

SCHEDULE 2
OF BYLAW 7900
CITY OF KELOWNA
SERVICING AGREEMENT

SERVICING AGREEMENT

LAND TITLE ACT FORM C

(Section 219.81)

Province of British Columbia
GENERAL INSTRUMENT - PART 1

(This area for Land Title Office use)

Page 1 of _____ Pages

1. Application: (Name, address, phone number and signature of applicant, applicant's solicitor or agent)

2. PARCEL IDENTIFIER(S) AND LEGAL DESCRIPTION(S) OF LAND:*

(PID) (LEGAL DESCRIPTIONS)

[insert legal description]

3. NATURE OF INTEREST:*

Description	Document Reference (page and paragraph)	Person Entitled to Interest
Section 219 Covenant	Entire Document Pages 3 through _____	Transferee

4. TERMS: Part 2 of this instrument consists of (select one only)

(a) File Standard Charge Terms	_____	D.F. No.
(b) Express Charge Terms	<u> X </u>	Annexed as Part 2
(c) Release	_____	There is no Part 2 of this instrument

A selection of (a) include any additional or modified terms referred to in Item 7 or in a schedule annexed to this instrument. If (c) is selected, the charge described in Item 3 is released or discharged as a charge on the land described in Item 2.

5. TRANSFEROR(S):*

[insert NAME and incorporation number]

6. TRANSFEREE(S): (including postal address(es) and postal code[s])*

CITY OF KELOWNA, 1435 Water Street, Kelowna, British Columbia, V1Y 1J4

LAND TITLE ACT
FORM C

(Section 219.81)

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GENERAL INSTRUMENT - PART 1

Page 2

7. ADDITIONAL OR MODIFIED TERMS:*

N/A

8. EXECUTION(S):**This instrument creates, assigns, modifies, enlarges, discharges or governs the priority of the interest(s) described in Item 3 and the Transferor(s) and every other signatory agree to be bound by this instrument, and acknowledge(s) receipt of a true copy of the filed standard charge terms, if any.

Officer Signature(s)

Execution Date

Party(ies) Signature(s)

Name:

____ _

[INSERT NAME] by its authorized signatories:

Name:

Name:

Name:

____ _

CITY OF KELOWNA by its authorized signatories:

(as to both signatures)

Mayor:

City Clerk:

OFFICER CERTIFICATION:

Your signature constitutes a representation that you are a solicitor, notary public, or other person authorized by the Evidence Act, R.S.B.C., 1979 c.116 to take affidavits for use in British Columbia and certifies the matters set out in Part 5 of the Land Title Act as they pertain to the execution of this instrument

* If space insufficient, enter "SEE SCHEDULE" and attach schedule in Form E.

** If space insufficient, continue executions on additional page(s) in Form D.

DOCUMENT APPROVAL			
Reference No.			
Project (Street)			
Cir.	Department	Date	Init.

TERMS OF INSTRUMENT - PART 2
SECTION 219 COVENANT

THIS COVENANT dated for reference the _____ day of _____, 199__

BETWEEN:

[INSERT NAME]
 [insert address]
 (the "Covenantor" or "Owner")

OF THE FIRST PART

AND:

CITY OF KELOWNA, a municipality incorporated under the *Local Government Act*, R.S.B.C. 1996, c. 323 and having its municipal office at 1435 Water Street, Kelowna, British Columbia, V1Y 1J4
 ("the City")

OF THE SECOND PART

WHEREAS:

- A. The Covenantor is the Owner of the Lands defined herein;
- B. The Covenantor desires to Subdivide or Develop the Lands and, in connection therewith, is required to provide all or part of the following:

