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CITY OF KELOWNA

MEMORANDUM

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**Date:** July 10, 2008  
**File No.:** 2380-20  
**To:** City Manager  
**From:** Property Manager  
**Subject:** Lagoons System Operating Agreement

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**RECOMMENDATION:**

**THAT** City Council approve the Lagoons System Agreement;

**AND THAT** the Mayor and City Clerk be authorized to execute the agreement.

**BACKGROUND:**

The Lagoon System was developed in partnership between the City and Relax Development on a 1/3<sup>rd</sup> - 2/3<sup>rd</sup> cost sharing basis for the development, maintenance and capital replacement.

Relax Development sold the strata lands to Lakepoint Developments which changed the cost sharing to be 1/3<sup>rd</sup> of the total cost of the Waterfront Park Lagoons System to the City, 1/3<sup>rd</sup> to Relax Development and 1/3<sup>rd</sup> to Lakepoint Development.

Recognizing that it is in the best interest of all parties involved, the Strata Councils have agreed for 2008 and until March 31, 2009 to extend the previous agreement under the same terms and conditions.

A new long-term agreement has been developed that is being presented to all Strata members for ratification. This approval process requires approval at an Annual General Meeting or a Special General Meeting. The long-term agreement will be presented to the Councils prior to the end of 2008.

**TERMS**

- The agreement is for 15 months with a clause that all parties shall meet and use their best efforts to reach an agreement in substitution for this Agreement for a ten (10) year or longer term subject to the appropriate City approval process. Civic Properties will take a lead role in this process.
- The agreement allocates the costs for operations, maintenance and capital replacement reserve of the Lagoons system.



- The costs are shared as follows:
 

▪ The Grand	33.3%		
▪ Lagoons Strata	6.06%	}	Collectively 33.3%
▪ Dolphins Strata	3.63%		
▪ Discovery Pointe Strata	7.26%		
▪ Discovery Bay Strata	16.35%		
▪ City of Kelowna	33.40%		
- There is a mechanism for the development of an annual budget that must be approved by the partners to the agreement.
- A capital replacement reserve will be funded at \$60,000 as part of the annual budget. The purpose of the capital reserve is to set aside funds for major repairs and capital improvements. It has been determined that this level of funding is inadequate to fully cover the anticipated costs within 5 years.
- The City grants access to the Lagoons waterway to the Administrator (party assigned the task of maintaining and operating the Lagoon System.)
- The City grants the right to occupy the boat berths and to charge and collect rent for the use of the berths as follows:
 

○ Lagoons Strata	10
○ Dolphins Strata	6
○ Discovery Pointe Strata	12
○ Discovery Bay Strata	27
- The agreement notes that any capital repairs up to \$500,000 shall be funded by the partners of the agreement using the above funding formula.
- The agreement also contains a clause that any capital repairs in excess of \$500,000 shall be funded by the partners of the agreement up to \$500,000 and that the City will cover 100% of the costs over the \$500,000 amount.

#### **FINANCIAL/BUDGETARY CONSIDERATIONS:**

A new ten-year agreement will require additional funds which will be applied for during the annual budget process.

Considerations that were not applicable to this report:

**INTERNAL CIRCULATION TO:**

**LEGAL/STATUTORY AUTHORITY:**

**LEGAL/STATUTORY PROCEDURAL REQUIREMENTS:**

**EXISTING POLICY:**

**PERSONNEL IMPLICATIONS:**

**TECHNICAL REQUIREMENTS:**

**EXTERNAL AGENCY/PUBLIC COMMENTS:**

**ALTERNATE RECOMMENDATION:**

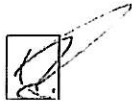
Submitted by:

*R. Forbes*

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R. Forbes – Property Manager

Approved for Inclusion:

A handwritten signature, likely "R. Forbes", is enclosed within a square box. A long, thin, curved line extends from the top right corner of the box.

cc: Director of Financial Services  
Director Recreation Parks and Cultural Services  
Civic Properties Manager

