

LATECOMER AGREEMENT NUMBER 2250-70-81

THIS AGREEMENT dated for reference the 7th day of November 2006

BETWEEN:

CITY OF KELOWNA
1435 Water Street
Kelowna BC V1Y 1J4

("the City")

AND:

Sun Holdings Ltd
5035 France Court
Kelowna, BC V1W 4W4

(the "Owner")

WHEREAS:

- A. The Owner has applied to the City to develop the Owner's Lands herein defined on Appendix A and is in accordance with the City's Subdivision and Development Bylaw providing water, sewage, drainage or Highway facilities, or a combination of such facilities, that will serve the Owner's Lands;
- B. A portion of the water, sewage, drainage, or Highway facilities (herein defined as "Excess or Extended Services") will serve the Benefiting Lands herein defined on Appendix B, which Benefiting Lands do not include the Owner's Lands;
- C. The City considers that its costs to provide the Excess or Extended Services in whole or in part are excessive, and requires the Owner of the Owner's Lands, and the owners of any other lands that, in the opinion of the City, will benefit from the Excess or Extended Services, to pay the cost of the Excess or Extended Services;
- D. The City is authorized to enter into this Agreement under Section 939 of the Municipal Act;
- E. The Council of the City has by way of Bylaw No. 6519, as amended or replaced from time to time, set the rate of interest referred to under Section 939(8) of the Municipal Act and in paragraph 3 of this agreement;

THIS AGREEMENT IS EVIDENCE THAT in consideration of the \$10.00 the mutual covenants and agreements made by each of the parties to the other as set out in this agreement, and for other valuable consideration (the receipt and sufficiency of which is hereby acknowledged) the City and the Owner covenant and agree as follows:

Interpretation

- 1. In this agreement

- (a) "Benefiting Lands" means the lands other than the Owner's Lands that:
 - (i) in the opinion of the City, will be served by the Excess or Extended Services, which Benefiting Lands are, subject to paragraph 1(a)(ii), legally described on Appendix B;
 - (ii) may be connected to the Excess or Extended Services after completion of those Excess or Extended Services;
- (b) "Excess or Extended Services" means any combination, as shown in Appendix D, of a portion of a:
 - (i) Highway system required to be constructed and installed by the owner that will provide access to land other than the land being subdivided or developed, or
 - (ii) Water, sewage, or drainage system constructed and installed by the owner that will service land other than the land being subdivided or developed;
- (c) "Latecomer" means an Owner of Benefiting Lands;
- (d) "Owner's Lands" means those certain lands equally described in Appendix A and owned by the Owner in respect of which the Owner is constructing works and services, a portion of which systems constitutes the Excess or Extended Services that will serve the Benefiting Lands;
- (e) "Owner" in respect of real property means the registered owner of an estate in fee simple, and includes:
 - (i) the tenant for life under a registered life estate,
 - (ii) the registered holder of the last registered agreement for sale,
 - (iii) the holder or occupier of land held in the manner mentioned in Sections 356 and 357 of the Municipal Act,
- (f) Substantial Performance is the stage of completion of all the Works and Services when:
 - (i) the Works and Services are ready to be used for their intended purpose, as certified by the Consulting Engineer; and
 - (ii) the total of the incomplete, defective and deficient Works and Services can be completed at a cost as estimated by the Consulting Engineer;

and verified by the City Engineer, of no more than 3% of the total cost of the Works and Services.

Payment of Latecomer Charges During Term

2. The City shall pay to the Owner charges imposed by the City under Section 939(5)(c) of the Municipal Act based upon the formula described on Appendix C, only if and to the extent the charges are paid by the Latecomers and collected by the City during the period commencing on the date of Substantial Performance and ending on the earlier of:
 - (i) the date on which the Owner's costs in connection with the Excess or Extended Services, determined in accordance with Section 11.1 of the Subdivision and Development Servicing Bylaw 7900, have been paid to the Owner; or
 - (ii) **June 15, 2016** - Ten Years from the date of Substantial Performance.

Interest

3. There shall be included in the charge payable to the Latecomer under Section 939(5) (c) interest calculated annually at a rate prescribed by a Bylaw of the City, payable for the period commencing on Substantial Performance, up to the date that the connection is made or the use commences, and if paid by the Latecomer and collected by the City during the period referred to in paragraph 2, the interest shall be paid to the Owner.

Assignment or Transfer of Owner's Rights

4. This Agreement may not be assigned by the Owner without the prior written consent of the City. In the event of a dispute as to the beneficiary of this Agreement, the City may, at its option, commence an action in interpleader joining any party claiming rights under this agreement, or other parties which the City believes to be necessary or proper, and the City shall be discharged from further liability on paying the person or persons whom the court having jurisdiction over such interpleader action shall determine, and in such action the City shall be entitled to recover its reasonable legal fees and costs, which fees and costs shall constitute a lien upon all funds accrued and accruing pursuant to this Agreement.

