

## **SPECIAL Parks and Recreation Advisory Committee Meeting to be held via Zoom**

*\*If you'd like to watch or listen to the live Committee meeting, please email [Committees@Penticton.ca](mailto:Committees@Penticton.ca) 24-hours prior to the commencement of the meeting for the Zoom meeting participation details. You will have an opportunity to ask questions related to the agenda at the end of the meeting.*

**Thursday, April 7, 2022  
at 9:00 a.m.**

1. **Call Special Committee Meeting to Order**

2. **Adoption of Agenda**

3. **Adoption of Minutes**

3.1 Minutes of the March 14, 2022 Parks and Recreation Advisory Committee Meeting **1-3**

**Staff Recommendation:**

*THAT the Parks and Recreation Advisory Committee adopt the minutes of the March 14, 2022 meeting as presented.*

4. **New Business**

4.1 Skaha Marina Management Operating Agreement – Anthony Haddad, General Manager of Community Services **4-174**

**Staff Recommendation:**

*THAT the Parks and Recreation Advisory Committee support the long-term Management Operating Agreement with Penticton Yacht Club as provided in Attachment A.*

5. **Next Meeting**

6. **Public Question Period**

7. **Adjournment**



# Minutes



## Parks and Recreation Advisory Committee Meeting

held via Zoom  
Monday, March 14, 2022  
at 3:00 p.m.

- Present:** Isaac Gilbert, Chair  
James Palanio, Vice Chair  
Cameron Baughen  
Drew Barnes  
Joanne Grimaldi  
John Archer  
Marc Tougas\*  
Raymond Stassi\*  
Tyson Bull  
Susan Fraser
- Council Liaison:** James Miller, Councillor
- Staff:** Anthony Haddad, General Manager of Community Services  
JoAnne Kleb, Public Engagement Program Manager  
Kelsey Johnson, Manager of Recreation, Arts and Culture  
Len Robson, Public Works Manager\*  
Rebecca Van Huizen, Legislative Assistant
- Regrets:** Andrew Drouin  
Laura Harp  
Robert (Sandy) Ross

\* denotes partial attendance

### 1. **Call to Order**

The Parks and Recreation Advisory Committee was called to order by the Chair at 3:00 p.m.

Marc Tougas entered the Zoom meeting at 3:03 p.m.

Marc Tougas left the Zoom Meeting at 3:04 p.m.

The Chair went over Robert's Rules of Order when voting on motions during the Committee meeting.

### 2. **Adoption of Agenda**

#### **It was MOVED and SECONDED**

THAT the Parks and Recreation Advisory Committee adopt the agenda for the meeting held on March 14, 2022 as presented.

**CARRIED UNANIMOUSLY**

### 3. **Adoption of Minutes**

#### 3.1 Minutes of the January 27, 2022 Special Parks and Recreation Advisory Committee Meeting

**It was MOVED and SECONDED**

THAT the Parks and Recreation Advisory Committee adopt the minutes from the Special Meeting of January 27, 2022 meeting as presented.

**CARRIED UNANIMOUSLY**

#### 3.2 Minutes of the February 14, 2022 Parks and Recreation Advisory Committee Meeting

**It was MOVED and SECONDED**

THAT the Parks and Recreation Advisory Committee adopt the minutes of the February 14, 2022 meeting as presented.

**CARRIED UNANIMOUSLY**

### 4. **New Business**

#### 4.1 Introduction of New Committee Members

The Chair introduced the three (3) new Parks and Recreation Advisory Committee Members that were recently appointed by Council. The Committee participated in roundtable introductions allowing newly appointed members Cameron Baughen and Joanne Grimaldi to introduce themselves.

Due to technical issues Raymond Stassi left the meeting at 3:15 p.m.

The Public Works Manager entered the Zoom meeting at 3:18 p.m.

#### 4.2 Civic Places and Spaces Engagement Update

The Public Engagement Program Manager displayed a PowerPoint presentation on the results of the Civic Places and Spaces Engagement Update process and anticipated next steps.

The floor was opened up to the Committee Members for questions and comments. Committee Members provided individual comments on the results and staff recommendations from the presentation.

A Committee Member suggested that when designing the new civic buildings that the City try to incorporate environmental benefits into the design. Staff need to also take into account the history, heritage, and emotional value the Memorial Arena and Art Gallery have when going through the engagement process. Noted that any disposition of property should be thought of early in the development as it can be a controversial route. A Committee Member agreed that more efficiency when designing the new buildings needs to be addressed. Raised concerns with parking near the Twin Arenas – might need additional lands to mitigate this. Suggested if there is a way to use current buildings as a foundation and do an addition to them as opposed to demolishing it – could be cost effective. A Committee Member suggested the City approach the School District to explore if the Shatford Centre may be part of the solution. A Committee Member provided comments on lack of land and space to grow within the City.

Councillor Miller noted that engagement with the Library Board and staff has been open and transparent.

The Chair thanked staff on the public engagement that has been done to date.

#### 4.3 Council Decisions Update – Sportsplex Surface Replacement

The Manager of Recreation, Arts and Culture provided a verbal update of Council's decision on the Sportsplex Surface Replacement and noted that Council approved it at the March 1 Council Meeting and it will be moving forward.

The Chair went over the Terms of Reference for the Parks and Recreation Advisory Committee as a refresher for both existing and new Committee Members.

#### 5. **Next Meeting**

The next Parks and Recreation Advisory Committee meeting is tentatively scheduled to be held on April 11, 2022 at 3:00 p.m.

#### 6. **Public Question Period**

#### 7. **Adjournment**

##### **It was MOVED and SECONDED**

THAT the Parks and Recreation Advisory Committee adjourn the meeting held on March 14, 2022 at 4:02 p.m.

**CARRIED UNANIMOUSLY**

Certified Correct:

---

Rebecca Van Huizen  
Legislative Assistant



# Committee Report

penticton.ca

**Date:** April 7, 2022 **File No:** 2380-20  
**To:** Parks and Recreation Advisory Committee  
**From:** Anthony Haddad, General Manager, Community Services  
**Subject:** **Skaha Lake Marina: Management Operating Agreement with Penticton Yacht Club**

## Staff Recommendation

THAT the Parks and Recreation Advisory Committee support the long-term Management Operating Agreement with Penticton Yacht Club as provided in Attachment A.

## Background

On March 31, 2021 Council endorsed the Community Opinion Question related to the Skaha Lake Marina lands to be held at the June 19, 2021 By-Election, and passed the following resolution:

*109/2021 It was **MOVED and SECONDED***

*THAT Council seek a community mandate to establish a long-term agreement with a private operator to help fund the capital improvements and operate the Skaha Marina by including the following question on the spring 2021 by-election ballot;*

*Do you support the City selecting a private operator and entering into a long-term agreement of up to 25 years in order to fund the marina improvements and provide marina services at Skaha Lake Park?*

*YES or NO*

*AND THAT the Council resolve to abide by the results of Community Opinion Question on the by-election ballot;*

*AND THAT if there is community support through the by-election, the proposed operating agreement will be brought back to the Parks and Recreation Advisory Committee for review and a recommendation prior to being presented to Council for a decision.*

**CARRIED UNANIMOUSLY**

The Community Opinion was held at the June 19<sup>th</sup> By-Election where the following question was asked:

Do you support the City selecting a private operator and entering into a long-term agreement of up to 25 years in order to fund the marina improvements and provide marina services at Skaha Lake Park?

YES or NO

The results of the Skaha Marina Community Opinion from the June 19, 2021 By-Election were as follows:

YES: 2,453  
NO: 2,416

Staff then presented a report to Council on July 20, 2021 with a summary of the Community Opinions results and identification of next steps, including the development of a draft RFP to seek proponents for the development of a long-term Operating Management Agreement up to 25 years for the Skaha Marina Lands. The following resolution was passed:

*222/2021 It was **MOVED and SECONDED***

*THAT Council reaffirm their commitment to abide by the results of the Community Opinion Question that was successfully supported on the June 19, 2021 by-election ballot;*

*AND THAT Council direct staff to proceed to develop a Request for Proposals for the development of a long-term Operating Management Agreement up to 25 years for the Skaha Marina lands and refer the proposal to the Parks and Recreation Advisory Committee for review before returning to Council for approval.*

**CARRIED UNANIMOUSLY**

On August 24<sup>th</sup>, staff presented the Draft Request of Proposals to the Parks & Recreation Advisory Committee. The Committee then passed the following resolution:

**It was MOVED and SECONDED**

THAT the Parks and Recreation Advisory Committee recommend to Council that the Skaha Lake Marina Request for Proposal document be supported.

**CARRIED UNANIMOUSLY**

Staff then presented the recommendation to Council and at their Meeting on September 7, 2021, Council then passed the following resolution:

*It was **MOVED and SECONDED***

THAT Council approve the Skaha Lake Marina Request for Proposal as provided in Attachment A of the report dated September 7, 2021 titled "Skaha Lake Marina: Request for Proposal".

**CARRIED UNANIMOUSLY**

Staff moved forward with the direction provided by Council and the Parks and Recreation Advisory Committee (PRAC) and finalized the Request for Proposals (RFP) document to commence the subsequent step in identifying a long-term operator for the Skaha Marina lands. The RFP process sought proposals for investment in a long-term Management Operating Agreement, up to a maximum of 25-years with the City for the use, development, operations and management of the Skaha Marina lands.

At the conclusion of the Process and after review with the Parks and Recreation Advisory Committee on January 27<sup>th</sup> 2022 and with Council on February 1<sup>st</sup>, 2022, both the Committee and Council unanimously supported awarding the long term agreement to the Penticton Yacht Club (PYC).

Since that direction provided by Council, staff have been working with the Penticton Yacht Club on the long term Management Operating Agreement, ensuring that the agreement meets the goals and objectives of the process completed to date and holds the PYC to their commitments provided within their proposal submitted.

### **Management Operating Agreement**

A complete draft of the Management Operating Agreement (MOA) is provided in Attachment A, however staff have summarized the main components below for the Committee's review.

- ***Definitions***

The MOA defines each of the key terms contained within the document to ensure that there are no conflicts as to how each of the requirements of the agreement are defined.

- ***Management and Operation of the Marina***

The MOA outlined the roles and responsibilities of the PYC, its partners and the City for the term of the agreement. The agreement states that the PYC Board will oversee the build out of the governance structure for the Skaha Marina, which will include an elected Board, a Skaha Planning Committee, extension of existing PYC resources to manage the operational areas of the Skaha Marina and the inclusion of a City representative of the Skaha Planning Committee to ensure effective communication and alignment with long term City objectives.

This section of the agreement outlines the 25-year term upon which the agreement is based and clearly describes the services that are expected to be operated within the marina lands. The requirement for an annual review of Marina Rates are also outlined in this section, with the goal of ensuring that rates are kept affordable and in line with equivalent facilities in the Okanagan.

During the term of the agreement, it is expected that the marina and its services be made available to the public and the requirement for marina operations are outlined including those of the restaurant. Requirements and responsibilities for landscaping, repairs and maintenance, approvals for any changes on site, compliance with laws and collaboration with First Nations are also included within this section of the agreement.

- ***Operating and Capital Contributions***

The operating fee of \$45,000 per year, including a review every five years, to be paid to the City is referenced within Section 3 of the agreement. All of the Capital upgrade commitment from the PYC and its partners are also included in this section, including the identified current capital needs of \$565,000 from the PYC and up to \$2,500,000 from the Restaurant operator for the capital investment into the building.

This section also outlines the responsibility of the PYC to pay taxes, utilities, foreshore lease / licence fees and any other applicable fees as well. As was included in the PYC proposal, they and their partners will be

responsible for all capital improvements moving forward, removing the City from any capital investment responsibility for the 25-year term of the agreement.

- ***The City's Rights and Obligations***

The City's Right and Obligations section of the agreement included reference to ensuring that the public's interest in the use of the lands is maintained. This includes requiring City approval for any changes within the Skaha Marina lands, the requirement of PYC to perform their duties to an appropriate standard under the conditions of the agreement and the ability of the City to utilize the lands should an emergency arise. This section of the agreement also outlines that upon expiry of the agreement, all of the marina improvement made over the course of the agreement will become the property of the City.

- ***Inspections and Monitoring***

On an annual basis the PYC will be required to submit an updated 5 Year Business Plan and every 3-5 years, the City will complete a performance review of the operations in partnership with the PYC, with the goal of ensuring the ongoing operations meet the intent of the original proposal and conditions of the MOA. Inspections of the building and infrastructure at the Marina will also occur as part of the agreement, including regular fire inspections, annual walk-throughs and inspections of the facility and docks.

- ***Financial and Other Reporting Requirements***

This section of the agreement includes provisions for annual reports, reporting of environmental incidents and financial reporting. From a financial perspective, reports will include revenues and expenses related to marina and slip rental, boat storage, restaurant, gas bar, retail sales and parking where required.

- ***Construction Letter of Credit Requirements***

Bonding requirements to ensure the work proposed gets completed to the satisfaction of the City is included in this section. Specific to the restaurant investment that will be made, a Letter of Credit in the amount of 25% of the construction value will be provided at the signing of the agreement. The Letter of credit will be reduced to 10% of the construction value upon issuance of a Building Permit for the works and will be held until completion.

- ***Termination***

The ability for the City to terminate the agreement is outlined in this section, providing for the appropriate processes to be followed should this need arise. The agreement includes provisions for non-payment, failure to deliver the services expected and breach of the agreement with the City.

The agreement is in place to protect the community and also the operators of the Marina to ensure the delivery of a high quality marina and associated facilities. The negotiation of this agreement has been completed in partnership with the PYC, under the understanding that the proposal upon which they were awarded the long term agreement will be completed to the satisfaction of the City.



### Staff Recommendation

The MOA that has been developed has taken into account all of the community objectives outlined at the beginning of the process and will hold the PYC and their partners to their commitments as outlined in their proposal. Staff are looking forward to working with PYC and their partners on the long term investment and sustainability of the Skaha Marina lands, providing a positive contribution to the future of these important lands.

### Next Steps

Should the Committee support the staff recommendation, staff will forward this onto Council for their approval so that the PYC can commence their undertaking of the Skaha Marina services and investment for the community.

### Attachments

Attachment A – Management Operating Agreement

Attachment B – Summary of Penticton Yacht Club Proposal

Respectfully submitted,



Anthony Haddad  
General Manager, Community Services

### Concurrence

<b>Director, Finance &amp; Administration</b>
<i>AMC</i>

**Attachment A – Management Operating Agreement**

## **Attachment B – Summary of Penticton Yacht Club Submission**

### **Penticton Yacht Club Proposal**

The proposal submitted by the Penticton Yacht Club (PYC) provides the long-term investment needed to sustain the Skaha Marina lands and supports the vision created by the community through the Skaha Lake Park East Plan.

- **Financial Contribution & Viability**

The PYC has budgeted an annual payment of \$45,000 to the City, which will be reviewed as larger investments are made in the marina lands. This would allow for the City to renegotiate the annual payment based upon the financial results of the operation. Initial capital upgrades will include approximately a \$250,000 investment into the marina docks and upgrading the existing fuelling system. Over a 2-5 year period the PYC will invest in upgrading office space and fire suppression systems to support marina users' safety and amenity, bringing the total PYC investment in the first five years to the marina lands to \$565,000. All future major capital upgrades will be funded by the PYC as annual surplus funds will be set aside into PYC Capital Reserves.

The proposal includes a \$2.5M investment by a local business person and his company to revitalize the existing marina building into a licenced brew/pub style restaurant. Construction of these improvements is proposed to commence at the end of the 2022 season and expect to be up and running by April or May of 2023. The restaurant will be a sub-lease to the PYC providing an additional revenue source to the marina operations.

The financial viability of the PYC is backed by its long-term operational success at Okanagan Lake for many years. The financial information provided within their proposal supported their ability to be a strong partner with the City into the future. As the City has an existing lease with the PYC for the Okanagan Lake Marina, the City already has an established relationship with this group and has had visibility to their financial operations for many years. The financial ability and commitment provided by the restaurant operator, who runs several successful restaurants in Penticton, is sound and again with local historical successes will be a long-term partner for the City into the future. The partnering with an off-site boat storage facility and providing a valet boat parking service is also included in the proposal and will support the use of Skaha Marina.

The proposal provides letters of assurance from the PYC, restaurant and boat storage operators. As part of the discussions with the proponent, security bonds would also be provided prior to the commencement of any construction occurring on site.

Through the negotiation of the Management Operating Agreement and prior to signing the agreement, requirements will be built in to ensure the construction of the proposed restaurant. This will likely be tied to the Provincial lease and liquor licence being granted, all which staff will be working towards over the coming months.

- **Benefit to the City & Community**

The PYC proposal meets the goals and objectives set out in the Skaha Lake Park East Master Plan. The proposed site layout and design aligns with the master plan in terms of retaining the existing

building and the existing dock configuration. The proposal goes over and above what was expected in the master plan in terms of adding new green space into the marina lands, consolidating the parking facilities into a more efficient configuration to meet on-site demand and enhancing environmental protection along the environmentally sensitive area to the east.

The proposal includes a range of marina services including boat rentals, repairs, valet and lake tourism opportunities. The proposal outlines that in consideration of the limited land availability on site and environmental sensitivity adjacent to the site, the majority of the boat storage and larger maintenance activities will take place off-site within a separate boat storage facility. Within the on-site facility retail offerings will also be supported in line with the marine use of the lands.

Food and beverage services are proposed in the form of a \$2.5M investment into the existing building, revitalizing it into a licenced brew/pub style restaurant. The existing coffee/bakery offerings will also be included in the future use of the marina building.

All current slip holders will be maintained as desired at the current annual rental rates at transition with no major increases to the moorage rates, other than cost of living into the future. The benefit to having a non-profit organization involved in the day-to-day operations of the marina, would be a positive component of this proposal in that the funds generated are invested back into the facility for the benefit of the users and wider community year over year.

- **Proponents Team**

The team involved in submitting this proposal included the following members:

- Marc Tougas – PYC Commodore (City contact for PYC Board of Directors), will be the main point of contact for the City on the day to day operations of the marina.
- Josie Tyabji – Strategic Advisor (PYC), will provide the long-term strategy advice to the PYC around alignment with City economic development objectives.
- Graham Perrie – PYC General Manager, will oversee the key functional areas of the marina for shared resources around maintenance.
- David Prystay – Sylvia Lake Holdings – Food Service / licenced Restaurant/Pub, will be leading the reinvestment into the marina building for the purpose of operating a brew pub style restaurant on site. The licensed premises will be family friendly and provide opportunities for additional investment in the area benefitting residents and tourist.
- Mark Melissen & Jordan McCallum – Penticton Boat Club and Rentals, will be leading the water and storage lease, including off-site storage for the marina. Services to be provided will also include watercraft rentals, boat club service, on and off-site storage and maintenance services, and valet service.

The PYC Board of Directors will oversee the build out and development of the governance structure to create a committee structure at the Skaha Marina, similar to the structure that exists at Okanagan Lake marina under the PYC Society. Within the structure of the PYC there is a wide cross section of skillsets from the local business community, ensuring a broad perspective around marina operations, working with the specific Skaha committee proposed.

The not-for-profit governance model will provide for a long term commitment to the location and consistency in terms of dealing with the City. The proposal also included the provision of having a

City liaison on the PYC board to ensure alignment around business and community planning goals, objectives and resources.

PYC management team will operate the existing services as is for the 2022 boating season, looking to retain existing tenants where possible. The governance structure allows for efficiencies in operations between the Okanagan Lake and Skaha Lake Marina.

## Proponents Plan

- The Vision

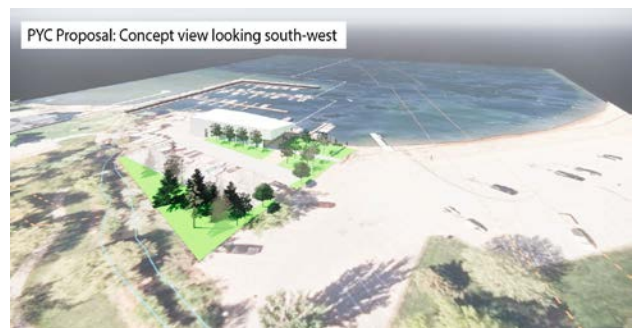
The plans submitted by PYC support a sustainable, long-term investment in the Skaha Marina lands for the community. The retention of the existing docks and upgrading of the infrastructure to support the marina into the future will allow for long-term sustainability for the boating community.

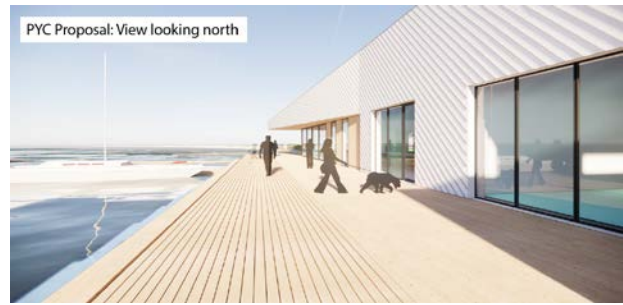
The vision attached to the significant investment in the marina building for the purpose of a brew/pub style licenced restaurant will provide Skaha Lake with a family-oriented food and beverage opportunity envisioned within the Skaha Lake Park East Plan. As part of the proposed concept, the addition of appropriate parking within the marina lands will support the increased intensity of use that will occur with the destination family restaurant.

The investment in 'greening' the marina lands is an opportunity that will allow for increased park land in an area currently containing hard surface. The concept proposed will be inviting for the community and add much needed park land in the area.

The vision also proposes the restoration of asphalt surface along the east which will support protection of the Riparian Area. While boat storage and maintenance is proposed to the south of the building, it will be reduced well over and above what exists today. Allowing this to occur is the creation of off-site storage and maintenance and valet boat parking service, which will reduce boat-trailer and vehicle congestion in the area.

The following images show some of the conceptual drawings for the site, with additional drawings and further details provided in Attachment B.





- Market Research

The Market Research provided by the PYC in the development of their proposal clearly outlined a good understanding of the marina businesses and the local economic climate. Their experience in the marina business for many years, supported by their business partners in the restaurant and watercraft industry, allow for a strong business background to support both the investment into the lands and also ensuring a strong benefit for the community.

- Marketing Plan

The Marketing Plan provided outlines strong knowledge of the local market but also a willingness to partner with the City and local tourism and business stakeholders to ensure success into the future.

- Design and Construction

The concept plans submitted will allow for ample community engagement to occur as the design process commences in 2022. The entrance to the marina will become a park like setting, the removal of existing fencing allowing for improved public access to these public lands and removing the physical barrier. The only fenced area will be to the south for storage security and maintenance operations.

The proponents engaged the Penticton Indian Band (PIB) as part of the proposal, specifically with Chief Gabriel, to outline the details of their proposal to the City. They were also the only proponents to meet with PIB. The opportunities for cultural expression to be incorporated into the eventual design were well received and provide an opportunity for future collaboration as the design process moves forward.

- Operations Plan

The PYC will utilize their existing marina management team from Okanagan Lake and will extend its existing resources and functions to oversee the supervision of the Skaha Lake operations. PYC will hire staff specifically for the Skaha Marina to tend to the daily on-site operational needs to service moorage holders and the boating public. The Manager / Supervisor of the Skaha Marina will take direction from the General Manager of Marina Operations as directed by the PYC Board of Director in charge of operations.

- Maintenance Standards

The PYC staff will be responsible for the maintenance of the marina and prior to each spring opening will ensure that the docks, buildings, grounds and equipment are safe and operational. A detailed maintenance plan is provided within the proposal, and will be detailed within the Management Operating Agreement.

Environmental protection will be taken into consideration within the day to day operations and future capital planning. Environmental standards will be followed and permits, where required, will be obtained through the appropriate governing bodies.

- Financial Plan

A detailed five year proforma was provided within the PYC proposal. The financial plan shows the annual fee payment to the City for use of the land and buildings as well as a complete forecasting of financial revenues and expenses. A review of the annual financial statements for the PYC will take place in addition to the review of operations every five years, including a review once the restaurant is up and running to ensure fair value is provided to the City for use of the lands once fully operational. With the proposed financial plan, the City will see over \$3 million of non-taxpayer dollars invested in the renewal of this amenity and will see this facility become self-funded for the foreseeable future.

- Transition Plan

Within the first year, the majority of operations will take place as they have in the past to support a smooth transition and allow PYC to work towards the longer term investments that will be made. The proponent is committed to learning more about the current operations and exploring opportunities to involve existing service providers.

- Construction & Opening Schedule

Within the first year the majority of operations will take place as they have in the past, as PYC work toward the longer-term investments that will be made. Over the first five years of operations, the PYC will invest \$565,000 into fire suppression, dock upgrades and a new fuel dock. These financial investments will be funded solely by the PYC.

The large capital investment of \$2.5M for the marina building / licenced brew pub style restaurant upgrades will commence in the fall of 2022, following a design and consultation process for the renovation and upgrade of the building. It is anticipated that the restaurant will be open to the public in the spring/summer of 2023.

- Capital Maintenance Plan

Maintenance of the facility will be the responsibility of the PYC, the standard of which will be built into the eventual Management Operating Agreement. Maintenance of the marina lands will occur to ensure the safe operations and opening of the lands each season.

**Skaha Lake Park Marina**

**Management Operating Agreement**

**between**

**The Corporation of the City of Penticton**

**(the “City”)**

**and**

**Penticton Yacht Club**

**(the “Manager”)**



## TABLE OF CONTENTS

<b>ARTICLE 1 DEFINITIONS .....</b>	<b>1</b>
1.1 Definitions .....	1
1.2 Interpretation .....	8
<b>ARTICLE 2 MANAGEMENT AND OPERATION OF THE MARINA .....</b>	<b>8</b>
2.1 Structure and governance of the Manager .....	8
2.2 Core Responsibilities of Manager .....	9
2.3 Term .....	9
2.4 Marina Services to be Provided .....	9
2.5 As-Is Basis .....	10
2.6 Standard of Care .....	10
2.7 Marina Rates .....	10
2.8 Compliance Requirements .....	11
2.9 Use .....	11
2.10 Independent Contractor .....	11
2.11 Foreshore License of Occupation and Foreshore Lease .....	11
2.12 Availability of the Marina .....	12
2.13 Restaurant .....	12
2.14 Landscaping .....	13
2.15 Repair and Maintenance .....	13
2.16 Maintenance by the Manager .....	13
2.17 Repair According to Notice .....	13
2.18 Alterations .....	14
2.19 Environmental Protection .....	14
2.20 Supporting Local Use .....	15
2.21 Collaboration with First Nations .....	15
2.22 Signs .....	15
2.23 Continued Use of Pathways .....	16
2.24 Conditions of Property .....	16
2.25 Service and Training .....	16
2.26 Marina Safety and Security .....	16
2.27 Emergency Contact .....	16
2.28 Approvals .....	17
2.29 Manager's Responsibility for its Contractors .....	17
2.30 Compliance with Laws .....	17
2.31 Notice of Non-Compliance .....	17
<b>ARTICLE 3 OPERATING FEE AND CAPITAL COMMITMENTS .....</b>	<b>17</b>
3.1 Operating Fee .....	17
3.2 Capital Expenditure Commitments .....	18
3.3 Foreshore Lease / License Rent .....	18
3.4 Taxes, Utilities and Other Fees .....	19
3.5 No Set-Off .....	20

<b>ARTICLE 4 THE CITY’S RIGHTS AND OBLIGATIONS .....</b>	<b>20</b>
4.1 Quiet Enjoyment .....	20
4.2 City Approval .....	20
4.3 Duties of City .....	21
4.4 Public Emergencies .....	21
4.5 Ownership of Improvements .....	21
4.6 Rights Reserved to the City .....	21
<b>ARTICLE 5 INSPECTIONS AND MONITORING .....</b>	<b>21</b>
5.1 Manager’s Obligations .....	21
5.2 Rolling Business Plans .....	22
5.3 Periodic Performance Review.....	22
5.4 Inspections and Monitoring .....	22
5.5 Rectifications or Deficiencies .....	22
5.6 Failure to Rectify .....	22
<b>ARTICLE 6 FINANCIAL AND OTHER REPORTING REQUIREMENTS .....</b>	<b>23</b>
6.1 Annual Reports .....	23
6.2 Immediate Reporting of Safety and Environmental Incidents .....	23
6.3 Financial Statements and Reporting .....	23
<b>ARTICLE 7 INSURANCE .....</b>	<b>24</b>
7.1 Insurance .....	24
7.2 Waiver of Subrogation .....	25
7.3 Loss Deductible Clause .....	25
7.4 Required Changes in Coverage and Amounts of Coverage .....	25
7.5 Replacement Required .....	26
7.6 Termination of Insurance .....	26
7.7 Certificates of Insurance .....	26
7.8 Obligations Survive .....	26
<b>ARTICLE 8 CONSTRUCTION LETTER OF CREDIT REQUIREMENTS .....</b>	<b>26</b>
8.1 Construction Letter of Credit .....	26
8.2 Release of Construction Letter of Credit .....	27
<b>ARTICLE 9 FORCE MAJEURE.....</b>	<b>27</b>
9.1 No Breach of Contract .....	27
9.2 Measures to be Taken .....	27
9.3 Extension of Time .....	27
9.4 Consultation .....	28
9.5 Termination.....	28
<b>ARTICLE 10 UNFORESEEN CHANGE OF CIRCUMSTANCES .....</b>	<b>28</b>
10.1 Unforeseen Change of Circumstances .....	28
<b>ARTICLE 11 TERMINATION.....</b>	<b>28</b>
11.1 Termination by the City for Manager Event of Default .....	28

11.2	Termination by the Manager for City Event of Default .....	30
11.3	Termination Without Prejudice .....	30
11.4	Recuperation by the City .....	30
11.5	Renunciation .....	30
11.6	Notice of Intention to Terminate .....	31
11.7	Notice of Termination .....	31
11.8	Waiver with respect to re-entry .....	31
11.9	Re-Entry and Damages .....	31
11.10	Remedies of the City are Cumulative .....	32
11.11	Payment of City Expenses .....	32
<b>ARTICLE 12</b>	<b>SURRENDER AND HANDBACK .....</b>	<b>32</b>
12.1	Handback Date .....	32
12.2	Handback Requirements .....	32
12.3	Inspection prior to Handback .....	32
12.4	Handback Procedure .....	33
12.5	Scope of Handback .....	33
12.6	Transfer of Insurance and Contractor Warranties .....	33
12.7	Technology Transfer .....	33
12.8	Training City Personnel .....	33
12.9	Cancellation of Contracts, Assignment .....	34
12.10	Removal of Objects Owned by the Manager .....	34
12.11	Effect of Handback .....	34
12.12	Overholding .....	34
12.13	Penticton's Sign .....	34
12.14	Inspection .....	35
12.15	Remedy of Defects after the Handback Date .....	35
<b>ARTICLE 13</b>	<b>LIABILITY AND INDEMNIFICATION .....</b>	<b>35</b>
13.1	Indemnification by the City .....	35
13.2	Indemnification by the Manager .....	36
13.3	Environmental Damage .....	37
13.4	Indemnification Procedure: Third Party Claims .....	37
13.5	Interest .....	39
13.6	Exclusive Remedy .....	39
13.7	Procedures for Indemnification - Direct Claims .....	40
13.8	Liability for Information Provided by the City .....	40
13.9	Survival .....	40
<b>ARTICLE 14</b>	<b>DISPUTE RESOLUTION .....</b>	<b>40</b>
14.1	Amicable Settlement .....	40
14.2	Mediation Committee .....	40
14.3	Arbitration .....	41
14.4	Costs of Dispute Resolution .....	41
14.5	Survival .....	41

<b>ARTICLE 15 MISCELLANEOUS PROVISIONS .....</b>	<b>41</b>
15.1 Representations and Warranties .....	41
15.2 Financial Resources .....	41
15.3 Assignment .....	42
15.4 Primacy of This Agreement.....	42
15.5 Variations in Writing .....	42
15.6 Entire Agreement .....	42
15.7 Severability .....	43
15.8 Non-Waiver.....	43
15.9 Interest.....	43
15.10 Notices.....	43
15.11 Applicable Law.....	44
15.12 Non-Exclusive Contract .....	44
15.13 Legal Costs Associated with This Agreement.....	44
15.14 Communications to the Public .....	44
15.15 Additional Services and Locations .....	44
15.16 No Waiver of Right to Enforce .....	45
15.17 Time of Essence .....	45
15.18 Counterpart Execution .....	45

## SKAHA LAKE PARK MARINA

### MANAGEMENT OPERATING AGREEMENT

**THIS AGREEMENT** (the “**Agreement**”) is dated as of April 1, 2022 between the Corporation of the City of Penticton, a municipal corporation under the laws of British Columbia (the “**City**”) and the Penticton Yacht Club (Inc. No. S0012072 (the “**Manager**”), a society established under the *Societies Act* British Columbia.