- (a) Works and Services, pursuant to Sections 938 and 939 of the *Local Government Act*, R.S.B.C. 1996, c. 323 (the "*Local Government Act*"), and the City of Kelowna Subdivision, Development and Servicing Bylaw No. 7900 (the "Bylaw 7900"); and
 - (b) certain amenities, pursuant to Section 904 of the *Local Government Act*.
- C. The Covenantor wishes to provide a Performance Bond and enter into this Covenant pursuant to Section 940 of the *Local Government Act* in order that the Approving Officer may approve the Subdivision or the Building Inspector may approve the Application for Building Permit, as the case may be, before the Works and Services have been completed;
- D. The City has agreed to accept the conveyance and transfer of certain amenities, including property, pursuant to Section 314 of the *Local Government Act*;
- E. Section 219 of the *Land Title Act*, R.S.B.C. 1996, c. 250 (the "*Land Title Act*") provides that a covenant may be registered as a charge against title to land, whether the covenant is of a negative or a positive nature, in respect of the use of land or the use of a building on or to be erected on land, or that land is not to be built on or Subdivided except in accordance with a covenant in favour of a municipality.

NOW THEREFORE in consideration of the premises and mutual covenants and agreements contained herein and the sum of \$1.00 now paid by the City to the Covenantor (the receipt and sufficiency of which are hereby acknowledged by the parties), the parties covenant and agree as follows:

1. Interpretation

- 1.1 Definitions. Words and terms used in this Covenant shall have the meaning set out in Bylaw 7900 unless otherwise defined herein. In this Covenant:

"Covenant" means a covenant in favour of the City registrable under Section 219 of the *Land Title Act*;

"day" means calendar day;

"Default Costs" means the costs to the City of performing any of the obligations of the Covenantor, as Owner, under Bylaw 7900, and the obligations of the Covenantor under this Covenant following a default by the Covenantor under Bylaw 7900 or this Covenant, and includes, without limitation, the cost of materials, labour (whether using the City's own forces or other contractors), administrative and overhead costs, engineering and other consultant's fees, and legal fees and disbursements;

"Lands" means those certain Parcels or tracts of lands and premises situate in the City of Kelowna, in the Province of British Columbia legally described as

P.I.D.:

"month" means a calendar month;

"Zone Amending Bylaw" means the bylaw(s) adopted by the City, following an application by the Covenantor, as Owner, in connection with the Subdivision or Development of the Lands, to amend City of Kelowna Zoning Bylaw No. 12375.

- 1.2 Grammatical. The singular includes a reference to the plural, the masculine includes a reference to the feminine or body corporate or politic where the context requires, and a reference to the plural includes a reference to the singular, unless the context requires otherwise.
- 1.3 Enactments. Any enactment referred to herein is a reference to an enactment of British Columbia or Canada, as the case may be, and regulations thereto, as amended, revised, consolidated or replaced from time to time, and any bylaw referred to herein is a reference to an enactment of the Council of the City of Kelowna, as amended, revised, consolidated or replaced from time to time.
- 1.4 Headings. The headings given to the Parts, Sections and Paragraphs in this Covenant are for convenience of reference only. They do not form part of this Covenant and shall not be used in the interpretation of this Covenant.
- 1.5 Severability. If any Part, Section, Paragraph or phrase of this Covenant is for any reason held to be invalid by the decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Covenant.
- 1.6 Appendices. The following appendices are annexed to and form part of this Covenant:
Appendix "A": Schedule of Works and Services

2.0 SUBDIVISION AND DEVELOPMENT

- 2.1 Restriction on Subdivision and Development of Lands. The Covenantor covenants and agrees with the City that the Lands shall not be Subdivided or Developed except in accordance with this Covenant and Bylaw 7900.

3.0 SECURITY FOR WORKS AND SERVICES

BL8680 amended Subsection 3.1:

- 3.1 Performance Bond. If a Covenantor wishes to submit an Application for Subdivision Approval or an Application for Building Permit to the City before a Certificate of Substantial Performance has been issued in respect of the Works and Services to be designed and constructed by the Covenantor, the Covenantor shall provide the City with a Performance Bond in the amount of 140% of the cost (130% of the cost if engineering design is complete), as estimated by the Consulting Engineer and verified by the City Engineer, of constructing any such Works and Services that are not constructed by the Covenantor prior to the Covenantor making such an application. The Performance Bond secures the obligations of the Covenantor, as Owner, under Bylaw 7900 (except Sections 10.1, 10.2 and 10.3) and the obligations of the Covenantor hereunder. The Performance Bond shall be administered in accordance with Section 7.0 herein and as follows:

- (a) Renewal of Bond. Unless the Performance Bond is perpetual, the Covenantor shall renew the Performance Bond, at least thirty (30) days prior to its expiration in any year, for a further twelve month period until a Certificate of Acceptance for the Works and Services has been issued. The amount of the renewed Performance Bond in respect of Works and Services for which no Certificate of Substantial Completion has been issued, calculated as set out above, shall be increased by the amount of the increase, if any, in the all items British Columbia Consumer Price Index as established by Statistics Canada, or its replacement index, over the preceding twelve month period.

