

ATTACHMENT B

CO-MANAGEMENT AGREEMENT

DATED FOR REFERENCE THE 5TH DAY OF DECEMBER, 2013

BETWEEN:

CITY OF NANAIMO
455 Wallace Street
Nanaimo, British Columbia
V9R 5J6
(the "City")

OF THE FIRST PART

AND:

NANAIMO ART GALLERY SOCIETY (INC. NO. S-0012135)
150 Commercial Street
Nanaimo, British Columbia
V9R 5G6
(the "Society")

OF THE SECOND PART

WHEREAS:

- A. The City is the registered owner in fee simple of those lands located at 150 Commercial Street, Nanaimo, British Columbia, legally described as PID: 004-753-551, LOT A, SECTION 1, NANAIMO DISTRICT, PLAN 12390 (the "Land") and the City owns a building located on the Land (the "Building") (together, the Land and the Building comprise the "Property");
- B. The Society is a not-for-profit society and wishes to licence the Property, and the City wishes to grant a licence of the Property to the Society on the terms and conditions set out in this Co-Management and Operating Agreement;
- C. This Agreement is intended to provide the terms of reference for the occupancy, operation and management of the Property and the obligations of the Society and City in that regard;

NOW THEREFORE in consideration of the foregoing and the mutual covenants and agreements set out in this Agreement and the payment of \$1.00 by the Society to the City (the receipt and sufficiency of which the City acknowledges), the parties covenant and agree each with the other as follows:

1. **Licence To Occupy** – The City hereby grants to the Society the contractual right to use and occupy the Property subject to all of the terms and conditions including earlier termination as set out in this Agreement.
2. **Term** – The Society shall have the right to occupy the Property for a term of ten consecutive years (the "Term"), commencing January 1st, 2014 and ending December 31st, 2023 unless earlier terminated in accordance with the terms and conditions of this Agreement at which date the right to occupy shall cease.

3. **Renewal Option** – If the Society wishes to renew this Agreement, the Society may, by providing notice to the City at least 365 days before the expiry of the Term, request a renewal of this Agreement. If, upon receiving such request, the City wishes, in its sole discretion, to accept the requested renewal of this Agreement, it will provide notice of acceptance of renewal to the Society and upon giving such notice this Agreement will be renewed, on the same terms and conditions (including this right of renewal), for a further Term of 10 years.
4. **Society as Manager and Operator** – The Society shall manage and operate the Property for the Term in accordance with and subject to the terms and conditions set forth in this Agreement. The City will designate a representative to deal on its behalf with the affairs of the Property, herein after called the “City Representative”.
5. **Rules and Regulations** – The Society shall make such policies and procedures as are required to provide for the proper operation and management of the Property provided that such rules and regulations shall not be inconsistent with:
 - (a) the bylaws of the Society;
 - (b) the provisions, terms and conditions of this Agreement; and
 - (c) all applicable Federal, Provincial and City laws, by-laws and regulations.
6. **Access and Use** – The Society shall only use the Property for the purpose of a public art gallery. The Society shall use the Property to accommodate any and all activity consistent with the Society’s vision and plans for a public art gallery. Access to and use of the Property by members of the Society and by the general public shall be in accordance with guidelines developed by the Society for the operation of the Property, drawing where appropriate on relevant guidelines contained in City documents.
7. **Programming and Operation** – The Society shall be responsible for all aspects of the operation of the Property (save those exclusively to be performed by the City as described in this Agreement) including without limitation:
 - (a) all programming and booking of events in the Property;
 - (b) all responsibilities and functions delegated by the Society to its Executive Artistic Director who will have responsibility for management of the Property.
8. **Society’s Covenants** – The Society covenants and agrees with the City:
 - (a) to provide all equipment, furnishings, and supplies that may be required to use the Property for the purpose of this Agreement;
 - (b) not to do, suffer or permit any thing in, on, or from the Property that may be or become a nuisance or annoyance to the owners, occupiers or users of adjoining lands or to the public, including the accumulation of rubbish or unused personal property of any kind;
 - (c) not to do, suffer or permit any act or neglect that may in any manner directly or indirectly cause injury to the Property or to any fixtures or appurtenances thereon;