## LAGOON SYSTEM AGREEMENT

**THIS AGREEMENT** dated for reference \_\_\_\_\_, 2008,

**BETWEEN:**

**CITY OF KELOWNA**, a municipal corporation incorporated pursuant to the laws of the Province of British Columbia, with its office at 1435 Water Street, Kelowna, British Columbia, V1Y 1J4;

(the "City")

**AND:**

**GRAND OKANAGAN RESORT LTD.**, a company extraprovincially registered under the *Company Act* of British Columbia under number A-30660 having its chief executive office at #103 , 808 42 Ave S.E. Calgary AB T2G 1Y9

(the "Grand")

**AND:**

**THE OWNERS, STRATA PLAN KAS1261 (PHASE 1 – THE DOLPHINS)**

(the "Dolphins")

**AND:**

**THE OWNERS, STRATA PLAN KAS1436**

(the "Lagoons")

**AND:**

**THE OWNERS, STRATA PLAN KAS2503**

("Discovery Bay")

**AND:**

**THE OWNERS, STRATA PLAN KAS2849**

( "Sunset Waterfront Resort")

WHEREAS the City entered into an agreement with Relax Development Corporation Ltd. ("Relax"), the developer of a hotel property now known as the Grand Okanagan Resort (the "Grand"), with respect to the construction and operation of a lagoon system, entitled Lagoon System Operation Agreement and dated February 26, 1990 (the "Original Lagoon Agreement").

AND WHEREAS Relax undertook the development of some land and the sale of other lands north of the Grand and assigned part of its responsibilities under the Original Lagoon Agreement to the subsequent purchasers and developers of these development lands, which have frontage on the lagoon system.

AND WHEREAS the parties to this Agreement are the owners of certain lands which comprise part of the lagoon system or which have frontage or are immediately adjacent to the lagoon system.

AND WHEREAS certain differences and disagreements have arisen with respect to the parties' responsibilities in connection with ongoing maintenance and repair costs of the lagoon system under the Original Lagoon Agreement.

AND WHEREAS the parties to this Agreement recognize that the lagoon system is an amenity to and provides value to all parties to this Agreement including the general public with respect to the City of Kelowna's interest.

AND WHEREAS the parties are desirous of entering into an agreement to clearly define their responsibilities for the operation, maintenance, repair and capital replacement of the lagoon system, which will replace the Original Lagoon Agreement.

NOW THEREFORE in consideration of the mutual agreements contained herein, the parties hereto agree as set forth below.

1. Definitions.

"Administrator" shall be the party, or its designated agent, assigned the task of maintaining and operating the Lagoon System. As of the commencement of the Agreement the Grand shall be the Administrator. In the event of the Grand ceasing to be the Administrator, the parties to the Agreement shall appoint one of them to be the Administrator and in default of such appointment, the City shall be the Administrator.

“Capital Items” means a repair or replacement to the Lagoon System that is made necessary by wear and tear, damage, loss, breakdown or failure of an asset forming the Lagoon System and for certainty, all of the items listed in Appendix B are deemed to be Capital Items

“Lagoon System” means the waterways, foundations, liner, pumping system, locks, floats and boat berths constructed by Relax under the Original Lagoon Agreement, the location of which is as shown on the drawing attached as Schedule 1, and which is comprised of the following parcels or portions thereof:

- (a) Parcel Identifier: 011-842-466  
District Lot 3454  
Osoyoos Division Yale District  
Except Plans A817, 33137 and 42174  
(owned by the City);
- (b) Parcel Identifier: 017-684-048  
Lot 1, District Lots 139, 4041, 4082 and 5199  
Osoyoos Division Yale District  
Plan KAP46717  
(owned by the City);
- (c) Parcel Identifier: 017-812-925  
Lot B, District Lots 139, 3454 and 4082  
Osoyoos Division Yale District  
Plan KAP47378  
Except Plan KAP73543  
(owned by the “Grand”);
- (d) Parcel Identifier: 018-298-419  
Lot C, District Lots 139 and 3454  
Osoyoos Division Yale District  
Plan KAP49982  
(See Plan as to Limited Access)  
(owned by the “City”);
- (e) Parcel Identifier: 025-751-000  
Lot B, District Lots 139 and 3454  
Osoyoos Division Yale District  
Plan KAP74092  
(owned by Sunset Waterfront Resort – *actually owned by 530751 B.C. Ltd.*);  
(Note: Lot A, Plan KAP74092 .... Owned by 530751 too);