#### RECITALS

- A. The City owns the Marina located on the Marina Property;
- B. The City wishes to engage the Manager to manage, operate and maintain the Marina and the Marina Property, and to fund and manage capital upgrades, all in accordance with the terms and conditions of this Agreement;
- C. This Agreement enables the City to rely on the Manager to fund the operation and maintenance of the Marina, while providing the City with a share of revenues and with the influence and controls necessary to ensure that the City’s requirements and standards are met and that the public interest is served and protected;
- D. This Agreement also enables the City to rely on private funding to support capital upgrades to the Marina while protecting public ownership; thereby aligning with the City’s *Parkland Protection and Use Policy*;
- E. The Manager has committed to implement a plan for capital improvements, enhanced amenities and efficient operations, plus greater alignment of the Marina with the overarching strategic plan of the City; and
- F. The City received a community mandate in the Spring 2021 by-election to enter into a long term agreement for the operation and financing of the Marina by a private sector operator;

NOW, THEREFORE, in consideration for the mutual covenants herein contained, the Manager and City agree as follows:

### ARTICLE 1 DEFINITIONS

#### 1.1 Definitions

The following terms have the following meanings:

- (i) “**Applicable Regulations**” means all laws, regulations, decrees, rules, administrative circulars and policies applicable to the Marina and the Marina Property, including to all operations and services in the Marina, whether

applicable at the time of execution of this Agreement or at anytime during the Term, whether of municipal, regional, provincial or national origin;

- (ii) **“Business Plans”** means, collectively, the Operations Plan, the Marketing Plan, the Financial Plan and the Maintenance Plan;
- (iii) **“Capital Commitments”** means the capital expenditure commitments of the Manager made pursuant to Section 3.2;
- (iv) **“Capital Improvements”** means the upgrades, enhancements and improvements to the Marina, as set forth in the Design and Construction Plan; including, without limitation, further upgrading of slips and moorage; renewal or replacement of the Marina building and construction and equipping of the Restaurant;
- (v) **“Capital Maintenance Plan”** means the Manager’s Capital Maintenance Plan, as approved by the City;
- (vi) **“City Indemnified Persons”** has the meaning ascribed to it in Section 13.2;
- (vii) **“Commencement Date”** means April 1, 2022;
- (viii) **“Community Charter”** means the *Community Charter of the City of Penticton*;
- (ix) **“Construction Letter of Credit”** means a letter of credit obtained by the Restaurant Construction Contractor in favour of the Restaurant Owner and the City in an initial amount of equal to 25% of the construction cost value;
- (x) **“Consumer Price Index”** mean the Consumer Price Index for all-items for British Columbia (or any index published in substitution for the Consumer Price Index or any other replacement index designated by the City acting reasonably, if it is no longer published) published by Statistics Canada (or by any successor thereof or any governmental agency including a Provincial agency);
- (xi) **“Change of Control”** means, in respect of a corporate entity, the occurrence of any of the following events: (i) an acquisition by another entity by means of any transaction or series of related transactions (including, without limitation, any share sale, reorganization, merger or consolidation); (ii) a sale of all or substantially all of an entity’s assets; (iii) any change in the entity’s ownership resulting in any person or company, directly or indirectly, becoming the beneficial owner of greater than 50% of the voting shares of the entity, or the rights to acquire such shares; (iv) a change in ownership of the entity resulting in the acquirer’s ability to elect more than 50% of the board of directors of the entity; or (v) a change in management of the entity;

- (xii) **"Damages"** has the meaning ascribed to it in Section 13.1;
- (xiii) **"Design and Construction Plan"** means the Manager's detailed design and construction design for the Capital Improvements (including the materials to be used, locations, where applicable, and decoration and designs of the Marina), as approved by the City;
- (xiv) **"Environmental Laws"** means all applicable federal, provincial, municipal or local laws, statutes, regulations or ordinances, as they may be amended from time to time after the Commencement Date relating to the environment, occupational safety or the transportation or regulation of Hazardous Substances, and includes any judgments, orders, notices, of offense, or other notices, decrees, codes, rules, instructions, policies, guidelines, guides, authorizations, approvals, permits and licenses, issued by any governmental authority having jurisdiction;
- (xv) **"Financial Plan"** means a detailed 5-year pro forma income statement (including cash flow statements and sources of income) showing projected revenues and operating expenses of the Marina; identifying key data sources, assumptions, and financial and operational triggers; and a detailed and descriptive human resources plan including staffing levels for full-time, part-time, and seasonal employees and attached as Schedule 1.1(xv);
- (xvi) **"Force Majeure"** means an event which is beyond the reasonable control of a Party, and which makes a Party's performance of its obligations hereunder impossible or so impracticable as reasonably to be considered impossible in the circumstances, and includes, but is not limited to, war, riots, civil disorder, pandemic, earthquake, fire, explosion, storm, flood or other adverse weather conditions, strikes, lockouts or other industrial action (except where such strikes, lockouts or other industrial action are within the power of the Party invoking Force Majeure to prevent) or confiscation by government agencies. Force Majeure shall not include (i) any event which is caused by the negligence or intentional action of a Party or such Party's consultants, agents or employees, nor (ii) any event which a diligent Party could reasonably have been expected to both (A) take into account at the time of the execution of this Agreement and (B) avoid or overcome in the carrying out of its obligations hereunder. Force Majeure shall not include insufficiency of funds or failure to make any payment required under this Agreement;
- (xvii) **"Foreshore Lease"** means a lease being negotiated between the Province of British Columbia and the City governing the Leased / Licensed Marina Property; and provided those negotiations are successful, to be executed on or before the expiration, as may be extended, of the Foreshore License of Occupation;

- (xviii) **“Foreshore Sub-Lease”** means the Sub-Lease to be granted by the City to the Manager to use and occupy the Leased / Licensed Marina Property during the Term in the event that the Foreshore Lease is successfully negotiated;
- (xix) **“Foreshore Lease / License Rent”** means the occupancy charge or rent set out in Section 3.3, as such occupancy charge or rent may be increased by the Province from time to time;
- (xx) **“Foreshore License of Occupation”** means the existing Foreshore License of Occupation attached hereto as Schedule 1.1(xx), granted by the Province of British Columbia to the City governing the Leased / Licensed Marina Property, and which is expected to be either extended or replaced by the Foreshore Lease on or before its expiry;
- (xxi) **“Foreshore Sub-License of Occupation”** means the Sub-License of Occupation granted by the City to the Manager to use and occupy the Leased / Licensed Marina Property during the Term;
- (xxii) **“Handback Assets”** means all buildings, fixtures and improvements which are part of the Marina or located on the Marina Property whether existing at the time of this Agreement or built, installed or constructed by the Manager and to be returned to the City under Article 12;
- (xxiii) **“Handback Date”** means March 31, 2047;
- (xxiv) **“Handback Requirements”** shall have the meaning ascribed to it in Section 12.2;
- (xxv) **“Hazardous Substance(s)”** means any substances that are defined or regulated as being waste, contaminants, pollutants, dangerous substances, industrial waste, special waste, toxic substances, hazardous waste, hazardous material or hazardous substance whether or not defined as such or pursuant to any law, regulation or order and without restricting any of the foregoing includes any potentially dangerous substance, corrosive substance, flammable material, explosive material, radioactive material and any other substance or material that when released into the natural environment is known to be likely to cause at some immediate or future time, material harm, adverse impact or degradation to the natural environment or material risk to human health;
- (xxvi) **“Indemnified Person”** has the meaning ascribed to it in Section 13.4(a);
- (xxvii) **“Indemnifying Party”** has the meaning ascribed to it in Section 13.4(a);
- (xxviii) **“Leased / Licensed Marina Property”** means the foreshore area outlined on Schedule 1.1(xxviii) attached hereto held by Her Majesty the Queen in Right of the Province of British Columbia and currently licensed to the City



pursuant to the Foreshore License of Occupation (expiring in 2026) and thereafter to be licensed pursuant to an extension of the Foreshore License of Occupation or leased pursuant to the Foreshore Lease; and all improvements thereon;

- (xxix) **“Maintenance Plan”** means the Manager’s detailed maintenance plans and standards for regular routine and annual maintenance, frequency of regular maintenance, replacement schedule and budget; and including a detailed capital renewal plan demonstrating how Marina infrastructure will be renewed to ensure that it remains at an appropriate standard and condition at the end of the Term, all as approved by the City and attached as Schedule 1.1(xxix);
- (xxx) **“Manager Indemnified Persons”** has the meaning ascribed to it in Section 13.1;
- (xxxi) **“Marina”** means the Skaha Lake Marina;
- (xxxii) **“Marina Property”** means the property located at 3895 Lakeside Road, , Penticton, BC, including approximately 2739 m<sup>3</sup> of City owned land and approximately 10,500 m<sup>3</sup> of Provincial lands located west of the high water mark (and legally described as Lot 1 District Lot 189 Similkameen Division Yale District Plan EPP50612, PID: 029-633-818); including the Owned Marina Property and the Leased / Licensed Marina Property; the boundaries of which are shown on the map attached as Schedule 1.1(xxxii);
- (xxxiii) **“Marina Services”** means the operation and maintenance of the Marina and the food and beverage services and associated improvements; including the services described in Section 2.4, and as more particularly detailed in the RFP;
- (xxxiv) **“Marketing Plan”** means the Manager’s Marketing Plan, as approved by the City; which plan shall set forth a detailed marketing plan and attached as Schedule 1.1(xxxiv);
- (xxxv) **“Notice of Intention to Terminate”** means the notice contemplated by Section 11.6;
- (xxxvi) **“Notice of Termination”** means a notice issued in accordance with Section 11.7;
- (xxxvii) **“OCP Bylaw”** means the City’s Official Community Plan Bylaw 2002-2020;
- (xxxviii) **“Offsite Storage Facility”** means a fenced offsite boat storage and maintenance facility, with valet service, located within Penticton, and possibly also including heated indoor storage;

- (xxxix) **“Operating Fee”** means the operating fee as further described in Section 3.1;
- (xl) **“Operations Plan”** means the Manager’s Operations Plan, as approved by the City; which plan shall set forth a detailed operations plan and minimum standards for quality of service; and attached as Schedule 1.1(xl);
- (xli) **“Owned Marina Property”** means the portion of the Marina Property owned by the City;
- (xlii) **“Owned Marina Property License of Occupation”** means the license of occupation for the Owned Marina Property granted by the City to the Manager;
- (xlili) **“Parks Bylaw”** means the City’s *Parks Dedication Bylaw No. 2018-37*;
- (xliv) **“Prime Rate”** means for any day, the annual rate of interest equal to the rate which the City’s principal bank establishes as the reference rate of interest to determine interest rates it will charge on that day for commercial loans in Canadian dollars made to its customers in British Columbia and which it refers to as its “prime rate of interest”;
- (xlv) **“Prudent Industry Practices”** means practices, methods, and acts engaged in or approved by competent and reliable operators of facilities similar to the Marina that, from time to time, in the exercise of a reasonable judgment in light of the facts known or that reasonably should be known at the time a decision is made, would be expected to accomplish the desired result in a manner consistent with Applicable Regulation, and the requirements of reliability, economy, expedition, safety, and environmental protection. With respect to the Marina, Prudent Industry Practice shall include, but shall not be limited to, taking reasonable steps to ensure that:
1. Adequate facilities, equipment, materials, resources and supplies are available to meet the needs of the operation of the Marina under normal conditions and reasonably anticipated abnormal conditions.
  2. Sufficient operating personnel are available and are adequately experienced and trained to operate the Marina properly, efficiently and within the relevant guidelines and specifications issued by the manufacturer of any equipment or machinery used by them and are capable of responding to emergency conditions.
  3. Preventive, routine and non-routine maintenance and repairs are performed on a basis that ensures reliable long-term and safe operation, and are performed by knowledgeable, trained and experienced personnel utilizing proper equipment, tools, and procedures.

4. All industry guidelines for quality services and operations are respected and followed.
  5. All Applicable Regulations are complied with by the Manager;
- (xlvi) **“Qualified Independent Engineer”** means a qualified independent consulting engineer appointed by the City pursuant to Section 5.4;
  - (xlvii) **“Restaurant”** means the licensed destination family-oriented brew pub style restaurant to be constructed by the Restaurant Operator in the Marina;
  - (xlviii) **“Restaurant Construction Agreement”** means a restaurant construction agreement between the Restaurant Operator and the Restaurant Construction Contractor;
  - (xlix) **“Restaurant Construction Contractor”** means Greyback Construction Ltd. (Matt Kenyon);
  - (l) **“Restaurant Management and Operating Agreement”** means a construction, management and operating agreement between the Manager and the Restaurant Operator;
  - (li) **“Restaurant Operator”** means Sylvia Lake Holdings (David Prystay) or such other reputable and financially sound restaurant operator as the City may approve;
  - (lii) **“RFP”** means the City’s Request for Proposals dated September 8, 2021 in respect of which the Manager was the successful bidder pursuant to the City’s procurement process;
  - (liii) **“Signs”** shall have the meaning ascribed to it in Section 2.22;
  - (liv) **“Skaha Lake East Park Plan”** means the City’s development plan for Skaha Lake East Park as approved by City Council on March 16, 2021 and as may be amended or revised;
  - (lv) **“Skaha Strategic Planning Committee”** means a committee established by the Manager to encourage and facilitate input from and liaison with the City, slip holders and other users of the Marina (such as dragon boaters, kayakers, paddle boaters, kite boarders, etc.), local business and tourism groups and local Indigenous groups; and whose membership will include representatives from the City, the Chamber of Commerce, Tourism Penticton, other local business, tourism and marketing agencies and local First Nations;
  - (lvi) **“Term”** shall have the meaning ascribed to it in Section 2.3;
  - (lvii) **“Third Party Claim”** has the meaning ascribed to it in Section 13.4;

- (lviii) **“Unforeseen Change in Circumstances”** means an unforeseen change in circumstances as defined in Section 10.1;
- (lix) **“Utilities”** means water lines, sanitary sewer lines, storm sewer lines, electrical lines, telephone lines cable TV lines, WIFI/fiber optic lines and gas lines; and
- (lx) **“Zoning Bylaw”** means the City’s Zoning Bylaw 2011-23.

## 1.2 Interpretation

- (a) The Schedules to this Agreement shall form an integral part hereof and references to Schedules shall be to Schedules to this Agreement unless otherwise stated.
- (b) The headings of Sections to this Agreement are inserted for convenience of reference only and shall not in any way affect the interpretation of this Agreement.
- (c) References to a "statute" includes every regulation made pursuant thereto, all amendments to the statute or to any such regulation enforced from time to time and any statute or regulation that supplements or supersedes such statute or any such regulation.
- (d) References to any party or person referred to in this Agreement include references to its respective successors and permitted assignees.
- (e) The words "include", "includes", and "including" shall at all times be construed as if followed by the words "without limitation".
- (f) References to days, weeks, months and years are references to days, weeks, months and years of the Gregorian calendar.
- (g) \$ means the lawful currency of Canada.

## ARTICLE 2 MANAGEMENT AND OPERATION OF THE MARINA

### 2.1 Structure and governance of the Manager

- (a) The Manager is a not-for-profit community organization organized as a society with the purpose of ensuring that the Penticton Yacht Club, and now also the Marina, meet the needs of its users.
- (b) The Penticton Yacht Club board of directors will oversee the build out a governance structure for the Marina that has the following key elements:

- (i) an elected board of directors chosen from the membership and community and comprised of individuals possessing the key strategic, leadership and governance skills required for an effective organization, and liaisons to each of the key City communities such as parks, economic development and tourism;
- (ii) the Skaha Strategic Planning Committee to ensure that activities of the Manager are aligned with the needs of the City, users of the Marina and the community; which committee shall at all times include a representative of the City;
- (iii) existing management of the Penticton Yacht Club Okanagan Lake Marina will extend its functions and resources to manage the functional operational areas of the Marina;
- (iv) the general manager of the Okanagan Lake Marina will oversee a manager or supervisor on site at the Marina; and
- (v) staff will be engaged for the day-to-day operation of the Marina.

## **2.2 Core Responsibilities of Manager**

The Manager shall be responsible for the management, operation and maintenance of the Marina and the Marina Property, and for provision of the Marina Services, throughout the Term at its own cost and risk. Subject to this Agreement, the Manager shall have the authority to fully and completely supervise, direct and engage in the operation and maintenance of the Marina and to make day-to-day decisions in all matters associated or related or ancillary to the operation and the maintenance of the Marina, including boat slip rentals and dry-dock storage, retail sales of marine supplies, gas and sundries, and operation of the Restaurant and parking lot. The City shall execute such documents as the Manager and City, in their reasonable judgment, deem necessary or advisable for the Manager to carry out its management of the Marina.

## **2.3 Term**

Subject to the terms this Agreement, the City hereby engages the Manager, as manager and operator, to manage, operate, and maintain the Marina and the Marina Property; and the Manager hereby agrees to manage, operate, and maintain the Marina and the Marina Property for a term of 25 years commencing on 12:01 a.m. on the Commencement Date and ending at midnight on the Handback Date (the “**Term**”).

## **2.4 Marina Services to be Provided**

The Marina Services to be provided by the Manager, as more particularly described in the RFP and in this Schedule 2.4, include the following:

- (a) short-term and long-term moorage; both on water and dry dock storage, including provision of a fire suppression system;

- (b) marina repairs to support Marina use;
- (c) operation of a gas dock with fuel sales and boat refueling; including a small retail area for marine items most commonly required by boaters;
- (d) watercraft and equipment rentals;
- (e) operation of a licensed restaurant;
- (f) offsite storage and maintenance facility, together with a valet service; and
- (g) appropriate parking to accommodate operations.

## **2.5 As-Is Basis**

Beginning on the Commencement Date, the Manager, having inspected the Marina and Marina Property prior to execution of this Agreement, shall assume possession of and responsibility for the Marina. The Manager acknowledges and agrees that it is taking over the management of the Marina and occupancy of the Marina Property on an “as-is” basis, and the City makes no representations or warranties as to the suitability of the Marina or the Marina Property for the intended use.

## **2.6 Standard of Care**

The Manager will manage and operate the Marina as a first class public marina and recreation facility offering dockage and other marina related services for the use of the general public. The Manager will perform all duties assigned in a careful, diligent, efficient, prudent, and vigilant manner. The Manager shall perform the Services in a manner as would a reasonably competent and diligent operator of Marina properties and shall ensure that, throughout the Term, the Marina and the Marina Property are at all times suitable for use by the public and are operated and maintained safely and in an environmentally responsible manner. The Manager shall carry on its business and affairs with due diligence and efficiency and in accordance with sound commercial standards and practices.

## **2.7 Marina Rates**

The Manager shall review marina rates in the Okanagan Valley on an annual basis and ensure that the rates that the Manager is charging at the Marina are competitive with those charged by the equivalent facilities in the Okanagan Valley. These reviews, as well as the current year's proposed rates, are to be shared and discussed, during the Skaha Strategic Planning Group meeting with the City prior to the final rates being set for each year of the Term by February 1<sup>st</sup> of each year; provided, however, that the Manager shall have the final determination of the rates.

## 2.8 Compliance Requirements

The Manager agrees to provide the City with Marina Services and to manage, operate and maintain the Marina and the Marina property at all times fully in compliance with:

- (a) this Agreement;
- (b) Prudent Industry Practices;
- (c) Applicable Regulations;
- (d) the Business Plans;
- (e) the OCP, including without limitation, obtaining a Development Permit to ensure compliance with the Commercial and Mixed Use Development Permit Area requirements of the OCP Bylaw; including having regard to the fact that large portions of the Marina Property are within the Riparian Development Permit Area of the OCP Bylaw;
- (f) the Skaha Lake East Park Plan;
- (g) the *Community Charter*; including, without limitation, the requirement that the Manager's proposed use of the park land be consistent with park purposes as required by section 30(5) of *The Community Charter*;
- (h) the Parks Bylaw;
- (i) the Zoning Bylaw; and
- (j) any other rules and requirements as the City may reasonable impose.

## 2.9 Use

The Manager shall not use the Marina Property and all improvements thereon for any purpose other than for the operation of the Marina and the related gas bar, retail shop, restaurant and parking lot, without the consent in writing from the City, which consent may be arbitrarily withheld in the sole discretion of the City.

## 2.10 Independent Contractor

The Manager is and shall remain an independent contractor and is neither agent, employee, partner nor joint venturer of the City.

## 2.11 Foreshore License of Occupation and Foreshore Lease

The Manager acknowledges that the City currently holds the Leased / Licensed Marina Property pursuant to the Foreshore License of Occupation and agrees, concurrently herewith, to enter into the Foreshore Sub-License of Occupation with the City in form and substance acceptable to the City, acting reasonably for a term equal to the Term; and

providing, among other things, that the Manager, as sub-licensee, shall perform all of the obligations of the City under the Foreshore License of Occupation as may be renewed or extended. The Manager acknowledges that the City is currently in discussions with the Province to replace the Foreshore License with the Foreshore Lease; and that if those discussions are successful, the Foreshore Licence will be replaced with the Foreshore Lease; at which point the Parties will enter into the Foreshore Sub-Lease. The Manager agrees to payment of the Foreshore Lease / License Rent, and to be bound by the terms of the Foreshore License of Occupation Foreshore Lease, as applicable, as if it were a party to the Foreshore License of Occupation Foreshore Lease, as applicable, in place of the City. The Manager shall not do or omit to do anything which would cause the City to be in breach of its obligations under the Foreshore License of Occupation or Foreshore Lease, as applicable or that would jeopardize the City's tenure under the Foreshore License of Occupation or Foreshore Lease, as applicable.

## **2.12 Availability of the Marina**

During the Term, the Manager shall ensure that the Marina is available and open to users and that the service offered to the public at the Marina is convenient and safe at all times in all weather conditions, provided that the Manager may require that users of moorage services become members of the Penticton Yacht Club. The Marina shall be open to the public at least between March 1<sup>st</sup> and November 30<sup>th</sup> (inclusive) for moorage and at least between April 1 and October 31<sup>t</sup> (inclusive) for storage during each year of the Term. The daily hours of operation of the Marina shall be at a minimum from **9:00 a.m. to 7:00 p.m.** daily during the months that the Marina is open and the Restaurant shall be open all year for seven days a week for breakfast, lunch and dinner. These hours of operation may be adjusted to meet the demands of the Marina and the Restaurant.

## **2.13 Restaurant**

The Manager shall enter into a Restaurant Management and Operating Agreement with the Restaurant Operator, which agreement shall include an up to \$2,500,000 capital commitment from the Restaurant Operator to construct and equip the Restaurant as well as a covenant of the Restaurant Operator to contract the Restaurant Construction Contractor to construct the Restaurant pursuant to the Restaurant Construction Agreement and to deliver the Construction Letter of Credit. The Restaurant Management and Operation Agreement, the Restaurant Construction Agreement and the Construction Agreement shall each be provided to the City before execution for review and shall be in form and substance acceptable to the City, acting in a commercially reasonable manner. Construction of the Restaurant shall commence on approximately October 1, 2022 and is scheduled for completion in April or May 2023. Prior to construction, detailed conceptual and architectural drawings shall be presented to the City for comment and approval. If this Agreement is terminated by the City, the Restaurant Operator will assign the Restaurant Management and Operating Agreement to the City and the City will assume the obligations (other than obligations arising from or related to matters arising before the assignment) and shall be entitled to the benefits of the Manager under such agreement.



## **2.14 Landscaping**

The Manager shall remove the fencing from the North side of the Marina Property and install shade trees and benches, and shall work with the City to connect a promenade through the Marina Property to the pathway in the City's park south of the Marina Property to access the park and parking.

## **2.15 Repair and Maintenance**

The Manager, at its own expense, will improve, repair and maintain the Marina and Marina Property and all improvements, appurtenances and equipment therein and thereon including, without limitation, repairing and maintaining all fuelling facilities, all plumbing, heating, and electrical systems, repairing and maintaining the roof, floors, foundations, bearing beams and the internal and external walls including all structural aspects thereof, replacing all broken windows and maintaining the landscaping of the Marina and the Marina Property, excepting from such standard of repair and maintenance reasonable wear and tear to the extent only that such reasonable wear and tear is not inconsistent with maintenance in good order and condition of the Marina and Marina Property generally. In this Section 2.15, "repair" will include replacement and renewals when necessary. The Manager will be responsible for all damage or destruction to the Marina and Marina Property and for promptly complying with all requests or orders of any applicable government authority with respect to upgrading of the Marina and Marina Property and for the investigation and remediation of any Hazardous Substance in, under or affecting the Marina and Marina Property.

## **2.16 Maintenance by the Manager**

The Manager covenants and agrees at its own expense to maintain the Marina Property and all improvements, appurtenances and equipment therein or thereon in accordance with all applicable building codes, bylaws, the laws and regulations of Canada, the laws and regulations of British Columbia and manufacturers specifications and using fully trained personnel. The Manager further covenants and agrees to promptly comply with all reasonable concerns and recommendations which the City may provide, but is under no obligation to do so, to the Manager in writing to ensure the safety and health of the boating public and related facilities as well as the aesthetic appearance of the Marina Property.

## **2.17 Repair According to Notice**

Without restricting the generality of Section 2.17, the Manager, promptly upon notice by the City, will make and do all repairs and maintenance as notified by the City in a good and workmanlike manner. If the Manager fails to repair or maintain within what the City considers to be a reasonable time, then the City may cause such repairs and maintenance to be undertaken (and may cause its representatives to enter on the Marina Property for such purpose). Should the City deem it necessary to undertake such repairs or maintenance, then the Manager will pay to the City a fee for supervision for carrying out the Manager's obligations an amount equal to ten percent (10%) of the cost of repairs or

maintenance carried out by the City, which amount will be in addition to the cost of such repairs or maintenance.

## **2.18 Alterations**

Notwithstanding anything to the contrary in this Agreement, the Manager will not make to or erect in the Marina Property any installations, alterations, additions or partitions without having received the prior written approval of the City to the plans and specifications and any variations or amendments thereof, such approval not to be unreasonably withheld, and all necessary approvals of any relevant statutory authority.

## **2.19 Environmental Protection**

- (a) In the performance of its obligations under this Agreement the Manager shall comply with all Environmental Laws and shall ensure that appropriate measures are taken to protect the environment of and around the Marina and the Marina Property from pollution, noise and other environmental impacts arising from its operations and other activities in accordance with any Applicable Regulations. At no time during the Term will the Manager carry on or permit or suffer to be carried on in or from the Marina Property or elsewhere surrounding the same anything which is noxious or offensive or which would constitute a public or private nuisance. The Manager will not cause any waste or damage to the Marina Property.
- (b) The Manager shall, as soon as reasonably practicable, notify the City in writing of:
  - (i) any enforcement, clean up, removal, litigation, or other governmental, regulatory, judicial, or administrative action instituted, contemplated, or threatened in respect of the land and/or buildings pursuant to any Environmental Laws, of which the Tenant is or becomes aware;
  - (ii) all claims, actions, orders, or investigations instituted, contemplated, or threatened by any third party relating to damage, contribution, cost recovery, compensation, loss, or injuries resulting from any Hazardous Substances on or released from, or any breach of the Environmental Laws on or in respect of, the Marina Property of which the Manager is or becomes aware; and
  - (iii) the release of any Hazardous Substance on or from the Marina Property or its discovery of any Hazardous Substances, or any occurrence or condition, on the Marina Property that could subject the City or the Manager to any fines, penalties, orders, or proceedings under any Environmental Laws.
- (c) If any Governmental Authority having jurisdiction shall order or require the removal or clean-up of any Hazardous Substances brought onto, used at or

released on the Marina Property or any adjacent property during the Term, including without limitation the soils or groundwater of the Marina Property or any adjacent property, by or due to the act or omission of the Manager, or any person for whom it is responsible, the Manager shall, at its own expense, prepare all necessary studies, plans and proposals, provide all bonds and other security required by such Governmental Authority having jurisdiction, and carry out the work ordered or required by such Governmental Authority having jurisdiction in compliance with all relevant laws and shall keep the City informed. All such Hazardous Substances shall remain the property of the Manager notwithstanding any rule of law or other provision of this to the contrary and notwithstanding the degree of their affixation to the Marina Property.

## **2.20 Supporting Local Use**

- (a) The Manager acknowledges that the Marina and the Marina Property are located on lands owned or leased by the City; and agrees to make the marine services generally available to residents of and visitors to the City at reasonably affordable prices. The Manager agrees to not restrict public access to the Marina Property or the Leased/Licensed Marina Property.
- (b) The Manager shall make two slips available at no cost for the Penticton Fire Department and two slips available at no cost for the Penticton Dragon Boat Society; each in suitable locations.

## **2.21 Collaboration with First Nations**

The Manager agrees to collaborate with the Penticton Indian Band and the City to develop opportunities for mutual benefit on Syilx Nation ancestral lands. Initially these opportunities will include an opportunity to locate the Offsite Storage in the industrial park on the channel parkway, and as well there would be opportunities for cultural activities and the incorporation of Indigenous design features on site at the Marina.

## **2.22 Signs**

The Manager will not erect, paint, display, place, affix or maintain or permit to be erected, painted, displayed, placed, affixed or maintained any sign, decoration, picture, lettering, symbol or notice of any nature or kind whatsoever (herein called “**Signs**”) either on the walls, fences or structures on the Marina Property that can be viewed from off such premises unless it is in conformance with City of Penticton Sign Regulation Bylaw 2013-17 and with the written mutual agreement of the City and the Manager. The Manager will cause any Signs to be maintained in a proper state of repair and will indemnify and save harmless the City from all personal injuries or property damage or loss to any person caused by the existence of any such Signs.

### **2.23 Continued Use of Pathways**

The Manager shall not impede or restrict the continued use, without charge, of the existing hard-surfaced pathways for general public pedestrian and cyclist purposes which run into or through a portion of the Marina Property, and including any future replacement of such pathways, for the Term.

### **2.24 Conditions of Property**

The Manager will not permit the Marina Property to become untidy or unsightly and will not permit waste or refuse to accumulate therein. The Manager shall not deposit on the Marina Property any earth, fill or other material for the purpose of filling in or raising the level of any part of the Marina Property or take any steps whatsoever to change the contour of the either of such premises without the prior written consent of the City, such consent not to be unreasonably withheld. The Manager will keep the Marina Property clean, landscaped and free from noxious weeds and brush growth at its expense; provided however that the Manager will not plant, prune or remove any trees, whether ornamental or fruit-bearing from the Marina property or adjacent park lands without the approval of the Penticton Parks Board. The Manager will be responsible for ensuring that the areas around all garbage and recycling bins on the Marina Property are kept neat and tidy at all times.

### **2.25 Service and Training**

The Manager shall throughout the Term provide employees, agents and any sub-tenant of the Manager with the level of training required, reasonably considering the position to be filled by the employee, agent or sub-tenant, to maintain and operate the Marina, gas bar and retail area, or restaurant, and parking lot and to assist the clientele and visitors to these facilities and the boating public in a safe, effective, responsive and courteous manner. The Manager shall keep records of such training and those records will be made available upon request for inspection by the City.

### **2.26 Marina Safety and Security**

The Manager shall ensure that its operations on the Marina comply with all applicable health and safety standards under all Applicable Regulations. The Manager shall be responsible for taking all necessary security measures on the Marina, including measures to exclude unauthorized access. The Manager's security agents shall wear or carry proof of identity and function when performing their duties. Notwithstanding any other provision of this Agreement the City shall have the right to close the Marina or any parts thereof, or take any other measure if, in the City's opinion, such closure or measure is necessary in an emergency case for the protection of the public.

### **2.27 Emergency Contact**

The Manager shall provide the City with the name and telephone number of a management person who will be on call at all times for emergencies or other matters related to the operations under this Agreement.

## **2.28 Approvals**

The Manager shall at its own cost make all necessary applications and carry out all other necessary acts at the requisite time and in requisite form to obtain and maintain such Approvals as may be necessary for the Manager to perform its obligations under this Agreement. The Manager shall procure all permits, licenses and approvals, for the operation and performance under this Agreement.

## **2.29 Manager's Responsibility for its Contractors**

For avoidance of doubt, the Manager shall be responsible for the acts or omissions of any and all of its contractors and sub-contractors, their employees and agents, as if such acts and omissions were the acts and omissions of the Manager. All contractors and sub-contractors engaged at the Marina shall be appropriately qualified and licensed (including business licenses) and all work shall be properly permitted.

## **2.30 Compliance with Laws**

The Manager, at its own expense, will promptly comply with all applicable requirements of all governmental, judicial and administrative authorities which relate, directly or indirectly to the use and occupation of the Marina Property and, without limiting the generality of the foregoing, including, all requirements pursuant to the statutes and regulations of the Province of British Columbia, all Environmental Laws, all bylaws of the City of Penticton, all applicable building codes and the requirements of all building permits issued in connection with the improvement, maintenance and operation of the intended facilities on the Marina Property.

## **2.31 Notice of Non-Compliance**

The Manager will deliver promptly to the City a copy of any notice, request, order, demand or claim of any nature, and any documentation ancillary thereto, pertaining to any actual or alleged failure by the Manager or others with regard to the Marina Property to comply with any common law obligation or any applicable requirement of any governmental, judicial and or administrative authorities which relate, directly or indirectly to the Marina Property, and including, without limiting the generality of the foregoing, any actual or alleged presence or discharge of any Hazardous Substance(s) on, under or affecting the Marina Property.

# **ARTICLE 3 OPERATING FEE AND CAPITAL COMMITMENTS**

## **3.1 Operating Fee**

The Manager agrees to pay the City the amount of \$45,000 plus GST annually for the right to manage and operate the Marina. Such payment shall be paid in twelve monthly instalments on the 1<sup>st</sup> of each month commencing on the Commencement Date and shall be prorated in the first and last years of operation. The level of the Operating Fee will be reviewed every five years and adjusted, having regard to Marina revenues and

expenditures, capital expenditures and capital commitments, net pre-tax profit and other relevant considerations. The Operating Fee shall increase annually, in an amount equal to the increase in the Consumer Price Index from the previous year. In the event this Agreement is terminated by either party, the Operating Fee shall be paid on a pro-rata basis for the partial year of operation.

### **3.2 Capital Expenditure Commitments**

- (a) The Manager has made the following capital expenditure commitments as more particularly detailed in Schedule 3.2:
  - (i) A total capital commitment directly from the Manager over the first five years of the Term plus an estimated \$20,000 put aside for an engineered fire suppression analysis along with an environmental survey and assessment. This includes an estimate of \$225,000 in the first two years of the Term for 445 feet of main dock way and an estimated \$40,000 for a fuel dock and fuel delivery system, each in the first two years of the Term;
  - (ii) An estimated \$100,000 to install an NRFS fire suppression system in the 3rd year of the Term; and an estimated \$100,000 in the fourth and fifth year of the Term to complete updated offices, meeting rooms and a members lounge that could be rented out for small private gatherings;
  - (iii) A total commitment from the Restaurant Operator of up to \$2,500,000.00 to revamp the existing Marina facility and the grounds surrounding the facility to construct the Restaurant;
  - (iv) Surpluses from the contributions in (a) and (b) above shall be retained in a capital reserve account, together with operating profits.
- (b) Throughout the Term, the Manager shall be solely responsible for funding all capital expenditures, whether involving maintenance or improvements; and the City shall not be required to contribute to the funding of any such capital expenditures.

### **3.3 Foreshore Lease / License Rent**

In addition to the Operating Fee and the Capital Commitments, the Manager shall pay to the City the Foreshore Lease / License Rent upon the following terms:

- (a) annual payments equal to the amount charged by the Province of British Columbia under the Foreshore License of Occupation (later to be replaced by the Foreshore Lease, as applicable);
- (b) the Manager shall manage and perform, at the cost and expense of the Manager, all of its obligations and the obligations of the City under the

Foreshore License of Occupation or Foreshore Lease, as applicable, and to exercise the tenants' interest under the Foreshore License of Occupation or Foreshore Lease, as applicable, in accordance with this Agreement;

- (c) the Manager will not do or omit to do any act on the Marina Property which would cause a breach of the City's and the Manager's obligations as tenants under the Foreshore License of Occupation or Foreshore Lease, as applicable; and
- (d) the Manager will not do, suffer or permit any act on the Marina Property which may in any manner, directly or indirectly, cause injury or damage to the Marina Property or which may be or become a nuisance to or interference with the owners, occupiers or users of adjoining lands or to the public, including the accumulation of rubbish or unused personal property of any kind.

