

**TERMS OF INSTRUMENT - PART 2**

**Section 219 Conservation Covenant**

**and**

**Section 218 Statutory Right of Way**

The Agreement is dated for reference November 12, 2012.

BETWEEN:

**Denman Island Memorial Society**, (Incorporation No. S55505),  
a society registered in British Columbia of 9521 McFarlane Road,  
Denman Island, British Columbia V0R 1T0

(the "Transferor")

AND: **Denman Conservancy Association**, (Registration No. S27585),  
a society registered in British Columbia of P.O. Box 60, Denman Island,  
British Columbia V0R 1T0

(the "Transferee")

(collectively, the "Parties")

**RECITALS:**

- A. The Transferor is hereinafter referred to as the "Owner;"
- B. The Transferee is hereinafter referred to as the "Covenant Holder;"
- C. The Owner is the registered owner in fee simple of the Land as defined in section 1 below;
- D. The Covenant Area as defined in section 1 below contains significant amenities including flora, fauna and natural features of importance to the Owner, the Covenant Holder and the public;
- E. The Owner wishes and has agreed to grant to the Covenant Holder a covenant pursuant to section 219 of the *Land Title Act* to restrict the use of the Covenant Area;
- F. A statutory right of way under section 218 of the *Land Title Act* in favour of the Covenant Holder is necessary for the operation and maintenance of the undertakings of the Covenant Holder; and
- G. The Covenant Holder has been designated by the British Columbia Minister of Forests, Lands and Natural Resources Operations as an entity authorized to accept covenants and as an entity authorized to accept statutory right of ways, pursuant to sections 218 and 219 of the *Land Title Act*.

**NOW THEREFORE** in consideration of the payment of \$2.00 by the Covenant Holder to the Owner, the receipt and sufficiency of which is acknowledged by the Owner, and in consideration of the promises exchanged below, the parties agree as follows, in accordance with sections 218 and 219 of the Land Title Act (British Columbia):

## 1. INTERPRETATION

### 1.1 In this Agreement

- (a) "Amenities" includes any natural, scientific, environmental, wildlife, plant, or cultural value relating to the Covenant Area;
- (b) "Ashes" means the remains of a human body after cremation;
- (c) "Cemetery" means a place of burial of human remains or ashes, and incidental or ancillary buildings on the land;
- (d) "Covenant Area" means all the Land;
- (e) "CPI" means the All-Items Consumer Price Index published by Statistics Canada, or its successor in function, for Vancouver, British Columbia, where the year 2010 equals 100;
- (f) "GOERT" means the Garry Oak Ecosystems Recovery Team, a non-profit organization that is a leader in Canada in the development of recovery planning for species at risk;
- (g) "Invasive Plant Species" means non-native species that can thrive in areas beyond their natural range of dispersal, are characteristically adaptable, aggressive, and have a high reproductive capacity and whose introduction does or is likely to cause environmental harm. A list of such species, which may be regularly updated in the Management Plan, is included in the Report;
- (h) "Land" means the land legally described as PID 028-994-965, Lot A, Section 17, Denman Island, Nanaimo District, Plan VIP 89491 as set out on the reduced copy of the subdivision plan attached as Schedule A;
- (i) "Management Plan" means the management plan for the Covenant Area created in accordance with section 5 and consists of a report, which may include illustrations, maps and photos, which sets out the existing nature, including the Amenities of the Covenant Area, and illustrates the proposed alterations (including but not limited to the locating of burial areas, public parking areas, fences, gates, driveways, pathways, Memorial Structure, meadow, maintenance shed, outhouse toilet, water collection and storage facilities, outdoor furniture, and the scattering area) of the Covenant Area by the Owner.
- (j) The Management Plan takes into consideration the scheduling of future activities and the impact that the proposed alterations may have on the vegetation, soils, drainage, wildlife and other Amenities, and identifies all restorative and remedial actions including policies, regulations and practices that the Owner will take to lessen or eliminate impacts identified;
- (k) "Memorial Structure" means i) a structure erected to communally commemorate the lives of those buried in the cemetery and ii) is understood not to be a building and is modest in scale to accommodate small rather than community sized gatherings;
- (l) "Natural Burial" means a) burial of a human corpse in its natural state, that is, one that has not been treated by any means so as to preserve it, along with a coffin or other container that is biodegradable or b) burial of ashes along with any biodegradable container allowing, however, that the container for either a corpse or ashes may be constructed with the assistance of non-biodegradable, non-toxic fasteners or c) scattering of ashes;
- (m) "Owner" means the Denman Island Memorial Society and its successors and permitted assigns;

