

TERMS OF INSTRUMENT - PART 2

RECITALS:

- A. The Transferor ("**Owner**") is the registered owner in fee-simple of those lands more particularly described in Item #2 of Form C, in the municipality of the Township of Esquimalt in the Province of British Columbia (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 from C-5A [Tourist Commercial] to CD No.102 [Comprehensive Development District No. 102] further to ZONING BYLAW, 1992, NO. 2050, AMENDMENT BYLAW NO. 2893 ("**Rezoning Bylaw**"), and acknowledges that it is in the public interest that the use of Lands be restricted and a right of way be secured for future public trail along the waterfront, including in accordance with Official Community Plan policies. The CD-102 Zone includes density bonusing provisions under LGA s.482 which permits higher density of development in exchange for amenities including restrictions on subdivision and a public trail, as follows:

(2) S.219 Covenant: The owner shall grant a Covenant under Section 219 of the *Land Title Act* with the Township for the purposes of:

- maximizing Dwelling Units for use as individual residential accommodations, including by prohibiting subdivision, including building stratification, and prohibiting institutional uses, releasing and indemnifying the Township; and
- restricting use, building, development and re-construction within 20m of The Gorge Waterway to passive recreation uses and the potential future public trail (noted below), as consistent with the Official Community Plan, while respecting the reasonable lifespan of current non-conforming Two-Family Dwellings.

(3) Statutory Right of Way: The owner shall grant a perpetual Statutory Right of Way under Section 218 of the *Land Title Act* over that part of the parcel located within 20 metres of the High Water Mark of The Gorge Waterway for future trail corridor and development, for public use at all times of day and night, the final trail design to be subject to the owner's approval, not to be unreasonably withheld.

- D. The Owner has further volunteered and wishes to grant this covenant and statutory right of way over the Lands to the Township, in satisfaction of the above and in furtherance of the public interest and safety for the proposed redevelopment, and the Township has accepted this covenant and statutory right of way (collectively, the "**Agreement**").
- E. Section 218 of the *Land Title Act* ("**LTA**") 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 Section 219 provides that a covenant, whether of negative or positive nature, 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 except in accordance with the covenant;
- that land is not to be used or built on;
- that land or specified amenities be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state;

may be granted in favour of the Township and may be registered as a charge against the title to that land.

- F. This Statutory Right of Way is necessary for the operation and maintenance of the Township's undertaking for public trails facilitating public access and movement.

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 Sections 218 and 219 of the LTA:

PART I - Grant of Statutory Right of Way under LTA s. 218:

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, a Statutory Right of Way, including:
 - (a) right, license, liberty, privilege, permission and right of way to lay down, install, construct, operate, maintain, inspect, alter, remove, replace, and repair a public walkway on, over, under and within those portions of the Lands as shown outlined in bold and identified as Area “___” on Statutory Right of Way Plan _____ attached as Schedule “A” (the “**SRW Area**”), for the purpose of a Public Trail (the “**Public Trail**”), including all associated services, including but not limited to structures, improvements, furniture, walkways, hard and soft landscaping (including but not limited to lawns, trees, shrubs, bushes, flowers and other flora), 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

SRW Area, 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

- (b) grants, conveys, confirms and transfers to the Transferee, for and on behalf of and for the benefit, use and enjoyment of all members of the public, the full, free and uninterrupted right, license, liberty, privilege, permission and right of way at all times of day or night, to enter, use, go, pass, return, pass over, and across the Public Trail, by foot and non-motorized vehicles or with motorized wheelchairs or electric scooters for persons with limited mobility.
2. The Owner covenants and agrees, in connection therewith, that the Township shall:
- (a) for itself and its servants, agents, workers, contractors and all other licensees of the Transferee,
 - (b) together with machinery, vehicles, equipment and materials,
 - (c) upon, over, under and across the Right of Way,
 - (d) as may be necessary for the purposes in Section 1, and
 - (e) only in connection with the operations of the Transferee in relation to the Public Trail or Related Works and Services,

be entitled at all times during daylight hours, to enter, use, pass and repass, labour, construct, erect, install, dig, carry away soil or other surface or subsurface materials, clear of all trees, stumps, growth, or obstructions now or hereafter in existence.

3. The Township covenants and agrees with the Owner that the Township will:
- (a) as far as reasonably necessary, carry out the repair, maintenance, cleaning, clearing, protecting, replacing and operating of the Public Trail and the Related Works and Services in the SRW Area in a proper and workmanlike manner;
 - (b) consult with the Owner regarding the design and construction of the Public Trail, with final design subject to the written approval of the Owner acting reasonably, the parties however agreeing that this provision cannot be used to prevent the establishment of the Public Trail or to require the Township to establish a trail of a standard inconsistent with Township bylaws and policies for comparable locations; and
 - (c) not establish the Public Trail within three (3) metres of the foundation(s) of any of the five (5) two family dwellings existing at the time of registration of

this Agreement, unless there is no reasonable alternative routing within the SRW Area;

- (d) not invite the public to use the SRW Area until a Public Trail has been established.
4. 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 herein contained.

