

## TERMS OF INSTRUMENT - PART 2

**RECITALS:**

- A. The Transferor (the “**Owner**”) is the registered owner in fee-simple of those lands particularly described in Item #2 of Form C, in the District of Kitimat in the Province of British Columbia, namely:
- 010-782-320 District Lot 7648 Range 5 Coast District Except the South 700 Feet
- (the “**Lands**”).
- B. The Transferee is the District of Kitimat (the “**District**”).
- C. The Owner has submitted an application to the District to amend the Official Community Plan designation and the zoning of the Lands, further to Amendment Bylaw Nos. [REDACTED] and [REDACTED] (the “**Amendment Bylaws**”), by changing the permitted uses and regulations in the G5 – Forestry Zone for the Lands, in particular the areas identified as Soil Storage Area 1, 2-1, 2-2, and 5 (“**Soil Storage Areas**”) in the **Site Plan** attached as Schedule “A” to this Agreement, to add Soil Storage Facility as a site specific use for those portions in order to authorize development of a storage facility on the Lands to receive and store clean, waste soil stripped from development sites throughout Kitimat, with a capacity to store up to 1,100,000 cubic metres (m<sup>3</sup>) with a berm volume of 102,000 m<sup>3</sup> of such soil (the “**Development**”); and, acknowledging that the restrictions and requirements contained herein are in the public interest, the Owner has offered and voluntarily provided this Section 219 Covenant to the District, and the District has accepted this covenant and required its registration as a condition to the enactment of the Amendment Bylaws (the “**Agreement**”).
- D. Section 219 of the *Land Title Act* gives authority for a covenant and indemnity, whether of a negative or positive nature, to be registered against the Lands and granted in favour of the District with provisions:
- in respect of the use of land or the use of a building on or to be erected on land;
  - that land is to be built on in accordance with the covenant;
  - that land is not to be built on or subdivided except in accordance with the covenant;
  - that land is not to be used, built on or subdivided;
  - that parcels of land designated in the covenant and registered under one or more indefeasible titles are not to be sold or otherwise transferred separately; and
  - that land or a specified amenity in relation to it be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state in accordance with the covenant and to the extent provided in the covenant.

**NOW THEREFORE** in consideration of the payment of the sum of \$10.00 by the District to the Owner (receipt and sufficiency acknowledged), the mutual covenants and agreements contained in this Agreement, and for other good and valuable consideration, the parties covenant and agree as to the following, including under Section 219 of the *Land Title Act*:

### Restrictions and Requirements – Use of Land Restricted

1. The Owner covenants and agrees that the Lands must not be developed except in accordance with the Amendment Bylaw, the *Kitimat Municipal Code* and the District's zoning bylaws.
2. Notwithstanding broader or greater uses permitting by District bylaws, only the deposition and storage of clean overburden is permitted as part of the Soil Storage Facility use on the Lands, and only in accordance with the further restrictions and requirements of this Agreement.
3. For greater certainty, the Site Plan in Schedule "A" is attached for informational purposes only, and the parties intend this Agreement to be registered and enforced as a blanket charge. Should the Owner wish to limit the requirements and restrictions of this Agreement, they may, at their sole cost, survey the Lands and seek modification from the District, and the District agrees to act reasonably in the consideration of such request.

### Development only in accordance with Professional Reports

4. Having consulted with qualified professionals to determine that the Lands are safe for the intended use of the Development, the Owner covenants and agrees that, notwithstanding broader or greater uses, density or other regulations in the District's *Kitimat Municipal Code*, zoning and other bylaws, the Lands must not be built upon or used for the Development, or the additional uses and areas permitted under the Amendment Bylaws, except in strict accordance with the conditions, recommendations and best practices identified in each of the following, all at the Owner's sole cost:
  - (a) Knight Piesold Consulting Report, a copy of which is attached as Schedule "B" to this Agreement:
    - (i) Sandhill Storage Areas 1, 2, and 5 - Geotechnical and Geophysical Site Investigation, February 28, 2020;
  - (b) Frontier Geosciences Inc. Report, a copy of which is attached as Schedule "C" to this Agreement:
    - (i) Seismic Refraction Survey Report Sandhill Storage Facility Project Kitimat BC, February 14, 2020;
  - (c) Tetra Tech - 3rd Party Review Reports, copies of which are attached as Schedule "D" to this Agreement:
    - (i) Waste Soil Storage Facility - Sandhill SSA Geotechnical Peer Review Tetra Tech Response, March 11, 2022, and
    - (ii) Sandhill Materials Soil Storage Area Geotechnical Assessment Report, April 12, 2022;
  - (d) WSP - 3rd Party Review Reports, copies of which are attached as Schedule "E" to this Agreement:
    - (i) Review of Sandhill Soil Storage Area (SSA) - Request for Information (RFI),

