

TERMS OF INSTRUMENT – PART 2

ENCROACHMENT EASEMENT

BETWEEN:

ARAGON ESQUIMALT TC PROPERTIES LTD.

#201 – 1628 West 1st Avenue

Vancouver, BC V6J 1G1

(the "Grantee" or "Aragon")

OF THE FIRST PART

AND:

CORPORATION OF THE TOWNSHIP OF ESQUIMALT

1229 Esquimalt Road

Esquimalt, BC V9A 3P1

(the "Grantor" or "Township")

OF THE SECOND PART

RECITALS:

- A. The Grantor owns a highway adjacent to the Dominant Tenement which is shown as road on Plan VIP2854 (the "Highway"), and includes sidewalks, boulevard, curb, gutter;
- B. The Grantee is the owner of lands legally described as:

PID 029-349-111
Lot 1 Section 11 Suburban Lot 40 Esquimalt District Plan EPP32782

(the "Dominant Tenement" or "Land");
- C. The Grantor has authority under section 35(11) of the Community Charter to grant a licence of occupation or easement or permit an encroachment in respect of the Highway;
- D. The Grantee has requested from the Grantor permission to non-exclusively encroach upon, use and occupy the portion of the Highway shown on Plan EPP84906, attached as Schedule "A", for the purpose of installing, operating, using and maintaining a water main (collectively the "Works"), as shown on the attached Schedule "B", consistent with and for the benefit of the Dominant Tenement;

- E. The encroachment is entirely underground and the Grantor considers that the any aboveground work undertaken in relation to the encroachment is a necessary restriction of the common law right of passage and has agreed to grant the Grantee this Encroachment Easement over a portion of the Highway subject to the provisions set forth
- F. The Grantee has requested the Township to grant permission to construct, use or continue the use or existence of an encroachment onto land owned or possessed by the Township (the "**Highway**") which encroachment is appurtenant to the Land, which request the Township has agreed to grant, subject to the provisions set forth.

NOW THIS AGREEMENT WITNESSES that in consideration of the financial consideration **ONE DOLLAR (\$1.00)**, premises, terms and conditions herein contained, the sufficiency and receipt of which is hereby acknowledged, the parties covenant and agree each with the other as follows:

1.0 ENCROACHMENT EASEMENT

- 1.1 The Grantor hereby grants to the Grantee, with respect to the portion of the Highway shown in heavy outline on the reference Plan EPP**84906** by **Ryan P. Hourston**, B.C.L.S., dated the **23rd** day of **July**, 2018, a copy of which is attached as Schedule "A" (the "**Encroachment**"), for the benefit of and appurtenant to the Dominant Tenement for the use and enjoyment of the Grantee, in common with the Grantor and all other persons now or hereafter having the express or implied permission of the Grantor, the full, free and non-exclusive permission to encroach upon, use and occupy the Encroachment for the purpose of installing, operating, using and maintaining the Works.
- 1.2 The Grantor agrees that the Encroachment is permitted to remain until such time as the buildings on the Dominant Tenement to which the Works relate are demolished, deconstructed or otherwise no longer exist, at which time the Agreement shall terminate and the Grantee shall restore the Encroachment and the Lands to a state similar to the adjacent Highway, and restore any sidewalks, curbs, gutters, road markings and other improvements therefor to the satisfaction of the Director of Engineering & Public Works.
- 1.3 The Grantee acknowledges and agrees that the Encroachment is over a highway and that the Grantor has limited power to authorize the private use of highways. The Grantee further acknowledges and agrees that any rights granted by the Grantor to the Grantee by this Agreement are not exclusive and are subject to the public's right to pass and repass. The Grantee will not close or otherwise prevent access to and use of the Encroachment as a public highway, and will only restrict access to the Encroachment insofar as necessary to install, operate, use and maintain its Works.

2.0 NO RELIEF

- 2.1 It is understood, covenanted and agreed by and between the parties hereto that no provision of these presents and no act or omission or finding of negligence, whether joint or several, as against the Township, in favour of any third party, shall operate to relieve, or be deemed to relieve, the Grantee in any manner whatsoever from any liability to the Township in the premises, or under these presents, or under the provisions of the *Community Charter*, the *Local Government Act*, or any bylaw of the Township and amendments thereto.