- (f) Parcel Identifier: 025-074-334  
 Lot 2, District Lots 139, 1349, 3454 and 3457  
 Osoyoos Division Yale District  
 Plan KAP69051  
 (Limited Access by Easement Only) (owned by Discovery Bay to be transferred to the City).

2. Operation and Maintenance. The Lagoon System will be operated and maintained by the Administrator in accordance with this Agreement. The Administrator will endeavour to maintain the Lagoon System in a good state of repair. The Administrator may provide for the maintenance of the Lagoon System by its own employees or by hiring contractors to perform maintenance work. For greater certainty, the Administrator's right to hire contractors for maintenance work shall not extend to contracting out the entirety of the Administrator's obligations under this section. The Administrator may contract out its responsibilities under this section with the consent of the other parties to this Agreement, such consent not to be unreasonably withheld.
3. Operation and Maintenance Costs. The total costs of administering, maintaining and operating the Lagoon System (including an administration fee not exceeding 10% of the operating budget) will be shared by the parties to this Agreement as provided below:

(a) the Grand		33.3%
(b) the Lagoons	18.2%	Collectively 33.3%
(c) the Dolphins	10.9%	
(d) Sunset Waterfront Resort	21.8%	
(e) Discovery Bay	49.1%	
(f) the City		33.4%
		100 %

The Administrator will invoice the other parties to this Agreement for their respective shares on a quarterly basis with appropriate details of costs incurred, which will be due and payable thirty (30) days after the billing date thereof.

4. Annual Budget. On or before January 31 of each year, the Administrator will prepare a budget of the projected costs for maintaining and operating the Lagoon System for the calendar year. The budget will be based on the previous year's expenditures adjusted for inflation plus any identified additional work required. The budget may include an administration fee not to exceed 10% of the operating budget that will be payable to the Administrator. The budget will be circulated to the other parties to this Agreement and a meeting of all parties will be held in



February before the calendar year to which the budget pertains for the purpose of discussing, amending as necessary and approving the budget and Capital Reserve Allocation. Approval of the budget will be by majority vote of the parties present at the meeting, with each party of this Agreement being entitled to one vote, provided that the majority must comprise more than 50 percent of the share of the costs of operation and maintenance as set out in Section 3 herein. If agreement on the budget is not reached at this meeting then the budget amount for the previous year will be carried over and adjusted for inflation plus any identified additional work required. If budget disputes cannot be resolved by the parties, then the dispute may be referred to arbitration and costs apportioned as set out in Section 3 herein.

5. Expenditures. The Administrator will make expenditures during the calendar year in accordance with the approved budget. On an emergency basis the Administrator is authorized to make necessary repairs costing no more than \$20,000 or up to 10% of the annual budget, whichever is greater per occurrence to a maximum of \$30,000 per budget year. For all other emergencies that arise that require an expenditure in addition to those provided for in the preceding sentence and not contemplated in the approved budget, the Administrator shall call the parties to an emergency meeting on not less than 24 hours notice, at which meeting, approval will be sought for the expenditure on the same majority voting basis as provided for in Section 4 herein. The Administrator shall notify the other parties (but without the necessity of calling a meeting) of any emergency expenditure for repairs greater than \$5,000.
6. Capital Reserve. The Administrator will be responsible for the administration of a reserve fund (the "Capital Reserve") to be set aside for major repairs and capital improvements. The parties to this Agreement will make contributions to the reserve fund on an annual basis and in the same percentages of the total annual reserve fund contributions as are set out in Section 3 herein. Capital Reserve expenditure levels and funding sources are noted in Appendix "A". The expenditures noted in Appendix "A" are deemed to be cumulative for the term of the agreement. The size of the total annual contribution to the Capital Reserve will be determined as part of the review and approval process of determining the annual budget for operation, maintenance and administration of the Lagoon System as noted in Section 4. To assist in the determination of the level of Capital Reserve required Appendix "B" shows the life cycle costing of the various lagoon components from 2005 to 2035. The Capital Reserve funds shall be retained in a separate interest bearing account administered by the Administrator or as determined by the same voting majority basis as provided in Section 4. The administrator must retain reasonable access to these funds.
7. Insurance. The Administrator will be responsible for obtaining Comprehensive General Liability Insurance with respect to the Lagoon System and all operations of the Lagoon System in an amount of not less than \$5,000,00.00 for each occurrence or accident and include coverage for Products/Completed Operations, Blanket Contractual, Contractor's Protective, Personal Injury, Contingent Employer's Liability, Broad Form Property Damage and marina operations. The insurance policy or policies required by this section must name all parties to this Agreement as additional insureds and state that the said policy or policies are primary without any right of



