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# **CONFIDENTIAL SERVICES COMMITTEE MEETING**

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**CONFIDENTIAL MATTERS**

8.1 Hortex Licence Agreement (Attachments) .....4  
8.2 Repurposing Assets .....49

## 8.1 HORTEX LICENCE AGREEMENT

Contact Person: Ms Grace Pelle

### Why is this matter confidential?

Subject to an order pursuant to Section 90 (3) (h) of the Local Government Act 1999, this matter is confidential because the report contains legal advice.

### A. COUNCIL/COMMITTEE TO MOVE MOTION TO GO INTO CONFIDENCE

No action – this motion passed in the open section.

### B. THE BUSINESS MATTER

## 8.1 HORTEX LICENCE AGREEMENT

**Responsible Executive Manager** : Ms Grace Pelle

**Report Author** : Mr Dermot Cussen

**Delegated Authority** : Matters which cannot be delegated to a Committee or Staff.

**Attachments** :       1↓. Hortex Licence Agreement  
                          2↓. Legal Advice - Hortex Partnership Agreement - **Confidential**

### PURPOSE

To consider the outcomes of Council Resolution 3619, in June 2019, regarding the Licence Agreement (Licence Agreement) between the Council and Hortex Alliance (Hortex) for the Virginia Horticulture Centre (VHC).

### CEO Recommendation

1. Pursuant to Regulation 21 of the Local Government (Procedures at Meetings) Regulations 2013, the CEO recommends that the Council revokes the resolution passed at the Council meeting of 25 June 2019, Resolution 3619, regarding changes to the Licence Agreement, the partnership agreement (Partnership Agreement) between the Council and Hortex and other licence arrangements at the VHC.
2. That the Council acknowledges its obligations under:
  - the Partnership Agreement (Attachment 1); and
  - the Licence Agreement (Attachment 1).
3. Staff to, by the end of February 2020, issue a Request for Expressions of Interest (REOI) for the period commencing on 1 July 2020, for the use of the VHC and new partnering arrangements for the advancement of the horticultural industry beyond June 2020.
4. Staff to provide a presentation to Council regarding Expressions of Interest received from the REOI and seek feedback from Council regarding which Expressions of Interest Council would like to progress into developing new partnership agreement(s) and new



licence agreement(s) for the use of the VHC.

5. Staff to then negotiate new partnership agreement(s) and licence agreement(s) for the use of the VHC, based on Council feedback.
6. Staff to then provide a report to Council regarding proposed new partnership agreement(s) and new licence agreement(s) for the VHC for its consideration and endorsement.

## **EXECUTIVE SUMMARY**

In June 2019, Council Resolution 3619 sought to amend the Partnership Agreement to include the Vietnamese Farmers Association (VFA).

The Partnership Agreement is contained within the annually renewed Licence Agreement.

The Licence Agreement expired on 30 June 2019, and Hortex is currently occupying the VHC on a monthly holding over basis.

The Partnership Agreement commenced in May 2017, subject to an annual review. The 2018/2019 review has been completed, and the Partnership Agreement expires on 30 June 2020.

Council Resolution 3619 sought to unilaterally amend the Partnership Agreement to establish a management structure to manage the shared use of the VHC and the Council funding support of up to \$75,000 for the advancement of the horticulture industry.

New partnership and licence / lease arrangements were to be finalised by the end of September 2019, which has not occurred.

In addition, a letter was received from Hortex's lawyers, following which staff sought legal advice, which indicated that Council Resolution 3619 puts the Council in breach of the Partnership Agreement and the Licence Agreement. The legal advice to Council is attached (Attachment 2).

## **1. BACKGROUND**

In 2016-17, Council endorsed the City of Playford entering into a three year Partnership Agreement with Hortex (until June 2020) to support the development and growth of the Horticultural Industry in the Northern Adelaide Plains in line with Council's Strategic Plan.

The Partnership Agreement is contained within a Licence Agreement between Council and Hortex for the use of the VHC.

The Licence Agreement expired on 30 June 2019, and Hortex is currently occupying the VHC on a monthly holding over basis.

The Partnership Agreement commenced in May 2017, subject to an annual review. The 2018/2019 review has been completed, and the Partnership Agreement expires on 30 June 2020.

In June 2019, Council Resolution 3619 sought to amend the Partnership Agreement to also include the Vietnamese Farmers Association (VFA) pursuant to which:

- Hortex and VFA have approximately equal use of the VHC at a peppercorn rent of \$10 per annum;

- Council will provide funding of \$25,000 to drive the development and growth of the horticulture industry;
- Council commits up to \$50,000 pa additional funding to leverage, Private, Federal and/or State funding for projects as agreed between the City of Playford and Hortex and/or VFA.
- a partnership agreement needs to be established to form a management structure to manage the expenditure of the \$25,000 contributed by Council, the management of the VHC including the payment of outgoings and to identify projects to leverage the additional \$50,000 contribution from Council.

The new partnership agreement, inclusive of license/lease arrangements, needs to be finalised by the end of September 2019. If no agreement can be reached, a further report will be presented to Council seeking direction on the future use of the VHC.

As at the end of September 2019, no agreement has been reached regarding the implementation of Council Resolution 3619.

In addition, staff sought legal advice, from Council's lawyers, Norman Waterhouse, regarding Council Resolution 3619, following a letter from Hortex's lawyers objecting to the amendment to the Partnership Agreement.

Norman Waterhouse has advised, as per its attached letter (Attachment 2), that should the Council Resolution 3619 been implemented, this would have put the Council in breach of the Partnership Agreement and the Licence Agreement.

## **2. RELEVANCE TO STRATEGIC PLAN**

### 3: Smart Jobs & Education Program

Outcome 3.2 Commercial and industrial growth

## **3. PUBLIC CONSULTATION**

There is no requirement to consult with the public on this matter.

## **4. DISCUSSION**

**4.1** Council's lawyers have advised that had the Council Resolution 3619 been implemented, this would have put the Council in breach of the Partnership Agreement and the Licence Agreement between Council and Hortex. Norman Waterhouse's advice as per its attached letter (Attachment 2), states that:

4.1.1 in its *'view the Council Resolution puts the Council in breach of the Partnership Agreement and the Licence Agreement between the Council and Hortex'*.

4.1.2 To clarify, while the motion itself was not in breach; the action the motion was requesting, if implemented, would have resulted in a breach of the partnership agreement;

4.1.3 *'Whilst the Council is at liberty under the Partnership Agreement to enter into other partnership arrangements, the Council does not have the right to unilaterally amend the terms of the Partnership Agreement to reduce the funding to Hortex';* and

4.1.4 *'Council does not have the right to unilaterally amend the Licence Agreement to halve the space currently, licensed to Hortex. Council's obligation to grant a lease (or licence) to Hortex is contained within the Partnership Agreement. Albeit not expressly stated, it may be argued by Hortex that it is entitled to a*

*lease (or licence) of the entirety of the VHC as the Partnership Agreement provides that the Council will lease the VHC to Hortex.'*

- 4.2 In addition, Norman Waterhouse states that Council '*will also need to address its legal obligations towards the VFA as we assume that the VFA is also aware of the provisions of the Council Resolution.'*
- 4.3 The VFA is aware of the provisions of Council Resolution 3619.
- 4.4 The VFA is also aware from its discussions with Hortex regarding Council Resolution 3619 that Hortex would likely seek legal advice as Hortex believed the Licence Agreement and Partnership Agreement could not be amended without its agreement.
- 4.5 The VFA has not communicated that it is going to, or considering seeking legal advice regarding Council Resolution 3619.
- 4.6 Though new agreements have not been reached in respect of Council Resolution 3619, both Hortex and VFA have partnered together to deliver a project that is seeking to improve irrigation efficiencies in Virginia greenhouses for non-Vietnamese growers. The project, which is being funded under the terms of the Hortex Partnership Agreement, leverages a Building Better Regions Fund grant that the VFA received to improve irrigation efficiencies in Virginia greenhouses for Vietnamese growers.
  - 4.6.1 In addition, both organisations are members of the Northern Adelaide Plains Food Cluster, which is fostering greater industry and stakeholder collaboration across the region.
  - 4.6.2 It is the staff's view that this is an indication that both organisations, under mutually acceptable circumstances, can work together for the benefit of the industry as a whole.

## 5. OPTIONS

### CEO Recommendation

1. Pursuant to Regulation 21 of the Local Government (Procedures at Meetings) Regulations 2013, the CEO recommends that the Council revokes the resolution passed at the Council meeting of 25 June 2019, Resolution 3619, regarding changes to the Licence Agreement, the partnership agreement (Partnership Agreement) between the Council and Hortex and other licence arrangements at the VHC.
2. That the Council acknowledges its obligations under:
  - the Partnership Agreement (Attachment 1); and
  - the Licence Agreement (Attachment 1).
3. Staff to, by the end of February 2020, issue a Request for Expressions of Interest (REOI) for the period commencing on 1 July 2020, for the use of the VHC and new partnering arrangements for the advancement of the horticultural industry beyond June 2020.
4. Staff to provide a presentation to Council regarding Expressions of Interest received from the REOI and seek feedback from Council regarding which Expressions of Interest Council would like to progress into developing new partnership agreement(s) and new licence agreement(s) for the use of the VHC.
5. Staff to then negotiate new partnership agreement(s) and licence agreement(s) for the use of the VHC, based on Council feedback.

