

**Consolidated Clause in Policy and Finance Committee Report 6, which was considered by City Council on July 25, 26 and 27, 2006.**

**59**

**Proposed Redevelopment of the Hummingbird Centre  
for the Performing Arts**

*City Council on July 25, 26 and 27, 2006, adopted this Clause without amendment.*

*Council also considered additional material, which is noted at the end of this Clause.*

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**The Policy and Finance Committee recommends that City Council adopt the recommendations contained in the Recommendations Section of the report (July 18, 2006) from the Deputy City Manager and Chief Financial Officer and the Chief Executive Officer, Hummingbird Centre for the Performing Arts.**

Purpose:

To report on the terms and conditions of the proposed redevelopment of the Hummingbird Centre for the Performing Arts (“HC”).

Financial Implications:

The proposed Umbrella Agreement includes provisions that enable two principal redevelopment options for the HC. Options A and B outlined in the Umbrella Agreement correspond to the 3A and 3B options described in the July 21, 2005, staff report on the updated HC business plan.

If the HC has raised sufficient funds to pay for the capital costs of constructing CityCentre, Council can then make a determination whether or not to proceed with Option A. If Council determines not to proceed with Option A, then Option B proceeds automatically.

Option A:

Capital Cost Implications:

Under Option A, the HC will enter into two principal transactions:

- (i) the sale of a portion of land on the HC site to Castlepoint for the construction of a residential condominium building; and
- (ii) a contract providing for the construction of the CityCentre and the restoration of a portion of the existing theatre.

The Agreement establishes a minimum payment by Castlepoint to the HC of \$15 million for the land used for the proposed residential condominium building. Castlepoint will also pay the HC an additional \$35 for each square foot of gross floor area by which the completed residential building exceeds a total of 428,571 square feet.

In order to proceed with Option A, HC must raise approximately \$57 million to supplement \$3.3 million in existing reserve funds and \$15 million from the proposed sale of City land. The total funding of approximately \$75 million would be used to finance the construction of the CityCentre, implement the CityCentre programmes within the new programming space, carry out deferred lifecycle maintenance on the existing HC building, and pay the costs associated with a two-year closure of the theatre. There is no cash contribution from the City contemplated towards these works in the Business Plan. The City's contribution will be the actual land being sold, together with accepting a "down-zoned" value on the retained lands in light of the proposed "up-zoning" of the sold lands.

The HC must notify Castlepoint of its decision to proceed with this option six months prior to the date at which Castlepoint elects to begin construction of a residential development on the sold portion of the HC site. This means that the necessary fundraising may have to be successfully completed by as early as June 30, 2007.

#### Operating Cost Implications:

The July 21, 2005, report from the Deputy City Manager and Chief Financial Officer and the City Solicitor outlined the operating cost implications associated with the potential construction of the CityCentre. As discussed in that report, if the CityCentre is built, there is a potential for HC to generate an operating surplus of \$1.1 million annually (at 100 percent of target attendance). However, because of the difficulty in forecasting operating results for the facility, there is also a risk of operating deficits. The staff analysis indicated that without the forecast parking revenues, the CityCentre will have to consistently achieve an average of 88 percent of the target attendance in order to break even.

#### Option B:

##### Capital Cost Implications:

This scenario involves the following components:

- (i) the sale of a portion of land on the HC site to Castlepoint for the construction of a residential condominium building;
- (ii) a contract providing for the restoration of a portion of the existing theatre; and
- (iii) the "sale" of an additional portion of land in the proposed location of the CityCentre to Castlepoint by way of an eighty-nine year lease.

Under this option Castlepoint would pay the HC the same amount for the land used for the residential development as it would under Option 'A'. The land sales revenue, together with the existing balance in HC's capital reserve, would be used to carry out all of the required and

optional deferred lifecycle maintenance works identified in a report prepared for HC by Helyar Associates. The proceeds would also be used to pay for the costs incurred as a result of the two-year closure of the exiting theatre while this work is carried out and the residential development is constructed.

Castlepoint would develop the additional parcel for retail/commercial uses and pay HC, in addition to the \$15 million, a further \$3.5 million. The building constructed by Castlepoint would have the same external form as the proposed CityCentre. The HC would then have the option of potentially terminating the lease and converting the building into the CityCentre or to make use of it for some other civic purpose. This option could be exercised on the following dates following project stabilization (which will be approximately one year after completion of the building):

- (i) any year between years 10 -15; and
- (ii) any year between years 26-30.

In order to retake possession between years 10-15, HC must make a payment to Castlepoint that results in Castlepoint realizing a 10 percent annual rate of return on its equity investment after taking into account all of the revenues and expenditures associated with financing, constructing, leasing and operating the retail/commercial component. This rate of return was approved by Council at its meeting of July 27, 2005, and is considered to be a fair market return on a real estate transaction with this risk profile.

Based on a pro-forma forecast produced for Castlepoint, and reviewed for the City by Price WaterhouseCoopers, it is estimated that the price to retake possession in year 15 would be approximately \$32 million fifteen years from now. This is equivalent to \$15 million in present value terms (i.e., in today's dollars). However, this forecast is based on current revenue and cost information for similar retail/commercial developments. The actual return that Castlepoint achieves during the time that it controls the building will depend on leasing market conditions and a variety of business decisions. If these decisions result in an unexpectedly low return on Castlepoint's original investment, this would result in a higher-than-forecast termination price, meaning that, in effect the City would share in the risk of Castlepoint's retail/commercial venture to the extent that the City wishes to exercise the termination option. Conversely, if Castlepoint experiences a higher-than-forecast return, the termination option price, should the City exercise it, would be lower than the currently estimated amount of \$32 million. It is noted that the decision to exercise this option is entirely the City's to make.

Castlepoint will ensure that the HC can retake possession of the retail/commercial component in year 15 unencumbered by existing tenant leases. The HC would, however, still incur the cost of converting the building into the proposed CityCentre.

The HC can, alternatively, choose to retake possession in years 10-14 but it will then potentially face additional costs to vacate existing tenants. These additional costs cannot currently be quantified.

If the HC does not exercise its option to retake the retail/commercial component during years 10-15, it can opt to retake possession between years 26-30 by making a payment to Castlepoint for the fair market value of the building. This value will be determined through an appraisal carried out by a mutually agreed-upon appraisal firm.

Under this option, Castlepoint has not committed to providing the retail/commercial component unencumbered by existing tenant leases. They have only committed to ensuring that tenant leases will not have terms extending beyond year 40. Therefore, if the City intends to make immediate use of the building after exercising this option, some additional costs will likely be incurred in vacating the existing tenants.

#### Operating Cost Implications:

If the CityCentre is not immediately implemented, revenue derived from corporate naming rights for the existing theatre would then be available to offset operating deficits incurred by the existing theatre. According to the Business Plan, operating deficits can also be offset by additional revenues received through a proposed parking joint venture with the developer. However, the financial terms of a potential parking venture have not yet been negotiated.

In the absence of additional parking revenues, the analysis within the July 21, 2005, staff report indicated that even at 80 percent of the forecast attendance, the reserve fund created through a naming rights agreement for the existing theatre will be sufficient to fund any deficits incurred by the theatre for a period of approximately ten years. At the forecast attendance levels, there will be no requirement to draw on this reserve.

#### Parking Venture:

On or before the closing of the transaction Castlepoint will need to satisfy the parking requirements for the residential tower. As discussed in the July 21, 2005, staff report, it is prohibitively costly to develop parking facilities on the HC property. Therefore, Castlepoint has entered into discussions with GO Transit regarding the development of an off-site parking facility on GO lands located at the south-east corner of the Esplanade and Yonge Street. The updated HC Business Plan assumed that the HC would enter into a joint venture with Castlepoint for the development of this parking facility. The facility would incorporate private parking for the residents of the tower and a public parking garage operated by the HC. The revenues from the public parking garage were to contribute towards the realization of the HC's overall business plan.

The financial terms of a potential agreement between Castlepoint and GO Transit have not yet been negotiated. Therefore, staff currently cannot comment on the financial implications of the HC's proposed parking venture.

Recommendations:

It is recommended that:

- (1) the Business Plan of The Board of Directors of the Hummingbird Centre for the Performing Arts (the “Board”) be approved;
- (2) authority be granted for the execution of the following agreements, to be entered into between: the City, the Board (where appropriate) and Castlepoint Realty Partners Limited (“Castlepoint”):
  - (a) Umbrella Agreement providing for:
    - (i) the conditional sale of a strata portion of the HC site, being Parts 2, 3, 5 and 7 on Sketch PS-2006-058 attached hereto as Appendix 1 (the “Site”), for Fifteen Million Dollars (\$15,000,000.00), for a private development to be integrated with the existing theatre; and
    - (ii) the construction, if the Board’s fundraising targets are met, of a cultural and entertainment attraction referred to as CityCentre, or, alternatively, a commercial component for retail usage (the “Commercial Component”),  
  
in accordance with terms and conditions as summarized in the “Executive Summary” attached to this report as Appendix 2, and substantially in the form of the agreement attached to this report as Appendix 3;
  - (b) Short Term Lease of the Site for a period to approximate the construction period of the proposed condominium/hotel tower estimated to be 48 months, to be terminated upon satisfaction of Castlepoint’s obligations in the Umbrella Agreement, to be replaced with a Transfer of the Site from the City to Castlepoint;
  - (c) Mutual Easements and Shared Facilities Agreement, in order to effectually integrate the Site, HC and CityCentre (or the Commercial Component, as the case may be);
  - (d) if the parties proceed with the Commercial Component, a Long Term Lease for a term of 89 years, for a one-time rental payment of \$3,500,000.00;
  - (e) such other agreements or documents as may be, in the opinion of the City Solicitor, desirable or necessary to give effect to the Umbrella Agreement, including, but not limited to, architect’s agreement, construction procedures agreement, easements, licences, etc.; and
  - (f) any amending agreements in relation to the foregoing agreements not materially inconsistent with the business terms approved by Council;

- all documentation to be on terms and conditions satisfactory to the Deputy City Manager/Chief Financial Officer and the Chief Executive Officer of the Board, and in a form satisfactory to the City Solicitor;
- (3) the proposed disposition of the Site be exempted from the Housing First Policy, with the City's affordable housing objectives to be addressed by provisions in the Umbrella Agreement providing for Castlepoint to voluntarily elect to participate in an Affordable Housing Request for Proposals or to make a voluntary contribution in the amount of \$500,000.00;
  - (4) authority be granted to the Chief Corporate Officer to approve the submission of, and to execute, on behalf of the City, any required documents within the Ministry of the Environment's process under the *Environmental Protection Act* including Pre-Submission Forms and Records of Site Condition;
  - (5) the Chief Corporate Officer be authorized to administer and manage the sale and lease transactions, including the provision of any consents, approvals, waivers and notices (including termination), provided he may, at any time, refer consideration of any such matters (including their content) to City Council for its consideration and direction;
  - (6) the City Solicitor be authorized to complete the lease and sale transactions, deliver any notices (including termination), pay any expenses and amend the commencement, closing and other dates to such earlier or later date(s), on such terms and conditions, as she may, from time to time, determine;
  - (7) the Chief Executive Officer, Hummingbird Centre for the Performing Arts, in consultation with the Deputy City Manager and Chief Financial Officer report back to Council, 2 months before the date the City is required to notify Castlepoint as provided for in the Umbrella Agreement, on the status of Board fundraising for Council determination as to whether the City wishes to proceed with Option A;
  - (8) funds from the sale of the Site, leasing payments, private sector contributions, and Federal and Provincial contributions, be held in the Hummingbird Capital Improvement Reserve Fund (XR3003);
  - (9) funds from naming rights be held in the Hummingbird Capital Improvement Reserve Fund (XR3003) in Option A and in the Hummingbird Stabilization Reserve Fund in Option B;
  - (10) all private donations received for the redevelopment of the HC be placed in the Hummingbird Capital Improvement Reserve Fund (XR3003) and all unrestricted private donations be placed in the Hummingbird Donations Reserve Fund;
  - (11) funds from any payment made by Castlepoint in respect of affordable housing in accordance with the Umbrella Agreement, be placed in the Capital Revolving Fund for Affordable Housing;

- (12) subject to the *City of Toronto Act, 2006* coming into force, authority be granted to the Board to operate offsite or onsite parking and to conduct its business at venues other than HC;
- (13) funds from the Hummingbird Centre Capital Improvement Reserve Fund, Cost Centre XR 3003, be used to continue to retain Borden Ladner Gervais in an amount of approximately \$230,000;
- (14) authority be granted to the City and the Board to retain BDO Dunn Woody or another party determined by the City Solicitor in conjunction with the Chief Financial Officer to finalize the due diligence review of Castlepoint Realty Partners Limited and its principals and to provide any such other advice and assistance as is appropriate and necessary with respect to the proposed redevelopment to a maximum of \$15,000.00;
- (15) authority be granted for the introduction of any necessary Bills into Council; and
- (16) the appropriate City officials be authorized and directed to take the necessary action to give effect thereto.

Background:

HC, which is owned by the City, is located on 2.45 acres (or 0.99 hectares) of land on the southeast corner of Yonge and Front Streets. HC, originally the O'Keefe Centre, was built in 1959/1960 and currently has a seating capacity for an audience of 3,223 people. HC also contains a rehearsal hall, storage facilities, dressing rooms, lounges and other amenities.

Historically, the Board has not required operating subsidies from the City. However, HC has a backlog of lifecycle maintenance work and most of the theatre's mechanical and electrical systems have not been updated since construction of HC. The Board has identified \$9.2 million in required lifecycle maintenance and \$8.1 million of modernization works for implementation over the next fifteen years.

In 2002, the Canadian Opera Company announced that it would be relocating in mid-2006 to the new Four Seasons Centre for the Performing Arts. Subsequently, the National Ballet Company announced that it too would be relocating to the new facility. With the relocation of the Canadian Opera Company and the National Ballet of Canada, the Board lost approximately 200 rental days per year.

The Board estimates that the departure of these two major tenants will result in a substantial operating shortfall even if existing programming is significantly increased. In order to address this issue, the Board developed a plan for a new facility that would augment the existing theatre's operations. According to the proposal outlined in Clause 1 of Report 8 of the Policy and Finance Committee, adopted by Council at its meeting of July 22, 23 and 24, 2003 (the "2003 Report"), this facility, called CityCentre, would include arts, culture, media, and dining components and are intended to generate sufficient revenues to support continued programming in the mainstage theatre without the two existing anchor tenants.

Current zoning for the HC site permits development up to 59,430 square metres (639,420 square feet) of gross floor area. A renovated theatre and the proposed additional structure which would house CityCentre activities would have a proposed gross floor area of approximately 17,419 square metres (187,504 square feet) thereby leaving approximately 42,011 square metres (451,916 square feet) of unused, permitted gross floor area for further potential development. Council adopted the 2003 Report's recommendation that the value of the unused density (captured by a sale of the Site) be used as the City's sole contribution to the capital costs of the implementation of the full CityCentre concept.

