



**CLEAN AND SAFE WATER  
FOR UNION BAY**

**FINAL REPORT**

Seeking an Agreement between the  
Union Bay Improvement District and  
Kensington Island Properties

Prepared for the Ministry of Community, Sport and Cultural Development

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August, 2017

## Preface

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All use in this report of Minister or Ministry refer to the Minister of Community, Sport and Cultural Development and Ministry of Community, Sport and Cultural Development respectively unless otherwise stated in the report. On July 18, 2017, the Ministry was renamed the Ministry of Municipal Affairs and Housing.

On August 30, 2013, the Vancouver Island Health Authority launched “Island Health” as their new public name. Island Health, Vancouver Island Health Authority and VIHA have all been used in this document but they refer to the same agency.

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# Seeking an Agreement between Union Bay Improvement District and Kensington Island Properties

## 1. Introduction

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This Report summarizes the water treatment situation in Union Bay and provides background and summarizes the state of affairs regarding the relationship between the Union Bay Improvement District (UBID) and the development of Kensington Island Properties (KIP) at Union Bay BC. The report has been prepared by an independent consultant, James Mattison, under contract to the Ministry of Community, Sport and Cultural Development. Mr. Mattison is a professional engineer and has more than 30 years' experience in the water management area. He was an assistant deputy minister in the BC government and also served 10 years as comptroller of water rights in which position he regulated both public and private water utilities. His contract required him to attempt to facilitate an agreement acceptable to both the UBID and KIP and to complete a report on his process and his findings with recommendations.

The report is prepared mainly from Minutes of UBID Board meetings and other information available from UBID, correspondence that has been shared with the writer, and sometimes from newspaper articles. In addition, this work was informed by interviews with the people directly involved and through fact-checking by directly asking people involved about the issues. Provincial Agencies were contacted and files were checked in government offices. The facilitator arranged meetings with the UBID Administrators and with the Board of Trustees as well as with the principal of KIP. Some of the Board meetings attended by the facilitator were held in-camera and nothing from those meetings is discussed in this report unless it was released by the Board or discussed in public. Every attempt has been made to keep this report as factual as possible. Recommendations are also provided at the end of the Report.

## Union Bay

Union Bay is a small unincorporated community of about 1200 people situated on the ocean and straddling Highway 19A about 15 kilometers south of Courtenay British Columbia.

Coal was discovered near the present community of Cumberland in 1852. A group of investors organized the Union Company to exploit the coal but failed to make it a success. With the 1888 formation of the Union Colliery Company of British Columbia at Cumberland, coal production started and Cumberland began growing. By 1891 shipments of high grade steam and domestic coal were being shipped to the east coast of Vancouver Island from an area known as Union Bay after the Company name. Homes began to be constructed near the mines in 1888 and the government was asked to lay out a town site. Surveys were filed and the area at the Union Colliery was named Cumberland after the English County and incorporated as a city January 1, 1898.

To enable the processing and shipping of coal, facilities and a wharf were built at Union Bay. Houses and other amenities were also built near the waterfront and the present community, also known by the name of Union Bay, grew around the port activities.

## K'ómoks First Nation

Union Bay lies within the traditional territory of the K'ómoks First Nation (KFN). The KFN has been involved in the Treaty Process with the Government of Canada and the Government of British Columbia since 1992. In 2010, the KFN reached an Agreement in Principle to provide a framework for finishing a Treaty, which was signed by all three parties in 2012. K'ómoks First Nation is currently in Final Agreement negotiations (Stage 5 of the 6 Stage BC Treaty Commission process). The KFN own free-simple lands within the community of Union Bay and have selected Treaty Settlement Land in near proximity to Union Bay.

## Improvement Districts in British Columbia

Improvement districts are local authorities that provide services for the benefit of the residents of a community. Improvement districts vary considerably in size, from small subdivisions to larger communities, and are usually located in rural areas of British Columbia.

Individual Improvement districts are empowered in Letters Patent to provide particular local services such as water supply, fire protection, street lighting, drainage, garbage collection and parks. Improvement districts do not provide general governance or land use planning that municipalities and regional districts provide to residents.

Every improvement district is governed by a board of trustees elected by area property owners. The board selects one of their trustees to act as the board chair. The powers exercised by the trustees (to enact and enforce its regulations and charges, to assess and collect taxes, to acquire, hold and dispose of lands, to borrow money and to expropriate lands) flow from the improvement district's Letters Patent, their bylaws, *the Local Government Act* and other applicable provincial statutes

Most improvement districts are located within the boundary of a regional district. However, the improvement district and regional district are independent of each other. Overlaps in jurisdiction can and do occur, therefore co-ordination between the two bodies is essential. Regional districts can apply on behalf of

improvement districts for infrastructure planning and capital grants from senior governments but improvement districts cannot access this funding on their own.

Although improvement districts are independent, they are subject to supervision by the provincial government. All bylaws passed by the board of trustees must be registered with the Inspector of Municipalities and the bylaws are not effective until that approval is granted. In addition, each year the improvement district's audited financial statements and the minutes of its annual general meeting must be reviewed and filed with the Ministry.

## 2. Union Bay Improvement District

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Water in Union Bay was originally supplied by wells, with the coal company building some large community wells from which people accessed water. Many homeowners also dug their own wells. In 1908, Langley Lake, at 500 feet elevation, was dammed to supply the coal washer with water. There was an earth-fill dam with large timbers facing the toe side and a 10-inch pipe to the washer. In 1912 the dam failed, flooding an area of homes of Chinese workers and the colliery yards. The dam was re-built to a better design and is still in use today.

A water system for Union Bay was installed after the dam was rebuilt with a two inch supply line taken from the 10" main line. In the 1940's the main line was replaced by a wood stave pipe bound with galvanized wire. In 1953, about seven families living further up the hill incorporated the Union Bay Water Association and got permission from Canadian Collieries (as it was then) to connect to the main line to supply their water.

In 1960, the Union Bay Waterworks (newly formed from the Water Association) bought their water system for a \$1.00 from the Canadian Collieries (Dunsmuir) Limited. They also bought the land under Langley Lake for \$1,000, one of the few lakes in BC for which the bed is privately owned. The Union Bay Waterworks became the Union Bay Improvement District, which was incorporated by Letters Patent on March 18, 1960 as the authority responsible for providing waterworks to the residents and property owners of Union Bay. Fire Protection and Street Lighting were added to UBID responsibilities in 1972.

UBID is governed by an elected Board of Trustees who are chosen to serve overlapping terms at elections which are held as part of an Annual General Meeting. Trustees are paid a small stipend. Day to day business is managed by a full-time Administrator, who is supported by a part-time Administrative Assistant, along with a Public Works Superintendent and a Public Works Technician, both full time. Union Bay Fire Rescue is a volunteer fire department with a half-time paid Fire Chief. The fire crew are volunteers with modest stipends paid to a couple of senior officers and an annual honourarium paid to the department as a whole.

### Current Water System

Union Bay still uses Langley Lake as its water source. UBID has legal title and ownership of the lakebed, which is 78 acres, surrounded by a shoreline set-back consisting of 20 acres with a main distribution and road access extending from the lake. Total area owned is 101.9 acres.

UBID holds Conditional Water Licences 112815 and 112817 that together authorize water storage in Langley Lake and water use for waterworks purpose along with the construction and operation of works within the boundaries of the Union Bay Improvement District. The licences cumulatively authorize the use of 178 million gallons per year at a rate not to exceed 1,828,000 gallons a day. This equates to 809,204 cubic metres per year at a constant average draw of 25.7 litres per second. Actual instantaneous usage can be greater or lower than this figure as long as the daily maximum withdrawal rate set out in the licence is not exceeded.

This daily maximum permissible rate of diversion equates to about 96 litres per second, which is nearly four times the sustainable draw and is not a limitation on current operations or future plans at this time.

The water system today provides water from Spindrift Drive in the north to the Buckley Bay Ferry Terminal in the south, and serves about 670 properties. The extension of the service to the Buckley Bay area took place in the early 1970's. The wood stave pipes have been replaced with asbestos cement and PVC pipes. Current distribution system is an 8-inch PVC main line conveying raw water via gravity feed to a concrete reservoir situated on a lot at 451 McLeod Road, on property currently leased from KIP. This reservoir was built in 1974 with a reported capacity of 137,000 Imperial gallons or 620 cubic metres. Chlorination, added since the 1970's as a disinfectant, is provided at the McLeod Road reservoir from where an electric booster pump feeds a 4-inch line running back to the higher elevation connections. This pump is not adequate to provide fire flows to the higher elevation properties. Also from the reservoir, the 8-inch mainline (now with chlorinated water) runs east down McLeod Road via gravity. Six-inch PVC distribution lines tee off the main line along 7<sup>th</sup>, 6<sup>th</sup> and 5<sup>th</sup> streets. Below 5<sup>th</sup> street the main line is asbestos cement. At the old Island Highway (19A), the mainline runs north to Spindrift Road and south to Buckley Bay. Distribution lines are 80% asbestos cement with newer ones PVC or polyethylene. A balancing reservoir to support peak demand and fire flows for the south end of the system was built at McKay Road in the mid-1990s. It has a capacity of 65,000 Imperial gallons or about 300 m<sup>3</sup>.

Langley Lake is primarily a spring-fed lake. It also has several creeks that feed it during the winter rains from the Island Timberlands property that forms the watershed area. The dam at Langley Lake was refurbished in the late 1970's. A new deep intake to the Lake was installed in 1999. The Lake has a licensed storage capacity of 160 acre-feet or 197,357 m<sup>3</sup> but has a reported volume of 690,000 m<sup>3</sup>. Water flows over the spillway for approximately seven months of the year (October to April). This spilled water follows Washer (Hart) Creek to the ocean.



**Figure 1: Langley Lake (UBID picture)**

The reservoir has a peat bottom and floating islands of peat. Turbidity levels fluctuate depending on the incoming flows into the Lake. Langley Lake has a natural high organic content from peat and tannins, creating colour concerns in the summer. The water has low pH (acidic). Based on raw water testing of Langley Lake conducted from 2012 – 2014, the water quality is reported to have elevated colour, turbidity, and total organic carbon, with occasional iron and manganese spikes. There are seasonal variations in water quality; and concern has been expressed about potential for development of trihalomethanes (discussed below).

### 3. Water Treatment

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Currently UBID's only treatment is chlorination. Chlorine kills bacteria (salmonella, E coli, leptospira, cholera, campylobacter, etc.) most of the time (more below). Most viruses (enterovirus, hepatitis A & E, norovirus, etc.) persist for a long time in water and are moderately resistant to chlorine. Protozoa (cryptosporidium, giardia, Entamoeba) persist for a moderate time in water (crypto for a long time) and have a high chlorine resistance.

Island Health, formerly known as the Vancouver Island Health Authority or VIHA regulates drinking water quality. Island Health's Surface Water Quality Treatment Objectives are based on provincial and national guidelines that require a "4-3-2-1 Treatment" which means a 4-log inactivation of viruses, a 3-log removal of parasites, two treatment processes and turbidity of less than 1 NTU (Nephelometric Turbidity Unit). Ultra-violet light exposure is effective against bacteria and viruses but requires clear water and appropriate exposure time. Thus filtration must come first and then test for viruses and treat with ultra-violet if necessary. Most protozoa can be removed through filtration and are weakened by ultra-violet, and ultra-violet is very effective against cryptosporidium and giardia. So again, filter first and test, then treat with ultra-violet if necessary.

Chlorine is an excellent drinking water treatment and is a great benefit to human health. However, it can form trihalomethanes in certain circumstances. Trihalomethanes (THM) are a group of four chemicals (chloroform is one) that are formed along with other disinfection by-products. These occur when chlorine or other disinfectants that are used to control microbial contaminants in drinking water react with naturally occurring organic and inorganic matter in the water. Many THMs are considered carcinogenic to humans on ingestion, inhalation or dermal contact. They are typically formed when chlorine levels are raised during high organic loading in the water to try and kill bacteria that "hides" in the organic matter in water. If the concentration and contact time of the chlorine is high and long enough, the chlorine reacts with the organic matter and forms THMs. This is a rare situation but it can occur and is the reason for the guidelines being the way they are. Testing for THMs is rarely done because it is expensive, must be done with strict protocols and in the right place and time, and the samples must be properly preserved and sent to a lab in a short time. More usually, if the circumstances exist for THM formation, assume you are at risk and spend your money on filtration. This is may be the case in Union Bay during the summer when the organic matter is present in the water and chlorine levels are increased to remove the bacteria. Certainly there is a risk of THM formation.