With reference to (a) above, upon receipt from the Manager, the City will in turn remit to the Province of British Columbia the rent charged by the Province under the Foreshore License of Occupation or Foreshore Lease, as applicable.

### **3.4 Taxes, Utilities and Other Fees**

In addition to the Operating Fee, Capital Commitments, and Foreshore Lease / License Rent, the Manager shall pay, as and when due, to the authority or person to which the same are owing:

- (a) all taxes (including without limitation all goods and services tax), license fees, rates, duties and assessments imposed, assessed or levied by any lawful authority relating to:
  - (i) the business carried on in relation to the Marina and the use and occupancy of the Marina Property by the Manager;
  - (ii) the Foreshore License of Occupation or the Foreshore Lease, as applicable; and
  - (iii) personal property used and business and trade carried on by the Manager in relation to the Marina and other improvements owned or installed by or on behalf of the Manager in, on or affixed to the Marina Property.

whether any such taxes, license fees, rates, duties and assessments are payable by law by the Manager or by the City and whether or not same are allocated separately in respect of the Owned Marina Property and the Leased / Licensed Marina Property;

- (b) all charges, rates, levies and assessments imposed, assessed or levied by any lawful authority in respect of electricity, light, heat, power, water,

sanitary sewer, telephone, cable TV, internet and Utilities of whatsoever nature or kind (including works and services in connection therewith) used in or supplied to the Marina or the Marina Property and which shall be separately metered where possible with the cost of metering installation and utilities consumed by the Manager to be borne by the Manager; all Utility accounts shall be transferred into the name of the Manager as of the Commencement Date;

- (c) all license fees, permit fees, impact fees or inspection fees applicable to the Marina or the Marina Property or activities thereon; and
- (d) all property taxes as assessed by the British Columbia Assessment Authority (i) on the Marina Property and (ii) on Licensed /Leased Property; and as issued by the authority or person having jurisdiction and including without limiting the generality of the foregoing local improvement charges, school taxes, frontage taxes and all other special or extraordinary charges and whether or not same are allocated separately in respect of the Owned Marina Property and the Leased / Licensed Marina Property.

### **3.5 No Set-Off**

The Manager will pay to the City duly and punctually any and all Operating Fee, Capital Commitments, Foreshore Lease / License Rent and other taxes and fees as described in Section 3.4 above required to be paid by the Manager pursuant to this Agreement without any deduction, abatement or set-off whatsoever.

## **ARTICLE 4 THE CITY'S RIGHTS AND OBLIGATIONS**

### **4.1 Quiet Enjoyment**

From and after the Commencement Date, and throughout the Term, the City shall provide the Manager with quiet occupation of the Marina Property pursuant to the Owned Marina Property Licence of Occupation and the Foreshore Sub-License of Occupation.

If the Manager duly and punctually pays the Operating Fee, Capital Commitments, Foreshore Lease / License Rent and other taxes and fees as described in Section 3.4, and complies with its obligations under this Agreement, the Owned Marina Property License of Occupation and the Foreshore Sub-License of Occupation, the Manager will be entitled to peaceably possess and enjoy the Marina Property as provided herein during the Term without any unreasonable interruption or disturbance from the City.

### **4.2 City Approval**

The Manager agrees it will obtain prior written approval from the City prior to implementing changes on the following matters:

- (a) changes to the Business Plans;



- (b) any improvements or modifications to be constructed on the Marina property;
- (c) any uninstalled equipment requiring any building or facility modifications;
- (d) any use of the City's name; and
- (e) the decor of the Marina and all signs to be installed directed or displayed in, on, or in the vicinity of the Marina property and any changes thereto at any time during this Agreement.

#### **4.3 Duties of City**

The City shall cooperate with the Manager in the performance of its duties under this Agreement.

#### **4.4 Public Emergencies**

Before, during and after a public emergency, disaster, hurricane, tornado, flood, forest fire or other acts of God, that City shall have a "first priority" to the Marina Services and access to the Marina Property. It is vital and imperative that citizens are protected from any emergency situation that threatens public health and safety as determined by the City.

#### **4.5 Ownership of Improvements**

Upon the expiration of this Agreement, for any reason, all existing and any future buildings and all existing and future installed fixtures, equipment, improvements and appurtenances attached to or built into the Marina in such a manner as to become part of the freehold estate whether or not by the expense of the Manager, shall become and remain a part of and be surrendered with the Marina Property. Similarly, any furniture, furnishings, equipment or other articles of moveable personal property owned by the Manager and located on the Marina Property, and not removed by the Handback Date shall become the property of the City.

#### **4.6 Rights Reserved to the City**

All rights not specifically intended to the Manager by this Agreement are reserved to the City, and the designation of any particular remedy for the City without prejudice to any other relief available in law or equity and all such relief is reserved to the City.

### **ARTICLE 5 INSPECTIONS AND MONITORING**

#### **5.1 Manager's Obligations**

In providing the Marina Services, the Manager shall at all times operate the Marina in accordance with the Business Plans and maintain the Marina and the Marina Property in

accordance with the Maintenance Standards; each of which may be revised or updated by the City from time to time acting reasonably.

## **5.2 Rolling Business Plans**

On or before March 31<sup>st</sup> of each year, the Manager will prepare and provide updated 5 year Business Plans to the City for review and discussion. The first business plan will be required on or before March 31<sup>st</sup>, 2023, and every 5 years thereafter.

## **5.3 Periodic Performance Review**

Every three to five (3-5) years, at the election of the City, the City shall conduct a review of the Manager's performance under this Agreement and the City will provide the Manager with a performance report including suggestions for improvement and proposed changes or additions to the Business Plans, which recommendations shall be incorporated by the Manager into the Business Plans.

## **5.4 Inspections and Monitoring**

After the Commencement Date and until the end of the Term, the City or its representatives may enter and inspect the Marina and the Marina Property from time to time to ensure that the Manager's obligations in respect of operation and maintenance are being discharged in accordance with the terms of this Agreement and the Business Plans. If desired by the City, the City may involve a Qualified Independent Engineer in such inspections. At a minimum, the City will require regular fire inspections, annual walk throughs and inspections of the facility and the docks.

## **5.5 Rectifications or Deficiencies**

If any inspection by the City reveals that the Marina is not being operated or maintained in accordance with this Agreement and the Business Plans, the City shall give notice to the Manager of the default and specifying:

- (a) the works required to rectify the default; and
- (b) a reasonable period of time (having regard to the nature of the default and the extent of the works required) in which the Manager is to make good the default at its own cost.

## **5.6 Failure to Rectify**

If, at any time, the City serves notice under Section 5.5 and the Manager fails to rectify the default within the time period specified, then the City may (without prejudice to the any other right or remedy available to the City) itself take such steps as necessary to rectify the default or engage a third party to take such steps. The Manager shall reimburse the City for all reasonable costs so incurred.

## **ARTICLE 6 FINANCIAL AND OTHER REPORTING REQUIREMENTS**

### **6.1 Annual Reports**

The Manager shall submit an annual written report to the City containing such information as the City may reasonably request, which includes but is not limited to:

- (a) financial statements as further set out in Section 6.3 below.
- (b) operating statistics, together with historical comparison;
- (c) Design and Construction Plan status report;
- (d) insurance claims;
- (e) litigation;
- (f) safety and environmental incidents; and
- (g) customer service issues.

### **6.2 Immediate Reporting of Safety and Environmental Incidents**

The Manager shall immediately report all safety and environmental incidents to the City and shall maintain a record of claims and complaints received from users of the Marina. The Manager shall make available such register to the City on reasonable request.

### **6.3 Financial Statements and Reporting**

The Manager shall fully account for all aspects of its business by preparing financial statements and delivering them to the City as follows:

- (a) at the end of each financial year, and delivered within 90 days of the end of each financial year, and prepared in accordance with generally accepted accounting principles on a review engagement basis by a chartered professional accountant, financial statements (comprised of a statement of financial position, a statement of operations, and statement of changes in cash flow, including a comparison to budget prepared) that also include the gross revenue generated and all expenses incurred from all aspects of the development and operations on the Owned Marina Property and Leased / Licensed Marina Property including but not limited to a break-down of the following details:
  - (i) marina and slip rental revenue and expenses;
  - (ii) boat storage revenue and expenses
  - (iii) restaurant revenue and expenses;

- (iv) gas bar revenue and expenses;
  - (v) retail store revenue and expenses;
  - (vi) parking revenue and expenses; and
  - (vii) any other revenues or expenses not noted above.
- (b) on or before December 31<sup>st</sup> of each year, an annual budget for the upcoming year and a reconciliation to the prior year's annual budget;
  - (c) the Manager shall prepare for submission to the City such other information on the financial position of the Marina as the City may from time to time reasonably request to monitor compliance with the Applicable Regulations and with this Agreement; and
  - (d) Notwithstanding (a) above, financial statements will not be required in respect of the Restaurant and other sub-contracted services provided that the revenue received by the Manager in respect of each such service is recorded as a separate line item in the Manager's financial statements.

The Manager shall retain all records relating to this Agreement for a period of at least six (6) years. All financial records noted this Section 6.3 shall be subject to an annual audit by the City or its designate.

## **ARTICLE 7 INSURANCE**

### **7.1 Insurance**

The Manager, at its cost, will obtain and keep in force throughout the Term the following insurance policies (each of which shall name the City as an additional insured):

- (a) All risk replacement cost fire, earthquake and all other perils insurance, including the City as a named insured, of all buildings, structures and improvements located and subsequently constructed on the Marina Property, including extended coverage endorsement and water damage insurance (including, if applicable, sprinkler leakage) as well as all the Manager's property in or on the Marina Property, including, without limitation, its improvements, furniture, equipment, fittings, fixtures and stock-in-trade, in an amount adequate to cover fully any loss that the Manager or the City could sustain. Such coverage shall include a stated amount co-insurance clause;
- (b) comprehensive general liability insurance (including, without limitation, tenant's fire, legal liability and contractual liability to cover the responsibilities assumed under Section 13.2 and under this Section 7.1 hereof) against claims for personal injury, death, property loss and damage

arising out of or in connection with the business activities, use and operations of the Manager and whether occurring upon or in or about the Marina Property or as a result of the business activities, use and operations conducted therefrom and environmental damage coverage, all in an amount of not less than \$10,000,000.00 per occurrence or such greater amount as the City may reasonably require from time to time. Such coverage shall contain no exclusions for host liquor liability;

- (c) business interruption insurance or proof of equipment breakdown coverage;
- (d) environmental impact and impairment liability insurance providing coverage for death, bodily injury, property loss and damage, remediation and all other losses arising out of or in connection with the business activities, use and occupation of the Marina Property in an amount of not less than \$5,000,000 per occurrence;
- (e) course of construction insurance from the start and through the course of any major improvements or renovations;
- (f) any other insurance required pursuant to the terms of the Foreshore License of Occupation, Foreshore Lease or Foreshore Sub-License of Occupation; and
- (g) such other insurance or increased insurance coverage as the City might reasonably require from time to time.

## **7.2 Waiver of Subrogation**

The Manager will ensure that the insurer waives its rights of subrogation, if any, against the City on each of the foregoing types of required insurance coverage.

## **7.3 Loss Deductible Clause**

The City will be exempt from, and in no way liable for, any sums of money that may represent a deductible in any insurance policy. The payment of such deductible will be the sole responsibility of the Manager.

## **7.4 Required Changes in Coverage and Amounts of Coverage**

The City may at any time require the Manager to increase the amount of coverage, change the terms of coverage, and provide additional or different types of coverage, as the City may deem necessary; provided that the changes or increase in coverage are consistent with such requirements for similar operations and businesses then operating within the City of Penticton area or are reasonable in light of prior claims made against Manager's policies. The Manager must comply with such requirements within 30 days after the City's demand. Any increase in costs associated with such changes will be the responsibility of the Manager.

### **7.5 Replacement Required**

The Manager will file replacement certificates 30 days prior to expiration or termination of the required insurance occurring prior to the acceptance of the work by the City. If such insurance lapses, the City expressly reserves the right to renew the insurance at Manager's expense.

### **7.6 Termination of Insurance**

The Manager may not cancel the insurance required by this Agreement until all services are completed, accepted by the City, and the Manager has received written notification from the City's risk manager that the Manager may cancel the insurance required by this Agreement and the date upon which the insurance may be cancelled.

### **7.7 Certificates of Insurance**

Manager shall cause its insurers or agents to provide the City with annual certificates of insurance evidencing the policies and endorsements listed above and the copies of said insurance must be acceptable to the City's risk manager. Failure by the Manager to obtain the insurance coverage or certificates of insurance required by this Article 7 shall not in any way relieve or limit the Manager's obligations and liabilities under any provision of this Agreement. If the Manager shall fail to procure or maintain any insurance required pursuant to this Article 7, then the City shall have the right to procure such insurance in accordance with the requirements of this Article 7 and the Manager shall reimburse the City for the costs of the same forthwith.

### **7.8 Obligations Survive**

The liabilities of the Manager under this Agreement will survive and not be terminated, reduced, or otherwise limited by any expiration or termination of insurance coverage. Neither approval nor failure to disapprove insurance furnished by the Manager will relieve the Manager or its sub-contractors from responsibility to provide insurance as required by this Agreement. Without qualification for the amount of insurance proceeds, the Manager covenants and agrees with the City that in the event of damage to or partial destruction of leasehold improvements, including any buildings or structures, the Manager, subject to the regulations and requirements of any governmental authority having jurisdiction, shall repair, replace or restore any part of the improvements, buildings or structures so destroyed.

## **ARTICLE 8 CONSTRUCTION LETTER OF CREDIT REQUIREMENTS**

### **8.1 Construction Letter of Credit**

The Manager shall cause the Restaurant Operator to obtain the Construction Letter of Credit from the Restaurant Construction Contractor guaranteeing the proper and timely performance of the Restaurant Construction Contractor's obligations in relation to the construction of the Restaurant issued by a financial institution acceptable to the

Restaurant Operator, Manager and the City, and valid until the completion of the Restaurant.

## **8.2 Release of Construction Letter of Credit**

The amount of the Construction Letter of Credit may be reduced to ten (10%) of the construction cost value once the building permit has been received. Following the completion of the Restaurant and the satisfaction of the Restaurant Construction Contractor's obligations under the Restaurant Construction Contract, unless there is any accrued liability under the Construction Letter of Credit, the City and the Manager shall undertake with due expedition such action as the Restaurant Operator or the Restaurant Construction Contractor may reasonably request to assist the Restaurant Construction Contractor in procuring the release of so much of the Construction Letter of Credit as remains outstanding.

## **ARTICLE 9 FORCE MAJEURE**

### **9.1 No Breach of Contract**

The failure of a Party to fulfill any of its obligations hereunder shall not be considered to be a breach of, or default under, this Agreement insofar as such inability arises from an event of Force Majeure, provided that the Party affected by such an event has taken all reasonable precautions, due care and reasonable alternative measures, all with the objective of carrying out the terms and conditions of this Agreement.

### **9.2 Measures to be Taken**

- (a) A Party affected by an event of Force Majeure shall take all reasonable measures to remove such Party's inability to fulfill its obligations hereunder with a minimum of delay;
- (b) A Party affected by an event of Force Majeure shall notify the other Party of such event as soon as possible, and in event not later than fourteen (14) days following the occurrence of such event, providing evidence of the nature and cause of such event, and shall similarly give notice of the restoration of normal conditions as soon as possible;
- (c) The Parties shall take all reasonable measures to minimize the consequences of any event of Force Majeure.

### **9.3 Extension of Time**

Any period within which a Party shall, pursuant to this Agreement, complete any action or task, shall be extended for a period equal to the time during which such Party was unable to perform such action as a result of Force Majeure.

#### **9.4 Consultation**

No later than thirty (30) days after a Party, as the result of an event of Force Majeure, has become unable to perform a material portion of its obligations, the Parties shall consult with each other with a view to agreeing on appropriate measures to be taken in the circumstances.

#### **9.5 Termination**

Upon the occurrence of Force Majeure, the Parties shall enter into discussions to reach a mutually satisfactory agreement. If the Parties fail to reach a mutually satisfactory solution within ninety (90) days of the commencement of such discussions, either party may issue a Notice of Intention to Terminate.

### **ARTICLE 10 UNFORESEEN CHANGE OF CIRCUMSTANCES**

#### **10.1 Unforeseen Change of Circumstances**

The rights and obligations of the Parties set out in this Agreement represent the Parties' positions relative to each other on the basis of the circumstances existing at the date hereof and on the basis of the common view the Parties have of the way those circumstances shall develop until the end of the Term. The Parties agree and acknowledge that neither seeks to benefit unduly from any unforeseen development of circumstances that actually occurs. Accordingly, if, after the date of this Agreement, a change of circumstances occurs which is beyond the control of either party, which does not constitute Force Majeure, which could not have been foreseen by either party at the date hereof and which shall over the Term materially upset the economic balance of this Agreement such as it exists at the date hereof (an "**Unforeseen Change of Circumstances**"), the Parties shall, upon notice given by either of them, enter into discussions to agree on the measures necessary to restore that economic balance. If the Parties have failed to reach a mutually solution within ninety (90) days of the commencement of such discussions, either party may issue a Notice of Intention to Terminate.

### **ARTICLE 11 TERMINATION**

Apart from events arising from Force Majeure or Unforeseen Change of Circumstances, this Agreement may only be terminated in the following cases:

#### **11.1 Termination by the City for Manager Event of Default**

Each of the following, if not cured within the time period permitted, shall constitute a Manager Event of Default which shall entitle the City to issue a Notice of Intention to Terminate immediately:



- (a) failure of the Manager to make timely payment of the Operating Fees or the Capital Commitments, or the Foreshore Lease / License Rent or any part thereof within fifteen (15) days of the due date;
- (b) the occurrence of a material breach by the Manager of its obligations under this Agreement, the Owned Marina Property License of Occupation or the Foreshore Sub-License of Occupation which has continued unsolved for thirty (30) days or more after notice thereof has been given to it by the City setting forth the details of such default;
- (c) the commencement of any action for the dissolution or liquidation of the Manager except for the purposes of amalgamation or reconstruction on terms approved in advance by the City in writing;
- (d) any representation or warranty made by the Manager in this Agreement proving to have been materially incorrect when made such that the Manager's ability to perform its obligations under this Agreement is materially adversely affected;
- (e) if the Manager assigns this Agreement, or assigns or sub-lets the Owned Marina Property License of Occupation or the Foreshore Sub-License of Occupation, or parts with possession of the Marina Property or any part thereof without the approval of the City as set out in Section 15.3(a);
- (f) if and whenever:
  - (i) a receiver, guardian, trustee in bankruptcy or any other similar officer is appointed to take charge of all or any substantial part of the Manager's property by a court of competent jurisdiction;
  - (ii) a petition is filed for the re-organization of the Manager under any provision of the *Bankruptcy Act* or any law of Canada or any province thereof or of the jurisdiction in which the Manager is incorporated relating to bankruptcy or insolvency, then in force;
  - (iii) the Manager becomes insolvent;
  - (iv) the Manager files a petition for such re-organization or for arrangements under any provision of the *Bankruptcy Act* or any law of Canada or any province thereof or of the jurisdiction in which the Manager is incorporated relating to bankruptcy or insolvency then in force and providing a plan for a debtor to settle, satisfy or to extend the time for the payment of debts; or
  - (v) if any application or petition or certificate or order is made or granted for the winding up or dissolution of the Manager voluntarily or otherwise; and

- (g) the Manager abandoning the Marina or the Marina Property for a period of seven (7) days without the prior written consent of the City.

## **11.2 Termination by the Manager for City Event of Default**

Each of the following, if not cured within the time period permitted, shall be a City Event of Default which shall entitle the Manager to issue a Notice of Intention to Terminate immediately:

- (a) a material breach by the City of any of its obligations under this Agreement which has continued unsolved for thirty (30) days or more after notice thereof has been given to it by the Manager specifying the breach and requiring the City to remedy the same;
- (b) any representation or warranty made by the City in this Agreement proving to have been materially incorrect when made such that the City's ability to perform its obligations under this Agreement is materially adversely affected; or
- (c) issuance by any court of competent jurisdiction of any injunction, substantially restricting the use of the Marina Property.

## **11.3 Termination Without Prejudice**

In addition to any rights of termination of the City as provided herein, in the event the Manager is in default and such default has not been remedied within the time required, and should the City elect to terminate this Agreement, such termination shall be without prejudice to any rights to which the City has accrued under this Agreement before the said termination.

## **11.4 Recuperation by the City**

A decision to terminate this Agreement for recuperation of the Marina by the City in the public interest may be taken at any time after a period of five (5) years from the Commencement Date. In event of such recuperation, the City shall pay to the Manager an amount equal to the expected amount of its profit for the next two (2) years calculated on the basis of what could reasonably be expected given its earnings in the prior five (5) years), and shall refund to the Manager its Capital Commitments.

## **11.5 Renunciation**

Renunciation of this Agreement may be done by the Manager but only after a period of 5 years from the Commencement Date. In such case the Manager shall inform the City in writing at least 6 months in advance, shall pay to the City an amount equal to the estimated annual operating and administrative costs of operating the Marina for the next two years calculated on the basis of what could reasonably be expected given operating and administrative costs over the last five years and shall forfeit its Capital Commitments.

### **11.6 Notice of Intention to Terminate**

Any notice of intention to terminate shall specify the reasons: Force Majeure, Unforeseen Change of Circumstances, Manager Event of Default, or City Event of Default, or other causes, as applicable. Following the issuing of the Notice of Intention to terminate the Parties shall enter into good faith discussions to agree on mutually satisfactory terms on which to continue this Agreement.

### **11.7 Notice of Termination**

If, within ninety (90) days of the date of any Notice of Intention to Terminate, the Parties have not reached a mutually satisfactory solution, either Party may issue a notice to that effect to the other Party (a “**Notice of Termination**”), whereupon this Agreement shall terminate immediately.

### **11.8 Waiver with respect to re-entry**

The Manager hereby waives any present or future requirement that notice of the City’s intention to re-enter be served or that the City commence legal proceedings in order to re-enter.

### **11.9 Re-Entry and Damages**

If and whenever the City is entitled to re-enter the Marina Property, or does re-enter the Marina Property, the City may terminate this Agreement and/or seek the termination of the Manager’s interest under the Owned Marina Property License of Occupation and/or the Foreshore Sub-License of Occupation by giving written notice of termination to the Manager, or by posting notice of termination on the Marina Property, and in such event the Manager and or any persons that the Manager may have sublet to will forthwith vacate and surrender the Marina Property, or alternatively, the City may from time to time without terminating the Manager’s obligations under this Agreement, the Owned Marina Property License of Occupation or the Foreshore Sub-License of Occupation, make alterations and repairs considered by the City necessary to facilitate a further subletting or assignment including changing the door locks (without this being deemed to be a termination of the Agreement, the Owned Marina Property License of Occupation or the Foreshore Sub-License of Occupation), and assign and sublet the Marina Property, or any part thereof as agent of the Manager for such term or terms and at such rental or rentals and upon such other terms and conditions as the City in its reasonable discretion considers advisable. No re-entry by the City will be construed as an election on its part to terminate the Agreement, the Owned Marina Property License of Occupation, or the Foreshore Sub-License of Occupation unless a written notice of that intention is given to the Manager. Despite an assignment or subletting without termination, the City may elect at any time to terminate this Agreement and/or seek the termination of the Manager’s interest under the Owned Marina Property License of Occupation and/or the Foreshore Sub-License of Occupation for a previous breach.

### **11.10 Remedies of the City are Cumulative**

The remedies of the City in this Agreement, the Owned Marina Property License of Occupation, and the Foreshore Sub-License of Occupation are cumulative and are in addition to any remedies of the City at law or in equity. No remedy will be deemed to be exclusive and the City may from time to time have recourse to one or more of all the available remedies specified herein or at law or in equity.

### **11.11 Payment of City Expenses**

If at any time an action is brought where the City is otherwise required to employ the services of a bailiff, an agent, or its solicitors because of the breach by an act or omission of any covenant herein contained on the part of the Manager, the Manager shall pay to the City all expenses incurred by the City in the enforcement of its rights and remedies hereunder, including the City's administrative costs and legal fees on a solicitor and his own client basis in connection therewith, together with interest at an annual rate of the Prime Rate plus four percent (4%) accruing on a daily basis, from the date of demand until paid.

## **ARTICLE 12 SURRENDER AND HANDBACK**

### **12.1 Handback Date**

On the Handback Date, the Manager shall surrender and transfer to the City all and any of its rights, title and interests in the Marina and the Marina Property including possession of the Owned Marina Property and the Leased / Licensed Marina Property and fixtures and all improvements thereon, all of which will become the property of the City without any claim by or compensation to the Manager, all in good order, condition and repair in accordance with the Manager's obligation to repair and maintain pursuant to Section 2.15, and free and clear of all encumbrances and all claims.

### **12.2 Handback Requirements**

On the Handback Date, the Manager shall ensure that the Marina and Marina Property, at the time of their return to the City on the Handback Date, meet all of the City's requirements, are in the conditions of, and meet all of the City's criteria, all as set out in this Article 12 (the "**Handback Requirements**"). The Manager shall be solely responsible for all costs and expenses relating to compliance with the Handback Requirements.

### **12.3 Inspection prior to Handback**

At any time between twelve (12) and eighteen (18) months before the Handback Date, the City will, on 24 hours written notice, be granted access to enable it to extensively inspect the Marina and the Marina Property and all facilities thereon to the extent that the City requires, and the Qualified Independent Engineer shall carry out an inspection of the Marina and the Marina Property. Within twenty-eight (28) days of such inspection the City shall issue the Manager with a list of works which need to be carried out, in order to

ensure that the Marina and the Marina Property comply with the Handback Requirements on the Handback Date. The failure by the City or the Qualified Independent Engineer to detect any defect or item shall not relieve the Manager of its obligation under this Article 12.

#### **12.4 Handback Procedure**

Six (6) months prior to the Handback Date the Parties shall meet and agree on detailed procedures for the handback of the Marina and the Marina Property and shall draw up an inventory of the items to be included in the scope of handback under Section 12.5.

#### **12.5 Scope of Handback**

On the Handback Date, the Manager shall transfer to the City or its designee, free and clear of all debts, liens, encumbrances, mortgages, security interests, environmental contamination and claims of whatever kind or nature other than encumbrances of a routine nature that do not materially adversely affect the value of the Marina or interfere with its operation, all of the Manager's rights, title and interest to the Handback Assets as defined herein including but not limited to all rebuilt and repaired, and all of its right to use, possess and have access to the Marina and the Marina Property. The Manager shall also deliver to the City on the Handback Date all operation and maintenance manuals, design drawings and other information as may reasonably be necessary, or as may be requested by the City to enable it or its designee to continue operation and maintenance of the Marina.

#### **12.6 Transfer of Insurance and Contractor Warranties**

The Manager shall assign to the City or its designee on the Handback Date all unexpired guarantees and warranties from its sub-contractors and suppliers and all insurance policies.

#### **12.7 Technology Transfer**

On the Handback Date, the Manager shall transfer and assign or cause to be transferred and assigned to the City or its designee all technology and know-how relevant to the operation and maintenance of the Marina as may be necessary to enable the City or its designee to continue the operation of the Marina.

#### **12.8 Training City Personnel**

The Manager shall arrange for adequate training to be provided for personnel designated by the City or its designee as necessary to ensure the independent operation of the Marina by the City or their designee. As part of the handback procedure, the Manager and the City shall conduct a joint test program to confirm that the designated personnel have been properly trained in accordance with this Agreement.

## **12.9 Cancellation of Contracts, Assignment**

Subject to Sections 12.6 and 12.7 if required by the City, any operation and maintenance contract, equipment contracts, supply contracts and all other contracts entered into by the Manager and subsisting at the time of the transfer shall be canceled by the Manager and the City shall not be liable for any cancellation costs arising thereby and shall be indemnified and held harmless by the Manager in respect of the same. Otherwise the Manager shall endeavor to assign such contracts to the City or its nominee.

## **12.10 Removal of Objects Owned by the Manager**

The Manager shall, at its own cost, remove all equipment, inventories, supplies and other personal property owned by the Manager which are not included within the scope of the handback from the Marina and the Marina Property within thirty (30) days after the Handback Date.

## **12.11 Effect of Handback**

From the Handback Date the rights and obligations of the Manager under this Agreement shall terminate, except for the Manager's rights and obligations under Section 12.12 and any other obligations which expressly survive termination pursuant to this Agreement.

## **12.12 Overholding**

If the Manager remains in possession of the Marina Property after the Handback Date and without the execution and delivery of a new Agreement, Owned Marina Property License of Occupation, and Foreshore Sub-License of Occupation, the City may re-enter and take possession of the Marina Property and remove the Manager therefrom and the City may use such force as it may deem necessary for that purpose without being liable in respect thereof or for any loss or damage occasioned thereby. While the Manager remains in possession of the Marina Property after the Handback Date, the tenancy, in the absence of written agreement, will be from month to month only at a rent equal to two times the Foreshore Lease / License Rent payable in respect of the rental period immediately preceding the Handback Date, payable, on a pro-rata basis, in advance on the first day of each month and the Manager will be subject to all terms of the Agreement, the Owned Marina Property License of Occupation, and the Foreshore Sub-License of Occupation, except that the tenancy will be from month to month only and a tenancy from year to year will not be created by implication of law or otherwise.

## **12.13 Penticton's Sign**

The City may, during the last 12 months of the Term, place upon the Marina Property a notice, of reasonable dimensions and reasonably placed so as not to interfere with the business of the Manager, stating that the Marina Property is to be sub-leased and re-let.

### 12.14 Inspection

The City or its representatives may exhibit the Marina Property and at reasonable times to prospective tenants during the last twelve (12) months of the Term of this Agreement.

### 12.15 Remedy of Defects after the Handback Date

If, on the Handback Date, the Manager has not completed the works which need to be carried out pursuant to Section 12.2 or does not comply in all respects with the Handback Requirements then, on receipt of notice from the City specifying the defect and requiring the Manager to remedy the same within a reasonable time, the Manager shall remedy the defect accordingly at its own cost. If the Manager fails or refuses to correct the defect within a reasonable time then the City shall be entitled to remedy the defect itself or engage a third party to do so. In such case the Manager shall reimburse the City for the reasonable costs incurred within thirty (30) days of a request for payment from the City.

## ARTICLE 13 LIABILITY AND INDEMNIFICATION

### 13.1 Indemnification by the City

The City shall indemnify, defend and hold harmless on an after-tax basis, the Manager and, to the extent named or involved in any third party action or claim, its employees, shareholders, directors, officers, representatives and related persons (collectively, the **"Manager Indemnified Persons"**) from and against, and shall pay to the Manager and the Manager Indemnified Persons, on demand, the amount of, any loss, liability, obligation, claim, damages (including costs of investigation and defence and the full amount of all legal fees and other professional fees) (collectively, **"Damages"**), suffered by, imposed upon or asserted against, the Manager or any of the Manager Indemnified Persons as a result of, in respect of, connected with, or arising out of: (i) City's performance or non-performance of its obligations that result in a breach of this Agreement except to the extent that such personal injury, damage or loss is attributable to a negligent or intentional act or omission of the party seeking to be indemnified; and (ii) all claims and demands of every kind and nature made by any person or persons to or against the Manager Indemnified Persons for all and every manner of costs, damages, or expenses incurred by or injury or damage to such person or persons of his, her, or their property to the extent such claim or damages are a result of the City's negligence or breach of its obligations under this Agreement.

The City will not be liable or responsible in any way for any personal injury that may be sustained by the Manager or any Manager Indemnified Persons, or of any other person who may be upon the Marina Property or of any person who or for any loss of or damage or injury to, property belonging to or in the possession of the Manager or any Manager Indemnified Person or any other person, unless caused by gross negligence of the City or those for whom it is in law responsible, or resulting from a breach of this Agreement.

### 13.2 Indemnification by the Manager

The Manager shall indemnify, defend and hold harmless on an after-tax basis, the City and, to the extent named or involved in any third party action or claim, its employees, shareholders, directors, officers, representatives and related persons (collectively, the “**City Indemnified Persons**”) from and against, and shall pay to the City and the City Indemnified Persons, on demand, the amount of, any Damages, suffered by, imposed upon or asserted against, the City or any of the City Indemnified Persons as a result of, in respect of, connected with, or arising from:

- (a) any breach, violation or non-performance by the Manager of any obligation contained in this Agreement, the Owned Marina Property License of Occupation or the Foreshore Sub-License of Occupation to be observed or performed by the Manager;
- (b) any damage to the Marina Property by the Manager, or any person claiming through or under the Manager, or damage to any other property howsoever occasioned by the condition, use, occupation, repair or maintenance of the Marina Property;
- (c) any injury to any person, including death resulting at any time therefrom, occurring in or about the Marina Property unless caused by the gross negligence of the City or those for whom it is in law responsible, or caused by a breach of this Agreement by the City;
- (d) any wrongful act or neglect of the Manager, its invitees and licensees, in and about the Marina Property;
- (e) any request or order made by any government authority requiring investigation or remediation of any Hazardous Substance on, under or affecting the Marina Property unless caused by the gross negligence of the City or those for whom it is in law responsible, or by a breach of this Agreement by the City; and
- (f) any and all liabilities, claims, damages, costs, loss, suits, or actions of any nature whatsoever (including legal fees incurred by the City in any related proceedings on a solicitor and own client basis) arising out of any release of a Hazardous Substance(s) in on or from the Marina Property or in, on, above or below the surface of the Marina Property as a result of the construction or operation of the Marina Property or any other activity carried out in, on, above or below the Marina Property by the Manager or its servants, or contractors or any person for whom the Manager is in law responsible.

Provided that this indemnity shall be reduced where and to the extent that the same is caused by the gross negligence of the City or by a breach of this Agreement by the City.



This indemnification provision shall survive any termination or expiration of this Agreement, the Owned Marina Property License of Occupation, and the Foreshore Sub-License of Occupation.

### 13.3 Environmental Damage

The Manager shall be liable for, and shall defend, indemnify and hold the City and its elected officials, officers, employees and agents harmless from and against, all liabilities, damages, losses, expenses, fines and claims (including, without limitation, all legal and consultants' fees and expenses and the cost of remediation of the Marina Property and any adjacent property) caused by environmental contamination from the operation and maintenance of the Marina, except when such losses, expenses or claims are solely attributable to the negligent or intentional act or omission of the City.

