

TERMS OF INSTRUMENT - PART 2

SECTION 219 COVENANT

THIS COVENANT dated for reference the ___ day of _____, 2008.

BETWEEN:

BELAY ENTERPRISES LTD. (Incorporation No. 502148)

Box 998, Fernie, B.C. VOB 1MO

(the "Grantor")

AND:

CITY OF FERNIE

Box 190, Fernie, B.C. VOB 1MO

(the "City")

WHEREAS the Grantor is the registered owner in fee simple of the land described in Item 2 of the Form C document to which these Terms of Instrument are attached (the "Land"); and

WHEREAS the Grantor has requested the City to include the Land within its municipal boundaries and to amend the applicable bylaws in respect of the Land to permit the Grantor to subdivide and develop the Land; and

WHEREAS the Grantor has, to induce the City to include the Land within its boundaries and amend the applicable bylaws, represented to the City that it intends to develop the Land in such a way as to preserve and protect certain environmental amenities, to make land available to the City for affordable housing, and to incorporate environmentally responsible building standards and practices into the design and construction of buildings on the Land; and

WHEREAS the Grantor and the City wish to ensure that the Land will be developed in the manner represented by the Grantor; and

WHEREAS Section 219 of the *Land Title Act* permits the City to be the grantee of a covenant containing provisions in respect of the use of land and buildings on land, even though it is not annexed to land owned by the City;

NOW THEREFORE in consideration of the premises and the covenants in this Agreement, the payment of one dollar by the City to the Grantor, and other good and valuable consideration, the receipt and sufficiency of which the Grantor acknowledges, the parties covenant and agree pursuant to s.219 of the *Land Title Act* as follows:

1. The Grantor shall not subdivide the Land unless:
 - a. the Grantor has granted an interim conservation covenant to the City, providing for the conservation of that portion of the Land identified as environmentally sensitive in the report described in subsection (c), which interim conservation covenant shall require the Grantor to grant, within a further eighteen month period, a permanent conservation covenant to the Nature Conservancy of Canada or an organization having similar objects and approved by the City, and if the City so requires, a permanent conservation covenant to the City and any third party eligible to hold such a covenant that the City may reasonably nominate, both in replacement for the interim covenant;
 - b. the Grantor has entered into an agreement with the City or an organization approved by the City providing for City or third party ownership and maintenance in perpetuity of portions of the Land including those portions designated as green space on the plan of proposed development of the Land dated April 11, 2008 which has been initialled by the parties and filed with the City of Fernie (hereinafter referred to as the “April 11 Plan”), and minor deviations from the boundaries of the areas designated on the April 11 Plan may be agreed by the parties, but in no circumstances shall the cumulative area of the land charged by the covenant described in subsection (a) and subject to agreement under this subsection (b) be less than 45% of the area of the Land;
 - b. the Grantor has entered into an agreement with the City or an organization approved by the City providing for City or third party ownership and maintenance in perpetuity of portions of the Land to be designated as green space and consisting of no less than 45% and no greater than 50% of the Land, which shall include but not be limited to:
 - (i) a 30 meter wide treed buffer on the Land adjacent to Mount Fernie Park Road;
 - (ii) the area of the Land identified pursuant to section 1a herein;
 - (iii) such additional areas of the Land as may be agreed between the parties.
 - c. the Grantor has at its expense provided to the City a report prepared by a professional environmental consultant acceptable to the City, identifying the ecological features and functions of the Land including natural drainage patterns and wildlife corridors, the likely impacts of the Grantor's development plans on those features and functions, mitigation measures that are required or desirable to eliminate or mitigate such impacts, and areas to be the subject of the covenants described in subsection (a), and incorporated such measures into its development plans;
 - d. the Grantor has at its expense provided to the City a water management plan for the Land prepared by a professional engineering consultant acceptable to the City that minimizes demand for treated potable water and minimizes wastewater generated, and provides for the management of storm water on site, and has incorporated the plan into its development plans;
 - e. the Grantor has at its expense prepared and implemented a trail development plan for the Land linking existing pathways in the City to Mt Fernie Park by dedicating and constructing trails, or granting a covenant to the City requiring the dedication and

construction of portions of the trails identified in the trail development plan as portions of the Land are developed;

- f. the Grantor has at its expense granted a covenant to the City requiring the retention of a 30 metre tree buffer along Mt. Fernie Park Road and a tree buffer parallel to Highway 3 in the location indicated on the April 11 Plan; and

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- g. the Grantor :

- i. simultaneously with the deposit of the subdivision plan, at the City's request deposits a fee simple transfer of a portion of the Land comprising not less than one acre for a purchase price of 50% of the market value of the land at the time of transfer, which request shall be made not later than five years from the date of registration of this Agreement, for use by the City as land for affordable housing, or the proceeds from its disposition must be used to provide affordable housing opportunities somewhere within the City of Fernie, or
- ii. has offered to transfer such land to the City and received written notice that the City does not require the land.