In November 2003, the Board issued an REI to determine the level of developer interest in developing the HC site, including consideration of building the CityCentre space, purchasing part of the site for a private development using the available on-site density. The REI evaluation of proposals received led to the selection of the proposal from Castlepoint Realty Partners Limited and the Board proceeded to refine the details of the proposal from Castlepoint.

An updated business plan based on the Castlepoint response was submitted to the CAO in April 2004. By adoption of Clause 3 of Report 6 of its Policy and Finance Committee at its meeting of July 20, 21 and 22, 2004 (the "2004" Report), Council directed that the City and the Board work with Castlepoint to refine the details of the business plan.

The Board retained PriceWaterhouseCoopers (PWC) to prepare an updated business plan that would meet the conditions laid out in the 2004 Report.

At its meeting of September 28, 29 and 30, 2005, Council considered Clause 1 of Report 8 of its Policy and Finance Committee (the "2005 Report"), being the Board's updated Business Plan and detailed redevelopment proposal from Castlepoint, outlining a number of development options and staff recommendations regarding the redevelopment proposal. Council directed that the City and the Board pursue the Board's preferred Business Plan option, which contemplated the building of the CityCentre space and the sale of a portion of the HC site to Castlepoint in order to help fund the cost of building the space. Council further directed that the parties consider a default option where Castlepoint would build the CityCentre space and enter into a long term lease with the City for the CityCentre site for use as a commercial space should the Board be unable to raise the entire amount of the funds necessary to build CityCentre by a predetermined date. The City would retain the option to terminate the lease early should the Board be successful in raising the entire amount of funds required to build CityCentre at a later date.

Council also granted authority for the following:

- (a) the City and the Board to enter into negotiations with Castlepoint of an umbrella agreement respecting the proposed development on the terms and conditions set out in the 2005 Report;
- (b) a comprehensive due diligence report regarding Castlepoint Realty Partners Limited and its principals to be conducted;



- (c) City staff in conjunction with the Board to enter into negotiations with GO Transit and/or Castlepoint with respect to parking with the understanding that no above-grade parking will be requested as part of the development;
- (d) a request to be made to the Province of Ontario for amending legislation, to expand the scope of the statutory purposes of the Board to include (i) the authority to present theatrical performances in theatres other than HC and (ii) the authority to own and/or operate parking spaces;
- (e) the Board to market the naming rights to the theatre and to negotiate, along with City Staff, a sponsorship agreement with any naming sponsor, in compliance with the City's Sign By-Law including that no sign will be erected on a location on a wall facing the street and shall not be erected above the 4th floor or 15 metres above grade on the condominium tower;
- (f) establishment of a reserve fund for the purposes of extraordinary programming, as contemplated in the Business Plan;
- (g) the Board to provide an interim report to Council on the status of its fundraising in March 2006;
- (h) the City and the Board to jointly retain Borden Ladner Gervais to provide legal services in respect of the proposed redevelopment project;
- (i) the City and the Board to jointly retain PriceWaterhouseCoopers to conduct the due diligence review of Castlepoint Realty Partners Limited and its principals and to provide any other such advice and assistance as is appropriate with respect to the Project;
- (j) City staff to begin the process of heritage designation of the building;
- (k) a Working Committee comprised of City of Toronto staff and the Board and its staff be established to consider alternate uses for the commercial space should the Board not have the required funding in place to fund CityCentre;
- (l) Council to recognize the market value of the residential component in the Part 1 lands is \$19.3 million based on a value of \$45.00/ft<sup>2</sup> of permissible GFA of 428,571 ft<sup>2</sup>, with an appropriate amount to be deducted for the expected incremental construction costs to be borne by Castlepoint, such that the resultant purchase price shall in no event be less than \$15 million; and
- (m) Council to recognize the market value for the 99-year lease on the commercial/retail component is \$4.5 million based on a value of \$45.00/ft<sup>2</sup> of permissible GFA of 100,000 ft<sup>2</sup>, with an appropriate amount to be deducted for the expected incremental construction costs to be borne by Castlepoint, such that the resultant value shall in no event be less than \$3.5 million.

## Comments:

Following adoption of the 2005 Report, City and Board staff formed a project team consisting of staff from Real Estate Services, Facilities, Finance, Legal, the CEO of the Board as well as outside legal counsel (Borden Ladner Gervais) and financial consultants (PriceWaterhouseCoopers). The Team has now negotiated the terms of an Umbrella Agreement, which summarizes the business and legal terms of the proposed redevelopment of HC as discussed below. A copy of the Umbrella Agreements is attached to this report as Appendix 3. The parties have also undertaken negotiation of two of the other prime transaction documents, being the Long Term Lease (to be used if the Commercial Component proceeds) and the Mutual Easement and Shared Facilities Agreement.

### 1.0 Summary of the Board Business Plan and Update:

The Board's Business Plan (the "Business Plan") option selected by Council in the recommendations of the 2005 Report proposes two options, A and B, described below and summarized in a flow chart attached in Appendix 4. The selection of either Option A or B is contingent upon whether the Board achieves its entire capital financing objective at a given point in time, or not.

#### 1.1 Option A:

The Site would be sold to Castlepoint for \$15 million dollars for a residential (or possibly a hotel/condo) development. An additional structure would also be built by the Board to house the CityCentre attractions. To achieve immediate implementation of the CityCentre concept, the Board must raise an additional \$56 million (\$30 million from the federal and provincial governments, \$26 million from private donations and naming rights revenue) to supplement \$4 million in existing reserve funds and \$15 million from the proposed sale of the Site. The total funding of \$75 million would be used to finance the construction of CityCentre as well as carry out deferred lifecycle maintenance and upgrade works on the existing HC building. There is no cash contribution from the City contemplated towards these works. The City's contribution will be the proceeds from sale of the Site which will utilize both the unused and permitted density on the HC site.

Should City staff be satisfied that sufficient funds are or shall be available to pay the capital costs of constructing CityCentre, then staff will recommend to Council that it elect to proceed with Option A and Council will then make a determination whether or not to proceed with Option A. If Council determines not to proceed with Option A, then Option B proceeds automatically.

| Table C1 – Capital Financing for Option (A)<br>(Immediate Implementation of Full CityCentre Option) |  |                  |
|---|--|------------------|
|   |  | Amount (\$000's) |
| Expenditures  |  |                  |
|   | Closure and Ramp-Up Costs                          | 6,470            |
|   | Branding   | 500              |
|   | FF&E and Content                                   | 15,700           |
|   | Construction and Lifecycle Costs during shutdown   | 52,330           |
|   | Total Uses   | 75,000           |
| Sources of Funds  |  |                  |
|   | Capital Reserve Account                            | 3,300            |
|   | Cash from Sale of Land For Residential Development | 15,000           |
|   | Naming Rights and Private Sector Contributions     | 26,000           |
|   | Federal and Provincial Contributions               | 30,700           |
|   | Total Sources                                      | 75,000           |

## 1.2 Option B:

If the funding for the immediate implementation of the CityCentre concept cannot be raised by June 2007 (or 180 days prior to the date Castlepoint is required to commence construction, whichever is later), the sale of the Site for the residential development will proceed in any event. The land sales revenue, together with the existing balance in the Board's capital reserve, would be used to carry out all of the required and optional deferred lifecycle maintenance works identified in a report prepared for the Board by Helyar Associates. It would also be used to pay for the costs incurred as a result of the two-year closure of the existing theatre while this work is carried out and the private residential development is constructed.

As well, should the capital funds not be raised in time prior to construction, the proposed CityCentre site will be leased to Castlepoint for a period of 89 years for the construction of a structure that will be used for retail/commercial purposes, for lump sum payment to the City in the amount of \$3.5 million. This structure will conform with the general form of the proposed CityCentre concept in order to facilitate potential conversion for CityCentre uses at some point in the future.

The City will have the option to terminate the lease at certain given points in time should the Board achieve its fundraising targets and wish to take possession of the commercial structure.

### 1.3 Option C:

If the Board does not have the capital financing in place by the required date, a third option (“C”), not originally contemplated in the Business Plan but now negotiated between the parties, would see the sale of the Site (and payment to the City) for the residential component and the long-term lease of the commercial component lands proceed, but, should the condo market conditions be unfavourable, would allow Castlepoint to delay building the residential development for up to ten years. The same lease terms would apply to the commercial/retail lands as in Option B, but the condo would be built up to ten years later.

The Business Plan also proposes that the Board lease and operate off-site parking in order to generate revenue to the Board, being approximately 100 parking spaces generating up to \$500,000 in revenue. The proposed parking site is located at the south west corner of Esplanade and Yonge and is owned by GO Transit. Castlepoint is currently negotiating with GO for the lease of the HC spaces as well as parking required for its residential development on the HC site.

## 2.0 Financial Issues and Analysis:

### 2.1 Determining the Cost to Retake Possession of the Commercial Component:

In order to retake possession of the commercial component between years 10-15, HC must make a payment to Castlepoint that results in Castlepoint realizing a 10 percent annual rate of return on its equity investment after taking into account all of the revenues and expenditures associated with financing, constructing, leasing and operating the retail/commercial component.

Castlepoint has provided an example of the necessary rate-of-return calculation in the form of a spreadsheet model. This model has been reviewed by Price Waterhouse Coopers on behalf of the City. According to PWC, this model, which has been incorporated into the Lease Agreement, correctly incorporates the necessary costs and revenues in determining Castlepoint’s return on equity during the period that it is in control of the building.

Based on current information, it is estimated that the cost to retake possession in year 15 will be approximately \$32 million. However, staff have carried out a sensitivity analysis to indicate the range over which the potential cost could vary based on a number of critical input factors. As shown in Table 2, relatively small changes in certain inputs such as the average vacancy rate can have a significant impact on the ultimate cost to retake possession of the building.

1 Table 2 – Sensitivity Analysis for Commercial Component

| 2  | 3  | Cost to Retake Possession of Commercial Component in Year 15 (\$2023 millions) |
|----|----|--|
| 4  | 5  | 32.1   |
| 6  | 7  | 35.6   |
| 8  | 9  | 28.6   |
| 10 | 11 | 30.5   |
| 12 | 13 | 33.7   |

2.2 Risk Mitigation:

A number of important risk mitigation measures have been incorporated in the proposed Umbrella Agreement:

2.2.1 Controlling the Cost of Retaking Possession of the Retail/Commercial Development:

As discussed above, the cost of retaking possession of the retail/commercial development will depend on the rate of return that Castlepoint has earned during the period that it has been in control of the building. In order to correctly determine the rate of return realized by Castlepoint during its control of the building, comprehensive audits of the financial results will be necessary. The right to carry out these audits has been incorporated in the proposed Lease Agreement.

A calculation of Castlepoint’s true overall rate of return must take into account any tax benefits that Castlepoint realizes as a result of being in control of the building. These benefits will arise as a result of potentially being able to transfer the tax impact of losses on this venture and applying them to offset the tax impact of profits on another Castlepoint venture.

Incorporating actual tax benefits in the rate of return calculation is difficult without including an audit of all of Castlepoint’s ventures. Therefore, the Agreement defines a deemed tax benefit that will be used in the rate of

return calculations. This deemed value represents a value that is close to the maximum tax benefit that Castlepoint could potentially realize.

### 2.2.2 Addressing Potential Delays in Construction of the Residential Tower:

The Umbrella Agreement provides Castlepoint with the option of not immediately proceeding with the construction of the residential tower upon closing of the land purchase. Delays in Castlepoint's construction commencement result in significant negative impacts on the HC's operations. In order to construct the tower, Castlepoint must first demolish portions of the existing theatre and then build the structure that will form the CityCentre under Option A or the retail/commercial development under Option B. The HC will not be able to mount performances during this stage of the construction work. Uncertainty over when this work will take place will make it difficult to properly schedule the HC's activities.

To address this issue, the Umbrella Agreement contains a schedule of payments that Castlepoint must make in order to postpone the commencement of construction. The payment amounts are based on the HC's estimates of the potential value of the bookings that would be lost because of uncertainty in the availability of the theatre. By making these payments, Castlepoint can potentially delay commencement of construction by up to 30 months. At that point Castlepoint would have the additional option of constructing the retail/commercial component alone (the third option outlined under the Agreement) without constructing the residential tower. The construction of the residential tower could then be carried out at any point over the next ten years.

In the event that construction of the project does not proceed at all, the Agreement contains a provision by which the HC would retain \$5 million of the original purchase price (along with the postponement payments already collected) to offset any costs that the HC has incurred for repairs and replacements during the period between the closing of the transaction and termination of the agreement with Castlepoint.

### 2.2.3 Developer Security:

Prior to the commencement of construction, Castlepoint will provide a letter of credit that will initially have a value of \$10 million. This letter of credit is intended to protect the HC in the unlikely event that Castlepoint abandons work on the project and Castlepoint's lenders do not step in to complete the project. The \$10 million amount is based on an estimate of the maximum amount that it would cost to restore the existing theatre building if, for instance, the work is abandoned immediately after sections of the existing building are demolished and the full excavation for the new building is completed.

The \$10 million letter of credit will be progressively reduced in value as the CityCentre or new retail/commercial development is constructed. Once the CityCentre or retail/commercial development is completed, the letter of credit will be reduced to a value of \$2 million. This \$2 million will provide an additional reserve for addressing the unlikely situation in which Castlepoint and its lenders have not discharged any liens incurred during construction of the residential tower.

### 3.0 Status of Fundraising including Sponsorship Opportunities:

The Board has hired Strategy Corp., a government relations company, to assist the Board in pursuing federal and Provincial funding in the amount of \$15 Million from each level of government.

The Board has been working to build connectivity with the new Federal government's elected members as well as with unelected officials. It is reported that the project is being well received and that awareness of its unique attributes is growing. With the announcement in the May 2 Budget of renewed funding for strategic infrastructure, the Board expects progress to accelerate in the weeks and months ahead.

At the provincial level, the Board is also continuing to build support among elected and unelected officials and continues to strengthen its relationships with the Ontario ministries of Culture and Public Infrastructure Renewal.

However, to date no specific financial commitments have been made by either the Federal or Provincial governments.

The Board has hired Wakeham and Associates to assist the Board in identifying and pursuing potential naming rights opportunities. To date efforts have been devoted to preparing appropriate written materials to make approaches to key contacts and preliminary meetings have been held with a number of them. There has been sufficient interest to date to anticipate that the Board will have the ability to raise approximately \$30 million from naming rights to the various components of HC.

However, to date, the Board has received no firm commitments respecting naming rights.

The Board has devoted its resources to securing naming rights opportunities and funds for the provincial and federal governments. Private donations previously anticipated to raise \$10 million are not being actively pursued as the Board has determined that its resources would be more productively devoted to securing funding from the provincial and federal governments and from naming rights.

#### 4.0 Reserve Funds and Use of Funds:

The Board has three reserve funds with the City:

- (1) Hummingbird Donations Reserve Fund: provides funding to finance capital improvements to the Hummingbird Center, to finance fund raising and extraordinary programming opportunities specifically related to the redevelopment plan.
- (2) Hummingbird Capital Improvement Reserve Fund: provides funding to finance major renovations and improvements.
- (3) Hummingbird Stabilization Reserve Fund: provides funding for assisting HC to operate effectively as a business, together with the goal of reducing, over time, its dependency on the City's funding.

