

**MAINTENANCE & COST SHARING  
AGREEMENT**

**BETWEEN:**

**THE CORPORATION OF  
THE TOWN OF FORT ERIE**

**- AND -**

**MOLINARO GROUP CRYSTAL BEACH  
WATERFRONT INC.**

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## MAINTENANCE & COST SHARING AGREEMENT

THIS AGREEMENT made this 24th day of July, 2012.

BETWEEN:

**THE CORPORATION OF THE TOWN OF FORT ERIE**  
(hereinafter referred to as the "Town")

OF THE FIRST PART

– and –

**MOLINARO GROUP CRYSTAL BEACH WATERFRONT INC.**  
(hereinafter referred to as "Molinaro")

OF THE SECOND PART

**WHEREAS** Molinaro is the beneficial owner under an Agreement of Purchase and Sale of the lands which are described in Schedule "A" attached hereto (the "Purchase Lands"), and will become the registered owner upon the transfer of title to the Purchase Lands;

**AND WHEREAS** Molinaro proposes to develop and construct the Purchase Lands for the purpose of a twelve (12) storey mixed use residential and commercial condominium building, underground parking for residential Condominium unit owners only, and Town-owned freehold Community Pavilion and Outdoor Podium, and a Toad Enhancement Area on town-owned land in accordance with an Overall Benefit Permit (the "Development");

**AND WHEREAS** freehold title to Parcels 2 and 3 on the Draft Plan attached hereto as Schedule "C" are to be transferred back to the Town pursuant to the terms of the said Agreement of Purchase and Sale;

**AND WHEREAS** Molinaro has agreed to create a Condominium Corporation in accordance with the *Condominium Act, 1998*, S.O. 1998, c. 19, comprising part of the development, within twelve (12) months of receiving permission to occupy any unit in the building;

**AND WHEREAS** the Town and Molinaro entered into a Community Benefits Agreement dated June 22, 2010 providing for the provision of certain public benefits by Molinaro on Town's lands;

**AND WHEREAS** the Town and Molinaro have agreed to enter into a Site Plan Agreement for the provision of works, facilities or matters referred as to in subsections 41(7) and (8) of the *Planning Act*, R.S.O. 1990, c. P.13, and the construction of the Development (which includes the

Community Pavilion, Outdoor Podium and other improvements on Town lands including Outdoor Public Washroom) all in accordance with the site plans, drawings, reports, studies, plans and specifications filed with the Town;

**AND WHEREAS** the said Community Benefits Agreement requires that the Town and Molinaro negotiate in good faith in order to enter into a maintenance and cost sharing agreement which will set out the standards for maintenance, and cost sharing terms, with respect to the Outdoor Podium and the Open Space Improvements required therein;

**AND WHEREAS** the Parties have agreed that maintenance, repair, replacement, governance, operation and the cost sharing of certain components of the Town Lands and the Development, will be governed by this agreement (the "Agreement");

**AND WHEREAS** the Parties acknowledge and confirm their mutual intention to implement the terms of this Agreement by applying principles of cooperation and sharing in order to optimize the financial and social benefits which may accrue to each of them and to the community through the use of the Development;

**NOW THEREFORE THIS AGREEMENT WITNESSES** that in consideration of the sum of Two Dollars (\$2.00) of lawful money of Canada now paid by each of the Parties hereto to the other and in consideration of the mutual covenants and agreements herein contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each of the Parties, the Town and Molinaro, do hereby covenant and agree as follows:

## **1. DEFINITIONS AND INTERPRETATION**

### **1.1 Definitions**

For all purposes of this Agreement and any amendments hereto and any other documents entered into by the Parties in accordance with the provisions hereof, the terms defined in this section shall have the following meanings, unless the context expressly or by implication otherwise requires, namely:

**"Agreement"**, this **"Agreement"**, **"hereto"**, **"hereof"**, **"herein"**, **"hereby"**, **"hereunder"**, and similar expressions mean and refer to this Agreement, all Schedules referred to in this Agreement, and all amendments to this Agreement executed in writing by both Parties.

**"Business Day"** means a day other than a Saturday, Sunday or any other day which is a holiday under section 88 of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F.

**"Commercial Area"** means the commercial portion of the Development located on the ground floor of the Development.

**"Commercial Public Washroom"** means the public washrooms identified on Drawing No. A201 of the Architectural Plans forming part of the Site Plan Agreement.

**"Community Benefits Agreement"** means the agreement entered into between the Parties pursuant to subsections 37(3) of (4) of the *Planning Act* dated June 22, 2010.

**"Community Pavilion"** means the community facility to be constructed within the Commercial Area and conveyed to the Town.

**"Condominium"** means the condominium approved pursuant to the *Condominium Act* that comprises part of the Development.

**"Condominium Act"** means the *Condominium Act, 1998, S.O. 1998, c. 19*.

**"Condominium Corporation"** means the condominium corporation to be created as a result of the registration of the declaration under the *Condominium Act* and comprising part of the Development.

**"Condominium Lands"** means the lands identified as Parcel 4 on the Draft Plan attached as Schedule "C".

**"Council"** means the Council of The Corporation of the Town of Fort Erie.

**"Development"** means the construction by the Owner of a condominium that will comprise a twelve (12) storey mixed-use residential and commercial building containing eighty-seven (87) residential units, a commercial area, underground parking for residential condominium unit owners only, a Town-owned freehold Community Pavilion and Outdoor Podium, Outdoor Public Washroom and Toad Enhancement Area.

**"Equipment Maintenance"** means the costs of day-to-day maintenance and such repairs and replacements of any and all equipment and apparatus, including but not limited to landscaping, walkways and other hard surface areas, pathways, seating and other park furniture, lighting, sodding, ground cover, shrubs, trees and other vegetation.