6. Staff to then provide a report to Council regarding proposed new partnership agreement(s) and new licence agreement(s) for the VHC for its consideration and endorsement.

### Option 2

1. Pursuant to Regulation 21 of the Local Government (Procedures at Meetings) Regulations 2013, the CEO recommends that the Council revokes the resolution passed at the Council meeting of 25 June 2019, Resolution 3619, regarding changes to the Licence Agreement, the partnership agreement (Partnership Agreement) between the Council and Hortex and other licence arrangements at the VHC.
2. That the Council acknowledges its obligations under:
  - the Partnership Agreement (Attachment 1); and
  - the Licence Agreement (Attachment 1).
3. Council requests that Hortex and the VFA explore an alternative, mutually acceptable, partnership arrangement, which includes use of the VHC beyond June 2020.
4. Should Hortex and the VFA not provide staff with an alternative arrangement that may be acceptable to Council by the end of January 2020, then:
  - Staff are to issue a Request for Expressions of Interest (REOI) for the period commencing on 1 July 2020, for the use of the VHC and new partnering arrangements for the advancement of the horticultural industry beyond June 2020.
  - Staff to provide a presentation to Council regarding Expressions of Interest received from the REOI and seek direction from Council regarding which Expressions of Interest Council would like to progress into developing a new partnership agreement and new licence agreement for the use of the VHC.
  - Staff to then negotiate a new partnership agreement(s) and licence agreement(s) for the use of the VHC, based on Council feedback.
  - Staff to then provide a report to Council regarding proposed new partnership agreement(s) and new licence agreement(s) for the VHC for its consideration and endorsement.

## 6. ANALYSIS OF OPTIONS

### 6.1 Recommendation Analysis

#### 6.1.1 Analysis & Implications of the Recommendation

This option takes into account the legal advice provided by Norman Waterhouse and provides Council with the opportunity of exploring new partnership arrangements beyond this financial year, including use of the VHC that support the advancement of the horticultural industry.

#### 6.1.2 Financial Implications

	Current Year 2019/20 \$'000	Future Years 2020/21 \$'000	Ongoing \$'000
Operating Revenue			
Operating Expenditure	75,000	0	0
<b>Net Operating Impact</b>	<b>75,000</b>		
Capital – Investing Revenue			
Capital Expenditure			
<b>Total Borrowings (Capital Investment)</b>			

The operating expenditure does not include Council's in-kind subsidy to the Horticultural Industry by Council of approximately \$50,000 pa for the grant of a licence lease of the VHC to HortEx, (mainly made up of depreciation and maintenance cost). The funding agreement is funded through the Strategic Projects budget allocation within the recurrent budget.

### 6.2 Option 2 Analysis

#### 6.2.1 Analysis & Implications of Option 2

This option takes into account the legal advice provided by Norman Waterhouse and provides an opportunity for Hortex and the VFA to explore and put forward a mutually acceptable, alternative partnership arrangement, which includes use of the VHC, by the end of January 2020. Should this not occur, it provides the option for Council to explore a new partnership arrangement (s) and Licence Agreement (s) for use of the VHC beyond June 2020.

#### 6.2.2 Financial Implications

The financial implications for the current year would remain given the partnership expiry date of 30 June 2020. Any financial implications of a mutually acceptable, alternative partnership arrangement will need to be negotiated and subject to Council endorsement.

## LICENCE AGREEMENT

Virginia Horticultural Centre

CITY OF PLAYFORD

HORTEX ALLIANCE

**Norman  
Waterhouse**  
LAWYERS

Level 15, 45 Pirie Street  
Adelaide SA 5000  
Telephone + 61 8 8210 1200  
Fax + 61 8 8210 1234  
[www.normans.com.au](http://www.normans.com.au)

# VIRGINIA HORTICULTURAL CENTRE LICENCE AGREEMENT

**THIS LICENCE AGREEMENT** is made the        day of        2019

**BETWEEN:** CITY OF PLAYFORD of 12 Bishopstone Road, Davoren Park SA 5113 (**Council**)

**AND:**        **HORTEX ALLIANCE** ABN 87 012 313 452 of PO Box 1644, Virginia SA 5120  
(**Licensee**)

## BACKGROUND

- A. The Council has the care, control and management of the Premises.
- B. The Licensee has requested a licence to use the Premises for the Permitted Use.
- C. The Council has resolved to grant the Licensee a licence of the Premises and (if necessary) undertaken public consultation and/or been granted Parliamentary approval in accordance with the *Local Government Act 1999* (SA).
- D. The Council grants and the Licensee accepts a licence of the Premises on the terms and conditions in the Schedule and this agreement.

**AND THE PARTIES AGREE** as follows:

## FIRST SCHEDULE

<b>ITEM 1 Premises</b>	The Virginia Horticultural Centre being the whole of the land comprised in Crown Record Volume 5852 Volume 687
<b>ITEM 2 Initial Term</b>	Commencing on the date of execution of this agreement ( <b>Commencement Date</b> ) and expiring at midnight on 30 June 2019
<b>ITEM 3 Licence Fee</b>	TEN DOLLARS (\$10.00) if demanded per annum (exclusive of GST)
<b>ITEM 4 Permitted Use</b>	Supporting the development and operation of the horticultural industry in the areas of training, research, advocacy, capacity and marketing

<b>ITEM 5 Public Risk Insurance</b>	<p>Twenty million dollars (\$20,000,000.00)</p>
<b>ITEM 6 Special Conditions</b>	<p><b>1. INDUSTRY DEVELOPMENT EXPECTATIONS OF LICENSEE</b></p> <p>Without limiting any other obligations under this Licence, throughout the Term of this Licence the Licensee must to Council's satisfaction (acting reasonably):</p> <ul style="list-style-type: none"> <li>1.1 act as a vehicle for collaboration and accelerated business improvement for the horticultural producers of the region;</li> <li>1.2 identify and facilitate the delivery of high-quality skills development programs in line with industry needs;</li> <li>1.3 maximise industry participation in development activities;</li> <li>1.4 engage with the Council and other key stakeholders to collectively progress the future of the horticulture region;</li> <li>1.5 maintain sound and transparent governance structures; and</li> <li>1.6 demonstrate prudent financial management providing strong financial sustainability into the future.</li> </ul>



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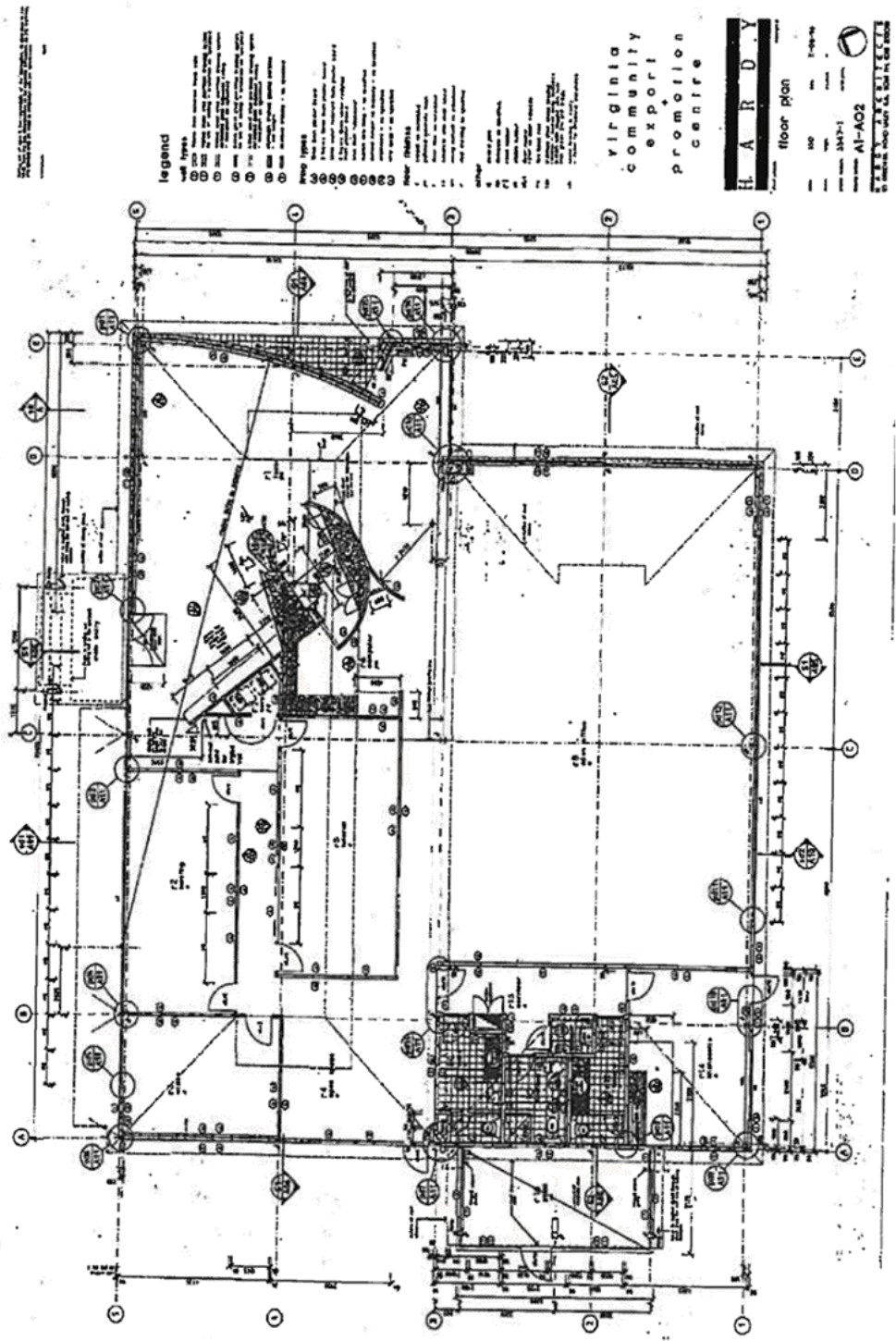
**SECOND SCHEDULE**