### 13.4 Indemnification Procedure: Third Party Claims

- (a) If any claim, assertion or proceeding is made or commenced by a third party (a **"Third Party Claim"**) against the Manager, the City, a Manager Indemnified Person or a City Indemnified Person, as the case may be (the **"Indemnified Person"**) in respect of which the Indemnified Person proposes to demand indemnification from a Party (the **"Indemnifying Party"**), the Indemnified Person shall give notice to that effect together with particulars of the Third Party Claim to the Indemnifying Party with reasonable promptness. The failure to give, or delay in giving, such notice will not relieve the Indemnifying Party of its obligations except and only to the extent of any prejudice caused to the Indemnifying Party by such failure or delay. From the time the Indemnified Person receives notice of the Third Party Claim, the Indemnified Person shall use commercially reasonable efforts to protect its rights and the rights of the Indemnifying Party in respect of such Third Party Claim.
- (b) The Indemnifying Party may, by notice to of the Indemnified Person given not later than thirty (30) days after receipt of the notice described in Section 13.4(a), assume control of the defence, compromise or settlement of the Third Party Claim provided that:
  - (i) the Third Party Claim involves only money damages and does not seek any injunctive or other equitable relief;
  - (ii) if the named parties in any Third Party Claim include both the Indemnifying Party and the Indemnified Person, representation by the same counsel would, in the judgment of the Indemnified Person, still be appropriate notwithstanding any actual or potential differing interests between them (including the availability of different defences);
  - (iii) settlement of, or an adverse judgment with respect to, the Third Party Claim is not, in the judgment of the Indemnified Person, likely to

establish a precedent, custom or practice adverse to the continuing business interests of the Indemnified Person; and

- (iv) the Indemnifying Party, at the request of the Indemnified Person acting reasonably, gives security reasonably satisfactory to such Indemnified Person against any costs and other liabilities to which the Indemnified Person may be or become exposed as a result of the Third Party Claim.
- (c) If the Indemnifying Party assumes control of the Third Party Claim, it is conclusively established for purposes of this Agreement that the Third Party Claim is within the scope of, and entitled to, indemnification pursuant to this Article 13.
- (d) Upon assumption of control by the Indemnifying Party:
  - (i) the Indemnifying Party shall actively and diligently proceed with the defence, compromise or settlement of the Third Party Claim at its sole cost and expense, retaining counsel reasonably satisfactory to the Indemnified Person;
  - (ii) the Indemnifying Party shall keep the Indemnified Person fully advised with respect to the status of the Third Party Claim (including supplying copies of all relevant documents promptly as they become available) and shall arrange for its counsel to inform the Indemnified Person on a regular basis of the status of the Third Party Claim; and
  - (iii) the Indemnifying Party shall not consent to the entry of any judgment or enter into any settlement with respect to the Third Party Claim unless consented to by the Indemnified Person (which consent may not be unreasonably or arbitrarily withheld or delayed).
- (e) The Indemnified Person may retain separate co-counsel at their sole cost and expense and may participate in the defence of the Third Party Claim.
- (f) Provided all the conditions set forth in Section 13.4(b) are satisfied and the Indemnifying Party is not in breach of any of its other obligations under this Section 13.3, the Indemnified Person shall, at the expense of the Indemnifying Party, cooperate with the Indemnifying Party and use their commercially reasonable efforts to make available to the Indemnifying Party all relevant information in their possession or under their control (provided that it does not cause either of them to breach any confidentiality obligations) and shall take such other steps as are, in the reasonable opinion of counsel for the Indemnifying Party, necessary to enable the Indemnifying Party to conduct such defence provided always that:

- (i) no admission of fault may be made by or on behalf of the Manager or any Manager Indemnified Person without the prior written consent of the Manager;
  - (ii) no admission of fault may be made by or on behalf of the City or any City Indemnified Person without the prior written consent of the City; and
  - (iii) the Indemnified Person is not obligated to take any measures which, in the reasonable opinion of the Indemnified Person's legal counsel, could be prejudicial or unfavourable to the Indemnified Person.
- (g) If (i) the Indemnifying Party fails to give the Indemnified Person the notice required in Section 13.4(b) or otherwise fails to comply with any of the conditions in Section 13.4(b) or (ii) the Indemnifying Party breaches any of its other obligations under Section 13.3, the Indemnified Person may assume control of the defence, compromise or settlement of the Third Party Claim and retain counsel as in its sole discretion may appear advisable, the whole at the Indemnifying Party's sole cost and expense. Any settlement or other final determination of the Third Party Claim will be binding upon the Indemnifying Party. The Indemnifying Party shall, at its sole cost and expense, cooperate fully with the Indemnified Person and use its reasonable commercial efforts to make available to such Indemnified Person all relevant information in its possession or under its control and take such other steps as are, in the reasonable opinion of counsel for the Indemnified Person, necessary to enable the Indemnified Person to conduct the defence. The Indemnifying Party shall reimburse the Indemnified Person promptly and periodically for the costs of defending against the Third Party Claim (including legal fees and expenses), and shall remain responsible for any Damages the Indemnified Person may suffer resulting from, arising out of or relating to the Third Party Claim to the fullest extent provided in this Article 13.

### **13.5 Interest**

Any amount required to be paid by an Indemnifying Party to an Indemnified Person under this Article 13 bears interest at an annual rate of the Prime Rate plus four percent (4%) accruing on a daily basis from the date on which a demand for payment is made until payment in full.

### **13.6 Exclusive Remedy**

The rights of indemnity set forth in this Article 13 constitute the Manager's sole and exclusive remedy from the City for any rights, actions, claims or causes of action which may arise in respect of this Agreement and the transactions contemplated hereby.

### **13.7 Procedures for Indemnification - Direct Claims**

A claim for indemnification for any matter not involving a Third Party Claim must be asserted by notice (setting out in reasonable detail the factual basis for the claim and the amount of potential Damages arising from it) to the Party from whom indemnification is sought and will be subject, at all times, to the provisions of Section 13.5.

### **13.8 Liability for Information Provided by the City**

The City makes no warranty in respect of and shall not be held liable for the accuracy of any information, drawings, designs or other documents of whatever nature relating to the Marina or the Marina Property provided by the City.

### **13.9 Survival**

The obligations under Sections 13.1, 13.2, and 13.3 above shall survive termination of this Agreement.

## **ARTICLE 14 DISPUTE RESOLUTION**

### **14.1 Amicable Settlement**

If any dispute arises in connection with this Agreement, either party may give notice to the other party of the same, whereupon the Parties shall meet promptly and in good faith attempt to reach an amicable settlement. The Manager's contact at the City for disputes is the General Manager of Community Services and the City's contact for disputes at the Manager is the Commodore or the Deputy Commodore. Prior to resorting to mediation, the Chief Operating Officer of the City and the Commodore of the Marina shall endeavour to resolve the dispute.

### **14.2 Mediation Committee**

If the Parties are unable to negotiate an amicable resolution pursuant to Section 14.1 above, within 60 days of the notice of dispute or disagreement, the Parties shall request the assistance of a skilled commercial mediator, such mediator to be mutually agreed upon by the Parties within 30 days of a receipt by a party of written notice requiring the mediation, failing which the mediator will be appointed by the British Columbia International Commercial Arbitration Centre (BCICAC). Any mediator selected must be qualified and experienced in the subject matter of the Agreement. Such mediation will be conducted under the Commercial Mediation Rules of the BCICAC to resolve a dispute unless otherwise agreed by the Parties. If a mediator is appointed under this provision, the mediated negotiations will be terminated 60 days after the appointment unless the Parties agree otherwise.

### **14.3 Arbitration**

All disputes arising in connection with this Agreement, which are not settled in accordance with Sections 14.1 or 14.2, shall be resolved by arbitration administered by the British Columbia International Commercial Arbitration Centre and the place of the arbitration shall be Penticton, British Columbia under its rules for the conduct of domestic commercial arbitrations.

### **14.4 Costs of Dispute Resolution**

The Parties agree that each Party will bear its own costs and expenses incurred in respect of the dispute resolution processes in this Article 14 and neither party will seek recovery against the other party for any of those costs and expenses.

### **14.5 Survival**

The dispute resolution provisions contained in this Article 14 shall survive termination of this Agreement.

## **ARTICLE 15 MISCELLANEOUS PROVISIONS**

### **15.1 Representations and Warranties**

Each Party hereby represents and warrants that:

- (a) it is duly existing pursuant to the laws and regulations of British Columbia;
- (b) it carries on its business in accordance with the applicable laws and regulations of British Columbia and, to that Party's knowledge, there are no proceedings pending or threatened for the bankruptcy, dissolution of that party such as would materially adversely affect that party's performance of its obligations under this Agreement; and
- (c) it is fully entitled to enter into this Agreement and authorized to and capable of performing its obligations hereunder.

No representative of the Manager or the City is authorized to make any representations, warranties or agreements other than as expressly set forth herein.

### **15.2 Financial Resources**

- (a) The Manager represents and warrants that it has the financial capacity to fund the working capital required to give effect to the Business Plans, as well as to fund its Capital Commitments together with the operating expenses associated with the first two years of operation of the Marina.

- (b) The Manager shall obtain the representation and warranty of the Restaurant Operator that it has the financial capacity to fund its Capital Commitments, together with a copy of the Restaurant Operator's lender's loan commitment with respect to the Restaurant Operator's Capital Commitment.

### **15.3 Assignment**

- (a) The Manager shall not assign this Agreement, the Owned Marina Property License of Occupation or the Foreshore Sub-License of Occupation without the approval of the City. The City, in making its determination of whether to approve an assignment shall be entitled to take into account its assessment of whether the assignee, transferee or sub-licensee is of good character and has the business experience and financial ability to manage and operate the Marina in accordance with this agreement. In the event of any such assignment without the approval of the City, the City shall be entitled to immediately terminate this Agreement, the Owned Marina Property License of Occupation or the Foreshore Sub-License of Occupation. A Change of Control of the Manager shall be deemed to be an assignment for purposes of this Agreement.
- (b) Should the City convey or assign or otherwise divest itself of its interest in this Agreement, the Owned Marina Property, the Foreshore License of Occupation or the Foreshore Lease, as applicable, it will be relieved of all obligations under this Agreement, the Foreshore License of Occupation, and/or Foreshore Lease, as applicable, from and after the effective date of such conveying, assigning or divesting, save and except for the obligation to account to the Manager for any monies due and payable to the Manager by the City pursuant to this Agreement up until the date of such conveyance, assignment or divestiture.

### **15.4 Primacy of This Agreement**

This Agreement shall govern all aspects of, and all contractual relationships relating to the Marina as between the Parties. The Manager shall ensure that the provisions of all agreements relating to the Marina are consistent with the terms hereof. In the event of conflict between this Agreement and any agreement on a matter affecting the Parties, including all questions of interpretation, this Agreement shall prevail.

### **15.5 Variations in Writing**

All additions, amendments and variations to this Agreement shall be binding only if in writing and signed by duly authorized representatives of each of the Parties.

### **15.6 Entire Agreement**

This Agreement, including the Schedules attached hereto, represents the entire agreement between the Parties in relation to the subject matter thereof and supersedes

any or all previous agreements or arrangements, whether oral or written, between the Parties in respect of the Marina, or the other contents of this Agreement.

### **15.7 Severability**

If any part or parts of this Agreement are agreed by the Parties or declared by any competent tribunal to be invalid, the other parts shall remain valid and enforceable.

### **15.8 Non-Waiver**

None of the provisions of this Agreement shall be deemed waived by either Party except when such waiver is given in writing. The failure by either Party to insist upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights under this Agreement shall not be construed as a waiver of any such provisions or the relinquishment of any such rights for the future.

### **15.9 Interest**

Any Party in default of payment of any amount due hereunder shall pay interest thereon at a rate calculated as 4% above the Prime Rate. Such interest shall be computed on a daily basis (on the basis of a 365 day year) from and including the day after the due date payment until but excluding the date when the relevant amount together with accrued interest is fully paid by the defaulting party.

### **15.10 Notices**

Unless otherwise stated, notices to be given under this Agreement shall be in writing and shall be given by hand delivery, recognized courier, mail, telex or facsimile transmission and delivered or transmitted to the Parties at their respective addresses set forth below:

The Corporation of the City of Penticton  
171 Main Street  
Penticton, BC  
V2A 5A9

Attention: Corporate Officer  
Email: [corpadmin@penticton.ca](mailto:corpadmin@penticton.ca)

with a copy to (such copy shall not constitute notice):

Farris LLP  
2500 – 700 W. Georgia St.  
Vancouver, BC  
V7Y 1B3

Attention: Al Hudec  
Email: [ahudec@farris.com](mailto:ahudec@farris.com)

The Manager:

Penticton Yacht Club  
 293 Marina Way  
 Penticton, BC  
 V2A 1H5  
 Attention: Marc Tougas  
 Email: [marctougas@shaw.ca](mailto:marctougas@shaw.ca)

or such other address, attention, telex number, or facsimile number as may be notified by that party to the other party from time to time, and shall be deemed to have been made or delivered (i) in the case of any communications made by letter, when delivered by hand, by recognized courier or by mail (registered, return receipt requested) at that address and (ii) in the case of any communications made by telex or facsimile, when transmitted properly addresses to such telex number or facsimile number.

#### **15.11 Applicable Law**

This Agreement shall be governed by the laws of British Columbia.

#### **15.12 Non-Exclusive Contract**

Award of this Agreement shall impose no obligation on the City to utilize the Manager for all work of the type which may develop with respect to the Marina during the term of this Agreement.

#### **15.13 Legal Costs Associated with This Agreement**

The City shall be responsible for paying the first Twenty-Five Thousand Dollars (\$25,000.00) in the City's legal fees associated with this Agreement. Any legal fees of the City over and above Twenty-Five Thousand Dollars (\$25,000.00) shall be paid by the Manager. Such excess is estimated at \$8,000 plus disbursements and taxes.

#### **15.14 Communications to the Public**

The City and the Manager agree that it would be beneficial to work together on communicating the benefits of this Agreement to the public and shall work collaboratively in all communications to the public about this Agreement.

#### **15.15 Additional Services and Locations**

The City reserves the right to request additional services relating to this Agreement from the Manager when approved by the Parties. The Manager shall provide such additional services as may become necessary. The City reserves the right to unilaterally add or delete services at its sole option as it may deem necessary or in the best interests of the City. In such case, the Manager will be required to provide services pursuant to this Agreement in accordance with the terms, conditions and specifications, and as set forth in an amendment approved by the Parties.



**15.16 No Waiver of Right to Enforce**

The waiver of any breach or any term covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or any subsequent breach of the same or any other term, covenant or condition herein contained. No covenant, term, or condition shall be deemed to have been waived, unless such waiver be in writing. Nor shall there be any accord and satisfaction unless expressed in writing and signed by both the City and the Manager.

**15.17 Time of Essence**

The Parties expressly agree that time is of the essence in the performance of this Agreement and the failure to complete the performance within the time specified, or within a reasonable time if no time is specified herein, shall relieve the Parties of any obligation to accept such performance. The Marina Services shall be performed in a timely manner as specified in the City's RFP.

**15.18 Counterpart Execution**

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

*[Signature Page Follows]*

**IN WITNESS WHEREOF**, this Agreement has been executed by duly authorized representative of the Parties hereto on the day, month and year first above written.

**THE CORPORATION OF THE CITY OF PENTICTON**

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

Title:

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

Title:

**PENTICTON YACHT CLUB**

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

Title:

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

Title:

**SCHEDULE 1.1(XV)**  
**FINANCIAL PLAN**

**SCHEDULE 1.1(XX)**  
**FORESHORE LICENSE OF OCCUPATION**

**SCHEDULE 1.1(XXVIII)**  
**LEASED / LICENSED MARINA PROPERTY**

**SCHEDULE 1.1(XXIX)**  
**MAINTENANCE PLAN**

**SCHEDULE 1.1(XXXII)**  
**MARINA PROPERTY**

**SCHEDULE 1.1(xxxiv)**  
**MARKETING PLAN**



**SCHEDULE 1.1(XL)**  
**OPERATIONS PLAN**

**SCHEDULE 2.4**  
**MARINA SERVICES**

**SCHEDULE 3.2**  
**CAPITAL EXPENDITURE COMMITMENT**

**Skaha Lake Park Marina**

**Management Operating Agreement**

**between**

**The Corporation of the City of Penticton**

**(the “City”)**

**and**

**Penticton Yacht Club**

**(the “Manager”)**

## TABLE OF CONTENTS

<b>ARTICLE 1 DEFINITIONS .....</b>	<b>1</b>
1.1 Definitions .....	1
1.2 Interpretation .....	8
<b>ARTICLE 2 MANAGEMENT AND OPERATION OF THE MARINA .....</b>	<b>8</b>
2.1 Structure and governance of the Manager .....	8
2.2 Core Responsibilities of Manager .....	9
2.3 Term .....	9
2.4 Marina Services to be Provided .....	9
2.5 As-Is Basis .....	10
2.6 Standard of Care .....	10
2.7 Marina Rates .....	10
2.8 Compliance Requirements .....	11
2.9 Use .....	11
2.10 Independent Contractor .....	11
2.11 Foreshore License of Occupation and Foreshore Lease .....	11
2.12 Availability of the Marina .....	12
2.13 Restaurant .....	12
2.14 Landscaping .....	13
2.15 Repair and Maintenance .....	13
2.16 Maintenance by the Manager .....	13
2.17 Repair According to Notice .....	13
2.18 Alterations .....	14
2.19 Environmental Protection .....	14
2.20 Supporting Local Use .....	15
2.21 Collaboration with First Nations .....	15
2.22 Signs .....	15
2.23 Continued Use of Pathways .....	16
2.24 Conditions of Property .....	16
2.25 Service and Training .....	16
2.26 Marina Safety and Security .....	16
2.27 Emergency Contact .....	16
2.28 Approvals .....	17
2.29 Manager's Responsibility for its Contractors .....	17
2.30 Compliance with Laws .....	17
2.31 Notice of Non-Compliance .....	17
<b>ARTICLE 3 OPERATING FEE AND CAPITAL COMMITMENTS .....</b>	<b>17</b>
3.1 Operating Fee .....	17
3.2 Capital Expenditure Commitments .....	18
3.3 Foreshore Lease / License Rent .....	18
3.4 Taxes, Utilities and Other Fees .....	19
3.5 No Set-Off .....	20

<b>ARTICLE 4 THE CITY’S RIGHTS AND OBLIGATIONS .....</b>	<b>20</b>
4.1 Quiet Enjoyment .....	20
4.2 City Approval .....	20
4.3 Duties of City .....	21
4.4 Public Emergencies .....	21
4.5 Ownership of Improvements .....	21
4.6 Rights Reserved to the City .....	21
<b>ARTICLE 5 INSPECTIONS AND MONITORING .....</b>	<b>21</b>
5.1 Manager’s Obligations .....	21
5.2 Rolling Business Plans .....	22
5.3 Periodic Performance Review.....	22
5.4 Inspections and Monitoring .....	22
5.5 Rectifications or Deficiencies .....	22
5.6 Failure to Rectify .....	22
<b>ARTICLE 6 FINANCIAL AND OTHER REPORTING REQUIREMENTS .....</b>	<b>23</b>
6.1 Annual Reports .....	23
6.2 Immediate Reporting of Safety and Environmental Incidents .....	23
6.3 Financial Statements and Reporting .....	23
<b>ARTICLE 7 INSURANCE .....</b>	<b>24</b>
7.1 Insurance .....	24
7.2 Waiver of Subrogation .....	25
7.3 Loss Deductible Clause .....	25
7.4 Required Changes in Coverage and Amounts of Coverage .....	25
7.5 Replacement Required .....	26
7.6 Termination of Insurance .....	26
7.7 Certificates of Insurance .....	26
7.8 Obligations Survive .....	26
<b>ARTICLE 8 CONSTRUCTION LETTER OF CREDIT REQUIREMENTS .....</b>	<b>26</b>
8.1 Construction Letter of Credit .....	26
8.2 Release of Construction Letter of Credit .....	27
<b>ARTICLE 9 FORCE MAJEURE.....</b>	<b>27</b>
9.1 No Breach of Contract .....	27
9.2 Measures to be Taken .....	27
9.3 Extension of Time .....	27
9.4 Consultation .....	28
9.5 Termination.....	28
<b>ARTICLE 10 UNFORESEEN CHANGE OF CIRCUMSTANCES .....</b>	<b>28</b>
10.1 Unforeseen Change of Circumstances .....	28
<b>ARTICLE 11 TERMINATION.....</b>	<b>28</b>
11.1 Termination by the City for Manager Event of Default .....	28

11.2	Termination by the Manager for City Event of Default .....	30
11.3	Termination Without Prejudice .....	30
11.4	Recuperation by the City .....	30
11.5	Renunciation .....	30
11.6	Notice of Intention to Terminate .....	31
11.7	Notice of Termination .....	31
11.8	Waiver with respect to re-entry .....	31
11.9	Re-Entry and Damages .....	31
11.10	Remedies of the City are Cumulative .....	32
11.11	Payment of City Expenses .....	32
<b>ARTICLE 12</b>	<b>SURRENDER AND HANDBACK .....</b>	<b>32</b>
12.1	Handback Date .....	32
12.2	Handback Requirements .....	32
12.3	Inspection prior to Handback .....	32
12.4	Handback Procedure .....	33
12.5	Scope of Handback .....	33
12.6	Transfer of Insurance and Contractor Warranties .....	33
12.7	Technology Transfer .....	33
12.8	Training City Personnel .....	33
12.9	Cancellation of Contracts, Assignment .....	34
12.10	Removal of Objects Owned by the Manager .....	34
12.11	Effect of Handback .....	34
12.12	Overholding .....	34
12.13	Penticton's Sign .....	34
12.14	Inspection .....	35
12.15	Remedy of Defects after the Handback Date .....	35
<b>ARTICLE 13</b>	<b>LIABILITY AND INDEMNIFICATION .....</b>	<b>35</b>
13.1	Indemnification by the City .....	35
13.2	Indemnification by the Manager .....	36
13.3	Environmental Damage .....	37
13.4	Indemnification Procedure: Third Party Claims .....	37
13.5	Interest .....	39
13.6	Exclusive Remedy .....	39
13.7	Procedures for Indemnification - Direct Claims .....	40
13.8	Liability for Information Provided by the City .....	40
13.9	Survival .....	40
<b>ARTICLE 14</b>	<b>DISPUTE RESOLUTION .....</b>	<b>40</b>
14.1	Amicable Settlement .....	40
14.2	Mediation Committee .....	40
14.3	Arbitration .....	41
14.4	Costs of Dispute Resolution .....	41
14.5	Survival .....	41

<b>ARTICLE 15 MISCELLANEOUS PROVISIONS .....</b>	<b>41</b>
15.1 Representations and Warranties .....	41
15.2 Financial Resources .....	41
15.3 Assignment .....	42
15.4 Primacy of This Agreement.....	42
15.5 Variations in Writing .....	42
15.6 Entire Agreement .....	42
15.7 Severability .....	43
15.8 Non-Waiver.....	43
15.9 Interest.....	43
15.10 Notices.....	43
15.11 Applicable Law.....	44
15.12 Non-Exclusive Contract .....	44
15.13 Legal Costs Associated with This Agreement.....	44
15.14 Communications to the Public .....	44
15.15 Additional Services and Locations .....	44
15.16 No Waiver of Right to Enforce .....	45
15.17 Time of Essence .....	45
15.18 Counterpart Execution .....	45



## SKAHA LAKE PARK MARINA

### MANAGEMENT OPERATING AGREEMENT

**THIS AGREEMENT** (the “**Agreement**”) is dated as of April 1, 2022 between the Corporation of the City of Penticton, a municipal corporation under the laws of British Columbia (the “**City**”) and the Penticton Yacht Club (Inc. No. S0012072 (the “**Manager**”), a society established under the *Societies Act* British Columbia.

#### RECITALS

- A. The City owns the Marina located on the Marina Property;
- B. The City wishes to engage the Manager to manage, operate and maintain the Marina and the Marina Property, and to fund and manage capital upgrades, all in accordance with the terms and conditions of this Agreement;
- C. This Agreement enables the City to rely on the Manager to fund the operation and maintenance of the Marina, while providing the City with a share of revenues and with the influence and controls necessary to ensure that the City’s requirements and standards are met and that the public interest is served and protected;
- D. This Agreement also enables the City to rely on private funding to support capital upgrades to the Marina while protecting public ownership; thereby aligning with the City’s *Parkland Protection and Use Policy*;
- E. The Manager has committed to implement a plan for capital improvements, enhanced amenities and efficient operations, plus greater alignment of the Marina with the overarching strategic plan of the City; and
- F. The City received a community mandate in the Spring 2021 by-election to enter into a long term agreement for the operation and financing of the Marina by a private sector operator;

NOW, THEREFORE, in consideration for the mutual covenants herein contained, the Manager and City agree as follows:

### ARTICLE 1 DEFINITIONS

#### 1.1 Definitions

The following terms have the following meanings:

- (i) “**Applicable Regulations**” means all laws, regulations, decrees, rules, administrative circulars and policies applicable to the Marina and the Marina Property, including to all operations and services in the Marina, whether

applicable at the time of execution of this Agreement or at anytime during the Term, whether of municipal, regional, provincial or national origin;

- (ii) **“Business Plans”** means, collectively, the Operations Plan, the Marketing Plan, the Financial Plan and the Maintenance Plan;
- (iii) **“Capital Commitments”** means the capital expenditure commitments of the Manager made pursuant to Section 3.2;
- (iv) **“Capital Improvements”** means the upgrades, enhancements and improvements to the Marina, as set forth in the Design and Construction Plan; including, without limitation, further upgrading of slips and moorage; renewal or replacement of the Marina building and construction and equipping of the Restaurant;
- (v) **“Capital Maintenance Plan”** means the Manager’s Capital Maintenance Plan, as approved by the City;
- (vi) **“City Indemnified Persons”** has the meaning ascribed to it in Section 13.2;
- (vii) **“Commencement Date”** means April 1, 2022;
- (viii) **“Community Charter”** means the *Community Charter of the City of Penticton*;
- (ix) **“Construction Letter of Credit”** means a letter of credit obtained by the Restaurant Construction Contractor in favour of the Restaurant Owner and the City in an initial amount of equal to 25% of the construction cost value;
- (x) **“Consumer Price Index”** mean the Consumer Price Index for all-items for British Columbia (or any index published in substitution for the Consumer Price Index or any other replacement index designated by the City acting reasonably, if it is no longer published) published by Statistics Canada (or by any successor thereof or any governmental agency including a Provincial agency);
- (xi) **“Change of Control”** means, in respect of a corporate entity, the occurrence of any of the following events: (i) an acquisition by another entity by means of any transaction or series of related transactions (including, without limitation, any share sale, reorganization, merger or consolidation); (ii) a sale of all or substantially all of an entity’s assets; (iii) any change in the entity’s ownership resulting in any person or company, directly or indirectly, becoming the beneficial owner of greater than 50% of the voting shares of the entity, or the rights to acquire such shares; (iv) a change in ownership of the entity resulting in the acquirer’s ability to elect more than 50% of the board of directors of the entity; or (v) a change in management of the entity;

- (xii) **"Damages"** has the meaning ascribed to it in Section 13.1;
- (xiii) **"Design and Construction Plan"** means the Manager's detailed design and construction design for the Capital Improvements (including the materials to be used, locations, where applicable, and decoration and designs of the Marina), as approved by the City;
- (xiv) **"Environmental Laws"** means all applicable federal, provincial, municipal or local laws, statutes, regulations or ordinances, as they may be amended from time to time after the Commencement Date relating to the environment, occupational safety or the transportation or regulation of Hazardous Substances, and includes any judgments, orders, notices, of offense, or other notices, decrees, codes, rules, instructions, policies, guidelines, guides, authorizations, approvals, permits and licenses, issued by any governmental authority having jurisdiction;
- (xv) **"Financial Plan"** means a detailed 5-year pro forma income statement (including cash flow statements and sources of income) showing projected revenues and operating expenses of the Marina; identifying key data sources, assumptions, and financial and operational triggers; and a detailed and descriptive human resources plan including staffing levels for full-time, part-time, and seasonal employees and attached as Schedule 1.1(xv);
- (xvi) **"Force Majeure"** means an event which is beyond the reasonable control of a Party, and which makes a Party's performance of its obligations hereunder impossible or so impracticable as reasonably to be considered impossible in the circumstances, and includes, but is not limited to, war, riots, civil disorder, pandemic, earthquake, fire, explosion, storm, flood or other adverse weather conditions, strikes, lockouts or other industrial action (except where such strikes, lockouts or other industrial action are within the power of the Party invoking Force Majeure to prevent) or confiscation by government agencies. Force Majeure shall not include (i) any event which is caused by the negligence or intentional action of a Party or such Party's consultants, agents or employees, nor (ii) any event which a diligent Party could reasonably have been expected to both (A) take into account at the time of the execution of this Agreement and (B) avoid or overcome in the carrying out of its obligations hereunder. Force Majeure shall not include insufficiency of funds or failure to make any payment required under this Agreement;
- (xvii) **"Foreshore Lease"** means a lease being negotiated between the Province of British Columbia and the City governing the Leased / Licensed Marina Property; and provided those negotiations are successful, to be executed on or before the expiration, as may be extended, of the Foreshore License of Occupation;

- (xviii) **“Foreshore Sub-Lease”** means the Sub-Lease to be granted by the City to the Manager to use and occupy the Leased / Licensed Marina Property during the Term in the event that the Foreshore Lease is successfully negotiated;
- (xix) **“Foreshore Lease / License Rent”** means the occupancy charge or rent set out in Section 3.3, as such occupancy charge or rent may be increased by the Province from time to time;
- (xx) **“Foreshore License of Occupation”** means the existing Foreshore License of Occupation attached hereto as Schedule 1.1(xx), granted by the Province of British Columbia to the City governing the Leased / Licensed Marina Property, and which is expected to be either extended or replaced by the Foreshore Lease on or before its expiry;
- (xxi) **“Foreshore Sub-License of Occupation”** means the Sub-License of Occupation granted by the City to the Manager to use and occupy the Leased / Licensed Marina Property during the Term;
- (xxii) **“Handback Assets”** means all buildings, fixtures and improvements which are part of the Marina or located on the Marina Property whether existing at the time of this Agreement or built, installed or constructed by the Manager and to be returned to the City under Article 12;
- (xxiii) **“Handback Date”** means March 31, 2047;
- (xxiv) **“Handback Requirements”** shall have the meaning ascribed to it in Section 12.2;
- (xxv) **“Hazardous Substance(s)”** means any substances that are defined or regulated as being waste, contaminants, pollutants, dangerous substances, industrial waste, special waste, toxic substances, hazardous waste, hazardous material or hazardous substance whether or not defined as such or pursuant to any law, regulation or order and without restricting any of the foregoing includes any potentially dangerous substance, corrosive substance, flammable material, explosive material, radioactive material and any other substance or material that when released into the natural environment is known to be likely to cause at some immediate or future time, material harm, adverse impact or degradation to the natural environment or material risk to human health;
- (xxvi) **“Indemnified Person”** has the meaning ascribed to it in Section 13.4(a);
- (xxvii) **“Indemnifying Party”** has the meaning ascribed to it in Section 13.4(a);
- (xxviii) **“Leased / Licensed Marina Property”** means the foreshore area outlined on Schedule 1.1(xxviii) attached hereto held by Her Majesty the Queen in Right of the Province of British Columbia and currently licensed to the City

pursuant to the Foreshore License of Occupation (expiring in 2026) and thereafter to be licensed pursuant to an extension of the Foreshore License of Occupation or leased pursuant to the Foreshore Lease; and all improvements thereon;

- (xxix) **“Maintenance Plan”** means the Manager’s detailed maintenance plans and standards for regular routine and annual maintenance, frequency of regular maintenance, replacement schedule and budget; and including a detailed capital renewal plan demonstrating how Marina infrastructure will be renewed to ensure that it remains at an appropriate standard and condition at the end of the Term, all as approved by the City and attached as Schedule 1.1(xxix);
- (xxx) **“Manager Indemnified Persons”** has the meaning ascribed to it in Section 13.1;
- (xxxi) **“Marina”** means the Skaha Lake Marina;
- (xxxii) **“Marina Property”** means the property located at 3895 Lakeside Road, , Penticton, BC, including approximately 2739 m<sup>3</sup> of City owned land and approximately 10,500 m<sup>3</sup> of Provincial lands located west of the high water mark (and legally described as Lot 1 District Lot 189 Similkameen Division Yale District Plan EPP50612, PID: 029-633-818); including the Owned Marina Property and the Leased / Licensed Marina Property; the boundaries of which are shown on the map attached as Schedule 1.1(xxviii);
- (xxxiii) **“Marina Services”** means the operation and maintenance of the Marina and the food and beverage services and associated improvements; including the services described in Section 2.4, and as more particularly detailed in the RFP;
- (xxxiv) **“Marketing Plan”** means the Manager’s Marketing Plan, as approved by the City; which plan shall set forth a detailed marketing plan and attached as Schedule 1.1(xxxiv);
- (xxxv) **“Notice of Intention to Terminate”** means the notice contemplated by Section 11.6;
- (xxxvi) **“Notice of Termination”** means a notice issued in accordance with Section 11.7;
- (xxxvii) **“OCP Bylaw”** means the City’s Official Community Plan Bylaw 2002-2020;
- (xxxviii) **“Offsite Storage Facility”** means a fenced offsite boat storage and maintenance facility, with valet service, located within Penticton, and possibly also including heated indoor storage;

- (xxxix) **“Operating Fee”** means the operating fee as further described in Section 3.1;
- (xl) **“Operations Plan”** means the Manager’s Operations Plan, as approved by the City; which plan shall set forth a detailed operations plan and minimum standards for quality of service; and attached as Schedule 1.1(xl);
- (xli) **“Owned Marina Property”** means the portion of the Marina Property owned by the City;
- (xlii) **“Owned Marina Property License of Occupation”** means the license of occupation for the Owned Marina Property granted by the City to the Manager;
- (xlili) **“Parks Bylaw”** means the City’s *Parks Dedication Bylaw No. 2018-37*;
- (xliv) **“Prime Rate”** means for any day, the annual rate of interest equal to the rate which the City’s principal bank establishes as the reference rate of interest to determine interest rates it will charge on that day for commercial loans in Canadian dollars made to its customers in British Columbia and which it refers to as its “prime rate of interest”;
- (xlv) **“Prudent Industry Practices”** means practices, methods, and acts engaged in or approved by competent and reliable operators of facilities similar to the Marina that, from time to time, in the exercise of a reasonable judgment in light of the facts known or that reasonably should be known at the time a decision is made, would be expected to accomplish the desired result in a manner consistent with Applicable Regulation, and the requirements of reliability, economy, expedition, safety, and environmental protection. With respect to the Marina, Prudent Industry Practice shall include, but shall not be limited to, taking reasonable steps to ensure that:
1. Adequate facilities, equipment, materials, resources and supplies are available to meet the needs of the operation of the Marina under normal conditions and reasonably anticipated abnormal conditions.
  2. Sufficient operating personnel are available and are adequately experienced and trained to operate the Marina properly, efficiently and within the relevant guidelines and specifications issued by the manufacturer of any equipment or machinery used by them and are capable of responding to emergency conditions.
  3. Preventive, routine and non-routine maintenance and repairs are performed on a basis that ensures reliable long-term and safe operation, and are performed by knowledgeable, trained and experienced personnel utilizing proper equipment, tools, and procedures.