- (b) Draw on Bond for Default. If the Covenantor fails to observe or perform any of the obligations of the Covenantor, as Owner, under Bylaw 7900 (except Sections 10.1, 10.2, and 10.3) on the part of the Owner to observe or perform, or any of the obligation of the Covenantor hereunder, the City may, upon notice to the Covenantor, cure the default and draw upon the Performance Bond in an amount equal to the Default Costs incurred by the City in curing such default.
 - (c) Shortfall in Bond. If the Performance Bond is insufficient to cover the Default Cost, the Covenantor shall pay to the City, immediately on receipt of the City's invoice for same, the difference between the balance of the Performance Bond and the Default Costs.
 - (d) Reduction of Bond. If the Covenantor wishes to apply to the City for a reduction of the Performance Bond before a Certificate of Substantial Performance has been issued with respect to all Works and Services, the Consulting Engineer must schedule a field inspection with the City Engineer and provide the City with materials certificates as set out in the Specifications and a Statutory Declaration with respect to such completed Works and Services. The City may reduce the Performance Bond by an amount equal to the cost, as estimated by the Consulting Engineer and verified by the City Engineer, of designing and constructing such completed Works and Services; provided that in no event will the Performance Bond be no less than 5% of the original Performance Bond value.
 - (e) Interest. In no event shall the City be required to pay interest on the amount of the Performance Bond.
 - (f) Return of Bond. The City shall return the balance of the Performance Bond to the Covenantor following the receipt of a Certificate of Substantial Performance prepared by the Consulting Engineer with respect to all Works and Services, a Maintenance Bond, and a Statutory Declaration all in accordance with Section 9.5 of Bylaw 7900; provided that the City will be entitled to hold back 5% of the Performance Bond until the Covenantor, as Owner, has complied with the provisions of Section 9.6 of Bylaw 7900.
- 3.2 Maintenance Bond. Upon the issuance of the Certificate of Substantial Performance, the Covenantor shall provide the City Engineer with a Maintenance Bond equal to the greater of: (i) 5% of the cost of the Works and Services; and (ii) \$1,000.00, all or part of which amount may be withheld by the City from the balance of the Performance Bond otherwise payable to the Covenantor. The Maintenance Bond secures the obligations of the Covenantor, as Owner, under Section 10.1, 10.2 and 10.3 of Bylaw 7900. The Maintenance Bond shall be administered in accordance with Section 7.0, and as follows:
- (a) Draw on Deposit for Default. If the Covenantor fails to observe or perform any of the obligations of the Covenantor, as Owner, under Sections 10.1, 10.2 or 10.3 of Bylaw 7900, the City may give notice to the Covenantor of the City's election to cure the default and may draw upon the Maintenance Bond in an amount equal to the Default Costs incurred by the City in curing such default.

- (b) Shortfall in Deposit. If the Maintenance Bond is insufficient to cover the Default Cost, the Covenantor shall pay to the City, immediately on receipt of the City's invoice for same, the difference between the balance of the Maintenance Bond and the Default Costs.
- (c) Interest. In no event shall the City be required to pay interest on the amount of the Maintenance Bond.
- (d) Return of Deposit. The City shall return the balance of the Maintenance Bond following the expiration of all Maintenance Periods, receipt by the City of a Statutory Declaration from the Covenantor, verification by the City Engineer that all information, documents, agreements, covenants and Fees required from the Covenantor, as Owner, and Consulting Engineer pursuant to Bylaw 7900 have been provided to the City, and issuance by the City of the Certificate of Acceptance in accordance with Section 10.4 of Bylaw 7900.