**Virginia Horticultural Centre**  
**Licence Agreement between City of Playford and Hortex Alliance**

Below is a summary of anticipated outgoings payable by Hortex Alliance Incorporated in accordance with the Licence for The Virginia Horticultural Centre, commencing on 4 May 2017 and expiring on 4 May 2018.

<b>Outgoings</b>	<b>Estimate of HortEx Contribution</b>
Examples includes: Power, Cleaning, Insurance, Telecommunications, Water	
<b>Total</b>	<b>\$15,600</b>

### ANNEXURE A PLAN(S)



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**ANNEXURE B  
COUNCIL'S EQUIPMENT**

**1. RECEPTION AREA**

- 1 x Reception desk
- 12 x Flip Trestle Tables
- 40 x Visitor chairs
- 1 x PABX Phone System (with the number of telephones provided as part of the PABX Phone System to be notified in writing by the Council to the Licensee once confirmed)

**2. REAR OFFICES**

- 3 x Corner desks
- 1 x Pedestal drawers
- 2 x Book case
- 1 x Book case (Grey)

**3. TRAINING ROOM**

- 2 x Whiteboards
- 6 x plastic trestle tables
- 15 x orange chairs
- 1 x data projector - Mitsubishi
- 1 x Screen (Pull Down)
- 1 x Computer table

**4. KITCHEN**

- 1 x Westinghouse fridge
- 1 x Samsung microwave
- 1 x sunbeam toaster
- 1 x sunbeam sandwich toaster
- 1 x LG dishwasher
- 1 x Sunbeam kettle
- 12 x Red wine glasses
- 12 x White wine glasses
- 24 x Glasses tall
- 14 x Tea cups
- 12 x Coffee cups
- 6 x Carafes

- 16 x Dinner plates
- 18 x Side plates
- 16 x Tea saucer
- 11 x Dessert bowl
- 3 x Large platter
- 3 x Large serving bowls
- 4 x Assorted plastic containers
- 24 x Teaspoons
- 24 x Knives
- 24 x Forks
- 24 x Spoons
- 2 x Large ladles
- 2 x Tongs
- 1 x Bin

5. **OFFICE 1**

- 1 x corner desk
- 1 x bookcase

6. **OFFICE 2**

- 1 x corner desk
- 1 x small table
- 1 grey book case

7. **BOARD ROOM**

- 1 x board table
- 16 x charcoal chairs

8. **OFFICE 3**

- 1 x bookcase

9. **OFFICE 4**

- 1 x corner desk
- 1 x bookcase

**ANNEXURE C  
PROGRESS AND FINANCIAL REPORT**

**PROGRESS and FINANCIAL REPORT**

**Prepared by: Hortex Alliance Incorporated  
Relating to: Virginia Horticultural Centre**

**Reporting period: \_\_\_\_\_**

**PROGRESS REPORT**

<b>1.1 Act as a vehicle for collaboration and accelerated business improvement for the horticultural producers in the region</b>		
Outcomes achieved	Plans for next period	Issues/Concerns

<b>1.2 Identify and facilitate the delivery of high-quality skills development programs in line with industry needs</b>		
Outcomes achieved	Plans for next period	Issues/Concerns

**ANNEXURE C  
PROGRESS AND FINANCIAL REPORT**

<b>1.3 Maximise industry participation in development activities</b>		
Outcomes achieved	Plans for next period	Issues/Concerns

<b>1.4 Engage with the Council and other key stakeholders to collectively progress the future of the horticultural region</b>		
Outcomes achieved	Plans for next period	Issues/Concerns

<b>1.5 Maintain sound and transparent governance structures</b>		
Outcomes achieved	Plans for next period	Issues/Concerns

**ANNEXURE C  
PROGRESS AND FINANCIAL REPORT**

<b>1.6 Demonstrate prudent financial management providing strong financial sustainability into the future</b>		
Outcomes achieved	Plans for next period	Issues/Concerns

<b>1.7 Demonstrate that a marketing plan has been developed and implemented to actively promote the use of the Virginia Horticulture Centre to the local horticultural industry Council wide, encouraging membership from the whole northern region.</b>		
Outcomes achieved	Plans for next period	Issues/Concerns

<b>Bookings of the Virginia Horticultural Centre during the reporting period</b>			
Name of Party	Term of the booking	Fee Paid	Comment

**ANNEXURE C**  
**PROGRESS AND FINANCIAL REPORT**

**FINANCIAL REPORT**

The following Financial Reports are attached to this Report:

- Income and Expenditure Statement
- Balance Sheet (at end of financial year reporting period)

*The information provided in this report is verified as true and accurate*

Signature: \_\_\_\_\_ on behalf of Hortex Alliance Incorporated

Name & position: \_\_\_\_\_

Date: \_\_\_\_\_



## ANNEXURE D

### City of Playford and HortEx Partnership Agreement

The City of Playford's Strategic Plan "Smart Jobs & Education Program", seeks to lead by example and advocate to other organisations to support the diversification of our local economy and improve the employment prospects for our community. This includes providing the right environment for investment and business attraction and connecting our community up with the right skills and education for the transitioning economy.

The Adelaide Plains Food and Wine Region is one of the most significant regions for horticultural production in Australia, with the Virginia and Northern Adelaide Plains contributing approximately 6.5 percent to the state's economy and employing nearly half of the state's vegetable industry.

The City of Playford needs to develop relationships and partnerships to continue to drive the development of the Horticultural Industry to ensure the creation of *"local jobs for local people"*. This document summaries the partnership agreement between the City of Playford and HortEx. Both parties acknowledge that this is not an exclusive partnership and the City of Playford and Hortex may enter into other partnership arrangements to progress the development of the Horticulture Industry.

#### Objectives

The City of Playford and HortEx partnership, through active engagement, will strive to drive the development and growth of the Horticultural Industry in the Northern Adelaide Plains by:

- Strengthening the representation, marketing and promotion of the industry
- Helping the industry to identify, consider and tackle future challenges
- Engagement with all sectors of the industry to identifying constraints in the development of the industry and develop solutions to address these constraints
- Provision of training and development
- Collection and analysis of relevant data to help increase innovative capacity of the industry
- Assisting the horticulture sector and other relevant stakeholders to increase innovation and adopt new technologies and address regional knowledge gaps relating to productivity and market access.
- Strengthen collaboration between the horticulture sector and government
- Assisting the industry to improve land and waste management practices and high value add capture opportunities

#### Timeframe of Agreement

The partnership agreement, which commenced in May 2017, is intended to run for 3 years (i.e. to 30 June 2020), but is subject to an annual review by Council.

#### Facility

The Virginia Horticulture Centre was established to enhance the horticulture industry through promotions, training and development, research, community development, tourism and to develop linkages with other State initiatives. The Virginia Horticulture Centre provides an opportunity to establish a focal point to play a significant role within the industry.

To support the horticultural industry the City of Playford will lease the Virginia Horticulture Centre to HortEx under a "pepper corn" rent arrangement. The table below summarises the financial contribution associated with the lease of the facility on an annual basis.

	HortEx Contribution	Council Contribution
Depreciation		\$33,000*
Annual Maintenance		\$13,000*
Outgoings: examples include Power, Cleaning, Insurance, Telecommunications and Water	\$15,600*	
		\$3,000
<b>Total</b>	<b>\$15,600*</b>	<b>\$49,000*</b>

\* These are 2016-17 figures

#### Sub-lease arrangements:

HortEx can sub-lease the facility to organisation(s) that support the horticultural industry subject to Council's agreement. HortEx can retain the associated income from sub-lease arrangements to support the operations of HortEx. Administration would use the following criteria in determining support for a sublease.