4. All industry guidelines for quality services and operations are respected and followed.
  5. All Applicable Regulations are complied with by the Manager;
- (xlvi) **“Qualified Independent Engineer”** means a qualified independent consulting engineer appointed by the City pursuant to Section 5.4;
  - (xlvii) **“Restaurant”** means the licensed destination family-oriented brew pub style restaurant to be constructed by the Restaurant Operator in the Marina;
  - (xlviii) **“Restaurant Construction Agreement”** means a restaurant construction agreement between the Restaurant Operator and the Restaurant Construction Contractor;
  - (xlix) **“Restaurant Construction Contractor”** means Greyback Construction Ltd. (Matt Kenyon);
  - (l) **“Restaurant Management and Operating Agreement”** means a construction, management and operating agreement between the Manager and the Restaurant Operator;
  - (li) **“Restaurant Operator”** means Sylvia Lake Holdings (David Prystay) or such other reputable and financially sound restaurant operator as the City may approve;
  - (lii) **“RFP”** means the City’s Request for Proposals dated September 8, 2021 in respect of which the Manager was the successful bidder pursuant to the City’s procurement process;
  - (liii) **“Signs”** shall have the meaning ascribed to it in Section 2.22;
  - (liv) **“Skaha Lake East Park Plan”** means the City’s development plan for Skaha Lake East Park as approved by City Council on March 16, 2021 and as may be amended or revised;
  - (lv) **“Skaha Strategic Planning Committee”** means a committee established by the Manager to encourage and facilitate input from and liaison with the City, slip holders and other users of the Marina (such as dragon boaters, kayakers, paddle boaters, kite boarders, etc.), local business and tourism groups and local Indigenous groups; and whose membership will include representatives from the City, the Chamber of Commerce, Tourism Penticton, other local business, tourism and marketing agencies and local First Nations;
  - (lvi) **“Term”** shall have the meaning ascribed to it in Section 2.3;
  - (lvii) **“Third Party Claim”** has the meaning ascribed to it in Section 13.4;

- (lviii) **“Unforeseen Change in Circumstances”** means an unforeseen change in circumstances as defined in Section 10.1;
- (lix) **“Utilities”** means water lines, sanitary sewer lines, storm sewer lines, electrical lines, telephone lines cable TV lines, WIFI/fiber optic lines and gas lines; and
- (lx) **“Zoning Bylaw”** means the City’s Zoning Bylaw 2011-23.

## 1.2 Interpretation

- (a) The Schedules to this Agreement shall form an integral part hereof and references to Schedules shall be to Schedules to this Agreement unless otherwise stated.
- (b) The headings of Sections to this Agreement are inserted for convenience of reference only and shall not in any way affect the interpretation of this Agreement.
- (c) References to a "statute" includes every regulation made pursuant thereto, all amendments to the statute or to any such regulation enforced from time to time and any statute or regulation that supplements or supersedes such statute or any such regulation.
- (d) References to any party or person referred to in this Agreement include references to its respective successors and permitted assignees.
- (e) The words "include", "includes", and "including" shall at all times be construed as if followed by the words "without limitation".
- (f) References to days, weeks, months and years are references to days, weeks, months and years of the Gregorian calendar.
- (g) \$ means the lawful currency of Canada.

## ARTICLE 2 MANAGEMENT AND OPERATION OF THE MARINA

### 2.1 Structure and governance of the Manager

- (a) The Manager is a not-for-profit community organization organized as a society with the purpose of ensuring that the Penticton Yacht Club, and now also the Marina, meet the needs of its users.
- (b) The Penticton Yacht Club board of directors will oversee the build out a governance structure for the Marina that has the following key elements:



- (i) an elected board of directors chosen from the membership and community and comprised of individuals possessing the key strategic, leadership and governance skills required for an effective organization, and liaisons to each of the key City communities such as parks, economic development and tourism;
- (ii) the Skaha Strategic Planning Committee to ensure that activities of the Manager are aligned with the needs of the City, users of the Marina and the community; which committee shall at all times include a representative of the City;
- (iii) existing management of the Penticton Yacht Club Okanagan Lake Marina will extend its functions and resources to manage the functional operational areas of the Marina;
- (iv) the general manager of the Okanagan Lake Marina will oversee a manager or supervisor on site at the Marina; and
- (v) staff will be engaged for the day-to-day operation of the Marina.

## **2.2 Core Responsibilities of Manager**

The Manager shall be responsible for the management, operation and maintenance of the Marina and the Marina Property, and for provision of the Marina Services, throughout the Term at its own cost and risk. Subject to this Agreement, the Manager shall have the authority to fully and completely supervise, direct and engage in the operation and maintenance of the Marina and to make day-to-day decisions in all matters associated or related or ancillary to the operation and the maintenance of the Marina, including boat slip rentals and dry-dock storage, retail sales of marine supplies, gas and sundries, and operation of the Restaurant and parking lot. The City shall execute such documents as the Manager and City, in their reasonable judgment, deem necessary or advisable for the Manager to carry out its management of the Marina.

## **2.3 Term**

Subject to the terms this Agreement, the City hereby engages the Manager, as manager and operator, to manage, operate, and maintain the Marina and the Marina Property; and the Manager hereby agrees to manage, operate, and maintain the Marina and the Marina Property for a term of 25 years commencing on 12:01 a.m. on the Commencement Date and ending at midnight on the Handback Date (the “**Term**”).

## **2.4 Marina Services to be Provided**

The Marina Services to be provided by the Manager, as more particularly described in the RFP and in this Schedule 2.4, include the following:

- (a) short-term and long-term moorage; both on water and dry dock storage, including provision of a fire suppression system;

- (b) marina repairs to support Marina use;
- (c) operation of a gas dock with fuel sales and boat refueling; including a small retail area for marine items most commonly required by boaters;
- (d) watercraft and equipment rentals;
- (e) operation of a licensed restaurant;
- (f) offsite storage and maintenance facility, together with a valet service; and
- (g) appropriate parking to accommodate operations.

## **2.5 As-Is Basis**

Beginning on the Commencement Date, the Manager, having inspected the Marina and Marina Property prior to execution of this Agreement, shall assume possession of and responsibility for the Marina. The Manager acknowledges and agrees that it is taking over the management of the Marina and occupancy of the Marina Property on an “as-is” basis, and the City makes no representations or warranties as to the suitability of the Marina or the Marina Property for the intended use.

## **2.6 Standard of Care**

The Manager will manage and operate the Marina as a first class public marina and recreation facility offering dockage and other marina related services for the use of the general public. The Manager will perform all duties assigned in a careful, diligent, efficient, prudent, and vigilant manner. The Manager shall perform the Services in a manner as would a reasonably competent and diligent operator of Marina properties and shall ensure that, throughout the Term, the Marina and the Marina Property are at all times suitable for use by the public and are operated and maintained safely and in an environmentally responsible manner. The Manager shall carry on its business and affairs with due diligence and efficiency and in accordance with sound commercial standards and practices.

## **2.7 Marina Rates**

The Manager shall review marina rates in the Okanagan Valley on an annual basis and ensure that the rates that the Manager is charging at the Marina are competitive with those charged by the equivalent facilities in the Okanagan Valley. These reviews, as well as the current year's proposed rates, are to be shared and discussed, during the Skaha Strategic Planning Group meeting with the City prior to the final rates being set for each year of the Term by February 1<sup>st</sup> of each year; provided, however, that the Manager shall have the final determination of the rates.

## 2.8 Compliance Requirements

The Manager agrees to provide the City with Marina Services and to manage, operate and maintain the Marina and the Marina property at all times fully in compliance with:

- (a) this Agreement;
- (b) Prudent Industry Practices;
- (c) Applicable Regulations;
- (d) the Business Plans;
- (e) the OCP, including without limitation, obtaining a Development Permit to ensure compliance with the Commercial and Mixed Use Development Permit Area requirements of the OCP Bylaw; including having regard to the fact that large portions of the Marina Property are within the Riparian Development Permit Area of the OCP Bylaw;
- (f) the Skaha Lake East Park Plan;
- (g) the *Community Charter*; including, without limitation, the requirement that the Manager's proposed use of the park land be consistent with park purposes as required by section 30(5) of *The Community Charter*;
- (h) the Parks Bylaw;
- (i) the Zoning Bylaw; and
- (j) any other rules and requirements as the City may reasonable impose.

## 2.9 Use

The Manager shall not use the Marina Property and all improvements thereon for any purpose other than for the operation of the Marina and the related gas bar, retail shop, restaurant and parking lot, without the consent in writing from the City, which consent may be arbitrarily withheld in the sole discretion of the City.

## 2.10 Independent Contractor

The Manager is and shall remain an independent contractor and is neither agent, employee, partner nor joint venturer of the City.

## 2.11 Foreshore License of Occupation and Foreshore Lease

The Manager acknowledges that the City currently holds the Leased / Licensed Marina Property pursuant to the Foreshore License of Occupation and agrees, concurrently herewith, to enter into the Foreshore Sub-License of Occupation with the City in form and substance acceptable to the City, acting reasonably for a term equal to the Term; and

providing, among other things, that the Manager, as sub-licensee, shall perform all of the obligations of the City under the Foreshore License of Occupation as may be renewed or extended. The Manager acknowledges that the City is currently in discussions with the Province to replace the Foreshore License with the Foreshore Lease; and that if those discussions are successful, the Foreshore Licence will be replaced with the Foreshore Lease; at which point the Parties will enter into the Foreshore Sub-Lease. The Manager agrees to payment of the Foreshore Lease / License Rent, and to be bound by the terms of the Foreshore License of Occupation Foreshore Lease, as applicable, as if it were a party to the Foreshore License of Occupation Foreshore Lease, as applicable, in place of the City. The Manager shall not do or omit to do anything which would cause the City to be in breach of its obligations under the Foreshore License of Occupation or Foreshore Lease, as applicable or that would jeopardize the City's tenure under the Foreshore License of Occupation or Foreshore Lease, as applicable.

## **2.12 Availability of the Marina**

During the Term, the Manager shall ensure that the Marina is available and open to users and that the service offered to the public at the Marina is convenient and safe at all times in all weather conditions, provided that the Manager may require that users of moorage services become members of the Penticton Yacht Club. The Marina shall be open to the public at least between March 1<sup>st</sup> and November 30<sup>th</sup> (inclusive) for moorage and at least between April 1 and October 31<sup>t</sup> (inclusive) for storage during each year of the Term. The daily hours of operation of the Marina shall be at a minimum from **9:00 a.m. to 7:00 p.m.** daily during the months that the Marina is open and the Restaurant shall be open all year for seven days a week for breakfast, lunch and dinner. These hours of operation may be adjusted to meet the demands of the Marina and the Restaurant.

## **2.13 Restaurant**

The Manager shall enter into a Restaurant Management and Operating Agreement with the Restaurant Operator, which agreement shall include an up to \$2,500,000 capital commitment from the Restaurant Operator to construct and equip the Restaurant as well as a covenant of the Restaurant Operator to contract the Restaurant Construction Contractor to construct the Restaurant pursuant to the Restaurant Construction Agreement and to deliver the Construction Letter of Credit. The Restaurant Management and Operation Agreement, the Restaurant Construction Agreement and the Construction Agreement shall each be provided to the City before execution for review and shall be in form and substance acceptable to the City, acting in a commercially reasonable manner. Construction of the Restaurant shall commence on approximately October 1, 2022 and is scheduled for completion in April or May 2023. Prior to construction, detailed conceptual and architectural drawings shall be presented to the City for comment and approval. If this Agreement is terminated by the City, the Restaurant Operator will assign the Restaurant Management and Operating Agreement to the City and the City will assume the obligations (other than obligations arising from or related to matters arising before the assignment) and shall be entitled to the benefits of the Manager under such agreement.

## **2.14 Landscaping**

The Manager shall remove the fencing from the North side of the Marina Property and install shade trees and benches, and shall work with the City to connect a promenade through the Marina Property to the pathway in the City's park south of the Marina Property to access the park and parking.

## **2.15 Repair and Maintenance**

The Manager, at its own expense, will improve, repair and maintain the Marina and Marina Property and all improvements, appurtenances and equipment therein and thereon including, without limitation, repairing and maintaining all fuelling facilities, all plumbing, heating, and electrical systems, repairing and maintaining the roof, floors, foundations, bearing beams and the internal and external walls including all structural aspects thereof, replacing all broken windows and maintaining the landscaping of the Marina and the Marina Property, excepting from such standard of repair and maintenance reasonable wear and tear to the extent only that such reasonable wear and tear is not inconsistent with maintenance in good order and condition of the Marina and Marina Property generally. In this Section 2.15, "repair" will include replacement and renewals when necessary. The Manager will be responsible for all damage or destruction to the Marina and Marina Property and for promptly complying with all requests or orders of any applicable government authority with respect to upgrading of the Marina and Marina Property and for the investigation and remediation of any Hazardous Substance in, under or affecting the Marina and Marina Property.

## **2.16 Maintenance by the Manager**

The Manager covenants and agrees at its own expense to maintain the Marina Property and all improvements, appurtenances and equipment therein or thereon in accordance with all applicable building codes, bylaws, the laws and regulations of Canada, the laws and regulations of British Columbia and manufacturers specifications and using fully trained personnel. The Manager further covenants and agrees to promptly comply with all reasonable concerns and recommendations which the City may provide, but is under no obligation to do so, to the Manager in writing to ensure the safety and health of the boating public and related facilities as well as the aesthetic appearance of the Marina Property.

## **2.17 Repair According to Notice**

Without restricting the generality of Section 2.17, the Manager, promptly upon notice by the City, will make and do all repairs and maintenance as notified by the City in a good and workmanlike manner. If the Manager fails to repair or maintain within what the City considers to be a reasonable time, then the City may cause such repairs and maintenance to be undertaken (and may cause its representatives to enter on the Marina Property for such purpose). Should the City deem it necessary to undertake such repairs or maintenance, then the Manager will pay to the City a fee for supervision for carrying out the Manager's obligations an amount equal to ten percent (10%) of the cost of repairs or

maintenance carried out by the City, which amount will be in addition to the cost of such repairs or maintenance.

## **2.18 Alterations**

Notwithstanding anything to the contrary in this Agreement, the Manager will not make to or erect in the Marina Property any installations, alterations, additions or partitions without having received the prior written approval of the City to the plans and specifications and any variations or amendments thereof, such approval not to be unreasonably withheld, and all necessary approvals of any relevant statutory authority.

## **2.19 Environmental Protection**

- (a) In the performance of its obligations under this Agreement the Manager shall comply with all Environmental Laws and shall ensure that appropriate measures are taken to protect the environment of and around the Marina and the Marina Property from pollution, noise and other environmental impacts arising from its operations and other activities in accordance with any Applicable Regulations. At no time during the Term will the Manager carry on or permit or suffer to be carried on in or from the Marina Property or elsewhere surrounding the same anything which is noxious or offensive or which would constitute a public or private nuisance. The Manager will not cause any waste or damage to the Marina Property.
- (b) The Manager shall, as soon as reasonably practicable, notify the City in writing of:
  - (i) any enforcement, clean up, removal, litigation, or other governmental, regulatory, judicial, or administrative action instituted, contemplated, or threatened in respect of the land and/or buildings pursuant to any Environmental Laws, of which the Tenant is or becomes aware;
  - (ii) all claims, actions, orders, or investigations instituted, contemplated, or threatened by any third party relating to damage, contribution, cost recovery, compensation, loss, or injuries resulting from any Hazardous Substances on or released from, or any breach of the Environmental Laws on or in respect of, the Marina Property of which the Manager is or becomes aware; and
  - (iii) the release of any Hazardous Substance on or from the Marina Property or its discovery of any Hazardous Substances, or any occurrence or condition, on the Marina Property that could subject the City or the Manager to any fines, penalties, orders, or proceedings under any Environmental Laws.
- (c) If any Governmental Authority having jurisdiction shall order or require the removal or clean-up of any Hazardous Substances brought onto, used at or

released on the Marina Property or any adjacent property during the Term, including without limitation the soils or groundwater of the Marina Property or any adjacent property, by or due to the act or omission of the Manager, or any person for whom it is responsible, the Manager shall, at its own expense, prepare all necessary studies, plans and proposals, provide all bonds and other security required by such Governmental Authority having jurisdiction, and carry out the work ordered or required by such Governmental Authority having jurisdiction in compliance with all relevant laws and shall keep the City informed. All such Hazardous Substances shall remain the property of the Manager notwithstanding any rule of law or other provision of this to the contrary and notwithstanding the degree of their affixation to the Marina Property.

## **2.20 Supporting Local Use**

- (a) The Manager acknowledges that the Marina and the Marina Property are located on lands owned or leased by the City; and agrees to make the marine services generally available to residents of and visitors to the City at reasonably affordable prices. The Manager agrees to not restrict public access to the Marina Property or the Leased/Licensed Marina Property.
- (b) The Manager shall make two slips available at no cost for the Penticton Fire Department and two slips available at no cost for the Penticton Dragon Boat Society; each in suitable locations.

## **2.21 Collaboration with First Nations**

The Manager agrees to collaborate with the Penticton Indian Band and the City to develop opportunities for mutual benefit on Syilx Nation ancestral lands. Initially these opportunities will include an opportunity to locate the Offsite Storage in the industrial park on the channel parkway, and as well there would be opportunities for cultural activities and the incorporation of Indigenous design features on site at the Marina.

## **2.22 Signs**

The Manager will not erect, paint, display, place, affix or maintain or permit to be erected, painted, displayed, placed, affixed or maintained any sign, decoration, picture, lettering, symbol or notice of any nature or kind whatsoever (herein called “**Signs**”) either on the walls, fences or structures on the Marina Property that can be viewed from off such premises unless it is in conformance with City of Penticton Sign Regulation Bylaw 2013-17 and with the written mutual agreement of the City and the Manager. The Manager will cause any Signs to be maintained in a proper state of repair and will indemnify and save harmless the City from all personal injuries or property damage or loss to any person caused by the existence of any such Signs.

### **2.23 Continued Use of Pathways**

The Manager shall not impede or restrict the continued use, without charge, of the existing hard-surfaced pathways for general public pedestrian and cyclist purposes which run into or through a portion of the Marina Property, and including any future replacement of such pathways, for the Term.

### **2.24 Conditions of Property**

The Manager will not permit the Marina Property to become untidy or unsightly and will not permit waste or refuse to accumulate therein. The Manager shall not deposit on the Marina Property any earth, fill or other material for the purpose of filling in or raising the level of any part of the Marina Property or take any steps whatsoever to change the contour of the either of such premises without the prior written consent of the City, such consent not to be unreasonably withheld. The Manager will keep the Marina Property clean, landscaped and free from noxious weeds and brush growth at its expense; provided however that the Manager will not plant, prune or remove any trees, whether ornamental or fruit-bearing from the Marina property or adjacent park lands without the approval of the Penticton Parks Board. The Manager will be responsible for ensuring that the areas around all garbage and recycling bins on the Marina Property are kept neat and tidy at all times.

### **2.25 Service and Training**

The Manager shall throughout the Term provide employees, agents and any sub-tenant of the Manager with the level of training required, reasonably considering the position to be filled by the employee, agent or sub-tenant, to maintain and operate the Marina, gas bar and retail area, or restaurant, and parking lot and to assist the clientele and visitors to these facilities and the boating public in a safe, effective, responsive and courteous manner. The Manager shall keep records of such training and those records will be made available upon request for inspection by the City.

### **2.26 Marina Safety and Security**

The Manager shall ensure that its operations on the Marina comply with all applicable health and safety standards under all Applicable Regulations. The Manager shall be responsible for taking all necessary security measures on the Marina, including measures to exclude unauthorized access. The Manager's security agents shall wear or carry proof of identity and function when performing their duties. Notwithstanding any other provision of this Agreement the City shall have the right to close the Marina or any parts thereof, or take any other measure if, in the City's opinion, such closure or measure is necessary in an emergency case for the protection of the public.

### **2.27 Emergency Contact**

The Manager shall provide the City with the name and telephone number of a management person who will be on call at all times for emergencies or other matters related to the operations under this Agreement.



## **2.28 Approvals**

The Manager shall at its own cost make all necessary applications and carry out all other necessary acts at the requisite time and in requisite form to obtain and maintain such Approvals as may be necessary for the Manager to perform its obligations under this Agreement. The Manager shall procure all permits, licenses and approvals, for the operation and performance under this Agreement.

## **2.29 Manager's Responsibility for its Contractors**

For avoidance of doubt, the Manager shall be responsible for the acts or omissions of any and all of its contractors and sub-contractors, their employees and agents, as if such acts and omissions were the acts and omissions of the Manager. All contractors and sub-contractors engaged at the Marina shall be appropriately qualified and licensed (including business licenses) and all work shall be properly permitted.

## **2.30 Compliance with Laws**

The Manager, at its own expense, will promptly comply with all applicable requirements of all governmental, judicial and administrative authorities which relate, directly or indirectly to the use and occupation of the Marina Property and, without limiting the generality of the foregoing, including, all requirements pursuant to the statutes and regulations of the Province of British Columbia, all Environmental Laws, all bylaws of the City of Penticton, all applicable building codes and the requirements of all building permits issued in connection with the improvement, maintenance and operation of the intended facilities on the Marina Property.

## **2.31 Notice of Non-Compliance**

The Manager will deliver promptly to the City a copy of any notice, request, order, demand or claim of any nature, and any documentation ancillary thereto, pertaining to any actual or alleged failure by the Manager or others with regard to the Marina Property to comply with any common law obligation or any applicable requirement of any governmental, judicial and or administrative authorities which relate, directly or indirectly to the Marina Property, and including, without limiting the generality of the foregoing, any actual or alleged presence or discharge of any Hazardous Substance(s) on, under or affecting the Marina Property.

# **ARTICLE 3 OPERATING FEE AND CAPITAL COMMITMENTS**

## **3.1 Operating Fee**

The Manager agrees to pay the City the amount of \$45,000 plus GST annually for the right to manage and operate the Marina. Such payment shall be paid in twelve monthly instalments on the 1<sup>st</sup> of each month commencing on the Commencement Date and shall be prorated in the first and last years of operation. The level of the Operating Fee will be reviewed every five years and adjusted, having regard to Marina revenues and

expenditures, capital expenditures and capital commitments, net pre-tax profit and other relevant considerations. The Operating Fee shall increase annually, in an amount equal to the increase in the Consumer Price Index from the previous year. In the event this Agreement is terminated by either party, the Operating Fee shall be paid on a pro-rata basis for the partial year of operation.

### **3.2 Capital Expenditure Commitments**

- (a) The Manager has made the following capital expenditure commitments as more particularly detailed in Schedule 3.2:
  - (i) A total capital commitment directly from the Manager over the first five years of the Term plus an estimated \$20,000 put aside for an engineered fire suppression analysis along with an environmental survey and assessment. This includes an estimate of \$225,000 in the first two years of the Term for 445 feet of main dock way and an estimated \$40,000 for a fuel dock and fuel delivery system, each in the first two years of the Term;
  - (ii) An estimated \$100,000 to install an NRFS fire suppression system in the 3rd year of the Term; and an estimated \$100,000 in the fourth and fifth year of the Term to complete updated offices, meeting rooms and a members lounge that could be rented out for small private gatherings;
  - (iii) A total commitment from the Restaurant Operator of up to \$2,500,000.00 to revamp the existing Marina facility and the grounds surrounding the facility to construct the Restaurant;
  - (iv) Surpluses from the contributions in (a) and (b) above shall be retained in a capital reserve account, together with operating profits.
- (b) Throughout the Term, the Manager shall be solely responsible for funding all capital expenditures, whether involving maintenance or improvements; and the City shall not be required to contribute to the funding of any such capital expenditures.

### **3.3 Foreshore Lease / License Rent**

In addition to the Operating Fee and the Capital Commitments, the Manager shall pay to the City the Foreshore Lease / License Rent upon the following terms:

- (a) annual payments equal to the amount charged by the Province of British Columbia under the Foreshore License of Occupation (later to be replaced by the Foreshore Lease, as applicable);
- (b) the Manager shall manage and perform, at the cost and expense of the Manager, all of its obligations and the obligations of the City under the

Foreshore License of Occupation or Foreshore Lease, as applicable, and to exercise the tenants' interest under the Foreshore License of Occupation or Foreshore Lease, as applicable, in accordance with this Agreement;

- (c) the Manager will not do or omit to do any act on the Marina Property which would cause a breach of the City's and the Manager's obligations as tenants under the Foreshore License of Occupation or Foreshore Lease, as applicable; and
- (d) the Manager will not do, suffer or permit any act on the Marina Property which may in any manner, directly or indirectly, cause injury or damage to the Marina Property or which may be or become a nuisance to or interference with the owners, occupiers or users of adjoining lands or to the public, including the accumulation of rubbish or unused personal property of any kind.

With reference to (a) above, upon receipt from the Manager, the City will in turn remit to the Province of British Columbia the rent charged by the Province under the Foreshore License of Occupation or Foreshore Lease, as applicable.

### **3.4 Taxes, Utilities and Other Fees**

In addition to the Operating Fee, Capital Commitments, and Foreshore Lease / License Rent, the Manager shall pay, as and when due, to the authority or person to which the same are owing:

- (a) all taxes (including without limitation all goods and services tax), license fees, rates, duties and assessments imposed, assessed or levied by any lawful authority relating to:
  - (i) the business carried on in relation to the Marina and the use and occupancy of the Marina Property by the Manager;
  - (ii) the Foreshore License of Occupation or the Foreshore Lease, as applicable; and
  - (iii) personal property used and business and trade carried on by the Manager in relation to the Marina and other improvements owned or installed by or on behalf of the Manager in, on or affixed to the Marina Property.

whether any such taxes, license fees, rates, duties and assessments are payable by law by the Manager or by the City and whether or not same are allocated separately in respect of the Owned Marina Property and the Leased / Licensed Marina Property;

- (b) all charges, rates, levies and assessments imposed, assessed or levied by any lawful authority in respect of electricity, light, heat, power, water,

sanitary sewer, telephone, cable TV, internet and Utilities of whatsoever nature or kind (including works and services in connection therewith) used in or supplied to the Marina or the Marina Property and which shall be separately metered where possible with the cost of metering installation and utilities consumed by the Manager to be borne by the Manager; all Utility accounts shall be transferred into the name of the Manager as of the Commencement Date;

- (c) all license fees, permit fees, impact fees or inspection fees applicable to the Marina or the Marina Property or activities thereon; and
- (d) all property taxes as assessed by the British Columbia Assessment Authority (i) on the Marina Property and (ii) on Licensed /Leased Property; and as issued by the authority or person having jurisdiction and including without limiting the generality of the foregoing local improvement charges, school taxes, frontage taxes and all other special or extraordinary charges and whether or not same are allocated separately in respect of the Owned Marina Property and the Leased / Licensed Marina Property.

### **3.5 No Set-Off**

The Manager will pay to the City duly and punctually any and all Operating Fee, Capital Commitments, Foreshore Lease / License Rent and other taxes and fees as described in Section 3.4 above required to be paid by the Manager pursuant to this Agreement without any deduction, abatement or set-off whatsoever.

## **ARTICLE 4 THE CITY'S RIGHTS AND OBLIGATIONS**

### **4.1 Quiet Enjoyment**

From and after the Commencement Date, and throughout the Term, the City shall provide the Manager with quiet occupation of the Marina Property pursuant to the Owned Marina Property Licence of Occupation and the Foreshore Sub-License of Occupation.

If the Manager duly and punctually pays the Operating Fee, Capital Commitments, Foreshore Lease / License Rent and other taxes and fees as described in Section 3.4, and complies with its obligations under this Agreement, the Owned Marina Property License of Occupation and the Foreshore Sub-License of Occupation, the Manager will be entitled to peaceably possess and enjoy the Marina Property as provided herein during the Term without any unreasonable interruption or disturbance from the City.

### **4.2 City Approval**

The Manager agrees it will obtain prior written approval from the City prior to implementing changes on the following matters:

- (a) changes to the Business Plans;

- (b) any improvements or modifications to be constructed on the Marina property;
- (c) any uninstalled equipment requiring any building or facility modifications;
- (d) any use of the City's name; and
- (e) the decor of the Marina and all signs to be installed directed or displayed in, on, or in the vicinity of the Marina property and any changes thereto at any time during this Agreement.

#### **4.3 Duties of City**

The City shall cooperate with the Manager in the performance of its duties under this Agreement.

#### **4.4 Public Emergencies**

Before, during and after a public emergency, disaster, hurricane, tornado, flood, forest fire or other acts of God, that City shall have a "first priority" to the Marina Services and access to the Marina Property. It is vital and imperative that citizens are protected from any emergency situation that threatens public health and safety as determined by the City.

#### **4.5 Ownership of Improvements**

Upon the expiration of this Agreement, for any reason, all existing and any future buildings and all existing and future installed fixtures, equipment, improvements and appurtenances attached to or built into the Marina in such a manner as to become part of the freehold estate whether or not by the expense of the Manager, shall become and remain a part of and be surrendered with the Marina Property. Similarly, any furniture, furnishings, equipment or other articles of moveable personal property owned by the Manager and located on the Marina Property, and not removed by the Handback Date shall become the property of the City.

#### **4.6 Rights Reserved to the City**

All rights not specifically intended to the Manager by this Agreement are reserved to the City, and the designation of any particular remedy for the City without prejudice to any other relief available in law or equity and all such relief is reserved to the City.

### **ARTICLE 5 INSPECTIONS AND MONITORING**

#### **5.1 Manager's Obligations**

In providing the Marina Services, the Manager shall at all times operate the Marina in accordance with the Business Plans and maintain the Marina and the Marina Property in

accordance with the Maintenance Standards; each of which may be revised or updated by the City from time to time acting reasonably.

## **5.2 Rolling Business Plans**

On or before March 31<sup>st</sup> of each year, the Manager will prepare and provide updated 5 year Business Plans to the City for review and discussion. The first business plan will be required on or before March 31<sup>st</sup>, 2023, and every 5 years thereafter.

## **5.3 Periodic Performance Review**

Every three to five (3-5) years, at the election of the City, the City shall conduct a review of the Manager's performance under this Agreement and the City will provide the Manager with a performance report including suggestions for improvement and proposed changes or additions to the Business Plans, which recommendations shall be incorporated by the Manager into the Business Plans.

## **5.4 Inspections and Monitoring**

After the Commencement Date and until the end of the Term, the City or its representatives may enter and inspect the Marina and the Marina Property from time to time to ensure that the Manager's obligations in respect of operation and maintenance are being discharged in accordance with the terms of this Agreement and the Business Plans. If desired by the City, the City may involve a Qualified Independent Engineer in such inspections. At a minimum, the City will require regular fire inspections, annual walk throughs and inspections of the facility and the docks.

## **5.5 Rectifications or Deficiencies**

If any inspection by the City reveals that the Marina is not being operated or maintained in accordance with this Agreement and the Business Plans, the City shall give notice to the Manager of the default and specifying:

- (a) the works required to rectify the default; and
- (b) a reasonable period of time (having regard to the nature of the default and the extent of the works required) in which the Manager is to make good the default at its own cost.

## **5.6 Failure to Rectify**

If, at any time, the City serves notice under Section 5.5 and the Manager fails to rectify the default within the time period specified, then the City may (without prejudice to the any other right or remedy available to the City) itself take such steps as necessary to rectify the default or engage a third party to take such steps. The Manager shall reimburse the City for all reasonable costs so incurred.

## **ARTICLE 6 FINANCIAL AND OTHER REPORTING REQUIREMENTS**

### **6.1 Annual Reports**

The Manager shall submit an annual written report to the City containing such information as the City may reasonably request, which includes but is not limited to:

- (a) financial statements as further set out in Section 6.3 below.
- (b) operating statistics, together with historical comparison;
- (c) Design and Construction Plan status report;
- (d) insurance claims;
- (e) litigation;
- (f) safety and environmental incidents; and
- (g) customer service issues.

### **6.2 Immediate Reporting of Safety and Environmental Incidents**

The Manager shall immediately report all safety and environmental incidents to the City and shall maintain a record of claims and complaints received from users of the Marina. The Manager shall make available such register to the City on reasonable request.

### **6.3 Financial Statements and Reporting**

The Manager shall fully account for all aspects of its business by preparing financial statements and delivering them to the City as follows:

- (a) at the end of each financial year, and delivered within 90 days of the end of each financial year, and prepared in accordance with generally accepted accounting principles on a review engagement basis by a chartered professional accountant, financial statements (comprised of a statement of financial position, a statement of operations, and statement of changes in cash flow, including a comparison to budget prepared) that also include the gross revenue generated and all expenses incurred from all aspects of the development and operations on the Owned Marina Property and Leased / Licensed Marina Property including but not limited to a break-down of the following details:
  - (i) marina and slip rental revenue and expenses;
  - (ii) boat storage revenue and expenses
  - (iii) restaurant revenue and expenses;

- (iv) gas bar revenue and expenses;
  - (v) retail store revenue and expenses;
  - (vi) parking revenue and expenses; and
  - (vii) any other revenues or expenses not noted above.
- (b) on or before December 31<sup>st</sup> of each year, an annual budget for the upcoming year and a reconciliation to the prior year's annual budget;
  - (c) the Manager shall prepare for submission to the City such other information on the financial position of the Marina as the City may from time to time reasonably request to monitor compliance with the Applicable Regulations and with this Agreement; and
  - (d) Notwithstanding (a) above, financial statements will not be required in respect of the Restaurant and other sub-contracted services provided that the revenue received by the Manager in respect of each such service is recorded as a separate line item in the Manager's financial statements.

