

Memo



Date: April 6, 2010
File: 2250-70-84
To: CITY MANAGER
From: DEVELOPMENT ENGINEERING MANAGER
Subject: LATECOMER CHARGES - ESA 12 GRAINGER RESERVOIR EXPANSION

RECOMMENDATION:

THAT THE MUNICIPAL Council requires the owner of **Lot 2, KAP 86216 Sec 31, Twp 26 SDYD**(formerly Lot 1 KAP 76392; with no changes to the Service Agreement), which is to be subdivided or developed, to provide the excess or extended services shown in Appendix E of the Latecomer Agreement No. 2250-70-84 attached to the report of the Director of Development Services/Community Services, dated January 19, 2010.

AND THAT the Municipal Council consider the cost to provide the excess or extended services shown in Appendix E of the Latecomer Agreement No. 2250-70-84 in whole or in part, to be excessive:

AND THAT the Latecomer charges be imposed for excess or extended services, as shown in Appendix E of Latecomer Agreement No. 2250-70-84, which are required to be installed as part of the referenced Development Project;

AND THAT Latecomer charges be imposed on the benefiting lands listed in Appendix E of Latecomer Agreement No. 2250-70-84

AND THAT the City enter into Latecomer Agreement No. 2250-70-84 with the owner to be effective upon Substantial Performance of the Excess or Extended Services, and the Mayor and City Clerk be authorized to execute and affix the corporate seal to this Latecomer Agreement;

AND FURTHER THAT the owners of the benefiting lands be advised in writing of the Latecomer charge to be imposed on their land.

BACKGROUND:

Pursuant to the Local Government Act, where an owner of land that is to be subdivided or developed is required to provide excess or extended services by Council, and where Council considers its cost to be provided these services are excessive: then Council can require the services to be paid for by the owner.

However, where the owner is required to pay for these costs, Council is required to:

- (a) determine the proportion of the cost of providing the highway or water, sewerage or drainage facilities that it considers constitutes the excess or extended service:

A handwritten signature in black ink, located in the bottom right corner of the page.

- (b) determine which part of the excess or extended service that it considers will benefit each of the parcels of land that will be serviced by the excess or extended service: and
- (c) impose as a condition of an owner connecting to or using the excess or extended service, a charge related to the benefit determined under paragraph (b).

The purpose of this report is to establish these latecomer charges which will be collected from latecomers who connect to or use the designated services for a period fixed by the Latecomer Agreement which shall be no greater than 10 years commencing from the date of **Substantial Performance November 26, 2007** as determined by the City Engineer.

In this particular development, the services which are the subject of a Latecomer charge are identified in Appendix E of the Latecomer Agreement.

All of the benefiting parcels have been identified as Appendix E of the Latecomer Agreement and the total Latecomer charge for each parcel is shown along with a breakdown by individual utility.

Where Development Cost Charge works are proposed to be constructed, a rebate will be made to the owner according to current Development Cost Charge rebate policy. Development Cost Charge works, are not eligible for Latecomer Charges.

Considerations that were not applicable to this report.

- INTERNAL CIRCULATIN TO:
- LEGAL/STATUTORY PROCEDURAL REQUIREMENTS:
- FINANCIAL/BUDGETARY CONSIDERATIONS:
- PERSONNEL IMPLICATION:
- TECHNICAL REQUIREMENTS:
- EXTERNAL AGENCY/PUBLIC COMMENTS:
- ALTERNATE RECOMMENDATION:

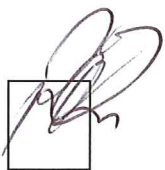
Submitted by:



Steve Muenz, P. Eng.

Development Engineering Manager

Approved for inclusion: RD



WATER SYSTEM EXTENDED SERVICE AGREEMENT
RESERVOIR EXPANSION – GRAINGER RESERVOIR
2250-70-84
ESA 12

City of Kelowna

And

Ryan Peak ULC.