- (n) "Natural State" means the state of the Covenant Area as described in the Report, but taking into account that the forest has recently undergone logging, that it is the intent of the parties that the Covenant Area will be used as cemetery for Natural Burials, and that following the disturbance arising from the burials in any locality, the flora and fauna of the Covenant Area will regenerate and evolve through natural succession over time;
  - (o) "Rent Charge" means the rent charge granted by the Owner under section 12;
  - (p) "Rent Charge Amount" means the amount set out in section 12, the payment of which is secured by the Rent Charge;
  - (q) "Rough Clearing" means the cutting and chipping of all tree branches and shrubs; and, the removal by machine of all trees, recent stumps, shrub roots and slash to follow the contour of the land and then machine raking the land to follow this contour;
  - (r) "Report" means the baseline documentation report that describes the Covenant Area and the Amenities in the form of text, maps, photographs, and other records of the Covenant Area and the Amenities as of May 2010, a copy of which is on file with each of the parties at the addresses set out in section 15.5 and an overview of which is attached as Schedule B;
  - (s) "Vault" means any structure, above or below ground, designed to house one or more bodies;
  - (t) "Woody Debris" means dead portions (of any dimension) of trees or shrubs on the forest floor, occurring naturally or by alteration, excluding stumps from logging earlier than 1995 and excluding material that is buried beneath organic or mineral soil layers enough to be part of the forest floor;
- 1.2 Where this Agreement says something is in the "sole discretion" of a party, that thing is within the sole, absolute and unfettered discretion of that party;
- 1.3 This Agreement must be interpreted in accordance with the laws of British Columbia and the laws of Canada applicable in British Columbia;
- 1.4 This Agreement includes the recitals to the Agreement, the Schedules to the Agreement and Part 1 of the Land Title Act Form C to which this Agreement is attached.
- 1.5 In this Agreement:
- (a) reference to the singular includes a reference to the plural, and vice versa, unless the context otherwise requires;
  - (b) where a word or expression is defined in this Agreement, other parts of speech and grammatical forms of the same word or expression have corresponding meanings;
  - (c) article and section headings have been inserted for ease of reference only and are not to be used in interpreting this Agreement;
  - (d) the word "enactment" has the meaning given to it in the *Interpretation Act* (BC) on the reference date of this Agreement;
  - (e) reference to any enactment is a reference to that enactment as consolidated, revised, amended or re-enacted or replaced, unless otherwise expressly provided;
  - (f) reference to a "party" or the "parties" is a reference to a party or the parties to this Agreement and their respective successors, assigns, trustees, and receivers; and

- (g) reference to a “day”, “month”, or “year: is a reference to a calendar day, calendar month, or calendar year, as the case may be, unless otherwise expressly provided.

## **2. REPRESENTATIONS AND WARRANTIES**

- 2.1 The Owner warrants that the facts set out in Recitals C and E are, or will be, true as of the date of the registration of this Agreement in the Land Title Office.
- 2.2 The Covenant Holder warrants that the facts set out in Recital G are true as of the date of this Agreement.
- 2.3 The Parties warrant that the facts set out in Recitals D and F are true as of the date of this Agreement.

## **3. INTENT OF AGREEMENT**

- 3.1 The parties each agree that the general intent of this Agreement is:
  - (a) to protect, preserve, conserve, and maintain, enhance or restore the Covenant Area, and the Amenities, in a Natural State subject to section (c) and (d) below; and
  - (b) to prevent any occupation or use of the Covenant Area that will impair or interfere with the Natural State of the Covenant Area or the Amenities subject to section (c) and (d) below;
  - (c) to provide for the use of the Covenant Area as a Cemetery for Natural Burials in accordance with the Management Plan agreed upon by the parties as hereinafter set out; and
  - (d) to provide for the use of the Covenant Area for walking, nature observation and environmental education in accordance with the Management Plan agreed upon by the parties as hereinafter set out;

and the parties agree that this Agreement is to be interpreted, performed and applied accordingly.

## **4. SPECIFIC RIGHTS AND RESTRICTIONS ON THE OWNER'S USE OF THE COVENANT AREA**

- 4.1 The Owner shall not use the Covenant Area for any purpose other than as a Natural Burial Cemetery for human remains or ashes in compliance with the terms of this Agreement and for those ancillary uses expressly permitted herein.
- 4.2 The Owner reserves all of its rights as owner of the Land, including the right to use, occupy and maintain the Land, including the Covenant Area, in any way that is not expressly restricted or prohibited by this Agreement, so long as the use, occupation or maintenance are consistent with the intent of this Agreement. Without limiting the generality of the foregoing, acknowledged as a component of section 3.1(c) and 3.1(d) is the Owner's right, subject to the terms of this Agreement, to construct and operate structures and facilities such as
  - (a) pedestrian trails, benches, fences, gates, an outhouse toilet, and related water collection and storage facilities,
  - (b) a Memorial Structure, including an underground water storage tank, and parking areas,
  - (c) a pathway along the existing old road running diagonally across the land, lined with native trees and incorporating some of the existing trees,

- (d) a small meadow with native trees, arranged in such a way as to achieve the appearance of a natural meadow, rather than an orchard,
- (e) a small maintenance shed, and
- (f) the only roofs shall be on the maintenance shed, entry gate and outhouse toilet and may be used to collect water, with storage of that water being under or above ground, at the option of the Owner

provided that such structures and facilities are shown in a Management Plan approved by the Covenant Holder as described in section 5 and are in accordance with applicable statutes, regulations, plans and by-laws.

4.3 The Owner shall have the right to construct, operate, and maintain on the Covenant Area a Natural Burial Cemetery subject to the following conditions and restrictions:

- (a) Burial Locations. Burials shall not be located in any areas except those shown on the Management Plan approved by the Covenant Holder. No whole body burials shall occur in the non-disturbance areas adjacent to Denman Road and North Central Road as more thoroughly described in section 4.6.
- (b) Cemetery Development. In order to create a cemetery that is anticipated to meet the needs of Denman Island for at least the next 100 years, it is acknowledged and agreed that an extensive area of the land will have to be used to accommodate the estimated number of grave sites required. The nature of development of the Cemetery shall allow for operation of up to 3 burial areas at any one time as well as the carrying out of the work permitted by this section 4 and section 8 below, and to anticipate future burial needs, shall also allow Rough Clearing of all the Land except the scattering area and non-disturbance areas referred to in section 4.6. Such Rough Clearing shall be undertaken in stages so that only areas for immediate use and for up to 35 years of projected use for burials may be Rough Cleared at any one time, as described in the approved Management Plan. In those burial areas to be used later than a projected 35 years, it is agreed, however, that:
  - (i) the cutting and removal of all non-alder trees is permitted, provided that stumps created by that cutting are left in the ground until that area becomes an active burial area and provided, further, that the timing of such cutting (to address seasonal limitations) and the manner of cutting and removal are approved in the Management Plan and that the cutting and removal are done in consultation with an authorized representative of DCA, who shall be entitled to be onsite for that cutting and/or removal if required in the Management Plan; and
  - (ii) the pulling and/or relocation of non-alder tree saplings is permitted, provided that such sapling removal is approved in the Management Plan and is done in consultation with an authorized representative of DCA, who shall be entitled to be onsite for that removal and/or relocation if required in the Management Plan.
- (c) Natural Burials.
  - (i) Only Natural Burials shall be permitted in the Cemetery. Burial sites shall be restored to a Natural State as soon as reasonably possible, taking into account the operational needs of the Owner.
  - (ii) New and restored plants may be tended and watered until the end of the second growing season following the burial.

