

TERMS OF INSTRUMENT - PART 2

THIS AGREEMENT (Option to Purchase) dated for reference the ___ day of _____, 202*.

BETWEEN:

1237932 BC LTD.

(Incorporation No. BC1237932)

a company incorporated under the laws of British Columbia, and
having a registered office at 4566 Cordova Bay Road, Victoria, BC V8X 3V5

(the "**Transferor**")

OF THE FIRST PART

AND:

CORPORATION OF THE TOWNSHIP OF ESQUIMALT,

a municipality incorporated under the laws of British Columbia, and
having an office at 1229 Esquimalt Road, Esquimalt, BC V9A 3P1

(the "**Transferee**")

OF THE SECOND PART

WHEREAS:

A. The Transferor is the registered owner in fee simple of the following lands and premises:

PID 030-353-556

LOT 1 SECTION 10 ESQUIMALT DISTRICT PLAN EPP78715

(the "**Land**");

B. The Transferee is the Corporation of the Township of Esquimalt;

C. The Transferee has sold the Land to the Transferor on the condition that should the Transferor fail to commence construction of the Project (as defined herein) on the Land on or before the date that is 365 days after the issuance of a Building Permit for the Project, the Transferee shall have the option to purchase the Land;

D. To secure the obligation of the Transferor as referred to in Paragraph C, the Transferor has agreed to grant to the Transferee an option to purchase the Land on the terms and conditions set out herein;

NOW THEREFORE, in consideration of the premises and the sum of Ten Dollars (\$10.00) now paid by the Transferee to the Transferor (the receipt and sufficiency of which is hereby acknowledged by the Transferor), the parties agree as follows:

Definitions

1. In this Agreement:

- (i) **“Agreement”** means this Agreement, including its recitals and schedules, and Forms C and D attached hereto;
- (ii) **“Building Permit”** means a building permit issued pursuant to the Township of Esquimalt Building Regulation Bylaw, 2017, No. 2899, authorizing construction of the Project;
- (iii) **“Commence Construction”** means that the Transferor has commenced physical construction of the Project to the point where excavation work and other site preparation has been completed, and construction of the first forms for footings and foundations has commenced;
- (iv) **“Completion Date”** means the 60th day following the provision of the Exercise Notice by the Transferee, or if the Land Title Office is closed on such day, the next day that office is open, or such other date as may be agreed in writing by the parties;
- (v) **“Development Permit”** means the development permit for the Project issued by the Corporation of the Township of Esquimalt under Division 7 of Part 14 of the *Local Government Act*;
- (vi) **“Exercise Notice”** has the meaning given in section 6;
- (vii) **“Force Majeure”** means an event or circumstance beyond the control of a party to this Agreement that prevents or delays the performance of an obligation of that party under this Agreement, including an act of God, acts of terrorism, the order of any government, war, acts of war (whether war be declared or not), labour shortage, strike or lock-out, civil commotion, epidemic, pandemic, failure or default of public utilities or common carriers, supply chain issues with respect to any building materials or construction equipment, destruction of production facilities or materials by fire, earthquake, storm or like catastrophe. For certainty, the inability of a party to meet its financial obligations or to pay its suppliers shall not constitute an event of Force Majeure;
- (viii) **“GST”** means the Goods and Services Tax levied pursuant to the *Excise Tax Act* (Canada).

- (ix) **“Improvements”** includes all improvements on the Land as of the date of exercise of the Option by the Transferee;
- (x) **“Land”** means the land described in Recital A of these Terms of Instrument – Part 2, together with all Improvements;
- (xi) **“Option”** has the meaning given in section 3;
- (xii) **“Option Period”** has the meaning given in section 4;
- (xiii) **“Option Event”** means the event that triggers the Transferee's right to exercise the Option, as set out in section 4 of this Agreement;
- (xiv) **“Permitted Encumbrances”** means the liens, charges and encumbrances set out in Schedule "A" to this Agreement;
- (xv) **“Project”** means the housing development authorized by the Development Permit, consisting of a building containing 42 residential units that will be rental units, and 3 residential units that may be owner-occupied, to be constructed on the Land by the Transferor;
- (xvi) **“Purchase Agreement”** means the purchase and sale agreement dated October 21, 2020 between the Transferor and the Transferee, as amended from time to time;
- (xvii) **“Purchase Price”** means the sum of \$1,050,840.00, excluding GST, Property Transfer Tax, and like charges, subject to adjustment in accordance with subsection 13(c) and other relevant provisions in the Purchase Agreement;
- (xviii) **“Registration Date”** means the date that this instrument is registered against title to the Land in the Land Title Office;
- (xix) **“Transfer”** has the meaning given in section 13(g);
- (xx) **“Transferor”** includes the successors in title of the Transferor;
- (xxi) **“Zoning Bylaw”** means the Township of Esquimalt Zoning Bylaw, 1992, No. 2050; and
- (xxii) **“Zoning Bylaw Amendment”** means the amendment to the Zoning Bylaw, approved by the Council of the Transferee with respect to the Project.