November 20, 2007

WATER SYSTEM EXTENDED SERVICE AGREEMENT

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**WATER SYSTEM
EXTENDED SERVICES AGREEMENT**

This Agreement dated for reference November 20, 2007 is

BETWEEN:

CITY OF KELOWNA,
1435 Water Street
Kelowna, B.C. V1Y 1J4

AND:

RYAN PEAK ULC
Grand Peaks Properties, LLC
4582 S. Ulster Street Parkway, Suite 1200
Denver, CO 80237

RECITALS:

- A. The Developer proposes to develop the Ryan Peak ULC Land;
- B. In order to develop the Ryan Peak ULC Land, it is necessary for the Water System to be built;
- C. The Water System will in part serve Benefiting Lands;
- D. The Developer is prepared to construct and install the Water System on the terms of this Agreement;
- E. Council considers its costs to provide the Water System to be excessive;
- F. By Council resolution passed on December 12, 2005, Council has required the Developer to construct and install the Water System as an excess or extended service within the meaning of s. 939 of the *Local Government Act*; and
- G. Under s. 939 of the *Local Government Act*, the City and the Developer wish to enter into this Agreement to provide for the collection of part of the Construction Costs of the Water System from Benefiting Owners through the collection of Benefit Charges and their payment to the Developer,

In consideration of the payment of \$10.00 by the Developer to the City (the receipt of which is acknowledged), and in consideration of the promises exchanged below, the parties agree as follows:

1.0 DEFINITIONS AND INTERPRETATION

1.1 Definitions - In this Agreement (including its recitals):

- (a) "Benefit Charges" means charges determined, levied and actually collected by the City from Benefiting Owners in accordance with this Agreement;
- (b) "Benefiting Lands" means any of the lands, shown as such in Schedules "D", and any parcel of land subdivided from any such lands by any means (including subdivision plan, bare land strata plan, strata plan or lease) or into which any such lands are consolidated by any means;
- (c) "Benefiting Owner" means an owner of Benefiting Lands;
- (d) "Capacity" means the number of UNITS shown on Schedule "A" as being capable of connection to a CWS
- (e) "City" means the City of Kelowna;
- (f) "Completion" means completion of the water system, such that it is complete and may be operated for its intended purpose, in accordance with the drawings and specifications prepared for it and sealed under the professional seal of a Professional Engineer, and in accordance with all applicable enactments;
- (g) "Completion Date" means the date on which Completion of the water system was reached, that being November 27, 2007;
- (h) "Construction Costs" means Construction Costs of a CWS as set out in Schedule "B" which includes all costs, of every kind, necessary to design, construct and install that CWS to Completion;
- (i) "Conversion Method" means the method of determining the number of Units attributable to a building or other structure on, or use of, land other than a single family residential use, including institutional, commercial or industrial uses, which method is set out in Schedule "C";
- (j) "Council" means the council of the City under the *Local Government Act*;
- (k) "CWS" means a component of the Water System as described generally in Schedule "A" and referred to in Schedule "A" by number;
- (l) "Developer" means Ryan Peak ULC.
- (m) "ESA - 12" means any of the Benefiting Lands shown in Schedule "D";

- (j) all provisions are to be interpreted as always speaking;
- (k) reference to a "party" is a reference to a party to this Agreement and to their respective successors, assigns, trustees, administrators and receivers;
- (l) reference to a "day", "month", "quarter" or "year" is a reference to a calendar day, calendar month, calendar quarter or calendar year, as the case may be, unless otherwise expressly provided;
- (m) references to money are, unless otherwise expressly provided, references to Canadian currency;
- (n) reference to "owner" is a reference to that term as it is defined in the *Local Government Act*;
- (o) any act, decision, determination, consideration, consent or exercise of discretion under this Agreement must be performed, made or exercised acting reasonably unless it is said to be within the "sole discretion" of the party, in which case the act, decision, determination, consideration, consent or exercise of discretion may be performed, made or exercised in the absolute, unfettered and unreviewable discretion of that party;
- (p) where the word "including" is followed by a list, the contents of the list are not intended to circumscribe the generality of the expression preceding the word "including" and the expression is to be given the broadest possible interpretation; and

- (q) where it is provided that the parties, or any person, may or must "agree" or enter into an "agreement", the person or parties must agree in writing or enter into an agreement in writing in order for them to be bound.