- (iii) Ashes may be scattered unless it is determined that the volume of ashes is changing soil chemistry in a way that impairs the conservation values of the Covenant Area.
- (iv) The Owner shall have the right to construct or install:
  - (a) individual small grave markers not more than 4" above the ground, and
  - (b) small simple markers to identify entrances to grave areas, all of which are to be made of indigenous material or such stone as is commonly used for grave markers and memorial structures (granite or grano-diorite) and are located in accordance with and comply with the specifications in the Management Plan.
- (v) No synthetic materials will be used to clothe bodies in preparation for burial.
- (vi) Graves will be without liners.
- (vii) All burial practices shall meet the Green Council Burial Standards for a Natural Burial Ground which are in effect at the time of the burial. In the event the Green Council fails at any time to maintain Burial Standards for a Natural Burial Ground, then the Owner and Covenant Holder agree to jointly, in writing, select and follow the comparable standards established by an organization operating at that time and having expertise in the area of Natural Burials.
- (d) Embalming. No burial of embalmed bodies shall be permitted.
- (e) Vaults. No Vaults shall be permitted.
- (f) Protection of Native Plants. Except as otherwise permitted elsewhere in this document, the Owner shall exercise its best efforts to re-establish and protect existing native species plants in the Covenant Area following the Rough Clearing and to restore and enhance conditions for such plants. All plants used for restoration and memorials shall be site appropriate species native to the region as listed in the Management Plan.
- (g) Soil disturbance, removal, and replacement. The Owner shall use reasonable measures to ensure that removed organic materials are replaced in the same area and in the reverse order they were removed when conducting burials so as to encourage reestablishment of native vegetative covers.
- (h) Stumps. The parties each agree that the large stumps remaining from pre-1995 logging, as documented in the Report, are an Amenity of the Covenant Area and the Owner shall exercise its best efforts to protect and maintain such stumps, with the exception of (a) those stumps that have deteriorated to ground surface level, and b) those stumps located within the area containing the Memorial Structure, when planning for Cemetery facilities and conducting burials.
- (i) Woody Debris. Woody Debris is a significant component of and contributor to the natural amenities of the Covenant Area. The Owner may relocate the Woody Debris within the Covenant Area when conducting its operations.
- (j) Removal of Vegetation and Woody Debris. The Owner shall be allowed to remove or alter by trimming and/or chipping living or dead trees, shrubs and other vegetation as well as Woody Debris in order to:
  - (i) install burial areas and operate the Cemetery in accordance with section 3.1(c);
  - (ii) install the facilities permitted in section 4.2;

- (iii) prevent hazard to life or property;
  - (iv) deal with diseased vegetation;
  - (v) eliminate Invasive Plant Species; or
  - (vi) manage the scattering area including, but not limited to, the installation of walkable pathways and the removal of the slash pile as provided for in the approved Management Plan.
- (k) Exception. All resulting organic material from permitted activities set out in subsection j above shall be relocated in the Covenant Area other than the following, which may be removed from the Covenant Area:
- (i) Invasive Plant Species, provided such removal shall be in accordance with the best management practices established by GOERT (or successor agency);
  - (ii) diseased trees or diseased limbs attached to living trees; and
  - (iii) trees of 20 cm or greater dbh (diameter at breast height) which have fallen from natural causes or have been felled to create a burial area, or have been felled to create the facilities in section 4.2, or wood products from those trees, which may be removed and sold commercially.
- 4.4 The Covenant Area shall not be subdivided.
- 4.5 There shall be no construction or placing of signs, billboards, or any type of advertising devices or materials on the Covenant Area except for directional signs required by law, signs required for institutional controls of human activities associated with the Covenant Area, signs required for purposes of public safety, and signs associated with the uses and activities described in sections 3.1(c) and 3.1(d).
- 4.6 Non-Disturbance Areas: The Owner shall not disturb or alter any area that is within 8 meters of the property boundary adjacent to both Denman and North Central Roads except:
- (a) to construct and operate pedestrian trails, benches, fences, gates, and related water collection and storage facilities, or
  - (b) to prevent hazard to life or property, or
  - (c) to deal with diseased vegetation, or
  - (d) to eliminate Invasive Plant Species, or
  - (e) to install an access road off North Central Road, or
  - (f) to scatter, but not bury, ashes subject to section 4.3(c)iii above, or
  - (g) to create an open area immediately west of the south entranceway to accommodate three cedar figures and provide space for people to walk around the figures.
- 4.7 Hunting of animals, grazing of domestic animals, and collecting of plants shall not be permitted on the Covenant Area.
- 4.8 Except as may be reasonably required in connection with any of the uses and activities expressly permitted by this covenant, there shall be no filling or excavating; no removal of topsoil, sand, gravel, rock, minerals or other materials; no interference with watercourses; no dumping of trash, garbage, or any other material; and no alteration of the topography of the land in any manner. For clarity, the Owner shall be entitled to carry out any of the aforementioned activities where reasonably required to fulfill the intentions set out in subsections 3.1(c) and (d) above.
- 4.9 Installation of public walkways within the Covenant Area shall be limited as shown on the Management Plan approved by the Covenant Holder to locations associated with the use of the

Covenant Area as a Cemetery and for low impact recreation such as walking and nature observation.