The Manager shall retain all records relating to this Agreement for a period of at least six (6) years. All financial records noted this Section 6.3 shall be subject to an annual audit by the City or its designate.

## **ARTICLE 7 INSURANCE**

### **7.1 Insurance**

The Manager, at its cost, will obtain and keep in force throughout the Term the following insurance policies (each of which shall name the City as an additional insured):

- (a) All risk replacement cost fire, earthquake and all other perils insurance, including the City as a named insured, of all buildings, structures and improvements located and subsequently constructed on the Marina Property, including extended coverage endorsement and water damage insurance (including, if applicable, sprinkler leakage) as well as all the Manager's property in or on the Marina Property, including, without limitation, its improvements, furniture, equipment, fittings, fixtures and stock-in-trade, in an amount adequate to cover fully any loss that the Manager or the City could sustain. Such coverage shall include a stated amount co-insurance clause;
- (b) comprehensive general liability insurance (including, without limitation, tenant's fire, legal liability and contractual liability to cover the responsibilities assumed under Section 13.2 and under this Section 7.1 hereof) against claims for personal injury, death, property loss and damage



arising out of or in connection with the business activities, use and operations of the Manager and whether occurring upon or in or about the Marina Property or as a result of the business activities, use and operations conducted therefrom and environmental damage coverage, all in an amount of not less than \$10,000,000.00 per occurrence or such other amount as the City may reasonably require from time to time. Such coverage shall contain no exclusions for host liquor liability;

- (c) business interruption insurance or proof of equipment breakdown coverage;
- (d) environmental impact and impairment liability insurance providing coverage for death, bodily injury, property loss and damage, remediation and all other losses arising out of or in connection with the business activities, use and occupation of the Marina Property in an amount of not less than \$5,000,000 per occurrence;
- (e) course of construction insurance from the start and through the course of any major improvements or renovations;
- (f) any other insurance required pursuant to the terms of the Foreshore License of Occupation, Foreshore Lease or Foreshore Sub-License of Occupation; and
- (g) such other insurance or increased insurance coverage as the City might reasonably require from time to time.

## **7.2 Waiver of Subrogation**

The Manager will ensure that the insurer waives its rights of subrogation, if any, against the City on each of the foregoing types of required insurance coverage.

## **7.3 Loss Deductible Clause**

The City will be exempt from, and in no way liable for, any sums of money that may represent a deductible in any insurance policy. The payment of such deductible will be the sole responsibility of the Manager.

## **7.4 Required Changes in Coverage and Amounts of Coverage**

The City may at any time require the Manager to increase the amount of coverage, change the terms of coverage, and provide additional or different types of coverage, as the City may deem necessary; provided that the changes or increase in coverage are consistent with such requirements for similar operations and businesses then operating within the City of Penticton area or are reasonable in light of prior claims made against Manager's policies. The Manager must comply with such requirements within 30 days after the City's demand. Any increase in costs associated with such changes will be the responsibility of the Manager.

### **7.5 Replacement Required**

The Manager will file replacement certificates 30 days prior to expiration or termination of the required insurance occurring prior to the acceptance of the work by the City. If such insurance lapses, the City expressly reserves the right to renew the insurance at Manager's expense.

### **7.6 Termination of Insurance**

The Manager may not cancel the insurance required by this Agreement until all services are completed, accepted by the City, and the Manager has received written notification from the City's risk manager that the Manager may cancel the insurance required by this Agreement and the date upon which the insurance may be cancelled.

### **7.7 Certificates of Insurance**

Manager shall cause its insurers or agents to provide the City with annual certificates of insurance evidencing the policies and endorsements listed above and the copies of said insurance must be acceptable to the City's risk manager. Failure by the Manager to obtain the insurance coverage or certificates of insurance required by this Article 7 shall not in any way relieve or limit the Manager's obligations and liabilities under any provision of this Agreement. If the Manager shall fail to procure or maintain any insurance required pursuant to this Article 7, then the City shall have the right to procure such insurance in accordance with the requirements of this Article 7 and the Manager shall reimburse the City for the costs of the same forthwith.

### **7.8 Obligations Survive**

The liabilities of the Manager under this Agreement will survive and not be terminated, reduced, or otherwise limited by any expiration or termination of insurance coverage. Neither approval nor failure to disapprove insurance furnished by the Manager will relieve the Manager or its sub-contractors from responsibility to provide insurance as required by this Agreement. Without qualification for the amount of insurance proceeds, the Manager covenants and agrees with the City that in the event of damage to or partial destruction of leasehold improvements, including any buildings or structures, the Manager, subject to the regulations and requirements of any governmental authority having jurisdiction, shall repair, replace or restore any part of the improvements, buildings or structures so destroyed.

## **ARTICLE 8 CONSTRUCTION LETTER OF CREDIT REQUIREMENTS**

### **8.1 Construction Letter of Credit**

The Manager shall cause the Restaurant Operator to obtain the Construction Letter of Credit from the Restaurant Construction Contractor guaranteeing the proper and timely performance of the Restaurant Construction Contractor's obligations in relation to the construction of the Restaurant issued by a financial institution acceptable to the

Restaurant Operator, Manager and the City, and valid until the completion of the Restaurant.

## **8.2 Release of Construction Letter of Credit**

The amount of the Construction Letter of Credit may be reduced to ten (10%) of the construction cost value once the building permit has been received. Following the completion of the Restaurant and the satisfaction of the Restaurant Construction Contractor's obligations under the Restaurant Construction Contract, unless there is any accrued liability under the Construction Letter of Credit, the City and the Manager shall undertake with due expedition such action as the Restaurant Operator or the Restaurant Construction Contractor may reasonably request to assist the Restaurant Construction Contractor in procuring the release of so much of the Construction Letter of Credit as remains outstanding.

## **ARTICLE 9 FORCE MAJEURE**

### **9.1 No Breach of Contract**

The failure of a Party to fulfill any of its obligations hereunder shall not be considered to be a breach of, or default under, this Agreement insofar as such inability arises from an event of Force Majeure, provided that the Party affected by such an event has taken all reasonable precautions, due care and reasonable alternative measures, all with the objective of carrying out the terms and conditions of this Agreement.

### **9.2 Measures to be Taken**

- (a) A Party affected by an event of Force Majeure shall take all reasonable measures to remove such Party's inability to fulfill its obligations hereunder with a minimum of delay;
- (b) A Party affected by an event of Force Majeure shall notify the other Party of such event as soon as possible, and in event not later than fourteen (14) days following the occurrence of such event, providing evidence of the nature and cause of such event, and shall similarly give notice of the restoration of normal conditions as soon as possible;
- (c) The Parties shall take all reasonable measures to minimize the consequences of any event of Force Majeure.

### **9.3 Extension of Time**

Any period within which a Party shall, pursuant to this Agreement, complete any action or task, shall be extended for a period equal to the time during which such Party was unable to perform such action as a result of Force Majeure.

#### **9.4 Consultation**

No later than thirty (30) days after a Party, as the result of an event of Force Majeure, has become unable to perform a material portion of its obligations, the Parties shall consult with each other with a view to agreeing on appropriate measures to be taken in the circumstances.

#### **9.5 Termination**

Upon the occurrence of Force Majeure, the Parties shall enter into discussions to reach a mutually satisfactory agreement. If the Parties fail to reach a mutually satisfactory solution within ninety (90) days of the commencement of such discussions, either party may issue a Notice of Intention to Terminate.

### **ARTICLE 10 UNFORESEEN CHANGE OF CIRCUMSTANCES**

#### **10.1 Unforeseen Change of Circumstances**

The rights and obligations of the Parties set out in this Agreement represent the Parties' positions relative to each other on the basis of the circumstances existing at the date hereof and on the basis of the common view the Parties have of the way those circumstances shall develop until the end of the Term. The Parties agree and acknowledge that neither seeks to benefit unduly from any unforeseen development of circumstances that actually occurs. Accordingly, if, after the date of this Agreement, a change of circumstances occurs which is beyond the control of either party, which does not constitute Force Majeure, which could not have been foreseen by either party at the date hereof and which shall over the Term materially upset the economic balance of this Agreement such as it exists at the date hereof (an "**Unforeseen Change of Circumstances**"), the Parties shall, upon notice given by either of them, enter into discussions to agree on the measures necessary to restore that economic balance. If the Parties have failed to reach a mutually solution within ninety (90) days of the commencement of such discussions, either party may issue a Notice of Intention to Terminate.

### **ARTICLE 11 TERMINATION**

Apart from events arising from Force Majeure or Unforeseen Change of Circumstances, this Agreement may only be terminated in the following cases:

#### **11.1 Termination by the City for Manager Event of Default**

Each of the following, if not cured within the time period permitted, shall constitute a Manager Event of Default which shall entitle the City to issue a Notice of Intention to Terminate immediately:

- (a) failure of the Manager to make timely payment of the Operating Fees or the Capital Commitments, or the Foreshore Lease / License Rent or any part thereof within fifteen (15) days of the due date;
- (b) the occurrence of a material breach by the Manager of its obligations under this Agreement, the Owned Marina Property License of Occupation or the Foreshore Sub-License of Occupation which has continued unsolved for thirty (30) days or more after notice thereof has been given to it by the City setting forth the details of such default;
- (c) the commencement of any action for the dissolution or liquidation of the Manager except for the purposes of amalgamation or reconstruction on terms approved in advance by the City in writing;
- (d) any representation or warranty made by the Manager in this Agreement proving to have been materially incorrect when made such that the Manager's ability to perform its obligations under this Agreement is materially adversely affected;
- (e) if the Manager assigns this Agreement, or assigns or sub-lets the Owned Marina Property License of Occupation or the Foreshore Sub-License of Occupation, or parts with possession of the Marina Property or any part thereof without the approval of the City as set out in Section 15.3(a);
- (f) if and whenever:
  - (i) a receiver, guardian, trustee in bankruptcy or any other similar officer is appointed to take charge of all or any substantial part of the Manager's property by a court of competent jurisdiction;
  - (ii) a petition is filed for the re-organization of the Manager under any provision of the *Bankruptcy Act* or any law of Canada or any province thereof or of the jurisdiction in which the Manager is incorporated relating to bankruptcy or insolvency, then in force;
  - (iii) the Manager becomes insolvent;
  - (iv) the Manager files a petition for such re-organization or for arrangements under any provision of the *Bankruptcy Act* or any law of Canada or any province thereof or of the jurisdiction in which the Manager is incorporated relating to bankruptcy or insolvency then in force and providing a plan for a debtor to settle, satisfy or to extend the time for the payment of debts; or
  - (v) if any application or petition or certificate or order is made or granted for the winding up or dissolution of the Manager voluntarily or otherwise; and

- (g) the Manager abandoning the Marina or the Marina Property for a period of seven (7) days without the prior written consent of the City.

## **11.2 Termination by the Manager for City Event of Default**

Each of the following, if not cured within the time period permitted, shall be a City Event of Default which shall entitle the Manager to issue a Notice of Intention to Terminate immediately:

- (a) a material breach by the City of any of its obligations under this Agreement which has continued unsolved for thirty (30) days or more after notice thereof has been given to it by the Manager specifying the breach and requiring the City to remedy the same;
- (b) any representation or warranty made by the City in this Agreement proving to have been materially incorrect when made such that the City's ability to perform its obligations under this Agreement is materially adversely affected; or
- (c) issuance by any court of competent jurisdiction of any injunction, substantially restricting the use of the Marina Property.

## **11.3 Termination Without Prejudice**

In addition to any rights of termination of the City as provided herein, in the event the Manager is in default and such default has not been remedied within the time required, and should the City elect to terminate this Agreement, such termination shall be without prejudice to any rights to which the City has accrued under this Agreement before the said termination.

## **11.4 Recuperation by the City**

A decision to terminate this Agreement for recuperation of the Marina by the City in the public interest may be taken at any time after a period of five (5) years from the Commencement Date. In event of such recuperation, the City shall pay to the Manager an amount equal to the expected amount of its profit for the next two (2) years calculated on the basis of what could reasonably be expected given its earnings in the prior five (5) years), and shall refund to the Manager its Capital Commitments.

## **11.5 Renunciation**

Renunciation of this Agreement may be done by the Manager but only after a period of 5 years from the Commencement Date. In such case the Manager shall inform the City in writing at least 6 months in advance, shall pay to the City an amount equal to the estimated annual operating and administrative costs of operating the Marina for the next two years calculated on the basis of what could reasonably be expected given operating and administrative costs over the last five years and shall forfeit its Capital Commitments.

### **11.6 Notice of Intention to Terminate**

Any notice of intention to terminate shall specify the reasons: Force Majeure, Unforeseen Change of Circumstances, Manager Event of Default, or City Event of Default, or other causes, as applicable. Following the issuing of the Notice of Intention to terminate the Parties shall enter into good faith discussions to agree on mutually satisfactory terms on which to continue this Agreement.

### **11.7 Notice of Termination**

If, within ninety (90) days of the date of any Notice of Intention to Terminate, the Parties have not reached a mutually satisfactory solution, either Party may issue a notice to that effect to the other Party (a “**Notice of Termination**”), whereupon this Agreement shall terminate immediately.

### **11.8 Waiver with respect to re-entry**

The Manager hereby waives any present or future requirement that notice of the City’s intention to re-enter be served or that the City commence legal proceedings in order to re-enter.

### **11.9 Re-Entry and Damages**

If and whenever the City is entitled to re-enter the Marina Property, or does re-enter the Marina Property, the City may terminate this Agreement and/or seek the termination of the Manager’s interest under the Owned Marina Property License of Occupation and/or the Foreshore Sub-License of Occupation by giving written notice of termination to the Manager, or by posting notice of termination on the Marina Property, and in such event the Manager and or any persons that the Manager may have sublet to will forthwith vacate and surrender the Marina Property, or alternatively, the City may from time to time without terminating the Manager’s obligations under this Agreement, the Owned Marina Property License of Occupation or the Foreshore Sub-License of Occupation, make alterations and repairs considered by the City necessary to facilitate a further subletting or assignment including changing the door locks (without this being deemed to be a termination of the Agreement, the Owned Marina Property License of Occupation or the Foreshore Sub-License of Occupation), and assign and sublet the Marina Property, or any part thereof as agent of the Manager for such term or terms and at such rental or rentals and upon such other terms and conditions as the City in its reasonable discretion considers advisable. No re-entry by the City will be construed as an election on its part to terminate the Agreement, the Owned Marina Property License of Occupation, or the Foreshore Sub-License of Occupation unless a written notice of that intention is given to the Manager. Despite an assignment or subletting without termination, the City may elect at any time to terminate this Agreement and/or seek the termination of the Manager’s interest under the Owned Marina Property License of Occupation and/or the Foreshore Sub-License of Occupation for a previous breach.

### **11.10 Remedies of the City are Cumulative**

The remedies of the City in this Agreement, the Owned Marina Property License of Occupation, and the Foreshore Sub-License of Occupation are cumulative and are in addition to any remedies of the City at law or in equity. No remedy will be deemed to be exclusive and the City may from time to time have recourse to one or more of all the available remedies specified herein or at law or in equity.

### **11.11 Payment of City Expenses**

If at any time an action is brought where the City is otherwise required to employ the services of a bailiff, an agent, or its solicitors because of the breach by an act or omission of any covenant herein contained on the part of the Manager, the Manager shall pay to the City all expenses incurred by the City in the enforcement of its rights and remedies hereunder, including the City's administrative costs and legal fees on a solicitor and his own client basis in connection therewith, together with interest at an annual rate of the Prime Rate plus four percent (4%) accruing on a daily basis, from the date of demand until paid.

## **ARTICLE 12 SURRENDER AND HANDBACK**

### **12.1 Handback Date**

On the Handback Date, the Manager shall surrender and transfer to the City all and any of its rights, title and interests in the Marina and the Marina Property including possession of the Owned Marina Property and the Leased / Licensed Marina Property and fixtures and all improvements thereon, all of which will become the property of the City without any claim by or compensation to the Manager, all in good order, condition and repair in accordance with the Manager's obligation to repair and maintain pursuant to Section 2.15, and free and clear of all encumbrances and all claims.

### **12.2 Handback Requirements**

On the Handback Date, the Manager shall ensure that the Marina and Marina Property, at the time of their return to the City on the Handback Date, meet all of the City's requirements, are in the conditions of, and meet all of the City's criteria, all as set out in this Article 12 (the "**Handback Requirements**"). The Manager shall be solely responsible for all costs and expenses relating to compliance with the Handback Requirements.

### **12.3 Inspection prior to Handback**

At any time between twelve (12) and eighteen (18) months before the Handback Date, the City will, on 24 hours written notice, be granted access to enable it to extensively inspect the Marina and the Marina Property and all facilities thereon to the extent that the City requires, and the Qualified Independent Engineer shall carry out an inspection of the Marina and the Marina Property. Within twenty-eight (28) days of such inspection the City shall issue the Manager with a list of works which need to be carried out, in order to



ensure that the Marina and the Marina Property comply with the Handback Requirements on the Handback Date. The failure by the City or the Qualified Independent Engineer to detect any defect or item shall not relieve the Manager of its obligation under this Article 12.

#### **12.4 Handback Procedure**

Six (6) months prior to the Handback Date the Parties shall meet and agree on detailed procedures for the handback of the Marina and the Marina Property and shall draw up an inventory of the items to be included in the scope of handback under Section 12.5.

#### **12.5 Scope of Handback**

On the Handback Date, the Manager shall transfer to the City or its designee, free and clear of all debts, liens, encumbrances, mortgages, security interests, environmental contamination and claims of whatever kind or nature other than encumbrances of a routine nature that do not materially adversely affect the value of the Marina or interfere with its operation, all of the Manager's rights, title and interest to the Handback Assets as defined herein including but not limited to all rebuilt and repaired, and all of its right to use, possess and have access to the Marina and the Marina Property. The Manager shall also deliver to the City on the Handback Date all operation and maintenance manuals, design drawings and other information as may reasonably be necessary, or as may be requested by the City to enable it or its designee to continue operation and maintenance of the Marina.

#### **12.6 Transfer of Insurance and Contractor Warranties**

The Manager shall assign to the City or its designee on the Handback Date all unexpired guarantees and warranties from its sub-contractors and suppliers and all insurance policies.

#### **12.7 Technology Transfer**

On the Handback Date, the Manager shall transfer and assign or cause to be transferred and assigned to the City or its designee all technology and know-how relevant to the operation and maintenance of the Marina as may be necessary to enable the City or its designee to continue the operation of the Marina.

#### **12.8 Training City Personnel**

The Manager shall arrange for adequate training to be provided for personnel designated by the City or its designee as necessary to ensure the independent operation of the Marina by the City or their designee. As part of the handback procedure, the Manager and the City shall conduct a joint test program to confirm that the designated personnel have been properly trained in accordance with this Agreement.

## **12.9 Cancellation of Contracts, Assignment**

Subject to Sections 12.6 and 12.7 if required by the City, any operation and maintenance contract, equipment contracts, supply contracts and all other contracts entered into by the Manager and subsisting at the time of the transfer shall be canceled by the Manager and the City shall not be liable for any cancellation costs arising thereby and shall be indemnified and held harmless by the Manager in respect of the same. Otherwise the Manager shall endeavor to assign such contracts to the City or its nominee.

## **12.10 Removal of Objects Owned by the Manager**

The Manager shall, at its own cost, remove all equipment, inventories, supplies and other personal property owned by the Manager which are not included within the scope of the handback from the Marina and the Marina Property within thirty (30) days after the Handback Date.

## **12.11 Effect of Handback**

From the Handback Date the rights and obligations of the Manager under this Agreement shall terminate, except for the Manager's rights and obligations under Section 12.12 and any other obligations which expressly survive termination pursuant to this Agreement.

## **12.12 Overholding**

If the Manager remains in possession of the Marina Property after the Handback Date and without the execution and delivery of a new Agreement, Owned Marina Property License of Occupation, and Foreshore Sub-License of Occupation, the City may re-enter and take possession of the Marina Property and remove the Manager therefrom and the City may use such force as it may deem necessary for that purpose without being liable in respect thereof or for any loss or damage occasioned thereby. While the Manager remains in possession of the Marina Property after the Handback Date, the tenancy, in the absence of written agreement, will be from month to month only at a rent equal to two times the Foreshore Lease / License Rent payable in respect of the rental period immediately preceding the Handback Date, payable, on a pro-rata basis, in advance on the first day of each month and the Manager will be subject to all terms of the Agreement, the Owned Marina Property License of Occupation, and the Foreshore Sub-License of Occupation, except that the tenancy will be from month to month only and a tenancy from year to year will not be created by implication of law or otherwise.

## **12.13 Penticton's Sign**

The City may, during the last 12 months of the Term, place upon the Marina Property a notice, of reasonable dimensions and reasonably placed so as not to interfere with the business of the Manager, stating that the Marina Property is to be sub-leased and re-let.

### 12.14 Inspection

The City or its representatives may exhibit the Marina Property and at reasonable times to prospective tenants during the last twelve (12) months of the Term of this Agreement.

### 12.15 Remedy of Defects after the Handback Date

If, on the Handback Date, the Manager has not completed the works which need to be carried out pursuant to Section 12.2 or does not comply in all respects with the Handback Requirements then, on receipt of notice from the City specifying the defect and requiring the Manager to remedy the same within a reasonable time, the Manager shall remedy the defect accordingly at its own cost. If the Manager fails or refuses to correct the defect within a reasonable time then the City shall be entitled to remedy the defect itself or engage a third party to do so. In such case the Manager shall reimburse the City for the reasonable costs incurred within thirty (30) days of a request for payment from the City.

## ARTICLE 13 LIABILITY AND INDEMNIFICATION

### 13.1 Indemnification by the City

The City shall indemnify, defend and hold harmless on an after-tax basis, the Manager and, to the extent named or involved in any third party action or claim, its employees, shareholders, directors, officers, representatives and related persons (collectively, the **"Manager Indemnified Persons"**) from and against, and shall pay to the Manager and the Manager Indemnified Persons, on demand, the amount of, any loss, liability, obligation, claim, damages (including costs of investigation and defence and the full amount of all legal fees and other professional fees) (collectively, **"Damages"**), suffered by, imposed upon or asserted against, the Manager or any of the Manager Indemnified Persons as a result of, in respect of, connected with, or arising out of: (i) City's performance or non-performance of its obligations that result in a breach of this Agreement except to the extent that such personal injury, damage or loss is attributable to a negligent or intentional act or omission of the party seeking to be indemnified; and (ii) all claims and demands of every kind and nature made by any person or persons to or against the Manager Indemnified Persons for all and every manner of costs, damages, or expenses incurred by or injury or damage to such person or persons of his, her, or their property to the extent such claim or damages are a result of the City's negligence or breach of its obligations under this Agreement.

The City will not be liable or responsible in any way for any personal injury that may be sustained by the Manager or any Manager Indemnified Persons, or of any other person who may be upon the Marina Property or of any person who or for any loss of or damage or injury to, property belonging to or in the possession of the Manager or any Manager Indemnified Person or any other person, unless caused by gross negligence of the City or those for whom it is in law responsible, or resulting from a breach of this Agreement.

### 13.2 Indemnification by the Manager

The Manager shall indemnify, defend and hold harmless on an after-tax basis, the City and, to the extent named or involved in any third party action or claim, its employees, shareholders, directors, officers, representatives and related persons (collectively, the “**City Indemnified Persons**”) from and against, and shall pay to the City and the City Indemnified Persons, on demand, the amount of, any Damages, suffered by, imposed upon or asserted against, the City or any of the City Indemnified Persons as a result of, in respect of, connected with, or arising from:

- (a) any breach, violation or non-performance by the Manager of any obligation contained in this Agreement, the Owned Marina Property License of Occupation or the Foreshore Sub-License of Occupation to be observed or performed by the Manager;
- (b) any damage to the Marina Property by the Manager, or any person claiming through or under the Manager, or damage to any other property howsoever occasioned by the condition, use, occupation, repair or maintenance of the Marina Property;
- (c) any injury to any person, including death resulting at any time therefrom, occurring in or about the Marina Property unless caused by the gross negligence of the City or those for whom it is in law responsible, or caused by a breach of this Agreement by the City;
- (d) any wrongful act or neglect of the Manager, its invitees and licensees, in and about the Marina Property;
- (e) any request or order made by any government authority requiring investigation or remediation of any Hazardous Substance on, under or affecting the Marina Property unless caused by the gross negligence of the City or those for whom it is in law responsible, or by a breach of this Agreement by the City; and
- (f) any and all liabilities, claims, damages, costs, loss, suits, or actions of any nature whatsoever (including legal fees incurred by the City in any related proceedings on a solicitor and own client basis) arising out of any release of a Hazardous Substance(s) in on or from the Marina Property or in, on, above or below the surface of the Marina Property as a result of the construction or operation of the Marina Property or any other activity carried out in, on, above or below the Marina Property by the Manager or its servants, or contractors or any person for whom the Manager is in law responsible.

Provided that this indemnity shall be reduced where and to the extent that the same is caused by the gross negligence of the City or by a breach of this Agreement by the City.

This indemnification provision shall survive any termination or expiration of this Agreement, the Owned Marina Property License of Occupation, and the Foreshore Sub-License of Occupation.

### 13.3 Environmental Damage

The Manager shall be liable for, and shall defend, indemnify and hold the City and its elected officials, officers, employees and agents harmless from and against, all liabilities, damages, losses, expenses, fines and claims (including, without limitation, all legal and consultants' fees and expenses and the cost of remediation of the Marina Property and any adjacent property) caused by environmental contamination from the operation and maintenance of the Marina, except when such losses, expenses or claims are solely attributable to the negligent or intentional act or omission of the City.

### 13.4 Indemnification Procedure: Third Party Claims

- (a) If any claim, assertion or proceeding is made or commenced by a third party (a **"Third Party Claim"**) against the Manager, the City, a Manager Indemnified Person or a City Indemnified Person, as the case may be (the **"Indemnified Person"**) in respect of which the Indemnified Person proposes to demand indemnification from a Party (the **"Indemnifying Party"**), the Indemnified Person shall give notice to that effect together with particulars of the Third Party Claim to the Indemnifying Party with reasonable promptness. The failure to give, or delay in giving, such notice will not relieve the Indemnifying Party of its obligations except and only to the extent of any prejudice caused to the Indemnifying Party by such failure or delay. From the time the Indemnified Person receives notice of the Third Party Claim, the Indemnified Person shall use commercially reasonable efforts to protect its rights and the rights of the Indemnifying Party in respect of such Third Party Claim.
- (b) The Indemnifying Party may, by notice to of the Indemnified Person given not later than thirty (30) days after receipt of the notice described in Section 13.4(a), assume control of the defence, compromise or settlement of the Third Party Claim provided that:
  - (i) the Third Party Claim involves only money damages and does not seek any injunctive or other equitable relief;
  - (ii) if the named parties in any Third Party Claim include both the Indemnifying Party and the Indemnified Person, representation by the same counsel would, in the judgment of the Indemnified Person, still be appropriate notwithstanding any actual or potential differing interests between them (including the availability of different defences);
  - (iii) settlement of, or an adverse judgment with respect to, the Third Party Claim is not, in the judgment of the Indemnified Person, likely to

establish a precedent, custom or practice adverse to the continuing business interests of the Indemnified Person; and

- (iv) the Indemnifying Party, at the request of the Indemnified Person acting reasonably, gives security reasonably satisfactory to such Indemnified Person against any costs and other liabilities to which the Indemnified Person may be or become exposed as a result of the Third Party Claim.
- (c) If the Indemnifying Party assumes control of the Third Party Claim, it is conclusively established for purposes of this Agreement that the Third Party Claim is within the scope of, and entitled to, indemnification pursuant to this Article 13.
- (d) Upon assumption of control by the Indemnifying Party:
  - (i) the Indemnifying Party shall actively and diligently proceed with the defence, compromise or settlement of the Third Party Claim at its sole cost and expense, retaining counsel reasonably satisfactory to the Indemnified Person;
  - (ii) the Indemnifying Party shall keep the Indemnified Person fully advised with respect to the status of the Third Party Claim (including supplying copies of all relevant documents promptly as they become available) and shall arrange for its counsel to inform the Indemnified Person on a regular basis of the status of the Third Party Claim; and
  - (iii) the Indemnifying Party shall not consent to the entry of any judgment or enter into any settlement with respect to the Third Party Claim unless consented to by the Indemnified Person (which consent may not be unreasonably or arbitrarily withheld or delayed).
- (e) The Indemnified Person may retain separate co-counsel at their sole cost and expense and may participate in the defence of the Third Party Claim.
- (f) Provided all the conditions set forth in Section 13.4(b) are satisfied and the Indemnifying Party is not in breach of any of its other obligations under this Section 13.3, the Indemnified Person shall, at the expense of the Indemnifying Party, cooperate with the Indemnifying Party and use their commercially reasonable efforts to make available to the Indemnifying Party all relevant information in their possession or under their control (provided that it does not cause either of them to breach any confidentiality obligations) and shall take such other steps as are, in the reasonable opinion of counsel for the Indemnifying Party, necessary to enable the Indemnifying Party to conduct such defence provided always that:

- (i) no admission of fault may be made by or on behalf of the Manager or any Manager Indemnified Person without the prior written consent of the Manager;
  - (ii) no admission of fault may be made by or on behalf of the City or any City Indemnified Person without the prior written consent of the City; and
  - (iii) the Indemnified Person is not obligated to take any measures which, in the reasonable opinion of the Indemnified Person's legal counsel, could be prejudicial or unfavourable to the Indemnified Person.
- (g) If (i) the Indemnifying Party fails to give the Indemnified Person the notice required in Section 13.4(b) or otherwise fails to comply with any of the conditions in Section 13.4(b) or (ii) the Indemnifying Party breaches any of its other obligations under Section 13.3, the Indemnified Person may assume control of the defence, compromise or settlement of the Third Party Claim and retain counsel as in its sole discretion may appear advisable, the whole at the Indemnifying Party's sole cost and expense. Any settlement or other final determination of the Third Party Claim will be binding upon the Indemnifying Party. The Indemnifying Party shall, at its sole cost and expense, cooperate fully with the Indemnified Person and use its reasonable commercial efforts to make available to such Indemnified Person all relevant information in its possession or under its control and take such other steps as are, in the reasonable opinion of counsel for the Indemnified Person, necessary to enable the Indemnified Person to conduct the defence. The Indemnifying Party shall reimburse the Indemnified Person promptly and periodically for the costs of defending against the Third Party Claim (including legal fees and expenses), and shall remain responsible for any Damages the Indemnified Person may suffer resulting from, arising out of or relating to the Third Party Claim to the fullest extent provided in this Article 13.

### **13.5 Interest**

Any amount required to be paid by an Indemnifying Party to an Indemnified Person under this Article 13 bears interest at an annual rate of the Prime Rate plus four percent (4%) accruing on a daily basis from the date on which a demand for payment is made until payment in full.

### **13.6 Exclusive Remedy**

The rights of indemnity set forth in this Article 13 constitute the Manager's sole and exclusive remedy from the City for any rights, actions, claims or causes of action which may arise in respect of this Agreement and the transactions contemplated hereby.

### **13.7 Procedures for Indemnification - Direct Claims**

A claim for indemnification for any matter not involving a Third Party Claim must be asserted by notice (setting out in reasonable detail the factual basis for the claim and the amount of potential Damages arising from it) to the Party from whom indemnification is sought and will be subject, at all times, to the provisions of Section 13.5.

### **13.8 Liability for Information Provided by the City**

The City makes no warranty in respect of and shall not be held liable for the accuracy of any information, drawings, designs or other documents of whatever nature relating to the Marina or the Marina Property provided by the City.

### **13.9 Survival**

The obligations under Sections 13.1, 13.2, and 13.3 above shall survive termination of this Agreement.

## **ARTICLE 14 DISPUTE RESOLUTION**

### **14.1 Amicable Settlement**

If any dispute arises in connection with this Agreement, either party may give notice to the other party of the same, whereupon the Parties shall meet promptly and in good faith attempt to reach an amicable settlement. The Manager's contact at the City for disputes is the General Manager of Community Services and the City's contact for disputes at the Manager is the Commodore or the Deputy Commodore. Prior to resorting to mediation, the Chief Operating Officer of the City and the Commodore of the Marina shall endeavour to resolve the dispute.

### **14.2 Mediation Committee**

If the Parties are unable to negotiate an amicable resolution pursuant to Section 14.1 above, within 60 days of the notice of dispute or disagreement, the Parties shall request the assistance of a skilled commercial mediator, such mediator to be mutually agreed upon by the Parties within 30 days of a receipt by a party of written notice requiring the mediation, failing which the mediator will be appointed by the British Columbia International Commercial Arbitration Centre (BCICAC). Any mediator selected must be qualified and experienced in the subject matter of the Agreement. Such mediation will be conducted under the Commercial Mediation Rules of the BCICAC to resolve a dispute unless otherwise agreed by the Parties. If a mediator is appointed under this provision, the mediated negotiations will be terminated 60 days after the appointment unless the Parties agree otherwise.



### **14.3 Arbitration**

All disputes arising in connection with this Agreement, which are not settled in accordance with Sections 14.1 or 14.2, shall be resolved by arbitration administered by the British Columbia International Commercial Arbitration Centre and the place of the arbitration shall be Penticton, British Columbia under its rules for the conduct of domestic commercial arbitrations.

### **14.4 Costs of Dispute Resolution**

The Parties agree that each Party will bear its own costs and expenses incurred in respect of the dispute resolution processes in this Article 14 and neither party will seek recovery against the other party for any of those costs and expenses.

### **14.5 Survival**

The dispute resolution provisions contained in this Article 14 shall survive termination of this Agreement.

## **ARTICLE 15 MISCELLANEOUS PROVISIONS**

### **15.1 Representations and Warranties**

Each Party hereby represents and warrants that:

- (a) it is duly existing pursuant to the laws and regulations of British Columbia;
- (b) it carries on its business in accordance with the applicable laws and regulations of British Columbia and, to that Party's knowledge, there are no proceedings pending or threatened for the bankruptcy, dissolution of that party such as would materially adversely affect that party's performance of its obligations under this Agreement; and
- (c) it is fully entitled to enter into this Agreement and authorized to and capable of performing its obligations hereunder.

No representative of the Manager or the City is authorized to make any representations, warranties or agreements other than as expressly set forth herein.

### **15.2 Financial Resources**

- (a) The Manager represents and warrants that it has the financial capacity to fund the working capital required to give effect to the Business Plans, as well as to fund its Capital Commitments together with the operating expenses associated with the first two years of operation of the Marina.