- (d) to pay all costs and expenses of any kind whatsoever associated with and payable in respect of the Building, including without limitation, all taxes, levies, charges and assessments, permit and license fees, repair and maintenance costs (other than those for which the City is expressly responsible pursuant to this Agreement), water, and sewage disposal;
 - (e) except for those items for which the City is expressly responsible pursuant to this Agreement, to repair and maintain the Property and all fixtures and appurtenances thereon in a safe, clean and sanitary condition and to take all reasonable precautions to ensure the safety of all persons using the Property;
 - (f) to keep the areas immediately adjacent to the Property free of any rubbish and debris originating from the Property;
 - (g) to carry on and conduct its activities on the Property in compliance with any and all laws, statutes, enactments, bylaws, regulations and orders from time to time in force and to obtain all required approvals and permits thereunder and not to do or omit to do anything in, on or from the Property in contravention thereof.
9. **Improvements and Alterations** – The Society must not make any improvements, extensions, installations, alternations, additions or renovations to the Property, or alter the existing state of the Property in any way, without the prior written consent of the City. If the City gives such consent, the Society must obtain the City's prior approval of drawings and specifications for such work, must do such work strictly in accordance with the approved drawings and specifications and must comply with any conditions the City imposes with that approval.
10. **Ownership of Improvements** – Any improvements carried out to the Property shall, upon their completion, become the property of the City and shall be left in the Property following termination of this Agreement, except those assets listed in attached Schedule B (the "Nanaimo Art Gallery Society Assets").
11. **Property Accepted "As Is"** – The Society acknowledges and agrees that the City has made no representations or warranties with respect the Property or the suitability of the Property for the Society's intended use and the Society hereby agrees to use and occupy the Property on an "as is" basis and condition.
12. **Powers and Duties of the Society** – The Society shall be responsible for:
- (a) the negotiation of all agreements with third parties for the use or occupancy of the Property. Except as otherwise provided in this Agreement the Society shall have the power to make any agreement in respect of the Property which relates to the long term operation, use or occupancy of the Property during the Term;
 - (b) the general administration of the Property and, without limiting the generality of the foregoing, this shall include all expenses incurred in the operation and management of the Property. The City Council may, pursuant to the *Community Charter*, grant the Society an exemption from taxation on the assessed land and improvements during the life of this Agreement. Nothing in this Agreement requires the Council to grant such an exemption and any such exemption is in Council's sole and unfettered discretion from time to time.

13. **Property Policy** – All policies governing the operations of the Property shall be in accordance with the provisions of this Agreement and shall be approved and determined by the Society with the Society being responsible for initiating such policy. The Society shall inform the City Representative with respect to policy matters and shall keep the City Council advised as outlined in section 5.
14. **Repair and Maintenance of Property** –
- (a) Other than those items for which the City is expressly responsible under this Agreement, the Society must keep the Property, and all fixtures and appurtenances thereon, in good repair consistent with standards of repair generally accepted in British Columbia with respect to comparable premises and, the Society is responsible for and must do all routine maintenance and repairs with respect to the Property necessary for the Society's use, occupation and operation of the Property and upon written notice from the City the Society must make such repairs as are required by the City in the notice. At the end of the Term, the Society must surrender the Property to the City in good repair, excepting reasonable wear and tear. If the Society fails to leave the Property in a condition required by this Agreement, the City may do so on behalf of the Society and the Society must, on demand, compensate the City for all costs incurred by the City.
 - (b) The City shall maintain and repair the roofs, exterior walls, external horticulture, outside sidewalks, foundations and site civil services.
 - (c) The City shall maintain and repair the electrical, heating, ventilation and air conditioning systems.
 - (d) Schedule A "Schedule of Operating Responsibilities" attached to this Agreement outlines these responsibilities in more detail.
15. **Entrances, Sidewalks and Snow Removal** – The City shall be responsible for the maintenance of and snow removal from the access roads, walkways, plaza and sidewalks.
16. **Liens** – In the event that any claim of builders lien is registered against the title of the Land pursuant to the provisions of the *Builders Lien Act* (British Columbia) with respect to any improvements, work, or construction that the Society undertakes on the Property, then the Society shall, within 30 days notification thereof, cause any such claim to be discharged from the title of the Lands. Should the Society fail to discharge any such lien within the time aforesaid, the City shall have the right to make application pursuant to Section 32 of the *Builders Lien Act* to have sufficient funds paid into Court to cause any such lien to be discharged from the title of the Land and the Society shall be responsible for payment to the City of any such sum, together with the costs thereof calculated on a solicitor and own client basis. The Society shall comply at all times with the *Builders Lien Act* in respect of any improvements, work or construction undertaken on the Property.
17. **Insurance Requirements** –
- (a) The City shall, at its sole expense, insure the Building and fixtures against the perils and under the terms and conditions that the City insures other similar types of buildings and fixtures owned by the City.