September 16, 2021, and

- (ii) WSP Geotechnical Peer Review - Review of Sandhill Storage Area (SSA) - Final Issue, October 6 2021;
  - (e) McElhaney Ltd. Reports, copies of which are attached as Schedule "F" to this Agreement:
    - (i) Civil Design of Soil Storage Sites and Road Access, December 7, 2021, and
    - (ii) Sandhill Soil Storage – Storm Water Management, February 22, 2022;
  - (f) Environmental Protection Plan, to be prepared by a Qualified Environmental Professional, and submitted to the District Engineer,
  - (g) Further geotechnical reports for phases not yet considered, to be prepared by Professional Engineer, and submitted to the District Engineer, and
  - (h) Site Reclamation Plan, to be prepared by a Qualified Professional, and submitted to the District Engineer,
- (collectively, the "**Professional Reports**").

**[DRAFTING NOTE: Report names and dates to be checked on final.]**

5. Without limiting the above, the parties agree that the use of "must", "shall", "should", "will", "is to be" and "recommend" (and similar statements) in the Professional Reports is to be interpreted as mandatory requirements, while "may" is optional and determined in the professional judgment of the Qualified Professional attending during construction on the Lands, including site preparation as appropriate.
6. Without limiting the above, the Owner acknowledges that the Geotechnical Report has been provided for purposes of rezoning only, and includes assumptions, and a Geotechnical Engineer or other suitably Qualified Professional Engineer is to be further consulted at time of excavation, site preparation and building, including to provide additional information and confirmation, in writing, of satisfaction of the conditions and recommendations identified in the Professional Reports, including determining if any further conditions are required so that the relevant portion of the land may be safely used for the intended use; the Owner further covenants and agrees that:
  - (a) if the qualified professional determines that the Lands may be used safely for the use intended with no further conditions, then there are no additional restrictions on Development under this Agreement;
  - (b) if the qualified professional certifies that the Lands, or any particular portion, may only be used safely for the use intended if the Lands or any particular portion, is used in accordance with further conditions specified in the professional's report, then the Lands, or any particular portion, may not be built upon or used except in strict conformance with those conditions; or
  - (c) if the qualified professional determines that the Lands, or any particular portion, may not be used safely for the use intended, then the Lands, or that particular

portion, may not be built upon or used.

For each of the above, the Owner covenants and agrees to provide the District Engineer with a copy of the further professional report(s) or supplemental letters, if any are prepared and the Owner will seek to replace or modify this Agreement to add such further professional report(s) or supplemental letters as a schedule.

