

**SCHEDULE 9****Works Servicing Agreement**

LAND TITLE ACT

**FORM C**

(Section 233)

Province of  
British Columbia**GENERAL INSTRUMENT - PART 1**

(This area for Land Title Office Use)

PAGE 1 of 40 pages

1. APPLICATION: (Name, address, phone number and signature of applicant, applicant's solicitor or agent)  
BULL, HOUSSER & TUPPER LLP, Barristers & Solicitors, 3000 - 1055 West Georgia Street, Vancouver,  
British Columbia, V6E 3R3 687-6575 (File No. 05-2793) LTO Client No. 11299 (Work Servicing)

\_\_\_\_\_  
Brian Taylor, Solicitor

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

(PID)

(LEGAL DESCRIPTION)

SEE SCHEDULE

3. NATURE OF INTEREST:\*

DESCRIPTION

DOCUMENT REFERENCE

PERSON ENTITLED TO INTEREST

(page and paragraph)

Section 219 Covenant

Pages 20 and 21, Section 8.1

Transferee

Statutory Right of Way

Page 20, Section 7.1

Transferee

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

- (a) Filed Standard Charge Terms  D.F. Number:  
 (b) Express Charge Terms  Annexed as Part 2  
 (c) Release  There is no Part 2 of this instrument

A selection of (a) includes 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):\*

**PORPOISE BAY DEVELOPMENTS LTD.** (Incorporation No. ▼)

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

**DISTRICT OF SEHELDT**, a municipal corporation under the *Local Government Act* and having its  
municipal offices and postal address at 5797 Cowrie Street, Sechelt, British Columbia, V0N 3A0

7. ADDITIONAL OR MODIFIED TERMS:\*

N/A

**GENERAL INSTRUMENT**

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)

| Y | M | D |
|---|---|---|
|   |   |   |

**PORPOISE BAY DEVELOPMENTS LTD.** by its authorized signatory(ies):

\_\_\_\_\_

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

(as to both signatures)

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

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

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

**DISTRICT OF SEHELDT** by its authorized signatory(ies):

Name: \_\_\_\_\_, Mayor

(as to both signatures)

Name: \_\_\_\_\_, District 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. 1996, c. 124, 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.

**TERMS OF INSTRUMENT - PART 2****SERVICING AGREEMENT**

## WHEREAS:

- A. It is understood and agreed that this instrument shall be read as follows:
- (a) the Transferor, Porpoise Bay Developments Ltd. is called the "Owner"; and
  - (b) the Transferee, District of Sechelt is called the "District";
- B. The Owner is the registered owner of the Lands.
- C. Section 218 of the Land Title Act R.S.B.C. 1996 chapter 250 provides that a person may and shall be deemed to always to have been able to create, by grant or otherwise in favour of a municipality, an easement, without a dominant tenement, to be known as a statutory right-of-way, for any purpose necessary for the operation or maintenance of such municipality's undertaking.
- D. Section 219 of the Land Title Act R.S.B.C. 1996 chapter 250 permits registration of a covenant in favour of a municipality in respect of the use of land and that land is or is not to be built on and is or is not to be subdivided except in accordance with the covenant.
- E. To facilitate the development of all the Works, the Owner has agreed to grant the District the within statutory right-of-way and section 219 covenant.
- F. The statutory right-of-way and the section 219 covenant are necessary for the operation and maintenance of the District's undertaking.
- G. The Owner has agreed to construct all the Works on the terms and conditions herein contained.

NOW THEREFORE THIS INDENTURE WITNESSETH THAT in consideration of the sum of Ten Dollars (\$10.00) now paid by each party to each other party (the receipt and sufficiency of which each party hereby acknowledges), and for other good and valuable consideration, the Owner and the District each covenant with the other as follows:

**1. DEFINITIONS AND SCHEDULES****1.1 Definitions**

The parties agree that in this Agreement the following terms have the definitions now given:

- (a) **"C.P.I."** means the Consumer Price Index (All Items) for Vancouver, British Columbia, as published by Statistics Canada but if the C.P.I. ceases to use the