It should be noted that unrestricted funds generated from Hummingbird naming rights proceeds in 1996 and currently residing in the Capital Improvement Reserve Fund could be used for operating purposes and transferred to the Stabilization Reserve Fund to offset operating deficits during the closure of the theatre for redevelopment under Options A or B.

##### 4.1 Option A:

It is recommended that under Option A, the funds identified and received with the intent to finance the \$75 million in capital improvements for the redevelopment of the HC including: the sale of land, naming rights, private sector contributions (received for the redevelopment of the Center) and federal/provincial contributions, be held in the Hummingbird Capital Improvement Reserve Fund.

##### 4.2 Option B:

The use of funds under Option B have been identified in prior reports approved by Council. The 2005 Report recommended that the \$15 million from the sale of the land for residential development in addition to the balance in the Capital Improvement Reserve Fund, be used to carry out all of the required and optional deferred lifecycle maintenance works identified in a report by Helyar Associates including costs incurred as a result of the two-year closure of the existing theatre while this work is carried out and the residential development is constructed. It is therefore recommended that the funds received from the sale of land be placed in the Hummingbird Capital Improvement Reserve.

It is anticipated that any capital funding received from the Federal or Provincial governments would be specifically linked to the development of the CityCentre proposal and therefore would not be available under Option B unless the City exercised its option of early termination of the long-term lease and took possession of the commercial/retail space for the purposes of building CityCentre. If funding is received at a later date for



this purpose under Option B, then it is recommended that the funds be held in the Hummingbird Capital Improvement Reserve.

It is anticipated that the funds generated from the naming rights under Option B will be considerably less than the naming rights funding that could be realized under Option A. The 2005 Report suggested that these funds could be available to offset operating deficits. Given this purpose, it is recommended that these funds be held in the Hummingbird Stabilization Reserve Fund.

Under Option B, it is recommended that the lease payment of \$3.5 million for the Long Term Lease be held in the Hummingbird Capital Improvement Reserve. The funds should be held in the Capital Improvement Reserve until such time as a decision is made not to proceed with the CityCentre option given the uncertainty as to future sources of funding and the additional costs that will require funding including the lease termination payment and the cost to retrofit the facility for CityCentre purposes.

If the decision is made not to exercise the option to terminate the lease and reclaim the commercial/retail facility or if the City's and the Board's operating financial conditions require alternate sources of funding (for example if the naming rights have been exhausted by funding prior year operating deficits) to offset operating deficits; then Council could at a later date approve the transfer of funds from the Capital Improvement Reserve to the Stabilization Reserve Fund.

All private donations received on the basis of their use for the redevelopment of HC should be placed in the Capital Improvement Reserve. Unrestricted donations can be held in the Hummingbird Donations Reserve Fund and used to fund extraordinary programming or for the development of CityCentre.

#### 5.0 Market Value of the Site:

Real Estate appraisal staff have reviewed an appraisal report and two update reports of the Site prepared for the Board by Altus Helyar, a real estate appraisal and cost consulting company. These appraisals reported a market value of \$15.23 million as at April 29, 2004, \$19.60 million as at May 18, 2005 and \$21.75 Million as at April 27, 2006. All of the market value estimates were based on a buildable GFA of 435,000 sq. ft. and contingent on the Site being capable of independent development whereas the Site has to be developed such that the proposed new residential tower will be integrated with the existing HC theatre structure.

Altus Helyar also provided an elemental Order of Magnitude Estimate ("OME") based on the impacted area resulting from construction of the residential tower in the southwest corner. The assessment resulted in an estimated cost to reconstruct the impacted areas, including a soft costs allowance of 25 percent or \$2.7 million, of a total amount of \$13.385 million. Facilities staff have reviewed the OME and confirmed that the OME appears to be reasonable. They further confirmed that the incremental construction cost due to the integration of the two buildings would, in all likelihood, be no less than \$7 million.

Real Estate appraisal staff are satisfied with the current market value of the Site at the appraised value of \$21.75 million. They are also agreeable to the concept of allowing an appropriate amount for the integration costs, to be deducted from the appraised value of \$21.75 million to arrive at the purchase price. Real Estate staff are of the opinion that the fair market value of the Site should not be lower than \$15.00 million or \$35.00 per sq. ft. of buildable GFA.

#### 6.0 Capitalized Rental Value of the Commercial Component Lease:

It is proposed that should the Board be unable to meet the fundraising target of \$56.00 million by June 2007, part of the HC site proposed for the construction of CityCentre will be used for retail/commercial purposes under a long term lease with Castlepoint, with lease termination provisions exercisable by the City at certain periods during the life of the lease.

An appraisal report on the Commercial Component Lease was prepared by Altus Helyar. Its finding concludes that the market value of a potential development of 130,000 sq. ft. of office and retail GFA at the site at \$4.55 million or \$35.00 per sq. ft. of GFA as at May 30, 2006. The value estimate does not take into account any unusual development costs associated with integrating the proposed development with the existing HC theatre structure.

Real Estate appraisal staff have reviewed the appraisal report and concur with the finding therein. Real Estate appraisal staff are of the opinion that under normal conditions, the capitalized rental value of the Commercial Component Lease should not be lower than \$4.55 million based on a GFA of 130,000 sq. ft. or \$35.00 per sq. ft. of GFA. It is noted that the original proposal for the Commercial Component was 100,000 sq. ft. of GFA and it is now changed to 130,000 sq. ft. at the request of the Board, the floor plate is anticipated to be redesigned which will result in a higher than normal ceiling height, the capitalized rental value of \$4.55 million may be negatively impacted by these requirements.

#### 7.0 Affordable Housing:

Since the Site is being sold in its entirety for which Castlepoint is paying market value, the terms of the proposed transaction require an exemption from the City's Housing First policy. However, on a completely voluntary basis, in addition to paying market value for the lands, Castlepoint has offered to further the City's affordable housing objectives. The Umbrella Agreement provides that Castlepoint may elect to participate in a City Request for Proposal under the City/Provincial program for affordable housing. Should Castlepoint either participate in the process and be unsuccessful (or withdraw) or elect to not participate in the RFP process, Castlepoint will make a voluntary contribution of \$500,000.00 to the City, to be placed in the City's Capital Revolving fund for Affordable Housing.

## 8.0 Delegation of Authority by City to the Board under the new *City of Toronto Act, 2006*:

Changes will be required to the Board's statutory authority in order to permit the Board's to operate an off-site parking lot and to present theatrical shows at venues other than HC. Such changes can be effected through the City's power to delegate duties and responsibilities to city boards under the new *City of Toronto Act, 2006*, once it comes in to force in January 2007. It is recommended that Council delegate these new responsibilities to the Board once the new *City of Toronto Act, 2006*, comes in to force.

## 9.0 Planning issues:

### 9.1 City Planning:

There have been no applications or pre-applications for development approvals provided to City staff. City staff has not had the ability to review any of the development proposed for the site on any of the components except in some cases on a purely conceptual basis.

The circulation of such applications would normally be given to the various departments in the City, such as, but not limited to, Urban Development Services, Community and Neighbourhood Services, Works and Emergency Services, Economic Development, Culture and Tourism Technical Services including Development Engineering and Toronto Water. Since the normal application or pre-application staff circulation process has not occurred as of yet, staff are unable to comment on potential problems, issues or deficiencies which may be a consequence of these developments except in a superficial manner.

### 9.2 Changes to Existing Land Use Planning Regime:

Implementation of any of the development options of the private component would require amendments to the Official Plan and Zoning By-law, which also require a public process and statutory public meetings.

As well, any development of the private component would require a satisfaction of site plan application requirements and approval of a condominium plan. Castlepoint as proponent and agent for the City would be the applicant for these approvals.

In the event that any planning approval is refused Castlepoint has the right to appeal the refusal(s) to the Ontario Municipal Board (OMB), even though title to their portion of the site has not yet been conveyed. Castlepoint would be responsible to present its case on the appeal. In such a case, Council would have to determine what position it would take on the appeal, only as an approval authority under the *Planning Act*.

### 9.3 Urban Design:

The City has recently undertaken a significant study of urban design in the St. Lawrence Area. City Council adopted in 2005 the “St. Lawrence Neighborhood Focused Community Urban Design Guidelines” for implementation in this area.

### 9.4 Scott Street Sewage Pumping Station:

Although the development of HC on its own does not trigger the need for expansion of the Scott Street Pumping Station (SSPS), the development, together with the magnitude of recent developments in the Waterfront and the known (and unknown) expansion expected over the next 20 years, in the area has generated the need to assess the current operation of the SSPS and the local sewer infrastructure that is tied to both the upstream and downstream sides of the SSPS.

Should the assessment conclude that expansion of the plant and local infrastructure is required, an Environmental Assessment would have to be undertaken to assess the best alternatives. Funding would likely be provided from City’s Development Charges Reserve Funds as the expansion is attributed to development.

The proposed HC redevelopment does directly affect the SSPS in the sense that any future expansion of the current footprint would affect the HC site. The Umbrella Agreement provides for acknowledgment of the possible future expansion of the SSPS and the right of the City to undertake this expansion if necessary.

More immediately, the potential rezoning of the HC site to include a residential tower on the Site brings about the need for improvements that should come at the expense of the private development.

Permanent on site back up power is required to prevent the shut down of operations now that Toronto Hydro cannot guarantee the continuous power supply necessary. The Board has acknowledged that this would also be a requirement of the theatre and a mutual use generator could be employed to meet both needs.

An odour control unit is required to help alleviate complaints that may arise due to the proximity of residents to the SSPS. At this point there are no design details available or projected cost estimates. These would have to be worked out during design.

However until actual plans for the proposed redevelopment are available for review, staff cannot ascertain what other issues may arise. Any tunnels or expansion of the PATH system may have to be tested for feasibility of construction and impact on existing infrastructure.

Other issues include, but are not limited to, fire protection, solid waste management, access, stormwater management including rainwater harvesting provisions, servicing, and land dedications would come from a full planning submission process.

#### 9.5 Heritage Designation:

The Business Plan and proposed development options recognize the importance of retention of the heritage aspects of the HC. Castlepoint has retained the services of ERA Research Associates Inc for the services of Michael McLelland for the purposes of working with the City's Heritage Preservation Services and completing the "Conservation Strategy" as required for any planning applications for the site. This is also reflected in terms of the proposed Umbrella Agreement.

#### 10.0 Status of Due Diligence Inquiry:

It is important for the City to conduct a review and assessment of a proponent's corporate and financial wherewithal to undertake projects of this nature where private investment occurs on lands so inextricably linked with lands owned by the City. The purpose of the due diligence review is to evaluate, to the extent possible, the corporate and financial soundness of the proponent and to identify any deficiencies in order to minimize the risks to the City.

As previously advised, the Board provided the City with an initial due diligence report regarding Castlepoint Realty Partners Limited, but it was not comprehensive or complete. The final execution of any agreements with Castlepoint should be subject to a requirement that a due diligence report be submitted to the satisfaction of the City Solicitor and Deputy City Manager and Chief Financial Officer. To this end, we recommend that a third party professional organization be retained to finalize this investigations which includes, but is not limited to confirmation of information already provided by the principals of Castlepoint.

#### 11.0 Working Committee:

As directed by Council, a Working Committee composed of City Staff and Board members was formed to consider alternate civic uses for the retail/commercial component of the proposed development, should the CityCentre concept not proceed immediately. The Committee met and determined that all potential civic uses should be considered in due course at the appropriate time and that it was premature to recommend any one use at this time.

#### 12.0 Humanitas:

The City has also undertaken an initiative entitled Humanitas. The CEO of the Board and members of the Humanitas team have met to discuss their respective projects. They concluded that although there are similarities between the Humanitas concept and the CityCentre concept, Humanitas focuses on individual stories of immigrants to Toronto,

whereas CityCentre focuses on the different cultures represented in the city. The concepts are complimentary rather than competitive. As well, the time line for CityCentre is much more compressed than the one for Humanitas and it is anticipated that the two will not be approaching the same institutional donors at the same time.

Conclusions:

It is recommended that City Council approve the Business Plan and authorize the City and the Board to proceed with the proposed redevelopment of the HC, including the sale of the Site to Castlepoint and the entering into of an Umbrella Agreement, together with all additional agreements necessary to give effect thereto.

Staff from the Legal Division, Facilities, Works, Transportation, Toronto Water, Planning, Development and Engineering, and the Board staff have been consulted in the preparation of this report and are in agreement with the recommendations in this report within the scope of their respective areas of responsibility.

Staff from the Legal Division have also been heavily involved in the negotiations with Castlepoint and are satisfied with the documentation as negotiated to date.

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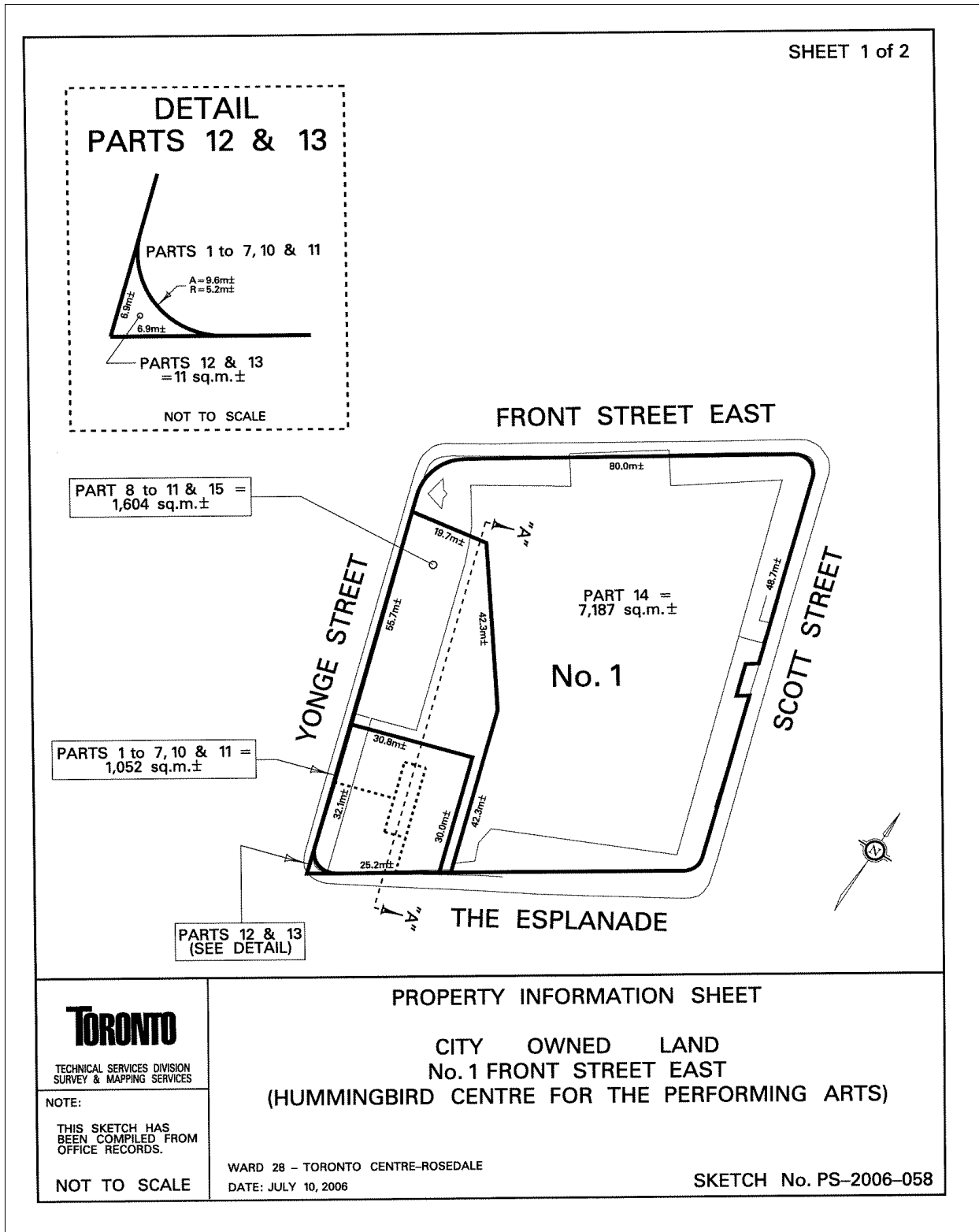
Joe Casali  
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Attachments:

Appendix 1 - Sketch PS-2006-058;  
Appendix 2 - Executive Summary of Umbrella Agreement;  
Appendix 3 - Umbrella Agreement; and  
Appendix 4 - Summary of Project Options A and B as Detailed in Umbrella Agreement.