- 4.10 There shall be no pesticides, including but not limited to herbicides, insecticides or fungicides, or chemical fertilizers applied to or introduced into or onto the Covenant Area.
- 4.11 Horses shall not be permitted to enter the Covenant Area except for the purpose of moving logs or of being used at burial-related ceremonies.
- 4.12 No motorized vehicles shall be permitted to enter the Covenant Area except those vehicles described in the Management Plan as necessary for the operation of the Cemetery
- 4.13 The Owner shall not lease or license the use of the Land unless the lease or license is expressly made subject to the provisions of this Agreement and expressly entitles the Owner to terminate the lease and license if the lessee or licensee breaches any of the provisions of this Agreement;
- 4.14 The Owner shall not place any financial encumbrances on the Land having priority over this Agreement;
- 4.15 The Owner shall not carry out any acts on or in respect of the Covenant Area which, in the opinion of the Covenant Holder, acting reasonably, may have detrimental impact on the Covenant Area other than as specifically permitted in this Agreement.

## **5. MANAGEMENT PLAN**

- 5.1 The Owner shall create a Management Plan for the Covenant Area and submit the Management Plan to the Covenant Holder for approval. The Covenant Holder must, within 30 Business Days of receipt of the proposed Management Plan, notify the Owner in writing whether or not the Covenant Holder, acting reasonably, approves the proposed Management Plan.

If the Covenant Holder does not approve the proposed Management Plan, the Covenant Holder will, in its notification to the Owner, provide written reasons for not approving the Management Plan and a description of changes to the Management Plan that are necessary for the Covenant Holder to approve the Management Plan. If the Covenant Holder fails to notify the Owner as above required, it shall be deemed to have approved the Management Plan.

If the Owner does not approve the requested changes within 30 days of receipt, the Owner and the Covenant Holder agree to meet within a further 30 days in an attempt to resolve their differences. If all issues are not resolved at that meeting, or if no meeting takes place, the Owner and the Covenant Holder shall jointly select a single person who shall act as an arbitrator under the Commercial Arbitration Act to resolve the matter. If the parties cannot agree on a single arbitrator, then the Owner and the Covenant Holder or either of them may request the British Columbia International Commercial Arbitration Centre or, if that Centre is not then in existence or operation, its successor, to appoint the arbitrator. The decision of this arbitrator is final and binding and his/her costs shall be borne equally between the Owner and the Covenant Holder.

- 5.2 Once a Management Plan is created for the Covenant Area, the Owner shall be the manager and shall manage the Covenant Area according to the Management Plan.
- 5.3 The Owner shall review and possibly revise the Management Plan at five year intervals and obtain the further approval by the Covenant Holder of any revised Management Plan as detailed above.
- 5.4 At the Owner's option, it may at any time prepare a revised Management Plan for presentation to and approval by the Covenant Holder in the same manner as set out in subsection 5.1.

## **6. BASELINE DOCUMENTATION REPORT**

- 6.1 The parties agree that the Covenant Area and the Amenities are described in the Report.
- 6.2 The parties agree that the Report is intended to serve as an objective information baseline for monitoring compliance with the terms of this Agreement and the parties each agree that the Report provides an accurate description of the Covenant Area and the Amenities as of the date of this Agreement.

## **7. DISPUTE RESOLUTION**

- 7.1 If a breach of this Agreement occurs or is threatened, or if there is disagreement as to the meaning of this Agreement, the Covenant Holder or the Owner may give notice to the other party requiring a meeting of both parties within 14 days of receipt of the notice. For the sake of clarity, this section 7 does not apply where there is a failure to approve a Management Plan, which failure shall be governed and resolved by the process set out in section 5 above.
- 7.2 All activities giving rise to a breach or threatening a breach of this Agreement, or giving rise to a disagreement as to the meaning of this Agreement must immediately cease upon receipt of notice.
- 7.3 The parties must attempt to resolve the matter, acting reasonably and in good faith, within 28 days of receipt of the notice.
- 7.4 If the parties are not able to resolve the matter within that time, the parties may appoint a mutually acceptable person to mediate the matter, with the costs of the mediator to be borne equally between the Owner and the Covenant Holder, and the parties must act reasonably and in good faith and cooperate with the mediator and with each other in an attempt to resolve the matter within 30 days after the mediator is appointed.
- 7.5 If the parties are not able to resolve the matter within that time with the assistance of a mediator or if no mediator is appointed, the parties agree to submit the matter to a single arbitrator under the *Commercial Arbitration Act* (British Columbia) appointed jointly by the Owner and the Covenant Holder.
- 7.6 If the parties cannot agree on a single arbitrator, then the Owner and the Covenant Holder, or either of them, may request that the British Columbia International Commercial Arbitration Centre or, if that Centre is not then in existence or operation, its successor, appoint the arbitrator.
- 7.7 The decision of the arbitrator is final and binding.
- 7.8 The costs of the arbitrator will be borne equally between the Owner and the Covenant Holder.
- 7.9 This section 7 does not affect the right of the Covenant Holder to pursue any injunction proceedings through the Supreme Court of British Columbia in relation to a breach or a threatened breach of this Agreement.

