

# MARINA BERTH LICENCE EXISTING



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## MARINA BERTH LICENCE

Pursuant to the rights attaching to the Berth Entitlement Unit in the Trust held by the Licensee, the Licensor grants to the Licensee a licence to use, occupy and enjoy the Berth in the Existing Marina upon the following terms and conditions, including the specific terms and conditions set out in the schedule to this licence.

### 1. Licence For Ownership And Use By Nominated Boat Only

1.1 This licence and the Berth are only available to, and shall only be used by the Licensee for the purpose of berthing the Nominated Boat, (except as authorised by the Licensor in the case of subletting or a surrender and re-grant pursuant to clauses 7 or 8) such boat being personally and beneficially owned (as to not less than a 25% share) by the Licensee. The Licensee may at any time or times, by notice in writing, nominate a different boat provided that the boat so nominated complies with the provisions of this clause and the dimension requirements specified in clause 6 and part II of the schedule.

1.2 The Licensor may at any time require, and the Licensee shall then provide, a statutory declaration and shall produce such documents and materials as the Licensor shall deem necessary as to the ownership of the Nominated Boat or such other matters pertaining to any of the provisions of this licence.

1.3 The provisions of this clause shall not prevent the Licensee from jointly owning the Nominated Boat with another person or persons at the time the licence is issued provided that the Licensee shall not own less than a 25% share in the Nominated Boat.

### 2. Recreational Boats Only

2.1 The Licensee shall use the Berth only for berthing the Nominated Boat whilst the Nominated Boat is used for recreational boating purposes which use shall be deemed to include charter boats used for recreational purposes subject to the provisions of clause 2.3. The Berth shall not be used to berth commercial fishing boats, charter boats for non-recreational purposes, boats for hire or instruction, work boats, commercial freight carriers or for any other commercial or industrial purpose.

2.2 The Licensee shall ensure that use of the Nominated Boat within the Westhaven Boatharbour shall (except for charter boats used for recreational purposes) be restricted to non-commercial and non-industrial purposes and shall not be used for any of the prohibited purposes referred to in clause 2.1.

2.3 If the Berth is used by a charter boat for recreational purposes, then:

- the loading and unloading of passengers, goods and other supplies shall not be undertaken at the Berth but at other facilities designed for this purpose;
- the Licensee shall advise the Licensor that the Berth is used by a charter boat for recreational purposes.

### 3. Term Of Licence

3.1 The term of this licence is for the period specified in part IV of the schedule.

### 4. Annual Operating Expenses

4.1 For the first period of the term from the Commencement Date until the following 30 June, the Licensee shall pay the initial fee specified in part IV of the schedule on account of operating expenses. Such sum shall be paid on the Commencement Date in advance up to the 30 June date.

4.2 For each subsequent 12 month period during the term of this licence, the Licensee shall pay to the Licensor in advance an annual operating expenses contribution which sum shall be set by the Licensor to cover the Licensee's proportion of the actual or budgeted operating expenses incurred by the Licensor in operating and maintaining the Existing Marina.

4.3 The Licensee's proportion of the operating expenses referred to in clause 4.2 shall be the proportion reasonably set by the Licensor.

4.4 As soon as practicable after 30 June in each year upon request by the Licensee, the Licensor will furnish to the Licensee a statement giving reasonable details of the operating expenses referred to in clause 4.2, for the preceding period of 12 months.

4.5 Notwithstanding the expiration or sooner determination of the term of this licence, the Licensee shall continue to be liable for the operating expenses referred to in clause 4.2 down to the date of expiration or determination of the term.

4.6 The term "Operating Expenses" means all actual or budgeted costs incurred by the Licensor in the operation and maintenance of the Existing Marina including, but not limited to, the following expenses:

(a) all rates, charges, assessments, duties, impositions, royalties, levies and fees of any local body or government body, authority or department (including the Licensor's and Head Licensor's land tax, if any, and levies payable by the Licensor under the Injury Prevention, Rehabilitation, and Compensation Act 2001 or royalties or fees under the Resource Management Act 1991 or any acts in substitution therefore and GST) in respect of the Existing Marina;

(b) all insurance premiums, valuation fees and other charges or levies payable by the Licensor to insure the fixtures and fittings comprising the Existing Marina to their full insurable reinstatement value against physical loss or damage caused by all usual and reasonably insurable risks, and to effect such other insurances including loss of rent, loss of profits, public liability and to insure in respect of such other risks as the Licensor may deem necessary or desirable in relation to the Existing Marina or the Licensor's interest therein or in relation to any liability of the Licensor in respect of the Existing Marina or the management or use thereof;

(c) all charges for utilities and services or other requirements whatsoever furnished or supplied to the Existing Marina;

(d) all running costs and costs of repairs and maintenance to, and replacement of, all utilities, services and equipment in the Existing Marina including the cost of all service contracts in respect of such utilities, services and equipment and depreciation at normal rates on all machinery and equipment acquired by the Licensor for such purpose;

(e) all costs of repairs, painting, dredging, channels, maintenance, renovations and replacements of and to the Existing Marina;

(f) all costs and expenses associated with the repair, maintenance and improvement of common public facilities, parking areas, fencing, direction and information signs and drains, and the regular maintenance and improvement of lawns and planted areas including the replacement of plants and shrubs in the Existing Marina;