**"Event of Default"** means the occurrence of any of the following events:

- (a) if any Party fails to make any payment required to be made by this Agreement from time to time within fifteen (15) Business Days after any such payment is due;
- (b) if any Party fails in any material respect to observe, perform, or comply with any agreement, condition or obligation required by this Agreement, and such failure continues for a period which is the shorter of:
  - (i) fifteen (15) Business Days after notice of such failure and the demand for observance, performance or compliance shall have been given by any other Party, or
  - (ii) such other grace period, if any, as is specifically applicable thereto as set out in this Agreement,

provided however, that if the nature of such failure is such that it cannot rectified or remedied by payment of money or cannot rectified or remedied within a period of fifteen (15) Business

Days or such shorter grace period as referred to above, if any, as the case may be, such Party shall have such additional time as is necessary as long as the curing of such default is begun promptly and proceeds and continues with due diligence to completion.

**“Final Acceptance”** means approval of the Certificate of Final Acceptance for each component of the works, facilities or matters provided for in the Site Plan Agreement.

**“Force Majeure”** means an event causing a *bona fide* delay in the performance of any obligations under this Agreement (other than as a result of financial incapacity) and not caused by an act or omission of any Party or Parties or a person not at arm’s length with such Party or Parties, resulting from:

- (i) an inability to obtain materials, goods, equipment, services, utilities or labour,
- (ii) any statute, law, by-law or order in council or any regulation or order or amendment thereto passed or made pursuant thereto but excluding any statute, law, by-law, order in council, regulation, order or amendment passed or made by any Party,
- (iii) an order or direction of any administrator, controller or board, or any governmental department or officer or other authority excluding any order or direction of any Party,
- (iv) an inability to procure any licence, permit, permission or authority necessary for the performance of such obligations,
- (v) a strike, lockout, slowdown or other combined action or workmen, or
- (vi) an act of God,

which such Party or Parties cannot reasonably be expected to have foreseen as a reasonable likelihood and to have overcome by alternative means without the expenditure of an amount of money and/or other resources that is substantially disproportionate to the value to be gained or the loss to be avoided by any such alternative means, and which in any case shall cause such Party or Parties to be unable to fulfill or to be delayed or restricted in the fulfillment of any obligation hereunder.

**“Improvements”** mean the Community Pavilion, Outdoor Podium, Outdoor Public Washroom, Parking Garage, Revetment Works and any other works, facilities or matters of a public or quasi-public nature under this Agreement.

**“Maintenance Guarantee Period”** means the period or periods of time during which Molinaro is obliged to maintain the components of the works, facilities or matters provided for in the Site Plan Agreement.

**“Manager of Facilities”** means the Manager of Facilities for the Town from time to time or the holder of the office exercising the functions presently performed by this official and includes his or her designate.

**“Major Damage”** means damage or destruction giving rise to repairs in excess of 50% of the replacement cost of the Improvements.

**“Molinaro”** means Molinaro Group Crystal Beach Waterfront Inc.

**“Open Space Lands”** means the Town-owned lands identified as Parcel 1 on the Draft Plan attached as Schedule “C”.

**“Outdoor Podium”** means the outdoor public space and beachfront promenade to be constructed in the area identified as Parts 2 and 3 on Preliminary Plan Number A202 forming part of the Site Plan Agreement.

**“Outdoor Public Washroom”** means the public washrooms on the Town Lands and identified on Drawing No. A001 of the Architectural Plans forming part of the Site Plan Agreement.

**“Overall Benefit Permit”** means the permit issued by the Ministry of Natural Resources (“MNR”) under section 17 of the *Endangered Species Act, 2007*, S.O. 2007, c. 6.

**“Parking Garage”** means the indoor, underground parking structure designed specifically for the use of automobile parking to be constructed within the Development located below ground level, and including the structural support system for the publicly owned Outdoor Podium identified on Drawing No. A200 of the Architectural Plans forming part of the Site Plan Agreement.

**“Parking Lot”** means the Town-owned parking lot municipally known as 4168 Erie Road (North Side Erie Road, West Side Eastwood Avenue), and being Lots 30, 31, and 50 to 54 inclusive, Plan 412 Bertie; Lot 133, Lot 189 except BE51234, Plan 419 Bertie; except Eastwood Avenue and Beechwood Avenue Plan 419, Fort Erie, being all of PIN 64178-0192(LT).

**“Party” or “Parties”** means the Town or Molinaro or both of them.

**“Purchase Lands”** means the lands and premises described in Schedule “A” of this Agreement.

**“Revetment Works”** means physical structures, including but not limited to stone boulders and concrete walls, designed and constructed to provide protection from natural hazards in accordance with regulatory requirements.

**“Site Maintenance”** means all repairs and maintenance and the cost of operation, lighting, snow removal, supervising repairs to and replacements of paving, curbs, walkways, landscaping, drainage, irrigation systems, garbage and refuse removal, and lighting facilities as may from time to time be necessary.

**“Site Plan Agreement”** means the Site Plan Agreement entered into between the Parties for the Development.

**“Toad Enhancement Area”** means the lands identified on Drawing No. L-3 (OBP L-1) of the Landscape Plans forming part of the Site Plan Agreement and in the Overall Benefit Permit.



**“Town”** means The Corporation of the Town of Fort Erie.

**“Town Land”** means the lands and premises described in Schedule “B” to this Agreement.

**“Utility Costs”** means the cost of utilities incurred by the Parties relating to electricity, natural gas, water and sewer, and the cost of any other utilities required with respect to the Outdoor Podium, Outdoor Public Washroom, and Commercial Area Public Washroom.

**“Winter Control Plan”** means the Town’s Winter Control Plan as adopted by Council from time to time, and as may be amended.

## **1.2 Interpretation**

The Parties agree as follows:

- (a) the part numbers and headings, subheadings and section, subsection, clause and paragraph numbers are inserted for convenience of reference only and shall not affect the construction or interpretation of this Agreement;
- (b) the division of this Agreement into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Agreement;
- (c) the terms “this Agreement”, “hereof”, “hereunder”, and similar expressions refer to this Agreement and not to any particular section or other portion hereof and include any agreement or instrument supplement or ancillary hereto;
- (d) this Agreement shall be construed with all changes in number and gender as may be required by the context and words importing persons shall include individuals, partnerships, associations, trusts, unincorporated organizations and corporations and *vice versa*;
- (e) references herein to any statute or any provision thereof include such statute or provision thereof as amended, revised, re-enacted and/or consolidated from time to time and any successor statute thereto;
- (f) all obligations herein contained, although not expressed to be covenants, shall be deemed to be covenants;
- (g) whenever a statement or provision in this Agreement is followed by words denoting inclusion or example and then a list of or reference to specific items, such list or reference shall not be read so as to limit the generality of that statement or provision, even if words such as “without limiting the generality of the foregoing” do not precede such list or reference; and
- (h) that all covenants and conditions contained in this Agreement shall be severable, and that should any covenant or condition in this Agreement be declared invalid or unenforceable by a court of competent jurisdiction, the remaining covenants and

conditions and the remainder of the Agreement shall remain valid and not terminate thereby.