- Commercial entity not relating to Horticulture – Do not support
- Commercial entity supporting Horticulture – Support (commercial terms)
- Government/Not for Profit supporting Horticulture – Support (agreed terms)
- Government/Not for Profit supporting community during and post emergency – Support (no charge, except outgoings)

HortEx will provide to Council at no cost a "Hot Desk" arrangement to facilitate the working partnership between Council and HortEx.

#### Industry Development Grant:

In addition to the provision of the facility the City of Playford will provide an additional \$50,000 for the first year and then \$25,000 pa indexed annually by CPI to support HortEx in achieving the objectives of the Partnership agreement.

The City of Playford agrees to commit up to \$50,000 pa additional funding to leverage Private, Federal and/or State funding for projects as agreed between the City of Playford and HortEx to achieve the objectives of this agreement.

### In-kind Outcomes

	HortEx	Council
Branding	All HortEx activities jointly badged with Council logo	
Marketing	Develop and implement a marketing plan to demonstrate that the use of the centre is actively promoted to the local horticultural industry Council wide, encouraging membership from the whole northern region	
Governance	Council representative on a Management Group to oversee Partnership Agreement	
Reporting	Provision of Audited Financial Statements annually  Provision of 3 year Business Plan	
	Provision of representation base details – total number of farmers/organisations represented, annually Training and development – total number of training and development programs held, their intended outcomes and attendance – Quarterly.	
Information Sharing	Provision of Horticultural Industry and Value Chain Analysis	Provision of Horticultural Industry and Value Chain Analysis
Engagement	Facilitate engagement between Council and Industry representatives	Council will consult where appropriate with HortEx and other industry groups as relevant in regard to significant horticultural issues
Industry Support	Provide intelligence in relationship to new developments	Case management of significant developments  In-kind support to progress specific issues (as agreed)



**EXECUTED as an AGREEMENT**

**COUNCIL**

**Signed** for **City of Playford** by its authorised delegate in the presence of:

..... Signature of witness	..... Signature of authorised delegate
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..... Name of witness (print)	..... Name of authorised delegate (print)
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.....  
Position of authorised delegate

**LICENSEE**

**Executed** for **Hortex Alliance ABN 87 012 313 452** by its authorised officers in the presence of:

..... Signature of Authorised Committee Member	..... Signature of Authorised Committee Member
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..... Name (print)	..... Name (print)
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.....  
Signature of witness

.....  
Name of witness (print)

## 1. DEFINED TERMS AND INTERPRETATION

### 1.1 Defined terms

In this Licence:

**Agreed Consideration** means the Licence Fee and all other consideration (money or otherwise) paid or provided by the Licensee for any supply or use of the Premises and any goods, services or other things provided by the Council under this Licence (other than tax payable under clause 19).

**Business Day** means a day which is not a Saturday, Sunday or public holiday in South Australia.

**Claims** includes any action, proceeding, right, claim or demand whether present or future, certain or contingent, due or may become due, known or unknown and including all costs and expenses (including legal expenses).

**Commencement Date** means the commencement date described in Item 2.

**Council** means the party described as "Council" in this Licence and where the context permits includes the employees, contractors, agents and other invitees of the Council.

**Council's Equipment** means all fixtures and fittings, plant, equipment, services, chattels and other goods installed or situated in or on the Premises and available for use by the Licensee including such equipment listed and annexed to this Licence as Annexure B.

**Default Rate** means the rate which is two per centum (2%) per annum greater than the published annual rate of interest charged from time to time by Westpac Banking Corporation on overdraft facilities of more than \$100,000.00 and if there is more than one rate published the highest of those rates.

**Dispute** means a dispute between the Council and the Licensee in relation to this Licence.

**GST** has the same meaning as given to that term in the GST Legislation.

**GST Legislation** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any ancillary or similar legislation.

**GST Rate** means 10% or such other percentage equal to the rate of GST imposed from time to time under the GST Legislation.

**Insolvency Event** means:

- in the case of a Licensee being a company or association:
  - a meeting of the directors or members of the Licensee is convened to pass a resolution that an administrator of the Licensee be appointed or that the Licensee be wound up voluntarily;
  - any person appoints an administrator of the Licensee;
  - an application is made to any court to wind up the Licensee;
  - an application is made pursuant to Section 411 of the Corporations Act 2001;



- a Controller, Managing Controller, Receiver or Receiver and Manager is appointed to the Licensee or in respect of any property of the Licensee; or
- the Licensee is deregistered or dissolved;
- in the case of a Licensee being a natural person:
  - the Licensee commits an act of bankruptcy or a sequestration order is made against the Licensee;
  - a creditor of the Licensee presents a creditor's petition against the Licensee under the *Bankruptcy Act 1966*;
  - the Licensee presents a petition against himself or herself under the *Bankruptcy Act 1966*;
  - the Licensee signs an authority under Section 188 of the *Bankruptcy Act 1966*;
  - the Licensee gives a debt agreement proposal to the Official Trustee under Part IX of the *Bankruptcy Act 1966*, and that debt agreement proposal is accepted by the Licensee's creditors;
  - the Licensee becomes subject to an order directing the Official Trustee or a specified registered Trustee to take control of his or her property before sequestration; or
  - the Licensee is convicted of an indictable offence (other than a traffic offence);

**Institute** means the South Australian Division of the Australian Property Institute (or its successor or equivalent).

**Legislation** includes any relevant Statute or Act of Parliament (whether State or Federal) and any regulation or by-law including by-laws issued by any Statutory Authority.

**Licence Fee** means the licence fee described in Item 3 (as reviewed from time to time).

**Licensee** means the party described as "Licensee" in this Licence and where the context permits includes the employees, contractors, agents, customers and other invitees of the Licensee.

**Licensee's Agents** means each of the Licensee's agents, contractors, officers, employees, subtenants, invitees and other persons claiming through or under the Licensee.

**Licensee's Equipment** means any and all fittings and other equipment installed on, brought on to or kept on the Premises by the Licensee (with or without the consent of Council).

**Loss** means any loss, damage, death or injury.

**Outgoings** means the total of all amounts paid or payable by the Council in connection with the ownership, management, administration and operation of the Premises including<sup>i</sup>:

- the cost of insuring the Premises including all improvements and Services;
- the amount of any excess or deductible not paid or excluded under any insurance policy taken out by the Council;

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<sup>i</sup> An estimate of Outgoings is attached in the Second Schedule to this Licence.

- all costs (including wages and other usual employment on-costs) of the management, control and administration of the Premises;
- all costs of the Council in connection with the operation, supply, maintenance, repair, replacement and renovation of Services and all other facilities in the Premises that are provided from time to time not including the maintenance or emptying of the septic tank used by the Premises;
- all costs of the Council in connection with the maintenance, repair, replacement and renovation of the Premises from time to time;
- all costs of the Council in connection with cleaning, lighting, heating and air-conditioning the Premises and with providing supplies and consumables for toilets, washrooms and other facilities provided to the Premises by the Council;
- all costs of the Council in connection with the maintenance, repair, replacement and renovation of car parking areas, pedestrian areas and landscaped areas within the Premises;
- all costs of the Council in relation to establishing, maintaining, repairing and replacing common signs, notices and directory boards within the Premises; and
- all costs of the Council in connection with providing security in and for and around the Premises (including equipment, systems and security and other personnel).

**Payment Date** means the Commencement Date and then each anniversary of the Commencement Date during the Term.

**Permitted Use** means the use described in Item 4.

**Plan** means the plan(s) comprising Annexure A.

**Premises** means the premises described in Item 1 including:

- all present and future improvements thereon;
- the Council's Equipment; and
- all the Services, conveniences, and amenities of, in or to the Premises.

**Rates and Taxes** means all present and future rates, charges, levies, assessments, duty and charges of any Statutory Authority, department or authority having the power to raise or levy any such amounts in respect of the use, ownership or occupation of the Premises and includes (if applicable) water and sewer charges, council rates, emergency services levy and land tax (on a single holding basis).

**Resolving Body** means LEADR or if that body no longer exists an equivalent Australasian organisation formed to promote dispute resolution.

**Services** means all services (including gas, electricity, water, sewerage, fire control systems, air-conditioning, plumbing and telephone and all plant, equipment, pipes, wires and cables in connection with them as applicable) to or of the Premises supplied by any authority, the Council or any other person the Council authorises.

**Special Conditions** means any special conditions (if any) in Item 6.

**Statutory Authorities** means any government or semi government authorities (including the Council in its separate capacity as local government authority) or authorities created by or under Legislation.

**Statutory Requirements** means all relevant and applicable Legislation and all lawful conditions, requirements, policies, notices and directives issued or applicable under any such Legislation or by any Statutory Authorities (including any requirement of Council in its separate capacity as a Statutory Authority).