For this purpose, "market value" means the per acre B. C. Assessment Authority assessed value of undeveloped portions of the Land on the relevant date or, if the parties do not agree that the assessed value shall determine "market value", the average of two appraisals of the per acre value of undeveloped portions of the Land prepared by members of the B.C. Association of the Appraisal Institute of Canada for each of the parties at that party's cost.

2. The Grantor shall not construct or erect any building or structure on the Land unless the building or structure meets a minimum of the Silver Level of the *Built Green Alberta* checklist developed by the Calgary Region Home Builders Association, or if a similar standard is developed for British Columbia, at the sole option of the City of Fernie, an equivalent level under such standard.. For the purpose of monitoring compliance with this restriction, the Grantor must provide to the City such information as it may reasonably require, in addition to information ordinarily provided in relation to an application for a building or occupancy permit, to determine whether the Grantor is in compliance with this Agreement, including information on the Energuide rating of residential dwellings; operational systems; building materials; exterior and interior finishes; indoor air quality; waste management; water conservation; and business practices.

3. The Grantor shall comply with all requirements of this Agreement at its own cost and expense.

4. The parties agree that this Agreement creates only contractual obligations and

obligations arising out of the nature of this document as a covenant under seal. The parties agree that no tort obligations or liabilities of any kind exist between the parties in connection with the performance of, or any default under or in respect of, this Agreement. The intent of this section is to exclude tort liability of any kind and to limit the parties to their rights and remedies under the law of contract and under the law pertaining to covenants under seal.

5. The rights given to the City by this Agreement are permissive only and nothing in this Agreement imposes any legal duty of any kind on the City to anyone, or obliges the City to enforce this Agreement, to perform any act or to incur any expense in respect

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of this Agreement, except that nothing in this section shall affect the contractual rights and obligations of the parties hereto under this Agreement.

6. This Agreement shall restrict use of the Land in the manner provided herein notwithstanding any right or permission to the contrary contained in any bylaw of the City or preserved by s.911 of the *Local Government Act*.

7. This Agreement does not

(a) affect or limit the discretion, rights or powers of the City under any enactment (as defined in the *Interpretation Act*, on the reference date of this Agreement) or at common law, including in relation to the use of the Land;

(b) affect or limit any enactment relating to the use of the Land, or

(c) relieve the Grantor from complying with any enactment, including in relation to the use of the Land,

and the Grantor covenant and agree to comply with all such enactments with respect to the Land.

8. Every obligation and covenant of the Grantor in this Agreement constitutes both a contractual obligation and a covenant granted under s.219 of the *Land Title Act* in respect of the Land and this Agreement burdens the Land and runs with it and binds the successors in title to the Land.

9. An alleged waiver of any breach of this Agreement is effective only if it is an express waiver in writing of the breach in respect of which the waiver is asserted. A waiver of a breach of this Agreement does not operate as a waiver of any other breach of this Agreement.

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

11. This Agreement binds the parties to it and their respective successors, heirs, executors and administrators.

12. The parties hereto shall execute and do all such further deeds, acts, things and assurances that may be reasonably required to carry out the intent of this Agreement.

13. Time is of the essence of this Agreement.

14. This Agreement is not intended to create a partnership, joint venture, or agency between the Grantor and the City.

15. Any notice or other communication required or contemplated to be given or made by any provision of this Agreement must be given or made in writing and delivered personally (and if so must be deemed to be received when delivered if delivered on a business day prior to 4 p.m. and otherwise on the next business day) so long as the notice is addressed as follows: If to the Grantor:

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BELAY ENTERPRISES LTD.

Box 998, Fenrie, B.C. VOB 1MO

If to the City:

CITY OF FERNIE

Box 190, Fernie, B.C. VOB 1MO

Attention: Administrator

or to such other address of which a party hereto from time to time notifies the other party in writing.

16. By executing and delivering this Agreement each of the parties intends to create both a contract and a deed executed and delivered under seal.

As evidence of their agreement to be bound by the terms of this instrument, the parties each have executed and delivered this Agreement under seal by executing Part 1 of the *Land Title Act* Form C to which this Agreement is attached and which forms part of this Agreement.

END OF DOCUMENT