## **8. OWNER'S ANCILLARY RESERVED RIGHTS**

- 8.1. The Owner shall have the right to use and operate the mechanical equipment in the Covenant Area as described in the Management Plan.
- 8.2 The Owner may establish requirements for the operation and management of the Cemetery. The Owner shall have the right to administer and enforce such requirements provided they do not conflict with or are not inconsistent with the purposes of this Agreement.
- 8.3 Subject to the restrictions set out in section 3 and 4, the Owner shall have the right to occupy the Land in accordance with applicable statutes, regulations, plans and by-laws.

- 8.4 The Owner acknowledges and agrees that the Covenant Holder has not agreed to endorse any general or specific exercise of the Owner's rights as the owner of the Land.
- 8.5 Subject to section 8.6, nothing in this Agreement restricts or affects the right of the Owner or any other party to do anything reasonably to:
- (a) prevent potential injury or death to any individual, or
  - (b) prevent, abate or mitigate any damage or loss to any real or personal property.
- 8.6 If the Owner intends to do anything described in section 8.5 the Owner must give at least 30 days' prior written notice to the Covenant Holder, describing in reasonable detail the intended action, the reason for it, and its likely effect on the Covenant Area or the Amenities. The Owner must allow the Covenant Holder to enter upon and inspect the Covenant Area if any action is proposed under section 8.5. The Covenant Holder may comment on the proposed action and the Owner and any other party must take those comments into consideration before doing anything under that section.
- 8.7 Despite section 8.6, in an emergency situation, such as fire or threat to human safety, the Owner may do anything reasonably necessary to prevent potential injury or death without the consent of the Covenant Holder, but the Owner must notify the Covenant Holder of the circumstances of such action within 10 days, including the Owner's reasonable expectation of the actual or likely effect on the Covenant Area or the Amenities.

## **9. OWNER'S OBLIGATIONS**

- 9.1 The Owner retains all responsibility and bears all liability related to the ownership, use, occupation and maintenance of the Covenant Area other than for improvements and alterations carried out by the Covenant Holder. The Owner will take out and maintain a policy of public liability insurance in a minimum amount and on terms as advised by the Owner's insurance agent, based on what is common and responsible for similar properties and operations, subject to annual increases consistent with industry standards. The Owner will provide a copy of the policy of insurance to the Covenant Holder within 30 days after receiving written request for it.
- 9.2 The Owner hereby indemnifies the Covenant Holder, its directors, officers, employees, agents and contractors, from and against any and all liabilities, damages, losses, personal injury or death, causes of action, actions, claims, and demands by or on behalf of any person, arising out of any act or omission, negligent, or otherwise, in the use, occupation and maintenance of the Covenant Area or the Amenities by the Owner. The Covenant Holder hereby indemnifies the Owner, its directors, officers, members, volunteers, employees, agents and contractors, from and against any and all liabilities, damages, losses, personal injury or death, causes of action, actions, claims, and demands by or on behalf of any person, arising out of any act or omission, negligent or otherwise in the use and maintenance of the Covenant Area or the Amenities by the Covenant Holder.
- 9.3 The Owner is liable for any and all breaches by it of this Agreement, but the Owner is not liable for:
- (a) breaches of this Agreement which occur while the Owner is not the registered owner of any interest in the Land;
  - (b) injury or alteration to the Covenant Area or the Amenities resulting from natural causes, or causes beyond the Owner's reasonable control, including accidental fire, flood, storm, vandalism, trespass and earth movement, but excluding injury or alteration resulting from

actions of the Owner or any third party acting with the actual or constructive knowledge of the Owner;

- (c) any prudent action taken by the Owner under emergency conditions to prevent, abate, or mitigate significant injury to the Covenant Area or the Amenities resulting from natural causes, including accidental fire, flood, storm and earth movement; or
- (d) injury or alteration to the Covenant Area caused by the Covenant Holder while exercising its rights under this Agreement.

9.4 Without limiting the generality of sections 9.1, 9.2 and 9.3, the Owner:

- (a) is solely responsible and liable for any loss or damage, or liability of any kind (whether civil, criminal or regulatory), in any way connected with the existence in, on, from, to or under the Covenant Area (whether through spill, emission, migration, deposit, storage or otherwise) of any pollutant, contaminant, waste, special waste, or any other matter that impairs the environment unless caused by the Covenant Holder while exercising its rights under this Agreement or prior to the Owner acquiring ownership of the Land or by any third party acting without the actual or constructive knowledge of the Owner; and
- (b) hereby indemnifies the Covenant Holder from and against any loss, damage, liability, cause of action, action, penal proceeding, regulatory action, order, directive, notice or requirement, including those of any government agency, incurred, suffered, brought against or instituted against the Covenant Holder in any way associated with anything for which the Owner is liable under section 9.4(a).

9.5 Where, as provided under section 9.3(b), the Owner is not responsible for damage or theft due to trespass or vandalism, the Owner will take all reasonable steps to identify and prosecute the person responsible and to seek financial restitution for the damage or theft. The Owner shall apply the proceeds (if any) of such a restitution claim to remediate or restore (to the extent reasonably possible) the damage or theft.

9.6 The Owner must pay when due all taxes, assessments, levies, fees and charges of whatever description which may be levied on or assessed against the Land and must pay any arrears, penalties and interest in respect thereof.

