

SECOND AGREEMENT TO VARY (in respect of an Agreement to Lease and Lease) **FOR PREMISES AT NGAHUE RESERVE, ST JOHNS, AUCKLAND**

between

AUCKLAND COUNCIL

and

OCEANIA FOOTBALL CONFEDERATION INCORPORATED



GST means tax levied under the Goods and Services Tax Act 1985 and includes any tax levied in substitution for that tax; and

Lease means the lease of the Premises to be granted to the Lessee pursuant to the Agreement to Lease;

Lessee includes its executors, administrators, successors, permitted assigns and (as applicable) any person for whose acts or omissions the Lessee is responsible;

Licence to Occupy means the licence to occupy dated 26 August 2015 entered into between the Council and the Lessee as varied pursuant to the First Agreement to Vary; and

Orakei Local Board means the local board for the Orakei area, including that of the Premises, being an unincorporated body under the Local Government (Auckland Council) Act 2009.

- 1.2 Incorporated Terms:** Capitalised expressions, unless defined within this Agreement, have the same defined meaning as in the Agreement to Lease;
- 1.3 Defined Expressions:** Expressions defined in the main body of this Agreement have the defined meaning in the whole of this Agreement including the background;
- 1.4 Headings:** Section, clause and other headings are for ease of reference only and do not form any part of the context or affect this Agreement's interpretation;
- 1.5 Joint and Several Liability:** An obligation by two or more persons binds those persons jointly and each of them severally;
- 1.6 Negative Obligations:** Any obligation not to do anything will include an obligation not to suffer, permit or cause that thing to be done;
- 1.7 Parties:** References to parties are references to parties to this Agreement;
- 1.8 Persons:** References to persons will include references to individuals, companies, corporations, partnerships, firms, joint ventures, associations, trusts, organisations, governmental or other regulatory bodies or authorities or other entities in each case whether or not having separate legal personality;
- 1.9 Singular and Plural:** The singular words include the plural and vice versa;
- 1.10 Schedules:** The schedules to this Agreement and the provisions and conditions contained in these schedules will have the same effect as if set out in the body of this Agreement;
- 1.11 Sections, Clauses and Schedules:** References to sections, clauses and schedules are references to this Agreement's sections, clauses and schedules; and

- 1.12 Statutes and Regulations:** References to any statutory provision will include any statutory provision, which amends or replaces it, and any subordinate legislation made under it.

2. VARIATION TO AGREEMENT

- 2.1** The form of the Lease attached to the Agreement to Lease is hereby deleted and replaced with the form attached to this Agreement.
- 2.2** Upon the completion of Stage One and the grant of the Lease the Council will finalise any outstanding matters in the form of the Lease including attaching and plan of the Premises and correctly describing the Premises.
- 2.3** The Lessee shall execute the Lease and return it to the Council within twenty (20) Working Days of receipt of the Lease by the Lessee or the Lessee's solicitors.
- 2.4** Until the Lessee and Council have signed and delivered the Lease, from the Commencement Date the parties will be bound by the terms and conditions contained in the Lease (as varied herein) as if it had already signed and delivered.

3. CONDITIONS

- 3.1** The variations to the Lease and Agreement to Lease contemplated in clauses 4 and 5 of this Agreement are conditional upon:
- (a) first, the Council via the Orakei Local Board confirming its approval to the variations to the Agreement to Lease and Lease contemplated in clauses 4 and 5 of this Agreement (such approval to be given or withheld at the board's sole discretion and without giving any reason). This Condition to be satisfied by 5pm on 31 March 2017; and then
 - (b) secondly, the Council undertaking and both Council and the Lessee being satisfied with (in their respective complete discretion) any public notifications, consultations and other matters required pursuant to section 54(1) of the Reserves Act 1977 required to grant the Lessee a lease of the Premises on terms proposed by the variations to the Agreement to Lease and Lease contemplated in clauses 4 and 5 of this Agreement in particular (but without limitation) the variation to the Required Use and the subleasing to third parties (together **Approvals**). This Condition to be satisfied by 5pm on the date four (4) months following the satisfaction of the Condition at clause 3.1(a).
- 3.2** The Council shall use all commercially reasonable endeavours to undertake the notification and consultation matters required to obtain the Approvals prior to the date stated in clause 3.1(b); and the Lessee will bear the Council's costs and expenses (including those on a solicitor-client basis) in undertaking the same (whether or not the condition at clause 3.1(b) is satisfied).

- 3.3** If any of the Conditions are not satisfied within the specified period, then the Council or the Lessee may terminate this Agreement as it relates to the variations to the Lease and Agreements to Lease contemplated in clauses 4 and 5 of this Agreement by giving written notice to the other party to that effect and the relevant parts of this Agreement shall be immediately at an end. Termination of this is without prejudice to the Agreement to Lease, First Agreement to Vary and the Lease and any claim the Council or Lessee may have arising from the non-compliance by the other of any of its obligations under this Agreement.
- 3.4** Despite the provisions of clause 3.1(b) if conditions are imposed on any Approvals with the effect that those Approvals are not acceptable to either the Council or the Lessee, then the Council and the Lessee will, before terminating this Agreement under clause 3.3, discuss in good faith how best to resolve any issues arising as a result of those conditions.