1986 average equals one hundred (100) as the basis of calculation, or if a change is made in the term or number of items contained in the C.P.I., or if the C.P.I. is altered, modified, converted or revised in any other way, then the C.P.I. will be adjusted to the figure that would have been arrived at had the change in the manner of computing the C.P.I. in effect on November 2, 1993 not been altered. If the C.P.I. is not available the District's Director of Finance or his successor in function shall choose a publication evaluating like information theretofore used in determining the C.P.I. The substitute index is also called "**C.P.I.**";

- (b) "**Contaminants**" means any substance, including without limitation urea formaldehyde, hydrocarbons, lead, pollutants, polychlorinated biphenyls ("PCB's"), contaminants, deleterious substances, dangerous substances or goods, hazardous, corrosive, or toxic substances, special waste, waste, pesticides, defoliants, and any material, including without limitation radioactive materials, asbestos-containing materials, PCB-containing equipment or materials, and any other solid, liquid, gas, vapour, odour, radiation, or combination of any of them, the storage, manufacture, handling, disposal, treatment, generation, use, transport, remediation or release into the environment of which is now or hereinafter prohibited, controlled or regulated under any applicable laws;
- (c) "**District Engineer**" means the Director of Engineering and Public Works of the District of Sechelt and his successors in function and their respective nominees;
- (d) "**Event of Force Majeure**" means acts of God or public enemy, wars, declared or undeclared, revolution, riots, insurrection, civil commotions, fires, floods, slides, epidemics, quarantine restrictions, strikes or lockouts, including illegal work stoppages or slowdowns, or stop work orders issued by a court or public authority, including the District, provided that such orders were not issued nor any such labour disputes occasioned, as a result of an act or omission of the Owner, or anyone employed or retained by the Owner, freight embargoes or power failures, provided that any such event or circumstance reasonably constitutes a material disabling event or circumstance which is beyond the reasonable control of the Owner, does not arise from the neglect or default of the Owner, and which results in a material delay, interruption or failure by the Owner in carrying out its duties, covenants or obligations under this Agreement, but which does not mean or include any delay caused by the Owner's lack of funds or financial condition;
- (e) "**Initial Subdivision Plan**" means the subdivision plan attached as Schedule C;
- (f) "**Landscape Architect**" means a professional landscape architect registered and in good standing with the B.C. Society of Landscape Architects;
- (g) "**Lands**" means the lands and premises legally described in Item 2 of the Form C General Instrument Part I which these Terms of Instrument are attached;

- (h) **"Park Works"** means the works and services described in Section 3 and 4 of Schedule A and further described in Schedule B;
- (i) **"Professional Engineer"** means a professional engineer registered and in good standing with the Association of Professional Engineers and Geoscientists of British Columbia and maintaining professional liability and errors and omissions insurance in the amount of not less than Three Million Dollars (\$3,000,000) per occurrence during the term of his engagement;
- (j) **"Prime Rate"** means, at any time, the per annum rate of interest published by the main branch in the City of Vancouver of the Royal Bank of Canada, or its successor at such time, as its reference rate for setting rates of interest on loans of Canadian dollars and referred to by such bank as its "prime rate", provided however that if such bank publishes more than one (1) such reference rate at any time, the Prime Rate shall be the highest thereof, and provided further that, if a court or arbitrator holds that this definition of Prime Rate is vague, uncertain or otherwise defective then the Prime Rate shall be three percent (3%) greater than the per annum rate of interest established by the Bank of Canada as the rate payable on overnight loans by Schedule I Canadian Chartered Banks;
- (k) **"Road Works"** means the works and services described in Sections 1 and 2 of Schedule A and further described in Schedule B;
- (l) **"Works"** means collectively the Road Works and the Park Works; and
- (m) **"Works Completion Date"** means five (5) years from the date of this Agreement.