9.7 The Owner hereby indemnifies the Covenant Holder from and against any fee, tax, or other charge which may be assessed or levied against the Owner or the Covenant Holder pursuant to any enactment, including the *Income Tax Act* (Canada) with respect to the Land or with respect to this Agreement, including any fee, tax or other charge which may be assessed or levied against the Owner or Covenant Holder as a result of the amendment or termination of this Agreement, provided that the Owner does not indemnify the Covenant Holder from and against a tax assessed against the Covenant Holder under *the Income Tax Act* (Canada) as a result of the Covenant Holder's non-compliance with the provisions of the *Income Tax Act* (Canada), the revocation of the Covenant Holder's registration as a charity or of the Covenant Holder's disposing or changing the use, without authorization or permission, of the interest in the Land granted to the Covenant Holder under this Agreement.

9.8 Any debts or other amounts due from the Owner to the Covenant Holder under this Agreement, if not paid within 30 days after notice, will bear interest at the annual interest rate that is 1 percent greater than the prime rate of interest. For the purposes of this section, the "prime rate of interest" is the annual rate of interest charged from time to time by the Bank of Montreal, at its main branch in Vancouver, BC, for demand Canadian dollar commercial loans and designated from time to time by the Bank of Montreal as its prime rate.

- 9.9 For clarity, the indemnities granted under sections 9.2, 9.4(b) and 9.7 are indemnities granted as an integral part of the section 219 (Land Title Act) covenant granted by this Agreement.
- 9.10 The rights given to the Covenant Holder by this Agreement are permissive only and nothing imposes any obligation on the Covenant Holder to anyone, or obliges the Covenant Holder to perform any act or incur any expense for any purpose in respect of this Agreement except as expressly set out in this Agreement. Neither does the mere signing of this Agreement render the Covenant Holder an occupier of the Covenant Area.

## **10. STATUTORY RIGHT OF WAY**

- 10.1 The Owner grants to the Covenant Holder a license, and statutory right of way pursuant to section 218 of the *Land Title Act*, permitting the Covenant Holder to do the following:
- (a) to enter upon and inspect the Covenant Area at all reasonable times upon prior written notice by the Covenant Holder to the Owner of at least 7 days, unless, in the opinion of the Covenant Holder, there is an emergency or other circumstance which does not make giving such notice practicable, in the sole discretion of the Covenant Holder;
  - (b) as part of inspection of the Covenant Area, to take soil, water or other samples, photographs, video, sound and other image recordings and sound recordings as may be necessary to monitor compliance with and enforce the terms of this Agreement;
  - (c) to enter upon and protect, preserve, conserve, maintain, enhance, rehabilitate or restore, in the Covenant Holder's sole discretion and at the Covenant Holder's expense, the Covenant Area or the Amenities to as near the condition described in the Report or established in accordance with the Management Plan as is practicable, if an act of nature or of any person destroys, impairs, diminishes or negatively affects or alters the Covenant Area or the Amenities from the condition described in the Report or established in accordance with the Management Plan;
  - (d) subject to section 11, to construct, reconstruct and maintain, in its sole discretion and at its expense, in a good workmanlike manner, improvements for purposes of public safety, limited public access (as hereinafter set out) or protection of the Amenities;
  - (e) to carry out or evaluate, or both, any program agreed upon between the parties for the protection, preservation, conservation, maintenance, restoration or enhancement of all or any portion of the Covenant Area or the Amenities;
  - (f) to place survey pegs or other markings on the Covenant Area or to increase the visibility of existing survey pegs or other markings; and
  - (g) for any other purpose reasonably necessary to monitor, implement or enforce this Agreement.
- 10.2 The Covenant Holder may bring workers, vehicles, equipment and construction materials on the Covenant Area when exercising its rights under this Agreement. If the exercise of its rights under this Agreement causes harm or damage to the Land or the personal property of the Owner, the Covenant Holder will repair or remedy the harm or damage at its own cost and expense. The Covenant Holder will remove its vehicles, equipment and excess construction materials from the land when it has finished the task for which they were brought onto the Covenant Area.
- 10.3 Public Access Initiated by the Covenant Holder. The Covenant Holder may invite the public to enter upon the Covenant Area from time to time for educational and scientific purposes upon written notice by the Covenant Holder to the Owner of at least 7 days. Access to the Covenant

Area for such purposes shall be overseen by an authorized representative of the Covenant Holder. Also, access to the Covenant Area shall be available to the public for walking and nature observation in accordance with the Management Plan. No unrestricted right of general access by the public to the Covenant Area is intended by this Agreement.

## **11. ENFORCEMENT REMEDIES OF THE COVENANT HOLDER**

- 11.1 If the Covenant Holder, acting reasonably, believes that the Owner has neglected or refused to perform any of the obligations set out in this Agreement or is in breach of any term of this Agreement, the Covenant Holder may serve on the Owner a notice setting out particulars of the breach and of the Covenant Holder's estimated maximum costs of remedying the breach.
- 11.2 The Owner has 30 days from receipt of a notice under section 11.1, or from the conclusion of the dispute resolution process under section 7 if it is invoked and the arbitrator finds a breach, to remedy the breach.
- 11.3 If the Owner does not remedy the breach described in section 11.1 or any breach confirmed in the section 7 dispute resolution process, as applicable, within the time acceptable to the Covenant Holder under section 11.2, the Covenant Holder may enter upon the Covenant Area and remedy the breach or carry out the arrangements referred to in section 11.2 and the Owner must reimburse that Covenant Holder for any expenses incurred in doing so, up to the estimated maximum costs of remedying the breach set out in the notice given under section 11.1.
- 11.4 Expenses incurred by a Covenant Holder under this section, until paid, are a debt owed by the Owner to the Covenant Holder and the Covenant Holder may take action to secure judgment and payment of that debt through the Courts.