Term

2. Subject to section 12, the term of this Agreement is eighty (80) years commencing on the Registration Date, provided that if the perpetuity period for the Option as specified in the *Perpetuity Act* is increased or decreased in length then the term of this Agreement will be increased or decreased accordingly.

Grant of Option

3. The Transferor grants to the Transferee an irrevocable option to purchase the Land (the “**Option**”) on the terms and conditions set out in this Agreement.

Option Event

4. The Transferee may exercise the Option in the event that the Transferor does not Commence Construction of the Project within 365 days following the issuance of the Building Permit (the “**Option Period**”).
5. In the event that the Transferor is unable as a result of Force Majeure to Commence Construction of the Project within 365 days following the issuance of the Building Permit, the Option Period shall be extended for such period of time that the Transferor is delayed in the commencement of construction by Force Majeure, provided:
 - (a) the Transferor has promptly provided written notice to the Transferee describing the event of Force Majeure that has prevented or delayed the commencement of construction, as well as notice of the anticipated duration of the Force Majeure event or circumstance, and the actions being taken by the Transferor to avoid or minimize the effect of Force Majeure; and
 - (b) the Transferor continues to exercise best efforts to remove or overcome the Force Majeure event or circumstance.

Notice of Exercise of Option

6. In order to exercise the Option, the Transferee must deliver written notice (the “**Exercise Notice**”) to the Transferor of the Transferee's exercise of the Option pursuant to the terms and conditions of this Option to Purchase. The Exercise Notice must be given within 30 days after the Option Event.
7. The Exercise Notice must be delivered by registered mail addressed to the registered office of the Transferor except in the event of any disruption or stoppage in mail services, or at all times by personal service upon a director of the Transferor.

8. The Transferee agrees to withdraw the Exercise Notice if, following delivery or service of the Exercise Notice, and in any event within 30 days after the Option Event, the Transferor:
 - (a) provides evidence satisfactory to the Transferee, acting reasonably, that the Transferor had Commenced Construction of the Project; or
 - (b) has provided written notice to the Transferee in accordance with section 5 of this Agreement of a Force Majeure event that has prevented or delayed the commencement of construction, but only if it was impracticable, given the timing of the Force Majeure event, for the Transferor to have given prompt notice of the Force Majeure event before the Transferee's exercise of the Option.
9. If the Transferee withdraws the Exercise Notice pursuant to section 8(a), this Agreement shall terminate in accordance with section 12. If the Transferee withdraws the Exercise Notice pursuant to section 8(b), this Agreement shall continue in effect and the Transferee may exercise the Option in accordance with section 6 in the event that the Transferor has not Commenced Construction within the Option Period as extended pursuant to section 5.

Price

10. The purchase price for the Land on exercise of the Option shall be equal to the Purchase Price.

Sale Contract

11. The delivery of the Exercise Notice constitutes a binding contract of sale and purchase of the Land. The completion of the sale and purchase of the Land shall take place on the Completion Date, and on or before the Completion Date the parties shall execute and deliver such documents as are reasonably required to convey title to the Land to the Transferee, free and clear of all liens, charges and encumbrances, whether registered or unregistered, except the Permitted Encumbrances.

Termination and Discharge

12. This Agreement shall terminate, and the Transferee shall provide a discharge of this Agreement in registrable form at the expense of the Transferor, in either of the following cases:
 - (a) if the Option Event occurs, and the Option is not exercised in the manner and within the time set forth in this Agreement; or
 - (b) the Transferor has Commenced Construction of the Project within the Option Period, or if section 5 of this Agreement applies, within the extended

period of time as provided for under section 5.