Indemnity

5. The Owner covenants not to sue the City, its administrators, successors, assigns, directors, officers, agents, employees, servants, tenants, solicitors, consultants, and anyone else whom the City is in law liable, by reason of or arising out of or in any way connected with any error, omission, or conduct of the City in relation to the Excess or Extended Services, including, without the generality of the foregoing, a failure of the City to pass a resolution, enact a bylaw, enter into an agreement, impose a charge, calculate a charge correctly, or collect a charge under Section 939 of the Municipal Act.

Termination

6. Upon the expiration of the Term, the City shall be forever released and wholly discharged from any and all liability and obligations hereunder this agreement, or howsoever arising pertaining to the Latecomer Charges, and whether arising before or after the expiry of this Agreement.
7. Paragraphs 5 to 16 shall survive the termination of this Agreement.

Owner Representation and Warranty

8. The Owner represents and warrants to the City that the Owner has not received, claimed, demanded or collected money or any other consideration from the Latecomers for the provision, or expectation of the provision of the Excess or Extended Services, other than as contemplated and as provided for under this Agreement; and further represents and warrants that the Owner has not entered into any agreement the Latecomers for consideration in any way related to or connected directly or indirectly with the provision of the Excess or Extended Services.

Miscellaneous

9. Time is of the essence.
10. Any notice required by this Agreement will be sufficiently given if delivered by mail to the parties at the addresses first above written.

11. This Agreement will enure to the benefit of and be binding on the parties hereto and their respective successors and assigns.
12. This Agreement shall be governed by the laws of the Province of British Columbia.
13. This Agreement constitutes the entire agreement between the City and the Owner with regard to the subject matter hereof and supersedes all prior agreements, understandings, negotiations, and discussions, whether oral or written of the City with the Owner.
14. No amendment or waiver of any portion of this agreement shall be valid unless in writing and executed by the parties of this agreement. Waiver of any default by a party shall not be deemed to be a waiver of any subsequent default by that party.
15. A reference, in this Agreement to the City or the Owner includes their permitted assigns, heirs, successors, officers, employees, and agents.
16. The Owner represents and warrants to the City that:
 - (a) all necessary corporate actions and proceedings have been taken by the Owner to authorize its entry into and performance of this Agreement;
 - (b) upon execution and delivery on behalf of the Owner, this Agreement constitutes a valid and binding contractual obligation of the Owner;
 - (c) neither the execution and delivery, nor the performance, of this agreement shall breach any other agreement or obligation, or cause the Owner to be in default of any other agreement or obligation, respecting the Owner's Lands; and
 - (d) the Owner has the corporate capacity and authority to enter into and perform this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the year and date first above written.

Sun Holdings Ltd
by its authorized signatories:


Authorized Signatory (Print name and position of person signing)

CITY OF KELOWNA
by its authorized signatories:

Authorized Signatory (Print Name) Mayor


Authorized Signatory (Print name and position of person signing)
President

Authorized Signatory (Print Name) City Clerk

Appendix A to Latecomer Agreement 2250-70-81

<u>Legal Description of Owner's Land</u>	<u>Roll No.</u>	<u>KID No.</u>
Lot 2 KAP 30846	7125.306	284378

Appendix B to Latecomer Agreement 2250-70-81

<u>Legal Description of Benefiting Lands</u>	<u>Roll No.</u>	<u>KID No.</u>
1. Lot A KAP 30848	7125.308	205296
2		
4		
5.		
6.		

Appendix C to Latecomer Agreement 2250-70-81

The charges imposed by the City for the purposes of paragraph 2 will, in respect of the particular **Parcel** of the **Benefiting Lands**, be based on one of the following formula. The selection of appropriate formula will be at the sole discretion of the City.

$$\frac{\text{Water} \quad (\text{Benefiting Parcel } 181.0\text{m})}{(\text{Total Benefiting } 181.0\text{m}) + (\text{Owner's } 181.0\text{mLands } 7)} \times \$ 31,606.30 = \$ 15,803.15$$

$$\frac{\text{Sanitary} \quad (\text{Benefiting Parcel } 270.0\text{m})}{(\text{Total Benefiting Lands } 187.0\text{m}) + (\text{Owner's Lands } 187.0\text{m})} \times \$ 52,983.48 = \$ 38,250.11$$

$$\frac{\text{Drainage} \quad (\text{Benefiting Parcel } 185.0\text{m})}{(\text{Total Benefiting Lands } 185.0\text{m}) + (\text{Owner's Lands } 185.0\text{m})} \times \$ 33,601.70 = \$ 16,800.85$$

Appendix D to Latecomer Agreement 2250-70-81

DISTRIBUTION OF LATECOMER CHARGES PER PARCEL

Developer's Name: Sun Holdings Ltd

Project Number: S04-0087

		Latecomer Charge				
Legal Description Benefiting Parcel	Tax Roll No.	Hwys	Water	Sanitary	Storm	Total
Lot A KAP 30848	7125.308		\$15,803.15	\$38,250.11	\$16,800.85	\$70,854.11
					Total	\$70,854.11

APPENDIX "E"

Latercomer 2250-70-81