**1.2 Schedules**

The following Schedules are attached and form part of this Agreement:

| Schedule | Description              |
|----------|--------------------------|
| A        | Works                    |
| B        | Works Particulars        |
| C        | Initial Subdivision Plan |

**2. DESIGN AND CONSTRUCTION OF THE WORKS**

**2.2 Owner's Covenants**

The Owner covenants and agrees with the District:

- (a) that the Owner, at its cost, shall on or before four (4) years following the date of this Agreement submit to the District final engineering plans, drawings and specifications, in form and substance acceptable to the District Engineer in respect of the Works;
- (b) that all the Works shall be designed by a Landscape Architect and a Professional Engineer or Engineers, as applicable, and all plans shall bear their professional seal and signature;
- (c) that the Owner shall at all times be familiar with the standards established by the District Engineer, from time to time for works of the nature or type of the Works and that all the Works when constructed and installed shall meet such standards required by the District Engineer at the time of construction or installation;
- (d) that the plans, drawings and specifications referred to in section 2.1 (a) shall be submitted to the District Engineer for acceptance on or before the prescribed date set out in section 2.1(a). The District shall, within ninety (90) days of receipt of the final engineering plans, drawings and specifications either; (i) accept the final engineering plans, drawings and specifications; (ii) reject the final engineering plans, drawings and specifications with reasons; or (iii) require the Owner to make such changes and amendments to the said plans, drawings and specifications as are stated by the District Engineer to be necessary or desirable. If the District does not exercise its rights under (i), (ii) or (iii) within the ninety (90) day period it shall be deemed to have accepted the submitted plans, drawings and specifications;
- (e) The Owner acknowledges and agrees that the District Engineer may engage, at his discretion and at the cost of the Owner, consultants to assist the District in its review and administration of the plans, drawings and specifications. The Owner acknowledges that the District and its officials shall have no obligation to issue any permit in respect of the Lands until the District Engineer has accepted the final engineering plans, drawings and specifications for the Works;
- (f) that the Owner:
  - (1) shall not enter into contracts for the construction or installation of the Works or any portion thereof; and
  - (2) shall not commence construction or installation of, or cause, suffer or permit any construction or installation of the Works or any portion thereof to commence,

until the District Engineer has given written confirmation that the final engineering plans, drawings and specifications for the Works or any portion thereof meet the standards then required by the District and that the final engineering plans, drawings and specifications are to his satisfaction and until the Owner has

obtained all necessary approvals, licenses and permits for the aforesaid work from all authorities having jurisdiction;

- (g) that the Owner shall comply with all applicable federal, provincial and municipal laws, statutes, regulations, bylaws, orders and policies, and shall obtain all necessary government approvals and permits, concerning all the Works and the construction and installation thereof, and that the Owner shall construct and install all the Works in compliance with all applicable federal, provincial, municipal and other laws, bylaws, regulations and statutes;
- (h) that all the Works shall be constructed and installed at the cost of the Owner, in strict compliance with the design and working plans, drawings and specifications, sealed by the Owner's Professional Engineers and the design, working plans, drawings and specifications of the Owner's Landscape Architect all as accepted by the District Engineer pursuant to Section 2.1(d) hereof. Without limiting the generality of the foregoing the Owner will, if required by the District Engineer, alter the approved plans, drawings and specifications because of conditions at the site so that the construction or use of the Works or any portion thereof or the excavation of the Lands function and operate in a manner satisfactory to the District Engineer;
- (i) that the Owner shall commence the construction and installation of the Works or any portion thereof after the date the final plans, drawings and specifications for those portions of the Works are approved in writing by the District Engineer, and shall complete the construction and installation of the Works to the satisfaction of the District Engineer on or before the earlier of the dates described in Schedule B and the Works Completion Date.
- (j) The Owner acknowledges and agrees that the District Engineer may engage, at his discretion and at the cost of the Owner, consultants to assist the District in its review, including tests and inspections of the construction and installation of the Works;
- (k) that the Owner shall give the District Engineer not less than five (5) clear days' delivered written notice before commencing initial construction or installation of the Works or any portion thereof and thereafter shall keep the District Engineer properly and adequately advised of the progress of construction and installation of the Works or any portion thereof and the Owner shall call for inspections, after giving the District Engineer not less than five (5) clear days' written notice, at all important stages;
- (l) that the Owner shall ensure that any comments or directions, including requests for alterations, given or made by the District Engineer, shall be promptly responded to and complied with, and shall ensure that the District Engineer is satisfied with such response and compliance and is provided with the opportunity to be so satisfied;