(g) all costs and expenses in operating (including, but not limited to, all taxes levies and assessments of every nature and kind including GST) the Existing Marina equipment, vessels, vehicles and other facilities and including all costs and expenses of insuring, repairing, maintaining and replacing the equipment, vehicles and other facilities relating to or serving the Existing Marina;

(h) the cost of cleaning the Existing Marina area including the common public facilities, parking areas, landscaped areas and the cost of garbage disposal and any charges or remuneration paid to any contractor for any such purpose;

(i) all costs or an appropriate share thereof, incurred in maintaining structures and improvements outside the Existing Marina but which benefit the Existing Marina or the users of the Existing Marina;

(j) all bank charges and other financial costs, including interest on any financial accommodation necessary to manage the cash flows associated with all aspects of repairing, maintaining and operating the Existing Marina;

(k) all costs (including wages, remuneration, overheads and other emoluments) of administration, operation, supervision, supply, caretaking, night watchmen, security personnel or contractors, parking attendants, cleaning, gardening and provision of any other services to the Existing Marina which the Licensor may actually and reasonably incur;

(l) such other costs and expenses including professional fees and trustees' charges as may from time to time arise and be properly and reasonably assessed, charged, chargeable, paid, payable or otherwise incurred by, against or upon the Licensor in relation to the ownership, management, repair and maintenance of the Existing Marina and all other costs incurred in complying with the terms of any licences granted to the Licensor in respect of the Existing Marina;

(m) all extraordinary costs, including financial costs, not normally associated with, or contemplated by the parties as, management or operational costs being costs which are not incurred in the normal course of the management or operation of the Existing Marina but nevertheless incurred by the Licensor or the Licensor's manager as extraordinary costs in respect of the Existing Marina;

(n) all licence or other fees payable by the Licensor in relation to the Existing Marina under any coastal permit, head lease or licence from time to time in force in relation to the Existing Marina;

(o) the Manager's fee (plus GST) as more particularly specified in the Deed of Establishment.

4.7 All payments referred to in clauses 4.1, 4.2 and 4.6 of this licence shall be made exclusive of any taxes, duties, assessments, impositions, levies of every kind ("Levies") which during the term of this licence shall be imposed or payable to the intent that any Levies so imposed shall be paid by the Licensee in addition to the moneys payable pursuant to clauses 4.1, 4.2, and 4.6.

4.8 In the event that any Operating Expenses are not incurred solely in respect of the Existing Marina or are incurred for the benefit of parties other than the Licensee but with an associated benefit for the licensees in the Existing Marina, the Licensor shall make an apportionment of the expenses to attribute a fair proportion thereof to the Existing Marina such proportion being deemed for the purposes of this licence as actual or budgeted costs incurred by the Licensor in operating and maintaining the Existing Marina. The Licensor's determination of such proportion shall be final and binding on the Licensee.

## 5. Major Refurbishment Expenses

5.1 For the first period of the term from the Commencement Date until the following 30 June, the Licensee shall pay on the Commencement Date the sum specified in part IV of the schedule on account of major refurbishment expenses.

5.2 For each subsequent 12 month period during the term of this licence, the Licensee shall pay the Licensor an annual major refurbishment contribution fee payable annually in advance at such rate as the Licensor shall reasonably determine in respect of each 12 month period of the term as being adequate to cover prospective repairs, renovations, replacements and maintenance of a substantial but infrequent or irregular nature in respect of the Existing Marina structures and permanent services. The sum to be levied each year for the purposes referred to in this sub clause shall not be more than 10% of the Operating Expenses as defined in clause 4.6 (excluding sub clauses 4.6(n) and (o)) for the preceding 12 month period of the licence term.

5.3 The major refurbishment contribution fees shall be held and applied for the purpose of carrying out the repairs, renovations, improvements, replacements and maintenance referred to in clause 5.2.

## 6. Maximum Dimensions Of Boat

6.1 The Licensee shall at no time allow any part of any vessel using or moored in the Berth which has dimensions (including spars, equipment or appurtenances of any kind) to exceed the dimensions of the Berth specified in Part III of the schedule with the length being measured from the berth face of the adjacent walkway.

## 7. Subletting Of Berth

7.1 The Licensee may sublet the Berth for any period which will not exceed 12 months or any combination of periods not exceeding 12 months in the aggregate, provided the following conditions and restrictions are first satisfied:

(a) before entering into any subletting arrangement, the Licensee shall give prior written notice to the Licensor setting out the full name, address and contact telephone numbers of the proposed sub-licensee and full details of the proposed sub-licensee's boat (which must comply with the requirements of clause 6) and shall specify the term of the proposed subletting;

(b) such subletting shall be subject to the approval of the Licensor, that approval not to be unreasonably withheld;

(c) the execution by the proposed sub-licensee of a deed of covenant with the Lessor agreeing to comply with the terms and conditions of this licence other than the provisions of clauses 4 and 5;

(d) payment of the Lessor's costs associated with the consideration and administration of the proposed subletting arrangement.

7.2 The Lessor's approval of any specific subletting arrangement shall not extend to any other subletting arrangement and shall be strictly limited to the period and boat approved. If the Licensee wishes to extend the period of subletting beyond the initial period or to substitute a different boat from that approved, the Licensee shall make further written application to the Lessor, which may grant or withhold its approval in its absolute discretion.