4. VARIATION TO LEASE

Upon the satisfaction of the Conditions, the Lease is varied as follows:

- 4.1** by amending the definition of "Required Use" in the Reference Schedule to read:
- "All activities and operations related to a football facility, including administration, coaching, refereeing, competitions, physiotherapy and/or sports medicine, sports retail, football academies and development, gym, futsal and café SUBJECT to limitations provided for within the Lease.";
- 4.2** by inserting or varying the following definitions into clause 1.1:
- "**Additional Rent** means fifty percent (50%) of the Sublease Rent";
- "**Rent** means the rent referred to in the Reference Schedule and where applicable includes the Additional Rent";
- "**Sublease Rent** means the rental charged under any sublease of part of the Premises as provided for in clause 24.3";
- 4.3** by inserting the following as a new clause 3.3:
- "3.3 Subject to the Council's consent and the preconditions as specified in clause 24.3, if at any time the Tenant subleases part of the Premises then, in addition to the Rent, the Tenant must pay the Additional Rent to the Council by equal monthly instalments in advance on the first day of each month.";
- 4.4** by deleting and replacing clause 12.5 with the following:
- "12.5 When considering whether the Tenant is operating for a profit, or is generating a profit from the Premises, the Council will:

- (a) take into account the capital expenditure of the Tenant in the Building Work, Improvements, and in fulfilling its obligations under this Lease; and
- (b) not take into account any profit made by a third party that is party to a sublease or license arrangement with the Tenant.”;

4.5 by deleting and replacing clause 24 with the following:

“24 ASSIGNMENT AND SUBLETTING

24.1 The Tenant must not assign, mortgage, charge or part with possession of the Premises or any part of the Premises, except as permitted under this Lease.

24.2 If the Tenant is an incorporated society or an association or trust (whether incorporated or not), any amalgamation, or any change in the Tenant's constitution or rules which affects the objects or purposes of the Tenant (excluding those changes that the Tenant is required to make as a result of its submission to decisions made by the Fédération Internationale de Football Association), will be deemed to be an assignment of this Lease unless the Tenant has obtained the Council's prior written approval to the change, which shall not be unreasonably withheld.

24.3 The Tenant may, subject to the Council's prior written consent (such consent not to be unreasonably withheld or delayed) and the Tenant fulfilling the following preconditions, sublet part only of the Premises:

- (a) the proposed subtenant is to be a respectable, responsible, solvent and suitable occupier of part of the Premises;
- (b) the proposed subtenant may only use the part of the Premises for:
 - (i) physiotherapy and/or sports medicine rooms to maximum floor area of 75 square metres;
 - (ii) sports retail to maximum floor area of 50 square metres;
 - (iii) a gym to maximum floor area of 75 square metres;
 - (iv) a café to maximum floor area of 75 square metres; and/or
 - (v) office space (for a football related organisation) to maximum floor area of 240 square metres; and
- (c) the sublease to be entered into between the Tenant and the proposed subtenant must be on the following basis:

- (i) the subtenant will not be entitled to request any variation to its use or further subletting of its estate;
- (ii) the rent charged under the sublease is to be calculated at a market net rental between a willing landlord and a willing tenant and record the true cost of the rental taking into account any incentives that may have been negotiated. The Tenant will, in making its application for any subtenancy, supply reasonable evidence of this agreed rental including valuations from a registered valuer. For the sake of clarity, the Tenant is not entitled to sublease any part of the Premises at a rate less than market;
- (iii) limit the subtenant's signage and advertising to discrete signage at the premises itself and not overtly viewable from outside the Premises;
- (iv) provide for the usual terms for subleasing including usually acceptable review of rental as would be agreed in any arms-length negotiation; and
- (v) ensuring that the subtenant's occupation and use is primarily focused upon providing services and/or goods to the Tenant and its users and visitors to the Premises for the uses undertaken by the Tenant rather than offering services and/or goods to the general public.

24.4 The Council and the Tenant shall enter into an agreed variation of this Lease to record the Additional Rent, should the Tenant sublease part of the Premises pursuant to clause 24.3.”

4 CONDITIONAL VARIATION TO AGREEMENT

Upon the satisfaction of the Conditions, the Agreement to Lease is varied by amending the definition of “Stage Two” in clause 1.1 and Schedule 1 to read as follows:

“**Stage Two** means associated buildings comprising the office, sports club, changing rooms, café, gym, Futsal facility (1050m²), physio and/or sports medicine facility, retail outlet, one (1) 900m² artificial practice/warm-up football turf, two hundred and ten (210) carparks, maintenance yard (400m²) and a maintenance building;”.

5 CONTINUANCE

The covenants in the Agreement to Lease expressed or implied except as expressly modified or varied by this Agreement shall continue to be in full force and effect after the execution of this Agreement.

6 COSTS

Save as otherwise provided for in clause 3.2 of this Agreement, each party must pay all of its own costs and expenses (including those on a solicitor-client basis) for the preparation and completion of this Agreement.

EXECUTION BY THE PARTIES:

SIGNED for and on behalf of the **AUCKLAND COUNCIL** under delegated authority in the presence of:

Regional Operations Manager

Witness signature

Full Name

Occupation

Address

SIGNED by **OCEANIA FOOTBALL CONFEDERATION INCORPORATED** as Lessee in the presence of:

Full name of authorised signatory

Signature of authorised signatory

Full name of authorised signatory

Signature of authorised signatory

Witness:

Signature of witness

Full name of witness

Occupation of witness

Address of witness

FORM OF VARIED LEASE

Refer attached.