### **Restrictions and Requirements – Site Reclamation**

7. The Owner covenants and agrees that reclamation and landscaping of the Lands must occur in accordance with the Site Reclamation Plan, including but not limited to, all at the Owner's sole cost:
  - (a) all material and overburden that are part of the Owner operations shall be stored by the Owner on the Lands until the Owner has permanently ceased operation of sand/gravel and quarrying processes carried out on the Lands;
  - (b) the Owner must use such stored material and overburden in accordance with the Site Reclamation Plan submitted by the Owner to the District Engineer;
  - (c) the Owner shall not store or bring onto the Lands any such material or overburden resulting from sand/gravel and quarrying processes carried out in locations other than the Lands, nor any other material not permitted under this Agreement;
  - (d) as the Owner, anticipates infill of the proposed storage areas will occur over many years, to ensure exposed soils are kept to a minimum, soil infill will be focused such that areas will be brought up to final grade and completed in phases. Once a soil storage area is completed, vegetation efforts will be undertaken to help stabilize the piles and reduce sediment and erosion control impacts, as well as to demonstrate due diligence to regulatory agencies. A combination of hydroseeding and planting conifer saplings should be used for revegetation;
  - (e) long term monitoring must commence once revegetation of an area is completed to ensure there is successful growth and colonization of the respective soil storage area, as well as ensuring sediment and erosion control measures (e.g., silt fencing, check dams, and ponds.) are working properly. It is assumed the site will be substantially vegetated with grass and low brush after the first two years. The site would be monitored regularly for effectiveness and measures will be implemented for areas needing follow up. Over time, it is anticipated the sediment and erosion control measures will be removed as site conditions warrant. During subsequent years, semi-regular visits would take place to ensure all measures are established and all temporary measures have been decommissioned.

### **Restrictions and Requirements – Security**

8. The Owner covenants and agrees that the Lands must not be used or built upon, including development or construction of the Development, until the Owner has, as security for the due and proper performance by the Owner of all of the covenants, agreements and obligations of the Owner in this Agreement, deposited with the District an unconditional, automatically-renewing letter of credit (the "**Letter of Credit**") in a form and amount acceptable to the District Engineer, the value of which is to be 125% of the combined preliminary cost estimate for:

- (a) the complete and permanent construction of the Stormwater Pond in the Stormwater Treatment Area shown in the Site Plan as located westwards of the Soil Storage Areas,
- (b) the construction of berms in each Soil Storage Area as based on estimates of a Professional Engineer for the costs of such construction, and
- (c) such other matters reasonably necessary for the safe and aesthetic reclamation and final landscaping of the Lands, as the District Engineer may reasonably identify,

with such estimates provided to the District Engineer by the Owner at the Owner's sole cost.

- 9. The parties acknowledge and agree that the Letter of Credit may be used by the District for the obligations under this Agreement, the District is not obligated to release the Letter of Credit, and the amounts deposited shall be returned only in accordance with the following conditions:
  - a) The portion of the security constituting the estimated construction cost of the wastewater ponds shall be released or returned upon their complete and permanent construction, subject to approval of a qualified professional to be granted only when the qualified professional determines the construction of such to be in accordance with the Reports attached to this document;
  - b) The portions of the security for berm construction shall be released or returned in accordance with the cost used to construct each berm subject to approval of a qualified professional to be granted only when the qualified professional determines the construction of such berms to be in accordance with the Reports attached to this document, or returned entirely if the District, without limiting its discretion, is satisfied that berm construction will not occur for several years;
  - c) Other portions shall be released or returned upon completion to the reasonable satisfaction of the District Engineer of the related commitment; and
  - d) Instead of release or return, portions of the security may be rolled over into similar obligations applicable to future phases of the Development.
- 10. The Owner and the District further covenant and agree that no interest on the Letter of Credit shall be paid to the Owner and that the receipt of the Letter of Credit by the District will in no way fetter Council's discretion or the discretion of the Approving Officer.
- 11. The Owner covenants and agrees that the Letter of Credit provided by the Owner to the District shall be a clean, unconditional, and irrevocable Letter of Credit in favour of the District drawn on a Canadian chartered bank or such other financial institution satisfactory to the District, and such Letter of Credit shall be maintained as good and valid security by the Owner at all times as required by this Agreement,
- 12. The Owner covenants and agrees that if the Owner shall fail to observe, perform or keep any of the provisions of this Agreement to be observed, performed or kept by the Owner, the District may at its sole discretion and without prejudice to any other remedy rectify the default of the Owner, at the Owner's expense and without limiting the generality of the foregoing may:

- (a) enter onto the Lands and do or cause to be done through its servants, contractors and others, all such things as may be required to fulfill the obligations of the Owner including without limitation, the complete and permanent construction of the proposed soil storage facility, including reclamation and final landscaping of the Lands or applicable portion thereof; and
- (b) make any payments required to be made for and on behalf of the Owner;

and for such purposes may without notice or limitation draw upon the Letter of Credit for all costs, and expenses incurred, payment and expenditures made, and monies due and owing to the District.