Closing

13. If the Transferee exercises the Option, then:
- (a) the purchase and sale of the Land will complete on the Completion Date;
 - (b) the Transferee will be entitled to possession of the Land at noon on the Completion Date;
 - (c) all adjustments of taxes, utilities and other items normally adjusted between a vendor and purchaser on the sale of similar property shall be made with respect to the Land to and including the Completion Date. Real property taxes, if not yet determined on the Completion Date, will be adjusted on the basis that current year's taxes will be 5% higher than previous years' taxes but the parties will readjust ten (10) days after determination of the actual current year real property taxes. The Transferor will pay the costs of the Transferee in relation to the transfer of the Land, including Land Title Office registration fees and legal fees but not any taxes, to the extent payable by the Transferee, and the Purchase Price shall be adjusted accordingly;
 - (d) the Land will be at the risk of the Transferor until 12:00 noon on the Completion Date;
 - (e) all documentation required to convey the Land to the Transferee will be prepared by its solicitors and delivered to the solicitors for the Transferor at least five (5) Business Days before the Completion Date, and the Transferor will execute, in registrable form, all documents necessary to transfer title to the Land to the Transferee;
 - (f) the Transferor will execute and deliver to the Transferee such further documents and give such further assurances as the solicitors for the Transferee may require in order to carry out and give effect to the intent of this Agreement and the purchase and sale contemplated in this Agreement;
 - (g) on the Completion Date the Transferee will cause its solicitors to register the freehold transfer of the Land (the "**Transfer**") in the Land Title Office; and
 - (h) following registration of the Transfer on the Completion Date, and upon the Transferee's solicitors being satisfied as to the Transferee's title to the Land after conducting a post-filing registration title search disclosing only the following:
 - (i) the existing title number for the Land;

- (ii) the Permitted Encumbrances;
- (iii) any financial encumbrances to be discharged by the Transferor in accordance with section 14; and
- (iv) the pending number assigned to the Transfer,

the Transferee will pay or cause its solicitors to pay to the Transferor or its solicitors by way of solicitor's trust cheque the Purchase Price due to the Transferor under this Agreement, as adjusted under subsection 13(c).

14. The Transferee acknowledges and agrees that if the Transferor's title to the Land is subject to any financial encumbrances including but not limited to any mortgage as contemplated under section 16 of this Agreement which are required to be discharged by the Transferor, the Transferee will pay or cause its solicitors to pay the adjusted Purchase Price for the Land to the Transferor's solicitors in trust on their undertaking to discharge such financial encumbrances from the proceeds of sale and the Transferor will not be required to clear title prior to the receipt of such sales proceeds.
15. After the delivery of the Exercise Notice, until 12:00 noon on the Completion Date the Transferor will:
- (a) permit the Transferee and its representatives to enter onto the Land and carry out such inspections, tests, studies, appraisals, surveys and investigations of the Land and Improvements as the Transferee may require, acting reasonably, provided that the Transferee must first provide advanced written notice of a request to enter into the Land of at least 48 hours;
 - (b) cause the Land to be maintained in the manner of a reasonable owner;
 - (c) maintain any existing insurance coverage with respect to the Land in full force and effect until 12:00 noon on the Completion Date in such amounts and on such terms as would a prudent owner;
 - (d) not enter into or amend any contract with respect to the Land including, without limitation, leases or service contracts, before the Completion Date without the prior written approval of the Transferee, acting reasonably;
 - (e) grant authorizations reasonably required by the Transferee to authorize municipal or other governmental authorities to release information confirming compliance with laws, bylaws and other statutory and governmental regulations and with respect to potential statutory liens;
 - (f) pay when due any indebtedness of the Transferor to any municipal or other governmental authority which, by operation of law or otherwise, becomes a

lien, charge or encumbrance on the Land or Improvements, from and after the Completion Date, including without limitation, corporation capital taxes and workers compensation payments; and

- (g) not modify, amend or cancel any of the Permitted Encumbrances without the prior written approval of the Transferee.

