

TERMS OF INSTRUMENT - PART 2  
S.219 COVENANT

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RECITALS:

- A. The Transferor ("**Owner**") is the registered owner in fee-simple of those lands with a current civic address of 1340 Sussex Street and 1337 Saunders Street, more particularly described in Item #2 of Form C, in the Township of Esquimalt in the Province of British Columbia, namely:

PID: 000-009-351

LOT 34, SUBURBAN LOT 45, ESQUIMALT DISTRICT, PLAN 2854 ("**Lot 34**");

PID: 000-009-369

LOT 35, SUBURBAN LOT 45, ESQUIMALT DISTRICT, PLAN 2854 ("**Lot 35**");

PID: 000-009-377

LOT 36, SUBURBAN LOT 45, ESQUIMALT DISTRICT, PLAN 2854 ("**Lot 36**");

PID: 000-009-385

LOT 37, SUBURBAN LOT 45, ESQUIMALT DISTRICT, PLAN 2854 ("**Lot 37**");

PID: 000-009-393

LOT 38, SUBURBAN LOT 45, ESQUIMALT DISTRICT, PLAN 2854 ("**Lot 38**");

PID: 000-009-407

LOT 39, SUBURBAN LOTS 37 AND 45, ESQUIMALT DISTRICT, PLAN 2854 ("**Lot 39**");

PID: 000-009-415

LOT 40, SUBURBAN LOTS 37 AND 45, ESQUIMALT DISTRICT, PLAN 2854 ("**Lot 40**");

PID: 000-009-423

LOT 41, SUBURBAN LOTS 37 AND 45, ESQUIMALT DISTRICT, PLAN 2854 ("**Lot 41**");

PID: 004-019-903

LOT 1, SUBURBAN LOT 45, ESQUIMALT DISTRICT, PLAN 16681 ("**Lot 1**");

PID: 004-019-890

LOT 2, SUBURBAN LOT 45, ESQUIMALT DISTRICT, PLAN 16681 ("**Lot 2**"); and

PID: 004-019-911

LOT 3, SUBURBAN LOT 45, ESQUIMALT DISTRICT, PLAN 16681 ("**Lot 3**")

(Collectively, the "**Lands**").

- B. The Transferee is the Township of Esquimalt ("**Transferee**" or "**Township**").
- C. The Owner has submitted an application to the Township to rezone the Lands to Comprehensive Development District No. 167 (1333 Saunders Street) CD No. 167 further to ZONING BYLAW, 1992, NO. 2050, AMENDMENT BYLAW NO. 3158 (the "**Amendment Bylaw**") to authorize the development of one (1) maximum twenty-one (21) storey Commercial Mixed-Use purpose-built rental residential building on the Lands, including for public park use (as further defined below), but not dedicated on a plan as such given underground parking for the development, and acknowledging that the amenities and restrictions contained herein are in the public interest the Owner has offered and voluntarily provided this Section 218 SRW with Section 219 Covenant to the Township, and the Township has accepted it and required its registration as a condition of the Amendment Bylaw (the "**Agreement**").
- D. Section 218 of the *Land Title Act*, R.S.B.C 1996, c. 250 enables the Owner to grant in favour of the Township an easement without a dominant tenement to be known as a statutory right of way, and the Owner wishes to grant such a statutory right of way.
- E. This Statutory Right of Way is necessary for the operation and maintenance of the Township's undertaking.
- F. Section 219 of the *Land Title Act* gives authority for a covenant and indemnity, whether of a negative or positive nature, to be registered against the Lands and granted in favour of the Township with provisions:
  - in respect of the use of land or the use of a building on or to be erected on land;
  - that land is to be built on in accordance with the covenant;
  - that land is not to be built on or subdivided except in accordance with the covenant;
  - that land is not to be used, built on or subdivided;
  - that parcels of land designated in the covenant and registered under one or more indefeasible titles are not to be sold or otherwise transferred separately; and
  - that land or a specified amenity in relation to it be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state in accordance with the covenant and to the extent provided in the covenant.

**NOW THEREFORE** in consideration of the payment of the sum of \$10.00 by the Township to the Owner (receipt and sufficiency acknowledged), the mutual covenants and agreements contained in this Agreement, and for other good and valuable consideration, the parties covenant and agree as to the following, including under Section 219 of the *Land Title Act*.