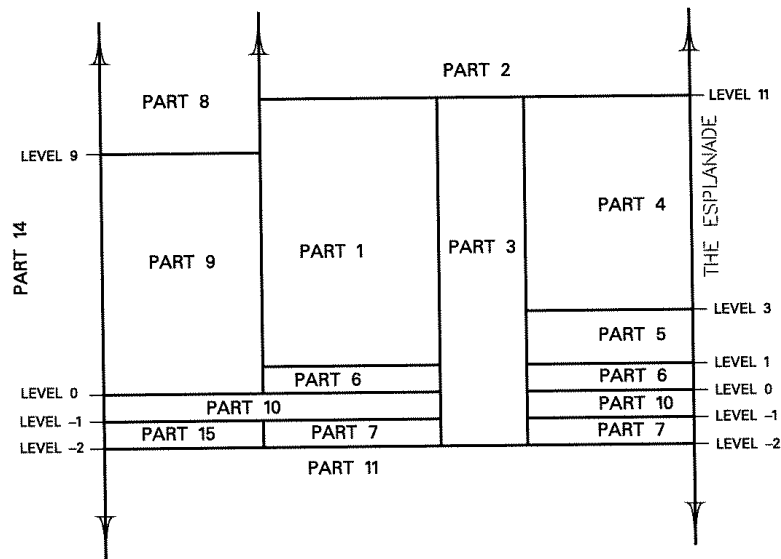
Appendix 1

Sketch PS-2006-058



SHEET 2 of 2

### DETAIL SECTION "A" (LOOKING EAST)



NOTE: SUBJECT TO APPROVAL OF THE PARTIES IN ACCORDANCE WITH THE UMBRELLA AGREEMENT, THERE MAY BE A SECOND LEVEL OF BASEMENT SPACE FOR THE PROPOSED CONDOMINIUM TOWER, BENEATH PART 7.

SKETCH No. PS-2006-058



## Appendix 2

### Hummingbird Centre Redevelopment Executive Summary of Umbrella Agreement

#### Purpose:

The Umbrella Agreement (“UA”) provides for sale of a portion of the City-owned lands on which the Hummingbird Centre (“HC”) is currently located, for purposes of the construction of a proposed condominium/hotel tower. The Agreement also provides for the construction on City-owned lands of an additional facility which, subject to the availability of funds, is intended to become an artistic and cultural centre operated by Hummingbird (“CityCentre”), and which will form part of the HC either upon completion of construction or, possibly, following a period in which the new facility is leased to Castlepoint Realty Partners Limited (“Castlepoint”).

#### Parties:

The parties to the agreement are the City of Toronto (the “City”), The Board of Directors of the Hummingbird Centre for the Performing Arts (the “Board”) and the proposed developer, Castlepoint.

#### Lands:

The UA pertains to the sale of a stratified land interest in a portion of the land owned by the City of Toronto at 1 Front Street East, Toronto on which the HC is located, that portion being Parts 2, 3, 5 and 7 on Sketch PS-2006-058 (the “Site”). The UA requires the preparation of a three dimensional strata reference plan with respect to the lands setting out the legal boundaries of the proposed private and public (or commercial, as the case may be) components of the redevelopment. The plan, to be approved by the City, the Board and Castlepoint, will show the portion of the lands to be conveyed into private ownership, and will delineate the remaining publicly-owned portions of the site, being comprised of the portion on which the CityCentre construction will occur and the lands on which the existing HC is located.

#### Project Alternatives:

The UA provides that the City shall elect one of two alternative options for the HC redevelopment.

In both options, Castlepoint will purchase the Site and construct a private structure. Castlepoint is required to provide notice to the City as part of the site plan approval process of the intended use of this “Private Component”, which uses may include a residential condominium or a hotel. In the first option for redevelopment (called “Option A”), the publicly-owned CityCentre will be constructed at the City’s cost and initiative, on the existing HC lands, to be used upon completion for the purposes of a multicultural arts and cultural centre facility. The UA contemplates that upon staff reporting back on fundraising efforts, relating to whether sufficient funds are available to pay for the construction of the new CityCentre facility, referred to as the “Public Component”, 2 months before the date the City is required to notify Castlepoint as

required by the UA, it will be Council's decision whether to proceed with Option A. The UA states that if the City has not decided to proceed with Option A and has not made the Option A Election by notice in writing to Castlepoint on or before the date 180 days prior to the Required Construction Commencement Date, the parties will proceed with Option B.

Alternatively, if City Council has not determined to proceed with Option A, the UA contemplates a second option (called "Option B") in which Castlepoint will construct the additional facility on the HC lands, in addition to constructing the private development on the purchased lands. In Option B, Castlepoint will receive a long term lease (89 years) of the additional City-owned facility (defined as the "Commercial Component") for commercial and retail uses. During the term of the lease granted to Castlepoint, the City would have two separate options to terminate the lease early and regain possession of the building for public uses.

In either Option A or B, in the event that the market is insufficient to permit financing of the Private Component, Castlepoint will also have the option of delaying the construction of the Private Component for up to 10 years. Notwithstanding any such permitted delay in construction of the Private Component, the UA requires that construction of the Public Component (or Commercial Component, if Option B is pursued) proceed as scheduled.

#### Sale of Site:

The purchase price for the Site under both Options is the sum of \$15,000,000.00 plus \$35.00 per square foot of approved gross floor area granted in excess of 428,571 square feet, to be paid on Closing. A deposit of \$1,500,000.00 is to be paid to the City upon execution of the UA.

On Closing, Castlepoint will not initially be given a Transfer/Deed but, rather, will be granted a short term lease for the Private Component for purposes of development and construction (the "Private Component Lease"). Title to the Private Component will only be transferred to Castlepoint once it has achieved Substantial Completion (as defined in the UA) of the Private Component in accordance with all contractual obligations.

#### Long Term Commercial Lease:

In Option B, Castlepoint will be granted a lease of the Commercial Component for a term of 89 years for a one time rental payment of \$3,500,000, to be made on Closing (the "Commercial Component Lease"). In addition to the \$1,500,000 deposit payable for the private lands, Castlepoint is to pay a rental deposit of \$350,000, 30 days after the City elects to proceed with Option B.

The terms of the Commercial Component Lease will permit Castlepoint to sublease the Commercial Component for certain permitted commercial uses and to mortgage the leasehold interest.

During the term of the lease, the City will have two opportunities to terminate the lease and reacquire possession of the Commercial Component for public use, in exchange for a termination payment to Castlepoint. The first such opportunity will be available from the 10th to 15th years following the earlier of Substantial Completion of the Commercial Component and achievement

of a 95 percent rental occupancy rate in the Commercial Component building (the “Stabilization Date”), in exchange for a payment to Castlepoint which guarantees Castlepoint a 10 percent return, compounded annually, on its equity invested in the Commercial Component. The second such opportunity will be available in the 26th to 30th years following the Stabilization Date, upon payment to Castlepoint of the fair market value of the leasehold interest.

#### Affordable Housing:

On Closing, Castlepoint will have either made a \$500,000 voluntary payment to the City for purposes of the City’s Capital and Revolving Fund for Affordable Housing, or have entered into an Affordable Housing Arrangement with respect to the provision of affordable housing in part of the Private Component.

#### Development Conditions:

The transaction is conditional upon Castlepoint receiving its required planning and site plan approvals for the Project and upon the completion of plans and specifications which have been approved by the City (the “Plans and Specifications”). Castlepoint has responsibility under Option A or B for applying for all necessary approvals, and the City, solely in its capacity as owner of the lands, will provide its consent to such applications, its rights as a planning authority to remain completely unfettered. The UA provides that the development applications must be submitted and completed pursuant to the City’s Development Guide and STAR (Streaming the Application Review) process. To the extent that the costs of the development approvals relate fairly and equitably to the Public Component under Option A, the Board/City will pay for such costs.

Castlepoint is responsible under the UA for the preparation of plans and specifications for the development of the Private Component and the Public or Commercial Component. The City has the right of approval of the Plans and Specifications, acting reasonably, with respect to matters affecting the design of the HC, and the UA provides for a cooperative process for the development and review of the Plans and Specifications by the parties. Although Castlepoint has carriage of the Plans and Specifications, if the City elects to pursue Option A, the City shall take carriage of the Plans and Specifications for the Public Component on the earlier of Closing and the decision to proceed with Option A. The UA also provides principles for the allocation of the costs of design matters between the Board/City and Castlepoint. Castlepoint acknowledges that it has entered into a preliminary architectural contract with Studio Daniel Libeskind and will enter into a formal Architectural Contract.

The UA provides that Castlepoint will make efforts to enter into a Parking Garage Contract for the provision of parking for the Private Component, and that the City may enter into a separate Parking Garage Contract with respect to the Public Component, in both cases in accordance with principles set out in the UA. However, the provision of additional parking is not essential for the operation of the Public Component or the HC.

## Construction

In Option A, the City will enter into a construction contract for the construction of the Public Component at its cost, while Castlepoint will enter into a construction contract at its sole cost for the construction of the Private Component, and the parties will enter into a construction procedures agreement with each other to coordinate construction. In Option B, Castlepoint will enter into a contract for the construction of both the Private Component and the Commercial Component, at its sole cost, and will undertake the renovations which are required to be made to the HC for purposes of the Project (the “Hummingbird Renovations”) as well as the construction of facilities which are to be shared between the HC, the Commercial Component and the Private Component (the “Shared Facilities”). In Option A, the responsibility for the Hummingbird Renovations and the Shared Facilities will be allocated between the City and Castlepoint in accordance with principles set out in the UA. The UA also provides that the Parties may, on or before December 15, 2006, mutually elect a different allocation of construction responsibilities in which event the Parties will make the necessary amendments to the UA.

The UA provides for the allocation of responsibility for the cost and construction of Hummingbird Renovations and Shared Facilities. In Option A, HC is primarily responsible for the cost of such renovations as would be required for HC regardless of the Project constructions (the “Hummingbird Necessary Renovations”). Castlepoint is primarily responsible for the cost of the demolition and renovations which are required as a result of the construction of the Project (the “Project Related Renovations”). The cost of Shared Facilities is allocated between the City and Castlepoint in accordance with principles set out in the UA.

## Developer Level Security

Castlepoint will provide, as security for the completion of its Developer obligations for completion of the Project, a letter of credit in the amount of \$10,000,000, which the City may call upon in the event of default under the UA for the purpose of, among other things, completing the Project Related Renovations, or, restoring the HC to its original state if Castlepoint commences but fails to complete construction. This letter of credit will be reduced as construction progresses, in accordance with the terms as set out in the UA. In addition, prior to commencing construction, Castlepoint must have delivered to the City a 50 percent performance bond and 50 percent labour and materials bonds relating to the Private Component and Project Related Renovations, and shall have assigned to the City, as collateral security ranking subsequent to any security granted to Castlepoint’s lender, the construction-related contracts and Plans and Specifications necessary to allow the City to complete the Project.

## Timing

Castlepoint is required to begin construction of the Project on January 1, 2008, subject to delays as a result of “Force Majeure” events or OMB deliberations (the “Required Construction Commencement Date”). The construction commencement date is also subject to Castlepoint electing, where certain market conditions are not met and by the required notice to the City, to postpone the construction commencement date in exchange for either specified postponement payments to the City or specified “blackout” payments to account for the costs to HC of closing

the theatre for an extended period. Notwithstanding postponements, construction may not begin later than 30 months following the Required Construction Commencement Date.

Under Option A, following commencement of construction, Castlepoint is required to complete all construction required to permit the HC to reopen within 21 months, to complete all elements of the Project Related Renovations and the Castlepoint Shared Facilities as soon as possible, to enable the City to complete the Public Component, and to achieve Substantial Completion of all construction, including the Private Component, within 42 months. Under Option B, following commencement of construction, Castlepoint is required to complete all construction required to permit the Hummingbird Centre to reopen within 21 months, and is required to achieve Substantial Completion of all construction including the Private Component within 42 months.

### Default

Under Option A or B, if Castlepoint fails to commence construction by the dates required, subject to Castlepoint's rights to cure the default within 180 days upon payment to the City of a further postponement payment, the City shall be entitled to terminate the UA. Upon termination, the City will be entitled to retain the deposit and all postponement payments as liquidated damages, and to retain the balance of the purchase price to apply in respect of operating losses of and capital expenditures for the HC, until the earlier of the date on which (i) such amounts and the deposit total \$5,000,000.00 or (ii) the City has entered into a transaction with a third party for the creation of a project on the private lands.

In Option A, if Castlepoint defaults in its obligation to complete the Project, after it has begun construction, and such default is not cured, the City shall be entitled to terminate the UA and to call upon the letter of credit and retain the full amount of the purchase price, and shall be entitled to all of the construction related security assigned to it by Castlepoint. Under Option B, if Castlepoint defaults in its obligation to complete the Project after it has begun construction, and such default is not cured, the City shall be entitled to terminate the UA and to call upon the letter of credit and retain the full amount of the purchase price and the rental payment, and shall be entitled to all of the construction-related security assigned to it by Castlepoint. In either case, the City shall be entitled to terminate the Private Component Lease. Subject to the rights of Castlepoint's Project lender, the City has the right to self help under the UA to rectify a default by Castlepoint.

