

SCHEDULE "EE": BOARDWALK ALTERNATIVE COVENANT

[attach *Land Title Act* Form C General Filing Instrument – Part 1]

TERMS OF INSTRUMENT - PART 2

THIS AGREEMENT is dated for reference the ____ day of _____, ____.

BETWEEN:

1042719 B.C. LTD., INC. NO. BC1042719

305-1788 West 5th Avenue
Vancouver, BC V6J 1P2

(the "Owner")

AND:

REGIONAL DISTRICT OF NANAIMO

6300 Hammond Bay Road
Nanaimo, BC V9T 6N2

(the "Regional District")

WHEREAS:

- A. The Owner is the registered owner of those lands and premises situated, lying and being in the Regional District of Nanaimo, in the Province of British Columbia, described as:

PID: 028-022-998

Lot 1, District Lot 78, Nanoose District and District Lots 2085, 2086, 2087, 2088 and 2089, Nanaimo District, Plan VIP87121;

PID: 001-760-068

Lot 1, District Lot 78, Nanoose District, Plan 28544; and
PID: 028-023-391

Lot 1, District Lot 2090, Nanaimo District and District Lot 78, Nanoose District, Plan VIP87122

(the “**Lands**”);

- B. Section 219 of the *Land Title Act*, R.S.B.C. 1996, c. 250 and amendments thereto (the “**Land Title Act**”), state that a covenant in favour of a municipality or regional district may be registered as a charge against the title to land and is enforceable against the covenantor and its successors in title even if the covenant is not annexed to land owned by the municipality or regional district;
- C. The predecessor in title to the Owner of the Lands entered into a Phased Development Agreement for the Lands, dated the 23rd of July, 2014 (the “**PDA**”), and the PDA contemplated the demolition of the existing building on the Lands and the construction of a public walkway along the waterfront on the Lands to be secured by a grant of a statutory right of way in favour of the Regional District;
- D. The Owner wishes to develop the Lands by way of the renovation and strata subdivision of the existing building on the Lands, which would eliminate the area on the Lands contemplated under the PDA for a public walkway to be secured by a statutory right of way (the “Public Walkway Right of Way”), and has requested an amendment to the PDA to replace the Owner’s obligation to construct a public walkway along the waterfront on the Lands with a public walkway along and over floats in the water, located on land described as District Lot 2084, Nanaimo District held under lease No. 10902, from the Province of British Columbia, having a term of 30 years from November 9, 2000, and District Lot 105, Nanaimo District, owned by Her Majesty the Queen in Right of Canada;
- E. The Regional District does not consider a floating walkway constructed and operated under a licence agreement to provide security of tenure equivalent to the Public Walkway Right of Way over the Lands, but has agreed to permit the Owner to substitute the floating public walkway over the water lots adjacent to the Lands for the Public Walkway Right of Way on the terms and conditions contained in this Agreement that:
 - (a) restrict the construction of a building or buildings to be constructed on or to be erected on the Lands;
 - (b) provide that the Lands are not to be used, built on or subdivided except in accordance with this Agreement; and
 - (c) obligate the Owner to construct an alternative amenity or pay an amenity contribution to the Regional District in the event the Water Lot Rights (as defined herein) or any one of them is terminated or expires.

NOW, THEREFORE, pursuant to Section 219 of the *Land Title Act* and in consideration of \$1.00 now paid by the Regional District to the Owner, the receipt and sufficiency of which is hereby acknowledged, and of the premises herein contained, the parties covenant and agree as follows:

1. **Definitions.**

1.1 In this Agreement:

“**Water Lots**” means land described as District Lot 2084, Nanaimo District, held under Lease No. 109021, and land described as District Lot 105, Nanaimo District.

“**Water Lot Rights**” means the Owner’s lease of District Lot 2084, Nanaimo District, as it may be extended or renewed, and any other right or interest secured by the Owner or otherwise necessary to permit the location of the Waterfront Pathway/Boardwalk on the Water Lots and the ongoing free public pedestrian access to and use of the Waterfront Pathway/Boardwalk on the Water Lots.

“**Waterfront Pathway/Boardwalk**” means a public pedestrian path to be provided by the Owner under and in accordance with the PDA and this Agreement;

2. **Owner’s Covenants.**

2.1 The Owner covenants and agrees with the Regional District that, except as may be consented to by the Regional District in writing:

- a. it shall use and develop the Lands only in accordance with this Agreement;
- b. it shall use the Lands only in a manner that permits ongoing free public pedestrian access to and along the floating structures located on the Water Lots and without limiting the generality of the foregoing, the Owner covenants and agrees that it shall not construct any building, structure, barrier or gate that prevents, impedes or obstructs public access from and across the Lands to the Waterfront Pathway/Boardwalk on the Water Lots; and
- c. if at any time the Water Lot Rights or any one of them is terminated or expires, and if such termination or expiry brings and end to the public right of access to and along the entirety of the Waterfront Pathway/Boardwalk located in the Water Lots and the Owner is not able to provide public pedestrian access to and along the entirety of the Waterfront Pathway/Boardwalk located on the Water Lots, then it shall do one of the following:
 - (i) construct on the Lands at the Owner’s expense, and in a manner and location satisfactory to the Regional District, acting reasonably, a Waterfront Pathway/Boardwalk or similar public pathway of a value and utility equivalent to the Public Walkway Right of Way; or
 - (ii) pay to the Regional District a sum of money (the “**Amenity Payment**”) equal to 125 percent of the estimated cost (as of the date of such termination or expiry,

and as determined by the Regional District, acting reasonably) of construction of a Waterfront Pathway/Boardwalk on the Lands.