2.0 CONSTRUCTION OF WATER SYSTEM

2.1 General Nature of Agreement - The City and the Developer agree that:

- (a) this Agreement applies to the Benefiting Lands;
- (b) the Developer must design and construct the Water System components CWS – 18, as described in Schedule "A", and
- (c) each CWS must be designed, constructed and installed by the Developer to Completion.

2.2 Water System Is An Excess Service - The City and the Developer agree that:

- (a) although the CWS's are capable of operating independently, they are functionally complementary and form part of an integrated system, being the Water System;
- (b) the Water System serves and benefits the Benefiting Lands and is an excess work and service as contemplated by, and for the purposes of, s. 939 of the *Local Government Act*;
- (c) Council has required the Developer to provide the Water System as an excess work or service;
- (d) Council considers its cost to provide the Water System to be excessive and has therefore required the Developer to pay the cost of providing the Water System;
- (e) Council has determined that the proportion of the cost of providing the Water System that it considers constitutes the excess or extended service is 100%;
- (f) Council has determined that the part of the Water System that it considers will benefit each of the parcels of land comprised in the Benefiting Lands is all portions of the Water System;
- (g) the table set out in Schedule "A" describes, in respect of each of the CWS, which of the Areas benefit from each CWS, and the capacity of each CWS; and
- (h) Council has determined to impose, as a condition of a Benefiting Owner connecting to or using the Water System, a Benefit Charge on each Benefiting Owner.

2.3 Determination of Benefit Charges - The City and the Developer agree that:

- (a) the Benefit Charges in respect of each CWS are as set out in Schedule "A";

- (b) the Benefit Charges set out in Schedule "A" are charges related to the benefit determined by Council as described in section 2.2(f); and
- (c) the Benefit Charges set out in Schedule "A" are payable in respect of each CWS, with the calculation of the total Benefit Charges payable by a Benefiting Owner upon connection to the Water System by that Benefiting Owner being as determined by the City based on the number of Units attributable to the Benefiting Lands being connected, using the Conversion Method where appropriate in the City's determination.

2.4 Construction Costs - The City and the Developer agree that:

- (a) the Construction Costs for each CWS are as set out in Schedule "B"; and
- (b) the Benefit Charges for each Unit set out in Schedule "A" is based on the Construction Costs.

3.0 DETERMINATION AND COLLECTION OF CHARGES

3.1 Collection of Benefit Charges - The City must impose, as a condition of connection to the Water System by a Benefiting Owner, the Benefit Charge payable by that Benefiting Owner as determined under section 2.3.

3.2 Interest - The City and the Developer agree that interest must be added to each Benefit Charge determined under section 3.1, with the interest being calculated annually at the Prescribed Rate from the relevant CWS completion date to the date the connection in question is made. The Prescribed Rate for the purposes of this Agreement is the annual interest rate, as established by the City's Bylaw No. 6519-89 (for greater certainty as amended from time to time). The current interest rate under the bylaw as of the date of this agreement is 5%.

3.3 City To Calculate Benefit Charges and Interest - The Developer agrees that the City is to calculate all Benefit Charges, including interest payable under section 3.2, and that the City's determination of such amounts is in each case conclusive and is binding on the Developer.

3.4 City To Pay Benefit Charges To the Developer - The City agrees to pay to the Developer all Benefit Charges actually collected by the City as promptly as is practicable after their receipt by the City. No interest is payable by the City on Benefit Charges for the period between their receipt by the City and their payment to the Developer.

3.5 Time Limit on Collection of Benefit Charges - The City and the Developer agree that:

- (a) Benefit Charges must be collected from Benefiting Owners by the City beginning on the Completion Date to the date that is the earlier of:

- 1) The date on which Capacity is reached for that CWS, or
- 2) 10 years from the completion date,

after which the City is no longer required to collect Benefit Charges related to that CWS from any Benefiting Owners; and

- (b) this Agreement and the obligations of the City under it (including with respect to the collection and payment of Benefit Charges) terminate on **November 27, 2017**.