For all of the above reasons, filtration is the first priority and it is urgent because it is important to everyone in Union Bay.

Funnily enough, asbestos is not really harmful in drinking water although it is undesirable. It is extremely harmful to humans if it is airborne and it is inhaled into the lungs. Asbestos-cement pipes have been used frequently all over the world. They were cheap to make and they lasted a long time if the water was low acid. But many in BC have been breaking down due to the acidic nature (low pH) of our water. This may also be the situation in Union Bay where some of the distribution pipes are still asbestos-cement and the water is high acid. UBID has been replacing the pipes with PVC pipes on a regular schedule of maintenance and repair. The rest of the pipes need to be replaced but it is a second priority compared to filtration.

In 2003 UBID completed a 20-year planning study, in which they planned to install treatment in 2006. In 2005 UBID conducted a pilot-project to determine which type of treatment would be appropriate to handle source water high in organics and turbidity and low in pH. The 2006 treatment plan was put on hold while



they undertook to update their 20-year planning study because in the interim, metering of use had been undertaken for all UBID connections. The resulting isolation and repair of leaks and decreased usage by residents combined for a dramatic reduction in overall water demand. UBID stated they would plan on 1,000 connections by 2023, which was a growth rate of 3%. The plan goes on to state:

*UBID has solicited a rough budget price from "Corix" for the supply of a dissolved air filtration (DAF) system. This system would consist of a treatment train roughly as follows:*

- *Addition of a flocculent chemical and rapid mixing.*
- *Separation of particulate material through the DAF process, whereby particles are floated to the top of the fluid via small air bubbles, introduced from a pressurized source in which air is saturated in solution.*
- *Filtration, via either sand or membrane media.*
- *Disinfection, via chlorine, ozone, UV, etc.*

Corix gave UBID a "rough" quotation of \$1.75 million for a plant to meet the existing demand (then 640 connections). UBID pro rated it to \$2.56 million to meet demand to 2023 and decided to plan on \$2.5 million for the plant costs. UBID proposed to meet the potential new treatment standards as soon as approval and funding could be determined for the project. Part of updating the 20-year planning study was to determine Capital Expenditure Charges (CEC) to all new connections to the system, which will form part of the funding for the water treatment project. The balance of the funds would be charged to users of the system in the form of a parcel tax.

In January 2006, UBID also received a *Water Supply and Treatment Options Feasibility Study* prepared by Focus Corporation and CH2MHill for the Kensington Island Properties, which served as the conceptual design for the supply of drinking water to the proposed Kensington Island Properties as well as Union Bay, District Lot 7, Christie lands and other lands.

In 2007, the Vancouver Island Health Authority introduced a health policy to help water suppliers determine whether existing treatment processes effectively safeguard against pathogens. The *Surface Water Quality Treatment Objectives* are based on provincial and national guidelines that require a "4-3-2-1 Treatment" (discussed above). In June 2008, the Vancouver Island Health Authority issued a request for UBID to advise of its plan to comply with the 4-3-2-1 Treatment requirement as required under the *Safe Drinking Water Act*.

Also in June 2008, representatives from VIHA met with the UBID Board of Trustees to address the surface water treatment policy and how it would affect UBID. An implementation plan was requested from UBID. The Board stated that the plan would be started once clarification was received from the Regional District on the proposed regional water system and how it might affect Union Bay. VIHA requested submission of the plan by 2009.

On April 3, 2009 VIHA issued a Notice of Proposed Change to the terms and conditions of UBID's Operating Permit.

After subsequent discussion and correspondence, VIHA amended UBID's Operating Permit on August 20<sup>th</sup>, 2010 to outline the required specifications for water treatment. At its own discretion, UBID was allowed to study source water quality and source protection measures for the purpose of proposing a filtration deferral. If it performed these studies, the results must be submitted to the Drinking Water Officer. If deferral is not accepted by the Drinking Water Officer, UBID was required to complete engineering design for a water filtration plant(s) and obtain a construction permit from VIHA by September 30, 2014 and complete construction of a of the water filtration plant(s) and commission the works by December 31, 2015.

During the time that UBID was in discussion with VIHA, there was also a development proposal for lands near Union Bay from Kensington Island Properties. This proposal will require water from UBID.

## 4. 034083 Yukon Inc., Kensington Island Properties

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34083 Yukon Inc. is an extra-provincial company incorporated on February 20, 2002 and registered in British Columbia on March 7, 2002. The company is in the property development business and has previously developed properties in Cumberland. In 1996, 034083 Yukon Inc. (hereafter referred to as the Developer) acquired 342 hectares (845 acres) of previously logged land adjacent to Union Bay for the purpose of development. Part of the lands sit atop the area that included the coal port and some of those lands have been designated as a “contaminated site”. Although only a small portion of the lands is contaminated, the designation was over the entire undivided parcel. No development can commence until there is an agreement for remediation of the lands approved by the Ministry of Environment. The Developer prepared a development plan for the property and called the development “Kensington Island Properties”.

In the early 2000’s, the Comox Strathcona Regional District (as it was then) approved a plan to link the development properties and Union Bay with Cumberland in a project that would supply Union Bay, Cumberland and the development with water from a lake near Cumberland. Residents of both communities and some environmental advocates felt they were shut out of the process leading to this decision and they went to court. In the end, the court decision split Union Bay and the KIP development from Cumberland and left Langley Lake as the Union Bay and KIP development water supply. However, the Developer had incurred large expenditures in legal fees and additional studies to no avail.

### Land Use Planning and Zoning

Regional Districts have authority for regional planning within their boundaries and for land zoning in unincorporated areas (outside of municipal boundaries). The Union Bay Improvement District is an unincorporated area and thus zoning is provided by the Regional District. The Comox Valley Regional District (CVRD) received a development application for Kensington Island Properties (KIP) in June 2005. Following a detailed process of review and consultation, the CVRD Board approved the KIP Master Development Agreement (MDA) and revised the amending official community plan (by Bylaw 56) and zoning bylaws (by Bylaw 57) to permit a mixed use community including residential, commercial, institutional, and recreation/open space uses. The bylaws were approved on December 10, 2009 and the MDA was registered as a covenant on the KIP properties on May 13, 2010.

Bylaw 57 creates five Comprehensive Development Areas within the KIP development, numbered CDA-1 through CDA-5 as shown on Schedule A of the Master Development Agreement, copied below.

**CDA-1** is zoned as *Golf Course – Residential*. Permitted uses include among others: golf courses, single-family residential, multi-family residential, limited neighbourhood commercial, institutional, licensed premises, and tourist accommodation.

**CDA-2** is zoned *Residential – Public Facilities*. Permitted uses include among others: single family residential, multi-family residential, golf course, recreation facilities, tourist accommodation, congregate care, and assisted living.

**CDA-3** is zoned *Mixed Use Commercial – Residential*. Permitted uses include among others: marina, golf course, multi-family, assisted living, community care, licensed premises, commercial, recreation facilities, and tourist accommodation.

**CDA-4** is zoned *Mixed – Residential*. Permitted uses include among others: multi-family residential, single-family residential, community care facilities, assisted living, institutional, golf courses excluding buildings and structures, recreational facilities, public facilities.

**CDA-5** is zoned *Mixed – Residential – Institutional*. Permitted uses include among others: multi-family residential, single family residential, institutional, public, assisted living, community care facility, and limited neighbourhood commercial.

For each permitted use within each zone, densities and further restrictions are specified in the Bylaw.

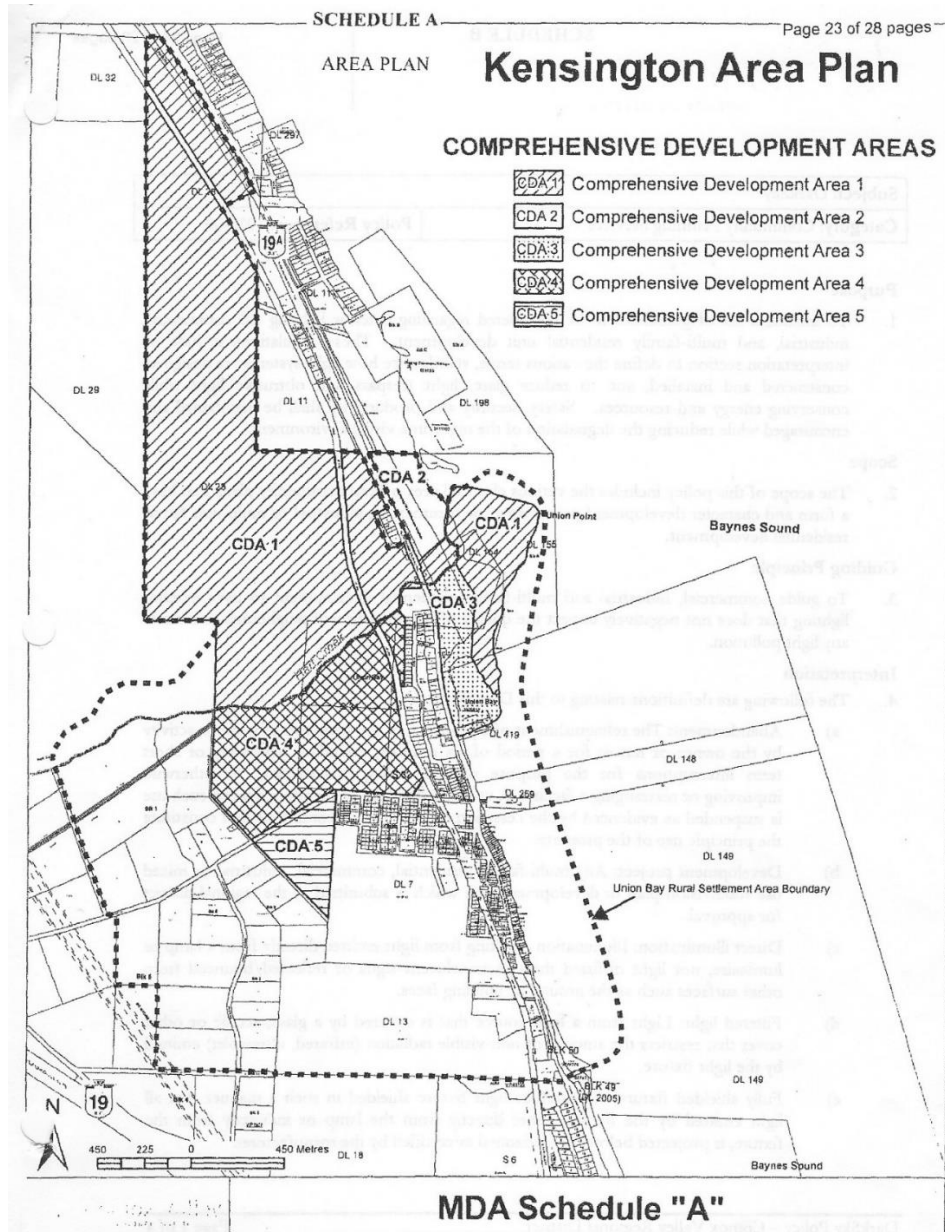


Figure 2: Kensington Area Plan

## The Master Development Agreement (MDA)

The Master Development Agreement, dated for reference April 30, 2010, is a key document. While the Bylaws created five Comprehensive Development Areas and generally specified the requirements of the development, it is the MDA that contains the specific requirements that the Developer must accomplish. The MDA lays out subdivision requirements; density requirements and bonus density for low-cost housing; the need for connectivity of trails and roads; the requirements for public space; the sewage system requirements; and other planning details for a community of over 3,000 residential units. It is also in the MDA that the Developer is required to have a water servicing agreement with UBID.

The MDA is a 28 page document divided into two parts plus the attached schedules. The actual MDA should be consulted for a complete understanding of its contents. However, an annotated summary is provided in Appendix A.