#### **PART 1 – S.218 STATUTORY RIGHT OF WAY ("SRW")**

1. The Owner, for himself, his heirs, executors, administrators, successors and assigns, hereby

grants and conveys in perpetuity and at all times to the Township, its officials, employees, contractors, subcontractors, agents, licensees, invitees, permittees, and the public generally, with or without invitation, blanket statutory right of way (the "**Statutory Right of Way**") for the full, free and uninterrupted right, licence, liberty, privilege, easement and right of way in common with the Owner for the purpose of public park use including pedestrian and other non-vehicular use and access (collectively, the "**Works**"), including all associated services, including but not limited to curbs, gutters, structures, improvements, furniture, walkways, hard and soft landscaping (including but not limited to lawns, trees, shrubs, bushes, flowers and other flora), paving, surfacing and retaining walls and such works required by the Township or necessary or convenient for lighting, drainage, irrigation and all other related utilities, furniture, equipment and elements to be installed or constructed on the Statutory Right of Way, and all other works of a similar nature or kind that may be required by the Township from time to time (collectively, the "**Related Works and Services**"), and in connection therewith:

- (a) to facilitate uninterrupted access of the Township and the public to and through the Statutory Right of Way, on foot, or in wheelchairs or strollers (or scooters for disabled persons but not in other private motorized vehicles);
  - (b) to provide access to the Township and allow the Township operate the Works and the Related Works and Services within the Statutory Right of Way, and if the Owners does not satisfy its requirements, to install, construct, repair, maintain, clean, clear, protect, replace the Works and the Related Works and Services;
  - (c) to clear the Statutory Right of Way and keep it clear of anything which, in the opinion of the Township constitutes or may constitute an obstruction to the use of the Statutory Right of Way or to the Works;
  - (d) to inspect the Statutory Right of Way for the purpose of ascertaining compliance with this Agreement;
  - (e) to hold events, regulate and otherwise operate the Public Space as a Township parkand
  - (f) to do anything else on or over the Statutory Right of Way that the Township considers necessary or desirable in connection with the rights granted by this Agreement, including, without limitation, to disturb the surface of the Statutory Right of Way and excavate it and to bring vehicles, machinery, equipment, tools and supplies on to and through the Statutory Right of Way, and use them thereon.
2. No right granted to or reserved by the Township in this Agreement will require the Township to establish, clean, repair, or maintain the Works or the Statutory Right of Way unless the Township is expressly required in this Agreement to perform such establishment, cleaning, repairing or maintenance.

3. No part of the title in fee-simple to the soil shall pass to or be vested in the Township under or by virtue of these presents, and the Owner may fully use and enjoy all the Lands of the Owner, subject only to the rights and restrictions contained in this Agreement.

### Conversion of Agreement to a Specific Statutory Right of Way

4. The Township and the Owner agree that the Works will be generally located over an area of approximately 1,718 sq.m (18,492 sq.ft.) portion of the Lands adjacent the Sussex Street frontage between Ontario Drive and Nelson Street generally as shown on the Landscape Concept Plan prepared by LADR Landscape Architects and dated March 2024, a copy of which is attached as Schedule "A" to this Agreement (the "**Public Space**"), and the Township agrees to generally limit the rights granted by this Agreement to the Park, and the parties further agree that any uncertainty regarding the Public Space is to be resolved in favour of the Township given this blanket charge.
5. The Township and the Owner covenant and agree that the Statutory Right of Way will, following further surveying by the Owner, be converted to a specific statutory right of way limited to the area of the Public Space. The Owner shall, at their sole cost, undertake further surveying and prepare a survey plan outlining and identifying the specific right of way area that is substantially in accordance with the Public Space, and register such plan on the title of the Lands.
6. Upon conversion to a specific statutory right of way, references to the Lands shall, as applicable, be interpreted as references to the Statutory Right of Way area or the Park.

