee will attempt to resolve the disagreement by further negotiation between them and their respective valuers, accountants, and legal representatives, but that where no mutual agreement can be reached between the parties it is appropriate to have the value of the business loss (if any) determined by the Land Valuation Tribunal (**LVT**).
 - c. Where further negotiation fails to result in mutual agreement the matter may be referred to the LVT by either the Lessee or the Council and the parties will co-operate in having the matter heard urgently and, if appropriate, may apply jointly to the LVT for an urgent hearing.
 - d. The award of the LVT shall be binding on the parties subject to the parties' right to appeal.
 - e. The Lessee's costs in any LVT hearing and any Appellate Court (in the event of any appeal to any Appellate Court) shall be determined by the LVT or the Appellate Court as the case may be.
 - f. Council shall pay simple interest on any difference between the sums paid under clause 27(a) and final payment made (excluding any GST component) to be calculated in accordance with the provisions of s94 PWA from the date the Temporary Business Loss Advance is paid to the date of final payment. The parties further acknowledge that the payment of interest is not subject to the imposition of GST.
28. The parties agree to work in good faith to keep temporary disturbance loss to the Business to a minimum. For the avoidance of doubt the Lessee acknowledges a duty to mitigate any loss caused by the Works. The parties will also work through their accountants to eliminate any other causes of temporary business loss which is not directly attributable to the Works and its effects if this proves necessary.



29. For the avoidance of doubt any business loss claimed in this agreement will exclude any increase in rent levied by the Owner under any new lease between the Owner and the Lessee at the Replacement Property (if applicable).

No Objection

30. The Lessee will not lodge any proceedings in any court or tribunal in relation to any designation or resource consents in respect of the Project or any alteration of the designation of the Project in the future, or participate in any proceedings, or take, participate in or fund any other action or make any claim that may have the effect of preventing or interfering with the Council's plans in relation to the Required Land or the Project. These requirements will not merge on settlement.

Dispute Resolution

31. Any dispute which may arise between Council and the Lessee concerning the interpretation of this agreement or relating to any other matter arising under this agreement, will be actively and in good faith negotiated by both parties with a view to a speedy resolution of such dispute.
32. If the Council and the Lessee cannot resolve a dispute within 15 business days of any dispute arising then, unless otherwise expressly provided in this Agreement, they will without prejudice to any other right, explore whether such dispute can be resolved by agreement between them using informal dispute resolution techniques such as mediation. The rules governing any such technique if adopted will be agreed between the Council and the Lessee or as selected by the organisation known as Resolution Institute.
33. If the Council and the Lessee cannot agree on any dispute resolution technique within a further 15 business days of any dispute being considered for referral by both parties to any informal dispute resolution technique under the above clause then the dispute shall be settled by reference to arbitration. Except as otherwise expressly provided in this Agreement the reference shall be to a single arbitrator if one can be agreed upon, or to two arbitrators (one to be appointed by each party) and their umpire (appointed by the arbitrators prior to their arbitration), such arbitration to be carried out in accordance with the Arbitration Act 1996 and the substantive law of New Zealand.
34. The Council and the Lessee will co-operate to ensure the expeditious conduct of any arbitration. In particular, each party will comply with any reasonable time limits sought by the other for settling terms of reference, interlocutory matters and generally all steps preliminary and incidental to the hearing and determination of the proceedings.
35. For the avoidance of doubt nothing in clauses 31 to 34 will apply to any dispute as to the quantum of compensation payable to the Lessee for the reimbursement of fees and costs to the Lessee pursuant to section 66 PWA or to the determination of any business loss claims made by the Lessee under this Schedule B.