## 5. UBID and KIP Negotiations

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In April 2011, a document known as the *2011 Water Agreement* (discussed Appendix B) was signed by UBID and the Developer of Kensington Island Properties (KIP), in which it was agreed that the Developer would construct the water treatment plant to serve both Union Bay and the KIP development. It was planned to build a plant first in a temporary location near the current chlorinator and reservoir and then move it to a permanent site when expansion was required.

In August 2012, UBID retained Koers and Associates Engineering Ltd. (Koers) from Parksville to act as their primary consultant and representative for the treatment plant design and construction by the KIP Developer.

At its March 17, 2013 meeting, the UBID Board of Trustees discussed delays with the KIP development and expressed concern at their vulnerable position with respect to the VIHA operating permit conditions regarding water filtration. They discussed moving forward on their own or getting an outside consultant to “put it together”.

On May 1, 2013 the UBID Trustees met with a representative of the Kensington Island Properties development in order to determine the extent of the potential delay the development has encountered due to the coal hills remediation work tied to the project. The Trustees expressed their concerns with respect to the timing UBID was now facing regarding the VIHA deadline for drinking water treatment. The Trustees requested specific detailed information on treatment plans or UBID would have to make preparations for an extension from VIHA. In a follow-up to the meeting, the Board learned that the further progress on the KIP development was contingent on a plan being in place with respect to the Union Bay Coal Hills Remediation. The KIP representative reported that discussions with the Province had re-commenced and he remained hopeful that a resolution would be reached in a reasonable time frame so the development could move forward.

On July 11, 2013, VIHA (now called Island Health) staff, Koers staff and the Public Works Committee of the UBID Board met to discuss progress on meeting the Island Health objectives. On July 17, 2013 the Board was told that further deferral was unlikely and UBID decided to conduct a comprehensive public works review and planning process to be followed by a detailed report to Island Health in the spring of 2014.

At its October 16, 2013 meeting, UBID authorized Koers to review the UBID water supply and develop a plan outlining the proposed phasing and implementation schedule for UBID's water treatment facility.

On July 4, 2014, Koers delivered a report called *Union Bay Improvement District Phasing Plan for Implementing Water Treatment*, which was endorsed by the UBID Board at its July 16, 2014 meeting. This Plan recommended a phased-in approach commencing with (1) the installation of a water treatment plant in 2016/17 followed by (2) an ultraviolet protection system in 2018 if deemed necessary by the Drinking Water Officer, and (3) construction of a new reservoir in 2021/22. Costs were estimated as \$1,786,000 for Phase 1, \$234,000 for Phase 2, and \$954,000 for Phase 3 for a total cost of \$2,974,000 million.

On September 19<sup>th</sup> 2014, UBID delivered to Island Health a report entitled *Response to Island Health's Surface Water Quality Treatment Objectives*, which had been adopted by the UBID Board of Trustees on September 17, 2014. The Koers Phasing Plan was included as appendix to the report. With the submission, UBID sought additional time to design and construct a water treatment plant.

At its October 15, meeting, UBID's Board approved an expenditure of \$46,000 to conduct pilot testing of the DAF technology to obtain detailed filtration data to (1) support the ultimate design and specifications for the water filtration plant, (2) to confirm whether or not implementation of UV disinfection will be necessary and (3) to provide information on how to deal with the sludge by-product and back-flush water that will result.

UBID's Permit to operate a water supply system was amended on October 31, 2014, by Island Health to require, among other things, the following:

- 3) *On or before May 31, 2015 complete filtration pilot testing.* [This was completed].
- 4) *On or before August 31, 2017 obtain a permit to construct from the Vancouver Island Health Authority (VIHA) Public Health Engineer. This permit is for the construction of a water filtration plant, disinfection processes and all works necessary to meet VIHA Surface Water Quality Treatment Objectives.*
- 5) *On or before August 31, 2018 construct and commission a water filtration plant and all works necessary to meet VIHA Surface Water Quality Treatment Objectives.*
- 6) *On or before August 2021, add a second primary disinfectant.* [The need for this will be assessed and this permit condition will be amended if secondary disinfection is deemed not necessary.]

On November 6, 2014 UBID reminded the Developer of its obligations under the *2011 Agreement*, which was to expire on December 31, 2014. The Developer responded that he needed an extension to at least April 2015 and he would get his contractor working immediately. UBID asked for justification for the extension, which they claimed they never received.

At its November 19, 2014 meeting, UBID approved and adopted its *Comprehensive Review of Public Works and Water Management in Union Bay* report. The Administrator was instructed to take all the recommendations of this report and turn them into a work plan. This report covered not only the planned work for a filtration facility, but included a source-to-tap assessment of the entire water system, from Langley Lake through future upgrades and/or replacement of water distribution lines, hydrants, etc.

In December, 2014 pilot test modules were installed and tested for about 2 weeks with encouraging results reported in reducing NTU to below the required standard as well as gaining information about the back-flush water and the outflow discharge.

Also at this time, the UBID Board felt that the coming expiry of the *2011 Agreement* was an opportunity to make some improvements and they could move forward with a revised agreement. In January, 2015, they provided the Developer with six issues which UBID saw as necessary to be spelled out in a new Agreement:

1. Not using a temporary site,
2. Aligning capacity of plant to ability of Langley Lake to supply water and the water licence,
3. Funding of all associated planning, design and construction costs,
4. Ownership of treatment facility
5. Design and engineering of treatment facility, and
6. Update on KIP plans.

At the January 21, 2015 meeting, the UBID Chair reported that as of December 31<sup>st</sup>, 2014 the *2011 Water Infrastructure Agreement* had automatically terminated as a result of the “temporary” water treatment plant not being completed. As of this point, UBID had not agreed to an extension of the deadline and did not know what the KIP developer’s plans were but the Chair indicated that the Board remained “*happy and prepared*” to meet and discuss what a new working relationship and a potential new agreement would look like. In the meantime, UBID was continuing to move forward on its plans and timelines as outlined in their comprehensive public works and water system review.

On February 18, 2015, the Chair of UBID reported that at a recent meeting with KIP there was a preliminary discussion concerning how a new relationship with KIP might move forward. However, no progress appeared to be made.

On June 3, 2015 a meeting was hosted by the Developer at the Union Bay Community Hall. No minutes were taken at that meeting but the meeting was reported in the Comox Valley Record on June 12, 2015. The newspaper reported that the Developer said he wanted to fulfill its commitment to finance upgrades to the UBID water system. He held the meeting to correct what he claimed was misinformation in the community. He said he wanted to honour the *2011 Agreement* that he was unable to complete by the December 31, 2014 deadline due to a long-standing issue with the provincial government over the remediation of the contaminated coal hills. The Developer said it was not until October 2014 when an agreement in principle was given to KIP to proceed. The Developer said he requested a four-month extension to the *2011 Agreement* but it was rejected. The Developer has said he had sought legal assistance to invoke the *Force Majeure* clause in the *2011 Agreement* that would allow KIP some flexibility with the project’s schedule. The newspaper also reported that a petition was circulating asking property owners whether they support funding of a new water system with UBID ratepayer tax dollars when an equivalent water treatment system can be provided immediately by KIP, at its expense by upgrading existing UBID water works.

At the June 17, 2015 Board meeting, a landowner and former UBID Trustee representing a delegation on behalf of Kensington Island Properties read a statement and presented the Trustees with a petition from 358 landowners urging UBID to provide KIP with immediate legal authorization to complete the water system as outlined in the *2011 Agreement*. At the end of the meeting, a question from the audience asked if the Board was prepared to provide its assurance that it was prepared to sit down with the developer and revisit the original contract in the hopes of resolving the differences. The Board responded that their intent was cooperation not confrontation and their goal was to negotiate a new, better agreement that is in the best interest of landowners and which also accommodates the development. However, given the long list of “...*questions, concerns, outstanding issues, etc. the Trustees have with the former agreement, in good conscience the former agreement cannot stand as it is.*”

Also at the June 17, 2015 meeting, the Board explained that the parcel taxes are collected on all properties within the UBID boundaries that have the opportunity to be provided with water service whether or not they are actually using water. The taxes are placed in a capital reserve fund to be used for the costs of renewal or replacement of the water system and not to be used for general operational or administrative costs. The Board also admitted that a small portion of the operational costs were being subsidized by parcel taxes but

they had been adjusting the water rates gradually over the last few years to eliminate this subsidy. If UBID was to implement water treatment in its own, these reserve funds would be used along with any grants that may be available or cost-shared funding that might be possible.

In response to a question from the Audience about Capital Expenditure Charges, the Administrator also talked about his concerns with the *2011 Agreement*. He stated: *An issue of utmost concern is the undefined or open-ended nature of the Capital Expenditure Charge recovery period that would be granted to the Developer under the [2011 Agreement].*

The meeting concluded with the Administrator stating that although UBID has prepared a plan to implement water treatment on their own, this does not preclude any arrangement they may be able to come to with the Developer that could potentially result in water treatment being implemented earlier than 2018 as UBID's current plan indicates.

In the July 15, 2015 meeting, the Board announced that as a result of four in-camera meetings, the Board has hired Steven Kelliher of Kelliher & Turner of Victoria as UBID's new legal counsel with respect to its negotiations with KIP regarding a new water agreement. As the negotiations were now being conducted through each party's legal counsel, the Board was not planning on making any further public comments. However, in response to a question from the audience at the end of the meeting, the Board said that it chose Steven Kelliher because due to the nature and complexity of the negotiations with the Developer, they felt they needed a "...senior level negotiator with extensive background and expertise in the areas of contract and land negotiations, First Nations, etc., representing UBID."

At some point after this meeting, the Administrator was instructed to prepare a *Draft Water Service Agreement* that specified the terms and conditions under which UBID was prepared to offer service to the KIP Development. This agreement contained language that stated: "...the Developer shall pay, prior to proceeding to construct the Development, such costs, above and beyond UBID's planned costs, as are necessary to upgrade the UBID water system to meet the Development's service demands according to UBID's service standards." The Administrator said this Draft Agreement was for discussion and UBID was prepared to negotiate reasonable changes if requested by the Developer. The Draft Agreement was sent to the Developer on August 31, 2015

At the October 21, 2015 Board meeting, the Chair stated that UBID was presently investigating alternate suppliers of water treatment technology to that of Corix Water Products as Corix is winding down its water treatment plant manufacturing and assembly operations to focus on other business lines.

Also at this meeting in response to a question from the audience, the Board responded that "*UBID has yet to receive a response from the developer with respect to the Draft Water Service Agreement presented to them on August 31<sup>st</sup>. The door remains open to sit down and commence negotiations towards a new agreement in this regard.*"

At its final meeting of 2015 on November 18, the Board was presented with a letter regarding the expired *2011 Agreement* which was read out to the Board by a landowner who discussed the reasons given by a Board member for the Board's concerns with the *2011 Agreement* and also some counter-argument in favour of the *2011 Agreement*. He suggested that KIP should be given an extension to the *2011 Agreement*. He also stated that the Developer indicated he would be willing to provide UBID with a suitable piece of property for Phase 2 of this project at no charge to the community if it would facilitate matters.

The Board Chair responded with a prepared statement saying among other things, that the "...Developer allowed the Agreement to expire." Further, the Chair confirmed that there would be no extensions and it is now time to move forward. The Chair stated: "*The Board provided the Developer with a new Draft Water*

*Service Agreement 2 ½ months ago and UBID has had no contact with the Developer since June 23, 2015. We have no means with which to make the Developer to come to the table to negotiate.”*

*Finally, the Chair said: “The Board has also explicitly said that it is more than willing to meet with the Developer to discuss issues face-to-face at the negotiation table. Development brings the potential for economic and social revitalization in Union Bay. Increased amenities and a larger tax base will help the community to survive and prosper. However, UBID cannot respond to third hand information on behalf of the Developer provided by community members who fell the need to try to act as intermediaries. ...If the Developer is committed to building on the Kensington Lands they need to meet with UBID to reach an agreement.”*

*A question from the audience asked: “Is the current planning for water treatment being undertaken solely because the developer hasn’t come forward?” The Board advised that the planning became necessary in part due to the requirement from Island Health for UBID to implement comprehensive water filtration processes to comply with their surface water quality treatment objectives. Further, the Board stated: *UBID hadn’t moved forward on firm actions to comply with these objectives until the last couple of years in anticipation that the development was going to move forward which included the construction of a water filtration plant. Island Health has made it clear that no further filtration deferrals will be granted.**

A meeting was arranged for December 1, 2015 between UBID and the Developer for the for the purpose of finding a way forward. No minutes appear to have been published from that meeting but the following summary was given in response to a question from the audience at the end of the January 20, 2016 Board meeting:

*UBID’s chief negotiator Steven Kelliher and the rest of its negotiating team, being the UBID Administrator and water consultant Hew McConnell, were all present at this meeting in Victoria. The developer, and his legal counsel, stated very clearly early into the session that he was unwilling to negotiate which meant that there was no reason to continue the session any further. [The Developer} and his lawyer then abruptly left after less than 30 minutes.*

## Land for the new Treatment Plant

In about 2008, UBID had started searching for suitable land on which to locate a new permanent water treatment plant that would service all properties connected to Union Bay’s drinking water system. In addition, the property would need room for a new, larger water storage reservoir to replace UBID’s existing main reservoir on McLeod Road, and also room for a water works equipment storage yard. The property should also be high enough in elevation to provide gravity flow of sufficient pressure to all or most of UBID customers to support firefighting.