7.3 Should the Licensee under this licence also be the manager of the Trust then, for such period as the Licensee is the manager of the Trust, it shall be entitled to sublet the Berth free of the restrictions imposed by clauses 7.1 and 7.2.

## 8. Transfer Of Licence

8.1 This licence and the Berth Entitlement Unit are personal to, and shall at all times be held beneficially by, the Licensee. The Licensee shall not, nor shall attempt to, assign, transfer, sublet, or otherwise howsoever dispose of this licence or any interest in this licence, whether legal or beneficial:

(a) except as provided in this licence and the Deed of Establishment of the Trust;

(b) independently of the Berth Entitlement Unit.

8.2 For the purpose of this clause if the Licensee is a company, any change in the company's shareholding or structure which alters the effective control of the company or, which after a series of changes alters the effective control of the company from that existing when the company first took the licence, shall be deemed to be an assignment of this licence for the purposes of clause 8.1.

NOTE: The sale of the interests in a marina berth licence is effected by the transfer of the relevant Berth Entitlement Unit in the Trust. The berth licence is surrendered on the transfer taking effect and the Trustee of the Trust issuing a new marina berth licence to the purchaser of the Berth Entitlement Unit. The transfer of Berth Entitlement Units is governed by the Deed of Establishment of the Trust and the following are the relevant clauses:

### *[“5. Provisions Relating to the Transfer and Transmission of Units*

*Notice of intended sale to be given*

*5.3 If a Unit Holder wishes to sell or otherwise transfer or dispose of any Berth Entitlement Unit on or after the Berth Licence Commencement Date, the Unit Holder shall give written notice to the Trustee of such intention specifying the terms and conditions on which it intends so to act.*

*Manager's consent required*

*5.4 The Unit Holder shall not without the prior written consent of the Trustee transfer a Berth Entitlement Unit to the person or persons nominated by the Unit Holder in any notice pursuant to clause 5.3 of this deed. The consent of the Trustee pursuant to this clause shall be subject to prior compliance with all of the following requirements which shall be conditions precedent to the existence of any right on the part of the Unit Holder to sell, transfer or otherwise dispose of the Berth Entitlement Unit other than to the Trustee:*

*(a) the Unit Holder shall submit to the Trustee the name, address and occupation (or, in the case of a corporation, the registered office and details of business) of the proposed transferee together with such evidence as the Trustee may require that the proposed transferee is respectable, responsible and solvent, and able to meet all the requirements of the Relevant Marina Berth Licence;*

*(b) the proposed transferee shall execute a New Form Berth Licence for the unexpired residue of the term of the existing Relevant Marina Berth Licence;*

*(c) all licence fees and other moneys for the time being due or payable by the Unit Holder under the Relevant Marina Berth Licence shall have been paid and the terms and conditions of the Relevant Marina Berth Licence shall have been performed and observed up to the date of the transfer;*

*(d) the Unit Holder shall have paid the Trustee's costs of and incidental to obtaining the Trustee's consent to the transfer;*

*(e) the Unit Holder has paid to the Manager the surrender and regrant fee calculated in accordance with clause 5.5 and any statutory fees or charges payable at the time of the surrender;*

*(f) the Unit Holder has executed a surrender of the Relevant Marina Berth Licence on terms and conditions acceptable in all respects to the Trustee;*

*(g) the proposed transferee's boat meets the dimension and other requirements as set out in the Relevant Marina Berth Licence.*

### *Surrender and regrant fee*

*5.5 The surrender and regrant fee referred to in clause 5.5 shall be the sum of \$1,000 plus goods and services tax increased each year by the percentage increase in the consumer price index (all groups) for the preceding year with the first adjustment to be made 1 January 1994 to the intent that the surrender and regrant fee shall be adjusted annually on a compounding basis. If the consumer price index changes then the nearest appropriate index shall be utilised. The Trustee's decision on the amount of the increase shall be final. The fee as so increased shall not be subject to any reduction in the event of any decrease in the index.*

### *Circumstances where fee not payable*

*5.6 Notwithstanding the provisions of clause 5.4(e), the surrender and regrant fee referred to in clause 5.5 shall not be payable in the event of a transfer of a Berth Entitlement Unit:*

*(a) to the Unit Holder's executors or administrators following the death of the Unit Holder;*

*(b) to the beneficiaries under the Unit Holder's will or letters of administration following the death of the Unit Holder;*

*(c) in circumstances where there is a change of trustee under a trust;*

*(d) where there are existing joint holders (holding with the consent of the Trustee), to a lesser number of the same holders of the Berth Entitlement Unit.*

### *Holding on trust not recognised*

*5.7 Except as required by law, no person shall be recognised by the Trustee as holding any Berth Entitlement Unit upon trust and the Trustee shall not be bound by, or be compelled in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any Berth Entitlement Unit or any interest in any fractional part of a Berth Entitlement Unit, or any other rights in respect of any Berth Entitlement Unit except an absolute right to the entirety thereof in the registered Unit Holder."*

## 9. Temporary Vacation Of Berth

9.1 The Lessor reserves the right to:

(a) require the Licensee to vacate the Berth for such period or periods as may be necessary to allow repairs or maintenance to be carried out;

(b) use the Berth in cases of emergency, but in those events will provide an alternative mooring or berthing within the Westhaven Boatharbour for the use of the Licensee and the Nominated Boat during the period involved.