contribution from any insurance otherwise maintained by the parties to this Agreement. The policy or policies must include a cross liability clause providing that the inclusion of more than one insured must not in any way affect the rights of any other insured hereunder, in respect to any claim, demand, suit or judgment made against any other insured. The individual parties to the agreement are responsible for obtaining and maintaining their own insurance for any aspects of the use of the Lagoon System that may be deemed to be severable from the joint use. In particular, the leasing of the boat berths by the individual parties may require individual insurance for that use.

8. Insurance Cost and Proof of Policies. The cost of the insurance to be obtained in accordance with Section 7 will be a normal cost of maintaining and operating the Lagoon System and will be apportioned in accordance with the formula set out in Section 3. The Administrator will, upon request of any of the other parties, provide copies of all contracts or policies of insurance obtained pursuant to Section 7. If the Administrator should fail to take out or maintain all the insurance required by Section 7, any of the other parties to this Agreement may, but will not be obligated to, take out all or any of such insurance and the party taking out such insurance will be entitled to be reimbursed from the other parties for their proportionate shares of the cost in accordance with Section 3.
9. Access Licence. The City hereby grants, transfers, conveys and confirms to the Administrator, its agents and employees the full, free and uninterrupted right, licence and permission to enter onto, use and pass and repass over those Lagoon System lands owned by the City (the "City Lagoon Lands") for the purpose of maintaining and repairing the Lagoon System. The Administrator will have the right to bring onto the City Lagoon Lands such materials, vehicles, watercraft, machinery and equipment necessary for the maintenance, operation and repair of the Lagoon System. Notwithstanding the foregoing, the access rights granted herein are subject to the City's applicable park rules and regulations in force from time to time.
10. Access Right of Way. The City hereby grants to the other parties to this Agreement, their agents, customers, guests and strata unit owners the full, free and uninterrupted right, licence and permission to enter onto and to pass and repass over the City Lagoon Lands, including by boat, for the purpose of accessing boat berths and the waters beyond the Lagoon System. The rights granted under this section to the respective parties to this Agreement are restricted to that portion of the City Lagoon Lands designated as being reserved to their benefit and identified on the plan attached to and forming part of this Agreement as Schedule 2. Notwithstanding the foregoing, the access rights granted herein are subject to the City's applicable park rules and regulations in force from time to time. The city shall use reasonable efforts to ensure the lock system can be used during special events occurring in the Waterfront Park.
11. Boat Berth Allocation. The parties agree and confirm that part of the Lagoon System is comprised of boat berths located within the City Lagoon Lands as shown on the plan attached to and forming part of this Agreement as Schedule 3. The parties acknowledge that the boat berths

will be limited to single "end-to-end" boat berths. The parties further acknowledge that the maximum number of berths reserved to their benefit are set out as follows:

a) the Grand	_____
b) the Dolphins	6
c) the Lagoons	10
d) Discovery Bay	27
e) Sunset Waterfront Resort	12
f) City of Kelowna	0