PART II - Owner Covenants under LTA s.219 regarding SRW Area:

5. The Owner covenants and agrees with the Township that, with respect to the SRW Area, the Owner:
- (a) will not, and will not permit any other person, to erect, place, install or maintain any building, structure, addition to a building or structure, mobile home, patio, pipe, wire or other conduit on, over or under any portion of the SRW Area, other than the five (5) two family dwellings existing at the time of registration of this Agreement, without the express written consent of the Township;
 - (b) will not do or permit to be done any act or thing which will interfere with or injure the Public Trail or the Related Works and Services and in particular will not carry out any blasting on or adjacent to the SRW Area, without the express written consent of the Township, the parties acknowledging that consent shall not be unreasonably withheld;
 - (c) will allow the Township, its officials, employees, contractors, subcontractors, agents, licensees, invitees, permittees and the public generally to enter upon the SRW Area as provided in Part 1, 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;
 - (d) 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; and
 - (e) will permit the Township to peaceably hold and enjoy the rights granted by this Agreement.
6. The Owner further covenants and agrees that, should any of the 5 two family dwellings continue to exist at the time the Public Trail is established, the Owner will remove, or permit the Township to remove, any portions of exterior deck(s) or related structures as and if necessary for the Township to establish a minimum

Public Trail width of three (3) metres. The parties acknowledge and agree that this provision cannot require the removal of any fully enclosed portion of the building itself, and this provision does not prevent the Public Trail being more or less than three (3) metres wide.

PART III - Owner Covenants under LTA s.219 regarding Lands:

7. The Owner covenants and agrees the Lands:
 - (a) must not be subdivided (including under the *Strata Property Act*);
 - (b) must not be built upon, or used, for institutional uses; and
 - (c) must be built upon and used in a manner to maximize residential uses for Dwelling Units (provided not inconsistent with zoning).
8. The Owner covenants and agrees that it will trim or, if necessary, cut down any tree or other growth on the Lands that, in the opinion of the Township, constitutes or may constitute a danger or obstruction to those using the Public Trail.
9. The Owner covenants and agrees to not use, or permit the Lands to be used for, residential Dwellings Units until it has, at its sole cost, installed one fire hydrant and related piping and appurtenances, to be located adjacent to the Craigflower Road frontage of the Lands, all as reasonably satisfactory to the Township's Fire Chief.

PART IV – Release and Indemnity for Covenants:

10. The Owner covenants and agrees to indemnify and save harmless the Township 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 or the use of the Lands contemplated under this Agreement.
11. The Owner releases and forever discharges the Township 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 its successors and assigns 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 or the use of the Lands contemplated under this Agreement.

PART V - General Provisions:

12. Nothing in this Agreement implies that the Township has any obligation to the Owner or to any person to exercise any of its rights under this Agreement and the Township may, at its sole option, execute a release of this Agreement at any time without liability to any person for doing so.
13. The Owner further covenants and agrees that Township, and any of its officers or employees, may but is not obligated to inspect the SRW Area for the purpose of ascertaining compliance with this Agreement.
14. No default by the Township with respect to this Agreement and no act or failure to act by the Township in connection with this Agreement will result or be deemed to result in the interruption, suspension, or termination of the Agreement, and the Owner will refrain from seeking any judgment, order, declaration, or injunction to that effect.
15. 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.
16. 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.
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.
18. The Owner, as a personal covenant between the parties, agrees to pay the legal fees and land title office costs of the Township in connection with the preparation and registration of this Agreement.
19. 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.
20. 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.
- 21. 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 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.
- 22. 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 fifteen (15) 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 3% 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 Owner may add such costs to property taxes for the Lands.
- 23. 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 Township; and the Township is entitled to an order for specific performance or a prohibitory or mandatory injunction in order to compel performance of the obligations in this Agreement.
- 24. 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.
- 25. 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.

26. The Owner acknowledges having received legal advice prior to executing this Agreement, and the Owner agrees that it fully and completely understands this Agreement and its impact on the Lands.
27. This Agreement is to be construed in accordance with and governed by the laws applicable in the Province of British Columbia.

Priority Agreement

28. **PEOPLES TRUST COMPANY INCORPORATION NO. A0033943** (the "Chargeholder") is the registered holder of a charge by way of MORTGAGE and ASSIGNMENT OF RENTS against each of parcels that comprise the Lands, registered under No. CA5690068 and CA5690069 respectively (the "**Charges**"), agrees with the Township, in consideration of the sum of Ten Dollars (\$10.00) paid by the Township to the Chargeholder (receipt and sufficiency acknowledged), that the Agreement shall be an encumbrance upon the Lands in priority to the Charges in the same manner and to the same effect as if the Agreement had been dated and registered prior to the Charges.

The parties acknowledge that this Agreement has been duly executed and delivered by the parties executing Forms C and D (pages 1 and 2) attached.

[PRIORITY PARAGRAPHS TO BE ADDED UPON FURTHER REVIEW OF CHARGES REGISTERED AGAINST THE LANDS]

SCHEDULE A
SRW Area (within 20m HWM) Plan _____

DRAFT