### Additional Project Agreements

The parties will also enter into an agreement governing the mutual easements and shared facilities to be created for purposes of the future interrelationship and integration of: the HC, the Private Component, and the Public Component or the Commercial Component, as the case may be. The parties will need to grant any necessary easements for support, and will enter into a Construction Procedures Agreement governing roles and responsibilities during construction. In due course, when construction of the proposed development is completed and "as-built" drawings are provided, it may be necessary to revise the technical legal description of owned, or leased, interests, and to permit alternatives to, or relocation of, easements, including granting new easements, if required, and to rescind the declaration of surplus for parts of the HC site not conveyed to Castlepoint.

Appendix 3  
Umbrella Agreement

Draft Dated July 14, 2006

City of Toronto  
- And -  
Castlepoint Realty Partners Limited  
- And -  
The Board of Directors of the Hummingbird Centre for the Performing Arts

Umbrella Agreement

Dated , 2006.

THIS AGREEMENT made the ● day of ●, 2006

BETWEEN:

CITY OF TORONTO  
(hereinafter referred to as the “City”)

- and –

CASTLEPOINT REALTY PARTNERS LIMITED, a corporation incorporated  
under the laws of the Province of Ontario  
(hereinafter referred to as “Castlepoint”)

- and –

THE BOARD OF DIRECTORS OF THE HUMMINGBIRD CENTRE  
FOR THE PERFORMING ARTS  
(hereinafter referred to as “Hummingbird”)

IN CONSIDERATION of the respective covenants and agreements hereinafter contained, the Parties hereto covenant and agree as follows:

1. Interpretation

1.1 Defined Terms

In this Agreement, including the Schedules hereto:

“Accommodation Agreement” has the meaning assigned to it in Section 0, with respect to Option A, and Section 0, with respect to Option B;

“Additional GFA” has the meaning assigned to it in Section 0;

“Adjusted for Inflation” means, for any amount at any time, that amount multiplied by the Inflation Index for the first day of the previous calendar year divided by the Inflation Index on the Execution Date;

“Adjustments” has the meaning assigned to it in Section 0 (or Section 0 in the case of Option B);

“Affiliate” has the meaning assigned to “affiliate” in the *Business Corporations Act* (Ontario);

“Affordable Housing” means housing having those attributes defined as “affordable housing” in accordance with the relevant By-law of the City;

“Affordable Housing Arrangement” means an arrangement and agreements pursuant to which:

- (a) Castlepoint has entered into a contract with an Affordable Housing Provider;
- (b) Castlepoint and the Affordable Housing Provider have responded to a request for proposals issued by the Affordable Housing Office with respect to a City/Province of Ontario program (the “Response”) for the creation of Affordable Housing within the Private Component (the “Affordable Housing Project”), the Response is accepted by the Affordable Housing Office and the Response and the Affordable Housing Project is approved by Council of the City; and
- (c) Castlepoint and the Affordable Housing Provider have entered into the agreement required by the Affordable Housing Office with respect to the creation of the Affordable Housing Project within the Private Component in accordance with the Response.

“Affordable Housing Contribution” has the meaning assigned to it in Section 0 (in Option A) and Section 0 (in Option B);

“Affordable Housing Office” means the Affordable Housing Office of the City;

“Affordable Housing Provider” means a provider of Affordable Housing that:

- (a) selects as tenants for an Affordable Housing Project, persons who are professional artists devoting a reasonable proportion of time as an artist, receive compensation for artistic work, have received professional training and have membership in a professional association appropriate to the relevant artistic activity; and
- (b) has been Approved by Hummingbird, acting reasonably.

“Agreement” means this Agreement including any recitals and schedules to this Agreement, as amended, supplemented or restated in writing from time to time;

“Amounts” has the meaning assigned to it in Section 0;

“Approved” means, in writing by the relevant Party in accordance with Article 0, unless expressly provided in an alternative manner in this Agreement and “Approval” has a corresponding meaning;

“Approved GFA” means the GFA permitted by the Official Plan and applicable zoning by-laws as a result of the satisfaction of the Development Approval Condition, to be constructed on the Private Lands pursuant to the Private Component Plans and Specifications;

“Approved Stage of Drawings” has the meaning assigned to it in Section 0;

“Arbitration” means arbitration in accordance with Section 0;

“Architect” means Studio Daniel Libeskind and/or such other world-class architectural firm or firms proposed by Castlepoint and Approved by the City, acting reasonably;

“Architectural Contract” means the contract to be entered into by Castlepoint with the Architect for the design of the Project which shall be in conformity to the Preliminary Architectural Agreement between Castlepoint and the Architect dated December 13, 2004, a copy of which has been provided to Hummingbird and which Hummingbird acknowledged by letter dated January 7, 2005;

“Article”, “Section” and “Subsection” mean and refer to the specified article, section and subsection of this Agreement;

“Authority” means any public or private utility supplier or governmental authority, quasi-governmental authority, agency, body or department whether federal, provincial or municipal, having jurisdiction over the Total Lands, or the use thereof and “Authorities” shall have a corresponding meaning;

“Balance” means, in Option A the balance of the Purchase Price due on Closing, subject to Adjustments as defined in Section 0 and, in Option B, the balance of the Purchase Price, subject to Adjustments plus the balance of the Rental Payment as defined in Section 0;

“Blackout Period” has the meaning assigned to it in Section 0;

“Blackout Period Payment” has the meaning assigned to it in Section 0;

“Business Day” means a day, other than a Saturday or Sunday, on which chartered banks in the City of Toronto are normally open for the transaction of business;



“Business Entity” means a corporation, partnership, limited partnership, joint venture or co-ownership;

“Castlepoint” means Castlepoint Realty Partners Limited, a corporation incorporated under the laws of the province of Ontario, its successors and permitted assigns;

“Castlepoint Certificate” has the meaning given to it in Section 0;

“Castlepoint Closing Documents” means those documents required to be delivered by Castlepoint to the City on the Closing in accordance with Section 0 (if Parties proceed with Option A) or Section 0 (if Parties proceed with Option B);

“Castlepoint Principals” means those Persons enumerated in Schedule ”3”;

“Castlepoint Shared Facilities” has the meaning given to it in Section 0;

“Castlepoint’s Solicitors” mean Aird & Berlis LLP or such other law firm as Castlepoint may designate by notice in writing to the City;

“Change of Control” means:

- (a) in the case of a corporation, subject to subparagraph (b), the issue of additional treasury shares of such corporation, its Holding Company or another corporation (collectively, the “corporation”) the sale, transfer, assignment, transmission on death, charge or other disposition of the outstanding shares of such corporation, the redemption or cancellation of the outstanding shares of such corporation, the amalgamation or merger of such corporation with any other corporate entity, the entering into of an agreement or arrangement, which results in a change in the Person or Persons who Control the corporation in fact or in Law;
- (b) in the case of Castlepoint, without limiting the generality of subparagraph (a), the issuance of additional treasury shares, the sale, transfer, assignment, transmission on death, charge or other disposition of the outstanding shares, the redemption or cancellation of the outstanding shares, the amalgamation or merger with another corporate entity, the entering into of an agreement or arrangement, which results in the Castlepoint Principals no longer being in Control of Castlepoint, in fact or in Law; and
- (c) in the case of a Business Entity, the sale, transfer, assignment or other disposition of all or any part of the beneficial interest in any such Business Entity, or the entering into of an agreement or arrangement respecting any of the foregoing which results in any change in the Person or Persons who Control the Business Entity in fact or in Law; for the purposes hereof a Change of Control (as defined in subparagraph (a) above) of any

corporation comprising the Business Entity shall result in a Change of Control of the Business Entity if such corporation Controls the Business Entity;

“City” means the City of Toronto;

“City Closing Documents” means those documents required to be delivered by the City to Castlepoint on the Closing;

“City Indemnified Parties” means the City, its successors and assigns, its Mayor, Councillors, elected or appointed officials, officers, directors, employees, agents, representatives, advisors or consultants;

“City Security” has the meaning assigned to it in Section 0;

“City’s Solicitors” mean the City Solicitor; and where specifically referred to herein City’s Solicitors shall include Borden Ladner Gervais LLP or such other law firm as the City may designate by notice in writing to Castlepoint (collectively “Outside Counsel”);

“Closing” means the closing and consummation of the transactions herein contemplated on the Closing Date at the offices of the Legal Division of the City at 10:00 a.m. (Toronto Time);

“Closing Date” means the 45<sup>th</sup> day following the earlier of:

- (a) the satisfaction (or waiver by Notice) of the Development Approval Condition; and
- (b) the Outside Development Approval Date;

“Closing Documents” means the Castlepoint Closing Documents and/or the City Closing Documents, as the context so requires;

“Commencement of Construction” means the date on which Castlepoint commences, in a bona fide manner, construction of the Project which shall be deemed to include demolition of any Existing Improvements and “Commence Construction” and “Commenced Construction” shall have a corresponding meaning;

“Commencement of Construction Obligation” has the meaning assigned to it in Section 0 and Section 8.20(3);

“Commercial Component” means, in the event that the Parties proceed with Option B, that portion of the Total Lands defined below as the Public Lands together with improvements to be constructed thereon in place of the Public Component which improvements shall consist of a building containing not less

than the Required Commercial GFA to be used for commercial/retail purposes, subject to the restrictions on use contained in the Commercial Component Lease;

“Commercial Component Construction Contract” means the fixed price construction contract to be entered into by Castlepoint with a contractor for the construction by Castlepoint of the Commercial Component;

“Commercial Component Election” has the meaning given to it in Section 0;

“Commercial Component Lease” means, in the event the Parties proceed with Option B, the lease to be entered into between the City as Landlord and Castlepoint as Tenant, respecting the Commercial Component, to be granted by the City to Castlepoint, containing the principles respecting the Termination Options set out in Schedule “4” and in the form of the lease as mutually agreed on between the Parties;

“Commercial Component Plans and Specifications” has the meaning given to it in Section 0;

“Commercial Lands” means, in the event the Parties proceed with Option B, a three-dimensional envelope to consist of the lands being Parts 1, 4, 9 and 15 on the sketch attached as Schedule “2”, the boundaries of which shall be delineated by the three dimensional envelope;

“Completed Application” means an application submitted in accordance with all Laws and in accordance with the Toronto Development Guide and accompanied by the required information identified therein and in accordance with the Streamlining the Application Review (STAR) Process which is described in the Toronto Development Guide, to the satisfaction of the Director of Community Planning;

“Construction Procedures Agreement” means the contract to be entered into between the City, Hummingbird and Castlepoint, with respect to co-operative procedures for construction of the Private Component, the Public Component and Hummingbird Renovations in accordance with Option A (or with respect to the Private Component, Commercial Component and Option B Renovations in accordance with Option B);

“Construction Security” means those matters relating to security for construction obligations contained in Section 0 and Section 0;

“Control” means:

- (a) with respect to a corporation
  - (i) beneficial ownership of more than 50 percent of all of the issued and outstanding securities, interests and units (including, without

- limitation, any warrants, options or other rights to purchase such securities, interests and units and securities or obligations convertible into or exchangeable for such securities, interests or units (collectively, the “Shares”) of each class of voting Shares; or
- (ii) beneficial ownership of more than 50 percent of each class of non-voting Shares; or
  - (iii) having the right to vote or determine the voting of interests by agreement or otherwise in such corporation which are sufficient, if exercised, to make, or being a Person whose approval is required to make, decisions on behalf of the corporation;
- (b) with respect to a Business Entity:
- (i) ownership or control of more than 50 percent of the beneficial interest in such Business Entity; or
  - (ii) a Person whose vote is required for the making of decisions on behalf of the Business Entity; or
- (iii) having the right to vote or determine the voting of interests in such Business Entity which are sufficient, if exercised, to make, or being a person whose approval is required to make, major decisions or significant decisions on behalf of the Business Entity;

“Council” means the Council of the City;

“Cure Period” has the meaning given to it in Sections 0, 0, 0, 0, and 0(A) for the purpose of each of such Sections;

“Default Date” has the meaning given to it in Section 0;

“Deposit” means the Deposit provided pursuant to Section 0 (or Section 0 in the event the Parties proceed with Option B), together in each case, with interest earned thereon;

“Development Approval Condition” means:

- (a) subject to subparagraph (b), obtaining Planning Approvals permitting a minimum of 423,500 square feet of GFA to be constructed on the Private Component and obtaining Site Plan Approval without Extraordinary Conditions;
- (b) notwithstanding subparagraph (a), “Development Approval Condition” shall not include the requirement for Site Plan Approval if:

- (i) Castlepoint fails to resolve a Site Plan that is satisfactory to the Planning Department of the City in the Discretion of the Planning Department and submit a Perfected Application with respect thereto within forty-five (45) days following receipt of Final Written Comments on a proposed Site Plan submitted by Castlepoint to the City for its review (a “Draft Site Plan”) respecting Site Plan Approval; or
- (ii) a Draft Site Plan is not submitted by Castlepoint to the City for review as aforesaid, within 150 days from the Execution Date; provided that the 150 day period may be extended for an additional period not exceeding two (2) months in the event that Castlepoint establishes to the satisfaction of the City, acting reasonably, that a delay in the finalization of the Draft Site Plan has occurred solely as a result of delays caused by Hummingbird in finalizing those aspects of the Draft Site Plan related solely to the Public Component; and
- (c) in the event that the Parties shall proceed with Option B, Development Approval Conditions shall include the Option B Development Approval Condition;

For the purposes of subparagraph (b)(i) above, “Final Written Comments” of the City on a proposed Site Plan shall be deemed to occur if the Planning Department of the City provides written comments which include a statement that the City is not requesting any further amendments of a Draft Site Plan at the time such comments are provided, without prejudice to the City’s right to provide further comments or request further amendments in its Discretion;

“Development Approvals” has the meaning given to it in Section 0;

“Discretion” means, with respect to any consent, approval or decision required to be made by a Party, that any such approval, consent or decision may be made in the sole and absolute discretion of the relevant Party;

“Disposition” means the assignment in whole or in part of all or any portion of this Agreement or Castlepoint’s right, title and interest in this Agreement, the assignment in whole or in part of all or any portion of any of the Project Agreements, the assignment or granting of a subcontract as security to a lender or the granting of any charge, or other security in or with respect to this Agreement to any lender, or any Change of Control of Castlepoint;

“Dispute” means any disagreement, failure to agree or other dispute between the City (and/or Hummingbird) and Castlepoint arising out of or in connection with this Agreement;

“Dispute Notice” means a notice from one Party to the other Party providing details of a Dispute other than an Excluded Dispute and invoking the Dispute Resolution Procedure in respect of that Dispute;

“Dispute Resolution Procedure” means Arbitration procedure for resolution of a Dispute other than an Excluded Dispute in accordance with Section 0;

“Document Registration Agreement” or “DRA” has the meaning given to it in Section 0;

“Easements” means those easements to be granted by the City to Castlepoint or by Castlepoint to the City in order to effectually integrate the Private Component, Hummingbird Centre and the Public Component (or the Commercial Component, as the case may be) as shall be described in the MESFA Agreement (including those easements to be granted in conjunction with either Option A or Option B);

“Environmental Laws” means all applicable federal, provincial and municipal statutes, by-laws, regulations, policies and orders relating to the protection of the environment or the manufacture, processing, distribution, use, treatment, storage, disposal, transport, handling or remediation of any Hazardous Substances;

“Event of Default” has the meaning assigned to it in Section 0;