The existing site of UBID’s reservoir and chlorinator is within the Kensington Island Properties on a lot leased from 034083 Yukon Inc., an arrangement that expired in 2016. This circumstance alone would urge UBID to obtain a permanent utility-owned location. In addition, the current reservoir was originally built in the 1970s, is thus approaching the end of its useful life, and does not have sufficient capacity to serve Union Bay’s potable water and firefighting needs over the long-term. The current leased site could not suitably accommodate an expanded reservoir and new water treatment plant including a works yard.

Once this search was underway, it became clear that any available properties having the potential of meeting these criteria were either Crown Land or privately held forest lands owned by Island Timberlands. By August 2012, UBID shifted its efforts away from one or two potential properties owned by Island Timberlands, due in part due to the costs being suggested to purchase one of these properties, in favour of some prospective Crown Land sites on the upper portion of McLeod Road.



Sometime in 2012 UBID made application for a grant of Crown land that would be suitable. In the course of considering the application, government staff forwarded a copy of the application to the K'ómoks First Nation (KFN), as is required. Initially there were no objections to the Grant and the Crown made a Crown Grant Offer on May 6, 2014. However, the KFN objected to the offer on the grounds that the subject land was in the traditional territories of the KFN and, while the subject land was not included (so far) as part of the proposed Treaty settlement lands, the Nation was in final stages of Treaty negotiations, and was objecting to any Crown disposition of traditional land of the Nation until Treaty was finalized. The UBID Chair and Administrator met to discuss the land with KFN Chief Councilor and their Chief Negotiator on March 3, 2015 and again on March 30 with the Developer of KIP present. The KFN took the position in both meetings that, while they were supportive of the KIP development and they wanted to work with UBID, they were not prepared to give up claim to the land until after Treaty discussions were completed.

Subsequently, UBID returned to consideration of the private land held by Island Timberlands. An agreement to purchase was made on a 26 acre parcel at the very top of McLeod Road where it meets the Inland Island Highway (HWY 19). The parcel has gravel soils with good foundation conditions, is large enough for a treatment plant with room for expansion, as well as a future reservoir and a works yard. In 2016 the agreement was concluded and UBID purchased this property. Costs to build an all-weather road to the property and to provide appropriate power to a treatment plant proved to be very expensive and UBID continued to look for other land that might be appropriate, including land within the KIP development.

## 6. The 2011 Water Infrastructure Agreement

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As stated above, in April 2011, The Union Bay Improvement District and the Developer entered into a Water Infrastructure Agreement, called for reference the "2011 Agreement". This Agreement is discussed in some detail in Appendix A.

One important consideration is that this is a "Water Infrastructure Agreement" and not a "Water Distribution Agreement." The Master Development Agreement for the KIP lands clearly states that the Developer must enter into an agreement with UBID for the distribution of potable water from UBID to the Development [Sub-Section 3.1(r)(i)]. Nevertheless, the 2011 Agreement does explicitly contemplate water supply and distribution. It should have been properly entitled *Water Infrastructure and Distribution Agreement*.

At June 17, 2015 Board meeting, the Administrator expressed concerns with the 2011 Agreement. He stated: *An issue of utmost concern is the undefined or open-ended nature of the Capital Expenditure Charge recovery period that would be granted to the Developer under the [2011 Agreement].*

- *Based on likely build out scenarios, would this be 10, 20, 30, 40 years? We just don't know as there are now no sunset clauses or timeline identified.*
- *If the developer were to build out phases 1 and 2 of water treatment under the agreement, then UBID would have to borrow (and borrow more) for necessary water infrastructure upgrades coming in the future as we wouldn't be collecting CECs from this development which would have gone into reserves as savings.*
- *We are also looking into the ramification this will have on our ability to levy parcel taxes on any of the properties developed within the project under our existing assessment and taxation bylaws.*

As previously stated, the Board laid out their concerns with the 2011 Agreement in a July 2015 "Landowners Update – Special Edition" as follows:

1. Location of Future Water Filtration / Treatment Facility (WTP)  
UBID is working hard to secure a permanent site for a water treatment facility. It makes no sense to put a temporary plant on lower McLeod Road site and then within 2 years (this is a requirement of Island Health and it is in our water license) to move it.
2. Capacity of Proposed DAF WTP must be aligned with that of Langley Lake  
The maximum capacity of the future complete and fully operational Water Treatment Plant must not exceed UBID's existing water license for community drinking water use from Langley Lake. UBID is not convinced that the current water license can support 500 new homes and wants to revisit the numbers. This does not mean the Master Development must be opened as the Developer has purported.
3. Funding of all Associated WTP Planning, Design and Construction Costs.  
UBID has a number of questions and concerns regarding specifically the collection of capital expenditure charges and latecomer fees. Any future agreement with the Developer needs to address costs, payment from the Developer and UBID's role in sharing this responsibility. The terms, conditions and details of each party's proposed financial contributions pertaining to such a cost-sharing arrangement would need to be developed as part of negotiations.
4. Ownership of the Future Water Filtration/Treatment Facility  
Full ownership, control and day-to-day operation of the future WTP must be retained by UBID.
5. Design and Engineering of the Future DAF Water Treatment Plant  
UBID's consulting engineers, Koers & Associates Engineering Ltd. of Parksville, must be responsible for any and all engineering and related professional consultation or project management work pertaining to the implementation of treatment and storage.
6. Update on Kensington Island Development Plans and Status  
KIP's existing development plans are now several years old and were designed prior to this extended period of economic uncertainty that began in 2008. Furthermore, based on our knowledge other pertinent environmental, regulatory and related issues continue to remain either fully or partially unresolved. As such, UBID requests that the Developer prepare a realistic development plan for presentation to the UBID Board of Trustees in order to provide sufficiently more clarity and awareness of the development's currently anticipated timeframes, benchmarks, required commitments, etc.

The Administrator's concerns are valid. There is insufficient clarity in when the CECs will be applied, when the plants can be considered "paid for" and how and whether CECs will be applied within the development beyond the those that offset the costs of building the plants. In addition, the lack of timelines leaves UBID in a position of being unable to plan for other demands that may be made on the system such as for the K'omoks First Nation and other possible development. The Board's concerns are valid as well and they all need to be addressed.

There are other concerns as well. There is not sufficient understanding of the availability of water to proceed with the full extent of the proposed development. Proof of the availability of water through a comprehensive hydrologic analysis is absolutely necessary before undertaking investments measured in millions of dollars. There are some hydrologic analyses that have been done based on basic watershed information and existing information but there is no solid analysis stating a sustainable yield that could form the basis of an investment decision for the full build-out of the KIP development.

## 7. The Facilitation Process

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After the breakdown of discussions at the December 1, 2015 meeting, the relationship between UBID and the Developer had completely failed. The Developer had made almost no progress on his development and UBID had less than three years to get a filtration plant in place for water supply to the community. The Board met with the Minister of Community, Sport and Cultural Development to seek assistance. The Developer had also spoken to the Minister and the MLA for the Comox area asking for help. The Minister offered assistance to the parties by way of a facilitated process involving the Developer and UBID to try to get negotiations back on track. A terms of reference was developed for this process, which was signed by the parties. It was to be a facilitated discussion and not a mediation session. The facilitator's role was to ease and re-establish communications between the parties and to seek resolution by way of a water servicing agreement.

The facilitator and writer of this report, James Mattison, commenced work on a contracted part-time basis in February 2016. Work began with discussions with the Ministry and reading background material. The facilitator met with the Developer and his lawyer on February 15, 2016. Contact was made with the UBID Administrator to set up a meeting with the Chair of the board of trustees. Discussions were held with the lawyer for the K'ómoks First Nation, with Vancouver Island Health Authority and with the Comox Valley Regional District.

The facilitator met with the Administrator and the Chair of the UBID Board on March 7 and with the entire Board of Trustees on March 14, 2016. During this period, discussions were held with government agencies, and with interested persons in Union Bay. The facilitator also attended the public meeting held by the Developer on the evening of March 14, 2016. The purpose of all these early meetings was explain the terms of reference and the facilitator's role, to gain information and an understanding of the issues and to begin to formulate a process for a way forward. The facilitator again met individually with the Developer and the UBID Administrator to determine the interests of the parties, the flexibility that was available for negotiation and the ideas of each party for a goal for negotiation.

Work stopped for the two weeks preceding the UBID Board election on April 3, 2016. On April 11, 2016, the facilitator travelled to Union Bay to meet with the Administrator and the two new trustees who had been elected to the UBID Board.

### The 2016 MOU

The first facilitated session with the Developer and the UBID Administrator was held in Nanaimo on April 25, 2016. Although much history was discussed, eventually the meeting became forward-looking and the parties began to understand their mutual interests in achieving an agreement. At this point, the Developer was still pushing for a re-instatement of the *2011 Agreement* that had expired on December 31, 2014.

Another meeting was held May 5 where it was decided by the parties to work towards a plain-language memorandum of understanding (MOU), which the lawyers for the parties could later turn into an agreement. A set of agreed-upon points came out of that meeting that the UBID Administrator turned into an MOU and it went back and forth between the Developer and the UBID Administrator until both parties accepted the language. The MOU was focused on providing water service to 40 or 50 residential units to get the Developer started while further work was done on hydrology before creating a more comprehensive agreement. The Administrator and the Developer both knew that MOU was not complete until it was approved and signed by the UBID board and also approved by the Comox Valley Regional District.

Just after this meeting, it was confirmed that the Developer had offered a parcel of his land free of charge as a place to locate the new treatment plant. This had not been made part of the MOU. Two of the trustees felt that the offer of “free land” was too good to be ignored and should be part of the MOU. The approach that the Administrator took in the negotiations followed the direction from the Board of Trustees that UBID must build, own and operate the new treatment plant. The Board direction included the requiring UBID to be completely independent from the Developer and treat him as any other customer. The developer could apply in accordance with the UBID by-laws and expect to obtain water service for 40 to 50 residential units as an initial start on development. There was a UBID Board meeting scheduled for May 18 but the agenda was full and the Administrator wanted the MOU to be discussed initially in camera. A separate in-camera meeting was arranged for June 6, 2016 to discuss the MOU.

The Board was divided on matters relating to the KIP development and some members did not trust the offer of free land, which had only been made verbally. At the same time, as discussed above, UBID was investigating a parcel of privately-owned land for the treatment plant at the very top of McLeod Road next to the Inland Island Highway. The May 18<sup>th</sup> Minutes of the UBID Board report that UBID was still doing due diligence with regard to the land purchase and the Developers offer had only been made verbally and was not considered. On June 8, 2016, the facilitator received an email from the UBID Administrator advising that, at an in-camera meeting on June 6<sup>th</sup>, the UBID Trustees had approved the MOU as discussed by the Parties and the facilitator at our May 5<sup>th</sup> meeting. The Administrator further advised that the Trustees had adopted a by-law authorizing the Chair and Administrator to sign the MOU and that two signed copies would be forwarded to the Developer.

