

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 a maximum of Three Hundred and Thirty-Five (335) residential rental dwelling units (the "**Dwelling Units**"), including at least twenty-three three-bedroom dwelling units, a minimum of 240 m<sup>2</sup> of commercial space on the ground floor, and a minimum of 242 off-street parking spaces including an indoor parking garage (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 219 Covenant to the Township, and the Township has accepted this covenant and required its registration as a condition of the Amendment Bylaw (the "**Agreement**").
- D. 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*.

1. The Owner and Township agree that this Agreement shall be interpreted in accordance with the definitions in the Township's Zoning Bylaw, as amended from time to time.

#### **Restrictions and Requirements – Consolidation, Linking and No Further Subdivision**

2. Notwithstanding broader or greater uses, density or other regulations in the Zoning Bylaw, the Owner covenants and agrees the Lands must not be subdivided (including

under the *Strata Property Act*), built upon, altered, or used for any use (other than continuation of the uses lawful at the time of this agreement), until the Owner has, at its sole cost and without expectation of compensation from the Township, consolidated the Eleven (11) parcels that comprise the Lands as one (the “**Consolidation**”).

3. The Owner further covenants and agrees that the Eleven (11) parcels that comprise the Lands must not be sold or otherwise transferred separately.
4. The Owner covenants and agrees that, following Consolidation, the Lands, or any building constructed on the Lands, must not be further subdivided (including under the *Strata Property Act*) and, for greater certainty, the building, and dwelling units, it constructs upon the Lands must not be subdivided or stratified or otherwise divided into separate ownership.

### **Restrictions and Requirements – Twenty-Three 3-Bedroom Units**

5. The Owner covenants and agrees that the Lands must not be built upon, used or continue to be used unless the Development has been designed and constructed to include, and continues to include, a minimum of Twenty-Three (23) 3-bedroom Dwelling Units.

### **Restrictions and Requirements – Residential Rental Use**

6. The Owner covenants and agrees that the Development will contain residential dwelling units, which must not be restricted as to their availability for rent by non-owners, that must be used for the purpose of providing rental housing to individuals.

### **Restrictions and Requirements - Commercial Space**

7. The Owner covenants and agrees that the Lands must not be built upon, used for any use (other than continuation of the uses lawful and lawfully established at the time of this Agreement), or subdivided (including under the *Strata Property Act*) unless the Development has been designed and constructed to include, and continues to include, a minimum 240 square metres (2,583 ft<sup>2</sup>) of floor area dedicated to commercial uses (permitted by zoning).

### **Restrictions and Requirements – Car Share Services & One (1) Car Share Vehicle**

8. The Owner covenants and agrees:
  - (a) in this section the following terms have the following meanings:
    - (i) “**Shared Vehicle Service Agreement**” means the agreement between the Owner and the Shared Vehicle Organization which sets out the terms by which the Shared Vehicle Organization will provide a Shared Vehicle Service to the owners in the Development;

- (ii) **"Shared Vehicle Organization"** means an entity whose principal business objective is to provide its members with a Shared Vehicle Service;
  - (iii) **"Shared Vehicle Service"** means the provision, for a fee, of a car-sharing service by which such members have self-serve access to a fleet of shared vehicles which they may reserve for use on an hourly or other basis;
- (b) at its expense, to enter into and maintain a Shared Vehicle Service Agreement with a Shared Vehicle Organization for the provision of a Shared Vehicle Service to each residential household in the Development;
- (c) the Owner further covenants and agrees to pay or cover the cost of memberships (each a **"Membership"**) with the Shared Vehicle Organization, in accordance with the following:
- (i) only residents of the Dwelling Units will be entitled to a Membership, with a maximum of one Membership available to each Dwelling Unit;
  - (ii) the Owner will be required to pay or cover the cost of up to Three Hundred and Thirty-Five (335) Memberships, for the life of the Development;
  - (iii) to provide a Membership to those occupants who desire to be part of the Shared Vehicle Organization within 30 days of the occupant entering into a residential tenancy agreement with the Owner, it being acknowledged by the parties that not every occupant of a Dwelling Unit in the Development may desire to be part of a Shared Vehicle Organization;
  - (iv) the Membership may be in the form of:
    1. an actual Membership with the Shared Vehicle Organization entered into by the Owner and assigned to the occupant; or
    2. a reimbursement equal to the cost of a Membership paid to the occupant by the Owner upon the Owner receiving evidence that the occupant has paid the cost of the Membership directly and has received the Membership directly from the Shared Vehicle Organization.
9. The Owner covenants and agrees to obtain the written approval of the Township's Director of Development Services, for:
- (a) any change in the Shared Vehicle Organization, and
  - (b) any Shared Vehicle Service agreement made between the Owner and any Shared Vehicle Organization.
10. The Owner covenants and agrees to provide one (1) four (or more)-seat, four-wheel

automobile, van or pickup truck passenger vehicle (the “**Car Share Vehicle**”) for use by the occupants of residential units within the Development in accordance with the following:

- (a) The Car Share Vehicle will be provided by the Owner in addition to any vehicles which may be available through the Shared Vehicle Service;
- (b) The Owner will, at its cost, cause the Car Share Vehicle to be maintained and insured in the manner a prudent owner of such a vehicle would; and
- (c) The Owner will be permitted to place conditions on access and use of the Car Share Vehicle in order to provide for the safe, efficient, legal and equitable use of the Car Share Vehicle by the occupants of the Development including without limitation in respect of:
  - (i) duration of use, hours of availability, and frequency of use;
  - (ii) ensuring operators have and maintain a valid British Columbia driver license; and
  - (iii) any other matters relating to the safety of operators and their passengers and compliance with applicable laws by operators and their passengers.

### **Restrictions and Requirements – Cash Contribution for Intersection Improvements**

- 11. 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 and until the Owner has provided to the Township, concurrent with the Owner’s application for a building permit for the Lands and prior to issuance of a building permit for the Lands and in a form and manner directed by the Township in accordance with all relevant Township procedures and policies, and without expectation of compensation or recuperation of such contribution, irrespective of whether the Development proceeds:
  - (a) a cash contribution of Two Hundred and Fifty Thousand Dollars (\$250,000.00) to be used by the Township towards construction of new traffic signals at the intersection of Esquimalt Road and Nelson Street.

### **Indemnity and Release**

- 12. 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.

13. 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.
14. 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.
15. The releases and indemnities of this Agreement shall survive its termination.

### **Registration**

16. 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.
17. 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.
18. The Owner agrees to execute all other documents and provide all other assurances necessary to give effect to the covenants contained in this Agreement.
19. 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**

20. 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.

21. 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.
22. 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.
23. 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.
24. 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.
25. 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.
26. 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.

- 27. 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.
- 28. 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.
- 29. 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.
- 30. 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.
- 31. 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.
- 32. 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.



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

### Priority Agreements

34. 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.
35. 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.
36. 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.