“Excluded Dispute” means:

- (a) any Dispute arising prior to the Closing of this Agreement;
- (b) any Dispute concerning a Party’s right to terminate this Agreement pursuant to the provisions of this Agreement or a Dispute respecting the validity of this Agreement; or
- (c) any Dispute with respect to which a Party has elected to seek interim or interlocutory injunctive relief or a mandatory order,

which matters shall be determined by action or application of any Party to the Superior Court of Justice of Ontario;

“Execution Date” means the date on which all of the Parties have executed and delivered a copy of this Agreement;

“Existing Improvements” has the meaning given to it in Section 0;

“Extraordinary Conditions” means, in relation to the approval of a Site Plan pursuant to Section 41 of the *Planning Act*, conditions which: (a) are not commonly imposed on similar projects (excluding the Public Component) in the City of Toronto in circumstances similar to those relating to the Project; and (b) have a material adverse effect on the economic fundamentals of the Project;

“Final Plans” means the Private Component Plans and Specifications and the Public Component Plans and Specifications (or the Commercial Component Plans and Specifications, as the case may be);

“Force Majeure” means:

- (a) war, civil war, armed conflict, terrorism, epidemic, pandemic or quarantine;
- (b) nuclear, chemical (including Hazardous Substance) or biological contamination unless the source or cause of the contamination is the result of actions of Castlepoint;
- (c) earthquake, tidal wave or flood;
- (d) pressure waves caused by devices travelling at supersonic speeds;
- (e) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes;
- (f) any failure or shortage of power, fuel or transport occurring outside the Total Lands provided such failure or shortage has not occurred as a consequence of a failure by any part of the Work;
- (g) any blockade or embargo;
- (h) any official or unofficial strike, lockout, work to rule or other labour disruption; or
- (i) an injunction or restraining order or other decision or order of a court which prohibits or restrains the construction of the Project;

“GFA” means gross floor area as determined in accordance with the applicable zoning bylaw of the City;

“Has Knowledge” or “Have Knowledge” means:

- (a) a natural person knows or has knowledge when information is received or acquired by the person under the circumstances in which a reasonable person would take cognizance of it; and
- (b) a corporation knows or has knowledge when information has been received or has come to the attention of:
  - (i) a director or officer of the corporation; or
  - (ii) a senior employee of the corporation with responsibility for matters to which the information relates;

under circumstances in which a reasonable person would take cognizance of it, and “Knowledge” has a corresponding meaning;

“Hazardous Substances” means any pollutants, contaminants, chemicals, deleterious substances, dangerous or potentially dangerous substances waste (including without limitation industrial, toxic or hazardous wastes), petroleum or petroleum products, asbestos, PCBs, underground storage tanks and the contents thereof, flammable materials, explosive materials or radioactive materials, biological materials and organisms (including, urea formaldehyde viral agents, mould, fungus and bacteria) and any other substance, materials, effect, or thing declared or defined to be hazardous, toxic, a contaminant, or a pollutant in or pursuant to any applicable Laws;

“Heritage Designation” has the meaning assigned to it in Section 0;

“Heritage Legislation” has the meaning assigned to it in Section 0;

“Holding Company” means a corporation that Controls another corporation;

“Hummingbird” means the Board of Directors of the Hummingbird Centre for the Performing Arts;

“Hummingbird Centre” means the existent facilities located on the Total Lands, which facilities are known as the “Hummingbird Centre”;

“Hummingbird Design Matters” means, collectively:

- (a) with respect to the Project, all matters requiring the approval of a municipality pursuant to Section 41 of the *Planning Act*;
- (b) with respect to the Public Component, Hummingbird Design Matters - Public Component;
- (c) with respect to the Private Component, the Hummingbird Design Matters – Private Component;
- (d) with respect to the Shared Facilities, Hummingbird Design Matters - Shared Facilities;
- (e) with respect to the Commercial Component, Hummingbird Design Matters – Commercial Component;

“Hummingbird Design Matters – Commercial Component” means:

- (a) with respect to the Private Component, the matters referred to in subparagraph (b) of the definition of Hummingbird Design Matters - Public Component; and



- (b) with respect to the Commercial Component:
  - (i) those matters referred to in subparagraph (a) above;
  - (ii) those matters referred to in subparagraph (b) of the definition of Hummingbird Design Matters – Public Component, as applied to the Commercial Component;
  - (iii) major interior elements, including, number of floors, floor-to-ceiling heights, location of services including stairwells and elevators and basic floor layouts;
  - (iv) reasonable accommodation to those elements which will permit the conversion of the Commercial Component to the Public Component in the event that a Termination Option is exercised by the City pursuant to the Commercial Component Lease, including exterior and interior placement and connections of buildings and systems within Hummingbird Centre and/or the Commercial Component and/or the Private Component, such as heating, electrical mechanical and the structure of buildings; and
  - (v) Commercial Component Plans and Specifications demonstrating a GFA that is a minimum of the Required Commercial GFA;

“Hummingbird Design Matters – Public Component” means:

- (a) with respect to the Public Component, all plans and specifications; and
- (b) with respect to the Private Component, all matters that affect or relate to the Hummingbird Centre or the Public Component, including, without limitation:
  - (i) exterior architectural detail including without limitation, the colour, texture and type of materials (which may include a pre agreed upon range of materials);
  - (ii) relationship of exterior architectural form, materials and detail with that of the Hummingbird Centre and the Public Component;
- (iii) exterior and interior placement and connections of buildings and systems within Hummingbird Centre and/or the Public Component and/or the Private Component, such as heating, electrical mechanical and the structure of buildings;
- (iv) LEED certification matters; and
- (v) external signage;

“Hummingbird Design Matters – Private Component” means those matters referred to in subparagraph (a) of the definition of Hummingbird Design Matters – Public Component;

“Hummingbird Design Matters – Shared Facilities” means all matters that affect or relate to the Hummingbird Centre or the Public Component in connection with the Shared Facilities, including, without limitation:

- (a) exterior and interior placement and connections of buildings and systems within Hummingbird Centre and/or the Public Component and/or the Private Component, such as heating, electrical mechanical and the structure of buildings;
- (b) design and engineering of Shared Facilities;
- (c) heating and cooling; and
- (d) specifications relating to matters in subparagraphs (a), (b) and (c).

“Hummingbird Engineer” has the meaning given to it in Section 0;

“Hummingbird Indemnified Parties” means Hummingbird its successors and assigns and any of its directors, officers, employees, agents, representatives, advisors or consultants;

“Hummingbird Necessary Renovations” has the meaning given to it in Section 0;

“Hummingbird Preservation Costs” means the cost of the Hummingbird Preservation Measures, which costs shall be shared between Castlepoint and the City on a fair and equitable basis, as provided in Schedule “10”;

“Hummingbird Preservation Measures” means the measures required to preserve and protect the Hummingbird Centre (and its remaining building systems) from damage during the construction of the Project, the scope of which is annexed hereto as Schedule ”10”;

“Hummingbird Renovations” means the Project Related Renovations (including the Hummingbird Preservation Measures) (in Option A), and the Option B Renovations (including Hummingbird Preservation Measures) (in Option B), and the Hummingbird Necessary Renovations;

“In Final Form” means, in addition to Planning Approvals, the obtaining of all approvals required in accordance with the *Planning Act* and the expiry of all appeals and appeal periods;

“Inflation Index” means an amount equal to Consumer Price Index, for All-items Items in Ontario, as published by Statistics Canada or, if the Ontario Consumer Price Index in its present form becomes unavailable, such similar index as may be agreed by the Parties, acting reasonably, and if such agreement cannot be reached, pursuant to the Dispute Resolution Procedure;

“Initial Plans” means the existing design drawings respecting the Project, prepared by the Architect, dated April 18, 2005;

“Initiating Party” has the meaning given in Section 0;

“Institutional Lender” means:

- (a) a bank included under Schedule “1” or Schedule “2” to the *Bank Act* (Canada);
- (b) an insurance company or a pension fund or other financial institution having a net asset value of not less than \$5 billion; or
- (c) such other financial institution as shall be Approved by the City in its Discretion;

“Intellectual Property” means any or all of the following and all rights, arising out of or associated therewith: (a) all national, international and foreign patents, utility models, mask works, and applications therefor and all reissues, divisions, renewals, extensions, provisionals, continuations and continuations-in-part thereof; (b) all inventions (whether patentable or not), invention disclosures, improvements, trade secrets, proprietary information, know-how, technology, technical data, product formulations and specifications, and all documentation of the foregoing throughout the world; (c) all copyrights, copyright registrations and applications therefor, and all other rights corresponding thereto throughout the world; (d) all industrial designs and any registrations and applications therefor throughout the world; (e) all rights in any internet uniform resource locators (URLs), domain names, trade names, logos, slogans, designs, common law trade-marks and service marks, trade-mark and service mark registrations and applications therefor throughout the world; (f) all moral and economic rights of authors and inventors, however denominated, throughout the world; and (g) any similar or equivalent rights to any of the foregoing anywhere in the world;

“Interior Architect” has the meaning given to it in Section 0;

“Law” means all present and future laws, statutes, by-laws, regulations, treaties, judgments, decrees and, binding judgments of relevant courts of law having the force of law, all present and future official directives, rules, consents, approvals, authorizations, guidelines, orders and policies of any relevant Authority;

“LEED” means the certification program established by the Canada Green Building Council referred to as “Leadership in Energy and Environmental Design”;

“Letter of Credit” means in irrevocable letter of credit issued by a bank listed in Schedule ”1” or Schedule ”2” to the *Bank Act* substantially in the form annexed hereto as Schedule ”14”;

“LRO” has the meaning given to it in Section 0;

“Market Delay Election” has the meaning assigned to it in Section 0;

“MESFA Agreement” means the Mutual Easement and Shared Facilities Agreement to be entered into between the City and Castlepoint in connection with the Easements and such other matters of mutual interest and concern between the City and Castlepoint in connection with the inter-relationship of the Private Component with Hummingbird Centre and the Public Component or the Commercial Component, as the case may be, as mutually agreed on between the Parties each acting reasonably, and failing agreement, as resolved by the Dispute Resolution Procedure;

“Necessary Renovations Cost” has the meaning assigned to it in Section 0;

“Notice” means any notice in writing by one Party to the other or by or to Hummingbird, in accordance with the requirements of Section 0; approval, election, demand, direction, consent, designation, request, agreement, instrument, certificate, report or other communication required or permitted to be given or made under this Agreement in writing, and delivered in accordance with Section 0;

“Notification Date” has the meaning given to it in Section 0;

“OMB Extension” means, in the event that Council approval of a rezoning of the Total Lands or any other planning approval or heritage matter in connection with the Project is appealed to the Ontario Municipal Board, the time period from the date of submission of such appeal to the date of the subsequent receipt of the decision of the Ontario Municipal Board;

“Option A” has the meaning given to it in Section 0;

“Option B” has the meaning given to it in Section 0;

“Option B Development Approval Condition” means obtaining Planning Approvals permitting a minimum of 100,000 square feet of GFA to be constructed on the Commercial Component.

“Option B Easements” means those easements to be granted by the City to Castlepoint and by Castlepoint to the City in conjunction with Option B, as shall be described in the MESFA Agreement;

“Option B Renovations” means the renovations to be made to Hummingbird Centre in the event the Parties proceed with Option B (including the Hummingbird Preservation Measures), which shall be comprised of the Project Related Renovations, subject to such changes as are required thereto in connection with the development of the Project in accordance with Option B in order to permit the Hummingbird Centre and the Commercial Component to function with each other, both practically and in accordance with Law, as shall be mutually agreed upon by the Parties each acting reasonably, and failing agreement, as determined by the Dispute Resolution Procedure prior to the Commencement of Construction;

“Outside Development Approval Date” means eighteen (18) months (subject to Time Relief) from the Execution Date;

“Outside Construction Commencement Date” means July 2, 2018;

“Overall M&E Engineer” has the meaning given to it in Section 0;

“Parking Garage” means the parking garage to be created pursuant to the Parking Garage Contract;

“Parking Garage Contract – Hummingbird Centre” means the contract respecting the provision of parking in favour of the Hummingbird Centre to be entered into between the City and GO Transit in connection with the Parking Garage in accordance with the provisions of Section 0;

“Parking Garage Contract – Private Component” means the contract respecting the provision of parking in favour of the Private Component to be entered into between Castlepoint and GO Transit respecting the Parking Garage in accordance with the provisions of Section 0;

“Parking Garage Contracts” means Parking Garage Contract – Private Component, Parking Garage Contract – Hummingbird Centre and the Parking Garage Cooperation Agreement;

“Parking Garage Cooperation Agreement” means the agreement to be entered into between Castlepoint and the City respecting the mutual cooperation between the Parties with respect to the Parking Garage Contracts and the Parking Garage;

“Parties” means the City, Castlepoint and Hummingbird and Party means the City, Castlepoint or Hummingbird;

“Payment Certifier” means Altus Helyar Inc. or such other quantity surveyor or other qualified professional mutually agreed upon by the Parties, each acting reasonably, for the purposes of this Agreement;

“Perfected Application” means a Completed Application which is recommended by City staff as indicated in a staff Report to Council thereon;

“Permits” means all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorizations required from any Authority or otherwise required by Law to construct and otherwise to carry out the Project in accordance with this Agreement;

“Permitted Encumbrances” means those encumbrances, restrictions and easements affecting title to the Total Lands, in existence on the 5<sup>th</sup> Business Day prior to the Execution Date, and which shall be assumed by Castlepoint on Closing and with respect to which title to the Private Lands (or the Commercial Lands, with respect to Option B) shall be subject on transfer of the Lands by the City to the Castlepoint on Closing;

“Permitted Investments” means investments permitted for a municipality in accordance with the provisions of Section 418(1) of the *Municipal Act*, 2001 (Ontario) and Regulation 438/97 made thereunder;

“Permitted Soft Costs” has the meaning given to it in Section 0;

“Person” means an individual, a corporation, a government or any department or agency thereof, a trustee, any unincorporated organization or association and the heirs, executors, administrators or other legal representatives of an individual;

“Planning Approvals” means obtaining an Official Plan amendment, if necessary, and a rezoning, both In Final Form, and shall also include any committee of adjustment variance increasing the GFA permitted to be constructed on the Private Lands;

“Postponement of Completion Payment” has the meaning assigned to it in Section 0;

“Postponement Payments” means payments required to be made by Castlepoint in accordance with Section 0 (in Option A) or Section 0 (in Option B) to postpone the date by which Castlepoint is obligated to Commence Construction of the Project as otherwise provided in Section 0 or Section 0, as the case may be;

“Preliminary Architectural Agreement” has the meaning given to it in Section 0;

“Presale Condition” has the meaning assigned to it in Section 0;

“Private Component” means the Private Lands and that portion of the Project to be created by Castlepoint on and within the Private Lands and which shall contain a condominium or rental residential component, and may also contain a hotel and/or retail/commercial facilities;

“Private Component Basement Costs” has the meaning given to it in Section 0;

“Private Component Construction Contract” means a fixed price construction contract to be entered into by Castlepoint with a contractor for the construction of the Private Component;