3.6 Risk of Underutilization - The Developer acknowledges, and agrees with the City, that:

- (a) the Developer bears all risk, and loss, of the financial and other consequences to the Developer connected with, or resulting from, the capacity of the Water System, or any CWS, being in excess of the actual use of or demand on the Water System or CWS because the extent of development of any or all of the Benefiting Lands is less than anticipated on the reference date of this Agreement;
- (b) the Developer irrevocably releases and waives, and must indemnify and hold harmless, the City (and its elected officials, officers, employees, agents or contractors) from and in respect of any loss, damage, liability or cost suffered or incurred by the Developer or anyone else in any way connected with anything described in this section.

4.0 ARBITRATION

4.1 Dispute Resolution - If any dispute, disagreement or issue arises regarding the interpretation, performance or a breach of this Agreement, a party may give notice of the matter to the other party. Within 15 days after such a notice is given, the parties must meet and attempt to resolve the matter to the satisfaction of each of the parties. Each of the parties must cooperate with the other, including by providing such information, on a without prejudice basis, as is reasonably necessary to assist in resolving the matter. If the parties are not able to resolve within 30 days after notice of the matter is given by a party, the matter must be referred for arbitration within 10 days after the expiry of the 30 day period by a single arbitrator appointed and acting under the *Arbitration Act* (British Columbia), who must issue a decision in respect of the matter within 30 days after its referral to the arbitrator. The cost of the arbitration is to be borne equally by the parties to it. The decision of an arbitrator to whom a matter is referred under this section is final and binding.

4.2 No Limit on Other Remedies - For clarity, nothing in this article affects the rights or remedies available to a party at law or under any enactment with respect to any threatened breach or breach of this Agreement by the other party.

5.0 GENERAL

5.1 Severance - If any term of this Agreement is held to be invalid, illegal or unenforceable by a court having the jurisdiction to do so, that term 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 term.

5.2 Notice - All notices or other communications required or permitted to be given under this Agreement must be in writing and must be sent by courier delivery or by facsimile transmission, addressed as follows:

(a) If to the City:

City of Kelowna
1435 Water Street
Kelowna, B.C.
V1Y 1J4

Attention: City Clerk
Fax: (250) 862-3399

(b) If to the Developer:

Ryan Peak ULC
Grand Peaks Properties, LLC
4582 S. Ulster Street Parkway, Suite 1200
Denver, CO 80237

Attention: Paul Herskowitz
Fax: 303-991-3143

Any notice or other communication that is delivered is considered to have been given on the next business day after it is dispatched for delivery. Any notice or other consideration that is sent by facsimile transmission is considered to have been given on the day it is sent if that day is a business day, and if that day is not a business day it is considered to have been given on the next business day after the date it is sent. If a party changes its address or facsimile number, or both, it must immediately give notice of its new address or facsimile number, or both, to the other party as provided in this section.

5.3 Further Acts - Each of the parties must at all times execute and deliver all such further documents, deeds and other instruments, and do and perform such acts, as may be reasonably necessary to give full effect to the intent and meaning of this Agreement.

5.4 Binding Effect - This Agreement ensures to the benefit of and is binding upon the parties and their respective heirs, executors, administrators, trustees, receivers, successors and permitted assigns.

5.5 No Waiver - No provision or breach of this Agreement, or any default, is to be considered to have been waived by a party unless the waiver is express and is in writing by the party. The waiver by a party of any breach by the other party of any provision, or Default, is not to be construed as or constituted a waiver of any further or other breach of the same or any other provision or default and the consent or approval of a party to any act by another party requiring the consent or approval of the party is not to be considered to waive or render unnecessary such consents or approvals to any subsequent same or similar act by the other party.

5.6 Third Party Beneficiaries - This Agreement is not to be interpreted to create rights in, or to grant remedies to, any third party as a beneficiary of this Agreement or of any duty, obligation or undertaking established in this Agreement.

5.7 Contractual Rights and Obligations Only - The parties each agree that this Agreement creates only contractual rights and obligations between them and they each by this section agree that no tort or other duty, obligation or liability is created by or under this Agreement (including any duty of care or fiduciary duty) is created by or under this Agreement.

5.8 All Actions at Developer's Expense - Unless otherwise expressly provided in this Agreement, all costs, expenses and liabilities of doing anything required by, or in connection with, this Agreement are solely those of the Developer, including all Construction Costs in respect of the Water System.