### **1.3 Schedules**

The following are Schedules annexed hereto and incorporated by reference and deemed to be a part hereof:

Schedule "A" – Legal Description of "Purchase Lands"

Schedule "B" – Legal Description of "Town Lands"

Schedule "C" – Draft Plan

Schedule "D" – Outdoor Podium, Outdoor Public Washroom and Commercial Public Washroom Maintenance Standards

Schedule "E" – Toad Enhancement Area Monitoring and Maintenance Standards

## **2. AGREEMENT TERM AND TERMINATION**

### **2.1 Commencement of Agreement**

The Parties agree that the term of this Agreement shall commence upon expiration of the Maintenance Guarantee Period(s) and the giving of Final Acceptance by the Town in accordance with terms of the Site Plan Agreement, and shall continue in perpetuity, unless otherwise terminated in accordance with the terms of this Agreement.

### **2.2 Termination of Agreement**

The Parties agree as follows:

- (a) that their respective rights and obligations under this Agreement shall be incapable of termination other than by an instrument to that effect executed under seal by all of the Parties and by any mortgagees/chargees of the Purchase Lands; and
- (b) notwithstanding the termination of any rights and obligations under this Agreement, if at the time of such termination any Party shall be obligated to pay any sum of money pursuant to the provisions of this Agreement, such obligation shall not be extinguished until such sum of money, together with any interest accruing thereon, has been paid, and any lien securing the payment of such sum of money shall remain in force and effect and continue to secure the payment of any interest which shall accrue thereon.

### **3. MAINTENANCE, REPAIRS & REPLACEMENT**

#### **3.1 General**

The Parties shall each maintain their respective lands and premises and all fixtures, equipment and chattels in a safe, clean and neat condition, and shall maintain all equipment and chattels used in the lands and premises in a good state of repair.

#### **3.2 Relocation, Removal, Replacement or Alteration**

Neither Party shall:

- (a) relocate, remove, replace or alter (save and except any alteration which does not materially affect the Development,) any part of the Outdoor Podium, Outdoor Public Washroom, Open Space Lands, or Parking Garage, or the soil, or any structure supporting same in any respect without the express written consent of the other Party, which shall not be unreasonably withheld;
- (b) do or omit to do anything to impair any right of support granted in this Agreement, or to render unstable or unsafe any structure(s), foundation(s), supporting column(s), footing(s), wall(s) or roof or floor slab(s) of the Development which are dependent on any lands, buildings or structures of the Development.

#### **3.3 Expansion of Structure or Component**

Neither Party shall exercise any right of replacement in such a way as to substantially expand the dimension of the structure or component thereby replaced, or as to place any non-trivial burden or greater burden, economic or otherwise, directly or indirectly, on any part of the Development, without the other Party's prior written consent, which shall not be unreasonably withheld if such expansion, burden or increase may be adequately compensated for monetarily without compromising what the other Party fairly regards as its essential interest and said Party legally binds itself to provide such compensation in the same manner as to payment (to the extent applicable) and enforcement as the payment of its own interests.

#### **3.4 Open Space Lands, Outdoor Podium and Outdoor Public Washroom**

The Parties agree:

- (a) that subject to Subsection 3.4(b), the Town shall be responsible for managing and performing Site Maintenance and Equipment Maintenance with respect to the Open Space Lands including the Outdoor Podium and Outdoor Public Washroom, at its own cost and expense, which shall be generally performed to the maintenance standards and scheduling set out in Schedule "D"; and
- (b) notwithstanding Subsection 3.4(a), the Town and Molinaro shall equally share the cost of all maintenance, repair and replacement of the Revetment Works on the Open Space Lands.

### **3.5 Revetment Works**

The Parties agree that:

- (a) in the event that maintenance, repairs or replacement of any part or parts of the Revetment Works is necessary in the opinion of the Manager of Facilities acting reasonably, the Town shall cause the work to be undertaken and the costs of same shall be shared equally between the Town and Molinaro. The Manager of Facilities shall invoice or cause to be invoiced to Molinaro, its fifty percent (50%) share of such costs for the work or works to be carried out;
- (b) save for emergency repairs involving manifest danger to persons or property, or immediately necessary for the preservation or safety of property or for the safety of persons, the Town shall not make any expenditures in excess of the low value purchases as described in the Town's Purchasing By-law adopted by Council from time to time, without first obtaining written quotations and the approval of Molinaro, which approval shall not be unreasonably withheld;
- (c) the Town may engage any firm or contractor in its sole discretion to perform such work, without obtaining written quotations or the approval of Molinaro, where it is reasonably estimated that the cost to be incurred will be less than the low value purchases as described in the Town's Purchasing By-law adopted by Council from time to time; and
- (d) in the event that Molinaro does not pay for the work billed in accordance with Subsection 3.5(a) within thirty (30) days of the billing date, then such amount shall bear interest at the rate one and one-quarter (1.25%) per cent per month calculated monthly on such amount as is from time to time unpaid, and until so paid, such amounts together with interest thereon as foreshall shall be and constitute a lien and charge in favour of the Town against each condominium unit and its appurtenant common interest. The Town shall be entitled to file a caution, lien or charge against Molinaro as permitted pursuant to the *Land Titles Act* or other applicable legislation. No conveyance or other divestiture of title shall in any way affect or diminish any lien arising pursuant to this Section which would have arisen pursuant to this Section and any lien which would have arisen pursuant to this Section had there been no conveyance or divestiture of title, shall not be defeated, or otherwise diminished or affected, by reason of such conveyance or divestiture of title.