9.2 Should the Licensee occupy another Berth as a result of this clause, the terms of this licence shall be deemed to apply for the duration of that occupation with only such modifications as are absolutely necessary.

9.3 The Lessor will not be liable to pay any compensation to the Licensee in respect of any vacation of the Berth and temporary relocation pursuant to the provisions of this clause.

## 10. Relocation Of Berth

10.1 The Lessor reserves the right to require the Licensee permanently to vacate the Berth so as to permit construction of the overall development scheme in the Westhaven Boatharbour or for the purpose of any alteration to the scheme or layout of berths in the Existing Marina.

10.2 Should the Licensee be required to vacate the Berth in accordance with the provisions of clause 10.1 the Licensee shall vacate the Berth and surrender this licence contemporaneously with the Licensor granting the Licensee a substitute licence in respect of a berth (of similar characteristics) in the Westhaven Boatharbour.

10.3 The Licensor will not be liable to pay any compensation to the Licensee in respect of the surrender of licence and the vacation and relocation of berthing pursuant to the provisions of this clause.

## 11. Water Space And Access Rights

11.1 This licence relates only to the allocated water space of the Berth. In common with others, the Licensee shall have the right to tie up to the allocated Berth structures and shall have the right of access in, and the use of, the common waterways and pathways of the Westhaven Boatharbour subject to such rules as to access and during such hours as the Licensor may from time to time specify for the safety, security and preservation of good order in the Westhaven Boatharbour.

## 12. Control Of Activities Within The Westhaven Boatharbour

### *Fastenings and security of vessel*

12.1 (a) Mooring lines shall be provided by the Licensee of such nature as may be required by the Licensor and shall be maintained by the Licensee to the Licensor's satisfaction, provided that if such mooring lines prove to be inadequate by design or lack of maintenance no liability shall attach to the Licensor and the Licensee shall keep the Licensor indemnified against all claims arising there from.

(b) The Licensor may serve on the Licensee a notice requiring the Licensee, within the time specified in the notice, to repair the fastenings so as to ensure that they will safely secure the vessel.

(c) Should the Licensee fail to comply with any such notice within the time specified, the Licensor may, without incurring any liability for so doing and without further notice, repair such fastenings and recover the cost plus 10% from the Licensee.

### *No alterations of berth or structures*

12.2 The Licensee shall not alter or modify the Berth or adjacent structures or make any additions such as fendering or dinghy racks without the prior written approval of the Licensor.

### *Use of facilities*

12.3 The Licensee may use the water, power and any other facilities provided on the structures in common with any other berth licensees on an occasional basis only but shall not use the facilities for any continuous period greater than 24 hours. If the Licensee requires more regular use of such facilities, special arrangements must be made with the Licensor which may make an extra charge to cover any additional costs. The Licensee shall, in the use of such facilities, utilise only appropriate fittings which comply with all relevant codes and regulations.

### *No pollution of Westhaven Boatharbour*

12.4 (a) The Licensee shall not pollute or permit the pollution of the Westhaven Boatharbour or discharge into the Westhaven Boatharbour or its waters, any poisonous, noxious, dangerous or offensive substance or thing and in particular shall comply with the provisions of the Resource Management Act 1991. Without prejudice to the generality of the preceding sentence the Licensee shall not discharge any sewage or otherwise empty any latrines into the Westhaven Boatharbour or otherwise dispose of any garbage, oil, fuel or other material whatsoever on or in the Westhaven Boatharbour except into containers or other receptacles which may be provided by the Licensor. The failure of the Licensor to provide containers or receptacles shall not derogate from the Licensee's obligations under this provision.

(b) The Licensee shall ensure that any boat using the Berth is equipped with either

(i) a sewage holding tank that can be discharged into a land-based pump out facility ; or

(ii) a suitable, portable sewage holding tank that can be carried to, and emptied at, the amenities block situated on the land forming part of the Existing Marina.

### *Pets*

12.5 The Licensee shall not permit or suffer any pet belonging to the Licensee or in the Licensee's charge to enter or remain on or in the Westhaven Boatharbour under the control of the Licensor unless, in the case of dogs, such dogs are led by chains, straps or other efficient restraints. The Licensee shall clean up any pet fouling left by the Licensee's pet or any pet in the Licensee's charge.

### *No swimming*

12.6 The Licensee shall not engage in any swimming, diving or underwater activities within the Westhaven Boatharbour provided that this shall not prohibit underwater maintenance of the Nominated Boat subject to the provisions of clause 12.4 and such reasonable directions as the Licensor may stipulate from time to time.

### *Control of boats in marina*

12.7 The Licensee shall not sail or moor within the Westhaven Boatharbour and will manoeuvre any boat so as to avoid:

(a) creating a danger or impediment or obstacle or inconvenience to other marina users; or

(b) obstructing the public right of navigation through the Westhaven Boatharbour.

### *No noise nuisance*

12.8 The Licensee shall ensure that all halyards, lines, ropes, rigging and sails on the Licensee's boat whilst berthed in the Existing Marina are secured so that they shall not create any noise. The Licensee shall not create a nuisance through parties or the use of television, radio, musical apparatus or any other form of sound reproduction.