5.9 Assignment of the Developer's Rights - If the rights of the Developer under this Agreement are assigned or transferred, in either case voluntarily or by operation of law, the Developer agrees that the City may pay any amounts payable to the Developer under this Agreement to the assignee, transferee or successor of the Developer considered by the City, in its sole discretion, to be entitled to receive those payments. If conflicting demands are made on the City for payment of amounts payable to the Developer under this agreement, the City is entitled, in its sole discretion, to begin interpleaded proceedings in the Supreme Court of British Columbia and to join in those proceedings any person the City in its sole discretion considers necessary or proper, including any person claiming rights under this Agreement. As the case may be, the City is released from any liability under this Agreement by paying amounts payable to the Developer under this Agreement to the assignee, transferee or successor of the Developer considered by the City, in its sole discretion, to be entitled to receive those payments or by paying amounts payable to the Developer under this Agreement to the person whom the Supreme Court of British Columbia orders in any interpleaded proceedings is entitled to receive those amounts. The City is entitled to recover its legal fees and disbursements incurred in any interpleaded proceedings, with the fees and disbursements constituting a lien upon all amounts payable to the Developer under this Agreement.

5.10 Release - The Developer irrevocably releases and waives, and agrees not to commence legal proceedings against, the City (or its elected officials, officers, employees, agents or contractors) from and in respect of any duty, obligation or liability of any of them in any way connected with any error, omission or act relating to this Agreement, including failure to pass any resolution, to adopt any bylaw, enter into any agreement, impose or collect any Benefit Charges or interest. This section does not apply to fraud or other intentional wrong on the part of the City (or its elected officials, officers or employees).

5.11 Developer's Representations and Warranties - The Developer represents and warrants to the City that:

- (a) the Developer has not claimed, demanded, received or collected money or any other consideration from Benefiting Owners or others interested in the land Benefiting Lands, or lands potentially from the Water System, for the provision, or the expectation of the provision of, the Water System;
- (b) the Developer has not entered into any agreement or other legal obligation with any Benefiting Owner of such potentially Benefiting Land in any way related to or connected directly or indirectly with provision of the Water System; and

- (c) the Developer is an unlimited liability company duly formed and registered and has the lawful authority and capacity to enter into and perform this Agreement in accordance with its terms.

For clarity, nothing in this section prevents the Developer from entering into agreements with the Benefiting Owners or others interested in lands potentially benefiting from the Water System with respect to adjustment between those parties of charges collected by the City and remitted to the Developer, under which the Developer may be obliged to remit to those other Benefiting Owners partial or complete reimbursement, as the case may be, of amounts received by the Developer from the City.

5.12 Entire Agreement - This Agreement is the entire agreement between the parties and it supersedes and terminates all previous agreements, promises, representations and warranties between the parties. The parties agree that there are no agreements, promises, representations or warranties other than as expressly set out in this Agreement. For clarity, the Developer acknowledges and agrees that the City has not made or given any representations or warranties to the Developer respecting the subject of this Agreement.

5.13 No Effect On Laws or Powers - This Agreement does not:

- (a) affect or limit the discretion, rights, duties or powers of the City under any enactment or at common law, including in relation to the use or subdivision of the land;
- (b) affect or limit any enactment relating to the use or subdivision of the land;
- (c) impose on the City any legal duty or obligation, including any duty of care or contractual or other legal duty or obligation, to enforce this Agreement; or
- (d) relieve the Developer or anyone else from complying with any enactment, including in relation to the use or subdivision of land.

5.14 Developer's Representations and Warranties - The Developer represents and warrants to the City as follows:

- (a) Ryan Peak ULC is the Developer and has the power, capacity and authority to enter into this Agreement.

- (b) all limited partnership and corporate acts and proceedings necessary to authorize the execution and delivery, and performance, of this Agreement by the Developer have been duly performed and completed in accordance with all applicable laws, the co stating documents of the Developer and all applicable partnership agreements and amendments thereto;
- (c) the Developer has the power, capacity and authority to enter into and perform this Agreement in accordance with its terms; and
- (d) neither the entry into, nor performance of this Agreement by the Developer conflicts with or violates any provision of the Park Permit or of any agreement, deed or other instrument to which the Developer is a party or by which it is bound.


