

PART 2 -- TERMS OF INSTRUMENT

RIGHT OF FIRST REFUSAL AND OPTION TO PURCHASE

THIS AGREEMENT dated for reference December 16, 1996 is

BETWEEN:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(the "Owners")

AND:

RESORT MUNICIPALITY OF WHISTLER, a municipality incorporated under the *Resort Municipality of Whistler Act*, S.B.C. 1975, c.67 and having its address at 4325 Blackcomb Way, Whistler, B.C., V0N 1B4

("Purchaser")

GIVEN THAT:

- A. The Owners and the Purchaser wish to enter into this Agreement to ensure that a Strata Lot is sold only to qualified individuals and for a price that reflects the public interest in employee housing; and
- B. The Owners have agreed to grant to the Purchaser a right of first refusal to purchase a Strata Lot,

This Agreement is evidence that, in consideration of the payment of \$2.00 by the Purchaser to the Owners (the receipt of which is acknowledged), and in consideration of the promises exchanged below, the parties agree with each other as follows:

Definitions

1. In this Agreement:

- (a) "Area" means the floor area of the Strata Lot plus a proportionate share of the floor area of the limited common property to which that Strata Lot is entitled, expressed in square feet, as shown on the strata plan for that Strata Lot, and for the purposes of this definition "proportionate share" shall mean the fraction which has as its numerator the unit entitlement of that Strata Lot and as its denominator the aggregate unit entitlement of all of the Strata Lots which are entitled to the use of that limited common property;
- (b) "Employee" means an individual:
  - (i) who is either employed or self-employed for an average of not less than 20 hours per week over the most recent three months and whose principal place of employment or business is located within the boundaries of the Resort Municipality of Whistler; and
  - (ii) who is a member in good standing of the Whistler Valley Housing Society;

- (c) "First Purchaser" means the person to whom the Strata Lot is first transferred by the Owners after substantial completion of the Strata Lot;
- (d) "First Sale Price" means the price determined under section 6(a) plus net goods and services tax;
- (e) "Housing Agreement" means the housing agreement under s. 963.2 of the *Municipal Act* between the Owners and the Municipality dated for reference September 1, 1996 and deposited for registration as a s. 215 *Land Title Act* covenant in the LTO;
- (f) "Interest" means the interest of the Owners in the Strata Lot;
- (g) "LTO" means the New Westminster/Vancouver Land Title Office;
- (h) "Municipality" means the Resort Municipality of Whistler;
- (i) "Offer" means a *bona fide* offer to purchase an interest in the Strata Lot made by a Third Party;
- (j) "Price Control Index" means the percentage multiplier determined under section 6(c) with respect to any period;
- (k) "Prime Rate" means the annual percentage rate of interest charged by the Royal Bank of Canada, Main Branch, Vancouver, for Canadian dollar loans and published by that Bank as its prime rate;
- (l) "Retiree" means an individual who has ceased employment and who was an Employee for 5 of the 6 years immediately preceding the date on which the individual ceased employment;
- (m) "Strata Lot" means a parcel of land legally described in item 2 of Part 1 of the Form C to which this Agreement is attached and forms part of this Agreement; and
- (n) "Third Party" means any person, other than the Purchaser, who makes an Offer.

### Interpretation

2. In this Agreement:

- (a) reference to the singular includes a reference to the plural, and vice versa, unless the context requires otherwise;
- (b) reference to a particular numbered section or article, or to a particular lettered Schedule, is a reference to the correspondingly numbered or lettered article, section or Schedule of this Agreement;
- (c) article and section headings have been inserted for ease of reference only and are not to be used in interpreting this Agreement.
- (d) the word "enactment" has the meaning given to it in the *Interpretation Act* (British Columbia) on the reference date of this Agreement;
- (e) reference to any enactment is a reference to that enactment as consolidated, revised, amended, re-enacted or replaced, unless otherwise expressly provided;
- (f) reference to a "party" or the "parties" is a reference to a party, or the parties, to this Agreement and their respective successors, assigns, trustees, administrators and receivers; and
- (g) reference to a "day", "month", "quarter" or "year" is a reference to a calendar day, calendar month, calendar quarter or calendar year unless otherwise expressly provided.