- (m) that during construction and installation of the Works the Owner shall, no later than five (5) days following receipt of same, deliver to the District Engineer true copies of all inspection and testing reports prepared during the construction and installation of the Works or any portion thereof;
- (n) that the Owner shall make the Works or any portion thereof available to the District, its employees and contractors at all times for inspection and testing and the Owner shall pay the District promptly on written request all costs incurred by the District in carrying out such inspections and tests including without limitation video inspection of all or part of the Works during construction up to the expiration of the Warranty Period; such inspections and tests may be carried out at such times, and as frequently, as the District Engineer, acting reasonably, deems necessary;
- (o) that all the Works shall, notwithstanding anything to the contrary in this Agreement contained, be constructed in accordance with sound engineering and construction practices, in a good and workmanlike manner and to the approval and satisfaction of the District Engineer acting reasonably;
- (p) that the Owner shall repair any damage to District property or highways including sidewalks arising directly or indirectly from any work undertaken by the Owner pursuant to this Agreement. Such repair shall be completed to the satisfaction of the District Engineer within the time period imposed by the District Engineer acting reasonably.;
- (q) upon the Works or any portion thereof being conveyed to the District, those Works or portions thereof shall become the property of the District and the Owner covenants to not so convey until such Works or portions thereof have been accepted in writing by the District Engineer acting reasonably as herein provided;
- (r) that the Owner from commencement of construction of the Works or any portion thereof and at its cost shall keep in force or cause any and all contractors to keep in force at all times until acceptance of all the Works by the District Engineer acting reasonably pursuant to section 2.4 hereof, the following:
- (1) property insurance protecting both the Owner and the District from loss or damage to the Works and all fixtures, equipment, improvements and building materials on the Lands and neighbouring properties and roads from time to time both during and after construction against fire, earthquake and all other perils from time to time customarily included in the usual all risks builders' risk form of policy applicable to similar properties during construction and effected in the Province of British Columbia by prudent owners, and such other perils as the District may reasonably require to be insured against to the full insurable value thereof at all times and in any event in an amount sufficient to prevent the Owner or the District being deemed a co-insurer; and

- (2) comprehensive general liability insurance (including legal and employer's liability and contractual liability to cover the responsibilities assumed under this Agreement generally and specifically under Sections 2.8 and 4.1), in an amount not less than Five Million Dollars (\$5,000,000.00) in respect of injury to or death of one or more persons and for damage to property, regardless of the number of claims arising as a result of any one occurrence protecting both the Owner and the District against claims for personal injury, death or property damage or other third party or public liability claims arising from any accident or occurrence upon, in or about the Works or any portion thereof and from any cause including the risks occasioned by the construction of the Works. The deductible under this coverage shall not exceed Five Thousand Dollars (\$5,000.00) per occurrence. Completed operations coverage in respect of all the Works shall be maintained for at least twenty-four (24) months after acceptance of all the Works by the District Engineer pursuant to Section 2.4;
- (3) Automobile Liability Insurance on all licensed vehicles used directly or indirectly in the construction of the Works or any portion thereof and the performance of all works associated therewith, protecting against damages arising from bodily injury (including death) and from claims for property damage arising from the operation of the contractors, subcontractors, their servants, agents or employees. This insurance shall be for a minimum amount of One Million Dollars (\$1,000,000.00) inclusive per accident;
- (4) Contractor's Equipment Insurance covering all equipment owned or rented by the contractors, subcontractors, their servants, agents or employees against all risks of loss or damage with coverage sufficient to allow for immediate replacement, and shall contain a waiver of subrogation against the District; and
- (5) All-Risks Insurance, including the perils of flood and earthquake, covering all the Works and all property of every description to be used in the construction of all the Works. This insurance shall be primary, include the District as named insured, and contain a waiver of subrogation against the District.