3.0 GRANTEE COVENANTS

- 3.1 The Grantee covenants and agrees:

Maintenance and Repair

- (a) at all times, and at the Grantee's own expense, to keep and maintain the Works in good and sufficient repair to the satisfaction of the Director of Engineering & Public Works;
- (b) to promptly attend at its own expense to any breakdown, maintenance, and repair of the Works to the satisfaction of the Director of Engineering & Public Works;
- (c) to be solely responsible for all costs associated therewith including those undertaken or assessed by the City of Victoria, the Township acknowledging that the Works pertain to water supplied by the City of Victoria and therefore the Grantee may arrange with, or the City of Victoria may otherwise of its own initiative maintain, repair or otherwise attend to the Works;

Non-interference

- (d) to carry out all work under this Agreement in a proper and workmanlike manner so as to do as little injury to the Highway as possible and to cause a minimum of obstruction and inconvenience to the Highway during any construction, maintenance and repair;
- (e) to not excavate on or under the Highway or construct, install, remove, repair, replace, maintain, amend, expand, add to or change the use of the Works without the prior written consent of the Director of Engineering & Public Works. For certainty, before commencement of any of the aforementioned actions, the Grantee shall obtain all permits and licenses necessary therefor under the bylaws of the Township, and the Grantee shall pay any inspection, license or permit fees in respect thereof;
- (f) to use the Encroachment in such a manner as not to interfere with any existing utilities located in the Highway;

- (g) to place and maintain such warning signs, barricades, lights or flares at or near the site of the works in progress as will give reasonable warning and protection to members of the public, and otherwise carry out any and all instructions, either oral or written, given to the Grantee, its agents, employees or contractors, by the Grantor with respect to the safety and protection and the continued and uninterrupted use by the Grantor and the public, subject to the rights hereby granted, of the Highway and the Encroachment;

Disturbance and Restoration

- (h) to make good at its own expense all damage or disturbance caused by the exercise of its rights pursuant to this Agreement, which may include damage or disturbance caused to the surface or support of the Highway, the Encroachment or any other services associated with the Highway or Works;
- (i) to, in the event of the expiry or termination of this Agreement from any cause whatsoever, at Grantee's own expense, and within a period of one month from the date of such termination, or such further or shorter period as may be specified by the Director of Engineering & Public Works, remove the Works and fill up any excavation made, constructed or maintained, with respect to such encroachment, and replace and put the sidewalk, street, lane or other public place in, under or over such area in the same condition as the adjoining sidewalk, street, lane or other public place to the satisfaction of the Director of Engineering & Public Works;

Fee

- (j) to pay to the Township the fee of **Ten Dollars (\$10.00)** upon execution of this Agreement, which the parties agree represents the fair market value of this Encroachment Easement;

Release and Indemnity

- (k) to indemnify and save harmless the Township from any and all liability whatsoever arising out of:
 - (i) the Works encroaching upon, under or over the Encroachment and Highway,
 - (ii) the Grantee's construction of anything upon, under or over the Encroachment and Highway,
 - (iii) the Grantee's maintenance of anything upon, under or over the Encroachment and Highway,
 - (iv) the Grantee's occupation or use of the Encroachment or the ground below or the air above for the purpose of such encroachment by the Works;

- (l) to release and forever discharge the Grantor 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 Grantee can or may have against the Grantor for any loss, damage, deprivation, enrichment or injury, including economic loss, arising out of or connected with the Grantee's installation, use, operation, maintenance and repair of the Works;
- (m) to charge its interest in the Land in favour of the Township for the payment of all sums which may at any time hereafter be payable to the Township in respect of any claims, loss, damage or expense of whatsoever kind arising:
 - (i) from the construction, maintenance or existence of the Works,
 - (ii) from the permission hereby granted.