### **RFR Grant**

3. The Owners grant to the Purchaser a right of first refusal to purchase the fee simple title to the Strata Lot on the terms of this Agreement. The Owners agree that it must not sell, assign or in any way transfer (collectively, "Sell", "Sale" and "Sold") any of its Interest to any person other than the Purchaser unless that Interest is first offered for Sale to the Purchaser in accordance with section 4. Subject to sections 5 and 7, the Purchaser has 5 business days from the date on which it receives the notice under section 4 to elect to acquire the Strata Lot on the same terms as those of the Offer (including purchase price) except that the agreement of purchase and sale created by that election is to be on the terms set out in sections 10 through 31.

### **Offer Notice**

4. If the Owners receive an Offer, the Owners must at once give notice of the Offer to the Purchaser and must deliver a copy of the Offer along with that notice.

**Option to Purchase**

5. Despite section 3, the Purchaser may elect, as an option to purchase hereby granted to the Purchaser to acquire the Strata Lot:

- (a) for the purchase price that is the lesser of:
  - (i) the purchase price set out in the Offer; and
  - (ii) the purchase price calculated in accordance with section 6; and
- (b) on the terms set out in sections 10 through 31.

**Price**

6. For the purposes of section 5, the purchase price is to be determined in accordance with the following:

- (a) In this section, "First Sale Price" means the amount determined by multiplying the Area X \$150.00.
- (b) If the fee simple title to the Strata Lot is transferred at any time between the date on which the strata plan is deposited in the LTO and 365 days after that date ("First Year"), the sale price, exclusive of the usual adjustments, must not exceed the amount (in this section "First Year Sale Price") that is the greater of:
  - (i) the Initial Price; and
  - (ii) the amount determined by multiplying the First Sale Price by 1.034 and then multiplying the result by the number determined by dividing the number of days in the period described above by 365.
- (c) If fee simple title to the Strata Lot is transferred at any time after expiry of the period described in section 6(b), the sale price of the Strata Lot, exclusive of the usual adjustments, must not exceed the amount determined in accordance with the following:
  - (i) with respect to each quarter, the Owners must establish the factor (in this section "Price Control Index") in respect of each quarter determined by subtracting 2.0% from the Prime Rate in effect on the first day of each quarter and multiplying the result by 0.1;

- (ii) with respect to the first period of 365 days beginning immediately after expiry of the First Year, the sale price for the Strata Lot must not exceed the amount determined by adding to the First Year Sale Price the amount determined by multiplying the Price Control Index by the First Year Sale Price at the beginning of each quarter in that year and compounding with respect to each whole quarter within that year to the date of the sale and adding an amount to prorate from the end of the last whole quarter to the date of the sale; and
  - (iii) with respect to each year after that described in section 6(b)(ii), the sale price for the Strata Lot must not exceed the amount determined by compounding and pro-rating the purchase price as at the end of the immediately preceding year in accordance with the method set out in section 6(c)(ii).
- (d) If an appraiser who is a member in good standing of the Appraisal Institute of Canada who has been retained by the Owners at the expense of the Owners determine that the Owners have made capital improvements to the Strata Lot that materially increase the market value of the Strata Lot beyond the sale price otherwise permitted under this section, the Municipality may, in its sole discretion, permit the Owners to increase the sale price for the Strata Lot by an amount commensurate with the increase in market value as certified by the appraiser in his or her report to the Owners.
- (e) The Owners must deliver to the Municipality a certified copy of the vendor's statement of adjustments with respect to sale of the Strata Lot by the Owners, and must deliver to the Municipality upon request such further evidence as the Municipality may reasonably require to confirm the sale price of the Strata Lot. If the Owners sell the Strata Lot for a sale price exceeding that permitted under this section, the Owners must pay the excess to the Municipality within 30 days after demand is made by the Municipality, with any amount remaining unpaid after those 30 days bearing interest at the Prime Rate in effect from time to time, calculated from the date due until the date paid and compounded annually not in advance.

**Waiver**

7. As an alternative to election under sections 3 or 5, the Purchaser is entitled to give notice to the Owners that the Purchaser agrees to waive its rights thereunder with respect to a specific Offer. The Purchaser must give notice under this section within 3 business days from the date on which it receives the notice under section 4. If the Purchaser gives notice under this section, the Purchaser's rights are deemed to be waived only if:

- (a) the Owners deliver to the Purchaser, within 2 days after notice of waiver is given by the Purchaser under this section a valid and binding written agreement of purchase and sale between the Owners and the Third Party in respect of the Interest and substantially on the terms and conditions of the Offer ("APS");
- (b) subject to section 8, at least 5 business days before completion of the sale to the Third Party the Owners deliver to the Purchaser written proof, satisfactory to the Purchaser, in its sole discretion, that:
  - (i) the Third Party is:
    - (A) an Employee; or
    - (B) a Retiree; and
  - (ii) the APS cannot be assigned or transferred by the Third Party; and
- (c) at least 5 business days before completion of the sale to the Third Party the Owners deliver to the Purchaser written proof, satisfactory to the Purchaser, in its sole discretion, that the purchase price payable by the Third Party under the APS does not exceed the purchase price calculated in accordance with section 6.