### **3.6 Commercial Public Washroom**

Molinaro shall be responsible for managing and performing Site Maintenance and Equipment Maintenance with respect to the Commercial Public Washroom at its own cost and expense to the maintenance standards set out in Schedule "D". In addition, Molinaro shall ensure that the Commercial Public Washroom is in a clean and tidy condition and accessible for public use at all times provided for in Schedule "D".

### **3.7 Monitoring of Toad Enhancement Area**

Molinaro shall:

- (a) be responsible for the monitoring requirements under the Overall Benefit Permit for the life of the Overall Benefit Permit, at its cost and expense, as set out in Schedule "E";
- (b) satisfy the requirements through a one-time commitment of Fifty Thousand Dollars (\$50,000.00) to the Town in order for the Town to undertake and administer the monitoring of the Toad Enhancement Area, which payment shall be delivered to the Town when Molinaro executes this Agreement; and
- (c) agree that the Town shall be entitled to retain any portion of the Fifty Thousand Dollars (\$50,000.00) that remains unused at the expiry of the life of the Overall Benefit Permit.

### **3.8 Maintenance of Toad Enhancement Area**

The Town shall be responsible for managing and performing Site Maintenance and Equipment Maintenance with the respect to the Toad Enhancement Area at its own cost and expense, which shall be generally performed to the maintenance standards and scheduling as set out in Schedule "E".

### **3.9 Community Pavilion**

The Town shall be responsible for the payment of Utility Costs and for managing and performing Site Maintenance and Equipment Maintenance with respect to the Community Pavilion, at its sole cost and expense, to the standards it deems appropriate in its sole discretion.

### **3.10 Town Parking Lot**

The Town shall maintain the Parking Lot at its sole cost and expense to the standards it deems appropriate in its sole discretion, and in accordance with the standards of the Town's Winter Control Plan for parking lots, in effect from time to time.

### **3.11 Repair, Maintenance and Reconstruction of Parking Garage**

The Parties acknowledge and agree that the terms and conditions regarding the ongoing maintenance, repair, reconstruction and insurance in respect of the Parking Garage, Outdoor Podium and Open Space Lands are governed by and set out in Schedule "D" of the Community Benefits Agreement between the Parties.

### **3.12 Condominium Lands**

Molinaro shall be responsible for managing and performing, at its sole cost and expense, all Site Maintenance and Equipment Maintenance with respect to the Condominium Lands.

### **3.13 Outside Contractors**

Molinaro and the Town shall both be entitled to retain outside contractors or to utilize their own forces to perform Site Maintenance and Equipment Maintenance, at their own cost and expense, for those lands, premises and areas for which they are responsible.

## **4. SUCCESSOR CONDOMINIUM CORPORATION**

### **4.1 Registration of Condominium Corporation**

The Town acknowledges that Molinaro intends to register a Condominium Corporation with respect to the Condominium Lands and agrees that such Condominium Corporation shall have the benefit and burden of this Agreement in accordance with the terms hereof.

### **4.2 Assumption by Condominium Corporation**

While it remains in control of the Condominium Corporation, Molinaro shall cause the Condominium Corporation to execute an assumption agreement with the Town, satisfactory to the Town in registrable form, whereby such Condominium Corporation acknowledges and agrees that it is bound by and subject to all terms and conditions of this Agreement in place of Molinaro. Such assumption agreement shall expressly provide for an assumption by the Condominium Corporation of Molinaro's share of the maintenance, repair and replacement costs provided in Section 3 and the Utility Costs provided in Section 6. Such assumption agreement shall also provide the agreement of the Condominium Corporation to keep a reasonable reserve as required in order to be able to be in a position to make all of the payments referred to herein.

### **4.3 Release of Molinaro**

On registration of the Condominium Corporation with respect to the Condominium Lands (and assumption by such Condominium Corporation of its cost sharing obligations expressed in this Agreement), Molinaro shall be released from any further payment or other obligations in respect of this Agreement.

## **5. DAMAGE OR DESTRUCTION**

### **5.1 Damage or Destruction to Outdoor Podium**

The Town covenants and agrees that:

- (a) in the event of Major Damage to the Outdoor Podium, save and except for any damage caused by Molinaro in the course of repair, maintenance and reconstruction of the Parking Garage, the Town covenants and agrees to repair, replace, restore or reconstruct the Outdoor Podium or such damaged or destroyed parts thereof, so that

the Outdoor Podium will be reinstated in accordance with the applicable plans and specifications, subject to budget approval by Council;

- (b) the obligation to repair, replace, restore and reconstruct the Outdoor Podium in the event of Major Damage will apply unless the Town is unable to repair, replace, restore or reconstruct the Outdoor Podium by reason of Force Majeure within two (2) years following such damage and destruction;
- (c) all repairs, replacements, restoration, and reconstruction shall be commenced as expeditiously as possible in the circumstances, and will proceed to complete the work continuously and expeditiously in order that it will be completed as soon as reasonably possible and in a good and workmanlike manner, subject to Force Majeure; and
- (d) all repairs, replacements, restoration and reconstruction shall be effected and performed substantially in accordance with the applicable plans and specifications. If the plans and specifications, or any portion thereof, cannot be functionally or practically used again, then variations from or changes to the plans and specifications required or desired by either Party shall be submitted to the other Party for its written approval (such approval not to be unreasonably withheld).

## **5.2 Co-operation as to Repair etc. of Outdoor Podium**

The Town and Molinaro covenant and agree that each will co-operate with the other with respect to the works to be completed for the repair, replacement, restoration and reconstruction of the Outdoor Podium.

## **6. PAYMENT OF UTILITY COSTS**

### **6.1 Outdoor Podium & Outdoor Public Washroom**

The Town shall be responsible and liable for the payment of Utility Costs related to the Outdoor Podium and Outdoor Public Washroom.

### **6.2 Commercial Public Washroom**

Molinaro shall be responsible and liable for the payment of Utility Costs related to the Commercial Public Washroom.