### PART 2 – S.219 COVENANT

7. The Owner covenants and agrees that the Lands must not be subdivided (including under the *Strata Property Act*), built upon, used or continue to be used, unless the Owner has provided, at its sole cost and without expectation of compensation from the Township, and continues to provide the Public Space.
8. The Owner hereby covenants and agrees with the Township that the Owner, all at its sole cost and responsibility:
  - (a) will construct and install the Works and the Related Works and Services within the Statutory Right of Way to the satisfaction of the Township's Director of Engineering and Public Works;
  - (b) will not, and will not permit any other person, to erect, place, install or maintain any building, structure, addition to a building or structure, concrete driveway or patio, pipe, wire or other conduit on, over or under any portion of the Statutory Right of Way, without the express written consent of the Township's Director of Engineering and Public Works;

- (c) will not do or permit to be done any act or thing which will interfere with or injure the Works or the Related Works and Services and in particular will not carry out any blasting on or adjacent to the Statutory Right of Way, without the express written consent of the Township's Director of Engineering and Public Works, the parties acknowledging that consent shall not be unreasonably withheld;
- (d) will maintain, care for and clean, and repair and replace as necessary, the Public Space, Works, the Related Works and Services, and the surface of the Statutory Right of Way to at all times keep the Public Space, Works and the Related Works and Services in a good and safe state, including in accordance with the Maintenance Standards identified in Schedule "B";
- (e) will trim or, if necessary, cut down any tree or other growth on the Lands which in the opinion of the Township constitutes or may constitute a danger or obstruction to those using the Statutory Right of Way;
- (f) will allow the Township, its officials, employees, contractors, subcontractors, agents, licensees, invitees, permittees and the public generally to enter upon the Statutory Right of Way as provided in Part 1 of this Agreement, and not to interfere with in any way or prevent any such person coming on to the respective area for the purposes permitted by this Agreement;
- (g) will from time to time and at all times at the reasonable request of the Township do and execute or cause to be made, done or executed any further and other lawful acts, deeds, things, devices, conveyances and assurances in law required to ensure the Township of its rights under this Agreement;
- (h) obtain and maintain the following insurance coverage while this Agreement remains in effect:
  - (i) comprehensive general liability insurance providing coverage for death, bodily harm and injury, property loss and damage, and all other losses arising out of or in connection with the operation, use and occupation of the SRW Area in an amount of not less than \$5,000,000 per occurrence;
  - (ii) any other form or forms of insurance that the Owner may reasonably require from time to time in amounts and for such perils against which a prudent owner acting
  - (iii) reasonably would protect itself in similar circumstances; and
  - (iv) such additional insurance as the Township may require from time to time,
 and all policies of insurance required to be taken out by the Owner must:

1. name the Township as an additional insured;
  2. include that the Township is protected notwithstanding any act, neglect or misrepresentation by the Owner which might otherwise result in the avoidance of a claim and that such policies are not affected or invalidated by any act, omission or negligence of any third party which is not within the knowledge or control of the insureds;
  3. be issued by an insurance company entitled to carry on the business of insurance under the laws of British Columbia;
  4. be primary and non-contributing with respect to any policies carried by the Township and that any coverage carried by the Township is excess coverage;
  5. not be cancelled without the insurer providing the Township with 60 days written notice to the Director stating when such cancellation is to be effective;
  6. not include a deductible greater than \$25,000.00 per occurrence;
  7. include a cross liability clause; and
  8. be on other terms acceptable to the Township, acting reasonably. and
    - (i) will permit the Township to peaceably hold and enjoy the rights granted by this Agreement.
9. Further, the Owner must obtain all required insurance at its sole expense and must provide the Township with certificates of insurance confirming the placement and maintenance of all required insurance as reasonably requested by the Township. If the Owner fails to insure or provide proof of insurance as required, the Township may, immediately and without notice to the Owner, effect the insurance in the name of and at the expense of the Owner. For clarity, the Township has no obligation to effect such insurance.
  10. At the Owner's sole cost, the Owner must do everything necessary to secure priority of registration and interest for this Agreement over all encumbrances of a financial nature.
  11. The Owner agrees to pay the legal fees and land title office costs of the Township in connection with the preparation and registration of this Agreement.
  12. The Owner further covenants and agrees that Township, and any of its officers or employees, may but is not obligated to inspect the Lands, including Public Space and Statutory Right of Way, for the purpose of ascertaining compliance with this Agreement.