- Term means the term described in Item 2 and any period during which the Licensee holds over or remains in occupation of the Premises.
- Valuer means a qualified valuer approved by the Commissioner for Consumer Affairs and appointed to make a determination under this Licence:
  - who will be appointed as agreed by the Council and the Licensee or, failing agreement by the person holding or acting in the position of President of the Institute;
  - who must have practiced as a valuer with a minimum of five (5) years relevant experience; and
  - who must act as an expert and not as an arbitrator.

**Yearly Amounts** means the aggregate of the Licence Fee and any other moneys payable by the Licensee during the Term.

## 1.2 Interpretation

Unless the contrary intention appears:

headings are for convenience only and do not affect interpretation;

the singular includes the plural and vice-versa;

a reference to an individual or person include a corporation, partnership, joint venture, authority, trust, state or government and vice versa;

a reference to any party in this Licence, or any other document or arrangement referred to in this Licence, includes that party's executors, administrators, substitutes, successors and assigns;

a reference to any document (including this Licence) is to that document as varied, novated, ratified or replaced from time to time;

a reference to this Licence includes any schedules and annexures to this Licence;

a reference to any Legislation includes any statutory modification, re-enactment or any Legislation substituted for it, and all by-laws, regulations and rules issued under it;

a provision is not construed against a party only because that party drafted it;



a reference in this Licence to the Council's approval or consent, is to the Council's prior written approval or consent which may be granted or withheld in the absolute discretion of the Council;

"including" and similar expressions are not and must not be treated as words of limitation; and

the special conditions in Item 6 prevail over the terms in the body of this Licence to the extent of any inconsistency.

### 1.3 **Retail and Commercial Leases Act**

The Council and Licensee acknowledge and agree that the *Retail and Commercial Leases Act 1995* (SA) does not apply to this Licence as the Licensee is not permitted to sell any goods or services to the public.

### 1.4 **Background**

The Background forms part of this Licence and is correct.

## 2. **GRANT OF LICENCE**

The Council grants and the Licensee accepts a licence of the Premises for the Term.

## 3. **PAYMENT OF LICENCE FEE**

The Licensee must unless otherwise agreed pay the Licence Fee on each Payment Date.

## 4. **RATES AND TAXES AND OUTGOINGS**

### 4.1 **Liability for Rates and Taxes**

The Council must pay all Rates and Taxes levied, assessed or charged in respect of the Premises or upon the owner or occupier of the Premises.

### 4.2 **Payment of Outgoings**

The Licensee must pay or reimburse the Council all Outgoings levied, assessed, charged or incurred in respect of the Premises or upon the owner or occupier of the Premises.

The Outgoings must be adjusted between the Council and the Licensee as at the Commencement Date and the end or termination date of this Licence.

### 4.3 **Power and other utilities**

The Licensee must pay, when due, all costs for the use of telephone, light and other facilities and the consumption of electricity, gas, and any and all other services and utilities supplied to or used from the Premises.

Without limiting this subclause, the Licensee must comply with any applicable electricity laws.

## 5. USE OF PREMISES

### 5.1 Permitted use

Subject to clause 12.2, the Licensee must use the Premises only for the Permitted Use and not use or allow the Premises to be used for any other use without the specific written consent of the Council.

### 5.2 Offensive activities

The Licensee must not carry on any offensive or dangerous activities on or from the Premises or create a nuisance or disturbance either:

for the Council; or

for the owners or occupiers of any adjoining property.

### 5.3 Use of Services

The Licensee will:

ensure that the Services are used responsibly and in accordance with any reasonable directions that may be given by Council; and

be responsible to repair or correct any damage or malfunction which results from any misuse or abuse of the Services.

### 5.4 Statutory requirements

The Licensee must comply with all Statutory Requirements relating to the Licensee's use and occupation of the Premises including the *Work Health and Safety Act 2012* (SA).

### 5.5 No alcohol

The Licensee must not:

5.5.1.1 serve, sell or provide to persons; or

5.5.1.2 consume or allow persons to consume alcohol on or from the Premises without:

5.5.1.3 the Council's consent; and

5.5.1.4 complying with all applicable Statutory Requirements including the *Liquor Licensing Act 1997* (SA).

The Council grants its consent under clause 5.5.1.3 to the Licensee:

5.5.1.5 serving or providing to persons; or

5.5.1.6 consuming or allowing persons to consume

alcohol on or from the Premises for networking and business related social events subject to the Licensee complying with all applicable Statutory Requirements including the *Liquor Licensing Act 1997* (SA).

## 5.6 Signs

The Licensee must not place any sign or advertisement on the outside or inside (if they can be seen from outside) of the Premises, except a sign or advertisement which:

- is approved by the Council; and
- complies with any relevant Statutory Requirements.

## 5.7 Dangerous equipment and installations

The Licensee may only install or use within the Premises equipment and facilities which are reasonably necessary for and normally used in connection with the Permitted Use and must not install or bring onto the Premises:

- any electrical, gas powered or other machinery or equipment that may pose a danger, risk or hazard;
- any chemicals or other dangerous substances that may pose a danger, risk or hazard; or
- any heavy equipment or items that may damage the Premises.

## 5.8 Fire precautions

The Licensee must comply with:

- all reasonable requirements of the Council relating to fire safety systems and procedures; and
- all Statutory Requirements relating to fire safety.

## 5.9 Security

The Licensee must keep the Premises securely locked at all times when the Premises is not occupied and must provide a key to the Premises to the Council to be used in the case of an emergency.

## 5.10 No warranty

The Council makes no warranty or representation regarding the suitability of the Premises (structural or otherwise) or the Services for the Permitted Use or any other purpose.

## 6. INSURANCE

### 6.1 Licensee must insure

The Licensee must keep current during the Term:

- public risk insurance for at least the amount in Item 5 (or any other amount the Council reasonably requires) for each claim;
- insurance in respect of the Licensee's Equipment for its full replacement value; and
- other insurances required by any Statutory Requirement or which the Council reasonably requires.

## 6.2 Requirements for Licensee's policies

Each policy the Licensee takes out must:

- be with an insurer and on terms (including value of the policy) reasonably approved by the Council;
- be in the name of the Licensee and note the Council's interest; and
- cover events occurring during the policy's currency regardless of when claims are made.

## 6.3 Evidence of insurance

The Licensee must give the Council copies of certificates evidencing the currency of the policies the Licensee has taken out under this clause 6.

During the Term the Licensee must:

- 6.3.1.1 pay each premium before it is due for payment;
- 6.3.1.2 give the Council copies of certificates of currency each year when the policies are renewed and at other times the Council requests;
- 6.3.1.3 not allow any insurance policy to lapse or vary or cancel it without the consent of Council; and
- 6.3.1.4 notify the Council immediately if a policy is cancelled or if an event occurs which could prejudice or give rise to a claim under a policy.

## 6.4 Additional premium and excess

The Licensee must not do anything which may:

- 6.4.1.1 prejudice or render void or voidable any insurance of the Premises; or
- 6.4.1.2 increase the premium for any insurance.

If the Licensee does anything (with or without the consent of the Council) that increases the premium of any insurance of the Council the Licensee must pay the amount of that increase to the Council on demand.

The Licensee must pay all excess amounts paid or payable by the Council relating to any accident or claim caused or contributed to by the Licensee on demand.

## 7. REPAIR, MAINTENANCE AND ALTERATIONS

### 7.1 Maintenance and repair

The Licensee must keep, repair and maintain the Premises and the Licensee's Equipment in good repair and condition to a standard reasonably required by the Council but excluding structural or capital work unless that work is required as a result of:

- 7.1.1.1 the Licensee's use or occupation of the Premises; or
- 7.1.1.2 any deliberate or negligent act or omission or default of the Licensee.

The Licensee must maintain items in or attached to the Premises, and, if damaged or worn, repair them or replace them with items of quality similar to those in use at the Commencement Date, or, if previously replaced with the Council's approval, when last replaced.

The Licensee must maintain and regularly empty the septic tank used by the Premises.

The Licensee must not (without the Council's consent) permit the Licensee's agents to:

- 7.1.1.3 cut, injure, damage, deface or obstruct any convenience, appliance, plant or equipment in the Premises; or
- 7.1.1.4 mark, drill, or deface the walls, ceilings, columns, floor or other parts of the Premises; or
- 7.1.1.5 use the lavatories, toilets, sinks, drains and other plumbing facilities in the Premises for any purpose other than that for which they were constructed or provided and not to deposit or permit to be deposited any rubbish or other material in such facilities.

If the Council is required to carry out any works which are the responsibility of the Licensee under this clause 7.1 then:

- 7.1.1.6 the Council may (without any obligation to do so and without any liability to the Licensee in respect of such works) execute such works as if it were the Licensee; and
- 7.1.1.7 the Licensee shall be liable for all of Council's reasonable costs and expenses in executing such works.

## 7.2 Alterations by Licensee

The Licensee must not carry out any alterations or additions to the Premises without the specific written consent of Council.