4.0 FEES AND CHARGES

- 4.1 Fees and Charges. Unless otherwise provided in Bylaw 7900, the Covenantor covenants and agrees with the City to pay the following to the City prior to the earlier of (i) the adoption of the Zone Amending Bylaw, if applicable; and (ii) registration of this Covenant in the Land Title Office:
 - (a) all fees, disbursements, expenses, charges, taxes, rates and assessments required to be paid to the City under Bylaw 7900 and the Building Bylaw;
 - (b) all development cost charges imposed by bylaw, where applicable, on the Subdivision and Development of the Lands. The Covenantor acknowledges and agrees that the work done and payments made pursuant to this Covenant are not payments or work to be applied as a credit toward development cost charges, save as may be expressly agreed by the City in writing;
 - (c) legal fees and disbursements incurred by the City in the preparation of this Covenant and ancillary documents, and the costs of registration of such documents in the Land Title Office.

5.0 CITY AMENITIES

- 5.1 Transfer of Lands for Public Use. The Covenantor further covenants and agrees with the City, in anticipation of and compliance with the proposed Zone Amending Bylaw and under Section 314 of the *Local Government Act*, that it will transfer, pay or contribute prior to or concurrent with the adoption of the Zone Amending Bylaw:
 - (a) [LIST AMENITIES AND DEADLINES FOR PERFORMANCE OF EACH]
 - (b) The Covenantor shall pay to the respective government such Property Transfer Tax, Goods and Services Tax, or other tax, fee, or charge that may be applicable in respect of any transfers of property to the City.
- 5.2 No Deemed Expropriation or Injurious Affection. The Covenantor acknowledges and agrees that the zoning of certain areas of the Lands for public use does not constitute an expropriation, deemed expropriation, condemnation, public taking or injurious affection for which the Covenantor would be compensated.

6.0 INSOLVENCY OF COVENANTOR

6.1 Performance Bond and Maintenance Bond. Notwithstanding any other provision of this Covenant, the City shall be entitled to draw on the Performance Bond or the Maintenance Bond and complete the Works and Services or remedy any defects in the Works and Services if:

- (a) the Covenantor commits an act of bankruptcy or makes a proposal or general assignment for the benefit of its creditors;
- (b) an order is made or a resolution passed or petition filed for the liquidation or winding-up of the Covenantor; or
- (c) a receiver or receiver-manager of the Covenantor, or the Lands or part thereof, is appointed or any encumbrance-holder takes possession of the Lands or any part thereof.

The Covenantor agrees that the Performance Bond and the Maintenance Bond are not assets of the Covenantor and are not subject to any trust or other right or claim of the Covenantor other than a contract claim expressly contemplated by this Covenant.

7.0 WAIVER AND RELEASE BY THE COVENANTOR

7.1 Waiver of Local Government Act Provision. The Covenantor agrees that any bylaw adopted by the City pursuant to Part 26 of the *Local Government Act* after the Covenantor has submitted an Application for Subdivision to the City and has paid the applicable Fee, which bylaw would otherwise be applicable to that Subdivision but, in accordance with Section 943 of the *Local Government Act*, would have no effect on the Subdivision for a period of 12 months after it was adopted unless agreed to by the applicant, shall apply to and affect the Subdivision of the Lands as and from the date on which such bylaw was adopted by the City.

7.2 Waiver and Release by Covenantor. The Covenantor waives, relinquishes, and abandons any right or claim which the Covenantor now has or may at any time have:

- (a) save and except as expressly provided in this Covenant, for any contribution from the City or any other person toward the Covenantor's cost of designing, constructing or installing the Works and Services, or of making the payments, contributions or transfers under Section 4.1 or 5.1 of this Covenant.