- (b) The Society shall, at its sole expense, obtain and maintain throughout the Term “all risk” insurance, for replacement cost, on all of the Society’s assets, including the Nanaimo Art Gallery Society Assets.
- (c) The Society shall, at its sole expense, obtain and maintain throughout the Term comprehensive general liability insurance providing coverage for death, bodily injury, property loss and damage, and all other losses arising out of or in connection with the operations, use, and occupation of the Property in an amount of not less than \$5,000,000 per occurrence.
18. **Insurance Policies** – All insurance required to be maintained by the Society hereunder shall be on terms and with insurers reasonably satisfactory to the City Representative. All policies shall name the City as an additional insured and must contain a waiver of rights or subrogation by the insurer against the City. The Society must obtain all required insurance at its sole expense and must deliver to the City certificates of insurance before the commencement of the Term. The policy shall provide for 30 days’ notice to the City before cancellation and should such policy lapse or be cancelled the City may, at the cost of the Society, place insurance as provided in this section.
19. **Effects Insurance** – The Society shall not, without the prior consent of the City, permit anything to be brought into the Property that would invalidate or increase the premium payable for policies of insurance held by the City or the Society in relation to the Property or that would injure or deface the Property. The Society in its contractual arrangements will undertake to assign culpability to contractual users of the Property, and ensure that adequate Effects Insurance is provided.
20. **Indemnity** – The Society will indemnify and save harmless the City from and against any and all liabilities, obligations, damages, penalties, claims, costs (including reasonable solicitors’ fees), fines, suits, demands and causes of action to, by or on behalf of any person, group, firm or corporation arising from the occupation or use of the Property by the Society or its invitees, employees, agents, members or any other person or persons for whose acts the Society is liable in law, or from any breach of the Society of any covenant, term or provision of this Agreement by the Society or its members, servants or agents or that might arise during the occupancy of the Property by the Society under this Agreement; save and except where any such matter is the cause of an act by the City or anyone for whom the City is in law responsible.
21. **Strikes** – The Society in its contractual arrangements with users will absolve itself of liability arising out of strikes or lockouts and thereby release the City from any responsibility or liability whatsoever that might arise out of the City failing to provide the Property or any services to the Property under the terms of this Agreement arising out of any strike or lockout between the City and its employees or as a result of any other labour dispute, provided reasonable notice of any situation that might give rise to a labour action has been provided to the Society such that the Society has had the opportunity to modify its operations to minimize its risk.
22. **Financial Records** – Proper and separate books of account and financial records of the Property’s operation, as required by the Society Act, shall be kept by the Society at its expense during the occupancy by the Society of the Property. The City Representative or any person authorized by the City shall have free access to the Society’s financial records at all reasonable times.