The Developer wrote to the UBID Board of Trustees in a letter dated June 7, 2016 wherein he confirmed the offer of land to be provided without Capital Expenditure Charge credits, which basically means at no cost to UBID, but it was conditional on the reinstatement of the *2011 Agreement*. In the June 18 Board Minutes, the Chair reported that the money for the land purchase at the top of McLeod Road had been transferred to UBID’s lawyer to complete the purchase.

The Developer sent a copy of the MOU, signed by the Board but not by the Developer, to the Comox Valley Regional District (CVRD) for their review and approval. At the same time, the lawyer for the K’ómoks First Nation contacted both the Developer and the facilitator and said that the KFN had interests in water service and they wanted to be sure their interest were protected. The KFN was specifically included in the MOU but both the Developer and the facilitator agreed to meet with the lawyer and the Chief and Council at their convenience.

On June 20, the Developer received an email from staff at the CVRD stating that the MOU contained “...terms and conditions which deviate from the 2010 master development agreement...” The letter further stated that the CVRD requests a detailed list of changes proposed to the 2010 MDA to address this. The Developer stated he and his lawyer were trying to find out more specific concerns from the CVRD staff as the Developer had no intention to amend the MDA.

The facilitator arranged to meet with the K’ómoks First Nation on July 6, 2016 and call CVRD staff on July 7. The purposes were to explain the interim nature of the MOU and to seek to understand what was needed to accommodate the interests of both the KFN and the CVRD. At the meeting with the KFN, the Chief explained that the KFN wanted water service from UBID soon for the property that the Nation owned in fee simple within the boundaries of the UBID service area. They also wanted to discuss water for future development on Treaty Settlement Lands when their treaty negotiations were finished. They wanted to make sure that UBID would make provision to supply water to them in the future. The Chief also made it clear that the KFN were prepared to pay their way and they were willing to discuss costs with UBID.

On July 11, the Developer wrote to the CVRD advising them that a revised Agreement would be prepared. On July 20, 2016, staff of CVRD replied stating that the CVRD was supportive of the KIP development but there were concerns with the MOU. They added an explanation with their preliminary comments on the deficiencies in the MOU from their perspective. CVRD staff also said they had sent the MOU for legal review and their lawyer would be replying with comments as well. The Developer wanted to proceed to amend the MOU to try and overcome the concerns that the CVRD were expressing. As information from the CVRD was received, work began turning the MOU into a more formal water servicing agreement.

## Another Delay

On July 27, 2016, at an in-camera meeting, the Chair of the UBID Board and two members submitted their resignations, leaving only the two members newly elected in April. No reasons for their resignations were given at that time although one Trustee expressed frustration due to the ongoing issue on the water agreement involving Kensington Island Properties.

There are five trustees on the UBID Board, one of whom is Chair. Three Trustees constitute a quorum. Without such a quorum, the Board could not make decisions and the Administrator felt he could not negotiate in good faith without a mandate from the Board. On July 30, 2016 one of the remaining trustees wrote to the Minister and requested that the Minister appoint a trustee to the Board to give them a quorum to operate. By mid-August 2016, a number of Union Bay residents had written to the Minister to request that UBID be dissolved and the assets turned over to the Comox Valley Regional District. One letter pointed out that government policy does not sanction the further establishment of improvement districts. It was further pointed out that Royston had turned over their waterworks to the CVRD a few years ago and Sandwick Waterworks District, also in the CVRD, will turn over control of their water system in 2017. On August 22, 2016, 325 signed petitions were submitted to the Ministry requesting dissolution of UBID with the responsibilities turned over to the CVRD. The letter accompanying the petitions stated that more signed petitions would be forthcoming.

The Province clearly has the authority to dissolve the improvement district. However current policy is not to take this action without consensus of the residents, of the board of trustees and of the regional district. Consensus would normally be determined in the form of a referendum conducted by the Board of Trustees or the Regional District followed by a resolution of the Board of Trustees. On August 17, 2016, the Inspector of Municipalities, under authority of section 683(5) of the *Local Government Act*, directed and empowered the UBID Administrator to fill the vacancies in the Trustees due to the absence of a quorum. Due to the necessity of giving notice of the election and doing the necessary preparation, the election was set for October 22<sup>nd</sup> 2016.

In the interim, on September 11, 2016 another 103 petitions for dissolution were submitted to the Ministry. With the UBID Administrator tied up organizing the election and having no mandate to negotiate with the Developer, no work was done on creating an improved agreement pending the outcome of the election.

## The 2017 Agreement

Three new Trustees were elected to the UBID Board of Trustees on October 22, 2016 and they took their oaths of office and elected a chair at a Committee of the Whole meeting on October 27th. As the new Trustees were filling in positions vacated by the resignations, two of them would be for terms of five and a half months and one for an 18 month term.

Normally, two positions are up for election each year for a three year periods. This means that there will always be at least one person on the Board with two years' experience and the other(s) with one year. A

result of this election is that it really created an entirely inexperienced Board. Even the two incumbents were people who had been elected the previous April and had only attended two Board meetings. Governance training is essential for new board members. Such things as responsibilities of board members, when confidentiality is important and appropriate, *Robert's Rules of Order*, and the by-laws, empowering legislation and policies of the Board are all necessary to be understood by serving trustees. This is not meant to be a comment on the people that were elected, it is just that people do not normally encounter or deal with these concepts in their lives. An inexperienced board relies heavily on its experienced administrator for guidance, coaching and instruction when necessary.

The first regular meeting of the Board on November 13, 2016 revealed the Board's inexperience as they struggled with the procedure for dealing with a petition from the Protect Our Waters group apparently signed by over 425 landowners requesting that Union Bay's Letters Patent be turned over to the CVRD (effectively dissolving the Improvement District). This was eventually tabled to be discussed in-camera and to be brought back for a vote at a subsequent meeting. Then a motion, not on the agenda, was made by a Trustee to ask UBID's lawyer to contact the lawyer for the Developer to communicate the intent of the Board to allow the *Force Majeure* clause in the 2011 Agreement with KIP to be accepted, thus bringing the 2011 Agreement back into validity. The motion eventually passed. The request by the Developer to invoke the *Force Majeure* clause in the 2011 Agreement had been denied by the previous UBID Board and the previous Board considered the 2011 Agreement expired.

On November 15, 2016, the facilitator wrote to the Developer and to the UBID Administrator asking them if, given the Board's decision, he should drop out and leave them to continue on this new course. The Developer responded on November 17 asking that the facilitation be continued. The UBID Administrator could not speak for the new Board and he asked that the Ministry write to the Board and offer to continue the facilitation.

On November 21<sup>st</sup>, UBID received a written legal opinion from their solicitor (which this writer has not seen). Based on a review of the legal opinion, the UBID Board of Trustees withdrew its intention to invoke the *Force Majeure* clause contained in the 2011 Agreement. Subsequently, UBID issued a letter to the Developer indicating the *Force Majeure* clause cannot be unilaterally invoked by UBID nor has a claim of force majeure been established, therefore this 2011 Agreement is terminated and of no further force or effect.

At its December 14 meeting, the UBID Board of Trustees reported that at a Committee of the Whole meeting held on December 6, 2016, they briefly discussed the petition of the Save Our Water Group. Subsequently, a Trustee proposed a motion that a committee be struck to examine the costs, benefits, pros, and cons of dissolving UBID and transferring its assets and operations to the CVRD as per the Protect Our Water Group petition. After discussion, a vote on the motion resulted in a tie and the Chair voted to break the tie and defeat the motion.

The year 2017 began with the UBID Administrator resigning effective February 3rd, to take up a position with the CVRD. Given the importance of an experienced Administrator to the Board, the Board began a search for a replacement, assisted by the out-going Administrator. The new interim Administrator commenced work in mid-January to provide a little overlap with the out-going Administrator. The interim Administrator agreed to stay until a new Administrator could be recruited.

On January 12, 2017, the Minister wrote to the UBID Chair and Trustees expressing the importance of getting on with improving the water infrastructure in Union Bay and encouraging the Board re-engage in the facilitated process with the Developer. To that end, he asked the Assistant Deputy Minister (who is also the Inspector of Municipalities) to meet with the Board to discuss continuation of the facilitation.

An in-camera Board of Trustees meeting was held on January 26<sup>th</sup>, 2017. The meeting was attended by the Assistant Deputy Minister and Inspector of Municipalities along with Ministry staff and the facilitator. The purpose of the meeting was to: emphasize that the Minister and Inspector were very concerned about matters in Union Bay; discuss the urgency of dealing with Island Health requirements for water treatment; to discuss the Board's interest in re-engaging with the Developer to negotiate a water servicing agreement; to offer the continued assistance of the facilitator Mattison in discussions with the Developer; and other issues that may develop.

At that meeting, the Board passed a resolution to re-engage in discussions with the Developer with the assistance of facilitator Mattison.

The facilitator met with staff at the CVRD on February 17, 2017 and then met with the UBID Administrator.

Staff at the CVRD said the Developer would need to agree to "surgical" amendments to the Master Development Agreement to permit a phased development. They said the Developer needs to identify how he wants to proceed, i.e. where and at what density. The CVRD would want site plans showing roads, trails, any portion of the golf course, etc. They would then amend the MDA to enable proceeding this way.

The Developer has been resistant to the idea of amending the MDA. CVRD staff would not commit one way or another if they would approve a water agreement in absence of the above-mentioned plans. However, they did say that if the Developer was contributing to the UBID treatment plant or facilitating it by contributing land that would be helpful in the review. CVRD staff also reminded that there were other things like sewer treatment that would be needed before the Developer would get subdivision approval.

On March 5, 2017, the facilitator met with the Developer to update him on the meeting with CVRD staff and to discuss dates for reconvening a negotiation session with UBID.

On March 15, 2017, the interim UBID Administrator and the Developer re-commenced negotiations supported by the facilitator. After a discussion of how we got to this point, two principles emerged: (1) the Parties would seek to develop a water servicing agreement (WSA) and (2) there would be no temporary plant.

UBID was seeking to build on a permanent location. The land that UBID owns beyond the end of McLeod Road would be very expensive to service with a permanent all-weather road and a three-phase power line. The Developer reiterated his offer for land at the corner of McLeod Road and Musgrave Road. Negotiations centered on the possibility of leasing this site almost immediately with an offer to purchase for \$1.00 (essentially a donation of the land) when it is possible to subdivide off the parcel. UBID also pressed the idea of leasing land for the new fire hall on the same basis with a transfer of the land when the subdivision can be approved. Donation of the fire hall land is a condition of the MDA so this is about how to do it early as the timing of this donation is dependent on when the Developer begins subdividing the land for development.

The Parties agreed that the WSA would take the best parts of the former MOU that were agreed upon, add some parts from the old *2011 Agreement* that were also agreed upon and add what new parts might be required. The Developer undertook to have the WSA drafted by the end of March.

At the March 16, 2017 meeting, a motion to examine the pros and cons of dissolution of UBID and transfer the assets to the CVRD was defeated. The motion was similar to the motion that was also defeated at the December 14, 2016 meeting.

As the UBID Annual General Meeting approached in April and the election of two Trustees, the interim administrator advised the facilitator that the treatment plant from an engineering point of view is stable – a DAF plant has been recommended for years by two different engineering firms. All the discussion has been

about the level of KIP involvement through a water servicing agreement, which will not likely be finalized before the Trustee election. Island Health is still pressing for designs to be submitted by August 31 this year and for the plant to be completed August 31, 2018. Financing the plant is still an issue. Actual costs will not be known until the Requests for Proposals are complete, and they depend on knowing where the plant will be located.

On March 29, 2017 the Parties met again for negotiations. Further discussion took place about the suitability of the KIP land for a treatment plant and the fire hall. The Developer agreed to allow UBID engineering consultants onto the land to ensure it was suitable. Further, there were discussions about how the offer of lease-to-buy for \$1.00 could be made binding on successor owners of the land in the event KIP should sell before the sale was registered. The Parties made some progress on the language of the draft agreement and agreed to meet again after the Trustee election.

The two incumbent Trustees ran for re-election and both were returned. They were sworn in at the first Board meeting following the election on April 26, 2017. This provided some needed stability to Board. The new "permanent" Administrator started April 29, 2017 and there was a short period of overlap to bring the new Administrator up to date on the negotiations.

The Parties met again with the facilitator on May 12, 2017. This time both the interim and the new Administrators attended. Progress was made on completing a draft agreement. This new agreement was titled *Water Servicing and Infrastructure Agreement*.