As evidence of their agreement to be bound by the above terms, the parties each have executed and delivered this Agreement under seal by executing this Agreement below:

CITY OF KELOWNA by its authorized signatories:

RYAN PEAK ULC. INC. NO.201837305

By its authorized signatory:

Mayor



Sign Name:

Clerk

LUKE SIMPSON

Print Name:

Approved by resolution of the Council of the City of Kelowna on: _____, 2008.

Date executed by the City of Kelowna: _____, 2008.

Date executed by Ryan Peak ULC,,: _____, 2008.

SCHEDULE "A"
Extended Service Agreement
Grainger Reservoir

1. DESCRIPTION OF WATER SYSTEM

This Schedule describes generally the component of the Water System, based on Unit Capacities for the purposes of this Agreement, as follows:

CWS-18
Grainger Reservoir expansion

2. BENEFITTING AREAS

Component	Capacity	Benefiting Areas
CWS-18	1000 units	ESA-12

3. LATECOMER BENEFIT CHARGES PER EQUIVALENT DWELLING UNIT(EDU)

Component	Charge
CWS-18	\$ 617.00/unit

Note: Latecomer charges are subject to an annual interest rate escalation, as described in Section 3.2, from the date of substantial completion.

SCHEDULE "B"
Extended Service Agreement
Grainger Reservoir

(a) Summary of Component Costs

Component	Cost (in \$)
CWS-18	\$616,858.81

SCHEDULE "C"
Water System Extended Service Agreement

Determination of Equivalent Dwelling Units (EDU's)

EDU's calculated for a building or parcel will be done on the basis that the minimum of any conversion will be one EDU, and any building or land area resulting in less than one EDU will be rounded up to one EDU. Conversions that result in greater than one EDU will be calculated to two decimal points, using standard algebraic rounding.