Insurance

- (n) if requested to do so by the Director of Engineering & Public Works, to deposit with the Township a policy of public liability insurance in the form and amount acceptable to the Director of Engineering & Public Works insuring both the Grantee and the Township against any loss resulting from the occurrences mentioned in section (b) above. Cancellations of such insurance will serve to immediately cancel this Agreement and any right the Grantee derives hereunder

Entry

- (o) that the Township's servants or agents shall have the right at any and all reasonable times of entering into and upon the Land for the purpose of constructing, maintaining, inspecting or removing any public structure, service or utility running underneath the Highway in the vicinity of the said Works;

Municipal Works

- (p) to, in the event of any alteration or change being necessary by the construction, maintenance, use or removal of the Works to any meter, water service, sewer or other public works or utility in the vicinity of the Land, reimburse the Township for whatever costs may be incurred by the Township in making such alterations or changes as may be deemed necessary by the Director of Engineering & Public Works; and

Default

- (q) at all times to observe and perform the provisions of the bylaws of the Township, and this Agreement shall at all times be subject thereto and in case the Grantee shall fail to comply with the provisions of the said bylaws, or any of them or of this Agreement, all rights of the Grantee hereunder shall

thereupon terminate and be at an end; but the Township, nevertheless, shall be entitled to proceed with the enforcement of any security or indemnity herein provided, or upon any bond or otherwise in satisfaction of any claim, loss or expense of whatsoever arising under this Agreement, or from the permission hereby granted.

3.2 Should the Grantee:

- (a) fail to keep the Works or covering thereof in good and sufficient repair, to the satisfaction of the Director of Engineering & Public Works,
- (b) fail to remove the Works or to fill up any excavation or fail to return the Encroachment to the satisfaction of the Director of Engineering & Public Works upon the expiry or termination of this Agreement, r
- (c) fail to otherwise abide by any condition of this Agreement,

the Director of Engineering & Public Works, upon fifteen (15) days written notification of such failure (except in the case of emergency when no notice is required) and provided that the Grantee has not resolved the failure within that period of time, may:

- (i) make such repairs, including structural changes, when the Director has deemed necessary, or
- (ii) remove the Works, or fill up such excavation,
- (iii) do any work necessary to fulfill any condition of this Agreement, or
- (iv) permit the Grantee to continue such rectification, repairs or work that the Grantee has commenced and is diligently continuing,

as the case may require, in the sole discretion of the Director of Engineering & Public Works.

3.3 The Grantee shall pay the costs of such work done under this Part forthwith to the Township; and in the default of payment, the amount of such cost and interest at twelve percent per annum may be recovered in any court of competent jurisdiction, or the same may be recovered in like manner as overdue taxes against the Dominant Tenement.

4.0 NO RESTRICTIONS OR REQUIREMENTS ON GRANTOR/ TOWNSHIP

4.1 This Agreement shall not in any way operate to restrict the right of the Township at any time to:

- (a) alter the road, curb, gutter, sidewalk or boulevard abutting or adjoining the Land, and notwithstanding that the effect of such alteration in width or

elevation may be to render the Works useless or of less value for the purposes of the Grantee;

- (b) construct any form of structure or utility on, over or under any portion of the Highway in which the Works encroach and for such purpose require that the Works be removed in part or in whole;
- (c) temporarily block off access to the Works and Encroachment as needed in its sole discretion when conducting Highway maintenance or making Highway improvements; and
- (c) permit other encroachments or use of the Encroachment and Highway.

4.2 The Grantee covenants that, in the event of the Township taking any action under this Part, the Grantee will release and forever discharge, and hereby releases and forever discharges, the Grantor from all manner of claims of any nature whatsoever, which may arise by reason of such action.

4.3 Nothing contained or implied in this Agreement:

- (a) prejudices or affects the rights, powers or discretion of the Grantor or the Approving Officer 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 Grantee;
- (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 Grantor or the Approving Officer with respect to its exercise of any right or remedy expressly provided in this Agreement or at law or in equity.

4.4 The Grantor 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 the issuance of a permit or approval does not act as a representation or warranty by the Grantor that the covenants of this Agreement have been satisfied.

4.5 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. Damages will be an inadequate remedy for the Grantor; and the Grantor is entitled to an order for specific performance or a prohibitory or mandatory injunction in order to compel performance of the obligations of this Agreement.

- 4.6 The Grantor, by waiving or neglecting to enforce its rights under this Agreement, including upon breach of this Agreement, does not waive its rights upon any subsequent breach of the same or any other provision of this Agreement.

5.0 SUBDIVISION & ASSIGNMENT

- 5.1 The restrictions and requirements in this Agreement are covenants running with the Land and shall bind the Dominant Tenement and shall attach thereto and run with each and every part into which the same may be subdivided or consolidated.