- 13. The Owner covenants and agrees that if the District incurs any costs and expenses or makes payments as provided in this Agreement, and the Letter of Credit is not sufficient to fully recompense the District, the Owner shall forthwith upon notice from the District pay to the District the amount of such deficiency together with interest thereon at THREE PERCENT (3%) per annum in excess of the Prime Lending Rate of the Royal Bank of Canada in effect from time to time, calculated and compounded monthly from the date such cost or expense was incurred or payment or expenditure was made by the District. Such amounts required to be paid by the Owner shall constitute a debt due and owing to the District, and failing payment, the District may add such costs to property taxes for the Lands.

### **Indemnity and Release**

- 14. The Owner covenants and agrees to indemnify and save harmless the District from any and all claims, causes of action, suits, demands, fines, penalties, costs or expenses or legal fees (on a solicitor-client basis) whatsoever, in law or equity, which anyone has or may have against the District or which the District incurs as a result of any loss, damage, deprivation, enrichment or injury, including economic loss, arising out of or connected with the restrictions or requirements of this Agreement, the breach of any covenant in this Agreement, or the use of the Lands contemplated under this Agreement.
- 15. The Owner releases and forever discharges the District of and from any claims, causes of action, suits, demands, fines, penalties, costs or expenses or legal fees (on a solicitor-client basis) whatsoever, in law or equity, which the Owner can or may have against the District for any loss, damage, deprivation, enrichment or injury, including economic loss, arising out of or connected with the restrictions or requirements of this Agreement, the breach of any covenant in this Agreement, or the use of the Lands contemplated under this Agreement.
- 16. Without limiting the above release and indemnity, the Owner acknowledges that this Agreement may be interpreted to contain conditions, restrictions, requirements, benefits or gifts that may not be specifically identified or required by law, although consistent with the District's bylaws. The Owner hereby expresses its intention to be solely responsible for the costs resulting from satisfying the conditions of this Agreement. The Owner further releases, waives and forever discharges the District from and against any claims, actions, or causes of action, whether based in law or equity, for damages or losses, for the recovery of the contributions or costs incurred, including legal expenses, or for unjust enrichment, in connection with the provision of those contributions.
- 17. The release and indemnity provisions of this Agreement survive its termination.

## General

18. The District and Owner agree that this Agreement shall be interpreted in accordance with the definitions in the *Kitimat Municipal Code*, as amended from time to time.
19. Where reports or other information is provided to the District or the District Engineer, the District Engineer shall have the option, but not the obligation, to review and comment on the reports or other information. Where comments are provided, the Owner, and its professionals, shall consider those comments and amend their reports or other information accordingly or provide an explanation of why such amendment is not necessary. Wherever in this Agreement the approval of the District is required or some act or thing is to be done to the satisfaction of the District:
  - (a) such provisions shall not be deemed to have been fulfilled or waived unless the approval or expression of satisfaction is in writing signed by the District and no prior approval or expression of satisfaction and no condoning, excusing or overlooking by the District on previous occasions when such approval or satisfaction was required shall be taken to operate as a waiver of the necessity for such approval or satisfaction wherever required by this Agreement; and
  - (b) such approval or satisfaction shall be at the discretion of the District acting reasonably in conformance with sound and accepted public municipal engineering practice.
20. The restrictions and requirements in this Agreement are covenants running with the Lands in favour of the District and are intended to be perpetual, and shall continue to bind all of the Lands when subdivided. For greater certainty, future owners of the Lands, or portions thereof, shall be considered the Owner under this Agreement.
21. The Owner covenants and agrees for itself, its heirs, executors, successors and assigns, that it will at all times perform and observe the requirements and restrictions set out in this Agreement.
22. It is mutually understood, acknowledged and agreed by the parties that the District has made no representations, covenants, warranties, guarantees, promises or agreements (oral or otherwise) with the Owner other than those contained in this Agreement.
23. The Owner acknowledges and agrees that neither the execution of this Agreement nor the adoption of the Amendment Bylaw in any way replace any other permits, conditions, or approvals that are necessary in order to proceed with the Development, and construct the Soil Storage Areas on the Lands.
24. Nothing contained or implied in this Agreement:
  - (a) prejudices or affects the rights, powers or discretion of the District in the exercise of its functions under any public or private statutes, bylaws, orders and regulations, all of which may be fully and effectively exercised in relation to the Lands as if the Agreement had not been executed and delivered by the Owner;
  - (b) imposes any legal duty or obligation, including any duty of care or contractual or other legal duty or obligation, to enforce this Agreement or the breach of any provision in this Agreement; or