The above noted insurance policies shall be in a form satisfactory to the District, acting reasonably, and shall be placed with insurers licensed to do business in Canada and shall exclude any rights of cross claim against the District or any rights of the insurer or insurers, whether by subrogation or otherwise, against the District and against those for whom the District is in law responsible. Each such policy shall name the District (including its officers and servants) as an additional insured as its interest may appear and shall contain a waiver in favour of the District of any breach or violation of any warranties, representations, declarations or conditions contained in such policies. The policy of comprehensive general liability insurance shall contain a severability of interest clause and a cross-

liability clause so that the District, its officers and servants shall be insured in the same manner and to the same extent as if separate policies had been issued to each. All policies shall contain a provision requiring that at least thirty (30) days written notice be given to the District by the insurer prior to cancellation of or material change to the policy. The Owner shall deliver certificates of insurance to the District in a form reasonably acceptable to the District. Receipt by the District of certificates of insurance or certified copies of insurance policies shall in no way act as confirmation by the District that the Owner's insurance complies with the terms of this Agreement. If the Owner fails to perform its obligations pursuant to this section 2.1(r), the District may effect such insurance on behalf of the Owner and all the District's costs in so doing shall be paid by the Owner forthwith upon written request from the District therefore. The Owner covenants that all insurance monies received on account of damage to or destruction of the Works or any portion thereof shall be applied to the restoration of such damage or destruction. The Owner agrees with the District that the indemnities contained in sections 2.8 and 4.1, are separate and independent from the Owner's covenant to insure herein.

### **2.3 Owner's Responsibility**

Notwithstanding that the District Engineer or his delegates may:

- (a) inspect the Works or any portion thereof or supervise aspects of construction of the Works or any portion thereof;
- (b) approve or accept the plans, drawings and specifications concerning the Works or any portion thereof ;

all design and construction responsibility and supervisory responsibility shall remain exclusively with the Owner and no such responsibility shall rest with the District Engineer or his delegates or District employees and neither the District, nor its officers or servants shall be liable to the Owner for the safety, adequacy or soundness of the Works by reason of any inspections made, changes required or approvals given under this Agreement with respect to the Works. Any approval given by and any inspection carried out by the District or its servants pursuant to this Agreement or concerning the Works shall be for the purposes only of ensuring compliance with this Agreement from the point of view of the District as contracting party, and no inspection or approval given by the District or its servants shall relieve the Owner from its obligation to comply strictly with the terms of this Agreement nor shall the giving of any approval constitute a waiver or release by the District of any duty or liability owed to the District or of any indemnity given by the Owner to the District, its officers or servants.

## **2.4 Deliveries to District by Owner**

Upon completion of all the Works and prior to acceptance of all the Works by the District Engineer, the Owner shall, at its own cost and expense, provide the District Engineer with:

- (a) two (2) sets of reproducible mylar "as built" drawings (hereinafter called the "As-Built Drawings") for all the Works satisfactory to the District Engineer, prepared by a Professional Engineer, in good standing in the Province of British Columbia;
- (b) three (3) paper prints of the As-Built Drawings signed and sealed by a Professional Engineer in good standing in the Province of British Columbia;
- (c) a Confirmation of Professional Assurance certificate from the Professional Engineer, the form and contents of which are to the reasonable satisfaction of the District Engineer.

## **2.5 Acceptance of Works**

In addition to those items to be delivered by the Owner pursuant to sections 2.1 to 2.3, upon completion of all the Works and prior to acceptance thereof by the District Engineer pursuant to this paragraph, the Owner shall deliver to the District Engineer a certificate of inspection of all the Works in form and content acceptable to the District Engineer acting reasonably, prepared, signed, sealed and dated by the Owner's Professional Engineer and the Landscape Architect as applicable certifying that all the Works have been constructed and completed in accordance with plans and specifications accepted by the District Engineer pursuant to this Agreement. As soon as reasonably practicable after receipt of this certificate of inspection and the items to be delivered pursuant to sections 2.1, 2.2 and 2.3, the District Engineer acting reasonably shall review same and deliver to the Owner either his written acceptance of all the Works, which acceptance shall not be unreasonably withheld, or his detailed reasons for not accepting all the Works.