## **12. RENT CHARGE AND ITS ENFORCEMENT**

- 12.1 As security for the performance of the Owner's obligations under this Agreement, the Owner grants to the Covenant Holder a perpetual rent charge against the Land, ranking prior to all other financial charges and encumbrances registered against the Land. The Rent Charge is granted both under section 219 of the *Land Title Act* (British Columbia) as an integral part of the statutory covenant created by this Agreement and as a fee simple rent charge at common law.
- 12.2 The Rent Charge secures payment to the Covenant Holder by the Owner of the sum of \$25,000.00 (the "Rent Charge Amount") in the course of any calendar year, subject to adjustment under section 12.3 and 12.4, for each violation occurring within that year.
- 12.3 The Rent Charge Amount is to be adjusted on January 1 of each year by increasing or decreasing, as the case may be, the Rent Charge Amount by the amount determined by multiplying the Rent Charge Amount on December 31 immediately preceding by the percentage increase or decrease, as the case may be, in the CPI between the previous January 1 and that December 31 and adding the amount so determined to the Rent Charge Amount as it stands on that December 31. If Statistics Canada, or its successor in function, ceases to publish a CPI or comparable indicator as determined by the Covenant Holder in its sole discretion, the parties agree that the factor to be used in determining the Rent Charge Amount for each year shall be 3%.
- 12.4 Provided however, notwithstanding anything to the contrary set out above, the Rent Charge Amount shall be the greater of a) \$25,000 plus the increase set out in section 12.3 above and b) a sum equal to 110% of the market value, at the date of any breach of this Agreement, of any flora or fauna, soil, rock, gravel or minerals, which have been altered, damaged, destroyed, moved, harvested or removed. For the purposes of this and section 12.5, "market value" shall be the average of 2 valuations obtained, one by each of the Owner and the Covenant Holder (each

at their own cost), from a person operating in the Comox Valley (including Denman and Hornby Islands), whose business has expertise in the valuation of such flora, fauna, rock, gravel, or minerals.

- 12.5 Notwithstanding anything to the contrary, if in any one year period there are breaches by an Owner of its obligations under the Agreement, where a) the cost of repair or cure (calculated at normal market rates for labour and materials) plus b) the market value, at the date of the breaches, of any flora, fauna, rock, soil, gravel or minerals which have been altered, damaged, destroyed, moved, harvested, or removed, total less than 5% of the current Rent Charge Amount calculated under section 12.3 (but not under section 12.4), the Rent Charge Amount shall be equal to 500% of that total rather than any of the other amounts set out above.
- 12.6 The Covenant Holder shall be entitled to recover from the Owner all reasonable expenses incurred as a result of enforcement of the Rent Charge.
- 12.7 The Rent Charge is suspended unless and until the Owner is in breach of any provision of this Agreement and has not cured the breach, or is not diligently proceeding to cure the breach in accordance with section 11 of this Agreement.
- 12.8 A Covenant Holder may enforce the Rent Charge by any of the following:
- (a) an action against the Owner for the Rent Charge Amount;
  - (b) an action for appointment of a receiver in respect of the Land
  - (c) distraint against the Land to the extent of the Rent Charge Amount; or
  - (d) an order for the sale of the Land.

### **13. SUCCESSORS OF THE OWNER**

- 13.1 This Agreement shall enure to the benefit of and be binding on the Owner and the Owner's successors and permitted assigns.

### **14. ASSIGNMENT OF AGREEMENT OR DISSOLUTION OF THE COVENANT HOLDER**

- 14.1 This Agreement shall be transferable by the Covenant Holder, but the Covenant Holder may assign its rights and obligations under this Agreement only to a person or entity qualified by law at the time of transfer to hold covenants under section 219 of the *Land Title Act* and statutory rights of way under section 218 of the *Land Title Act* (or any successor provision then applicable) and any applicable regulations.
- 14.2 The Covenant Holder agrees that before assigning its rights and obligations under this section, it must consult with the Owner, and consider the Owner's comments, with respect to the proposed assignee. The Covenant Holder must give notice to the Owner of the proposed assignment, setting out in reasonable detail the identity of the proposed assignee and the qualifications and experience of the proposed assignee. If the Owner does not provide comments to the Covenant Holder regarding the proposed assignee within 14 days after the Covenant Holder gave notice to the Owner under this section, the Owner is conclusively deemed to have declined to comment on the proposed assignee and to have consented to the assignment. For clarity, the Covenant Holder is entitled to assign its rights and obligations so long as it has consulted the Owner.
- 14.3 In the event of the winding-up or dissolution of a Covenant Holder, the Covenant Holder must use its best efforts to assign and transfer all of its interest under this Agreement to a person or entity authorized to accept covenants under section 219 of the *Land Title Act* and statutory rights of way

under section 218 of the *Land Title Act*. If the Covenant Holder does not assign and transfer all of its interest under this Agreement as set out in this section, it shall be deemed to have assigned and transferred all of its interest under this Agreement to Her Majesty the Queen in Right of the Province of British Columbia. For clarity, the consultation process set out in section 14.2 does not apply to this section.

## **15. NOTICE**

15.1 Any notice or other communication required or permitted under this Agreement must be in writing and must be:

- (a) delivered in person; or
- (b) sent by e-mail to the parties at their respective e-mail addresses set out in section 15.5, followed by a copy sent by ordinary mail; or
- (c) sent by pre-paid registered mail addressed to the parties at their respective addresses set out in sections 15.5. or 15.6.

15.2 If a notice is delivered in person, the party receiving the notice must forthwith acknowledge in writing receipt of the notice, and the notice shall be deemed to have been received on the date of the acknowledgment or failing an acknowledgment, 5 days after the date of delivery attested to in an affidavit by the delivering person.