- (b) The Manager shall obtain the representation and warranty of the Restaurant Operator that it has the financial capacity to fund its Capital Commitments, together with a copy of the Restaurant Operator's lender's loan commitment with respect to the Restaurant Operator's Capital Commitment.

### **15.3 Assignment**

- (a) The Manager shall not assign this Agreement, the Owned Marina Property License of Occupation or the Foreshore Sub-License of Occupation without the approval of the City. The City, in making its determination of whether to approve an assignment shall be entitled to take into account its assessment of whether the assignee, transferee or sub-licensee is of good character and has the business experience and financial ability to manage and operate the Marina in accordance with this agreement. In the event of any such assignment without the approval of the City, the City shall be entitled to immediately terminate this Agreement, the Owned Marina Property License of Occupation or the Foreshore Sub-License of Occupation. A Change of Control of the Manager shall be deemed to be an assignment for purposes of this Agreement.
- (b) Should the City convey or assign or otherwise divest itself of its interest in this Agreement, the Owned Marina Property, the Foreshore License of Occupation or the Foreshore Lease, as applicable, it will be relieved of all obligations under this Agreement, the Foreshore License of Occupation, and/or Foreshore Lease, as applicable, from and after the effective date of such conveying, assigning or divesting, save and except for the obligation to account to the Manager for any monies due and payable to the Manager by the City pursuant to this Agreement up until the date of such conveyance, assignment or divestiture.

### **15.4 Primacy of This Agreement**

This Agreement shall govern all aspects of, and all contractual relationships relating to the Marina as between the Parties. The Manager shall ensure that the provisions of all agreements relating to the Marina are consistent with the terms hereof. In the event of conflict between this Agreement and any agreement on a matter affecting the Parties, including all questions of interpretation, this Agreement shall prevail.

### **15.5 Variations in Writing**

All additions, amendments and variations to this Agreement shall be binding only if in writing and signed by duly authorized representatives of each of the Parties.

### **15.6 Entire Agreement**

This Agreement, including the Schedules attached hereto, represents the entire agreement between the Parties in relation to the subject matter thereof and supersedes

any or all previous agreements or arrangements, whether oral or written, between the Parties in respect of the Marina, or the other contents of this Agreement.

### **15.7 Severability**

If any part or parts of this Agreement are agreed by the Parties or declared by any competent tribunal to be invalid, the other parts shall remain valid and enforceable.

### **15.8 Non-Waiver**

None of the provisions of this Agreement shall be deemed waived by either Party except when such waiver is given in writing. The failure by either Party to insist upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights under this Agreement shall not be construed as a waiver of any such provisions or the relinquishment of any such rights for the future.

### **15.9 Interest**

Any Party in default of payment of any amount due hereunder shall pay interest thereon at a rate calculated as 4% above the Prime Rate. Such interest shall be computed on a daily basis (on the basis of a 365 day year) from and including the day after the due date payment until but excluding the date when the relevant amount together with accrued interest is fully paid by the defaulting party.

### **15.10 Notices**

Unless otherwise stated, notices to be given under this Agreement shall be in writing and shall be given by hand delivery, recognized courier, mail, telex or facsimile transmission and delivered or transmitted to the Parties at their respective addresses set forth below:

The Corporation of the City of Penticton  
171 Main Street  
Penticton, BC  
V2A 5A9

Attention: Corporate Officer  
Email: [corpadmin@penticton.ca](mailto:corpadmin@penticton.ca)

with a copy to (such copy shall not constitute notice):

Farris LLP  
2500 – 700 W. Georgia St.  
Vancouver, BC  
V7Y 1B3

Attention: Al Hudec  
Email: [ahudec@farris.com](mailto:ahudec@farris.com)

The Manager:

Penticton Yacht Club  
 293 Marina Way  
 Penticton, BC  
 V2A 1H5  
 Attention: Marc Tougas  
 Email: [marctougas@shaw.ca](mailto:marctougas@shaw.ca)

or such other address, attention, telex number, or facsimile number as may be notified by that party to the other party from time to time, and shall be deemed to have been made or delivered (i) in the case of any communications made by letter, when delivered by hand, by recognized courier or by mail (registered, return receipt requested) at that address and (ii) in the case of any communications made by telex or facsimile, when transmitted properly addresses to such telex number or facsimile number.

#### **15.11 Applicable Law**

This Agreement shall be governed by the laws of British Columbia.

#### **15.12 Non-Exclusive Contract**

Award of this Agreement shall impose no obligation on the City to utilize the Manager for all work of the type which may develop with respect to the Marina during the term of this Agreement.

#### **15.13 Legal Costs Associated with This Agreement**

The City shall be responsible for paying the first Twenty-Five Thousand Dollars (\$25,000.00) in the City's legal fees associated with this Agreement. Any legal fees of the City over and above Twenty-Five Thousand Dollars (\$25,000.00) shall be paid by the Manager. Such excess is estimated at \$8,000 plus disbursements and taxes.

#### **15.14 Communications to the Public**

The City and the Manager agree that it would be beneficial to work together on communicating the benefits of this Agreement to the public and shall work collaboratively in all communications to the public about this Agreement.

#### **15.15 Additional Services and Locations**

The City reserves the right to request additional services relating to this Agreement from the Manager when approved by the Parties. The Manager shall provide such additional services as may become necessary. The City reserves the right to unilaterally add or delete services at its sole option as it may deem necessary or in the best interests of the City. In such case, the Manager will be required to provide services pursuant to this Agreement in accordance with the terms, conditions and specifications, and as set forth in an amendment approved by the Parties.

**15.16 No Waiver of Right to Enforce**

The waiver of any breach or any term covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or any subsequent breach of the same or any other term, covenant or condition herein contained. No covenant, term, or condition shall be deemed to have been waived, unless such waiver be in writing. Nor shall there be any accord and satisfaction unless expressed in writing and signed by both the City and the Manager.

**15.17 Time of Essence**

The Parties expressly agree that time is of the essence in the performance of this Agreement and the failure to complete the performance within the time specified, or within a reasonable time if no time is specified herein, shall relieve the Parties of any obligation to accept such performance. The Marina Services shall be performed in a timely manner as specified in the City's RFP.

**15.18 Counterpart Execution**

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

*[Signature Page Follows]*

**IN WITNESS WHEREOF**, this Agreement has been executed by duly authorized representative of the Parties hereto on the day, month and year first above written.

**THE CORPORATION OF THE CITY OF PENTICTON**

---

Name:

Title:

---

Name:

Title:

**PENTICTON YACHT CLUB**

---

Name:

Title:

---

Name:

Title:

**SCHEDULE 1.1(XV)**  
**FINANCIAL PLAN**

**SCHEDULE 1.1(XX)**  
**FORESHORE LICENSE OF OCCUPATION**



**SCHEDULE 1.1(XXVIII)**  
**LEASED / LICENSED MARINA PROPERTY**

**SCHEDULE 1.1(XXIX)**  
**MAINTENANCE PLAN**

**SCHEDULE 1.1(xxxiv)**  
**MARKETING PLAN**

**SCHEDULE 1.1(XL)**  
**OPERATIONS PLAN**

**SCHEDULE 2.4**  
**MARINA SERVICES**

**SCHEDULE 3.2**  
**CAPITAL EXPENDITURE COMMITMENT**

## Operations Plan

### Moorage, Storage, Rentals, Repairs, Valet and Other Key Marina Functions

The PYC management team will operate using the existing Services to continue as is for the 2022 boating season and the PYC will partner with local operators to determine the best use of operation on site and the offsite possibilities of these operations in the future.

Having a membership based nonprofit organization as the leadership of management ensures that the members and therefore the marina, make the decisions around reinvesting the all profits back into the facilities rather than removing the profits for personal use.

The PYC has an existing Management Team that will extend its resources and functions to oversee the supervision and management of the Skaha lake operations. Staff will be hired to tend to the daily operations of maintaining and servicing the moorage holders and the boating public as well as operating the fueling station. The Manager or Supervisor of the Skaha Marina will take direction from the General Manager of Marina Operations as directed by the PYC board Director in charge of Operations.

The services operated by the management team will be moorage services, boat valet service, storage of non-motorized watercraft and winter storage of boats from moorage. The management team will also operate the fuel dock and have oversight of sub contracted services as a liaison to deal with any requirements or communications.

The future operation of services such as the boat rental business, food and beverage, café and boat servicing will go to RFP to local business interests to harness the greatest opportunities for capital and management expertise to meet the needs of the community and to align with the Skaha Park Master Plan. As this is a community asset, we are looking to service the broader community, not just power boaters and members with slips.

The boat valet service may be developed to vertical storage as needs increase. This service, as well as winter land storage and boat maintenance may evolve to an offsite location to ensure clean visual lines of operation and onsite parking for the food and beverage operation year-round.

A governance structure that has the opportunity to grant Penticton's boating community access to two lakes can create a more effective model for business efficiency that shares the administrative components of operation.

The PYC will develop strategies to work with the PIB to develop on site cultural opportunities and off site usage of PIB industrial land use for partnerships in business related uses on the channel parkway that support the boating community.

During the Term, the Manager shall ensure that the Marina is available and open to all users and that the service offered to the public at the Marina is convenient and safe at all times. The Marina shall be

open to the public for moorage and services between March 1<sup>st</sup> and November 30<sup>th</sup> of each year and have winter storage available each year of the Term. The daily hours of operation will be tailored to the users, planning for 10-6 for gas dock and marina services.

The licensed premises and other businesses will have hours that are tailored to the broader Penticton community to help build vibrancy down at the South end of town.



## FINANCIAL PLAN

This detailed five-year proforma income statement shows the projected revenues and operating expenses of the marina operations. The capital improvements are detailed on the tables, along with capital maintenance plan for the term of the agreement identified in Appendix H.

Cash flow statements and sources of income are included. The numbers and any assumptions made are from years of experience operating the Okanagan Lake Marina. Key financial or operational triggers that will be used to determine if a specific element is to proceed or not will be based on our RFP process for The Restaurant Pub and the RFP for a Boat rental, Valet and Marine Service sub contractor. Our contingencies are to operate short term as we do at the Okanagan Lake Marina. We feel confident that there are and will be competing offers for the RFP process will all sub contract opportunities.

Our human resource plan including staffing levels by year for full time, part time or seasonal employees are estimated to be 2-3 full time and 4 part time seasonal marina staff that will maintain the facility as a marina. The boat rental, valet operation will likely provide employment opportunities for 15-18 full time seasonal staff.

For the summer of 2023, a sub-contractor has indicated they would like to expand their operations to offer the following additional services off site:

1. Valet Services.
  - Provide a drop and go service for customers to show up and go. They will utilize a digital booking system for reservations and will have boats ready to go and waiting for customers to pick them up at designated slips.
2. Off-Site Heated Indoor Storage, Detailing, Gel Shop and Mechanical Services.
  - We expect to build a new facility offsite where we can store, valet and service boats from.
  - Sizing to accommodate 100+ watercraft.
  - Investment of \$3,000,000 - \$5,000,000
  - \*Although not located on Marina Property, we expect to build this within the City of Penticton.

The Financial Plan shows;

1. The annual fee payment to the City for the use of land and buildings within the Skaha Marina lands, east of the high water mark, and Expansion Area 1
2. and the annual sub-license of occupation payments to the Province of BC for the Skaha Lake Marina area, west of the high-water mark, owned by the Province of BC. would all be part of an annual amount of \$45,000.00 paid in 12 monthly payments of \$3750.00 plus gst.
3. Property taxes applicable will be paid annually. Please note that the PYC is a registered non profit group and will apply for applicable tax exemptions but we do recognize that a large part of the tax's will be for the commercial use of the land and building for retail purposes and would likely not be exempt or relieved.
4. The financial plan details how the capital contribution will be funded within the financial plan.
5. The PYC is willing to work on future increases of annual payments by having five year reviews of income and expenses. These reviews will encompass detailed 5 year plans showing excess of revenue over expenses and the re investment of those surplus revenues to be put back into the Marina. This formula and wording for reviews and investment would be worked in the offer of the contract over 25 years.

Skaha Yacht Club & Marina						
Revenue & Year End Projection						
	2022	2023	2024	2025	2026	5 Yr Forecast
<b>Revenues</b>						
Standard Moorage - 2022 rate frozen	\$140,000	\$144,200	\$148,526	\$152,982	\$157,571	
Valet/Visitor Slips	\$46,800	\$48,204	\$49,650	\$51,140	\$52,674	
Annual Membership Fee	\$12,750	\$13,000	\$13,000	\$13,000	\$13,500	
Initiation Fee - for new members	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	
Capital improvement Fee	\$12,750	\$12,750	\$12,750	\$12,750	\$12,750	
Storage Fees	\$5,000					
Fuel Sales	\$120,000	\$130,000	\$140,000	\$150,000	\$160,000	
F&B Rental	\$24,000	\$0	\$12,000	\$12,000	\$15,000	
Rental income Service bays	\$12,000					
Other Income Rentals	\$10,000	\$20,000	\$20,000	\$20,000	\$20,000	
<b>Total Revenues</b>	<b>\$393,300</b>	<b>\$378,154</b>	<b>\$405,926</b>	<b>\$421,871</b>	<b>\$441,495</b>	<b>\$2,040,747</b>
<b>Expenses</b>						
Advertising and Promotion	\$3,000	\$3,000	\$3,000	\$3,000	\$3,000	
Licences and Memberships	\$500	\$500	\$500	\$500	\$500	
Donations	\$1,000	\$1,500	\$1,500	\$1,500	\$1,500	
Gas dock purchases	\$85,000	\$90,000	\$95,000	\$100,000	\$105,000	
Insurance	\$8,000	\$9,000	\$9,000	\$9,000	\$9,500	
Interest and bank charges	\$2,000	\$2,200	\$2,300	\$2,400	\$2,500	
Office	\$500	\$500	\$600	\$700	\$800	
Professional Fees	\$3,000	\$3,500	\$4,000	\$4,000	\$4,200	
Property Taxes	\$11,000	\$1,000	\$2,000	\$3,000	\$4,000	
LTU payment	\$45,000	\$45,000	\$45,000	\$45,000	\$45,000	
Annual Repairs and Maintenance	\$7,000	\$10,000	\$10,000	\$12,000	\$13,000	
Engineering, Environmental	\$20,000					
Salaries and Wages	\$80,000	\$82,400	\$84,872	\$87,418	\$90,041	
Security	\$3,000	\$3,500	\$3,500	\$3,500	\$3,500	
Supplies	\$2,000	\$2,500	\$2,500	\$2,500	\$2,800	
Telephone	\$1,200	\$1,400	\$1,500	\$1,500	\$1,600	
Utilities	\$8,500	\$9,000	\$9,200	\$9,500	\$9,700	
Loan interest		-\$3,192	-\$2,884	-\$137		
<b>Total Expenses</b>	<b>\$280,700</b>	<b>\$261,808</b>	<b>\$271,588</b>	<b>\$285,381</b>	<b>\$296,641</b>	<b>\$1,396,117</b>
<b>Excess of revenues over expenses</b>	<b>\$112,600</b>	<b>\$116,346</b>	<b>\$134,338</b>	<b>\$136,490</b>	<b>\$144,854</b>	<b>\$644,629</b>
<b>Capital Fund</b>						
<b>Capital Impr Fund</b> (80% of surplus)	<b>\$90,080</b>	<b>\$93,077</b>	<b>\$107,471</b>	<b>\$109,192</b>	<b>\$115,883</b>	
<b>Capital Reserve</b> (20% of surplus)	<b>\$22,520</b>	<b>\$23,269</b>	<b>\$26,868</b>	<b>\$27,298</b>	<b>\$28,971</b>	
<b>Repayment of loan</b>	<b>\$0</b>	<b>-\$39,900</b>	<b>-\$36,054</b>	<b>-\$1,716</b>	<b>\$0</b>	
<b>Running Fund Balance</b>	<b>\$112,600</b>	<b>\$76,446</b>	<b>\$98,284</b>	<b>\$134,775</b>	<b>\$144,854</b>	
Accumulated Capital improvement funds	\$90,080	\$61,157	\$78,628	\$107,820	\$115,883	
Accumulated Capital reserve funds	\$22,520	\$15,289	\$19,657	\$26,955	\$28,971	

<b>Marina Capital Spend Plan</b>						
Funds for year 1 dock replacement.	\$112,600					
Funds for year 2 dock replacement		\$76,446				
Funds for year 3 Fire suppression.			\$98,284			
Surplus funds yr. 4 Office renos				\$134,775		
Surplus funds yr.5 Clun rooms					\$144,854	
<b>Capital improvements Spend plan</b>						
200 plus ft. of dock yr 1 & 2	-\$112,500	-\$112,500				
Gas dock and fuel delivery year 1.	-\$40,000					
NFPA 303 upgrades estimate year 3			-\$100,000			
4th year building upgrade				-\$100,000		
5th year lounge and meeting rooms.					-\$100,000	
	2022	2023	2024	2025	2026	
<b>Net capital improvement fund</b>	\$90,080	\$61,157	\$78,628	\$107,820	\$115,883	
<b>Net capital reserve</b>	\$22,520	\$15,289	\$19,657	\$26,955	\$28,971	
Years 1-5 Capital investments.	-\$152,500	-\$112,500	-\$100,000	-\$100,000	-\$100,000	
Funds borrowed year 1, 2, 3	-\$39,900	-\$36,054	-\$1,716			-\$77,670
Available surplus funds in year 4 and 5				\$34,775	\$44,854	\$79,629
Operating Surplus by year	\$112,600	\$116,346	\$134,338	\$136,490	\$144,854	<u>\$644,629</u>
<b>5 yr. surplus accumulative</b>	\$112,600	\$228,946	\$363,284	\$499,775	\$644,629	
Total Capital Expenses per year and total	-\$152,500	-\$112,500	-\$100,000	-\$100,000	-\$100,000	-\$565,000
Available funds after year 5						\$79,629



<b>MODIFICATION AGREEMENT</b>
-----------------------------------

Licence No.: 342689

File No.: 3403233

Disposition No.: 838408

THIS AGREEMENT is dated for reference July 2, 2010 .

**BETWEEN:**

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA**, represented by the minister responsible for the *Land Act*, Parliament Buildings, Victoria, British Columbia

(the "Province")

**AND:**

**CORPORATION OF THE CITY OF PENTICTON**  
171 Main St  
Penticton, BC V2A 5A9

(the "Client")

**WITNESS THAT WHEREAS:**

The Province and the CORPORATION OF THE CITY OF PENTICTON entered into Licence No. 342689 on April 21, 2004; (herein called the "Document") over those lands more particularly known and described as:

District Lot 4048s together with that part of District Lot 4017s, Similkameen Division Yale District, containing 1.05 hectares, more or less

The parties have agreed to amend the Tenure.

NOW THEREFORE in consideration of the premises, and of the covenants and agreements herein contained, the parties hereto mutually covenant and agree as follows:

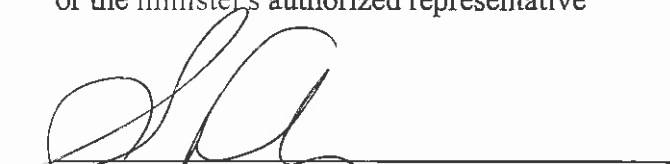
1 The parties agree to remove and replace Article 2 (2.2) of the Tenure with "The term of this

Agreement commences on the commencement Date and terminates on the 22nd Anniversary of that date, or such earlier date provided for in this Agreement".


- 2 In all other respects the Tenure shall remain in full force and effect and is hereby ratified and confirmed.
- 3 Time shall continue to be of the essence in this agreement and the Tenure.
- 4 This agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and permitted assigns.

IN WITNESS WHEREOF the parties hereto have executed and delivered this agreement as of the day and year first above written.

SIGNED on behalf of **HER MAJESTY  
THE QUEEN IN RIGHT OF THE  
PROVINCE OF BRITISH COLUMBIA**  
by the minister responsible for the *Land Act*  
or the minister's authorized representative

  
Minister responsible for the *Land Act*  
or the minister's authorized representative

SIGNED on behalf of CORPORATION OF THE CITY OF PENTICTON  
by its authorized signatories

  
Authorized Signatory **Dan Ashton, Mayor**  
Authorized Signatory **Cathy Ingram, Manager  
of Legislative Services**

<b>Council Approval</b>
Res. No. <u>916/2010</u>
Date <u>July 19, 2010</u>

## CONSENT TO SUBLICENCE OF TENURE

Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Agriculture and Lands ("us", "we" or "our") granted Lease Number 342689 dated April 21, 2004 (the "Tenure") over the following land:

District Lot 4048s together with that part of District Lot 4017s, Similkameen Division of Yale District, containing 1.05 hectares more or less,  
(the "Land")

The current holder of the Tenure is:

CORPORATION OF THE CITY OF PENTICTON  
("you")

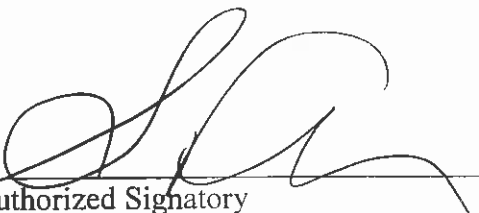
In accordance with the Tenure, you have asked us to consent to grant of sub-licence of the Tenure to PENTICTON YAMAHA & MARINE LTD., Incorporation No. BC0552283 (the "Sub-licencee") made between you and the Sub-licencee and dated January 1, 2006 (the "Sub-licence").

In consideration of the payment to us of the fees payable under the *Land Act Fees Regulations*, we consent to the Sub-licence on the following terms and conditions:

1. Our consent to the Sub-licence does not and will not be deemed to waive or modify our rights under the Tenure; and
2. Any provision of the Tenure prohibiting you from subletting, assigning, mortgaging or transferring the Tenure or permitting any other person to use or occupy the Land without our prior written consent remains in full force and effect.

Dated: July 2, 2010

SIGNED on behalf of **HER MAJESTY  
THE QUEEN IN RIGHT OF THE  
PROVINCE OF BRITISH COLUMBIA** by  
Authorized representative of the  
Minister responsible for the *Land Act*



Authorized Signatory

Note: This consent forms an integral part of the License Indenture and should be attached thereto.



Province of  
British Columbia

Ministry of  
Agriculture and  
Lands

## ENDORSEMENTS

---

Licence No. 342689

File: 3403233

---

**Endorsement No. 1**

**Date: August 23, 2010**

Licence modified by agreement dated July 2, 2010 to extend the term of the tenure. Tenure expires April 21, 2026.

Sub-licence unto Penticton Yamaha & Marine Ltd. for a period of 3 successive five year terms from January 1, 2006.



Ministry of Sustainable  
Resource Management

# LICENCE OF OCCUPATION

Licence No.:

342689

File No.: 3403233

Disposition No.: 838408

THIS AGREEMENT is dated for reference April 21st, 2004 and is made under the *Land Act*.

## BETWEEN:

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA**, represented by the minister responsible for the *Land Act*, Parliament Buildings, Victoria, British Columbia

(the "Province")

## AND:

**CORPORATION OF THE CITY OF PENTICTON**  
171 Main St  
Penticton, BC V2A 5A9

(the "Licensee")

The parties agree as follows:

## ARTICLE 1 - INTERPRETATION

1.1 In this Agreement,

**"Agreement"** means this licence of occupation;

**"Commencement Date"** means April 21st, 2004;

**"disposition"** has the meaning given to it in the *Land Act* and includes a licence of occupation;

**"Fees"** means the fees set out in Article 3;

**"Improvements"** means all buildings, structures, equipment, improvements and marine docking, moorage, storage and launching facilities for the accommodation, moorage, storage, launching, maintenance and minor repair of marine vessels (including bulkheads, groins, breakwaters and floating booms) that are made, constructed, erected, placed or installed on the Land at any time during the term of this Agreement, together



with all replacements, alterations, additions, changes, substitutions, improvements or repairs to any of them;

**“Land”** means that part or those parts of the following described land shown outlined by bold line on the schedule attached to this Agreement entitled “Legal Description Schedule”:

District Lot 4048s together with that part of District Lot 4017s, Similkameen Division of Yale District, containing 1.05 hectares, more or less,

except for those parts of the land that, on the Commencement Date, consist of highways (as defined in the *Highway Act*);

**“Land Value”** means for the first five years of the Term the value for the Land established by us prior to the Commencement Date which value shall thereafter be subject to review by us prior to the sixth anniversary of the Commencement Date and thereafter at five year intervals during the remainder of the Term;

**“Moorage Fee Discount”** means the following:  
NIL

**“Non-Moorage Fee Discount”** means the following:  
NIL

**“Potential Gross Income From Moorage”** means (amount of lineal footage of moorage space on the Land) x (monthly moorage charge per lineal foot for open moorage space) x (number of months, or portion thereof, operation is open for business);

**“Rate”**

- (a) during the first 15 year period of the Term means 3.5%; and
- (b) during the second 15 year period of the Term means 4.0%.

**“Ratio”** during each year of the Term means the percentage fixed by us in our sole discretion.

**“Realty Taxes”** means all taxes, rates, levies, duties, charges and assessments levied or charged, at any time, by any government authority having jurisdiction which relate to the Land, the Improvements or both of them and which you are liable to pay under applicable laws;

**“Security”** means the security referred to in section 6.1 or 6.2, as replaced or supplemented in accordance with section 6.5;

**“Term”** means the period of time set out in section 2.2;

“we”, “us” or “our” refers to the Province alone and never refers to the combination of the Province and the Licensee: that combination is referred to as “the parties”; and

“you” or “your” refers to the Licensee.

- 1.2 In this Agreement, “person” includes a corporation, firm or association and wherever the singular or masculine form is used in this Agreement it will be construed as the plural or feminine or neuter form, as the case may be, and vice versa where the context or parties require.
- 1.3 The captions and headings contained in this Agreement are for convenience only and do not define or in any way limit the scope or intent of this Agreement.
- 1.4 This Agreement will be interpreted according to the laws of the Province of British Columbia.
- 1.5 Where there is a reference to an enactment of the Province of British Columbia or of Canada in this Agreement, that reference will include a reference to every amendment to it, every regulation made under it and any subsequent enactment of like effect and, unless otherwise indicated, all enactments referred to in this Agreement are enactments of the Province of British Columbia.
- 1.6 If any section of this Agreement, or any part of a section, is found to be illegal or unenforceable, that section or part of a section, as the case may be, will be considered separate and severable and the remainder of this Agreement will not be affected and this Agreement will be enforceable to the fullest extent permitted by law.
- 1.7 Each schedule to this Agreement is an integral part of this Agreement as if set out at length in the body of this Agreement.
- 1.8 This Agreement constitutes the entire agreement between the parties and no understanding or agreement, oral or otherwise, exists between the parties with respect to the subject matter of this Agreement except as expressly set out in this Agreement and this Agreement may not be modified except by subsequent agreement in writing between the parties.
- 1.9 Each party will, upon the request of the other, do or cause to be done all lawful acts necessary for the performance of the provisions of this Agreement.
- 1.10 All provisions of this Agreement in our favour and all of our rights and remedies, either at law or in equity, will survive the termination of this Agreement.
- 1.11 Time is of the essence of this Agreement.
- 1.12 Wherever this Agreement provides that an action may be taken, a consent or approval must be obtained or a determination must be made, then you or we, as the case may be, will act

reasonably in taking such action, deciding whether to provide such consent or approval or making such determination; but where this Agreement states that you or we have sole discretion to take an action, provide a consent or approval or make a determination, there will be no requirement to show reasonableness or to act reasonably in taking that action, providing that consent or approval or making that determination.

## ARTICLE 2 - GRANT AND TERM

- 2.1 On the terms and conditions set out in this Agreement, we grant you a licence of occupation of the Land for the purpose of conducting the business of a marina, and you acknowledge this licence of occupation does not grant you exclusive use and occupancy of the Land.
- 2.2 The term of this Agreement commences on the Commencement Date and terminates on the 20th anniversary of that date, or such earlier date provided for in this Agreement.
- 2.3 In using the Land as permitted by this Agreement, you will not restrict, or permit the restriction of, the use of any service or facility (set out in section 2.1) to a defined or limited group of persons, it being the intention of the parties that such services and facilities will be available for use by all members of the public.

## ARTICLE 3 - FEES

- 3.1 You will pay to us:
  - (a) for the first year of the Term Fees of \$2,695.00 payable in advance, on the Commencement Date; and
  - (b) during the balance of the Term the sum of each of the annual Fees determined under sections 3.2 and 3.3 of this Article or \$500, whichever is the greater, payable in advance beginning on the first anniversary of the Commencement Date and thereafter on each anniversary of that date.
- 3.2 The annual Fees payable for moorage and ancillary use shall be an amount equivalent to the product of the Potential Gross Income From Moorage multiplied by the Rate, less the Moorage Fee Discount, if any.
- 3.3 The annual Fees payable for non-moorage uses shall be an amount equivalent to the product of the Land Value multiplied by the Ratio, less the Non-Moorage Fee Discount, if any.
- 3.4 You will, in each and every year during the Term within 90 days an anniversary of the Commencement Date deliver to us a Statutory Declaration containing:

- (a) the amount of lineal footage of moorage space developed on the Land;
  - (b) the monthly moorage charge per lineal foot for open moorage space;
  - (c) the number of months, or portion thereof, the operation is open for business;
  - (d) the ancillary uses in the operation; and
  - (e) the amount of business generated during the months of closure.
- 3.5 In the event you deliver the Statutory Declaration referred to in section 3.4 of this Article to us before the deadline referred to in section 3.4, we will, not later than 15 days before the anniversary of the Commencement Date during each year of the Term, give written notice to you specifying the annual Fees payable under section 3.4 for the immediately succeeding year of the Term.
- 3.6 If we do not give you notice under section 3.5 of this Article, the annual Fees shall be equal to the annual Fees calculated or in force during the immediately preceding year of the term.
- 3.7 If you fail to deliver the Statutory Declaration referred in section 3.4 of this Article to us before the deadline referred to in section 3.4 we may:
- (a) enter upon the Land and do such things as are necessary to determine the information required in section 3.4 of this Article; and
  - (b) based on the information determined under subsection (a) above, set the annual Fees, retroactive to the last anniversary date of the Commencement Date.
- 3.8 The annual Fees specified in a notice given under section 3.5 shall constitute conclusive evidence of the annual Fees payable for the year of the Term specified in the notice.

#### **ARTICLE 4 - COVENANTS**

**4.1 You must**

- (a) pay, when due,
  - (i) the Fees to us at the address set out in Article 10,
  - (ii) the Realty Taxes, and
  - (iii) all charges for electricity, gas, water and other utilities supplied to the Land for

use by you or on your behalf or with your permission;

- (b) deliver to us, immediately upon demand, receipts or other evidence of the payment of Realty Taxes and all other money required to be paid by you under this Agreement;
- (c) observe, abide by and comply with
  - (i) all applicable laws, bylaws, orders, directions, ordinances and regulations of any government authority having jurisdiction in any way affecting your use or occupation of the Land or the Improvements, and
  - (ii) the provisions of this Agreement;
- (d) in respect of the use of the Land by you or by anyone you permit to use the Land, keep the Land and the Improvements in a safe, clean and sanitary condition satisfactory to us, and at our written request, rectify any failure to comply with such a covenant by making the Land and the Improvements safe, clean and sanitary;
- (e) not commit any wilful or voluntary waste, spoil or destruction on the Land or do anything on the Land that may be or become a nuisance or annoyance to an owner or occupier of land in the vicinity of the Land;
- (f) not construct, place, anchor, secure or affix any Improvement in, on, to or into the Land except as necessary for the purposes set out in section 2.1 and, despite those purposes, you will not construct, place, anchor, secure or affix anything on or to the Land that may interfere with the riparian right of access of any person over the Land without first obtaining from that person a statutory right of way, in registrable form and in our favour, by which that person allows us to curtail his or her riparian right of access over the Land;
- (g) use and occupy the Land only in accordance with and for the purposes set out in section 2.1;
- (h) pay all accounts and expenses as they become due for work performed on or materials supplied to the Land at your request, on your behalf or with your permission, except for money that you are required to hold back under the *Builders Lien Act*;
- (i) if any claim of lien over the Land is made under the *Builders Lien Act* for work performed on or materials supplied to the Land at your request, on your behalf or with your permission, immediately take all steps necessary to have the lien discharged, unless the claim of lien is being contested in good faith by you and you have taken the steps necessary to ensure that the claim of lien will not subject the Land or any interest of yours under this Agreement to sale or forfeiture;

- (j) not cut or remove timber on or from the Land without
  - (i) our prior written consent, and
  - (ii) being granted the right under the *Forest Act* to harvest Crown timber on the Land;
- (k) dispose of raw sewage and refuse only in accordance with the requirements and regulations of appropriate federal and provincial agencies;
- (l) store bulk hazardous petroleum products and other toxic substances in accordance with the provisions of the *Waste Management Act*;
- (m) not use construction materials containing toxic substances;
- (n) not without prior written consent from us
  - (i) deposit on the Land, or any part of it, any earth, fill or other material for the purpose of filling in or raising the level of the Land;
- (o) not alter, repair or add to any Improvement without our prior written consent;
- (p) at our request and at your expense, have a British Columbia Land Surveyor conduct a survey of the Land within 6 months after survey instructions are issued by the Surveyor General. ;
- (q) permit us, or our authorized representatives, to enter on the Land at any time to inspect the Land and the Improvements, provided that in regard to our inspection of the Improvements we take reasonable steps to minimize any disruption of your operations;
- (r) indemnify and save us and our servants, employees and agents harmless against all claims, actions, causes of action, losses, damages, costs and liabilities, including fees of solicitors and other professional advisors, arising out of
  - (i) your breach, violation or nonperformance of a provision of this Agreement, and
  - (ii) any personal injury, bodily injury (including death) or property damage occurring or happening on or off the Land by virtue of your entry upon, use or occupation of the Land,and the amount of all such losses, damages, costs and liabilities will be payable to us immediately upon demand; and
- (s) on the termination of this Agreement,

- (i) peaceably quit and deliver to us possession of the Land and, subject to paragraphs (ii), (iii) and (iv), the Improvements in a safe, clean and sanitary condition,
- (ii) within 90 days, remove from the Land any Improvement you want to remove, if the Improvement was placed on or made to the Land by you and you are not in default of this Agreement,
- (iii) not remove any Improvement from the Land if you are in default of this Agreement, unless we direct or permit you to do so under paragraph (iv),
- (iv) remove from the Land any Improvement that we, in writing, direct or permit you to remove, other than any Improvement permitted to be placed on or made to the Land under another disposition, and
- (v) restore the surface of the Land as nearly as may reasonably be possible to the same condition as it was on the Commencement Date, to our satisfaction, but if you are not directed or permitted to remove an Improvement under paragraph (iv), this paragraph will not apply to that part of the surface of the Land on which that Improvement is located,

and all of your right, interest and estate in the Land will be absolutely forfeited to us, and to the extent necessary, this covenant will survive the termination of this Agreement.