If the Owners do not comply with sections 7(a) through (c), the Purchaser's rights under sections 3 and 5 are deemed not to be waived and the Purchaser is instead deemed to have made an election under section 5. The Owners agree that every APS entered into by the Owners must contain a provision by which the Owners and the Third Party with whom the agreement is entered into agree that the agreement is subject to a condition precedent for the benefit of both that may not be waived by either of them, such that the agreement becomes void and unenforceable unless the Purchaser's rights are deemed to be waived in accordance with sections 7(a) through (c).

**Exception to RFR and Option**

8. The Purchaser agrees that its rights under sections 3 and 5 do not apply in any of the following cases:
- (a) if the Owners are a mortgagee that is a bank or other financial institution established or regulated under any enactment of British Columbia or Canada ("Lender") and the Lender has for at least 45 days used reasonable best efforts to enter into an APS, including by listing the Interest for Sale with the

Purchaser or with a licensed real estate agent ("Agent"), or both, but has been unable to enter into an APS within the 45 days:

- (i) the Lender may after that time Sell the Interest to a Third Party who is not an Employee or Retiree, but the purchase price for the Interest must not exceed the purchase price calculated in accordance with section 6; and
  - (ii) the Strata Lot may only be used and occupied in accordance with the Housing Agreement;
- (b) if the Owners are a Lender and the Lender has for at least 90 days used reasonable best efforts to enter into an APS, including by listing the Interest for Sale with the Purchaser or with an Agent, or both, but has been unable to enter into an APS within the 90 days:
- (i) the Lender may after that time Sell the Interest to a Third Party who is not an Employee or Retiree and the purchase price for the Interest may be different from the purchase price calculated in accordance with section 6; and
  - (ii) the Strata Lot may only be used and occupied in accordance with the Housing Agreement;
- (c) if the Owners are a Lender and the Lender has for at least 120 days used reasonable best efforts to enter into an APS, including by listing the Interest for Sale with the Purchaser or with an Agent, or both, but has been unable to enter into an APS within the 120 days:
- (i) the Lender may after that time Sell the Interest to a Third Party who is not an Employee or Retiree and the purchase price for the Interest may be different from the purchase price calculated in accordance with section 6; and
  - (ii) the Strata Lot may be used and occupied subject only to all enactments applicable to the use of land and the Housing Agreement does not apply; and
- (d) if the Owners are not a Lender and the Owners have for at least 45 days used reasonable best efforts to enter into an APS, including by listing the Interest for Sale with the Purchaser or with an Agent, or both, but has been unable to enter into an APS within the 45 days:



- (i) the Owners may after that time Sell the Interest to a Third Party who is not an Employee or Retiree, but the purchase price for the Interest must not exceed the purchase price calculated in accordance with section 6; and
- (ii) the Strata Lot may only be used and occupied in accordance with the Housing Agreement.

The Owners agree that:

- (e) for clarity, this section applies each time an Offer is received by the Owners and each time the Interest is Sold;
- (f) it must deliver to the Purchaser written proof satisfactory to the Purchaser, in its sole discretion, to establish the existence of any of the cases set out in this section before this section operates such that the rights of the Purchaser under sections 3 and 5 do not apply.

#### **Interest Disposal**

9. Subject to section 7, if the Purchaser does not make an election under sections 3 or 5, the Owners may dispose of the Interest upon substantially the same terms as those of the Offer, but not otherwise, and if the Owners do not dispose of the Interest this Agreement and the rights it grants to the Purchaser continue in force at all times. For clarity, even if the Purchaser does not elect to Purchase the Strata Lot under sections 3 or 5, or does not under section 7 waive its right to make that election this Agreement and the rights it grants to the Purchaser continue in force at all times.