After this meeting, a revised draft agreement was put before the UBID Board at a Committee of the Whole meeting on May 15, 2017. The facilitator phoned into the meeting to discuss some aspects of the draft with Board members.

The Parties met again on June 7, 2017 and had a further draft prepared by June 13, 2017. This draft was discussed at an in-camera Committee of the Whole meeting on June 20, 2017. The facilitator attended this meeting to answer questions. Subsequently the facilitator was advised that the Trustees had some further comments and requested changes, which were sent to the Developer for follow-up.

The draft Agreement allows UBID to build their new Treatment Plant on KIP land to be leased to them as soon as the Agreement is signed. When KIP gets a subdivision approved, this land will be subdivided off and deeded to UBID for \$1.00 and the lease will no longer be needed. This is the lowest cost site for UBID to build on. The Treatment Plant will be designed for two 14 litre per second filter units but initially only one will be installed. When the plant reaches its capacity, KIP agrees to purchase a second 14 L/s unit to be installed in the new building. UBID will build the new building to house both units but the Developer will pay for the additional cost of making the building larger and plumbing for two units. This combined plant may serve all of the KIP development depending on final build-out size and will certainly serve the growth for many years. It is a good plan and should be supported.

All the Trustees attended the July 27 Board meeting and voted unanimously to approve the draft agreement in principle. It will get a legal review from both parties and will go the Regional District for review as well.

This was the final agreement that the facilitator saw. It is not yet signed by the UBID Board nor has the Regional District seen it. But it is fair to both parties, and the Board has approved it in principle. Most of the Board changes have been made in this version. By this point, the Developer and the UBID Administrator were working amicably with each other and did not require additional facilitation.



## 8. Conclusion

The path forward requires continued cooperation and professional relationships between the Developer, UBID and other agencies. The Developer is proposing subdivisions to be built out over several years (possibly decades) and possibly exceeding 2,500 residential units with commercial and recreational amenities including a golf course. Adding more than 2,500 connections to the UBID water system amounts to increasing the water system capacity by 3 to 4 times. This is a major undertaking for a small improvement district.

There is time to do this right. The immediate priority is to do some form of a Phase 1 development to build a water treatment plant with a capacity to treat the water currently authorized and some room for growth. As of this writing at the end of July, 2017, the UBID is planning for a 14 litre per second (L/s) dissolved air flotation (DAF) unit. This should provide water for about double the current peak demand, or about 1200 to 1400 residential unit equivalent demand, depending on the size of a new reservoir, also to be constructed. This plant must be fully designed in order to obtain a permit to construct from the Island Health Public Health Engineer by August 31, 2017. This permit is for the construction of a water filtration plant, disinfection processes and all works necessary to meet the Surface Water Quality Treatment Objectives.

UBID is also prepared to construct a building that is large enough for a second 14 L/s DAF unit with the plumbing, foundation, etc. in place providing that the Developer pays all increased costs for providing for this increased capacity. Current hydrology studies show Langley Lake should support a 14 L/s peak flow plant and may support the combined 28 L/s plant. A 28 L/s plant is also permitted by the current water licences. More hydrologic studies should be done before the second DAF unit is purchased.

This plan allows for the installation of filtration for the current customers with room for growth to provide water for the K'ómoks First Nation, for the developer, and for servicing any other undeveloped lots in the UBID service area for the next few years. While the 14 L/s plant is being constructed, there is time to do hydrologic studies to determine if Langley Lake will support a 28 L/s draw or if a second water supply is required to proceed with a second phase. Construction of a second reservoir will likely be needed with the installation of the second DAF plant. This will be at the Developer's expense if he wishes to proceed to complete the development.

UBID and the Developer need to work together to accomplish this. The onus is on UBID to act for the citizens of Union Bay who elected them to build a filtration plant as required by Island Health. At the current time, with 2 changes in Administrator in six months, UBID needs to turn to its proven consultants to get this done. If the Developer wants to proceed with the Kensington Island Property Development then it too should get an experienced consultant with municipal water service design experience to work with UBID and the CVRD. The Comox Valley Regional District needs to be involved to make sure that this Union Bay water service and distribution plan will satisfy the KIP Master Development Agreement. Then a financial and contractual agreement can be finalized between the parties.

## 9. Recommendations

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Improvement Districts can provide a few needed services in small rural unincorporated areas. As the population grows, the demand for services grows and the needs become more diverse. This inevitably leads to governance, financial and technical capacity issues. This is very true in Union Bay.

## Governance

Good, well-intentioned, community-spirited people have run for a positions as trustees in Union Bay in order to make a difference. As is typical in a rural community, they often have no experience or even familiarity with board governance. A good administrator can direct new trustees to board policy and procedures and can even coach them on Robert's Rules of Order. But the best administrator can be overwhelmed with a board of inexperienced people who are disagreeing over issues that they care about and who do not have an understanding of basic governance process.

This certainly has been the case in Union Bay. There were three elections in the space of one year and the Board was completely replaced by good people with almost no board experience. In addition, there have been three different Administrators over the last six months. Board meetings have been divisive and poorly run. To be fair, the practice is improving but there is still room for improvement.

1. All new trustees should have a full-day session to introduce them to board governance fundamentals with an emphasis on local issues and policies. This was done for UBID. The Ministry should continue to encourage this practice, especially in times of rapid turn-over.
2. New administrators should receive this training too.
3. Special coaching should be offered to the chair.

## Technical Capacity

UBID should continue on the current path to get a water treatment plant in place. However, UBID is a small improvement district with a small staff. Board governance, financing and technical matters all fall on the administrator's shoulders. The UBID Administrator had to deal with seeking and selecting appropriate treatment technology while seeking the means and planning to pay for it through water rates and parcel taxes. At the same time, the Administrator was trying to negotiate a major agreement with developer. The Administrator had access to good consultants, but money that went to consultants was not available to buy water treatment technology. Regional districts have financial people and engineers on staff and, while consultants are still used, regional districts are better positioned to deal with these multi-faceted issues.

4. When an improvement district is faced with changing technology and massive expansion, it may be time for the community to seriously consider coming under the wing of a regional district.

## Finance

Local governments often receive grants for infrastructure from senior governments. Improvement districts predate the modern system of regional governance in British Columbia and they have generally been denied these grants. The intention of this policy is to incorporate improvement districts into the modern local government system through becoming regional district service areas or joining pre-existing municipalities (or, in some rare cases for the very largest improvement districts, becoming new municipalities). To facilitate this process, the Province provides grants to improvement districts through an associated local government if they agree to convert to a regional service or join a municipality. This process takes time and is particularly burdensome to UBID while it is trying to meet a deadline in its operating permit to install filtration equipment to protect the citizens' drinking water. UBID is going to have to borrow money without access to the borrowing tools that are available to regional districts and municipalities. When improvement districts supplying drinking water are given a requirement to improve their water treatment systems, the Ministry should look at their financial capacity and discuss with them the advantage of joining the regional district.

5. The Ministry should urge the UBID Board of Trustees to do a costs, benefits, pro and cons study of turning the assets of UBID over to the CVRD.
6. The Ministry should continue to encourage and facilitate a close working relationship between UBID and the CVRD with a long-term goal of turning their assets over to the CVRD.
7. Over the next year, however, UBID must continue its focus on the acquisition, installation and operation of a water treatment facility for its customers.

The path forward has been determined. Now, UBID, the Developer, the Comox Valley Regional District and the Ministry all need to cooperate to achieve clean and safe water for the residents of Union Bay.

## Appendix A: Master Development Agreement

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The Master Development Agreement (MDA), dated for reference April 30, 2010, is a key document. While the Bylaws created five Comprehensive Development Areas and generally specified the requirements of the development, it is the MDA that contains the specific requirements that the Developer must accomplish. The MDA is a 28 page document divided into two parts plus the attached schedules. The MDA should be consulted for a complete understanding of its contents. However, a summary is provided here.

**Part 1** is the “**General Instrument**” that is required for registration in the Land Title Office and contains the necessary signatures, the Parcel Identifiers and the Legal Description(s) of the Land.

**Part 2** is the “**Terms of Instrument**” It contains a Preamble and then five sections, which detail requirements for the development of the KIP lands. The Preamble specifies the Parties to the agreement are (34083 Yukon Ltd. and the Comox Valley Regional District). The Preamble then states that the Developer is the registered owner of the Lands, that the CVRD approved the bylaws subject to certain requirements that were to be completed or addressed in a development agreement entered into between the Developer and the Regional District (called the “Condition”). Further it states that the Developer has voluntarily agreed to satisfy the Condition, and “... to provide the amenities, transfer to the CVRD certain portions of the Lands referred to herein, including the Parks and Trails, enter in the agreements referred to herein and install the Works defined herein which are necessary to serve the proposed developments of the Lands”. Further, the Preamble says that in accordance with the *Land Title Act*, an owner can enter into a Covenant in favour of the Regional District to control the use of the charged land, and the Developer **desires** to grant and the Regional District desires to accept the Covenant and the terms and conditions contained therein. Finally, the Developer and the Regional District agree to covenant each other as follows in the subsequent five sections.

**Section 1** provides many definitions of the terms used in the following parts of the document. Most of the words used in the following section that are capitalized, are defined terms in this section of the MDA.

**Section 2** begins the Covenants and sets the requirement that, prior to subdivision, the Developer will provide detailed drawings with details of amenities, on-site works and improvements to be constructed (Sec.2.2), Further, detailed building plans must be provided and approved by the CVRD approving officer of any multi-family residential or commercial buildings (Sec 2.3). Section 2.4 importantly states that the Developer “...warrants that it has not entered into any off-title agreement with a third party that would bind the Regional District in any way and will not enter into any such agreement without the prior approval of the Regional District”.

**Section 3**, *Developer’s Covenants*, is the main body of the document. There is only one sub-section numbered 3.1 and it states:“...the Developer hereby covenants and agrees with the Regional District that in constructing and developing the Development, the Developer will:...” and this is followed by 26 Covenants, each with a letter from “a” to “z” as explained below. Again, this summary is abridged and the actual MDA should be consulted for a more complete understanding.

(a) develop the lands in general compliance with the Area Plan. It is also importantly stated that the CVRD agrees that the Land may be developed in phases and that the Developer will have the flexibility to change the order of phasing provided that all other covenants and the Area Plan are complied with.

**(b)** donate (commencing in 2014) to a non-profit agency for affordable housing up to two lots per year to a total of 30 lots dispersed throughout CDA-1 located to the west of Highway 19a, CDA-4, and CDA-5. The Developer must service the lots to the property line but will have no further obligation with respect to the lots. The donated lots will be subject to the Developers building design restrictions. In return for each donation, additional density of two single family lots will be added to the CDA in accordance with the zoning bylaw. If, within 15 years, 30 lots have not been transferred to a non-profit agency, the Developer must transfer the remaining balance of the 30 lots to the CVRD.

**(c)** transfer to a non-profit agency upon written request and as approved by the CVRD, or if no request is made, transfer to the CVRD, not more than two Multi Family Lots that would permit a minimum of 120 and a maximum of 135 multi-family units in CDA-4 or CDA-5. Similar obligations apply. In return for this donation, density equivalent to three times the density permitted under the zoning bylaw for donated lots, shall be added to CDA-2 and CDA-3, and can be located at the discretion of the Developer.

**(d)** develop the lands in an environmentally sensitive manner in accordance with certain specified guidelines and objectives. The Developer must also pay particular attention to threatened or endangered ecological communities, indigenous species and subspecies in BC.

**(e)** transfer title or grant by statutory right of way, 16% of the total area of the Lands, excluding the portion of the Lands used for a golf course, for Parks and Trails with full right of public access. The actual location of the transfers will be specified to the satisfaction of the CVRD prior to subdivision approval or issue of any development permit. The locations will in aggregate on a CDA by CDA basis not be less than 5% of the total area of that CDA. Other conditions also apply and Interim Statutory Rights of Way are permitted.

**(f)** despite 3.1(e), at least two thirds of the land for Parks and Trails must be transferred within 10 years of the issuance of the first occupancy permit in the Development.

**(g)** provide security for maintenance of Parks and Trails until these are turned over to the CVRD.

**(h)** provide maintenance of Parks and Trails referred to above, and defines the Maintenance Obligation Period and maintenance standards during that period.