“Private Component Lease” means the lease to be granted on Closing by the City, as landlord, to Castlepoint, as tenant, respecting the Private Lands, which shall have a term commencing upon the Closing Date and expiring upon the Title Transfer Date;

“Private Component Plans and Specifications” has the meaning giving to it in Section 0;

“Private Lands” means that portion of the Total Lands on and within which the Private Component shall be created by Castlepoint being Parts 2, 3, 5 and 7 on the sketch attached as Schedule ”2”;

“Production Architects” has the meaning given to it in Section 0;

“Project” means effecting the Hummingbird Renovations, the creation of the Private Component and the creation of the Public Component (in the event of Option A) or the creation of the Commercial Component (in the event of Option B), as contemplated in this Agreement;

“Project Agreements” means the agreements and the leases referred to herein or annexed hereto as Schedules to this Agreement;

“Project Documents” has the meaning given to it in Section 0;

“Project Intellectual Property” mean the Intellectual Property which (or the subject matter of which) is created (i) with respect to the architecture of the Project, including external design, elevations and massing of the Project and the Final Plans; and (ii) with respect to the equipment, technology and software created in connection with the Public Component;

“Project Lender” means the Institutional Lender that provides financing to Castlepoint for the Private Component and those elements of the Hummingbird Renovations and Shared Facilities which are Castlepoint’s responsibility. For clarity, the term “Project Lender” shall also include the surety company engaged by Castlepoint for the purpose of providing deposit security to purchasers of

condominium units in the Private Component as required by the *Condominium Act*;

“Project Related Renovations” has the meaning given to it in Section 0;

“Public Component” means, in the event the Parties proceed with Option A, the Public Lands and that portion of the Project within and on the Public Lands which shall contain the physical facility to accommodate a series of interlocking public and entertainment attractions, as shall be determined by Hummingbird;

“Public Component Construction Contract” means a fixed price construction contract to be entered into by the City with a general contractor for the construction of the Public Component;

“Public Component Costs” means the costs (including both those referred to in the construction industry as the “hard” and “soft” costs) to create the Public Component which are estimated to be approximately \$220 per square foot. For clarity, this cost estimate is included for information purposes and to serve as an indication of what is financially feasible for Hummingbird in connection with the Public Component in the Option A scenario, but shall not be deemed to limit the determination of the costs of constructing the Commercial Component in an Option B scenario;

“Public Component Election” has the meaning given to it in Section 0;

“Public Component Plans and Specifications” has the meaning given to it in Section 0;

“Public Lands” means that portion of the Total Lands on and within which the Public Component shall be created being Parts 1, 4, 6, 8, 9, 10, 11, 14 and, in Option A scenario, Part 15 on the sketch attached as Schedule ”2”;

“Purchase Price” has the meaning assigned to it in Section 0 (or Section 0 if the Parties proceed with Option B);

“Receiver” has the meaning given to it in Section 0;

“Relief Event” means an event of Force Majeure or OMB Extension which adversely affects the time required in the performance of a Party’s obligations under this Agreement;

“Rental Payment” has the meaning assigned to it in Section 0;



“Required Construction Commencement Date” means the date on which Castlepoint is obligated to Commence Construction, being January 1, 2008 subject to a postponement thereof by a Relief Event or at Castlepoint’s election in accordance with Section 0 or Section 0 and except as otherwise provided in this Agreement;

“Required Commercial GFA” means, with respect to the Commercial Component, such amount of GFA as shall produce approximately 130,000 square feet of GFA within the existing footprint of the Commercial Component;

“Required Holdbacks” has the meaning assigned to it in Section 0;

“Residential Tower” means the residential tower to be created on that portion of the Total Lands described herein as the Private Component;

“Responding Party / Parties” has the meaning given in Section 0;

“Response” has the meaning given in Section 0;

“Security LC” has the meaning given in Section 0;

“Settlement Date” has the meaning assigned to it in Section 0;

“Shared Facilities” has the meaning given in Section 0 (with respect to Option A) and Section 0 (with respect to Option B);

“Site Plan” means the draft site plan respecting the Project annexed hereto as Schedule ”6” as may be revised by Castlepoint and Approved by Hummingbird, each acting reasonably, from time to time;

“Site Plan Approval” means approval of the Site Plan or a site plan permitting a project not materially different from the Project contemplated in the Site Plan pursuant to Section 41 of the *Planning Act*, with no conditions that are Extraordinary Conditions;

“Step-In Agreement” means the agreement among the Parties and the Project Lender described in Section 0;

“Substantial Completion” means:

- (a) except as provided in subparagraph (b), with respect to the Private Component, completion thereof to the same extent as a “contract” being “substantially performed” in accordance with *Construction Lien Act* (Ontario);

- (b) for the purposes of Sections 0 and 0, with respect to the Private Component, the Private Component shall be completed to the same extent as a “contract” being “substantially performed” in accordance with the *Construction Lien Act* (Ontario) except that:
- (i) the cost to complete the contract referred to in subparagraph (b) of the definition contained in Section 2(1) of the *Construction Lien Act* (Ontario) shall be a total of five percent of the balance of the contract price, rather than the percentages referred to in such subparagraph (b); and
- (ii) the exterior cladding shall be totally completed;

“Surveyor” has the meaning given to it in Section 0;

“Teraview Electronic Registration System” or “TERS” has the meaning given to it in Section 0;

“Termination Options means the options in favour of the City to terminate the Commercial Component Lease, the principles of which are described in Schedule “4”, and “Termination Option” has a corresponding meaning;

“Time of Adjustments” has the meaning given to it in Section 0 (or Section 0 in the Option B scenario);

“Time Relief” has the meaning given to it in Section 0;

“Title Transfer Date” has the meaning given to it in Section 0 or Section 0, as the context requires;

“Total Completion” means, a contract deemed to be “completed” in accordance with the *Construction Lien Act*;

“Total Lands” means the lands and premises municipally described in Schedule “1” annexed hereto;

“Transfer” means a transfer or conveyance of the Private Component to Castlepoint in accordance with Section 0 (or Section 0 in the Option B scenario);

“Work” means services performed or goods supplied by Castlepoint, its employees, agents, independent contractors (including subcontractors of a general contractor) in connection with the creation of the Project.

## 1.2 Construction and Interpretation:

In this Agreement, including the Recitals, Schedules and appendices to this Agreement, except where expressly stated to the contrary or the context otherwise requires:

- (a) the headings to Sections and Schedules are for convenience only and will not affect the interpretation of this Agreement;
- (b) each reference in this Agreement to “Section” and “Schedule” is to a Section of, and a Schedule to, this Agreement;
- (c) each reference to a statute is deemed to be a reference to that statute and any successor statute, and to any regulations, rules, policies and criteria made under that statute and any successor statute, each as amended or re-enacted from time to time;
- (d) each reference to a ministry, office, agency or similar body of any relevant Authority is deemed to be a reference to any successor or replacement of such ministry, office, agency or similar body;
- (e) words importing the singular include the plural and vice versa and words importing gender include all genders;
- (f) in the event that any time period referred to in this Agreement shall fall upon a day which is not a Business Day, such time period shall be deemed to expire on the first Business Day thereafter;
- (g) references to time of day or date mean the local time or date in Toronto, Ontario;
- (h) all references to amounts of money mean lawful currency of Canada;
- (i) an accounting term has the meaning assigned to it, and all accounting matters will be determined, in accordance with GAAP consistently applied;
- (j) the word “written” includes printed, typewritten, faxed or otherwise capable of being visibly reproduced at the point of reception and “in writing” has a corresponding meaning;
- (k) the words “include” and “including” are to be construed as meaning “including, without limitation”; and
- (l) the division of this Agreement into separate Articles, Sections, Subsections and the provision of a table of contents are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

### 1.3 Severability:

Each provision of this Agreement is severable. If any provision of this Agreement is or becomes illegal, invalid or unenforceable in any jurisdiction, the illegality, invalidity or unenforceability of that provision will not affect the legality, validity or enforceability of the remaining provisions of this Agreement or the legality, validity or enforceability of that provision in any other jurisdiction except that if:

- (a) on the reasonable construction of this Agreement as a whole, the applicability of the other provision presumes the validity and enforceability of the particular provision, the other provision will be deemed also to be invalid or unenforceable; and
- (b) as a result of the determination by a court of competent jurisdiction that any part of this Agreement is unenforceable or invalid and, as a result of such determination or this Section 0, the basic intentions of the Parties in this Agreement are entirely frustrated, the Parties will use reasonable efforts to amend, supplement or otherwise vary this Agreement to confirm their mutual intention in entering into this Agreement.

### 1.4 Governing Law:

This Agreement and each of the documents contemplated by or delivered under or in connection with this Agreement are governed exclusively by, and are to be enforced, construed and interpreted exclusively in accordance with, the laws of Ontario and the laws of Canada applicable in Ontario which will be deemed to be the proper law of this Agreement.

### 1.5 Time of Essence:

Time shall be of the essence of this Agreement.

### 1.6 Entire Agreement

This Agreement, the Project Agreements, any other agreements herein contemplated to be entered into among, by or with the Parties hereto and all documents contemplated by or delivered under or in connection with this Agreement constitute the entire agreement between the Parties with respect to the subject matter of this Agreement and supersede all prior agreements, negotiations, discussions, undertakings, representations, warranties and understandings, whether written or oral, express or implied, statutory or otherwise, of the Parties hereto, and there are no other warranties, representations or agreements between the Parties in connection with the subject matter hereof.

1.7 Paramountcy:

In the event of a conflict between this Agreement (which for the purposes of this Section 0 only, means this Agreement excluding the Schedules hereto) and the Schedules, or a conflict between any of the Schedules, the following shall apply:

- (a) where any of the Schedules are inconsistent with the provisions of this Agreement, this Agreement and the intent of the Parties contained in this Agreement shall govern the Schedules hereto; and
- (b) provisions contained in any of the Schedules which are more detailed than the provisions of this Agreement (and are not in conflict with this Agreement) or any of the other Schedules, shall govern.

1.8 Schedules:

The following schedules are attached to this Agreement and form an integral part hereof:

- Schedule "1" - Total Lands
- Schedule "2" - Sketch - Private Lands, Public Land and Commercial Lands
- Schedule "3" - Castlepoint Principals
- Schedule "4" - Principles Respecting Termination Options contained in Commercial Component Lease
- Schedule "5" - Parking Garage Principles
- Schedule "6" - Draft Site Plan
- Schedule "7" - Insurance Requirements During Demolition and Construction Phase of Project
- Schedule "8" - Project Related Renovations
- Schedule "9" - Hummingbird Necessary Renovations
- Schedule "10" - Hummingbird Preservation Measures
- Schedule "11" - Scope of Area to be Included in Project Related Renovations
- Schedule "12" - Description of Items included in Soft Costs
- Schedule "13" - Principles Respecting Allocation of Structural and Support Costs
- Schedule "14" - Form of Letter of Credit
- Schedule "15" - GST Certificate
- Schedule "16" - Form of Solicitor's Opinion to City and Hummingbird
- Schedule "17" - Current Fair Wage Policy of City
- Schedule "18" - Labour Trades Contractual Obligations in Construction Industry

(2) Project alternatives:

2.1 Two Alternatives:

There shall be two alternatives for the development of the Project (each of which alternatives being referred to in this Agreement as an "Option"), as follows:

- (a) The Parties shall proceed with Option A if by resolution of Council, the City has determined that sufficient funds are available to pay for the Public Component Costs and elects to proceed with Option A (the “Option A Election”). If the City staff is satisfied in its Discretion that sufficient funds are or shall be available to pay for the Public Component Costs, City staff shall recommend to Council that it elect to proceed with the Option A Election.
- (b) If the City notifies Castlepoint in writing that it has elected to proceed with Option B (the “Option B Notice”), or if the City has not exercised the Option A Election by notice in writing to Castlepoint on or before that date which is 180 days prior to the Required Construction Commencement Date (the “Notification Date”), then the Parties will proceed with Option B as provided for in this Agreement. For clarity, in the event that Castlepoint elects to delay the Required Construction Commencement Date as permitted in accordance with the provisions of this Agreement, the Notification Date shall be extended accordingly.

## 2.2 Synopsis of Options:

The provisions contained in this Section 0 are a brief synopsis of each of the Options, the purpose of which is a general description of each of the Options. The detailed provisions regarding the selection of the Option and the details of each of the Options set out below shall be paramount to the provisions contained in this Section 0.

### (1) Option A:

The first development alternative for the Project (“Option A”) includes the following:

- (a) Castlepoint shall develop the Private Component; and
- (b) the City shall cause the Public Component to be constructed. For clarity, Castlepoint will be responsible for obtaining all development approvals necessary to proceed with the Public Component without compensation or a fee payable by the City or Hummingbird. Hummingbird shall have its own project manager overseeing the design process, development approval process and preparing for construction. Hummingbird will enter into its own construction contract for the Public Component. Castlepoint shall enter into its own construction contract for the Private Component. With respect to the Hummingbird Renovations and Shared Facilities, these matters will be allocated between the Construction Contract for the Private Component and the Construction Contract for the Public Component in accordance with this Agreement; and

- (c) the Parties shall enter into the Construction Procedures Agreement and the MESFA Agreement.

(2) Option B

The second development alternative for the Project (“Option B”) includes the following:

- (a) Castlepoint shall develop the Private Component;
- (b) Castlepoint shall receive a grant of the Commercial Component Lease, construct the Commercial Component and provide the City with the options to terminate the Commercial Component Lease as provided for therein; and
- (c) the Parties shall enter into the Construction Procedures Agreement and MESFA Agreement.

2.3 Selection of Option:

Castlepoint agrees that it shall, subject to satisfaction of the conditions contained in Section 0 to 0 both inclusive, proceed with Option A if the City has exercised the Option A Election on or before the Notification Date failing which, Castlepoint shall proceed with Option B.

(3) Pre-closing Obligations of Castlepoint:

3.1 Scope of Article:

The provisions contained in this Article 0 set out certain of the obligations of Castlepoint commencing upon the Execution Date to and including Closing. However, the inclusion of the provisions in this Article respecting Castlepoint’s obligations prior to Closing shall not derogate from the obligations of Castlepoint prior to Closing contained in other Articles of this Agreement, as the inclusion of the obligations in this Article are so provided for convenience only and are not intended nor shall they be deemed to be restrictive.

3.2 Planning Applications:

- (1) Forthwith following the Execution Date, Castlepoint shall submit a Completed Application for and diligently and continuously pursue and use its commercial best efforts to obtain Planning Approvals necessary to satisfy the Development Approval Condition, and the Option B Development Approval Condition in the event the Parties proceed with Option B (collectively referred to as the “Development Approvals”). In furtherance of expediting the Development Approvals, Castlepoint shall submit and pursue an application for site plan approval for the Site Plan

pursuant to Section 41 of the *Planning Act* contemporaneously with an application for rezoning of the Private Lands and the Public Lands or the Commercial Lands, as the case may be, to permit the Project.