#### **Runs With Land**

10. This Agreement and the rights it grants to the Purchaser run with the Strata Lot and burden and bind every parcel into which the Strata Lot is subdivided by any means (including any strata lot or bare land strata lot created by deposit of a strata plan under the *Condominium Act* (British Columbia), but not any common property created upon deposit of a strata plan). For clarity, this Agreement and the rights it grants to the Purchaser burden and bind each Strata Lot.

#### **Completion Date**

11. The agreement arising from election under section 3 or 5 shall be completed on the date ("Completion Date") to be chosen by the Purchaser, such date not to be later than thirty (30) days after the date of the election notice being give to the Owners.

**Payment of Purchase Price**

12. The purchase price determined under section 3 or 5 shall be paid by the Purchaser to the Owners, subject to adjustments as provided in this Agreement, on the Completion Date according to the closing procedure as provided in this Agreement.

**Title**

13. On the Completion Date, the Owners shall convey the Strata Lot to the Purchaser free and clear of all mortgages and other financial charges.

**Possession**

14. The Owners shall give vacant possession of the Strata Lot to the Purchaser, subject only to the non-financial encumbrances and existing tenancies, following payment of the adjusted purchase price to the Owners on the Completion Date.

**Adjustments**

15. All adjustments, both incoming and outgoing, in connection with the purchase and sale of the Strata Lot, including adjustments of taxes, rates, rents and other matters usually the subject of adjustment between vendor and purchaser, shall be made as at the Completion Date.

**Representations, Warranties and Covenants of the Owners**

16. The Owners covenant and agree that it shall, from and after the date of the application to register this Agreement in the LTO:

- (a) take all reasonable care to protect and safeguard the Strata Lot and operate and otherwise deal with the Strata Lot as a careful and prudent owner would do and in such a manner that, except as contemplated in this Agreement, the warranties, representations and covenants of the Owners as contained in this Agreement remain true and correct;
- (b) take or cause to be taken all proper steps and actions and corporate proceedings to enable the Owners to vest a good and marketable title to the Strata Lot in the Purchaser at the Completion Date, free and clear of all liens, encumbrances, defects in title, equities or claims of every nature and kind except for Permitted Encumbrances and to enable the Owners to carry out the sale of the Strata Lot and to execute and deliver this Agreement as valid and binding obligations of the Owners.

17. The Owners hereby represent and warrant to, and covenant and agree with, the Purchaser as at the Completion Date that:

- (a) the Owners have no indebtedness or obligation to any person which might now or in future constitute a lien, charge or encumbrance on the Strata Lot, other than the Permitted Encumbrances;
- (b) the Owners have not used the Strata Lot or permitted any use of the Strata Lot, to store, manufacture, dispose of, emit, spill, leak, generate, transport, remediate, produce, process, release, discharge, landfill, treat or remediate any explosive, radioactive material, asbestos, urea formaldehyde, chlorobiphenyl, hydrocarbon, underground tank, pollution, contamination, hazardous substance, corrosive substance, toxic substance, special waste, waste, or matter of any kind which is or may be harmful to human safety or health or to the environment, including anything the storage, manufacture, disposal, emission, discharge, treatment, generation, use, transport, remediation or release into the environment of which is now or at any time after the execution of this Agreement is prohibited, controlled, regulated or licensed under any laws applicable to the Strata Lot ("Contaminant");
- (c) the Owners have not caused or permitted, the storage, manufacture, disposal, emission, spilling, leakage, treatment, generation, transportation, remediation, production, processing, release, discharge, landfilling, treatment or remediation of any Contaminant in, on, under or from the Strata Lot; and
- (d) the Owners have at all times used the Strata Lot in compliance with all laws relating to Contaminants and to the environment.

### Indemnity

18. The Owners covenant and agree with the Purchaser, which covenant shall survive the completion of any conveyance of the Strata Lot arising from the exercise of this Option, that the Owners must indemnify and save harmless the Purchaser, and its elected and appointed officials, officers, employees and agents, from and against any and all actions, causes of action, liabilities, demands, losses, damages, costs (including remediation costs and costs of compliance with any law, and legal fees and disbursements), expenses, fines and penalties, suffered or incurred by the Purchaser, whether brought against any one or more of them by the Owners or by any other person, or by any governmental authority, by reason of a breach of any representation or warranty, covenant or agreement of the Owners set forth in this Agreement.