4.2 You will not permit any person to do anything you are restricted from doing under this Article.

## ARTICLE 5 - LIMITATIONS

5.1 You agree with us that

- (a) we are under no obligation to provide access or services to the Land or to maintain or improve existing access roads;
- (b) this Agreement is subject to
  - (i) all subsisting dispositions and subsisting grants to or rights of any person made or acquired under the *Coal Act*, *Forest Act*, *Mineral Tenure Act*, *Petroleum and Natural Gas Act*, *Range Act*, *Wildlife Act* or *Water Act*, or any extension or renewal of the same, whether or not you have actual notice of them, and
  - (ii) the exceptions and reservations of interests, rights, privileges and titles referred

to in section 50 of the *Land Act*;

- (c) without limiting subsection 4.1(r), you must indemnify and save us and our servants, employees and agents harmless from and against all claims, actions, causes of action, losses, damages, costs and liabilities, including fees of solicitors and other professional advisors, arising out of any conflict between your rights under this Agreement and the rights of any person under a disposition or under a subsisting grant to or right of any person made or acquired under the *Coal Act, Forest Act, Mineral Tenure Act, Petroleum and Natural Gas Act, Range Act, Wildlife Act or Water Act* (or any prior or subsequent enactment of the Province of British Columbia of like effect), or any extension or renewal of the same, whether or not you have actual notice of them, and the amount of all such losses, damages, costs and liabilities will be payable to us immediately upon demand;
- (d) you release us from all claims, actions, causes of action, suits, debts and demands that you now have or may at any time in the future have against us arising out of any conflict between your rights under this Agreement and the rights of any person under a disposition or under a subsisting grant to or right made or acquired under the enactments referred to in subsection (c), and you acknowledge that this Agreement and your rights under this Agreement are subject to those grants and rights referred to in subsection (c) whether or not you have actual notice of them.
- (e) we may make other dispositions of or over the Land;
- (f) you will make no claim for compensation, in damages or otherwise, in respect of a disposition made under subsection (e), where such disposition does not materially affect the exercise of your rights under this Agreement;
- (g) subject to subsection (f), all of your costs and expenses, direct or indirect, that arise out of any lawful interference with your rights under this Agreement as a result of the exercise or operation of the interests, rights, privileges and titles reserved to us in subsections (b) and (e) will be borne solely by you;
- (h) you will not commence or maintain proceedings under section 65 of the *Land Act* in respect of any lawful interference with your rights under this Agreement that arises as a result of the exercise or operation of the interests, rights, privileges and titles described in subsections (b) and (e);
- (i) you will not dredge or displace beach materials on the Land without our prior written consent;
- (j) you will not moor or secure any boat or structure to the Improvements or on any part of the Land for use as a live-aboard facility, whether permanent or temporary;



- (k) you will not interrupt or divert the movement of water or of beach materials by water along the shoreline without our prior written consent;
- (l) you will not remove or permit the removal of any Improvement from the Land except as expressly permitted or required under this Agreement;
- (m) any interest you may have in the Improvements ceases to exist and becomes our property upon the termination of this Agreement, except where an Improvement may be removed under paragraph 4.1(s)(ii), (iii) or (iv) in which case any interest you may have in that Improvement ceases to exist and becomes our property if the Improvement is not removed from the Land within the time period set out in paragraph 4.1(s)(ii) or the time period provided for in the direction or permission given under paragraph 4.1(s)(iii); and
- (n) if, after the termination of this Agreement, we permit you to remain in possession of the Land and we accept money from you in respect of such possession, a tenancy from year to year will not be created by implication of law and you will be deemed to be a monthly occupier only subject to all of the provisions of this Agreement, except as to duration, in the absence of a written agreement to the contrary.

#### **ARTICLE 6 - SECURITY AND INSURANCE**

- 6.1 On the Commencement Date, you will deliver to us security in the amount of \$0.00 which will
- (a) guarantee the performance of your obligations under this Agreement;
  - (b) be in the form required by us; and
  - (c) remain in effect until we certify, in writing, that you have fully performed your obligations under this Agreement.
- 6.2 Despite section 6.1, your obligations under that section are suspended for so long as you maintain in good standing other security acceptable to us to guarantee the performance of your obligations under this Agreement and all other dispositions held by you.
- 6.3 We may use the Security for the payment of any costs and expenses incurred by us to perform any of your obligations under this Agreement that are not performed by you or to pay any overdue Fees and, if such event occurs, you will, within 30 days of that event, deliver further Security to us in an amount equal to the amount drawn down by us.
- 6.4 After we certify, in writing, that you have fully performed your obligations under this Agreement, we will return to you the Security maintained under section 6.1, less all amounts drawn down by us under section 6.3.

6.5 You acknowledge that we may, from time to time, notify you to

- (a) change the form or amount of the Security; and
- (b) provide and maintain another form of Security in replacement of or in addition to the Security posted by you under this Agreement;

and you will, within 60 days of receiving such notice, deliver to us written confirmation that the change has been made or the replacement or additional form of Security has been provided by you.

6.6 You must

- (a) without limiting your obligations or liabilities under this Agreement, at your expense, effect and keep in force during the Term Comprehensive/Commercial General Liability insurance protecting us as an additional insured in an amount of not less than \$2,000,000.00 inclusive per occurrence insuring against liability for personal injury, bodily injury (including death) or property damage, and claims for liability assumed under contract, arising from all accidents or occurrences on the Land or the Improvements;
- (b) on the Commencement Date and immediately upon demand, deliver to us a completed "Province of British Columbia Certificate of Insurance" for all insurance required to be maintained by you under this Agreement;
- (c) ensure that all insurance required to be maintained by you under this Agreement is
  - (i) placed with insurers licensed in British Columbia,
  - (ii) primary and does not require the sharing of any loss by any insurer that insures us, and
  - (iii) endorsed to provide us with 30 days' advance written notice of cancellation or material change; and
- (d) deliver or cause to be delivered to us, immediately upon demand, certified copies of all policies of insurance required to be maintained by you under this Agreement.

6.7 You acknowledge that we may, from time to time, notify you to

- (a) change the amount of insurance set out in subsection 6.6(a); and
- (b) provide and maintain another type or types of insurance in replacement of or in addition to the insurance previously required to be maintained by you under this Agreement;

and you will, within 60 days of receiving such notice, cause the amounts and types to be changed and deliver to us a completed "Province of British Columbia Certificate of Insurance" for all insurance then required to be maintained by you under this Agreement.

- 6.8 Despite subsections 6.6(a) to (d) and section 6.7, your obligations under those sections are suspended for so long as we in our sole discretion accept your decision to self insure in respect of the matters covered by those sections.

If we no longer accept your decision to self-insure in respect of the matters covered by subsections 6.6(a) to (d) and section 6.7, we will provide notice to you of our decision and you must, within 30 days of such notice, obtain the insurance described in section 6.6(a).

#### ARTICLE 7 - ASSIGNMENT

- 7.1 You must not sublicense, assign, mortgage or transfer this Agreement, or permit any person to use or occupy the Land, without our prior written consent, which consent we may withhold in our sole discretion.
- 7.2 For the purpose of section 7.1, if you are a corporation, a change in control (as that term is defined in subsection 1(4) of the *Company Act*) will be deemed to be a transfer of this Agreement.
- 7.3 Section 7.2 does not apply to a corporation if the shares of the corporation which carry votes for the election of the directors of the corporation trade on a stock exchange located in Canada.
- 7.4 Prior to considering a request for our consent under section 7.1, we may require you to meet certain conditions, including without limitation, that you submit to us a "site profile", "preliminary site investigation" or "detailed site investigation" (as those terms are defined in the *Waste Management Act*) for the Land or other similar type of investigation of the Land.

#### ARTICLE 8 - TERMINATION

- 8.1 You agree with us that
- (a) if you
    - (i) default in the payment of any money payable by you under this Agreement, or
    - (ii) fail to observe, abide by and comply with the provisions of this Agreement (other than the payment of any money payable by you under this Agreement),

and your default or failure continues for 60 days after we give written notice of the default or failure to you,

- (b) if, in our opinion, you fail to make diligent use of the Land for the purposes set out in this Agreement, and your failure continues for 60 days after we give written notice of the failure to you;
- (c) if you
  - (i) become insolvent or make an assignment for the general benefit of your creditors,
  - (ii) commit an act which entitles a person to take action under the *Bankruptcy and Insolvency Act* (Canada) or a bankruptcy petition is filed or presented against you or you consent to the filing of the petition or a decree is entered by a court of competent jurisdiction adjudging you bankrupt under any law relating to bankruptcy or insolvency, or
  - (iii) voluntarily enter into an arrangement with your creditors;
- (d) if you are a corporation,
  - (i) a receiver or receiver-manager is appointed to administer or carry on your business, or
  - (ii) an order is made, a resolution passed or a petition filed for your liquidation or winding up;
- (e) if you are a society, you convert into a company in accordance with the *Society Act* without our prior written consent;
- (f) if this Agreement is taken in execution or attachment by any person; or
- (g) if we require the Land for our own use or, in our opinion, it is in the public interest to cancel this Agreement and we have given you 60 days' written notice of such requirement or opinion;

this Agreement will, at our option and with or without entry, terminate and your right to use and occupy the Land will cease.

- 8.2 If the condition complained of (other than the payment of any money payable by you under this Agreement) reasonably requires more time to cure than 60 days, you will be deemed to have complied with the remedying of it if you commence remedying or curing the condition within 60 days and diligently complete the same.

8.3 You agree with us that

- (a) you will make no claim for compensation, in damages or otherwise, upon the lawful termination of this Agreement under section 8.1; and
- (b) our remedies under this Article are in addition to those available to us under the *Land Act*.

#### ARTICLE 9 - DISPUTE RESOLUTION

- 9.1 If any dispute arises under this Agreement, the parties will make all reasonable efforts to resolve the dispute within 60 days of the dispute arising (or within such other time period agreed to by the parties) and, subject to applicable laws, provide candid and timely disclosure to each other of all relevant facts, information and documents to facilitate those efforts.
- 9.2 Subject to section 9.5, if a dispute under this Agreement cannot be resolved under section 9.1, we or you may refer the dispute to arbitration conducted by a sole arbitrator appointed pursuant to the *Commercial Arbitration Act*.
- 9.3 The cost of the arbitration referred to in section 9.2 will be shared equally by the parties and the arbitration will be governed by the laws of the Province of British Columbia.
- 9.4 The arbitration will be conducted at our offices (or the offices of our authorized representative) in Kamloops, British Columbia, and if we or our authorized representative have no office in Kamloops, British Columbia, then our offices (or the offices of our authorized representative) that are closest to Kamloops, British Columbia.
- 9.5 A dispute under this Agreement in respect of a matter within our sole discretion cannot, unless we agree, be referred to arbitration as set out in section 9.2.

#### ARTICLE 10 - NOTICE

- 10.1 Any notice required to be given by either party to the other will be deemed to be given if mailed by prepaid registered mail in Canada or delivered to the address of the other as follows:

to us

Land and Water British Columbia Inc.  
3rd Floor, 145-3rd Ave.  
Kamloops, BC V2C 3M1;

to you

CORPORATION OF THE CITY OF PENTICTON  
171 Main St  
Penticton, BC V2A 5A9;

or at such other address as a party may, from time to time, direct in writing, and any such notice will be deemed to have been received if delivered, on the day of delivery, and if mailed, 7 days after the time of mailing, except in the case of mail interruption in which case actual receipt is required.

- 10.2 In order to expedite the delivery of any notice required to be given by either party to the other, a concurrent facsimile copy of any notice will, where possible, be provided to the other party but nothing in this section, and specifically the lack of delivery of a facsimile copy of any notice, will affect the deemed delivery provided in section 10.1.
- 10.3 The delivery of all money payable to us under this Agreement will be effected by hand, courier or prepaid regular mail to the address specified above, or by any other payment procedure agreed to by the parties, such deliveries to be effective on actual receipt.

#### ARTICLE 11 - MISCELLANEOUS

- 11.1 No provision of this Agreement will be considered to have been waived unless the waiver is in writing, and a waiver of a breach of a provision of this Agreement will not be construed as or constitute a waiver of any further or other breach of the same or any other provision of this Agreement, and a consent or approval to any act requiring consent or approval will not waive or render unnecessary the requirement to obtain consent or approval to any subsequent same or similar act.
- 11.2 No remedy conferred upon or reserved to us under this Agreement is exclusive of any other remedy in this Agreement or provided by law, but that remedy will be in addition to all other remedies in this Agreement or then existing at law, in equity or by statute.
- 11.3 The grant of a sublicence, assignment or transfer of this Agreement does not release you from your obligation to observe and perform all the provisions of this Agreement on your part to be observed and performed unless we specifically release you from such obligation in our consent to the sublicence, assignment or transfer of this Agreement.
- 11.4 This Agreement extends to, is binding upon and enures to the benefit of the parties, their heirs, executors, administrators, successors and permitted assigns.
- 11.5 If, due to a strike, lockout, labour dispute, act of God, inability to obtain labour or materials,

law, ordinance, rule, regulation or order of a competent governmental authority, enemy or hostile action, civil commotion, fire or other casualty or any condition or cause beyond your reasonable control, other than normal weather conditions, you are delayed in performing any of your obligations under this Agreement, the time for the performance of that obligation will be extended by a period of time equal to the period of time of the delay so long as

- (a) you give notice to us within 30 days of the commencement of the delay setting forth the nature of the delay and an estimated time frame for the performance of your obligation; and
- (b) you diligently attempt to remove the delay.

11.6 You agree with us that

- (a) we are under no obligation, express or implied, to provide financial assistance or to contribute toward the cost of servicing, creating or developing the Land or the Improvements and you are solely responsible for all costs and expenses associated with your use of the Land and the Improvements for the purposes set out in this Agreement; and
- (b) nothing in this Agreement constitutes you as our agent, joint venturer or partner or gives you any authority or power to bind us in any way.

11.7 This Agreement does not override or affect any powers, privileges or immunities to which you are entitled under any enactment of the Province of British Columbia.

The parties have executed this Agreement as of the date of reference of this Agreement.

SIGNED on behalf of HER MAJESTY  
THE QUEEN IN RIGHT OF THE  
PROVINCE OF BRITISH COLUMBIA by  
Land and Water British Columbia Inc.,  
authorized representative of the  
minister responsible for the *Land Act*

  
\_\_\_\_\_  
Authorized Signatory of  
Land and Water British Columbia Inc.

Licence

342689

File No.: 3403233

Disposition No.: 838408

SIGNED on behalf of CORPORATION OF THE CITY OF PENTICTON  
by its authorized signatories

Authorized Signatory

  
**C. David Perry, Mayor**

Authorized Signatory

  
**Leo den Boer, City Clerk****Council Approval**

Res. No.

819/2004

Date

Aug. 3, 2004







## MAINTENANCE PLAN

### Annual Planned Maintenance Review

The following areas are steps the Skaha Marina will complete every spring before opening to ensure all our docks, buildings, grounds and equipment are safe and operational.

### RESOURCES

Much of the work described below is done with our own staff members and where necessary with qualified and licensed trade persons

### PILINGS

Inspect for wear rot and tighten all pile loops and replace rub rails as necessary

### DOCKS

- Docks: Annual inspection for structural integrity and of all walkways, fingers and pilings to check for winter damage. This will include floatation under docks as well and replace or repair as necessary
- Identify areas that need major repair and upgrades and work with dock committee to see if they can be incorporated into plans
- Repair or replace as necessary to address all safety concerns
- Inspect all dock cleats, tighten or replace
- Inspect all finger connecting pins for wear and missing hardware, replace or tighten
- Inspect all wood timbers for rot, looseness or cracking, replace or repair
- Inspect all fire extinguisher pedestals for rot and looseness, replace or tighten
- Test all electrical outlets and covers for cracks or looseness, replace as required
- Comply with all electrical contractors with operational permit guidelines

### GANGWAYS

- Check all gates and security fencing for any problems and service as necessary
- Inspect headwall and abutment for sloughing and solidity
- Inspect approach deck boards for rot and looseness
- Inspect handrails for looseness and missing hardware
- Inspect gangway decking for rot and or looseness

### FIRE SAFETY

- Fire extinguishers to be remounted and inspected prior to Marina opening.
- Fire evacuation procedures including map of Marina to be displayed at prominent locations
- Review fire drill with all staff

- Comply with fire code for annual fire inspection

## **BUILDINGS**

- Check Main building roof, exterior walls, doors and windows. Clean and wash outside. Inside check lights, heating, cooling, plumbing and electrical systems.

## **OTHER AREAS**

- Check Fuel storage tanks, gas pumps and delivery system
- Check parking lot clean and address blacktop repairs as necessary
- All electrical wiring and lights to be inspected by an electrician throughout Marina
- Check for beaver damage and ice damage on all areas around the gas dock and all other docks

## Marketing Plan

### Marketing

Penticton has developed over the years as being recognized for its abundant natural backdrop and green spaces from a recreational as well as an agricultural perspective. Future brands are seeking success by leveraging natural and healthy living and by supporting local products and services throughout the community. By leveraging all that the 2 lakes have to offer in Penticton for sports and leisure, the campaign for working with Tourism Penticton would be broad in terms of the offerings and draw.

We would be looking to leverage each of these key messages around recreation in our promotional outreach. Having an artisan craft, local fare facility that supports all the local producers through a pub style restaurant on site also aligns with these trends.

We would also explore expanding the local licensed establishment to become an artisan brewpub in future. Being part of Explore BC's Ale Trail would provide added interest to the South end of Penticton and add on to visiting local wineries in the area.

In addition to the Skaha website which would provide links to our partner businesses, we would be looking to partner with Tourism Penticton, Tota and Destination BC, Destination Canada to leverage events and promote the lakes as an attractive draw to our area.

Social media, especially Instagram and Facebook, will be utilized during the launch of the new facilities and to promote what's happening at the marina on a regular basis.

We also see an opportunity to promote the area's rich history including our Indigenous roots, artwork and cultural events through the marina. Working hand in hand with the PIB to ensure positive relations within our communities.


In addition, there are other marinas across the Okanagan valley where we can promote staycations and visitation to our marinas and lakes.

Through the hotels and other tourist providers we can package up events and boat packages in coordination with our lessees to promote the offerings.


**HOW DO WE REACH OUR CUSTOMERS and BUILD CONSUMER DEMAND?**

— SHARE THE —  
**TRANSFORMATIVE  
POWER**  
— OF —  
**BC EXPERIENCES  
WITH THE WORLD**  
MOTIVATING OUR  
TARGET TRAVELLERS TO  
**VISIT  
BRITISH COLUMBIA**  
— NOW —

Our winning aspiration captures our strategic purpose. It is consistent with BC's tourism brand, it unifies our focus across all of our marketing efforts and, importantly, it motivates us to do our best work, every day.




— Vancouver Island



**Digital Marketing**

Scale your marketing efforts, strengthen your online presence, and deliver compelling content that speaks to your current fans and connects with prospective visitors.


[LEARN MORE](#) →



**Experience Development**

Create unforgettable experiences, programs, and services for your visitors.


[LEARN MORE](#) →



**Social Media Marketing**

Build your reputation and amplify your word of mouth marketing campaigns on social media.


[LEARN MORE](#) →



**Travel Trade & Travel Media**

Work with travel trade and travel media to increase awareness of your tourism experiences with BC's top international markets.


[LEARN MORE](#) →



**Applying Insights**

Use research and analytics to gain insights into your visitors, to make decisions in your marketing and experience activities, and to measure results.


[LEARN MORE](#) →



**Safety & Emergency Preparedness**

Plan, prepare, and respond to unexpected emergencies as they arise.

[LEARN MORE](#) →



**BC's Destination Brand**

Review brand resources and tools that align with BC's Destination brand, Super Natural BC.

[LEARN MORE](#) →

Drawing on the regional strategy that was developed in conjunction with British Columbia's strategy for the province will assist with our focus in building out our programming and our promotional campaigns. The information below summarizes some of the key concepts in the 41 page regional strategy 10 year plan.

In addition, Wellness Tourism is the fastest growing segment of the Global market for locals, Canadian staycationers, and International travelers. The majority of visitors to the region continue to be Western Canadians looking for a getaway that provides options for accessing healthy vacations, as per the excerpt below.

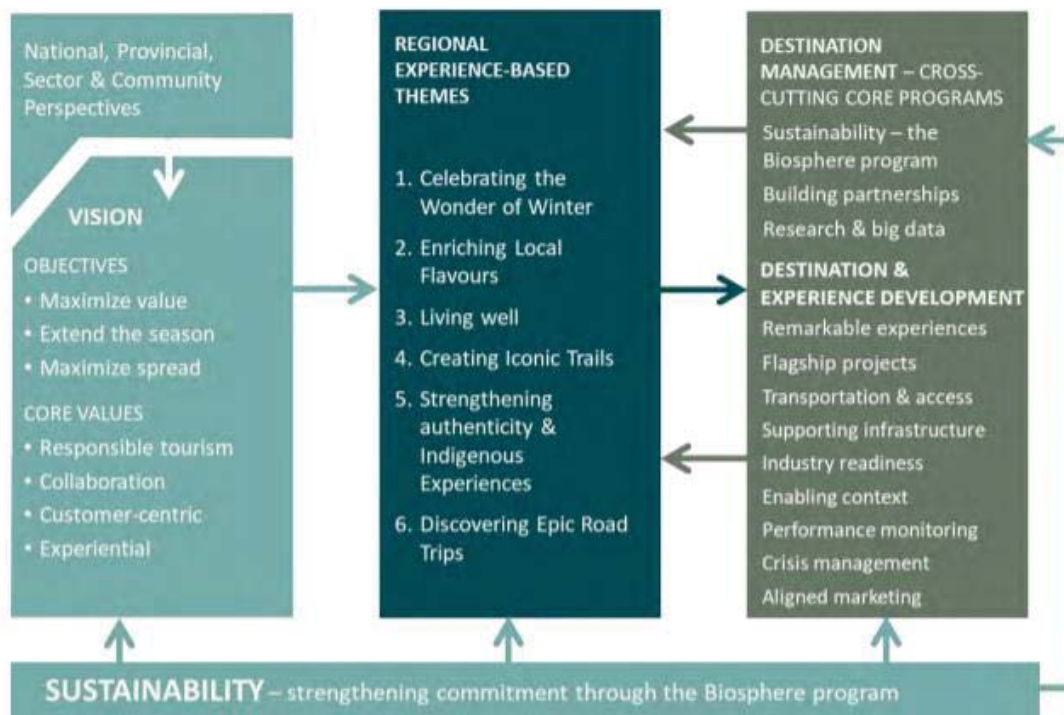
## OUR TEN-YEAR REGIONAL TOURISM STRATEGY 2.0

The demand for unique and authentic experiences that will allow travellers to connect with a destination is growing exponentially.

A focus on experienced based themes characterized the initial strategy with a focus that remains firmly in place. Globally, the growth in experiential travel is playing a key role in repositioning destinations that have embraced the concept. However, as our visitors seek to become “insiders” and travel with a deeper purpose, it is equally important to maintain a healthy balance between them and our residents.

Our outstanding landscapes and distinctive ecosystems, our culture and heritage, and our communities all need to be honoured and respected if we are going to continue to excel as hosts. The way to do business, the way to think about “success”, and the way to calculate the benefits of tourism are evolving within the Thompson Okanagan tourism region, and our priorities for the destination are changing to reflect our goals for a healthy future, a sustainable industry, and a resilient destination.

Embracing Our Potential 2.0 highlights the new priorities as we seek to work together to offer remarkable experiences and to deliver results based on a healthy industry, healthy businesses, healthy communities, and a healthy ecosystem.





Recent research indicates ongoing interest in culinary tourism, and estimates a compound annual growth rate of over 9% by 2023<sup>5</sup> in this sector. A key generator of this growth will be an increase in integrative experiences and events where food and beverage become an integral component within an activity that has another emphasis. The significance of local foods in festivals and events, or as part of an activity such as the emerging cycle winery tours that are occurring in the region, are indicative of this trend.

The burgeoning interest in local flavours reflects the desire to embrace the essence of place. Food, wine, artisan spirits, and beer are all local expressions of identity. Understanding the stories and the provenance of local flavours gives further insight into what is unique and distinctive about a place. It is often about slowing down, taking time to savour the moment, enjoy the aroma, and appreciate the tantalizing flavours, all in a way that adds value to the wider destination experience.

Not surprisingly, food and beverage have become particularly influential as a factor in choosing a vacation destination. According to recent research, Millennials (33.5%) and Generation Z (33.6%) put significant weight on local cuisine, considerably more than Baby Boomers (19.1%) or Generation X (26.5%). This aligns with the quest for transformative and experiential travel that has become very evident with younger travellers<sup>6</sup>.

Priorities moving forward include:

- Continuing to support the Slow Food Thompson Okanagan Community through promoting biodiversity in the food supply; elevating 'taste education'; connecting producers with co-producers through events and initiatives; and embracing Indigenous historical food practices.
- Supporting and further developing a vibrant agritourism sector and related experiences.

## Living well

In 2017, the value of wellness tourism was estimated at USD \$639 billion by the Global Wellness Institute. This segment has been growing at a rate of 6.5% annually with growth being driven by the expanding global middle class, a growing consumer desire to adopt a wellness lifestyle, and the rapidly expanding interest in experiential and transformative travel. What is of particular note, is that 89% of all wellness trips and 86% of expenditures are attributed to 'secondary wellness travellers' who are people who seek to maintain wellness or engage in wellness activities during any kind of travel<sup>7</sup>. With the region's focus on year-round outdoor activities, exceptional landscapes, enticing local flavours, and health resorts, this is a sector that can add considerable value to the destination.

5 January 2019, Global Culinary Tourism Market 2019-2023: Growing popularity of sustainable and organic culinary tourism – [www.technavio.com](http://www.technavio.com)

6 GlobalData, September 2018, Key Trends in Culinary Tourism. This research highlights four important trends:



## Boat Rentals, Repairs, Valet and Lake Tourism Opportunities

These will continue to be businesses that will partner or lease space and operate under the guidelines of the marina and present at the marina location into the future.

Currently there is a boat rental/Jet ski partner as well as valet and repairs on site. Each of these are important offerings that will continue on site at the marina. As we move into the future, we will look for ways to offer these services in a more efficient, broader scale and environmentally friendly way and one of the options is to provide these off-site in the future, as mentioned in the “proposed uses” section of the document.



## Strategic Planning

With a board composition and a non profit community society, there is an opportunity to tap into expertise from the business community. The strategic planning process will be more complete taking into consideration the key strengths, issues and opportunities at each of the lakes, making the best use of resources across the two facilities. The boards and membership will have greater input overall to the planning process. The alignment with Penticton business and tourism community as well as the marina membership and city will be more focused and aligned to the priorities of the community.

### City Liaison

Having one city liaison board will benefit both memberships as well as the city, as there will be more aligned business and community planning around goals, objectives and resources.

### Marketing and Tourism Liaison

The society sees the opportunity to leverage relationships to promote lake activities. The two lakes have the opportunity to attract significant tourism to the area, benefiting the financial success of the marinas and the community. The plan is to have our marketing coordinator work jointly with Tourism Penticton, the Chamber, and other organizations collectively to promote the two lakes which will benefit the marinas as well as the community.

### Input into Community investment

Having a membership organization ensures that the members and therefore the marina make the decisions around reinvesting the profits back into the facilities rather than removing the profits for personal use. The prioritization is decided by the membership who are the people utilizing the facility and can prioritize the requirements.

### Community and Business Development

A governance structure that has the opportunity to grant Penticton businesses access to two lakes can create a more effective model for business efficiency and provide additional revenues to businesses that may be operating in a silo at one or the other marinas. Having access to a broader set of resources will result in better management by providing additional resources for both locations.

We also see opportunities to work with the PIB under this arrangement with some of the future business recommendations. There may be an opportunity for business uses on the channel parkway that support the boating community such as repairs and storage, and as well there would be opportunities for cultural on site events working hand in hand with PIB.

## Proposed Uses

### Marina

The PYC society intends to maintain existing slip holders, configurations and footprints at the outset while additional due diligence is completed to provide the best model for the community, membership and environment over the long term. The plans will incorporate the following elements:

- Current slip holders to be maintained as desired at the current annual rental rates at transition with no major increases to the moorage rates other than cost of living in future years.
- Capital investments related to the current business model as identified will be built out over the next years through consultation with the city.
- Due to the limited space at the marina and to plan for population growth in the city, we believe we can continue existing services at the outset and look to enhance valet and boat storage and repair opportunities into the future through additional offsite services to increase access for those without slips and services for the boating community in an environmentally responsible way.
- Working with the local chamber, businesses and Tourism Penticton as well as other Okanagan and BC tourism agencies we would look to increase promotion for Penticton as a lake destination for all lake activities including non-motorized lake use such as dragon boating, paddleboarding, kiteboarding, and kayaking. The enhanced licensed facility on site would be a welcome addition as a gathering place for these groups and events.
- Improve safety and access across the marina property including relocation of the fueling dock for fuel service provisions.
- Continue to provide rentals of boats and jet skis and provide retail related to the daily needs of the boating community
- Promote and partner with other local businesses to drive interest in other lake activities in addition to power boating.

### Food Services, Entertainment, Events and Promotion

- Working with existing tenants as well as other partners, look to continue current coffee shop/bakery offerings at marina or within the park.
- Enhance offerings through creation of a licensed facility which would include artisan craft brewed products, local wines and local fare.
- Promote with Explore BC recreational programs as well as with the tourism and other lake activity associations.
- Partner with other yacht clubs.
- Year round opening for the community with seasonal offerings and events.
- Significant investment in the buildings to improve the aging asset base.
- Community celebrations, events and experiences to be promoted on site and we see opportunity for cultural lake events working with local partners such as the PIB

## Retail and Accessories

- Marina products to service day to day activities on the lake activities will be provided
- We will work with the membership to understand any gaps in this area into the future.

## Offsite Future Opportunities



The key limitation at Skaha marina is the small footprint on the land site as well as the limited amount of marina slips. The demand for moorage and lake access continues to grow in the city. Other concerns include environmental, as well as zoning limitations for servicing boats for moorage holders only, and these issues are similar on both lakes.

We see an opportunity into the future for creating a better facility for some of these offerings like repairs and maintenance, lake valet services, and year-round storage offsite to address some gaps in services in the community and providing a better model for park and environmental concerns. Moving these offsite to an industrial type space in the future would provide more room for the boating and recreational lake community on site while providing additional capacity for needed services off site.

Business development will include an extensive boat valet service to meet the growing demand of moorage needs.

This offsite facility would provide a much more attractive model for the boating community in the city as well as for tourists by servicing the marinas at both lakes and provide the solution for expanded access to the lakes for people visiting the area or for residents who are looking for this service or cannot get a slip in the short term. Storage is currently very limited within the city, as are repair services and valet offerings.

## Capital Expenditure Commitments

The Penticton Yacht Club Society and the Okanagan Marina has a solid track record of running a surplus while maintaining and upgrading facilities as required. A long term contract commitment will provide the certainty to invest a significant investment in capital for the long term. The experience of the team meets all of the criteria for overseeing planning, operations and investment to meet objectives related to the business.

The following projections are based on the current known elements of the marina and would continue to be expanded upon and refined pending further research and insights.

The Penticton Yacht club has been in existence since 1956 and has grown to what it is today. The opportunity to manage the Skaha lake facility and grow it into the vision we are proposing is very exciting. Having a long-term opportunity to realize this vision for the members of our community is very promising.

We have put together a financial plan with realistic budgeting for the first five years of operation. Together, with promising local business investment interests with related experience, we are prepared to fully invest into the building of a facility that will be pleasing to the local community as well as the City of Penticton and surrounding communities.

The Penticton Yacht Club has the expertise and experience to operate, build and promote a facility such as the Skaha Lake Marina. We have a track record of working with operators such as boat rental companies, Contractors to work with marina facilities and have a full understanding of maintaining and planning for long term use and maintenance of full Marina facilities.

## Summary

The PYC has budgeted an annual \$45,000.00 payment to the City of Penticton. This payment will be broken down into 12 monthly payments of \$3750.00 per month plus GST. Financial contributions to the Skaha Lake Community will begin with fully self-funding the identified items such as 445 feet of main dock way estimated to be in the range of \$225,000.00 and the estimated \$40,000 fuel dock and fuel delivery system in the first two years of operation.

There will also be an estimated \$20,000 put aside for an Engineered Fire suppression analysis along with an environmental survey and assessment. We plan to install the Fire suppression system in the 3rd year of operation at an estimated cost of \$100,000.00. In years four and five, when funds allow, we will complete updated offices, meeting rooms and a members lounge that could be rented out for small private gatherings.

We have budgeted \$100,000 in year four and year five to complete these projects. This will amount to a total Capital investment of \$565,000 over the first five years plus a \$20,000 budget for engineering and Fire suppression review in year one.



Our proposal also includes a commitment from a local business interest to commit up to \$2,500,000.00 to revamp the existing facility and the grounds surrounding the facility to operate a licensed public facility for all of Penticton to enjoy. This will not be a “Private Club”. This project is expected to begin in year one when the boating season is wrapping up with the expectation to open April or May of the 2023 boating season.

It is projected that by the end of year five there will be a balance of operating funds of \$63,700 and the beginning of a capital reserve of \$16,000 to begin planning of long term goals for the Skaha Lake Marina.

It is our goal to include non-motorized craft such as canoes, Kayaks and paddle board enthusiasts to join as members of the club. Future projects may include the joint funding of a facility for such users.

Our commitment will be to beautify the area into a clean venue free of a boat yard appearance providing members of the community a park setting with public access.

The sub contractor of the food and beverage site building has committed to an investment to create a destination brew pub style restaurant that will also accommodate the current bakery/cafe type offerings and will be open year round 7 days a week.

### **Five Year Revenue & expenses - Marina**

The below financial chart outlines annual revenues expenses and the surplus, as well as capital expenditures, funds borrowed and bank balance, funds available after year 5 and the Capital reserve after year 5.

These are specific to the marina itself and do not include investments made by lessee businesses.

#### **RESTAURANT AND BUILDING**

The hospitality investments by the sub contractor are estimated at an additional \$2.5 million in construction and outfitting costs for the restaurant facilities. Once open the payroll will be estimated at approximately \$1 million per year for 37 full and part time jobs.