## **7. INSURANCE**

### **7.1 Parties to Maintain Own Insurance Coverage**

The Town and Molinaro covenant and agree to maintain or cause to be maintained such insurance coverage in their respective names in respect of their respective lands and premises and in a form and content as would a prudent owner, acting reasonably.

## **8. INDEMNIFICATION**

### **8.1 Indemnification by Molinaro**

Molinaro hereby indemnifies and saves harmless the Town and each of the persons under the Town's jurisdiction, including its elected officials, its officers, directors, employees, contractors and agents, from and in respect of all manner of action, or actions, cause and causes of action, suits, debts, duties, dues, accounts, executions, covenants, contracts, claims, charges, demands or other proceedings of any nature whatsoever at law or equity, which may be brought against or made upon the Town and any of the aforementioned persons under the Town's jurisdiction, and of, from and against all loss, costs, charges, damages and expenses which may be sustained, incurred or paid by the Town and any of the aforementioned persons arising in any way by reason of any maintenance, replacement or repair by Molinaro required pursuant to this Agreement, including any materials installed, work done or constructed by the Town and any of the aforementioned persons under the Town's jurisdiction in default of the obligations of Molinaro pursuant to this Agreement, and Molinaro agrees that it shall pay to the Town and to any of the aforementioned persons under its jurisdiction, on demand, any loss, costs or damages which may be sustained, incurred or paid by the Town in respect thereof.

### **8.2 Indemnification by the Town**

The Town hereby indemnifies and saves harmless Molinaro including its officers, directors, employees, contractors and agents, from and in respect of all manner of action, or actions, cause and causes of action, suits, debts, duties, dues, accounts, executions, covenants, contracts, claims, charges, demands or other proceedings of any nature whatsoever at law or equity, which may be brought against or made upon Molinaro including its officers, directors, employees, contractors and agents, and of, from and against all loss, costs, charges, damages and expenses which may be sustained, incurred or paid by Molinaro and any of the aforementioned persons arising in any way by reason of any maintenance, replacement or repair by the Town required pursuant to this Agreement, and the Town agrees that it shall pay to Molinaro and to any of the aforementioned persons, on demand, any loss, costs or damages which may be sustained, incurred or paid by Molinaro, in respect thereof.

## **9. ADMINISTRATION**

### **9.1 Dispute Resolution**

The Parties agree that:

- (a) during the performance of their respective obligations under this Agreement, each of them will make good faith efforts to resolve any disputes by negotiation. If the matter has not been resolved within sixty (60) days of a Party's written request for negotiation either Party may initiate mediation as provided for hereafter, provided that if there is a summer or election break between meetings of Council that a further reasonable time period shall be provided to facilitate a resolution of any disputes under this clause;



- (b) that any dispute may be referred by any Party to structured negotiation with the assistance of a mediator appointed by the Arbitration and Mediation Institute of Ontario Inc. under the rules of such institute then in effect. Failing settlement of such dispute by mediation within thirty (30) days after the mediator has been appointed, the dispute will be referred to and finally resolved by arbitration in accordance with the provisions of Subsections 9.1 (c) and (d);
- (c) that notwithstanding the time periods provided in Subsections 9.1(a) and (b), if any Party to a dispute requires an arbitration, the Party desiring arbitration before a single arbitrator shall give the other Party a notice in writing referring the dispute to arbitration pursuant to the *Arbitration Act, 1991*, S.O. 1991, c. 17. If the Party issuing the notice requiring arbitration and the other Party is unable to agree upon the arbitrator within five (5) days after the delivery of such notice, then the appointment of the arbitrator shall be determined pursuant to the *Arbitration Act, 1991*; and
- (d) that the arbitrator's decision shall be final and binding upon them and shall not be subject to any appeal. The arbitrator shall have the authority to award costs pursuant to section 54 of the *Arbitration Act, 1991*. Without in anyway limiting the powers of the arbitrator under the *Arbitration Act, 1991*, the Parties agree that the arbitrator shall have access to all books and records relating to the Development and each of the other Parties will cooperate with the arbitrator and provide all information reasonable requested by the arbitrator.

## **9.2 Force Majeure**

If any Party herein is delayed or hindered in or prevented from the performance of its obligations hereunder or from compliance with any of its covenants hereunder by reason of Force Majeure, then the performance of the act or obligation or compliance with a covenant of such Party will be excused for the period of such delay and the period for the performance of the act or obligation or compliance with the covenant will be deemed extended for an equivalent period.

## **9.3 Scope of Agreement**

This Agreement shall not, nor shall anything in this Agreement, be construed to, constitute or create a partnership, joint venture, or agency relationship between the Parties hereto or the relationship of landlord and tenant or a contract of employment. The Parties agree that any obligation or liability agreed to, undertaken by, imposed on, or incurred by any Party in connection with the Development which is not expressly provided for or referred to in this Agreement shall, unless otherwise noted herein, be the sole responsibility, and at the sole cost, of that Party.

## **9.4 Notice**

All notices required or permitted to be given by one Party to the other shall be given in writing and shall be considered to have been validly given when delivered by hand, or deposited for mailing by Canada Post, registered mail service, to the address of the Party to whom such

notice is directed (as set forth below), or sent by facsimile transmission or e-mail to the Party to whom such notice is directed as follows:

- (a) to the Town:     The Corporation of the Town of Fort Erie,  
                          1 Municipal Centre Drive  
                          Fort Erie, Ontario, L2A 2S6,  
                          Attn: Sean Hutton, Manager of Facilities  
                          Facsimile: (905) 871-6100  
                          Email: [shutton@forterie.on.ca](mailto:shutton@forterie.on.ca)
- (b) to Molinaro:     Molinaro Group Crystal Beach Waterfront Inc.,  
                          155 Market Street  
                          Hamilton, Ontario, L8R 3H5  
                          Attn: Vince Molinaro/Sam DiSanto  
                          Facsimile: (905) 529-7969  
                          E-Mail: [sdisanto@molinaro.ca](mailto:sdisanto@molinaro.ca) / [vincemol@molinaro.ca](mailto:vincemol@molinaro.ca)

or such other address, fax number or email address of which either Party has notified the other, in writing, and any such notice mailed or delivered shall be deemed good and sufficient notice under the terms of this Agreement.