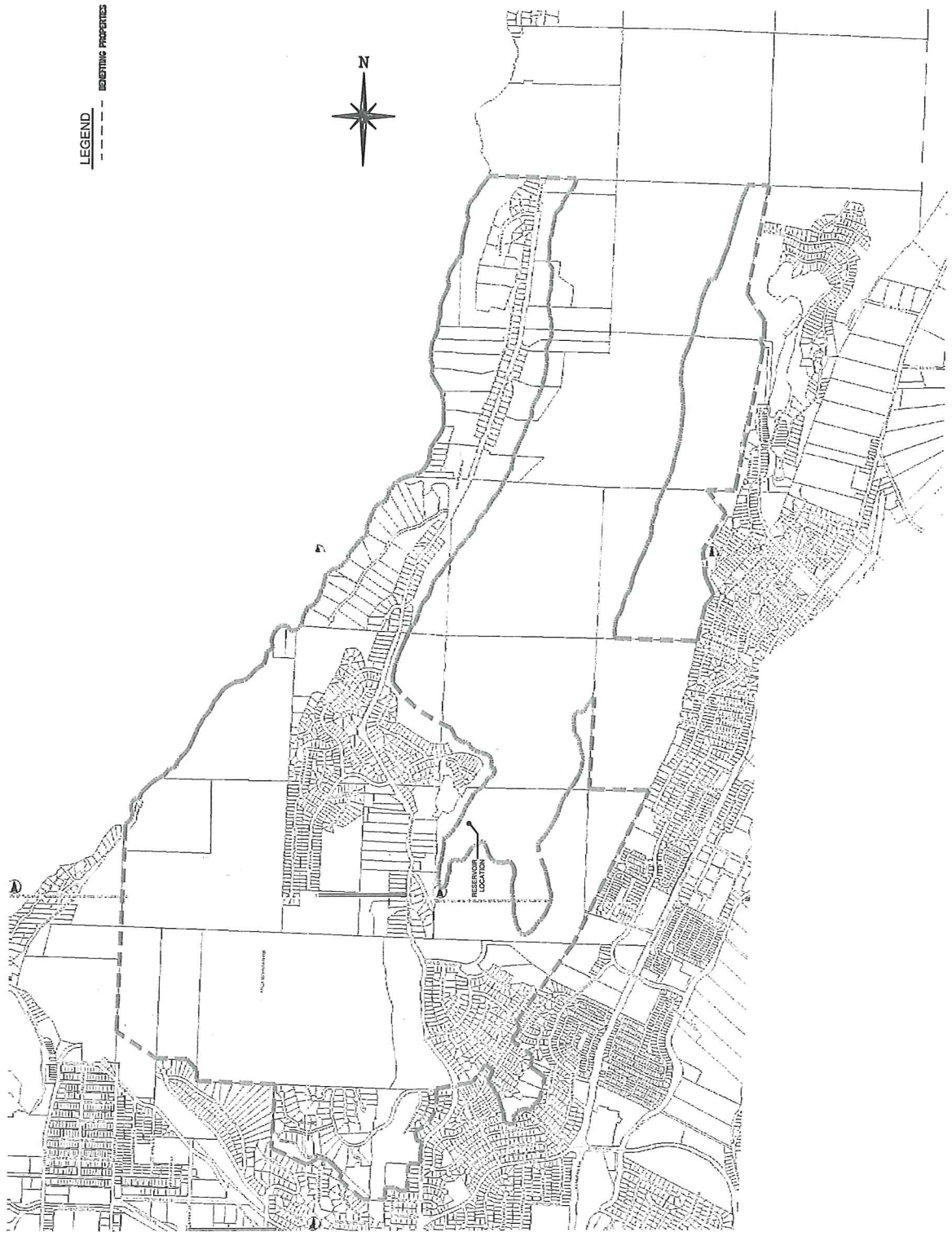
TABLE D.1
BASIS FOR DETERMINING NUMBER OF EQUIVALENT UNITS

Basis: 1.0 single family residential unit equals 1.0 Equivalent Dwelling Unit (EDU)

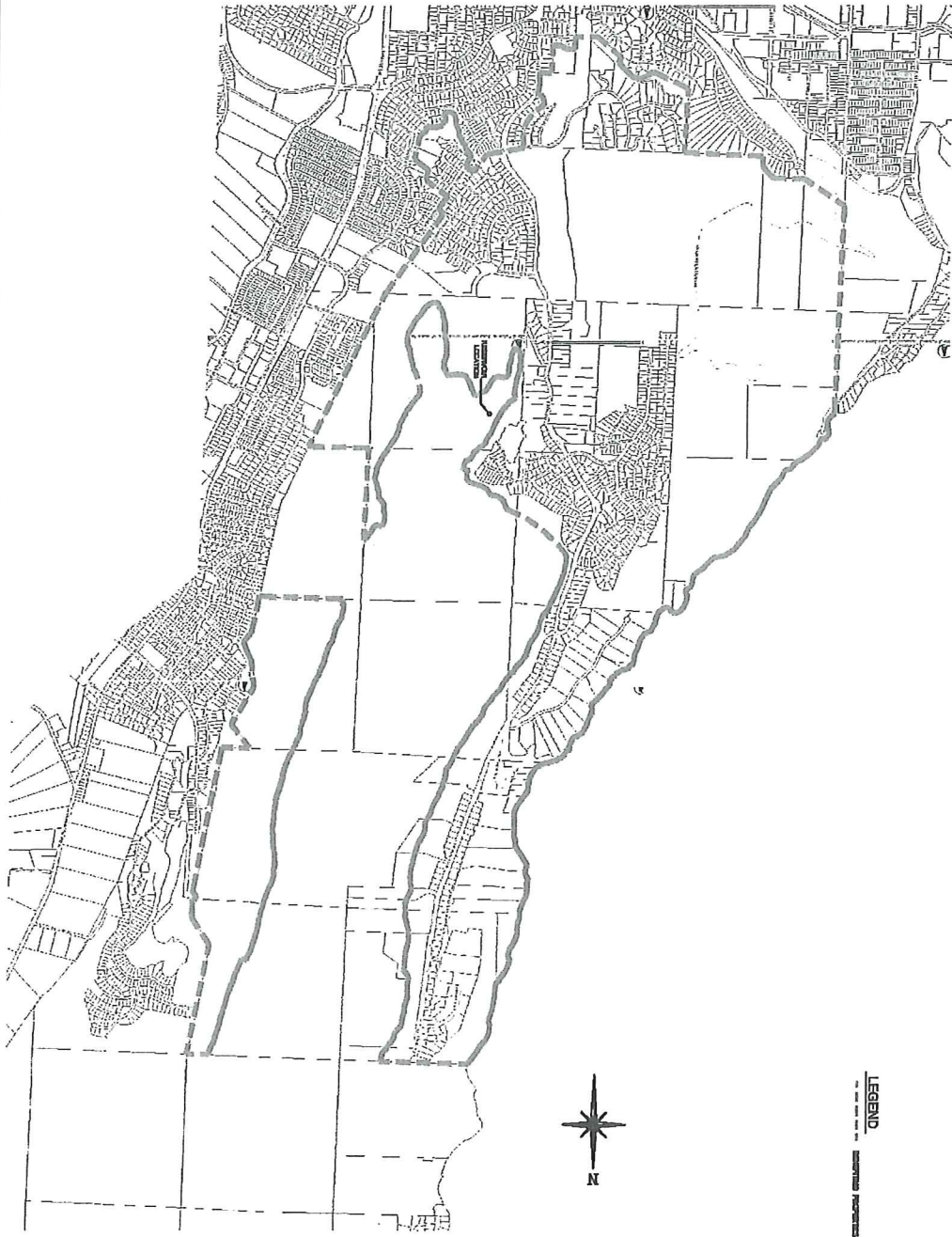
Zoning category as determined by Section 1.3.1 of Zoning Bylaw No. 8000	Factor
Residential	Each building lot, residential unit, group home or lodging house or mobile home space is one EDU. For "Multi-Family High Density Residential" units, as defined in the current Development Cost Charge Bylaw 7728, each multi-family high density residential unit equals .70 EDU.
Commercial	The first 2,600 square feet of floor area or portion thereof equals 1 EDU. Thereafter, 1/2600 EDU per square foot of floor area.
Industrial	The first .36 acres of developed land or portion thereof equals 1 EDU. Thereafter, 2.8 EDU's per acre of developed land.
Public and Institutional	The first 2,600 square feet of floor area or portion thereof equals 1 EDU. Thereafter, 1/2600 EDU per square foot of floor area. For schools, 50 elementary students equals one EDU and 35 middle or senior students equals one EDU.