Strata councils are to determine the exact configuration of their berth spaces and to mark the spaces accordingly. The boat berths are allocated to the respective parties, their agents, customers, guests and strata unit owners for their use in the areas as shown in the attached Schedule 3 (the "Boat Berth Allocation Areas"). The City hereby grants to the other parties the right to occupy and use the Boat Berth Allocation Areas for the purpose of mooring boats but contingent on the parties not being in breach of any provision of this Agreement, including the requirement to make payment, as invoiced, for the operation and maintenance of the Lagoon System under Section 3. the Administrator and the City may enter into the Boat Berth Allocation Areas at any time, without notice, for any reason. Nothing herein shall be interpreted as giving any right of exclusive possession in the Boat Berth Allocation Areas or a legal demise of any interest therein.

12. Responsibility for Conduct of Boat Berth Users. The parties shall be responsible for supervising the conduct of their agents, customers, guests and strata unit owners occupying the Boat Berth Allocation Areas and they will take prompt action to eject and prohibit persons from occupying boat berths who misconduct themselves, create a nuisance or interfere with the reasonable enjoyment of other boat berths or adjacent residences or who interfere with the operation of or cause damage to the Lagoon System or any component. The parties will respond promptly and diligently to any complaint by the other parties to this Agreement of any misconduct or improper use of boat berths as described above.
13. Term. This Agreement is for a period of 15 months January 1, 2008 and ending on March 31, 2009. The Life Cycle costing of the Lagoon's system shall be provided for inclusion in the renewed agreement.
14. Early Termination. Notwithstanding anything herein contained to the contrary, the Administrator shall be entitled to terminate their management and operating responsibilities of this Agreement for any reason whatsoever on ninety (90) days written notice.

15. Termination for Cause. Should any of the Dolphins, Lagoons, Sunset Waterfront Resort or Discovery Bay default in their obligations of payment under Section 3 herein; and such default not be rectified by payment of all outstanding amounts within sixty (60) days of receiving an invoice under Section 3, such defaulting party's rights under this Agreement are terminated and it must immediately vacate any boat berths allocated to it pursuant to Section 11. The defaulting party's obligations of payment under Section 3 shall survive any termination of its rights under this Agreement.
16. No Assignment. The rights and privileges granted under this Agreement to the Dolphins, Lagoons, Sunset Waterfront Resort and Discovery Bay shall not be assigned and no sub-licence shall be granted.
17. Enurement. This Agreement shall enure to the benefit of and be binding upon the respective successors of the parties.
18. Applicable Law. This Agreement shall be governed by and interpreted in accordance with the laws of British Columbia and the laws of Canada that have application therein and the parties shall attorn exclusively to the jurisdiction of the Supreme Court of British Columbia.
19. Interpretation.
  - a) In this Agreement the singular shall include the plural, and the masculine will include the feminine or body corporate where the context or the parties may require.
  - b) All headings and captions appearing in this Agreement have been inserted for convenience only and in no way define, limit or enlarge the scope or meaning of this Agreement or any provision hereof.
  - c) Time is of the essence in this Agreement.
20. Notices. Any notices, document or communication required or permitted hereunder shall be in writing and shall be deemed to have occurred when:
  - a) sent by facsimile transmission or when personally delivered, on the date of delivery; or
  - b) 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 the earlier, so long as the notice is mailed to the other party at the address provided herein or to another address to which the parties from time to time agree in writing.