#### **9.5 Ministry of Natural Resources Permit**

The Parties acknowledge that the maintenance of the facilities, services and matters provided for in this Agreement, may be impacted by conditions contained in the Overall Benefit Permit. The Parties further acknowledge and agree that notwithstanding anything to the contrary in this Agreement, the Overall Benefit Permit shall prevail.

#### **9.6 Other Applicable Laws**

Nothing in this Agreement shall relieve Molinaro from compliance with all applicable municipal by-laws, laws, regulations, notices or other policies or laws and/or regulations established by any other governmental body that may have jurisdiction.

#### **9.7 Consent of Condominium Owners Not Required for Future Amendments**

The Parties agree that:

- (a) this Agreement may be amended without the consent or agreement of the owners of any units located within any Condominium, subject to compliance with the *Condominium Act*;
- (b) any such amendment shall not relieve or release any such owner of a condominium unit from any obligations or restrictions under the provisions of this Agreement;
- (c) with respect to the units of any Condominium, Molinaro shall not deliver any disclosure statement pursuant to section 72 of the *Condominium Act*, unless the provisions of this Agreement are clearly set out therein.

### **9.8 No Interest in Town Lands Created**

Molinaro acknowledges and agrees that despite any obligations for maintenance, repair and replacement and costs, imposed by this Agreement on it (and any action by any Party in reliance upon its terms) is not intended and is not sufficient to create any title, interest, or other rights, including ownership interest, in any of the Town Land.

### **9.9 Registration of Agreement**

The Parties hereby consent to the registration of this Agreement or a notice of it against the title to the Purchase Lands and the Town Land.

### **9.10 Postponement and Subordination**

Molinaro covenants and agrees, at its own expense, to obtain and register such documentation from its mortgagees/chargees or encumbrancers as may be deemed necessary by the Town to postpone and subordinate their interests in Molinaro's lands and premises to the interest of the Town to the extent that this Agreement shall take effect and have priority as if it had been executed and registered prior to the execution and registration of the document or documents giving to the mortgagee/chargee and/or encumbrancers their interest in Molinaro's lands and premises.

### **9.11 Default**

If an Event of Default has occurred and is continuing in respect of a Party, and the curing of such default has not begun promptly and has not proceeded with due diligence to completion as provided by this Agreement, the other Party shall have the right, in addition to any other right to remedy available at law, to:

- (a) bring any proceedings in the nature of specific performance, injunction or other equitable remedy, it being acknowledged by each of the Parties hereto that damages at law may be an inadequate remedy for a default or breach of this Agreement;
- (b) remedy such Event of Default and be entitled upon demand to be reimbursed by the Party in default (and to bring any legal proceedings for the recovery thereof) for any monies expended to remedy any such default and any other expenses (including legal fees on a solicitor and client basis) incurred by such Party together with interest at the prime rate established by The Toronto-Dominion Bank from time to time as its reference rate of interest for determining the interest rate charged to its customers for commercial loans in Canada;
- (c) bring any proceeding at law as may be permitted in order to recover damages;
- (d) bring any proceeding at law as may be permitted in order to terminate this Agreement.

#### **9.12 Separate and Non-Cumulative Rights**

The rights available to the Parties under this Agreement, under any other agreement between the Parties and at law, shall be deemed to be separate and not dependent on each other and each such right accordingly shall be construed as complete in itself and not by reference to any exercised by the Parties from time to time and no such exercise shall exhaust the rights or preclude the Parties from exercising any one or more such rights or combination thereof from time to time thereafter or simultaneously.

#### **9.13 No Waiver**

The failure of either Party to require performance by the other Party of any obligation under this Agreement at any time in no way affects its right thereafter to enforce such obligation, nor shall any such failure be taken or held to be a waiver of the performance of same or any other obligation under this Agreement at any later time.

#### **9.14 Further Assurances**

Each Party hereto shall, at all times and from time to time hereafter, and upon any reasonable written request by the other Party, make, execute, deliver or cause to be made, done, executed and delivered, all such further acts, deeds, assurances and things as may be required for more effectively implementing and carrying out the true intent and meaning of this Agreement.

#### **9.15 Non-Assignment**

This Agreement may not be assigned by either Party without the express written consent of the other Party, which consent may be arbitrarily withheld.

#### **9.16 Council's Discretion to Remain Unfettered**

Notwithstanding any other provision of this Agreement, the Parties hereto acknowledge and agree that none of the provisions of this Agreement shall have the effect of operating in any way to fetter the exercise by the Council of any of its discretionary powers, duties or authorities. Molinaro acknowledges that it will not obtain any advantageous planning or other consideration or treatment by virtue of its having entered into this Agreement or by virtue of the existence of this Agreement.

#### **9.17 No Challenge to Agreement**

The Parties covenant and agree with each other not to call into question or challenge, directly or indirectly, in any proceeding or action in court, or before any administrative tribunal, the Party's right to enter into and enforce this Agreement. The law of contract applies to this Agreement and the Parties are entitled to all remedies arising from it. The Parties agree that adequate consideration has flowed from each Party to the other. This provision may be pleaded by either Party in any action or proceeding as an estoppel of any denial of such right.


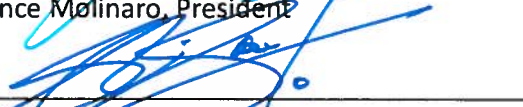

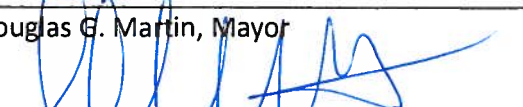
## 9.18 Governing Law

In all respects this Agreement shall be interpreted and governed in accordance with the laws of the Province of Ontario.

## 9.19 Successors and Assigns

All of the provisions of this Agreement shall run with each Party's lands and shall ensure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns, but only to the extent that such successors and permitted assigns are successors and assigns in compliance with this Agreement.

**IN WITNESS WHEREOF** the said Parties have hereunto set their respective corporate seals under the hands of their duly authorized officers.