### *No storage on marina*

12.9 The Licensee shall not permit or allow any property, gear or equipment under the control or direction of the Licensee to be stored on or in the Westhaven Boatharbour including the walkways, fingers or foreshore thereof without the written permission of the Licensor.

### *No alcohol*

12.10 The Licensee shall not consume alcoholic beverages within the Westhaven Boatharbour except on private vessels or on licensed premises or other premises where consumption of alcoholic beverages is not prohibited by law.

### *Use of fire hoses*

12.11 The Licensee shall not use fire fighting equipment supplied by the Licensor for any purpose other than the fighting of fires.

### *Safety restrictions*

12.12 (a) The Licensee shall not store motor spirit, petroleum, petroleum products, fuel, oil, liquified petroleum gas, compressed natural gas, kerosene or goods of a similarly dangerous or similarly inflammable nature on any marina structure or area under the control of the Licensor without the prior written approval of the Licensor.

(b) The Licensee shall not bring within the Westhaven Boatharbour any motor spirit, petroleum products, fuel oil, liquified petroleum gas, compressed natural gas, kerosene or goods of a similarly dangerous or similarly inflammable character without the permission of the Licensor PROVIDED THAT nothing in this clause 12.12 shall prevent the Licensee from carrying:

(i) reasonable quantities of fuel (required for vessels' engines) in tanks (maintained to all appropriate and relevant standards) which are properly fixed and installed in vessels;

(ii) small quantities of fuel reasonably required for engines or stoves in small safe containers. For the purposes of this sub clause small quantities of fuel shall mean quantities not greater than 10 litres.

(c) The Licensee shall not carry out any refuelling of any boat within the Westhaven Boatharbour save from the type of containers set out in sub clause (b) above and from permanent fuel facilities approved by the Licensor.

#### *No living on board*

12.13 The Licensee shall not live on board any boat at the Berth or permit anyone else to do so. For the purposes of this clause the expression "living on board" shall mean sleeping overnight on the boat for two consecutive nights or more.

#### *Control of visitors*

12.14 The Licensee shall not permit or allow any children for whom the Licensee is responsible, being children under the age of 12 years, to enter into the Westhaven Boatharbour unless accompanied by an adult. The Licensee shall also ensure that the Licensee's guests, invitees and other people accompanying the Licensee comply with the terms of this licence.

#### *No unlawful activities*

12.15 The Licensee shall ensure that no unlawful activities are conducted from, or on, the Nominated Boat or the Berth.

### **13. Indemnity**

13.1 The Licensor shall not be liable and accepts no responsibility for, loss or damage to boats, craft, third party property or persons using the same within the confines of, or near to the Westhaven Boatharbour, nor for the adequacy or otherwise of the Westhaven Boatharbour or of the Berth or any other part of the facilities of the Westhaven Boatharbour and the Licensor shall not be liable to the Licensee or any person for any loss or damage to property, or death or personal injury incurred or suffered within the Westhaven Boatharbour however the same occurs and whether or not such happening is attributable to the acts or defaults of the Licensor, or its servants or agents or contractors or otherwise howsoever.

13.2 The Licensee, in addition, shall indemnify the Licensor and the holder of the use and occupation resource consent ("Sub Licensor") against any loss, expense, legal liability, claims and costs incurred by the Licensor or the Sub Licensor arising as a result of the Licensee's acts or omissions or the acts or omissions of others to which the Licensee has contributed or the acts or omissions of any persons invited into the Westhaven Boatharbour by the Licensee.

### **14. Insurance**

14.1 The Licensee shall at all times keep all boats, craft and any other property owned or brought into the Westhaven Boatharbour by the Licensee and/or invitees, fully insured whilst in the confines of, or near to, the Westhaven Boatharbour against physical loss or damage caused by all usual and reasonably insurable risks.

14.2 The Licensee shall also effect adequate public liability insurance against death and/or bodily injury to persons and loss or damage to property of others arising out of the use of watercraft and/or use or occupation of the Westhaven Boatharbour. The amount of such liability insurance shall be as specified by the Licensor from time to time.

14.3 The Licensee shall, if requested by the Licensor, provide the Licensor with copies of the policies effected pursuant to this clause together with a certificate of currency for such policies.

### **15. Destruction Or Damage To Structures**

15.1 Subject to clause 15.3, if the Structures shall during the term be destroyed or damaged whether remaining partially available for use by the Licensee or incapable of use and if there shall be sufficient insurance moneys to repair and reinstate fully, the Licensor shall proceed with all reasonable speed to repair and reinstate the Structures and shall apply all insurance moneys recovered in that behalf.

15.2 If there shall be insufficient moneys to repair and reinstate the Structures fully then the Licensor shall elect, by giving written notice to the Licensee within one month of the date of such damage or destruction, ("Licensor's notice") either:

(a) to proceed (subject to clause 15.3) with all reasonable speed to repair and reinstate the Structures in which event it shall apply all insurance moneys recovered in that behalf to repair and reinstate the Structures as soon as practicable and shall meet the cost of such repair and reinstatement to the extent that such costs exceed the insurance moneys recovered; or

(b) elect to determine this licence in which event this licence shall be at an end and the insurance money shall be payable in accordance with clause 15.3.