21. Entire Agreement. The provisions herein contained shall constitute the entire agreement between the parties and supersede all previous communications, representations, warranties, covenants and agreement whether verbal or written between the parties with respect to the subject matter hereof.
22. Counterparts. This Agreement may be executed in counterparts and once all counterparts have been executed, they constitute a full and binding Agreement.
23. No Waiver. No condoning, excusing or overlooking by all parties of any default, breach or non-observance at any time by the other parties shall operate as a breach of the City's rights under this Agreement in respect of any continuing or subsequent default, breach or non-observance, or so as to defeat or affect the rights of the City in respect of any such continuing or subsequent default or breach.
24. Disposition of Assets and Reserves. At the end of this agreement should the parties be unable to agree to a new agreement, then all assets and the Capital Reserve shall become the property of the City. The City will use the funds within the Capital Reserve at its sole discretion only for the upkeep and / or maintenance of the Lagoons. This provision shall not be construed as affecting the interests of the Grand in Lot B, District Lots 139, 3454 and 4082, ODYD, Yale District, Plan KAP 473778 except Plan KAP 73543.
25. Survivorship.
  - a) The obligations of the parties to repay any funds borrowed for repairs, as contemplated by Appendix B(b), shall survive the termination of this Agreement.
  - b) Should any party be in arrears in respect of its contributions for the annual operating and maintenance budget or for the Capital Reserve, its repayment obligations shall survive the termination of this Agreement.
  - c) Any party not default of its repayment obligations or not in arrears in its budget contributions may bring proceedings to recover amounts in arrears or amounts to be repaid for repairs and in the event of recovery shall account for the amount recovered to the other parties not in default on the percentage shares provided for in Section 3 (modified to account for the defaulting party or parties not being entitled to a percentage share), after deducting for the costs of the recovery proceedings.
  - d) Should the parties enter in a new agreement in place of this Agreement or upon its termination, any funds in the Capital Reserve shall be credited to a reserve fund to be established by the new agreement

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first above written.

Signed, Sealed and Delivered by the City in  
the presence of

**CITY OF KELOWNA**  
by its authorized signatory(ies)

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Address

Name: \_\_\_\_\_

Occupation

Signed, Sealed and Delivered by the Grand  
in the presence of:

**GRAND OKANAGAN RESORT LTD.**  
by its authorized signatory(ies)

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Address

Name: \_\_\_\_\_

Occupation

Signed, Sealed and Delivered by The  
Owners, Strata Plan KAS1261 in the  
presence of:

**THE OWNERS, STRATA PLAN KAS1261**  
by its authorized signatory(ies)

Name: \_\_\_\_\_

Council Member

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Address

Council Member

Occupation

OR,  
if authorized by the Strata Corporation:

## Strata Manager

Signed, Sealed and Delivered by The  
Owners, Strata Plan KAS1436 in the  
presence of:

**THE OWNERS, STRATA PLAN KAS1436**  
by its authorized signatory(ies)

Name: \_\_\_\_\_

Council Member

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Address

Council Member

Occupation

OR,  
if authorized by the Strata Corporation:

## Strata Manager

Signed, Sealed and Delivered by The  
Owners, Strata Plan KAS2503 in the  
presence of:

Name: \_\_\_\_\_

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Address

Occupation

**THE OWNERS, STRATA PLAN KAS2503**  
by its authorized signatory(ies)

Council Member

Council Member

OR,  
if authorized by the Strata Corporation:

## Strata Manager



Signed, Sealed and Delivered by The  
Owners, Strata Plan KAS2849 in the  
presence of:

**THE OWNERS, STRATA PLAN KAS2849**  
by its authorized signatory(ies)

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Address

Name: \_\_\_\_\_

Occupation

OR,  
if authorized by the Strata Corporation:

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Strata Manager

26.

## Appendix "A"

Capital Reserve Expenditure Plan for the full term of the agreement. The expenditures noted in Appendix "A" are deemed to be cumulative for the term of the agreement.

- a) From \$1 to \$20,000 or 10% of the operating budget whichever is greater repairs will be taken from the maintenance budget subject to the guidelines noted in Clause 5.
- b) From \$20,001 to \$500,000 funds are taken from the Capital Reserve. If the reserve is insufficient to cover the cost then the option is to empty the reserve and borrow the remainder or borrow the full amount. Loan repayment in this option will be amortized over ten years. Individual strata councils have the option of amortizing their portion of the expense or paying their share immediately.
- c) Capital repairs in excess of \$500,000. The base funding will be noted in "b" above with the city covering 100% of the cost over the \$500,000 or the amount in the Capital Reserve fund whichever is greater.

**Schedule 1**



**Schedule 2**