**Closing Documents**

19. Not less than 14 days before the Completion Date, the Purchaser shall deliver to the Owners' solicitors:

- (a) two copies of a Form A Transfer transferring the fee simple title to the Strata Lot to the Purchaser ("Transfer") subject only to Permitted Encumbrances;
- (b) two copies of the Owners' Statement of Adjustments to be approved and executed by the Owners; and
- (c) a statutory declaration of any authorized officer of the Owners that the Owners are residents of Canada within the meaning of the *Income Tax Act* (Canada).

**Closing Procedure**

20. On or before the Completion Date, the Owners shall deliver to the Purchaser's solicitors, in trust, the Transfer executed on behalf of the Owners and in registrable form, on the undertakings that:

- (a) on the Completion Date, the Purchaser shall apply to register the Transfer in the LTO only if the adjusted Purchase Price has first been deposited in the trust account of the Purchaser's solicitors; and
- (b) after application has been made to register the Transfer in the LTO, and upon receipt of a satisfactory post-index search of the title to the Strata Lot indicating that in the normal course of LTO procedure the Purchaser shall become the registered owner of the Strata Lot free and clear of all liens, charges and encumbrances other than the Permitted Encumbrances, the Purchaser shall pay the Owners at once the adjusted Purchase Price by solicitor's trust cheque delivered to the Owners' solicitors.

**Risk**

21. The Strata Lot shall be at the Owners' risk until the Completion Date and shall thereafter be at the risk of the Purchaser. In the event of loss or damage to the Strata Lot occurring before the completion of the closing on the Completion Date by reason of fire, tempest, lightning, earthquake, flood or other acts of God, explosion, riot, civil commotion, insurrection or war, the Purchaser, at the Purchaser's option, may cancel this Agreement.

Access

22. The Purchaser, its agents and employees, have the licence, conditional on providing 48 hours prior written notice to the Owners, to enter upon the Strata Lot from time to time prior to the Completion Date, at the Purchaser's sole risk and expense, for the purpose of making reasonable inspections, surveys, tests and studies of the Strata Lot.

Fees and Taxes

23. The Purchaser shall pay:

- (a) any property transfer tax under the *Property Transfer Tax Act* (British Columbia);
- (b) LTO registration fees in connection with the transfer of the Strata Lot to the Purchaser;
- (c) the Purchaser's legal fees and disbursements but not the Owners'; and
- (d) all goods and services tax, if any, payable in respect of transfer of the Strata Lot to the Purchaser under the *Excise Tax Act* (Canada).

Further Assurances

24. Each of the parties shall at all times hereafter execute and deliver at the request of the other all such further documents, deeds and instruments and shall do and perform such acts as may be reasonably necessary to give full effect to the intent and meaning of this Agreement.

Notice

25. Where any notice, request, direction, or other communication is required to be given or made by either party under this Agreement, it shall be in writing and is effective if delivered in person, sent by registered mail, by telegram, by telex or by facsimile addressed to the party for whom it is intended at the address set out above and any notice, request, direction or other communication shall be deemed to have been given if by registered mail, when the postal receipt is acknowledged by the other party; by telegram, when transmitted by the carrier; and, by telex or facsimile when transmitted. The address of either party may be changed by notice in the manner set out in this provision.

**Time of Essence**

26. Time is of the essence of this Agreement.

**Tender**

27. Any tender of documents or money may be made upon the parties at their respective addresses set forth in this Agreement or upon their respective solicitors.

**Entire Agreement and Its Survival**

28. There are no representations, warranties, guaranties, promises or agreements other than those expressly contained in this Agreement, all of which shall survive the Completion Date, registration of documents and payment of the Purchase Price and shall not merge with any deeds or agreements delivered in connection with completion of this transaction and shall not merge with the Transfer or its registration. The provisions of this Option to Purchase Agreement between the parties with respect to the Strata Lot constitute the entire agreement between the parties and terminate and supersede all previous communications, representations, warranties, covenants and agreements, whether verbal or written, between the parties with respect to the subject of this Option to Purchase Agreement.

**Enurement**

29. This Agreement shall enure to the benefit of and be binding upon the parties and their respective heirs, executors, administrators, successors and assigns.

**Modification**

30. This Agreement may not be modified or amended except by an instrument in writing signed by the parties or by their successors or assigns.

**Interpretation**

31. Wherever the singular or masculine or neuter is used in this Agreement, the same shall be construed as meaning the plural, the feminine or body corporate where the context or the parties so require.

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