15.3 If any necessary permit or consent to rebuild the Structures cannot reasonably be obtained or in the event of the Licensor electing to determine the licence pursuant to clause 15.2(b) then:

(a) the insurance moneys recoverable shall be applied first towards meeting the cost of compliance with any acts, regulations or Coastal Permit terms or conditions and the costs of clearing the damaged structures from the Westhaven Boatharbour;

(b) any surplus insurance money after payment of the costs referred to in clause 15.3(a) shall be dispersed to the Licensee on a fair and equitable basis;

(c) this licence shall be deemed to have ceased and determined as from the date the damage occurred, but without prejudice to the rights of either party against the other in respect of any antecedent breach of any of the covenants, conditions or agreements contained or implied in this licence.

15.4 During the effecting of such repairs or reinstatement and until their completion, the Licensee shall continue to pay the Operating Expenses.

15.5 Any repair or reinstatement under this clause will be carried out by the Licensor using such materials and forms of construction and according to such plan as shall be reasonably determined by the Licensor. The Licensee acknowledges that the Licensor shall be under no obligation to effect the repairs or reinstatement strictly in accordance with the original materials, form of construction and plans.

### **16. Licensor's Insurance**

16.1 The Licensor will take all reasonable steps to insure all usually and reasonably insurable structures within the Westhaven Boatharbour ("Insurable Structures") to their full reinstatement value against physical loss or damage caused by all usual and reasonably insurable risks. The premiums for this insurance cover shall form part of the Operating Expenses. The Licensee will not do anything or allow anything to be done which may render void or voidable any policy of insurance effected by the Licensor.

16.2 The Licensor shall not, nor shall it be deemed to, be required to arrange or effect insurance cover in respect of the Insurable Structures (or any part thereof) against risks in respect of which insurance cover is unable to be obtained from time to time, including (without limitation) acts of war, nuclear incidents or acts of terrorism.

16.3 The Licensor shall not, nor shall it be deemed to, be required to arrange or effect insurance cover in respect of the Insurable Structures (or any part thereof) where, in the Licensor's opinion, it would be unreasonable, uneconomical or inefficient to do so.

16.4 If the Licensee shall do anything or allow anything to be done which may render any increased or extra premium payable in respect of any such insurance, the Licensee will forthwith on demand pay to the Licensor such increased or extra premium or premiums as the Licensor may be liable to pay.

### **17. Default**

17.1 If any of the following occur, the Licensor shall be entitled to cancel and terminate this licence:

(a) if any part of the operating expenses is in arrears and unpaid after any of the due dates for payment and remains unpaid for the space of 14 days following notice that the licence will be terminated should payment not be made;

(b) this licence and the Berth Entitlement Unit or any interest in this licence and the Berth Entitlement Unit whether legal or beneficial cease to be held together by the Licensee;

(c) if the Licensee breaches any of the other terms contained or implied in this licence and to be complied with by the Licensee and such default remains unsatisfied (if capable of satisfaction) after one month from the date of written notification from the Licensor to the Licensee or the Licensee's agent, specifying the default complained of, the Licensor may, and without the need for any further notice, forthwith cancel and terminate this licence.

17.2 Should this licence be terminated in accordance with the provisions of clause 17.1, the Licensee shall forthwith remove the Nominated Boat or any other vessel from the Berth failing which the Licensor may do so and all rights in respect of the Berth shall cease and determine.

17.3 Where the Licensee fails to remove the vessel, the Licensor may remove that vessel, place and maintain on any such vessel such number of custodians as may be necessary and shall be entitled to a lien on the vessel to the extent of the costs of security, removal and storage. Provided the Licensor has acted carefully in removing the vessel it shall not be liable should any damage occur to that vessel.

17.4 Should the Licensee fail to claim such vessel within the period of one month after the date of such removal, the Licensor may at any time thereafter offer the same for sale and appropriate the proceeds of any resultant sale in satisfaction of such expenses as may be incurred in respect of removal, security, storage and sale.

17.5 The Licensor may proceed against the Licensee for any moneys then owing. Any prepaid operating expenses relating to the period beyond the date of termination shall be deemed forfeited to the Licensor as liquidated damages it being acknowledged by the Licensee that the Licensor has relied upon and will or has used the moneys paid by the Licensee for the development and maintenance of the Existing Marina. Notwithstanding cancellation of this licence, the Licensee shall remain liable to meet the operating expenses until the Berth Entitlement Unit has been sold and a new licence executed by the purchaser of the Berth Entitlement Unit.

17.6 In the event that this licence is cancelled and terminated pursuant to clause 17.1 of this licence, the Licensor shall be entitled to sell the Berth Entitlement Unit in such manner as the Licensor thinks fit. Without limiting such power, the Licensor may sell the Berth Entitlement Unit either by way of public auction or private sale, and in either case the Manager shall be entitled to purchase the Berth Entitlement Unit, provided that in the event of a private sale the purchase price paid by the Manager shall not be less than the value of the Berth Entitlement Unit as established by a valuation obtained from an independent and appropriately qualified valuer appointed by the Licensor. The Licensee hereby irrevocably appoints the Licensor the attorney of the Licensee to execute all documents and do all such things as are necessary to give effect to such sale. The purchaser shall be registered as the holder of the Berth Entitlement Unit and shall not be bound to see to the application of the purchase money, nor shall the purchaser's title to the Berth Entitlement Unit be affected by any irregularity or invalidity in the sale proceedings. The proceeds of sale shall be received by the Licensor and applied firstly in payment of the costs of such sale, secondly in or towards satisfaction of any debts or liabilities to the Licensor and thirdly to the Licensee. In the event that the proceeds of such sale are not sufficient to pay the costs of sale and to satisfy fully such debts or liabilities, the Licensee shall remain personally liable to the Licensor for the amount which remains unsatisfied.