2.2 If the Owner fails to satisfy either paragraph 2.1c(i) or 2.1c(ii) within six (6) months following the date of termination or expiry of the Water Lot Rights as contemplated in paragraph 2.1c (the “**Grace Period**”), then, upon expiry of the Grace Period the Lands shall not be subdivided, built on, or used for marina-associated parking, accessory marina sales or marina-related office use, until such time as the Owner has satisfied either paragraph 2.1c(i) or 2.1c(ii).

2.3 The Amenity Payment, once paid to the Regional District, shall be used by the Regional District for the purpose of providing a public amenity within the general vicinity of the Lands of comparable benefit to the Waterfront Pathway/Boardwalk. The nature and exact location of such public amenity shall be within the sole discretion of the Regional District.

3. **Indemnity.**

4.1 The Owner hereby agrees to indemnify and save harmless the Regional District, and its elected and appointed officials, officers, employees, and agents from and against any loss, damage, debts, claims, liabilities, obligations, costs or causes of action which the Regional District and its elected and appointed officials, officers, employees and agents, or any of them, may suffer, incur, or be put, arising, whether directly or indirectly, out of a breach of any covenant or condition of this Agreement by the Owner or its directors, officers, employees, or agents, or any other person for whom it is legally responsible.

4. **Other.**

5.1 It is further understood and agreed between the parties hereto that:

- a. Covenants run with the Lands: The covenants contained in this Agreement charge the Lands pursuant to Section 219 of the *Land Title Act* and are covenants the burden of which run with the Lands. It is expressly agreed that the benefit of all covenants made by the Owner in this Agreement will accrue solely to the Regional District and this Agreement may only be modified or discharged by agreement of the Regional District, pursuant to the provisions of Section 219(9) of the *Land Title Act*;
- b. Liability During Currency of Ownership: Notwithstanding anything contained in this Agreement, the Owner will not be liable under any of the covenants contained in this Agreement where such liability arises after the Owner ceases to have any further interest in the Lands;
- c. Subdivision of Lands: This Agreement burdens and charges any parcel into which the Lands are subdivided by any means and upon which any portion of the Covenant Area is located;
- d. Notice: Whenever it is required or desired that either party shall deliver or serve a notice on the other, delivery or service shall be deemed to be satisfactory if, and deemed to have occurred when:

- (i) the Owner or the Corporate Officer of the Regional District has been served personally, on the date of service; or
 - (ii) mailed by prepaid registered mail, on the date received or on the sixth day after receipt of mailing by any Canada post office, whichever is earlier (except that in the event of interruption of mail service, notice shall be deemed to be delivered only when actually received by the party to whom it is addressed), so long as the notice is mailed to the party at the most recent address shown on title to lands in the records of the Lower Mainland Land Title Office for the party, or to whatever address the parties may from time to time advise in writing;
- e. No Derogation of Power: Nothing contained or implied herein will prejudice or affect the rights and powers of the Regional District in the exercise of its functions under any public and private statutes, bylaws, orders and regulations, all of which may be fully and effectively exercised in relation to the Lands as if this Agreement had not been executed and delivered by the Owner;
- f. Applicable Law: This Agreement shall be governed by and construed in accordance with the laws of the Province of British Columbia;
- g. Enurement: This Agreement will enure to the benefit of and be binding upon the parties to this Agreement and their respective successors and assigns;
- h. Number and Gender: Wherever the singular or masculine is used in this Agreement, the same will be construed as meaning the plural, feminine or body corporate or politic where the context of the parties so require;
- i. Amendments only in Writing: It is expressly agreed that the benefit of all covenants made by the Owner herein shall accrue to the Regional District and that this Agreement may only be modified or discharged by agreement of the Regional District and the Owner witnessed in writing;
- j. No Duty to Enforce: The Owner hereby covenants and agrees with the Regional District that the Regional District is under no obligation in law or equity to prosecute or enforce the terms of this Agreement in any way;
- k. Further Documents: The parties will do and cause to be done all things and execute and cause to be executed all documents which may be necessary to give proper effect to the intention of this Agreement; and
- l. Severance: If any section, subsection, sentence, clause or phrase in this Agreement is for any reason held to be invalid by the decision of a court of competent jurisdiction, the invalid portion will be severed and the provision that is invalid will not affect the validity of the remainder of the Agreement.

IN WITNESS WHEREOF the parties have executed this Agreement on Forms C and D to which this Agreement is attached and which form part of this Agreement, effective as of the date first above written.