23. **Budget** – The Society’s Board of Directors shall approve its annual Operating and Capital Budgets. The budget of the Society shall be submitted to the City Representative.
24. **Annual Audit Statement** – The Society will prepare and deliver to the City on an annual calendar year basis an audited statement of expense and income with respect to all revenues from and expenses for the use and operation of the Property as well as an audited statement of all related assets and liabilities. The Society will cause such annual financial statements to be audited by its auditor and thereafter submitted to the City Representative for consideration no later than October 1st each year of the Term.
25. **Reports** – The Society shall report annually to the City Council’s Parks, Recreation and Culture Commission stating the previous year’s operating results.
26. **City’s Financial Contribution** – The City will consider each year the inclusion in its budget of an operating grant to the Society to be paid in equal quarterly amounts at the beginning of the quarter. The Society shall participate in the City budget preparation process through the City’s Parks, Recreation and Culture Commission.
27. **Revenues** – All revenue obtained from operations at the Property shall be retained by the Society. The Society covenants and agrees that all revenue shall be used exclusively for operations at the Property.
28. **Society’s Representations and Warranties** – The Society represents and warrants that the Society:
- (a) is a not for profit society validly incorporated and in good standing under the laws of British Columbia and does not conduct its activities with a view to obtaining, and does not distribute, profit or financial gain for its members;
 - (b) has the power and capacity to enter into and carry out the obligations under this Agreement;
 - (c) has completed all necessary resolutions and other preconditions to the validity of this Agreement.
29. **Termination Without Breach** – This Agreement may be terminated by the Society or the City upon giving to the other party six months’ notice of its intention to terminate, such notice to be given in writing on the last day of any month of the Term.
30. **Termination for Breach** – If the Society does not fully observe, perform and keep each and every term, covenant, agreement, stipulation, obligation, condition and provision of this Agreement to be observed, performed and kept by the Society, and persists in such default for 60 days after written notice by the City, the City may, at its option, terminate this Agreement and the Term then becomes immediately forfeited and void and the Society must immediately cease all use of the Property and must immediately vacate the Property and remove all equipment and supplies brought onto the Property by the Society.
31. **Termination for Other Reasons** – In the event that:
- (a) the Society shall make an assignment for the benefit of creditors; or

- (b) the Society, for an unjustifiable reason, fails to hold a general meeting of members for a period of eighteen (18) months or longer; or
- (c) the Society becomes bankrupt or insolvent or takes the benefit of any Act now or hereafter in force for bankrupt or insolvent debtors; or
- (d) any order shall be made for the winding up of the Society; or
- (e) the Society is struck off the Register by the Registrar for any just reason whatsoever,

the City may give to the Society 60 days' notice to rectify the matter in question after which time, if the problem is not rectified to the satisfaction of the City, the City may terminate this Agreement and the Term then becomes immediately forfeited and void and the Society must immediately cease all use of the Property and must immediately vacate the Property and remove all equipment and supplies brought onto the Property by the Society.

- 32. **Amendments** – All amendments proposed to the terms and conditions of this Agreement shall be submitted in writing for consideration.
- 33. **Communications** – All communications relating to this Agreement between the Society and the City (apart from the ongoing exchange of operating information), shall be done in writing.
- 34. **Notices** – Any notice herein provided or permitted to be given by the Society to the City shall be sufficiently given if delivered to the City at:

CITY OF NANAIMO

City Hall
455 Wallace Street
Nanaimo, BC V9R 5J6
Attention: Director of Parks, Recreation and Culture

Any notice herein provided or permitted to be given by the City to the Society shall be sufficiently given if delivered to the Society addressed to:

NANAIMO ART GALLERY SOCIETY

150 Commercial Street,
Nanaimo BC V9R 5G6
Attention: Executive Artistic Director

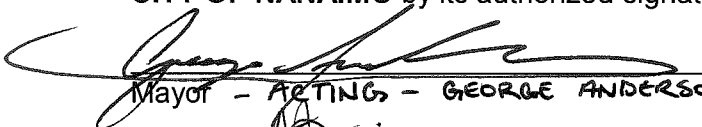
Either party may at any time give notice in writing to the other of any change of address of the party giving such notice and from and after the giving of such notice the address therein specified shall be deemed to be the address for such party for the giving of notice there under. The word "notice" in this paragraph shall be deemed to include any request, statement or other writing in this Agreement provided or permitted to be given by the City to the Society or by the Society to the City. Such notices may be given by personal delivery, mail or by fax and if given by mail shall be deemed to have been received five days after the date of mailing.

35. **Conflict of Interest** – Society Board Members and Staff shall be subject to the Society's "Conflict of Interest" policies.
36. **Agreement to Mediate Disputes** –
- (a) In the event that any dispute arises between the parties in relation to this Agreement, or out of this Agreement, and the dispute is not resolved by negotiation, the parties agree to submit the dispute to mediation. The parties further agree that their participation in mediation is a condition precedent to any party pursuing any other available remedy in relation to the dispute.
 - (b) Any party to the dispute may give written notice to the other party of his or her desire to commence mediation, and a mediation session must take place within (30) days after the date that such notice is given.
 - (c) The parties must jointly appoint a mutually acceptable mediator. If the parties are unable to agree upon the appointment of a mediator within (7) days after a party has given notice of a desire to mediate the dispute, any party may apply to the Mediate BC Society, or such other organization or person agreed to by the parties in writing, for appointment of a mediator.
 - (d) The parties agree that the mediation will be conducted in accordance with the Mediation Rules of the Mediate BC Society.
 - (e) The parties further agree to share equally the costs of the mediation, which costs will not include costs incurred by a party for representation by counsel at the mediation.
37. **Appeals** – In the event that Agreement between the City Representative and the Society cannot be reached on matters involving the City's and/or Society's interests, the Society or the City Representative may appeal the matter to the City Council. A decision of the Council shall be final and be binding on all matters which require City consent or approval.
38. **Agents** – It is understood and agreed that the Society and all agents, servants and employees of the Society are not and shall not be deemed to be agents, servants or employees of the City.
39. **Assignment** – This Agreement shall enure to the benefit of and be binding upon the parties hereto. This Agreement is personal to the Society and cannot be assigned to any other person.
40. **No Effect on Laws or Powers** – Nothing contained or implied herein prejudices or affects the City's rights and powers in the exercise of its functions pursuant to the *Local Government Act* (British Columbia) and the *Community Charter* (British Columbia) or its rights and powers under any enactment to the extent the same are applicable to the Property, all of which may be fully and effectively exercised in relation to the Property as if this Agreement had not been fully executed and delivered.
41. **Entire Agreement** – The provisions in this Agreement constitute the whole of the agreement between the parties and supersede all previous communications, representations, warranties, covenants and agreements, whether verbal or written, between the parties with respect to the subject matter of the Agreement.

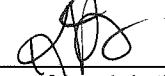
- 42. **Waiver or Non-Action** – Waiver by the City of any breach of any term, covenant or condition of this Agreement by the Society must not be deemed to be a waiver of any subsequent default by the Society. Failure by the City to take any action in respect of any breach of any term, covenant or condition of this Agreement by the Society must not be deemed to be a waiver of such term, covenant or condition.
- 43. **Interpretation** – Wherever the singular and masculine are used throughout this Agreement the same shall be constructed as meaning the plural or feminine or the body corporate or politic as the context requires.

IN WITNESS WHEREOF the parties hereto have set their hands and seals as of the day and year first above written.