Mortgage

16. In the event that the Transferor wishes to grant a mortgage or mortgages for the acquisition of the Land and construction of the Project during the currency of this Agreement, it shall be free so to do and the Transferee hereby acknowledges that each mortgagee's interest in the Land pursuant to such mortgage or mortgages, as well as all advances thereunder, shall rank prior to this Agreement notwithstanding that such mortgage or mortgages may be granted, registered or advanced, in whole or in part, subsequent to the grant or registration of this Agreement and, if required by any such mortgagee, the Transferee shall deliver such registrable assurances as are reasonably necessary for such mortgage to be prior to this Agreement (except as aforesaid), provided that the acknowledgement and obligation hereunder are subject at all times to:
- (a) the Option not being exercisable pursuant to section 4 at the time of the granting of any mortgage;
 - (b) all funds advanced under and secured by such mortgage or mortgages which are to have priority to this Agreement being used exclusively for the Project, and in particular, being disbursed only in payment by the Transferor of:
 - (i) the purchase price and costs incurred for the purchase of the Land;
 - (ii) the cost of buildings, fixtures and improvements actually constructed or erected on or installed in or made to the Land or offsite services required in connection with the Project and the cost of any letters of credit or bonding required in connection therewith;
 - (iii) costs commonly known as soft costs including consulting fees, design and administrative expenses and other overhead, marketing costs and interest costs (but excluding any profit to the Transferor), but only to the extent such soft costs are directly applicable to and reasonably incurred in connection with the Project; and
 - (iv) other costs and expenses in respect of the Project that are included in the construction budget for the Project that is approved by the Transferor's mortgagee; and
 - (c) the aggregate of all advances, interest and other monies to be secured by such mortgage or mortgages which are to have priority to this Agreement

never exceeding the Transferor's costs and expenses in respect of the Project as determined from time to time by the Transferor and approved by the Transferor's mortgagee.

General

17. Time is of the essence of this Agreement.
18. Any notice required to be given under this Agreement will be in writing and will be deemed to have been received, if delivered on the date of delivery or, if mailed by prepaid registered mail, on the fourth day following the date of mailing, addressed:

In the case of the Transferee:

1229 Esquimalt Road
Esquimalt, British Columbia, V9A 2P1
Attention: Corporate Officer

In the case of the Transferor, to the address of the Transferor as shown on title to the Land. In the case of the Transferee's Exercise Notice, notice shall be provided in accordance with section 7 of this Agreement.

19. No term, condition, covenant or other provision of this Agreement will be considered to have been waived by the Transferee unless such waiver is expressed in writing by the Transferee and the waiver by the Transferee of any such term, condition, covenant or other provision of this Agreement will not be construed as or constitute a waiver of any further or other breach of that or any other term, condition, or other provision of this Agreement.
20. Any tender of documents or money may be made upon the respective lawyers for the parties.
21. This Agreement extends to, is binding upon and ensures to the benefit of the parties and their respective heirs, executors, administrators, successors and assigns.
22. In this Agreement, unless the context otherwise requires, the singular includes the plural and the masculine includes the feminine gender and a corporation.
23. The headings in this Agreement are included for ease of reference only and shall not affect the interpretation of this Agreement or any provision of this Agreement.
24. All of the provisions of this Agreement shall be construed as covenants and agreements as though the words importing covenants and agreements were used in each separate paragraph.

25. This Agreement will be interpreted according to the laws of the Province of British Columbia.
26. If any section of this Agreement or any part of a section, is found to be illegal or unenforceable, that part or section, as the case may be, will be considered separate and severable and the remaining parts or sections, as the case may be, will not be affected and will be enforceable to the fullest extent permitted by law.
27. Nothing contained or implied in this Agreement shall prejudice or affect the rights and powers of the Transferee 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 Land as if the Agreement had not been executed and delivered by the Transferor.
28. This Agreement may be executed in counterparts and when the counterparts have been executed by the parties, each originally executed counterpart, whether a facsimile, photocopy or original, will be effective as if one original copy had been executed by the parties to this Agreement.

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

Schedule "A"

Permitted Encumbrances

(a) Charges

Undersurface Rights; M76301; Her Majesty the Queen in Right of the Province of British Columbia; Inter Alia

Undersurface Rights; 106260G; Puget's Sound Agricultural Society; Inter Alia

Statutory Right of Way; CA5052415; Corporation of the Township of Esquimalt

(b) Legal Notations

All notices with respect to any housing agreements entered into with the Transferee, including the Housing Agreement registered concurrently with this Option to Purchase, and all notices of permits issued by the Transferee under Part 14 of the *Local Government Act*.

(c) Exceptions and Reservations

None

(d) Additional Charges

All statutory rights of way, covenants and other agreements as required by the Transferee or other governmental authorities with respect to the rezoning, subdivision or development of the Land, including without limitation, the Development and Subdivision Covenant and Housing Agreement, registered concurrently with this Option to Purchase.