Note: Developed Land means that portion of area of a lot containing any improvements for the accommodation of a structure, storage, parking, landscaping or any entity, thing or device to facilitate the permitted use. Landscaped areas are exempt from charges Industrial land use designations only.

LEGEND
 --- SEWERING PROPERTIES



THE CITY OF KELOWNA DEPARTMENT OF PLANNING AND DEVELOPMENT		DIVISION 6017-LCP 0
PROJECT NO. APPROVED DATE SCALE		PROJECT NAME RYAN PEAKS ULC GRANGER RESERVOIR EXPANSION LATECOMER PLAN
DESIGNER DRAWN BY CHECKED BY DATE	PROJECT NO. APPROVED DATE SCALE	DIVISION 6017-LCP 0
PROTECH CONSULTANTS LTD. 200 - 1401 St. Paul Street Kelowna, B.C. Phone (605)-771-1000 Fax (605)-100-1000		
Legend Water Sewer Storm Gas U.S. Boundary	Methods Power Sewer Catch Basin Street	Design of Sewer at property line Design of Sewer at property line Design of Sewer at property line Design of Sewer at property line



Prepared by: _____
 Date: _____
 Scale: _____
 Title: _____

1. State of Iowa
 2. County of _____
 3. City of _____
 4. _____
 5. _____
 6. _____
 7. _____
 8. _____
 9. _____
 10. _____

PROTECH
CONSULTANTS LTD.
 1400 W. First Street, Des Moines, IA 50319
 Phone: (515) 281-1111
 Fax: (515) 281-1112

NO.	DATE	DESCRIPTION

THE CITY OF KEIOWNA
 RAIN PEAKS LLC
 GRANINGER RESERVOIR EXPANSION
 LATEROWNER PLAN

SHEET NO. 0017-LCP
 OF 0

SCHEDULE "D"