CITY OF NANAIMO by its authorized signatories:

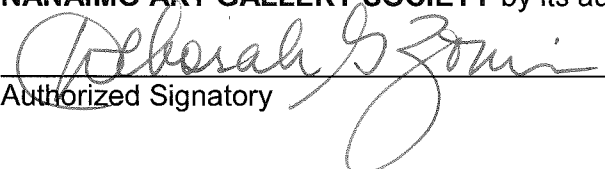


 Mayor - ACTING - GEORGE ANDERSON



 Director of Legislative Services Deputy Corporate Officer
 Kristin King

NANAIMO ART GALLERY SOCIETY by its authorized signatories:



 Authorized Signatory

Authorized Signatory

SCHEDULE A

SCHEDULE OF OPERATING RESPONSIBILITIES

Both organizations take responsibility for notifying each other of any system failure, anticipated failures or damage in a timely fashion. Representatives from both organizations shall meet on a regular basis to ensure that communication and planning coordination is current.

All planning and execution of these repairs / replacement jobs shall be done by the Society, or in coordination with the Society, to ensure that operational impact is kept to a minimum.

As stated in the agreement the City of Nanaimo will be responsible for all mechanical and building maintenance issues. The Society however will be responsible for capital improvements as illustrated in this schedule and the agreement. Capital planning for the Property and assets will be done in cooperation with the City and Society as outlined in this schedule and the co-management agreement. A 10 year capital plan will be established and updated by both organizations as outlined in the agreement.

1. Electrical

The City is responsible for:

- High voltage feed to the building up to and including the step-down transformers in the Property electrical vault;
- Backup generator maintenance and feed to the Property including transfer panel;
- Maintenance of all breaker panels.

The Society is responsible for:

- All electrical equipment and distribution at 120volt;
- Installation of additional circuits as required.

2. HVAC

The City is responsible for all HVAC inspections, repairs, and maintenance.

3. Plumbing Water

The City is responsible for:

- High pressure water, up to and including pressure reduction valve, in the Property;
- Inspection and annual certification of boilers;
- Drainage, sewage and storm water collection exterior to the building.

The Society is responsible for:

- ongoing maintenance of hot and cold water systems, for all plumbing fixtures and water distribution throughout the building;
- replacement of domestic hot water tanks.

4. Structural

The City is responsible for:

- maintaining and repairing exterior walls and building foundations;
- remediation of any hazardous environmental material existing prior to the commencement of the Term.

5. Roof

The City is responsible for:

- Maintenance and repair of roofing membrane;
- roof top fall arrest system and the annual inspection of anchors.

6. Equipment

The Society is responsible for:

- furnishings, fixtures and equipment and to provide inventory information to the City for insurance purposes.

7. Elevating Devices

The City is responsible for:

- Monthly inspections and annual certification of the public elevator and repairs as required.

8. Fire Suppression | Fire Alarm | Sprinkler (if installed)

The City is responsible for:

- maintenance and repair of high pressure valves.

The Society is responsible for:

- ongoing maintenance and care;
- annual testing and inspection.

9. Interior Surfaces

The Society is responsible for:

- maintenance and repair of all interior surfaces as required, including all interior doors and hardware.

10. Exterior

The City is responsible for:

- all exterior wall finishes, plaster, paint;
- maintaining and repairing all exterior doors, including automatic doors;
- maintaining and repairing all exterior lighting fixtures;
- all window repairs due to breakage and system failure;
- window maintenance, trim and desiccant inserts;
- landscaping and sidewalk maintenance;
- garbage pick-up of sidewalk trash cans;
- painting of all exterior handrails;
- Snow removal on sidewalks and parking lot – procedure will be worked out and added to City snow and ice and removal procedure.

The Society is responsible for:

- window cleaning;
- garbage and recycling contract for removal;
- maintenance of interior hardware on exterior doors including automatic doors.

11. Alarm and Security

The Society is responsible for:

- repair and maintenance of alarm and security systems.

SCHEDULE B

NANAIMO ART GALLERY SOCIETY ASSETS

- Gallery Permanent Collection
- Society files as per *Society Act*
- Intellectual Property- data
- Nanaimo Art Gallery staff personal items
- Operating supplies, office equipment, educational materials etc.