- (c) imposes any public law duty, whether arising from the principles of procedural fairness or the rules of natural justice, on the District with respect to its exercise of any right or remedy expressly provided in this Agreement or at law or in equity.
25. The parties agree that this Agreement shall not be modified or discharged except in accordance with the provisions of section 219(9) of the *Land Title Act*.
26. The Owner covenants and agrees that the District may withhold development permits, building permits and other approvals related to the use, building or subdivision of land as necessary to ensure compliance with the covenants in this Agreement, and that the issuance of a permit or approval does not act as a representation or warranty by the District that the covenants of this Agreement have been satisfied.
27. The Owner covenants and agrees that:
- (a) if the District advises of a breach of this Agreement, as determined in its reasonable discretion, the Owner must promptly remedy that breach at its sole cost;
  - (b) if the Owner has not remedied the breach to the reasonable satisfaction of the District within fifteen (15) days of notice or other time longer period specified by the District, the District may, but is under no obligation to, remove or rectify the breach at the expense of the Owner without further notice; and
  - (c) any costs to the District of such removal or rectification is a debt due from the Owner to the District together with interest at a rate of 3% per annum in excess of the Prime Lending Rate of the Royal Bank of Canada in effect from time to time, and:
    - (i) the Owner shall pay such costs and interest to the District forthwith upon demand; and
    - (ii) failing payment, the District may add such costs to property taxes for the Lands.
28. No remedy under this Agreement is to be deemed exclusive but will, where possible, be cumulative with all other remedies at law or in equity. The Owner agrees that the District is entitled to obtain an order for specific performance or a prohibitory or mandatory injunction, or other combination of remedies, in respect of any breach of this Agreement by the Owner.
29. The waiver by a party of any breach of this Agreement or failure on the part of the other party to perform in accordance with any of the terms or conditions of this Agreement is not to be construed as a waiver of any future or continuing failure, whether similar or dissimilar, and no waiver is effective unless it is written and signed by both parties.
30. 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.
31. Any notice required or permitted to be given in connection with this Agreement will be in writing and delivered personally or sent by prepaid express mail to the applicable



addresses set out above. If notice is delivered personally, it will be considered given when delivered. If notice is mailed, it will be considered given five days after mailing by deposit at a Canada Post mailing point or office. A party may only change their address for delivery under this section by notice to the other party in accordance with this section.

32. Whenever the plural, singular, masculine or neuter is used herein, the same shall be construed as including the plural, singular, feminine, body corporate or politic unless the context requires otherwise.
33. The Owner acknowledges having been directed to obtain independent legal advice prior to executing this Agreement, and the Owner agrees and acknowledges that they have read the terms of this Agreement and fully understood all of the terms and conditions of this Agreement and its impact on the Lands.
34. Where there is a reference to an enactment of the Province of British Columbia in this Agreement, that reference shall include a reference to any subsequent enactment of the Province of British Columbia of like effect, and unless the context otherwise requires, all statutes referred to herein are enactments of the Province of British Columbia.
35. This Agreement is to be construed in accordance with and governed by the laws applicable in the Province of British Columbia.

The Owner and District acknowledge that this Agreement has been duly executed and delivered by the parties executing Forms C and D (pages 1 and 2) attached.

**Schedule A  
Site Plan**

**DRAFT**

**Schedule B  
Knight Piesold Report**

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**Schedule C  
Frontier Geosciences Report**

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**Schedule D  
Tetra Tech Reports**

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**Schedule E  
WSP Reports**

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**Schedule F  
Tetra Tech Reports**

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