) **MOLINARO GROUP CRYSTAL BEACH**  
 ) **WATERFRONT INC.**  
 )  
 ) **Per:**   
 ) \_\_\_\_\_  
 ) Vince Molinaro, President  
 )  
 )   
 ) \_\_\_\_\_  
 ) Sam Di Santo, Vice-President  
 ) We have authority to bind the corporation.  
 )  
 ) Date: July 17<sup>th</sup>, 2012  
 )  
 ) **THE CORPORATION OF THE**  
 ) **TOWN OF FORT ERIE**  
 )   
 ) \_\_\_\_\_  
 ) Douglas G. Martin, Mayor  
 )   
 ) \_\_\_\_\_  
 ) Carolyn Kett, Town Clerk  
 ) We have authority to bind the corporation.  
 )  
 ) Date: July 24, 2012

## **SCHEDULE "A"**

### **Legal Description of the "Purchase Lands"**

Part of Lot 1, Part of Lot 2, All of Lot 3, Part of Lot 4, Part of Private Road, Plan 368, Bertie, designated as Part 2, on Reference Plan 59R-14530; Fort Erie

BEING PART OF PIN 64179-0452(LT)

## **SCHEDULE "B"**

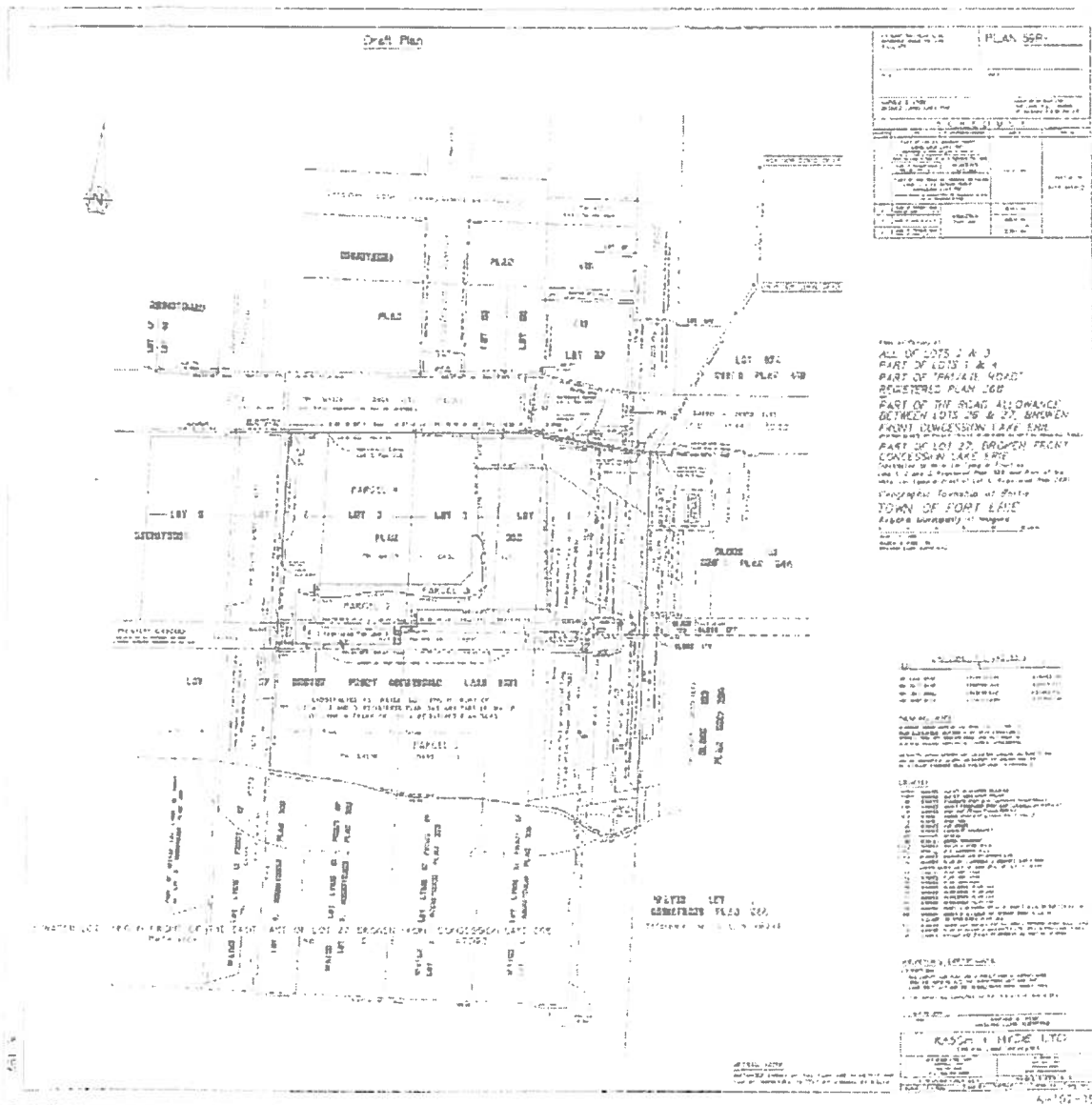
### **Legal Description of the "Town Land"**

Part of Lot 1, Part of Lot 2, Part of Private Road, Plan 368, Part of Road Allowance between Lots 26 & 27, Broken Front Concession Lake Erie, Part of Water Lot lying in front of Lots 1, 2, 3 and 4, Plan 368, Bertie; designated as Part 1 on Reference Plan 59R-14530, Fort Erie

BEING PART OF PIN 64179-0452 (LT)

## SCHEDULE "C"

## Draft Plan





## **SCHEDULE “D”**

### **Open Space Lands, Outdoor Podium, Outdoor Public Washroom and Commercial Public Washroom Maintenance Standards**

The Parties acknowledge and agree that the Town Lands are generally operated during the period mid-May through to the second week of September (the “Operating Period”).