**(i)** requires a Public Assembly Place (defined as an outdoor place in CDA-1 west of Highway 19A or in CDA-3) to be constructed no later than five years after the completion of construction of the first residential unit in CDA-3 and requires the Developer to improve landscape and maintain the Public Assembly Place for a period of 15 years after completion.

**(j)** requires donation to UBID of one legal parcel for the purpose of construction of a fire hall located in the portion of CD-1 west of Highway 19A on a specific location that is acceptable to the Developer and the UBID Fire Department. The Developer will service the donated lot to the lot line.

**(k)** at the option of the School District, either pay the school site acquisition charge as defined in the *Local Government Act*, or upon obtaining the first subdivision approval, will transfer the School Site Lot to the Regional District or the board of education of the School District. The Developer will have no obligation to construct any buildings or improvements in connection with the School Site Lot.

**(l)** at the option of the Ministry of Transportation and Infrastructure (MOTI) and at a time determined by MOTI, the Developer will either design and construct public highways necessary for the Development or provide security in an acceptable form. The required construction may include

an improved intersection where Highway 19A intersects with the main road access to the Development and at least three upgraded intersections at specified sites, or as determined by MOTI.

**(m)** comply with the Dark Sky Policy of the Regional District.

**(n)** comply with MOTI standards for construction of public roads.

**(o)** pay \$10,000 to the Regional District for construction of bus shelters as a condition of the first building permit.

**(p)** contribute \$5,000 annually for five years to the Regional District's transit program commencing 3 years after occupancy of the first residential unit.

**(q)** not use any part of the Lands for crushing or processing of sand, gravel or other aggregate material except as needed for the development. No commercial processing of sand, gravel or aggregate or sale of such material without prior written consent of the Regional District.

The following sub-section (r) contains the requirement for an agreement between UBID and the Developer for the distribution of water and shows that the agreement must have Regional District approval.

**(r)** not apply for any building permit, including residential buildings, for the Development or portion thereof, or make an application for the subdivision of the Lands (other than in respect of the First Subdivision) unless and until:

(i) the Developer has entered into an agreement with the UBID for the distribution of potable water from UBID to the Development;

(ii) the Regional District has, acting reasonably, approved of the agreement between the developer and the UBID;

(iii) the Developer has demonstrated to the Regional District's satisfaction, acting reasonably, that there is sufficient source of potable water to service that portion of the Lands that is the subject of the building permit or subdivision application, as the case may be, from either the UBID or the Regional District's water supply system; and

(iv) the Developer has constructed at its cost and expense, all infrastructure and improvements needed to service that portion of the Lands that is the subject of the building permit or subdivision application, as the case may be, with potable water (whether from the UBID or the Regional Water System), to the satisfaction of the Regional District, acting reasonably, or, in the alternative, post security in the form of an irrevocable letter of credit in lieu in an amount equal to 130% of the estimated cost to complete the construction of such infrastructure and improvements with the Regional District ... provided that the Regional District will not permit the occupancy of the buildings to be constructed pursuant to the building permit until actual construction of such infrastructure and improvements has been completed.

The subsequent paragraph in sub-section (r) specifies that the Developer will obtain water to service the Development from the UBID until such time as the Regional Water System is fully operational and the Regional District is able to service the Development with potable water from the Regional Water System. As of the summer of 2016, the Comox Valley Regional District had no plans to move forward with a Regional Water System although the Regional District staff acknowledge the desirability of such a system.

The next paragraph in sub-section (r) states in much legal language that the Developer effectually indemnifies the Regional District from and against all actions and proceedings arising out of or related to the insufficient capacity to provide additional water service to the Development from the UBID.

Another paragraph requires the Developer to use recognized water conservation techniques to minimize water use to the satisfaction of the Regional District acting reasonably.

Finally, sub-section (r.1) was added:

**(r.1)** not apply for any building permit in respect of residential buildings in the Development or make an application for subdivision for the Lands (other than in respect of the First Subdivision) unless and until the boundaries of the Union Bay Improvement District have been expanded to include all of the Lands and an agreement has been entered into between the Regional District and UBID to transfer the Langley Lakes water supply assets including that the Langley Lakes Water Licenses (sic);

The conditions in (r.1) have been satisfied. In February 2011, the UBID expanded its boundaries to take in all of the subject Lands and subsequently, on May 4, 2012, the CVRD and UBID signed an agreement that would govern the transfer of water supply assets if UBID requests such a transfer and the CVRD accepts, or if the Province mandates such a transfer.

**(s)** design, construct and maintain the Sewer System.

Several subsections follow as the requirements for the Sewer System are specified. As the Sewer System does not require anything from UBID, no detail is repeated here regarding the requirements.

**(t)** act in accordance with all applicable laws including the Official Community Plan and Zoning Bylaw and requires the Developer to obtain development permits as required by a bylaw of the Regional District.

**(u)** maintain all Parks and Trails and other public open spaces within the Development including the Public Assembly Place but excluding the Golf Course using non-organic pesticides and pest control methods in accordance with recognized best management practices for establishing chemical-based pesticide-free zones during the time the Developer is responsible for the maintenance.

**(v)** use a stringent program of environmental best management practices in the construction and maintenance of the Golf Course.

**(w)** specifies construction of the transit exchange.

**(x)** requires the use in CDA-3 of geothermal technology or other green technologies that minimize the consumption of fossil fuels and electricity for heating and cooling purpose in all building in the Village Core. For residential uses, this technology is encouraged.

**(y)** maximize accessibility in designing the Parks and Trails and other open space areas and buildings that have right of public access within the Development.

**(z)** prohibits the Developer from seeking to exclude the public from any underpass that the Developer may wish to obtain a right of way to construct under Highway 19.

**Section 4 Acknowledgement of Documents**, contains three sub-sections.

In Sub-section 4.1 (a), concerning that part of the Lands that the Developer owns, the Regional District acknowledges receipt of the Approval in Principle, dated Sept. 22, 2006, for implementation of remediation of a contaminated site, section 53, *British Columbia Environmental Act* (EMA). In 4.1(b), the Final

Determination, issued on November 28, 2005, under section 44, EMA that the lands described therein are not a contaminated site. And in section 4.1(c) a letter from the Director, EMA, to the Regional District, that the Regional District may approve the OCP and the Zoning Bylaw.

In Sub-section 4.2, the Regional District acknowledges receipt of two documents from the BC Integrated Land Management Bureau. 4.2(a) is a letter dated April 21, 2009 authorizing the Developer to act as its agent regarding the re-zoning of Crown Land comprising that portion of CDA-1 lying east of Highway 19A, known as Union Point. 4.2(b) is a letter dated November 5, 2009 authorizing the Developer to act as its agent regarding the re-zoning of Crown land comprising Block A and Block B of District Lot 419 and unsurveyed foreshore and/or land covered by fill being part of District Lot 419.

In Sub-section 4.3, the Developer acknowledges and agrees with the Regional District that the lands described in sub-sections 4.2(a) and 4.2(b) will not be developed until the Developer has either acquired fee simple ownership of those lands or the Developer has obtained authorization from ILMB for the Developer to develop these lands.

The significance of Section 4 is that it shows and the Regional District agrees that the Developer's Lands west of Highway 19A are not a contaminated site 4.1(a). The Lands east of Highway 19A are Crown land and the Developer is authorized to act as agent in getting them rezoned, which will require a remediation plan to be approved. The Developer cannot develop these Lands until fee simple ownership is acquired or provincial authority is granted for development to take place. These lands east of Highway 19A are the "contaminated site" that slowed progress on the Development in the 2010 to 2015 period of time.

**Section 5, *Regional Water System***, contains an acknowledgement by the Developer that a Regional Water System is in the best interests of the residents of the area within the Regional District's defined water supply area, which are intended to include the Developer's Lands.

**Section 6, *General***, contains legal language common to agreements of this type such a remedies, binding on successors and assigns, indemnification, etc.

The MDA also includes Schedule A, which is an area plan showing the Comprehensive Development Areas, and which is reproduced above as Figure 2, and Schedule B, which is the Regional District's *Dark Sky Policy*, that dictates lighting standards.



## Appendix B: 2011 Agreement

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Because of the importance of the 2011 Agreement to the discussions that have taken place, and because it is still being talked about, it is analyzed here but the actual 2011 Agreement should be consulted for a complete understanding of its contents

The 2011 Agreement is 12 pages, contained in 8 Parts after the Preamble and an additional 26 pages in 5 Schedules, all of which constitute the agreement between the Parties. The 2011 Agreement begins with a Preamble that includes a number of “whereas” clauses and then states that “...the Developer and UBID agree as follows.”

**Part 1 “Interpretation”** gives a number of agreed definitions. This part also confirms that the Schedules are incorporated into the 2011 Agreement and form a part of it and states that the division of the agreement into articles, sections and paragraphs, and the insertion of headings are for convenience only and are not to affect the interpretation of the Agreement.

All 26 definitions are important in understanding the 2011 Agreement and a few are repeated here with some explanation and others are explained below but are not repeated in their exact form:

- (a) **“CEC”** means a capital expenditure charge levied by UBID in respect of the cost of providing the Phase 1 or Phase 2 works, and shall also include, where UBID has assigned this Agreement (as contemplated herein) to a governing authority or other entity having jurisdiction over the subject matter of this Agreement, any development cost charge(s) levied in respect of the cost of providing the Phase 1 Works or Phase 2 Works by such governing authority or other entity having jurisdiction over the subject matter of this Agreement;
- (h) **“Permanent Water Facility Site”** means that location that is not located on the Lands and in close proximity to Langley Lake as determined by UBID in its sole discretion on which the Water Treatment Facility and the new permanent reservoir will be permanently located;

This defines a new site on Lands not owned by the Developer, where the treatment plant will be permanently located.

- (i) **“Phase 1 Works”** means the Water Infrastructure Works required to complete the construction and installation of the Water Treatment Facility at the Temporary Water Facility Site, including all works and infrastructure needed to convey water from the reservoir to the Temporary Water Facility Site, and from the Temporary Water Facility Site to UBID’s water main as part of the Water Infrastructure.
- (j) **“Phase 2 Works”** means the Water Infrastructure Works required to complete the construction and installation of the Water Treatment Facility at the Permanent Water Facility Site, including construction of the new permanent reservoir and all other works and infrastructure needed to convey water from Langley Lake to the Permanent Water Facility Site and from the Permanent Water Facility Site to UBID’s water main as part of the Water Infrastructure, as such works may be constructed in stages.

Definition (i) and (j) above describe a Phase 1 temporary water treatment plant to be built at the site of the existing UBID water disinfection plant, which is situated on KIP land and leased to UBID, and a Phase 2 water treatment plant to be built at the Permanent Water Facility Site on other lands owned by UBID.

- (u) **"Water Service"** means the distribution and supply of potable water from Langley Lake to the Lands for residential and commercial purposes;
- (y) **"Water Supply Infrastructure (Developer)"** means the Water Supply Infrastructure the Developer is responsible for to construct under this Agreement, which includes, without limitation:
  - (i) the Water Treatment Facility, the building that houses the Water Treatment Facility at the Temporary Water Facility Site;
  - (ii) the Water Treatment Facility, the building that houses the Water Treatment Facility at the Permanent Water Facility Site, and all pipes, conduits, valves and other infrastructure required to convey the water from Langley Lake to the Permanent Water Facility Site; and
  - (iii) the Lease as it pertains to the Water Treatment Facility and the building that houses it,

but excludes any infrastructure related to Langley Lake including without limitation the dam infrastructure at Langley Lake;

**Part 2 "Water Infrastructure Agreement"** states the general terms of the 2011 Agreement.

**Section 2.1** states that the 2011 Agreement applies to both the Phase 1 and Phase 2 works for the purpose of permitting the extension of Water Service to the Lands (of the Developer) for the purpose of the Development.

**Subsection 2.2** states that UBID acknowledges and agrees that the Developer, in the Developer's sole discretion but subject to the Water Servicing Bylaw (of UBID), may construct the Development in many phases and that the Water Supply Infrastructure is expected to be constructed in two phases, referred to as the Phase 1 Works and the Phase 2 Works. It also states that the Phase 2 Works may be constructed in multiple stages to provide Water Service to such portions of the Lands that the Developer is developing at any given time.