7.3 Act or Omission of Covenantor. Despite any rule of law or equity to the contrary, the Covenantor releases, saves harmless and forever discharges the City and its elected officials, officers, servants, employees, solicitors, agents, successors, and assigns from all manner of actions, causes of action, suits, debts, losses, dues, accounts, bonds, covenants, contracts, expenses, damages, costs, claims, and demands whatsoever, and whomsoever, brought by reason of or related to:

- (a) the Works and Services to be performed or provided by the Covenantor or its servants, agents, officers, contractors, sub-contractors, licensees, or invitees, under this Covenant;
- (b) liens for non-payment for labour or material, workers compensation assessment, unemployment insurance, or federal or provincial taxes.

7.4 Act or Omission of City. Despite any rule of law or equity to the contrary, the Covenantor releases, saves harmless and forever discharges, and covenants not to sue the City, its elected officials, officers, servants, consultants, solicitors, agents, successors, and assigns, in respect of any and all actions, causes of action, claims, demands, and damages howsoever arising which the Covenantor now has or may hereafter have against the City, its elected officials, officers, servants, employees, consultants, solicitors, agents, successors, and assigns, by reason of any cause, act, deed, matter, thing, omission, or commission, of the City which is existing or arising in relation to any matter arising from this Covenant, provided that this section is not intended to prevent the Covenantor from enforcing any remedy for breach by the City of its obligations under this Covenant.

7.5 General. Without limiting the application of Bylaw 7900 to this Covenant, the provisions of Sections 12.1 to 12.6 inclusive of Bylaw 7900 shall be incorporated by reference into this Covenant.

8.0 REPRESENTATIONS AND WARRANTIES OF COVENANTOR

8.1 Representations and Warranties of Covenantor. The Covenantor represents and warrants to the City that:

- (a) all necessary corporate actions and proceedings have been taken by the Covenantor to authorize its entry into and performance of this Covenant;
- (b) upon execution and delivery on behalf of the Covenantor, this Covenant constitutes a valid and binding contractual obligation of the Covenantor;
- (c) neither the execution, delivery or performance of this Covenant shall breach any other agreement or obligation, or cause the Covenantor to be in default of any other agreement or obligation, respecting the Lands; and
- (d) the Covenantor has the corporate capacity and authority to enter into and perform this Covenant.

9.0 GENERAL PROVISIONS

9.1 Intention of Parties. The parties intend, by their execution and delivery of this Covenant, to create a covenant granted to the City under Section 219 of the *Land Title Act*, a contract, and a deed executed and delivered to the City under seal.

9.2 Covenants Run with the Lands. The covenants set forth in this Covenant shall charge the Lands pursuant to Section 219 of the *Land Title Act* and are covenants the burden of which shall run with the Lands and bind the Lands and every part or parts thereof, and every part to which the lands may be divided or subdivided, whether by subdivision plan, strata plan, or otherwise. The covenants set forth in this Covenant do not terminate if and when a person other than the Covenantor becomes an owner in fee simple of the Lands or any portion thereof, but charge the whole of the interest of such person and continue to run with the Lands and bind the Lands and all future owners for the time being of the Lands or any portion thereof.