#### **Open Space Lands including Outdoor Podium**

The Town shall be responsible for managing and performing Site Maintenance and Equipment Maintenance with respect to the Open Space Lands including the Outdoor Podium, at its own cost and expense, which shall be generally performed to the following maintenance standards and scheduling:

During the Operating Period, the Town will provide daily cleaning of the Open Space Lands including the Outdoor Podium, which will include:

- i. light maintenance, and removal of debris and litter, generally between 8:00 a.m. to 6:00 p.m.;
- ii. beach cleaning will occur on a weekly basis using a beach rake, subject to weather conditions and approval from the Ministry of Natural Resources (“MNR”);
- iii. grass cutting will occur on a weekly basis, subject to weather conditions; and
- iv. landscaping beds/gardens will be weeded bi-weekly.

A seasonal clean-up will occur twice annually (the first to occur prior to the commencement of the Operating Period, and the second following the end of the Operating Period).

Prior to the commencement of the Operating Period, the Town will remove any debris which may be deposited on the beach over the winter, and grade the beach area.

During the fall and winter months, the Town will conduct weekly inspections of the Open Space Lands including the Outdoor Podium, however, maintenance will only occur on an as needed basis. During the winter months, only a portion of the Outdoor Podium will be cleared of snow to the standard of the Town’s Winter Control Plan for sidewalks, in order to permit pedestrian access to the Community Pavilion.

#### Outdoor Public Washroom

The Town shall be responsible for managing and performing Site Maintenance and Equipment Maintenance with respect to the Outdoor Public Washroom, at its own cost and expense, which shall be generally performed to the following maintenance standards and scheduling:

During the Operating Period, the Town will provide daily periodical inspections, stocking and cleaning as needed throughout each day between the hours of 8:00 am. and 6:00 p.m. Between the hours of 6:00 p.m. and 8:00 a.m. during the Operating Period, and at all other times of the year, the Outdoor Public Washroom shall be closed to the public.

#### Commercial Public Washroom

Molinaro shall be responsible for managing and performing Site Maintenance and Equipment Maintenance with respect to the Commercial Public Washroom situated within the Condominium Lands at its own cost and expense, to the following maintenance standards:

During the Operating Period, Molinaro shall provide daily periodic inspections, stocking and cleaning as needed throughout each day between the hours of 7:00 a.m. and 11:00 p.m.

Molinaro shall also ensure that the Commercial Public Washroom is in a clean and tidy condition and accessible for public use at all times when the Community Pavilion is in use. The Town shall provide Molinaro with twenty-four (24) hours written notice of the date and time such use will occur.

## **SCHEDULE "E"**

### **Toad Enhancement Area Monitoring and Maintenance Standards**

#### **Toad Enhancement Area Monitoring and Reporting**

Molinaro shall monitor and report on the Toad Enhancement Area, at its own cost and expense, in accordance with the following requirements of the Overall Benefit Permit:

- a) Monitoring shall take place following the construction of the Toad Enhancement Area and each year for at least ten (10) years following its construction under the supervision of a Qualified Professional and shall include:
  - i. late spring monitoring between May 15<sup>th</sup> and June 20<sup>th</sup> to document the physical conditions of the Toad Enhancement Area including depth and configuration of sand, evidence of erosion, condition of the root wads, presence of garbage or debris and any vandalism;
  - ii. pictures and descriptions of the vegetation in the Toad Enhancement Area to assess the success of the planted species, and presence of weedy or invasive plant species;
  - iii. replanting of vegetation in the Toad Enhancement Area if deemed necessary by the MNR through review of annual monitoring reports;
  - iv. removal of shrubs after several years if they encroach onto more than 35% of the Toad Enhancement Area;
  - v. corrective measures to vegetation consisting of hand-pulling and cutting only;
  - vi. measurements of the thermal conditions of the sand within the Toad Enhancement Area, which shall occur year round, twice daily at 12 a.m. and 12 p.m., using methodology approved by the MNR.
- b) Molinaro shall provide reports on the activities conducted during monitoring under this section written by a Qualified Professional to the MNR on or before December 31<sup>st</sup> of each year monitoring is required. The monitoring reports shall include all of the information collected during monitoring under this section.

#### **Fowler's Toad Surveys and Reporting**

Molinaro shall conduct surveys in the Toad Enhancement Area, and provide reports to the MNR, at its own cost and expense, in accordance with the following requirements of the Overall Benefit Permit:

- a) Fowler's toad surveys shall be conducted by a Qualified Professional and take place in the year the Toad Enhancement Area is constructed, as well as years 2, 5, 7 and 10 following the construction of the Toad Enhancement Area.
- b) The surveys shall take place five times per year on suitable warm nights between May and early September. The locations of encountered toads will be documented along with habitat description and behaviour to determine how they were using the Toad Enhancement Area.
- c) Molinaro shall provide reports on the surveys written by a Qualified Professional to the MNR on or before December 31<sup>st</sup> of each year surveys are required. The reports shall contain all of the information collected during the surveys under this section.

#### **Maintenance of the Toad Enhancement Area**

The Town shall be responsible for the maintenance of the Toad Enhancement Area at its current maintenance standards level and at its sole cost and expense, for the duration of the Overall Benefit Permit. The Town's current maintenance standards include:

- i. regular removal of garbage and debris, and removal of weedy or invasive plant species once a year after annual monitoring occurs, or as necessary;
- ii. installation of snow fencing as necessary to protect the Toad Enhancement Area during the winter months.

#### **Monitoring Results and Adjustments to Toad Enhancement Area**

In the event the reports provided for in the Overall Benefit Permit indicate that the Toad Enhancement Area is not being utilized by Fowler's Toad, and the Overall Benefit Permit is amended by the MNR with the consent of the Town and Molinaro to provide for modifications to the design, area and features of the Toad Enhancement Area, the Parties agree that this Schedule shall be deemed to be amended in accordance with the amended terms and conditions of the Overall Benefit Permit.

#### **Changes in Legislation Impacting Toad Enhancement Areas**

In the event that s. 17(2)(c) of the *Endangered Species Act, 2007*, S.O. 2007, c. 6, is amended and such amendments impact the extent of required Toad Enhancement Areas or permit conditions associated with said Toad Enhancement Areas, the parties agree that this schedule shall be deemed to be amended in accordance with any terms and conditions associated with either a subsequent amended Overall Benefit Permit or new permit approved by the MNR under any new amended s. 17(2)(c) of the *Endangered Species Act, 2007* for the lands subject to this Agreement.