15.3 If a notice is sent by e-mail, followed by ordinary mail, the e-mail notice shall be deemed to have been received on the date that an acknowledgement of receipt is received via e-mail by the party who sent the notice. If no e-mailed acknowledgement of receipt is received, then it shall be deemed to be received on the 6<sup>th</sup> day after a copy of that notice was sent by ordinary mail.

15.4 If a notice is sent by pre-paid registered mail, it shall be deemed to have been received on the sixth day after the notice was sent.

15.5 The addresses of the parties for notice are as follows

Owner:

Denman Island Memorial Society  
6400 Denman Road  
Denman Island, British Columbia V0R 1T0  
e-mail address: dinaturalburial@gmail.com

Covenant Holder:

Denman Conservancy Association,  
P.O. Box 60, Denman Island, British Columbia V0R 1T0  
e-mail address: info@denmanconservancy.org

15.6 Each party agrees to give notice immediately to the other party of any change in its street or e-mail address from those set out in section 15.5.

## **16. NOTICE OF COVENANT**

16.1 The Owner agrees to allow the Covenant Holder to publicize the existence of this Agreement in a tasteful manner similar to how it has publicized other similar covenants in its favour.

16.2 Without restricting the generality of the foregoing, the Owner agrees to allow the Covenant Holder to erect a plaque or other sign on the Covenant Area, to be erected in a tasteful manner and at the expense of the Covenant Holder, indicating that it holds a covenant on the Covenant Area. The size, style and location of plaque must be approved by the Owner prior to its placement, such approval not to be unreasonably withheld.

## **17. NO LIABILITY IN TORT**

17.1 The parties agree that this Agreement creates only contractual obligations and obligations arising out of the nature of this document as a covenant under seal. Without limiting the generality of the foregoing, the parties agree that no tort or fiduciary obligations or liabilities of any kind are created or exist between the parties in respect of this Agreement, and nothing in this Agreement creates any duty of care or other duty on either of the parties to anyone else. For clarity, the intent of this section is to, among other things, exclude tort liability of any kind and to limit the parties to their rights and remedies under the law of contract and the law pertaining to covenants under seal.

## **18. WAIVER**

18.1 An alleged waiver of any breach of this Agreement is effective only if it is an express written waiver signed by the Covenant Holder or the Owner, as is applicable, and is only effective to the extent of that express waiver and does not operate as a waiver of any other breach.

18.2 The failure of the Covenant Holder to require performance by the Owner at any time of any obligation under this Agreement does not affect the Covenant Holder's right to subsequently enforce that obligation.

18.3 The failure of the Owner to require performance by the Covenant Holder at any time of any obligation under this Agreement does not affect the Owner's right to subsequently enforce that obligation.

## **19. JOINT AND SEVERAL OBLIGATIONS**

19.1 Where two or more parties comprise the Owner in this Agreement: a) the obligations of those parties are joint and several and b) the written agreement of both such parties is required to bind the Owner to any agreement required to be in writing herein.

## **20. REMEDIES NOT EXHAUSTIVE**

20.1 Exercise or enforcement by a party of any remedy or right under or in respect of this Agreement does not limit or affect any other remedy or right that party may have against the other party in respect of or under this Agreement or its performance or breach.

## **21. COVENANT RUNS WITH THE LAND**

21.1 Unless it is otherwise expressly provided in this Agreement, every obligation and covenant of the Owner in this Agreement constitutes a personal covenant and also a covenant granted under section 219 of the Land Title Act (British Columbia) in respect of the Land. This Agreement burdens the Land and runs with it and binds the successors in title to the Land. This Agreement burdens and charges all of the Land and any parcel into which it is subdivided by any means and any parcel into which it is consolidated. Notwithstanding any other provision of this agreement, the Owner is not liable for breach of these covenants after the Owner has ceased to be Owner of the Land.

## **22. REGISTRATION**

22.1 The Owner agrees to do everything necessary at the Owner's expense to ensure that this Agreement, and the interests it creates, is registered against the title to the Land provided that the Agreement has been drafted and executed in registrable form.

22.2 The Owner agrees to do everything necessary and possible, at the Owner's expense, to ensure that this Agreement, and the interests it creates, are registered with priority over all financial charges, liens, and encumbrances, registered or pending registration in the Land Title Office at the time of application for registration of this Agreement excepting only reservations in favour of the Crown.

### **23. SEVERANCE**

23.1 If any part of this Agreement is held by a court or arbitrator to be invalid, illegal or unenforceable, that part is to be considered to have been severed from the rest of this Agreement and the rest of this Agreement is to remain in force unaffected by that holding or by severance of that part as if the part was never part of this Agreement.

### **24. NO OTHER AGREEMENTS**

24.1 This Agreement is the entire agreement between the parties and it terminates and supersedes all other agreements and arrangements regarding its subject.

### **25. INDEPENDENT ADVICE**

25.1 The Covenant Holder and the Owner acknowledge and agree that they have sought and obtained, to their satisfaction, such independent professional advice as they require regarding this Agreement and each acknowledges that they do not rely and have not relied on the other party for advice in this regard and that the other party has given no representation or warranty in that regard.

### **26. AMENDMENTS**

26.1 This Agreement is intended to be perpetual and may only be changed by a written instrument signed by all the parties.

### **27. DEED AND CONTRACT**

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

### **28. RIGHTS OF THE COVENANT HOLDER**

28.1 The Covenant Holder may exercise its rights under this Agreement through its directors, officers, employees, agents or contractors.

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