The Licensee must carry out any approved alterations and additions:

- 7.2.1.1 in a proper and workmanlike manner;
- 7.2.1.2 in accordance with the conditions and approvals imposed by the Council (as lessor under this Licence); and
- 7.2.1.3 in accordance with all Statutory Requirements.

The Licensee will pay all of the Council's reasonable costs (including consultant's costs and legal costs) in connection with any request for and undertaking of the Licensee's alterations and additions.

Unless otherwise agreed in writing, any alteration or addition made pursuant to this clause will be the property of the Council.

## 7.3 Pests

The Licensee must keep the Premises free of vermin, insects and other pests (including termites).



#### 7.4 **Cleaning**

The Licensee must keep the Premises clean and tidy and free from dirt and rubbish.

#### 7.5 **Painting**

The Licensee must paint the Premises at such times as the Council reasonably considers and directs that painting is required to the following specifications:

clean and repair all surfaces to be redecorated; and

paint (with at least two (2) coats) or wallpaper, stain, varnish or polish each surface to be redecorated according to the previous treatment of that surface.

### 8. **ASSIGNING, SUBLETTING AND CHARGING**

#### 8.1 **Assignment**

The Licensee must not assign, transfer or otherwise deal with the Licensee's interest in the Premises under this Licence without the consent of the Council which shall be at the Council's absolute discretion.

#### 8.2 **Request for Assignment**

If the Licensee requests that the Council consent to any assignment, transfer or other dealing the Licensee must comply with Council's procedural requirements for dealing with the request.

#### 8.3 **No Release**

Where the Council grants consent to an assignment or transfer, the Licensee (i.e. the party assigning or transferring the Licence or rights under the Licence) will not be released or discharged from the current or future obligations under this Licence.

#### 8.4 **Sublicensing**

The Licensee must not sublicense or otherwise part with possession of the Premises unless:

8.4.1.1 the Licensee obtains the consent of the Council (which shall be at the Council's absolute discretion); and

8.4.1.2 the sublicensee supports the horticultural industry.

8.4.1.3 If the Licensee does sublicense or otherwise part with possession of the Premises under clause 0, the Licensee must provide the Council with full details of all:

8.4.1.4 sublicences; or

8.4.1.5 other arrangements under which the Licensee parts with possession of the Premises,

on the first day of each month during the Term (or as otherwise reasonably required by the Council).

## 8.5 Charging

The Licensee must not charge the Licensee's interest in this Licence or the Licensee's Equipment without the Council's consent

## 8.6 Costs

The Licensee must pay all costs reasonably incurred by the Council (including any legal fees) in relation to any dealing under this clause, including in considering whether or not to grant any consent to a request by the Licensee under this clause 8.

## 9. REPORTING REQUIREMENTS OF LICENSEE

The Licensee must provide to the Council a progress and financial performance report in the form annexed to this Licence as Annexure C relating to the operation of the Premises and reporting specifically against the industry development expectations set out in Special Condition 1 of Item 6 and on any other matter reasonably required by the Council quarterly during the Term with the first report being due on 31 October 2017 (or as otherwise reasonably required by the Council).

## 10. COMPLIANCE WITH PARTNERSHIP AGREEMENT

10.1 The Licensee must comply with the terms of the attached, Annexure D, City of Playford and HortEx Partnership Agreement (Partnership Agreement) entered into between the Council and the Licensee on 4 May 2017.

10.2 Any breach of the Partnership Agreement referred to in clause 10.1 by the Licensee will be a breach of this Licence.

## 11. LICENSEE GOVERNANCE

11.1 On or before the Commencement Date the Licensee must provide to the Council a copy of the Licensee's constitution and any other documents that regulate its governance and operations.

11.2 The Licensee must provide to the Council any information in relation to the Licensee's use and occupation of the Premises and finances reasonably required by the Council.

11.3 The Licensee must give written notice to the Council of any change to its management (including any change to its committee or Chief Executive Officer) immediately following such a change.

## 12. COUNCIL'S OBLIGATIONS AND RIGHTS

### 12.1 Quiet enjoyment

Subject to the Council's rights under this Licence including clause 12.2 and to the Licensee complying with the Licensee's obligations under this Licence, the Licensee may occupy the Premises during the Term without interference from the Council.

### 12.2 Use of Premises

The Council may use the Premises at any time during the Term of this Licence after giving reasonable notice to the Licensee of the dates and times during which the Council will use the Premises and without any Claim by the Licensee.

During the dates and times the Premises is used by the Council under this clause 0 the Council may prevent the Licensee from entering the Premises.

### 12.3 Right to enter

The Council may (except in the case of emergency when no notice will be required) enter the Premises after giving the Licensee reasonable written notice:

to see the state of repair of the Premises;

to do repairs to the Premises or other works which cannot reasonably be done unless the Council enters the Premises; and

to do anything the Council must or may do under this Licence or must do under any Legislation or to satisfy the requirements of any Statutory Authority.

### 12.4 Emergencies

In an emergency the Council may close or restrict access to the Premises.

### 12.5 Works and restrictions

The Council may (without any Claim by the Licensee):

12.5.1.1 install, use, maintain, repair, alter, and interrupt Services;

12.5.1.2 carry out works on the Premises (including extensions, renovations and refurbishment); and

12.5.1.3 close (temporarily or permanently) and restrict access to the Premises.

The Council must (except in cases of emergency) take reasonable steps to minimise interference with the Licensee's use and occupation of the Premises.

### 12.6 Right to rectify

Council may at the Licensee's cost do anything which the Licensee should have done under this Licence but which the Licensee has not done or which the Council reasonably considers the Licensee has not done properly.

## 13. DAMAGE OR DESTRUCTION

### 13.1 Termination for destruction or damage

If the Premises is destroyed or is damaged so that the Premises is unfit for the Licensee's use then within three (3) months after the damage or destruction occurs, the Council must give the Licensee a notice either:

13.1.1.1 terminating this Licence (on a date at least one (1) month after the Council gives notice); or

13.1.1.2 advising the Licensee that the Council intends to repair the Premises (including any part of the Premises) so that the Premises are accessible and the Licensee can occupy and use the Premises.



If the Council gives a notice under clause 13.1.1.2 but does not carry out the intention within a reasonable time, the Licensee may give notice to the Council that the Licensee intends to end this Licence if the Council does not complete the repairs within a reasonable time (having regard to the nature of the required work).

If the Council does not comply with the Licensee's notice under clause 0, the Licensee may terminate this Licence by giving the Council not less than one (1) month's notice without any Claim by the Licensee against the Council.

### 13.2 Reduction or abatement of Licence Fee

The Yearly Amounts during the period the Premises cannot be used will be reduced unless:

- 13.2.1.1 the Premises is unfit or inaccessible; or
- 13.2.1.2 an insurer refuses to pay a claim as a result of a deliberate or negligent act or omission or default of the Licensee.

The level of the reduction (if any) will depend on the nature and extent of the damage.

If the level of the reduction (if any) cannot be agreed it will be determined by a Valuer.

### 14. RETURN OF PREMISES ON EXPIRY OR TERMINATION

#### 15. EXPIRY

This Licence will end at midnight on the last day of the Term unless it is terminated earlier by the Council or the Licensee under any other provision of this Licence.

#### 15.1 Handover of possession

Before this Licence ends, the Licensee must (if required to do so by the Council) to the Council's satisfaction:

- 15.1.1.1 remove and reinstate any alterations or additions made by the Licensee, remove the Licensee's Equipment and repair any damage caused by such removal; and
- 15.1.1.2 carry out and complete any repairs and maintenance that the Licensee is obliged to carry out under this Licence.

If it is not practical for the Licensee to undertake and complete these requirements before the Licence comes to an end, then such works must be undertaken immediately after the Licence comes to an end, but in accordance with the requirements of the Council.

If at the time that possession of the Premises is given back to the Council, the Licensee has not complied with all or any of its obligations under this clause 15.1, the Licensee shall not be relieved of its obligation to comply with these requirements, or to compensate the Council for failure to do so, by reason of the fact that the Council has accepted or taken possession of the Premises.

#### 15.2 Abandoned Goods

If, when this Licence comes to an end, the Licensee leaves any goods or equipment at the Premises, then the Council may deal with and dispose of those goods as it thinks fit.

### 15.3 Holding over

If with the consent of the Council the Licensee continues to occupy the Premises after the end of this Licence:

the Licensee does so as a monthly tenant which:

15.3.1.1 either party may terminate on one (1) month's notice given at any time; and

15.3.1.2 subject to clauses 0 to 0, is on the same terms as this Licence.

the Licence Fee payable on and from the date the Licensee begins holding over (**Holding Over Date**) will be agreed between the parties;

the Licence Fee may be reviewed at any time after the Holding Over Date;

if the Licence Fee to apply on and from the Holding Over Date is not agreed or determined by the Holding Over Date, the Licensee must continue to pay instalments of the Licence Fee at the rate that applied before the Holding Over Date until the Licence Fee is determined; and

once the Licence Fee to apply on and from the Holding Over Date is agreed or determined, the Licensee must pay any shortfall.