17.7 In the case of any default on the part of the Licensee under this licence and in addition to any other rights and powers of the Licensor under this licence and without prejudice to any other right or remedy the Licensor may have, it shall be lawful for, but not obligatory upon, the Licensor at its discretion to remedy such breach or consequence thereof at the Licensee's cost and the Licensee shall be deemed to have hereby irrevocably

## 18. Acknowledgments By Licensee

18.1 The Licensee acknowledges that:

(a) Ports of Auckland Limited has been granted the Coastal Permit. By a Waterspace Management Deed dated and having effect from 31 May 2004, Ports of Auckland Limited granted to Auckland City Council the sole and exclusive right to manage the use and occupation of the water space associated with Westhaven Boatharbour.

(b) pursuant to the common law and the terms of the Coastal Permit, the Auckland City Council may terminate the Coastal Permit if the terms of the Coastal Permit are breached;

(c) should the Coastal Permit be revoked or determined, the Licensee shall have no right or claim against the Licensor or the Licensor's manager or their successors, whatsoever;

(d) as holder of the Berth Entitlement Unit it is bound by all the provisions of the Deed of Establishment and the Deed of Trust;

(e) ownership of Westhaven Boatharbour passed from Ports of Auckland Limited to Auckland City Council with effect 31 May 2004; and

(f) ownership of Westhaven Boatharbour passed from Auckland City Council to Auckland Waterfront Development Agency Limited with effect from 1 November 2010 pursuant to the Local Government (Tamaki Makaurau Reorganisation) Council-Controlled Organisations Vesting Order 2010.

18.2 The Licensee further acknowledges that pursuant to the Deed of Trust the terms of this licence may be altered, modified or added to with the agreement of the Licensor, the Licensor's manager and either where the alteration or modification does not prejudice the general interests of the Berth Entitlement Unit Holders or following the approval of an extraordinary resolution of Berth Entitlement Unit Holders. Any such variation or modification shall be binding upon the Licensor and the Licensee to the same effect as if such modification or variation had been a term of this licence at the commencement date of this licence.

## 19. Compliance With Acts, Regulations, By-Laws and Instructions

19.1 The Licensee shall, in the use of the Berth and the Nominated Boat, comply with all statutes, ordinances, regulations, by-laws, planning decisions and associated conditions, or other lawful requirements affecting or relating to the Berth and the Nominated Boat or the use or occupation of the Berth and the Nominated Boat and shall also comply with the provisions of all licences, requisitions, notices or orders made or given by any authority having jurisdiction in respect of the Berth and the Nominated Boat or the use and occupation of the Berth and the Nominated Boat and shall keep the Licensor indemnified in respect of any non-compliance by the Licensee with the Licensee's obligations under this clause.

19.2 The Licensee shall also comply with any special instructions from time to time issued by the Licensor or any of its agents for the efficient, safe and harmonious use of the Westhaven Boatharbour and any of its facilities.

19.3 The Licensee shall, in its use of the common waterways within the Westhaven Boatharbour comply with the provisions of the Ministry of Transport General Harbour Regulations, Nautical and Miscellaneous, the International Collision Regulations, Harbour By-laws and any other provisions passed in substitution for, or in succession to, the above or Acts and Regulations passed after the Commencement Date relating to the use of the common waterways.

## 20. Notification Of Licensee's Address and Agent

20.1 The Licensee shall at all times advise the Licensor in writing of any change to the Licensee's current address and contact phone numbers from that stated in the schedule or alternatively the name, contact phone number and address of any agent to whom the Licensee grants unlimited authority to act for the Licensee in all matters concerned with, or arising out of, this licence and in the event of the appointment of an agent the Licensor shall be entitled to deal with that agent in all respects as if the agent were the Licensee and the Licensee shall be bound accordingly. In the event that there is more than one Licensee or the Licensee is a company or trust, then all Licensees shall appoint either one of their number or some other person to be their agent and in default of any such appointment the first named Licensee shall be deemed to be the agent of all the Licensees.

## 21. Service Of Notices

21.1 Wherever in this licence:

(a) the Licensor is required to give notice to, or communicate in any way with, the Licensee, such notice or communication shall for all purposes be deemed sufficiently made, given, served or communicated if given in writing by the Licensor and posted to the Licensee or the Licensee's agent at the last address recorded with the Licensor and any notification so posted shall be deemed to have been delivered and received in the ordinary course of post provided that any notice under clause 17 shall be sent by registered mail or given by personal service;

(b) any notice or request or other communication with the Licensor is called for, the same shall be made in writing to the Licensor's address and if not so made shall be deemed of no effect whatever.