## **2.6 Warranty of Works**

Without limiting or derogating from the covenants of the Owner contained in this Agreement, the Owner covenants, with respect to all the Works, that all workmanship shall be of good quality and that all materials shall be free of defects and deficiencies and suitable for the purposes to which they are put. The Owner further covenants and agrees, at its cost and expense to make good any and all defects and deficiencies in all the Works and, to keep all the Works in the condition of good repair (save and except normal wear and tear, acts of god and damage caused by the negligence of the District, its servants or agents or by those for whom the Owner is not vicariously liable) and free of defects and deficiencies and including without limitation, any defects arising from or related to design, construction or installation (including, without limitation, materials used) to the satisfaction of the District Engineer acting reasonably.

## **2.7 District's Right to Repair**

The Owner covenants and agrees that if the Owner fails to carry out repairs as required pursuant to Section 2.5 or fails to remedy all defects and deficiencies within a reasonable period of time following a written request by the District Engineer to do so, the District may affect such repairs and make such good defects and deficiencies, but the District shall have no obligation to affect such repairs or to make good defects or deficiencies provided however that no written request need be given by the District Engineer in case of emergency, apprehended emergency or crisis relating to such default by the Owner, as the determined by the District Engineer. If the District elects to repair or make good defects or deficiencies, then the District Engineer may determine the cost, plus the District's normal overhead charges which shall not exceed twenty (20%) percent of such costs. The Owner agrees to pay all such costs forthwith to the District upon written demand.

## **2.8 Builders' liens**

The Owner will, throughout the term of this Agreement, keep the Lands, free of any builders' liens relating to the Works or any portion thereof. In the event that a lien or claim is filed in regard to work done, labour and materials supplied to the Lands in connection with the Works or so claimed or alleged, the Owner will discharge same within fifteen (15) days after request made by the District of the Owner. The Owner will indemnify and save harmless the District from and against all costs, damages, expenses and actual lawyers costs and fees arising from or relating to any builders' liens filed or registered against the Lands, or claims against the District in connection with the Works or any portion thereof.

## **2.9 Transfer of Works**

The Owner covenants and agrees that upon completion of the construction of all the Works and the acceptance of all the Works by the District pursuant to Section 2.4, the Owner shall, forthwith upon written demand by the District, assign, transfer and convey to the District all of its right to title and interest in all the Works and grant to the District all such statutory rights-of-way over the Lands as may be required by the District Engineer to provide access to the Works or any portion thereof for the District and its officers, employees, servants, agents and invitees, including the public and emergency vehicles and personnel.

## **3. LETTERS OF CREDIT**

### **3.1 Letter of Credit Required**

Concurrent with the filing for registration of this Agreement the Owner shall tender to the District an unconditional irrevocable letter of credit to the District's favour drawn on a bank or credit union as the District's Director of Finance may approve for each original letter of credit and for each replacement letter of credit in an amount determined by the District Engineer in accordance with Schedule B. Upon approval of the final engineering plans, drawings and

specifications pursuant to Section 2.1(d) hereof for all or a portion of the Works the amount of the letter of credit will be adjusted to one hundred and twenty percent (120%) of the cost of constructing the Works or the portion thereof at the time of the approval. Thirty (30) days prior to the expiry of the letter of credit the Owner shall tender a replacement letter of credit and failing that the District may forthwith cash the letter of credit not so replaced. Upon receipt of a replacement letter of credit the District shall forthwith surrender the replaced letter of credit. Each replacement letter of credit shall be for the amount equal to the letter of credit being replaced with an adjustment thereof for the cost of living. The adjustment shall equal the sum determined by multiplying the amount of the letter of credit being replaced by a certain fraction the numerator of which is the change in the C.P.I. from the end of the month immediately prior to the issuance of the letter of credit being replaced to the end of the month immediately prior to the issuance of the replacement letter of credit and the denominator of which is the C.P.I. at the end of the month immediately prior to the issuance of the letter of credit being replaced. Any disagreement concerning the C.P.I. or the application of the C.P.I. to the calculation herein contemplated shall be finally and conclusively settled by the bona fide determination of the District's Director of Finance or his successor in function which determination shall be made in writing and delivered to the parties. The Owner shall determine the cost of living adjustment and have the District's Director of Finance settle any disagreements in respect of same within thirty-one (31) days of the expiry of the current letter of credit. Whenever any of the Owner's covenants to pay money including interest to the District pursuant hereto remain unfulfilled in whole or in part, the District may cash the letter of credit to satisfy the Owner's unfulfilled covenant.