**Subsection 2.3** provides that the water treatment facility to be built at the Temporary Water Facility Site will be designed and constructed by the Developer to have an initial capacity to service, at a minimum requirement, the 650 (approximate) existing residences in Union Bay. No alterations are allowed so long as the developer owns the facility unless the Developer in its sole and exclusive discretion approves those changes. The parties contemplate that from time to time alterations of modifications made be made to the facility to increase its capacity to handle up to approximately 1,150 residences in total within the UBID Service Area. The 1,150 residences would include the 650 (approximate) existing residences in Union Bay plus up to 500 new residences within the Development. Notwithstanding the foregoing, the Developer agrees that UBID may utilize the Water Treatment Facility to add up to 10 residences per year to the UBID water service.

**Subsection 2.4** states that UBID acknowledges that the CVRD approved the Development to have up to 3,354 residences and, subject to this agreement and the UBID Bylaws, UBID agrees that the Water Treatment Facility when located at the permanent site as part of the Phase 2 Works, may be designed and constructed by the Developer to have the capacity to serve up to 3,354 residences within the Development in addition to the Union Bay residences serviced by the Phase 1 Works.

**Subsection 2.5** states that while the construction of the Phase 1 and 2 Works will provide added capacity to facilitate the Development, both parties acknowledge that the UBID does not have the legal authority to

reserve capacity for the Development in the Water Supply Infrastructure until the Development is completed in full. Other landowners within the UBID Service Area are entitled to make application for water service as a result of the additional capacity created by the Phase 2 Works. The Developer's sole recourse and remedy will be under one or more Latecomers Agreements or as otherwise agreed in writing between the Developer and UBID.

**Subsection 2.6** provides that the 2011 Agreement is to govern the design and construction of the Phase 1 and Phase 2 works only and the Developer is not responsible for the design and construction of any water infrastructure other than that expressly provided for in the Agreement and the Water Infrastructure for the Development that is required under the Water Servicing Bylaw.

**Subsection 2.7** states that if the Phase 1 works are not completed and the Water Treatment Facility is not operational by December 31, 2014, then the Agreement shall automatically terminate unless there is a written agreement between the parties to amend the date or unless Section 8.12 is applies. Section 8.12 is the Force Majeure clause discussed below.

**This is the section that UBID relied upon to say that the 2011 Agreement is terminated.**

**Part 3 "Water Infrastructure – Phase 1 Works"** describes the agreement with respect to the water treatment facility at the temporary water facility site. To be clear, this is the part of the 2011 Agreement setting out the terms by which the Developer will build a new water treatment facility at the site of the current McLeod Road reservoir and chlorinator on land that is currently owned by the Developer and which is being leased by UBID.

**Subsection 3.1** states that "...the Developer shall design and construct, or cause to be designed and constructed, at the Developer's sole cost and expense, the Phase 1 Works in accordance with this Agreement and the Water Servicing Bylaw. Several commitments of the Developer are specified in the subsequent sub-sections such as the Developer shall:

**For access:** (a) make the site available to UBID under terms of the Lease (attached as Schedule B); (b) grant in favour of UBID statutory rights of way over the Developer's Lands (substantially in the form as attached as Schedule E) required by UBID to secure rights for the operation and maintenance of the Water Supply Infrastructure and the Water Distribution Infrastructure after completion of the Phase 1 works;

**For construction:** (c) engage all required consultants, contractors, and trades to design and construct the Phase 1 Works; (d) provide to UBID, for UBID's approval, copies of all studies, reports, cost estimates (including future operation and maintenance costs), designs and specifications obtained or commissioned by the Developer from accredited third party professionals for the Phase 1 Works as required by UBID to substantiate the sufficiency of the Phase 1 Works and to identify what upgrades, if any, are required to the Water Supply Infrastructure and the Water Distribution Infrastructure to satisfy the requirements of the Development as it is developed by the Developer; and (e) not construct any of the Phase 1 Works until UBID has in its sole discretion approved the studies, reports, cost estimates, designs and specification submitted by the Developer in accordance with sub-section 3.1(d)

**For approvals:** (f) cooperate with UBID to assist UBID in obtaining all third party consents, permits, approvals and operating certificates to complete the Water Supply Infrastructure where required by, among others, Vancouver Island Health Authority and the Provincial Ministry of Health; (g) upon completion of the Phase 1 Works, submit to UBID such certification by third party professionals that UBID requires to verify that the Phase 1 Works have been constructed in accordance with the designs and specifications approved by the UBID; and (h) comply with all applicable laws.

**Subsection 3.2** states that it is the intention of the parties that the Water Treatment Facility will not remain at the Temporary Water Facility Site permanently, and further that UBID acknowledges that the Developer intends to develop the site as soon as possible after relocation of the Water Treatment Facility to the permanent site.

**Part 4 “Water Infrastructure – Phase 2 Works”** describes the agreement with respect to the water treatment facility at the Permanent Water Facility Site. This is the part of the 2011 Agreement setting out the terms by which the Developer will build a Water Treatment Facility at a new location not on Lands owned by the Developer and which is in close proximity to Langley Lake as determined by UBID in its sole discretion and where a new reservoir will be permanently located.

**Subsection 4.1** states that the Developer shall design and construct or cause to be designed and constructed, at the Developer’s sole cost and expense, the Phase 2 Works in accordance with this Agreement and the Water Servicing Bylaw. Then sub-sections (a) through (g) provide almost the same commitments for access, construction, and approvals as Section 3.1 with two exceptions. Firstly, there is no need for the a commitment similar to sub-section 3.1(a) for the Developer to grant a lease over the site for the Phase 2 Works as these will be situated on a lot owned by UBID. Secondly, sub-section 4.1(c), is similar to section 3.1(d) but also requires the Developer to submit to UBID for UBID’s approval copies of studies, reports, etc. as required by UBID, in accordance with the Water Servicing Bylaw, to substantiate the adequacy of supply of water in Langley Lake for the planned capacity of the Phase 2 Works (as such works are constructed and installed in stages).

Finally, **Subsection 4.2** states: *“The Developer’s obligation to construct any portion of the Water Infrastructure (Developer) in connection with the Permanent Facility Site is subject to UBID securing a long-term land tenure pursuant to which the Permanent Facility can be constructed on the Permanent Facility Site.”*

#### **Part 5 “Maintenance and Warranty of Water Infrastructure”**

**Sections 5.1** and **5.2** state that subject to Section 5.4 the Developer will transfer the Phase 1 works (5.1) and the Phase 2 works (5.2) to UBID *“...upon completion of construction thereof (or completion of construction of such stages thereof)”* and shall provide the Warranty thereof. However, where a third party is providing the warranty, the Developer shall have no liability to UBID in respect of that warranty.

**Section 5.3** says that subject to Section 5.4 and upon commencement date of the Warranty of the Phase 1 or Phase 2 Works or portions of the Works as are completed, (a) the Developer will transfer to UBID a bill of sale, free of all liens, charges and encumbrances, and (b) UBID shall become the owner of the Water Infrastructure or such portions as are completed.

**Section 5.4** states: *“Notwithstanding Sections 5.1 and 5.3 hereof (or anything else set out in this Agreement), the Developer will retain ownership of the Water Treatment Facility at all times while it is situate at the Temporary Water Treatment Facility Site and will have no obligation to transfer ownership of the Water Treatment Facility pursuant to Sections 5.2 and 5.3 until the Water Treatment Facility is installed as part of the Phase 2 works at the Permanent Water Facility Site.*

**Section 5.5** states that when the Phase 1 Works are completed or any stage of the Phase 2 works are completed, UBID will assume all responsibility for staffing, operating and maintaining the water infrastructure except for the extent of any warranty. The developer also agrees to pay to train a staff person and if requested, will pay for half the salary of the staff person for the first 15 months.

**Section 5.6** prohibits UBID from increasing the capacity of the Phase 1 works without the consent of the Developer at its sole discretion, and if granted, the work shall be carried out by or at the direction of the Developer.

**Section 5.7** states that once the Phase 1 and Phase 2 Works (or phases thereof) have been transferred to UBID and after UBID adopts a bylaw authorizing it to charge Capital Expenditure Charges (CECs) for providing water service to the Developers Lands, the Developer will pay CECs provided it can set off as a credit against those CECs the sum of the Developer's out of pocket expenses incurred to design and construct the water infrastructure (except to the extent of any Latecomers Agreements entered into by the Developer and UBID).

This is a very important section. Normally a local government will plan and build excess capacity for a reasonable growth. When a new subdivision is created, the developer pays a Capital Expenditure Charge for each lot to pay for the development's share of the cost of the treatment plant, reservoir, and pipelines to get the water to the development. In this Agreement, the KIP Developer has agreed to build the plant at its own expense and then take credit for that expenditure in CECs it would normally have to pay when it subdivides the lots.

**Section 5.8** is legal language to secure UBID's interest in the treatment works by giving it priority over any other charge, encumbrance or security interest granted by the Developer to a third party.

#### **Part 6 "Ownership of Assets"**

**Section 6.1** commits the parties to cooperate in transferring the Water Licence to a third party and sets out the requirements for doing so.

**Section 6.2** prohibits UBID from voluntarily transferring the Water Licence while the Water Treatment Facility remains in operation at the temporary site.

**Section 6.3** says that upon the transfer of the Water Licence and transfer or conveyance of the Water Supply Infrastructure to a Transferee (defined as the third party) but without a concurrent transfer of the of the Water Distribution Infrastructure (i.e. the supply pipe-lines to the sub-division), UBID and the Developer shall be bound by this Agreement only as it relates to the Water Distribution Infrastructure.

These sections are strangely drafted. The only really viable Transferee is the Comox Valley Regional District if they construct the Regional Water System and these sections would protect the developer if such a transfer was to take place. It is very difficult to see a private owner or any other "third party" taking over the water system.

**Section 6.4** states that once the Water Treatment Facility is transferred to the Permanent Water Treatment Facility site, the lease will automatically on KIP lands where the Temporary Water Treatment Facility was (and currently is) and UBID shall permanently decommission the Water Infrastructure on the Temporary Site and restore it to a natural state (as opposed to its condition as at the commencement date at the term of the lease).

Section 6.5 states that if Union Bay incorporates as a municipality or if UBID is otherwise dissolved, then prior to UBID dissolution, UBID will cooperate with the Developer to ensure that the successor to UBID assume all obligations of UBID in the Agreement.

#### **Section 7. Latecomer Agreements and CEC Recovery**

Latecomer Agreements are defined in Section 1 of the Agreement and means an agreement substantially in the form attached to the Agreement as Schedule D, for a term of 15 years to be entered into between the

Developer and UBID (or a successor) for the distribution and supply of water in respect of “excess or extended services” provided by the Developer as part of the Water Infrastructure. “Excess or extended services” in this context means water service to any property not part of the KIP Development that is connected to the water system. Existing residences at the date of signing the Agreement and up to 10 new residences per year outside the Developers Lands are exempted from the need to pay Latecomers fees.

The Ministry of Community, Sport and Cultural Development has an explanation of Latecomer Agreements on the Ministry website as follows:

*Whether it is the local government, subdivider, or developer that pays the up-front costs, they are entitled to recover a portion of the costs from the owners of properties beyond their development that will benefit from the works in the future (latecomers). This is accomplished by having the local government collect a latecomer tax or fee (latecomer charge). Where a subdivider or developer have paid the up-front costs, the local government must collect the latecomer charge and remit monies collected to the subdivider or developer. The latecomer charge is payable at the time a latecomer connects to the service or the use begins. For example, where a developer financed the cost of a water main that is considered to be an excess or extended service, the latecomer charge would be payable when a latecomer obtains a water connection to the works financed by the developer.*

**Sections 7.1 to 7.4** state that Phase 1 works will be subject to one or more Latecomer Agreements and Phase 2 may be subject to Latecomer Agreements. As stated in Section 5.7, the Developer will be entitled to offset CECs with costs incurred in building the water infrastructure, except where Latecomer Agreements are in place; in which case the Latecomer fees are paid to the Developer.

#### **Section 8 “General”**

Section 8 contains 11 sections that are mostly legal language with respect to application and interpretation of the Agreement.