## 16. TERMINATION

16.1 The Council may give the Licensee a written notice of termination of this Licence (**Termination Notice**) at any time specifying the date on which this Licence is to come to an end being a date not less than three (3) months after the Termination Notice is given.

16.2 If the Council gives the Licensee a Termination Notice under clause 16.1, this Licence comes to an end at midnight on the day specified in the Termination Notice without any Claim by the Licensee.

16.3 On or immediately prior to the day this Licence comes to an end under clause 16.2, the Licensee must comply with clause 14 of this Licence and fulfil all other obligations of the Licensee under this Licence.

## 17. BREACH

### 17.1 Payment obligations

The Licensee must make payments due under this Licence:

17.1.1.1 without demand (unless this Licence provides demand must be made);

17.1.1.2 without set-off, counter-claim, withholding or deduction;

17.1.1.3 to the Council or as the Council directs; and

17.1.1.4 by direct debit or such other means the Council directs.

If a payment is stated to be due on a particular Payment Date (such as the next Payment Date or the first Payment Date after an event) and there is no such Payment Date, the Licensee must make that payment on demand.

## 17.2 Set off

The Council may, by notice to the Licensee, set off against any amount due and payable under this Licence by the Council to the Licensee, any amount due and payable by the Licensee to the Council under this Licence or under any other agreement or arrangement.

## 17.3 Council's rights on breach

If the Licensee is at any time in breach of any of its obligations under this Licence, and the Licensee fails to remedy that breach to the satisfaction of the Council after being requested by the Council to do so, the Council may at any time come onto the Premises without notice and do all things necessary to remedy that breach.

The Licensee will be liable to pay or reimburse the Council for all costs and expenses incurred by the Council in remedying the breach and which the Council may recover from the Licensee as a debt due and payable on demand.

## 17.4 Default, breach and re-entry

The Council may terminate this Licence by giving the Licensee not less than fourteen (14) days notice if:

- 17.4.1.1 the Licence Fee or any moneys payable under this Licence are unpaid for fourteen (14) days after any day on which those moneys were due;
- 17.4.1.2 the Licensee commits, permits or suffers to occur any breach, or default in the observance and performance of any of the covenants, obligations and provisions of this Licence;
- 17.4.1.3 there is an Insolvency Event;
- 17.4.1.4 any property on the Premises is seized or taken in execution under any judgment or proceedings; or
- 17.4.1.5 the Premises is left unoccupied for one (1) month or more without the consent of the Council.

If the Council terminates this Licence under clause 0, then the Council:

- 17.4.1.6 may re-enter and repossess the Premises, without prejudice to its other rights; and
- 17.4.1.7 is discharged from any claim by or obligation to the Licensee under this Licence.

Termination of this Licence does not affect Council's rights concerning any previous breach or matter.

## 17.5 Rights of Council not limited

The rights of the Council resulting from a breach of this Licence by the Licensee will not be excluded or limited in any way by reason of the Council having or exercising any powers under this clause 16.

## 17.6 Repudiation and damages

The Licensee acknowledges that the following obligations under this Licence are essential terms:

- 17.6.1.1 the obligation to pay the Licence Fee and any other moneys under the Licence;
- 17.6.1.2 the obligation to pay Outgoings;
- 17.6.1.3 the obligations and prohibitions in relation to use of the Premises;
- 17.6.1.4 the obligations in relation to repair and maintenance;
- 17.6.1.5 the obligations and restrictions in relation to additions and alterations to the Premises;
- 17.6.1.6 the restriction on assignment, subletting, mortgaging and licensing;
- 17.6.1.7 the obligations in relation to the industry development expectations of the Licensee under Special Condition 1 of Item 6 and the reporting requirements of the Licensee under clause 9 of this Licence; and
- 17.6.1.8 the obligation to comply with the terms of the Partnership Agreement referred to in clause 0.

If the Council accepts payment of the Licence Fee or any other moneys late or does not act or exercise any rights immediately or at all in respect of any breach of an essential term, Council will not be deemed to have waived the essential nature of that term.

If the Licensee breaches any essential term, that conduct on the part of the Licensee will be deemed to constitute a repudiation of this Licence and the Council may then at any time rescind this Licence.

If this Licence is terminated by the Council as a result of a breach by the Licensee of an essential term, or if the Licensee repudiates this Licence and the Council accepts that repudiation rescinding this Licence, the Licensee will be obliged to pay compensation to the Council including the Licence Fee and any other moneys which the Council would otherwise have received under this Licence had the Licensee not breached an essential term or repudiated this Licence.

The rights of the Council under this clause 0 and any action taken by the Council do not exclude or limit any other rights or entitlements which the Council has under this Licence or at law in respect of any breach or repudiatory conduct on the part of the Licensee.

## 17.7 Interest on overdue amounts

If the Licensee does not pay an amount when it is due, it must pay interest on that amount from when the amount becomes due until it is paid in full calculated on outstanding daily balances at the Default Rate.

## 18. INDEMNITY AND RELEASE

### 18.1 Risk

The Licensee occupies and uses the Premises at the Licensee's risk.



## 18.2 Indemnity

The Licensee is liable for and indemnifies the Council against all Claims for any Loss incurred or suffered directly or indirectly by the Council arising from the Licensee's use or occupation of the Premises including in connection with:

- any act or omission of the Licensee;
- the overflow or leakage of water or any other harmful agent into or from the Premises;
- any fire on or from the Premises;
- loss or damage to property or injury or death to any person caused by the Licensee, the use of the Premises by the Licensee or otherwise relating to the Premises;
- a breach of this Licence by the Licensee.

## 18.3 Release

The Licensee releases the Council from all Claims for any Loss occurring on the Premises except to the extent caused by the Council's negligence.

## 18.4 Indemnities are independent

Each indemnity is independent from the Licensee's other obligations and continues during this Licence and after this Licence ends.

## 19. GOODS AND SERVICES TAX

### 19.1 Agreed consideration

If a GST applies to impose tax on the Agreed Consideration or if the Council is liable to pay GST in connection with this Licence then:

- the Agreed Consideration for that supply is exclusive of GST;
- the Council may increase the Agreed Consideration or the relevant part of the Agreed Consideration by a percentage amount which is equal to the GST Rate; and
- the Licensee must pay the increased Agreed Consideration on the due date for payment by the Licensee of the Agreed Consideration.

### 19.2 Tax invoice

Where the Agreed Consideration is to be increased to account for GST under this clause 19, the Council will on or before the date on which the Agreed Consideration is payable, issue a tax invoice to the Licensee.

### 19.3 Penalties and interest

If the Licensee does not comply with its obligations under this Licence or with its obligations under GST Legislation in connection with the Licence and as a result the Council becomes liable for penalties or interest for late payment of GST, then the Licensee must pay the Council on demand an amount equal to the amount of the penalties and interest.

## 20. **DISPUTES RESOLUTION**

### 20.1 **Dispute**

A party to a Dispute must comply with this clause before starting arbitration or court proceedings (except proceedings for interlocutory relief).

### 20.2 **Notice of Dispute**

A party to a Dispute must give the other parties to the Dispute notice setting out details of the Dispute.

### 20.3 **Effort to resolve**

For twenty (20) Business Days after the notice in clause 20.2, each party to the Dispute must use reasonable efforts to resolve the Dispute.

### 20.4 **Mediator**

If the parties cannot resolve the Dispute under clause 20.3, they must refer the Dispute to a mediator.

If, within a further twenty (20) Business Days, the parties to the Dispute do not agree on a mediator, a party to the Dispute may ask the chairman of the Resolving Body to appoint a mediator.

The mediator assists in negotiating a resolution of the Dispute. A mediator may not bind a party unless the party agrees in writing.

The mediation ends if the Dispute is not resolved within twenty (20) Business Days after the mediator's appointment.

### 20.5 **Confidentiality**

Each party:

must keep confidential any information or documents disclosed in the dispute resolution process; and

may use that information or those documents only to try to resolve the Dispute.

### 20.6 **Cost of Dispute**

Each party to a Dispute must pay its own costs of complying with this clause. The parties to the Dispute must pay equally the costs of the mediator and any third party reports and enquiries requested by the mediator.

### 20.7 **Breach of Dispute clause**

If a party to a Dispute breaches this clause, the other parties to the Dispute do not have to comply with this clause in relation to the Dispute.

## 21. GENERAL

### 21.1 Costs

The Licensee must pay or reimburse to the Council if requested by the Council:

all stamp duty (if any) payable on this Licence;

all of the legal costs (determined on a solicitor and client basis) incurred by the Council in connection with the preparation of this Licence, negotiating, revising and engrossing this Licence (including all attendances on the Licensee and its legal and other advisers and all advices provided to the Council) and attending to the execution of this Licence;

all legal and other costs and expenses incurred by the Council in consequence of any actual or threatened breach by the Licensee hereunder or in exercising or enforcing (or attempting to do so) any rights or remedies of the Council hereunder or at law or otherwise arising in consequence of any actual or threatened breach by the Licensee.