## **22. Duties And Taxes**

22.1 The Licensee shall pay all duties, taxes and other imposts in respect of this licence (which term shall in this clause include any berth licence agreement or other agreement entered into in anticipation of this licence) and/or in respect of the payments, fees and other moneys due under this licence including (without limitation) stamp duty and goods and services tax. The Licensee's obligations under this licence shall apply regardless of whether the Licensor or the Licensee is primarily liable in respect of any such duty, tax or other impost or is liable for the charging thereof or otherwise to the intent that, without prejudice to the foregoing, the Licensor shall be held indemnified by the Licensee for any such duties, taxes and other imposts paid or payable by it in any capacity whatever.

## **23. Limitation Of Trustee's Liability**

23.1 The Licensee acknowledges that the Licensor has entered into this licence in its capacity as Trustee of the Trust pursuant to the Deed of Trust and the liability of the Licensor under this Deed shall at all times and for all purposes be limited, subject to the terms of the Deed of Trust, to the assets for the time being of the Trust.

## **24. Appointment Of Manager**

24.1 The Licensor shall be entitled to appoint from time to time a manager to perform the obligations of the Licensor under this licence and such manager shall act for and on behalf, and shall have all the rights and powers, of the Licensor under this licence.

## **25. Law and Jurisdiction**

25.1 The law to which this licence is to be subject is New Zealand Law.

25.2 The parties submit to the exclusive jurisdiction of the New Zealand courts.

## **26. Electronic Communications**

26.1 Notwithstanding clause 21 above, the Licensee consents to receiving any communications from the Licensor electronically and agrees that all agreements, notices, disclosures, information and any other communications that the Licensor provides to the Licensee electronically shall satisfy any legal requirement that such communications be in writing. The Licensee acknowledges and agrees to be bound by any agreement reached by electronic means in terms of the Electronic Transactions Act 2002.

## **27. Counterparts**

27.1 This license may be executed in two or more counterparts, all of which will together be deemed to constitute one and the same instrument. A party may enter into this license by signing a counterpart copy and sending it to the other party, including by facsimile or email.

## **28. Definitions and Interpretation**

28.1 Where in this licence the context requires or admits, the plural number includes the singular number and vice versa and the masculine gender includes the feminine gender.

28.2 If this licence is granted to more than one person the expression "the Licensee" wherever used in this licence includes all those persons jointly and each of them severally.

28.3 The bold type headings shall be for the purpose of quick reference only and do not form part of this document or have any relevance in its interpretation.

28.4 In this Licence and the schedule, unless the context otherwise requires:

"Berth" means the berth described in Part III of the schedule.

"Berth Entitlement Unit" means the unit held by the Licensee in the Trust as specified in Part IV of the Schedule.

"Commencement Date" means that date specified in Part IV of the schedule.

"Coastal Permit" means the resource consent granted initially to Ports of Auckland Limited for occupation of the coastal marine area pursuant to section 384A Resource Management Act 1991 and dated 28 July 1994.

"Deed of Establishment" means the deed of establishment of Westhaven (Existing Marina) Trust dated 15 August 1995 (subsequently amended by supplemental deeds dated 30 September 1995 and 26 November 1996) made between the Licensor and Ports of Auckland Limited by which the Trust was established. Ports of Auckland Limited assigned its rights and obligations under the Deed of Establishment to Auckland City Council with effect from 31 May 2004. With effect from 1 November 2010, these rights and obligations are held by Auckland Waterfront Development Agency Limited.

"Deed of Trust" means the Deed of Trust establishing the Westhaven Trust dated 11 November 1992 made between Ports of Auckland Limited and Westhaven Marina Trust Limited (as the Trustee was then named). Ports of Auckland Limited assigned its rights and obligations under the Deed of Trust to Auckland City Council with effect from 31 May 2004. With effect from 1 November 2010, these rights and obligations are held by Auckland Waterfront Development Agency Limited.

"Existing Marina" means that area generally shown shaded on the Plan.

"Licensee" means the Licensee described in Part I of the schedule including the Licensee's executors, administrators and successors and, where relevant, the Licensee's agent.

"Licensor" means Westhaven Marina Limited and its successors, their assigns and where not relevant, the servants and agents of the Licensor (including for the purpose of giving notice, any managing agent appointed from time to time by the Licensor).

"Manager" means the manager of the Trust. Auckland City Council was appointed manager of the Trust with effect from 31 May 2004 until 31 October 2010. With effect from 1 November 2010, Auckland Waterfront Development Agency Limited is the Manager of the Trust.

"Nominated Boat" means the boat nominated by the Licensee (in writing to the Licensor) and specified in Part II of the schedule or any boat substituted therefore which has been nominated by the Licensee and which complies with the dimension requirements specified in clause 6.

"Structures" means the finger forming the Berth together with the structures giving access to the Berth.

"Trust" means the Westhaven (Existing Marina) Trust.

"Westhaven Boatharbour" means the marina waters, common marina fairways, the floating structures, fingers and jetties, all marina foreshore areas, administration and service areas, parking areas, ramps and driveways and all other areas used for the Westhaven marina.

28.5 Where there is and conflict between any term of this license set out in the above clauses 1 to 28 inclusive and any term or provision of the schedule, the provisions of clauses 1 to 28 above shall prevail.