## Indemnity and Release

13. The Owner covenants and agrees to indemnify and save harmless the Township and each of its elected and appointed officials, officers, and employees from any and all claims, causes of action, suits, demands, fines, penalties, costs or expenses or legal fees (on a solicitor-client basis) whatsoever, in law or equity, which anyone has or may have against the Township or which the Township incurs as a result of any loss, damage, deprivation, enrichment or injury, including economic loss, arising out of or connected with the restrictions or requirements of this Agreement, the breach of any covenant in this Agreement, the granting of any approvals, or the use of the Lands contemplated under this Agreement.
14. The Owner releases and forever discharges the Township and each of its elected and appointed officials, officers, and employees of and from any claims, causes of action, suits, demands, fines, penalties, costs or expenses or legal fees (on a solicitor-client basis) whatsoever, in law or equity, which the Owner and anyone, including third parties, can or may have against the Township for any loss, damage, deprivation, enrichment or injury, including economic loss, arising out of or connected with the restrictions or requirements of this Agreement, the breach of any covenant in this Agreement, the granting of any approvals, or the use of the Lands contemplated under this Agreement.
15. Without limiting the above release and indemnity, the Owner acknowledges that this Agreement may be interpreted to contain conditions, restrictions, requirements, benefits or gifts that may not be specifically identified or required by bylaw. The Owner hereby expresses its intention to be solely responsible for the costs resulting from satisfying the conditions of this Agreement, and to donate any contribution to the Township as a gift without any expectation of credit, payment or reward of any kind. The Owner further releases, waives and forever discharges the Township from and against any claims, actions, or causes of action, whether based in contract, tort or equity, for damages or losses, for the recovery of the contributions or costs incurred, including legal expenses, or for unjust enrichment, in connection with the provision of those contributions.
16. The releases and indemnities of this Agreement shall survive its termination.

### **Registration**

17. The restrictions and requirements in this Agreement are covenants running with the Lands in favour of the Township and intended to be perpetual, and shall continue to bind all of the Lands when subdivided.
18. At the Owner's sole cost, the Owner must do everything necessary to secure priority of registration and interest for this Agreement over all encumbrances of a financial nature on the Lands.
19. The Owner agrees to execute all other documents and provide all other assurances necessary to give effect to the covenants contained in this Agreement.

20. The Owner agrees to pay the reasonable legal fees and land title office costs of the Township in connection with the preparation and registration of this Agreement.

## General

21. The Owner covenants and agrees that the Township's Director of Development Services, may, but is not obligated to, inspect the Shared Vehicle Service Agreement and such other matters addressed by this Agreement, and the Owner shall implement any reasonable measures identified by the Director of Development Services as a result of such inspection.
22. The Owner covenants and agrees for itself, its heirs, executors, successors and assigns, that it will at all times perform and observe the requirements and restrictions set out in this Agreement.
23. It is mutually understood, acknowledged and agreed by the parties that the Township has made no representations, covenants, warranties, guarantees, promises or agreements (oral or otherwise) with the Owner other than those contained in this Agreement.
24. Nothing contained or implied in this Agreement:
  - (a) prejudices or affects the rights, powers or discretion of the Township in the exercise of its functions under any public or private statutes, bylaws, orders and regulations, all of which may be fully and effectively exercised in relation to the Lands as if the Agreement had not been executed and delivered by the Owner;
  - (b) imposes any legal duty or obligation, including any duty of care or contractual or other legal duty or obligation, to enforce this Agreement or the breach of any provision in this Agreement; or
  - (c) imposes any public law duty, whether arising from the principles of procedural fairness or the rules of natural justice, on the Township with respect to its exercise of any right or remedy expressly provided in this Agreement or at law or in equity.
25. The parties agree that this Agreement shall not be modified or discharged except in accordance with the provisions of section 219(9) of the *Land Title Act*. Such modification or discharge may proceed without a public hearing, at the sole discretion of Township Council or their delegate.
26. The Owner covenants and agrees that the Township may withhold development permits, building permits and other approvals related to the use, building or subdivision of land as necessary to ensure compliance with the covenants in this Agreement, and that the issuance of a permit or approval does not act as a representation or warranty by the Township that the covenants of this Agreement have been satisfied.
27. The Owner covenants and agrees that:

- (a) if the Township advises of a breach of this Agreement, as determined in its reasonable discretion, the Owner must promptly remedy that breach at its sole cost;
  - (b) if the Owner has not remedied the breach to the reasonable satisfaction of the Township within thirty (30) days of notice or other longer time period specified by the Township, the Township may, but is under no obligation to, remove or rectify the breach at the expense of the Owner without further notice; and
  - (c) any costs to the Township of such removal or rectification is a debt due from the Owner to the Township together with interest at a rate of 1% per annum in excess of the Prime Lending Rate of the Royal Bank of Canada in effect from time to time, and:
    - (i) the Owner shall pay such costs and interest to the Township forthwith upon demand; and
    - (ii) failing payment, the Township may add such costs to property taxes for the Lands.
28. No remedy under this Agreement is to be deemed exclusive but will, where possible, be cumulative with all other remedies at law or in equity. The Owner agrees that the Township is entitled to obtain an order for specific performance or a prohibitory or mandatory injunction in respect of any breach of this Agreement by the Owner.
29. The waiver by a party of any breach of this Agreement or failure on the part of the other party to perform in accordance with any of the terms or conditions of this Agreement is not to be construed as a waiver of any future or continuing failure, whether similar or dissimilar, and no waiver is effective unless it is written and signed by both parties.
30. If any part of this Agreement is held to be invalid, illegal or unenforceable by a court having the jurisdiction to do so, that part is to be considered to have been severed from the rest of this Agreement and the rest of this Agreement remains in force unaffected by that holding or by the severance of that part.
31. The Owner acknowledges having been directed to obtain independent legal advice prior to executing this Agreement, and the Owner agrees and acknowledges that it has read and fully understands all of the terms and conditions of this Agreement and its impact on the Lands.
32. Whenever the plural, singular, masculine or neuter is used herein, the same shall be construed as including the plural, singular, feminine, body corporate or politic unless the context requires otherwise.
33. Where there is a reference to an enactment of the Province of British Columbia in this Agreement, that reference shall include a reference to any subsequent enactment of the

Province of British Columbia of like effect, and unless the context otherwise requires, all statutes referred to herein are enactments of the Province of British Columbia.

34. This Agreement is to be construed in accordance with and governed by the laws applicable in the Province of British Columbia.

### Priority Agreements

35. THE TORONTO-DOMINION BANK ("**TD**"), the registered holder of charges by way of MORTGAGE and ASSIGNMENT OF RENTS against Lot 34, Lot 35, Lot 36, Lot 37, Lot 38, Lot 39, Lot 40, Lot 41 registered under No. CA7231637 and CA7231638 (collectively, the "**TD Charges**"), agrees with the Township, in consideration of the sum of Ten Dollars (\$10.00) paid by the Township to TD (receipt and sufficiency acknowledged), that the Agreement shall be an encumbrance upon the Lands in priority to the TD Charges in the same manner and to the same effect as if the Agreement had been dated and registered prior to the TD Charges.
36. ROYAL BANK OF CANADA (the "**RBC**"), the registered holder of charges by way of MORTGAGE and ASSIGNMENT OF RENTS against Lot 1, Lot 2 and Lot 3 registered under No. CA9921770 and CA9921771 (collectively, the "**RBC Charges**"), agrees with the Township, in consideration of the sum of Ten Dollars (\$10.00) paid by the Township to RBC (receipt and sufficiency acknowledged), that the Agreement shall be an encumbrance upon the Lands in priority to the RBC Charges in the same manner and to the same effect as if the Agreement had been dated and registered prior to the RBC Charges.
37. INTRACORP PROJECTS LTD., Inc. No. A0065414 (the "**Intracorp**"), the registered holder of charges by way of MORTGAGE against the Lands registered under No. CB1589863 (the "**Intracorp Charge**"), agrees with the Township, in consideration of the sum of Ten Dollars (\$10.00) paid by the Township to Intracorp (receipt and sufficiency acknowledged), that the Agreement shall be an encumbrance upon the Lands in priority to the Intracorp Charge in the same manner and to the same effect as if the Agreement had been dated and registered prior to the Intracorp Charge.