### 21.2 Waiver

If the Council accepts or waives any breach by the Licensee, that acceptance or waiver cannot be taken as an acceptance or waiver of any future breach of the same obligation or of any other obligation under this Licence.

### 21.3 Notice

Without excluding any other form of service, any notice, demand, consent, approval or communication under this Licence will be sufficiently given or served as follows:

21.3.1.1 in the case of the Licensee, if posted by pre-paid post or delivered to the last known address of the Licensee; and

21.3.1.2 in the case of the Council, if posted by pre-paid post to the Council at its principal place of business in South Australia.

Notice served by pre-paid post will be deemed to have been given or served three (3) Business Days after posting.

Any notice may be signed on a party's behalf by its attorney, director, secretary, officer, solicitor, or authorised agent.

### 21.4 Severance

If any part of this Licence is found to be invalid, void or unenforceable, then that part will be severed from this Licence and the remainder of this Licence will continue to apply.

### 21.5 Special conditions

Any Special Conditions will apply to this Licence and in the event of any inconsistency with the terms and conditions in the body of this Licence, then those Special Conditions will prevail.

**21.6 Entire agreement**

The Council and the Licensee acknowledge and agree that this Licence contains and represents the entire agreement reached between them with regard to the Premises and that no promises, representations or undertakings, other than those contained in this Licence, were made or given or relied upon.

**21.7 Resumption**

If the Council receives notice of resumption or acquisition of the Premises or any land affecting the Premises from or by any Statutory Authority or any body or authority of such Statutory Authority, then the Council may terminate this Licence by giving not less than three (3) months written notice to the Licensee. When such termination takes effect, the rights and obligations of the Council and the Licensee hereunder will come to an end but if any breach by either party still exists at that time then the rights of the other party with regard to that existing breach will continue.





By Email: [dcussen@playford.sa.gov.au](mailto:dcussen@playford.sa.gov.au)  
Ref: MST\M00294909F05966346

13 September 2019

Mr D Cussen  
Director, Stretton Centre  
City of Playford  
12 Bishopstone Road  
DAVOREN PARK SA 5113

Dear Dermot

**Hortex Alliance & Virginia Horticulture Centre (832/1106/1001)**

I refer to our meeting on Tuesday.

Our understanding of the current status of arrangements between the Council and Hortex Alliance (**Hortex**) is as follows:

1. The Council has granted a licence of the Virginia Horticulture Centre in its entirety (**VHC**) to Hortex pursuant to a licence agreement dated 5 December 2018 (**Licence Agreement**).
2. The Licence Agreement expired on 30 June 2019.
3. Hortex is currently holding over VHC the on a monthly basis pursuant to clause 15 of the Licence Agreement.
4. Pursuant to clause 10 of the Licence Agreement, Hortex (and the Council, by implication) is required to comply with the terms of the partnership agreement, which is attached as Annexure D to the Licence Agreement (**Partnership Agreement**).
5. The Partnership Agreement commenced in May 2017 and "*is intended to run*" until 30 June 2020, "*subject to an annual review by Council*". We assume that the Council has completed its review for the 2018/2019 year, and the Partnership Agreement expires on 30 June 2020.
6. Pursuant to the Partnership Agreement, the Council has promised the following funds to Hortex:
  - a. \$50,000 in the first year;
  - b. \$25,000 per annum during the second and third years, indexed annually by CPI; **and**
  - c. up to \$50,000 per annum as agreed between the Council and Hortex.

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We note that pursuant to Resolution 3619 passed by the Council on 25 June 2019 (**Council Resolution**), the Council will:

- A. provide the Vietnamese Farmers Association (**VFA**) with half of the use of the VHC;
- B. amend the Partnership Agreement (between the Council and Hortex) to provide funding to the VFA as follows:
  - i. \$25,000 to drive development and growth of the horticulture industry;
  - ii. up to \$50,000 per annum funding for projects "as agreed between the Council, Hortex and/or the VFA".

Whilst not expressly clear, the wording of the Council Resolution – and in particular, items 2c and 2d - suggest that it was the intention of the Council that the funding promised to Hortex under the Partnership Agreement be shared between Hortex and VFA. I note your instructions at our meeting that this is also your understanding of the intended effect of the Council Resolution.

In our view, the Council Resolution (if the intended outcome is as described in the paragraph above) is problematic as it contradicts the terms of the Partnership Agreement and has the effect of reducing the funds otherwise promised to Hortex. Whilst the Council is at liberty under the Partnership Agreement to enter into other partnership arrangements, the Council does not have the right to unilaterally amend the terms of the Partnership Agreement to reduce the funding to Hortex.

Similarly, the Council does not have the right to unilaterally amend the Licence Agreement to halve the space currently licensed to Hortex. The Council's obligation to grant a lease (or licence) to Hortex is contained within the Partnership Agreement. Albeit not expressly stated, it may be argued by Hortex that it is entitled to a lease (or licence) of the entirety of the VHC as the Partnership Agreement provides that the Council will lease the VHC to Hortex (that is, there is no mention of portion(s) of the centre). Further, it is also implied that Hortex has the ability to sublease any part or parts of the VHC, subject to Council's agreement. The grounds on which the Council may not consent to a request for a sublease are unfortunately not specified.

Based on the above, it is our view that the Council Resolution puts the Council in breach of the Partnership Agreement and the Licence Agreement between the Council and Hortex. Subject to the status of discussions between the Council and the VFA, the administration may need to take this matter back to its elected members on a confidential basis to revoke the Council Resolution. This may be done on the basis that the administration has now sought and received legal advice that the Council Resolution causes the Council to be in breach of its legal obligations towards Hortex. The Council, of course, will also need to address its legal obligations towards the VFA as we assume that the VFA is also aware of the provisions of the Council Resolution. The Council may need to put interim arrangements in place with the VFA, bearing in mind that the Partnership Agreement is due to expire on 30 June 2020.

If the Council accepts the above, please be mindful to notify Hortex in writing that the holding over arrangements under the Licence Agreement will also expire on 30 June 2020.

Finally, we note that the VHC land is a Crown Record. We have assumed that the current use of the VHC is a permitted use.

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I would be grateful if you could consider the above so that we can discuss the Council's intentions going forward, as well as a response to the letter from Griffins dated 16 August 2019. In addition, please also let us know if the Council requires some advice regarding the process required to revoke the Council Resolution.

Thanks Dermot.

Yours faithfully  
Norman Waterhouse



**Mabel Tam**  
Principal

T 08 8210 1218  
mtam@normans.com.au

**C. COUNCIL/COMMITTEE TO DECIDE HOW LONG ITEM 8.1 IS TO BE KEPT IN CONFIDENCE****Purpose**

To resolve how long agenda item 8.1 is to be kept confidential.

**STAFF RECOMMENDATION**

Pursuant to Section 90(2) and Section 91(7) of the Local Government Act 1999, the Committee orders that the following aspects of Item 8.1 be kept confidential, with the exception of the third parties to allow the enactment of the resolution, in accordance with Committee's reasons to deal with this item in confidence pursuant to Section 90 (3) (h) of the Local Government Act 1999:

- Report for Item 8.1
- Attachment(s) for Item 8.1
- Minutes for Item 8.1

This order shall operate until a Licence Agreement for the use of the VHC and new partnering arrangements for the advancement of the horticultural industry beyond June 2020 have been established, or will be reviewed and determined as part of the annual review by Council in accordance with Section 91(9)(a) of the Local Government Act 1999, whichever comes first.

## 8.2 REPURPOSING ASSETS

Contact Person: Mr Greg Pattinson

### Why is this matter confidential?

Subject to an order pursuant to Section 90 (3) (b) of the Local Government Act 1999, this matter is confidential because information contained within the presentation could reasonably be expected to convey a commercial advantage. The presentation will cover the disposal of Council assets, and as such, releasing this information to the public may detrimentally impact on Council's commercial position.

### A. COUNCIL/COMMITTEE TO MOVE MOTION TO GO INTO CONFIDENCE

No action – this motion passed in the open section.

### B. THE BUSINESS MATTER

#### 8.2 Repurposing Assets

**Presenter:** Mr Paul Alberton

**Purpose:** To provide an update to Council on the repurposing of Council assets.

**Duration:** 20 Minutes

### C. COUNCIL/COMMITTEE TO DECIDE HOW LONG ITEM 8.2 IS TO BE KEPT IN CONFIDENCE

#### Purpose

To resolve how long agenda item 8.2 is to be kept confidential.

#### STAFF RECOMMENDATION

Pursuant to Section 90(2) and Section 91(7) of the Local Government Act 1999, the Committee orders that the following aspects of Item 8.2 be kept confidential in accordance with Committee's reasons to deal with this item in confidence pursuant to Section 90 (3) (b) of the Local Government Act 1999:

- Presentation for Item 8.2

This order shall operate until the next scheduled annual review of confidential items by Council at which time this order will be reviewed and determined in accordance with Section 91(9)(a) of the Local Government Act 1999.