- 9.3 Benefit of City. It is further expressly agreed that the benefit of all covenants made by the Covenantor in this Covenant accrues solely to the City and that this Covenant may only be modified by agreement of the City with the Covenantor, or discharged by the City pursuant to the provisions of Section 219(9) of the *Land Title Act* and this Covenant.
- 9.4 Decisions of City. Unless otherwise expressly provided in this Covenant, whenever the City is permitted to make or give any decision, direction, determination, or consent, the City may act in its sole discretion.
- 9.5 Entire Agreement. It is mutually understood, agreed, and declared by and between the parties the City has made no representations, covenants, warranties, guarantees, promises, or agreements (oral or otherwise), express or implied, with the Covenantor other than those expressly contained in this Covenant. This Covenant constitutes the entire agreement between the Covenantor and the City 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 Covenantor.
- 9.6 Rights Cumulative. Nothing contained or implied herein prejudices or affects the City's rights and powers in the exercise of its functions pursuant to the *Local Government Act* or its rights and powers under any public and private statutes, bylaws, orders, and regulations to the extent the same are applicable to the Lands, all of which may be fully and effectively exercised in relation to the Lands as if this Covenant had not been executed and delivered by the Covenantor.
- 9.7 Priority of Covenant. The Covenantor shall do or cause to be done, at the expense of the Covenantor, all acts necessary to grant priority to this Covenant and any covenants required under this Covenant over all charges and encumbrances which may have been registered against the title to the Lands in the Kamloops Land Title Office, save and except those specifically approved in writing by the City or in favour of the City.
- 9.8 Covenantor's Costs. Unless otherwise expressly provided in this Covenant, the expense of performing the obligations and covenants contained in this Covenant, and of all matters incidental to them, is solely that of the Covenantor. All of the costs of the preparation, execution, and registration of any amendments or discharges are to be borne by the Covenantor.
- 9.9 Time of the Essence. Time is of the essence of this Covenant. If a delay in performance of the Works and Services is caused by reason of strike or lockout, fire, Act of God, or any other act which in the opinion of the City Engineer is effectively beyond the Covenantor's reasonable control, the City Engineer will extend the time for completion of the Works and Services by the Covenantor by whatever time the City Engineer deems to be reasonable in the circumstances.
- 9.10 Notices. Any notice or other communication required or contemplated to be given or made by any provision of this Covenant shall be given or made in writing and either delivered personally (and if so shall be deemed to be received when delivered) or mailed by prepaid registered mail in any Canada Post Office (and if so shall be deemed to be delivered on the sixth business day following such mailing 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 addressed as follows:

to the Covenantor at:

[insert name]
[insert address]
Attention: [insert contact]

and:

to the City at:

City of Kelowna
1435 Water Street
Kelowna, BC
V1Y 1J4
Attention: City Clerk

Or to such other address to which a party hereto from time to time notifies the other parties in writing.

- 9.11 Waiver. No amendment or waiver of any portion of this Covenant is to be valid unless in writing and executed by the parties to this Covenant. Waiver of any default by a party is not to be deemed to be a waiver of any subsequent default by that party.
- 9.12 Relationship. This Covenant is not intended to create a partnership, joint venture, or agency between or among the Covenantor and the City.
- 9.13 Enurement. This Covenant enures to the benefit of and is binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns (as the context permits).
- 9.14 Choice of Law. This Covenant has been entered into and shall be governed by and construed according to the laws of and enforced in the Province of British Columbia.
- 9.15 Further Assurances. The Covenantor shall, on the request of the City execute and deliver or cause to be executed and delivered, all such further transfers, agreements, documents, instruments, easements, statutory rights-of-way, deeds and assurances, and do and perform or cause to be done and performed, all such acts and things as may be, in the opinion of the City necessary to give full effect to the intent of this Covenant.
- 9.16 Discharge of Covenant. Within 30 days of the issuance of the Certificate of Acceptance, and upon receipt of a registrable form of discharge prepared by and at the expense of the Covenantor, the City shall execute and deliver to the Covenantor a registrable discharge of this Covenant.

10.0 LEGAL EFFECT

- 10.1 Effective Date. This Covenant will not become binding upon the City unless and until the Covenantor's Application for Subdivision Approval has been approved by the Approving Officer, or its Application for Building Permit has been approved by the Building Inspector, as the case may be, the Zone Amending Bylaw, if required, have been adopted by City Council, and this Covenant has been executed and delivered by the Covenantor and executed by the City, failing which all plans, documents and monies which have been delivered to the City in connection with this Covenant or the proposed Subdivision or Development of the Lands other than:

- (a) the non-refundable fees paid to the City pursuant to Bylaw 7900 or Building Bylaw, as referred to in Section 5.1(a) herein; and
 - (b) the City's legal fees and disbursements referred to in Section 4.1(c) herein; and
- shall be returned to the Covenantor, and the City and Covenantor shall not have any further obligations pursuant to this Covenant.

As evidence of their agreement to be bound by the terms of this instrument, the parties hereto have executed the Land Title Office Form C which is attached hereto and forms part of this Covenant. Further, the Approving Officer or Building Inspector, as the case may be, acknowledges that this is the instrument creating the condition under Section 219 of the *Land Title Act* by the registered Owner referred to in this instrument.

END OF DOCUMENT

(Appendix A - Schedule of Works and Services to be attached)