### **3.2 District's Rights to Cash Letter of Credit**

If the Owner is in default of any of its obligations in respect of the construction and installation of the Works or any portions thereof the District may cash the letter of credit to secure completion of all or a portion of the Works and compliance with the terms of this Agreement, any payment obligations of the Owner in respect of the Works that remain unpaid including the discharge of any builder's liens, and such monies shall be applied to remedy the default and complete all or a portion of the Works and to satisfy the Owner's warranties in respect of same in the place and stead of the Owner and ensure compliance with the terms of this Agreement. In addition, the District may cash, retain and use the letter of credit to remedy any emergency condition which, in the sole opinion of the District Engineer acting reasonably, is associated with, arises from or is the result of the Works and requires expedient action. Notwithstanding the foregoing, the District may cash, retain and use the letter of credit to pay, settle or compromise any claim against the District for which the Owner has indemnified the District pursuant to Section 4.1. If the proceeds from the letter of credit are not sufficient to pay all costs and expenses incurred by the District in completing all or a portion of the Works including the District's normal overhead charges and satisfying the warranties therefore, curing other defaults by the Owner, or satisfying any amounts owing to the District pursuant to Sections 4.1 or 5.1, the Owner shall forthwith pay to the District the difference upon receipt from the District of invoices for the same together with all interest thereon at the Prime Rate plus two percent (2%) from the date of receipt by the Owner of the invoices for same and continuing until payment in full.

As the Owner's work on the Works proceeds, at intervals of not less than sixty (60) days the District may, but is not obligated to, authorize the reduction of the letter of credit to secure such construction costs by eighty-five percent (85%) of the value of the Works then completed as determined and certified by the Owner's Professional Engineer or Landscape Architect and confirmed by the District Engineer. After the first determination, each determination shall count the value from the last determination. such reduction may be achieved by tendering an amendment to the letter of credit or a substitute letter of credit; and if by substitute, the District shall upon receiving same return the letter of credit being substituted, provided that until expiry of the builder's lien period and thereafter until expiry of the civil works warranty by the Owner in Section 2.5 as the same may be extended pursuant to Section 2.5 the reductions may not go lower than eighty-five percent (85%) of the value of the Works completed.

### **3.3 Warranty Letter of Credit**

After acceptance of all the Works by the District Engineer as herein provided, the District shall within fifteen (15) days following receipt of a written request of the Owner to do so, return to the Owner any letter of credit then held by the District as security therefore on condition that the Owner secure its warranties therefore by providing the District with a letter of credit for a period of two (2) years ("Warranty Period") equal to ten percent (10%) of the actual total cost of all the Works adjusted for CPI from date of such estimate in the manner provided in section 3.1, or alternatively the Owner may provide an amendment to the letter of credit reducing the letter of credit to the ten percent (10%) adjusted for CPI as aforesaid.

### **3.4 District's Rights to Cash Letter of Credit**

The District may cash the letter of credit to satisfy the Owner's obligations under Section 5.1 and such monies may be applied to satisfy the Owner's obligations thereunder. If the proceeds from any letter of credit are not sufficient to satisfy the Owner's obligations under Section 5.1 the Owner shall forthwith pay to the District the difference upon receipt from the District of invoices for the same together with all interest thereon at the Prime Rate plus two percent (2%) from the date of receipt by the Owner of the invoices for same and continue until payment in full.

### **3.5 Return of Security**

Upon the expiration of the Warranty Period, the District Engineer shall, if satisfied that the Owner has complied with the covenants contained in this Agreement and there is no litigation pending by any third party against the District as a result of, or arising from, the construction of the Works, the District Engineer will direct that the Warranty Letter of Credit, or if the Warranty Letter of Credit has been cashed any monies still held by the District be returned to the Owner. The parties acknowledge and agree that the return of the security will not eliminate or diminish the Owners' obligations under Section 2.5 to maintain and repair the Works after the return of the security.