The Owner and Township acknowledge that this Agreement has been duly executed and delivered by the parties executing the Form C attached to, and forming part of, this Agreement.

**Schedule A**  
**Landscape Concept Plan**

## Schedule B

### Maintenance Standards for Owner

*(Subject to Revision by Township Director of Engineering and Public Works  
in accordance with Township policies and practices, as may be amended from time to time)*

1. Grounds
  - 1.1. Grounds are mowed and trimmed.
  - 1.2. Park is free of litter, debris, and hazards.
2. Plants
  - 2.1. Plants and lawns are healthy.
  - 2.2. Lawns are regularly mowed and trimmed.
  - 2.3. Plant beds are free of litter, debris, and weeds.
  - 2.4. Landscaping is to be maintained as per a maintenance plan approved by the Township
3. Irrigation
  - 3.1. Irrigation system is fully operational with complete uniform coverage.
  - 3.2. System is free of leaks.
  - 3.3. Heads are installed according to intended use.
  - 3.4. Heads are properly adjusted with rotations and arcs set to reduce water run off.
  - 3.5. Systems are set to run at specific times to minimized water evaporation and waste.
4. Walkways
  - 4.1. Walkways have a uniform surface and are level with the ground and free of trip hazards.
  - 4.2. Walkways are free of litter and debris.
  - 4.3. Walkways have unobstructed accessibility (free from low and protruding limbs, guide wires, etc.)
  - 4.4. Walkways are neatly edged.
  - 4.5. Walkways are clear of weeds and grass growth in cracks and expansion joints.
  - 4.6. Walkways are clear of snow and ice.
5. Benches
  - 5.1. Slats are smooth and structurally sound.
  - 5.2. Hardware is intact and structurally sound.
  - 5.3. Nails, bolts, or screws are flush with the surface.
  - 5.4. Seats and backing are smooth with no protrusions and have no exposed sharp edges or pointed corners.
6. Tables
  - 6.1. Tables are clean, free of rust, mildew, and graffiti.
  - 6.2. Table hardware is intact.
  - 6.3. Table frames are intact, and slats are properly secured.

6.4. Table seats and tops are smooth with no protrusions and have no exposed sharp edges or pointed corners.

7. Trash Receptacles

- 7.1. Receptacles are clean.
- 7.2. Wood receptacles are painted and free of damage or missing parts.
- 7.3. Hardware for wood receptacles is intact.
- 7.4. Concrete receptacles are intact and free of cracks or damage.
- 7.5. Area around trash receptacles is clean and free of trash and debris.

8. Washrooms

- 8.1. Washrooms are clean, sanitary, and properly stocked with paper products.
- 8.2. Lights and ventilation systems are operational.
- 8.3. Toilets, water faucets, stall doors, and hand air dryers are operational.
- 8.4. Washrooms are free of graffiti.
- 8.5. Restrooms have clean trash receptacles.
- 8.6. Restroom doors and locks are operational.

9. Drinking Fountains

- 9.1. Fountains are accessible and operational.

10. Play Structure

- 10.1. Play structure and surrounding play areas meet Canadian Playground Safety Institute standards.
- 10.2. Play equipment and hardware is intact.
- 10.3. Play equipment is free of graffiti.
- 10.4. Play equipment to be inspected by a qualified inspector annually.

11. Surfacing

- 11.1. Playground surface is clean, level, and free of litter and debris.
- 11.2. Playground surface meets Canadian Playground Safety Institute standards.
- 11.3. Playground surface is well drained.

12. Sport Court Surfacing

- 12.1. Surface is smooth, level, and well drained with no standing water.
- 12.2. Surface is free of large cracks, holes, and trip hazards.
- 12.3. Worn painted surfaces do not exceed 20% of total court surface.
- 12.4. Surface is free of litter, debris, gravel and graffiti.

13. Nets

- 13.1. Nets are free from tears and frays.
- 13.2. Nets are properly installed and secured to support poles.

13.3. Support poles have hardware intact, properly anchored, and installed.

14. Basketball Rims and Backboards

14.1. Rims and backboards are level with hardware intact.

14.2. Nylon nets are properly hung and are not torn or tattered.

14.3. Support poles are secure in the ground and straight.