- 5.2 If the Dominant Tenement is subdivided at any time either under the provisions of the *Land Title Act* or the *Strata Property Act*, and amendments thereto and re-enactments thereof, on the deposit of a plan of subdivision, the benefit of each of the easements and covenants herein granted shall continue and shall be annexed to and run with each of the new subdivided parcels so created and be registered and shown as charges on each resulting title. On the deposit of a strata plan, subject to this Part, the burden and the benefit of each of the easements and covenants herein granted shall continue and shall be annexed to and run with each of the strata lots so created and be registered and shown as charges on each resulting title (and shall be noted on the common property sheet).

- 5.3 Subdivision by Strata Plan. Upon subdivision of the Dominant Tenement by a strata plan:

- (a) the benefit and burden of the easements herein granted and the other covenants and agreements herein shall be accepted on behalf of the owners of the strata lots by the Strata Corporation and shall be administered, enforced, modified, or released by the strata corporation only. For greater certainty, the Strata Corporation shall, subject to the provisions of the *Strata Property Act*:
 - (i) perform and observe the Grantee's covenants herein at the expense of the strata lot owners;
 - (ii) enter into an assumption agreement with the Grantor in a form satisfactory to the Grantor, acting reasonably, causing the applicable newly created strata corporation to assume all of the then ongoing obligations of the Grantee hereunder;
 - (iii) endeavour to pass bylaws and include in the annual budgets of the Strata Corporation provisions reflecting the obligations of the Grantee hereunder; and
 - (iv) be entitled to give all permissions and consents permitted to be given by the Grantee;
- (b) the personal liability of each strata lot owner for the performance and observance of the covenants and obligations herein of the Grantee shall be

in proportion to the unit entitlement of his, her or its strata lot as established by the strata plan; and

- (c) subject to the *Strata Property Act*, no strata lot owner shall attempt to enforce or in any way interfere with the administration by the Strata Corporation of the easements and other provisions of this Agreement.

5.4 In the event of a subdivision of the Dominant Tenement, other than by way of strata plan, the Grantee and the Grantor shall, upon receipt of a written request from the Grantor or Grantee, surrender and discharge this Agreement by executing a discharge in registerable form, from title to all those parcels which are not intended by the Grantor or Grantee to have the benefit of the Encroachment.

5.5 The Grantee covenants and agrees not to transfer the Dominant Tenement, or any portion thereof, without advising the purchaser or transferee of this Agreement and without providing to the Grantor evidence that the purchaser or transferee agrees to take on the benefits and be bound by the obligations of this Agreement. The parties agree that this provision shall not apply to subdivision of the Dominant Tenement under the *Strata Property Act*, and related transfers, except with respect to the Strata Corporation.

6.0 INTERPRETATION

6.1 Time shall be of the essence of this Agreement

6.2 When the singular or neuter is used in this Agreement they include the plural or the feminine or the masculine or the body politic where the context or the parties require.

6.3 The headings to the clauses in this Agreement have been inserted as a matter of convenience and for reference only and in no way define, limit or enlarge the scope or meaning of this Agreement or any provision of it.

6.4 This Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, successors, administrators and permitted assignees.

6.5 No part of the title in fee-simple to the soil shall pass to or be vested in the Grantee under or by virtue of these presents, and the Grantor may fully use and enjoy all the Highway, subject only to the rights and restrictions herein contained

6.6 This Agreement shall be construed in accordance with and governed by the laws applicable in the Province of British Columbia.

6.7 All provisions of this Agreement are to be construed as covenants and agreements as though the word importing covenants and agreements were used in each separate paragraph.

- 6.8 This Agreement is the entire agreement between the parties and the Grantor has made no representations, warranties, guarantees, promises, covenants or agreements (oral or otherwise) to or with the Grantee other than those expressed in this Agreement.
- 6.9 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.
- 6.10 The Grantee acknowledges having received legal advice prior to executing this Agreement, and the Grantee agrees that it fully and completely understands this Agreement and its impact on the Lands and the Dominant Tenement.

IN WITNESS WHEREOF the parties acknowledge that this Agreement has been duly executed and delivered by the parties executing Form C (pages 1 and 2) attached hereto.

Authorized by Council resolution on the _____ day of _____, 2018

SCHEDULE A
PLAN EPP84906

SCHEDULE B WORKS

A water main servicing the Dominant Tenement as defined in the attached Encroachment Easement.