- (2)
  - (a) Subject to the provisions of subsection (b), all costs associated with the Development Approvals shall be the responsibility of and paid for by Castlepoint; and
  - (b) to the extent the costs associated with the Development Approvals fairly and equitably relate to the Public Component (as mutually agreed upon between the City and Castlepoint, and failing agreement, as determined by Arbitration), such costs shall be the responsibility of the City (the “Hummingbird Development Costs”). To the greatest extent possible, Castlepoint shall arrange for all development costs to be tracked and allocated between the Private Component and Public Component, subject to Approval of Castlepoint and the City, acting reasonably. Provided the City has exercised the Option A Election before Closing, the City shall pay the Hummingbird Development Costs to Castlepoint on Closing. In the event that the City has not exercised the Option A Election prior to Closing, but the City exercises the Option A Election after Closing, then the City shall pay the Hummingbird Development Costs to Castlepoint as soon as reasonably possible after the date of the Option A Election. For clarity, the Hummingbird Development Costs shall only be payable by the City if the Closing occurs.
- (3) The City, solely in its capacity as owner of the Private Lands and the Public Lands shall provide its consent to the applications required to be made by Castlepoint to obtain the Development Approvals, subject to the rights and obligations of the City as a planning authority referred to in Section 0.

### 3.3 Plans and Specifications – Private Component:

Commencing upon the Execution Date, Castlepoint shall diligently, continuously and using its commercial best efforts as would a prudent real property developer prepare, in consultation with Hummingbird, detailed plans and specifications sufficient to obtain all Permits, including, all building permits required in accordance with the *Building Code Act* (Ontario) and all other Laws as may be required for the construction of the Private Component:

- (a) in substantial conformity with the Initial Plans; and
- (b) as Approved by the City, acting reasonably with respect to Hummingbird Design Matters;

(the “Private Component Plans and Specifications”).



3.4 Plans and Specifications – Public Component, Commercial Component and Shared Facilities:

Commencing on the Execution Date, Castlepoint shall diligently, continuously and using its commercial best efforts prepare, in consultation with Hummingbird, detailed plans and specifications sufficient to obtain all Permits, including all building permits required in accordance with the *Building Code Act* (Ontario) and all other Law as may be required to construct the Public Component or the Commercial Component, as the case may be and the Shared Facilities:

- (a) in substantial conformity with the Initial Plans;
- (b) with respect to the Public Component or the Commercial Component, as the case may be and the Shared Facilities, as Approved by the City, acting reasonably with respect to Hummingbird Design Matters, subject to subsection (c) below;
- (c)
  - (i) with respect to the number of floors in the Commercial Component as Approved by the City in its Discretion; and
  - (ii) with respect to the floor-to-ceiling heights of the Commercial Component, such floor-to-ceiling heights must be adequate for a public institution, which Castlepoint acknowledges must be higher than a commercial project; subject to the foregoing, Hummingbird shall act reasonably.

(the “Public Component Plans and Specifications” or the “Commercial Component Plans and Specifications”, as the case may be, in each case including plans and specifications respecting the Shared Facilities).

3.5 Development of Plans and Specifications:

In order to expedite the finalization of the Private Component Plans and Specifications and the Public Component Plans and Specifications or the Commercial Component Plans and Specifications (collectively, the “Plans and Specifications”):

- (a) the Parties shall cooperate with each other to develop expeditiously the Plans and Specifications, and each of the Parties shall act diligently and shall review and provide comments on drafts of Plans and Specifications as soon as reasonably possible;
- (b) following the Execution Date, the development of the Plans and Specifications shall be based on the Initial Plans and Specifications;
- (c) Castlepoint shall provide draft plans to the City at least at those stages of draft plans commonly referred to as the “design development”,

“schematic” and “construction drawing” stages for the Approval of the City as required in accordance with this Agreement and if so Approved by the City (the “Approved Stage of Drawings”) each subsequent stage of plans shall then be in conformity with the immediately preceding Approved Stage of Plans, except as mutually agreed upon between Castlepoint and the City, each acting reasonably;

- (d) Castlepoint shall have carriage of the development of the Plans and Specifications, except that the City shall take carriage of the development of the Public Component Plans and Specifications following the earlier of the Closing and, if the Option A Election is exercised, following the Option A Election.

### 3.6 Allocation of Design and Costs of Design:

- (1) In addition to the Architect, Castlepoint shall engage Page and Steele (or such other architectural firm as Approved by the City, acting reasonably) as the architectural firm to produce construction drawings (the “Production Architects”).
- (2) With respect to the Public Component, the Architect and Production Architects shall design that portion of the Public Component commonly referred to in the construction industry as “the shell and cladding” and Hummingbird shall separately engage an architect for the remainder of the Public Component (the “Interior Architect”).
- (3) Castlepoint, with the approval of the City, acting reasonably, shall engage a firm of mechanical and electrical engineers for the plan of the overall design of the mechanical and electrical systems to the Project, excluding the Public Component and the Hummingbird Centre (the “Overall M&E Engineer”).
- (4) Hummingbird shall engage a firm of engineers with respect to mechanical and electrical matters relating to the Public Component and the Hummingbird Centre (the “Hummingbird Engineer”).
- (5) The costs of the Architect and the Production Architect respecting the finalization of the Plans and Specifications of the Private Component and the “shell” of the Public Component, shall be allocated between Castlepoint and the City in the same proportion as the GFA of the Private Component bears to the Public Component.
- (6) Costs of the Architect and Production Architect with respect to services performed relating to construction administration of the Project shall be allocated between Castlepoint and the City on a fair and equitable basis, as mutually agreed upon between the parties each acting reasonably, and failing agreement as determined by the Dispute Resolution Procedure;

provided that there shall be no cost allocated to the City with respect to architectural services respecting construction once the construction has reached the top of the Public Component.

- (7) Hummingbird shall be responsible for the costs of the Interior Architect.
- (8) Castlepoint shall be responsible for the engineering costs relating to the electrical vaults, the entire cost of which shall be the responsibility of Castlepoint.
- (9) Except as otherwise specified in this Section 0, the costs of the Overall M&E Engineer, the Hummingbird Engineer and other consultants engaged in connection with the creation of the Project shall be allocated between Castlepoint and the City on a fair and equitable basis as mutually agreed upon between the Parties, each acting reasonably, and failing agreement, as determined by Dispute Resolution Procedure, except for such consultants as are utilized exclusively, in connection with the Private Component or the Public Component (or the Hummingbird Centre), in which event the costs of such consultants shall be born by Castlepoint or the City, respectively.

### 3.7 Encroachment:

In the event that the Development Approval Condition is satisfied but the Planning Approvals or Site Plan Approval respecting the Project does not permit an encroachment of the Residential Tower into the air space above the public road known as “the Esplanade” as such encroachment is presently shown in the Initial Plans, the Parties shall amend the Private Component Plans and Specifications and the Public Component Plans and Specifications (or the Commercial Component Plans and Specifications, as the case may be) to the extent necessary to avoid the requirement for such encroachment, such amendments to be mutually agreed between the Parties, each acting reasonably.

### 3.8 Architectural Contract:

- (1) Castlepoint represents to the City that it has entered into a preliminary architectural agreement with the Architect in the form of the Agreement a true copy of which has been delivered to Hummingbird prior to the execution of this Agreement (the “Preliminary Architectural Agreement”).
- (2) Castlepoint shall use its commercially reasonable efforts to enter into the Architectural Contract on or before the 180<sup>th</sup> day following the Execution Date.

- (3) Castlepoint shall not enter into the Architectural Contract or any agreement to amend the Architectural Contract or waive any of the provisions contained therein without the Approval of the City, acting reasonably.
- (4) Contemporaneously with the execution of this Agreement, Castlepoint shall deliver to the City an agreement executed by the Architect and Castlepoint wherein:
  - (a) the Architect acknowledges that the Preliminary Architectural Agreement is in good standing;
  - (b) the Architect acknowledges the Hummingbird Design Matters with respect to which Hummingbird shall have Approval, acting reasonably;
  - (c) the Architect acknowledges that the Architectural Contract may not be amended without the prior Approval of the City, acting reasonably; and
  - (d) the Architect acknowledges that the City shall have a permanent, irrevocable, perpetual and royalty free license to use, reproduce and otherwise exploit throughout the world the Intellectual Property associated with all of the drawings and designs of the Project created pursuant to the plans and specifications for the Project.

### 3.9 Parking Agreement:

- (1) Castlepoint shall diligently and continuously use its commercial best efforts to enter into the Parking Garage Contract – Private Component in accordance with the principles described in Schedule "5".
- (2) Castlepoint acknowledges that the City may enter into the Parking Garage Contract – Hummingbird Centre in accordance with the principles enumerated in Schedule "5, in which event Castlepoint and the City shall enter into the Parking Garage Cooperation Agreement on terms and conditions mutually agreed upon between the Parties, each acting reasonably.
- (3) Castlepoint shall investigate and evaluate the inclusion of parking requirements for the Project within the Total Lands and consult with Hummingbird in connection therewith.
- (4) The plans and specifications respecting any pedestrian connection (below or above grade) between the Private Component and the Parking Garage (the "Pedestrian Connection") shall be subject to the Approval of the City

and Hummingbird. The Pedestrian Connection shall be constructed by Castlepoint at its expense substantially in accordance with the Final Plans. Castlepoint shall, at its expense, make application to the City for a license for the Pedestrian Connection and Castlepoint acknowledges that the license shall be in the standard form required by the City in connection therewith.

3.10 Sponsorship Accommodation:

In the event that Hummingbird is able to enter into an arrangement with a sponsor (the "Sponsorship Arrangement") which relates to an aspect of the Public Component or otherwise contemplates a date for Commencement of Construction of the Public Component prior to the date that Castlepoint is required to Commence Construction of the Public Component in accordance with this Agreement, Castlepoint shall negotiate with Hummingbird in good faith to accommodate Hummingbird and the prospective sponsor in order to facilitate the Sponsorship Arrangement and assist Hummingbird in completing the Sponsorship Arrangement at no fee or charge to Hummingbird or the City. However, any agreement to facilitate the Sponsorship Arrangement shall not derogate from the rights of Castlepoint contained in this Agreement and shall not obligate Castlepoint to expend any funds in order to implement the Sponsorship Agreement. The provisions contained in this Section shall apply following Closing, if the Sponsorship Arrangement had not been entered into prior to Closing.

3.11 Heritage Designation:

- (1) Castlepoint acknowledges that Hummingbird Centre has been included in the City's inventory of properties which will become the subject matter of an application to the City for a designation by-law under authority of the *Ontario Heritage Act*, as being of architectural and historic value or interest (the "Heritage Designation"). It is anticipated that this application may be made in conjunction with the applications for Planning Approvals and Site Plan Approval for the Project, without fettering the City's discretion.
- (2) Castlepoint shall comply with any and all requirements under the *Ontario Heritage Act* and other applicable legislation and/or any by-law or regulation pursuant to such act or legislation (collectively "Heritage Legislation") with regard to those matters which are its responsibility with respect to the Hummingbird Centre and to ensure that all renovations, repairs and any and all other work undertaken by Castlepoint on, at or upon Hummingbird Centre are in full compliance with the *Ontario Heritage Act*.

- (3) Castlepoint shall assist in the obtaining of the Heritage Designation, without charge or cost to Hummingbird or the City including, without limitation, engaging ERA Research Associates Inc. for the services of Michael McLelland or such other heritage architect as approved by the City acting reasonably, as a heritage architect for the Hummingbird Designation and related matters, and completing a comprehensive Heritage Impact Statement in the form required by the “Toronto Development Guide” as part of its Development Approvals applications. The third party reasonable expenses incurred by Castlepoint respecting the obtaining of the Hummingbird Designation shall be included in the costs of obtaining Development Approvals and shared between Castlepoint and Hummingbird as provided in Section 0.

3.12 Composition of Private Component:

Castlepoint shall provide Notice to the City advising of the use composition to be contained in the Private Component as part of its Completed Application for Site Plan Approval.

3.13 Pumping Station:

Castlepoint acknowledges that a sewage pumping station and related venting system exists and shall continue to exist or may be upgraded and/or expanded within the Total Lands and shall make such accommodations to the design elements of the Private Component Plans and Specifications as shall be necessary at Law in connection with the creation of the Project in connection with the continued existence and upgrading and/or expansion of the sewage pumping station within the Total Lands.

3.14 PATH System:

Castlepoint shall design the Project such that there shall be one or more knockout panels to connect the Project to the City of Toronto “PATH” system at such location or locations as shall be Approved by Hummingbird.

4. Conditions to Closing:

4.1 Conditions In Favour of City:

If any of the conditions contained in Sections 0 to 0, both inclusive are not performed or fulfilled on or before 5:00 p.m. on the Closing Date, the City may by notice in writing to Castlepoint terminate this Agreement.

4.2 Obligations of Castlepoint:

On Closing, all of the covenants and obligations contained in this Agreement to be complied with or performed by Castlepoint on or before Closing, shall have been complied with or performed in all material respects.

4.3 Representations and Warranties of Castlepoint:

On Closing, the representations and warranties of Castlepoint set out in Section 0 shall be true and accurate in all material respects and there shall have been no material changes as of Closing to any of such representations and warranties and Castlepoint shall have delivered to the City a certificate of Castlepoint signed by a senior officer of Castlepoint without personal liability, having knowledge of the matters certified therein (a "Castlepoint Certificate") with respect thereto.

4.4 Event of Default

On Closing, there shall be no outstanding Event of Default by Castlepoint, nor shall there be any breach of this Agreement by Castlepoint or any other matter which has occurred which, if not cured, shall result in an Event of Default.

4.5 Private Component Plans and Specifications:

On or before Closing, there shall be plans and specifications with respect to the Private Component advanced to the level of detail commonly referred to as design development, in substantial conformity with the Initial Plans and as Approved by the City, acting reasonably with respect to Hummingbird Design Matters.

4.6 Public Component Plans and Specifications:

On or before Closing, there shall be plans and specifications with respect to the Public Component (or the Commercial Component, as the case may be) advanced to the level of detail commonly referred to as design development, in substantial conformity with the Initial Plans and as Approved by the City, acting reasonably with respect to Hummingbird Design Matters.

4.7 Architectural Contract:

On Closing, the Architectural Contract shall have been entered into and be in good standing and Castlepoint shall have delivered an estoppel certificate from the Architect incorporating the principles expressed in Section 0.

4.8 Parking Agreement:

On or before Closing, the Parking Garage Contract - Private Component and the Parking Garage Cooperation Agreement shall have been entered into by Castlepoint and be in good standing and Castlepoint shall have delivered an

estoppel certificate from GO Transit confirming same in a form Approved by the City Solicitor, such Approval not to be unreasonably withheld. Alternatively, Castlepoint shall have otherwise satisfied the parking requirements for the Private Component in a manner Approved by the City.

4.9 Development Approval:

On or before Closing the Development Approval Condition shall have been satisfied.

4.10 Option B Development Approval:

If the Parties shall be proceeding with Option B, the Option B Development Approval Condition shall also have been satisfied.

4.11 Closing Documents:

Without limiting the generality of the provision contained in Section 0 hereof, on Closing, Castlepoint shall have complied with its obligations respecting deliveries on Closing.

4.12 Consequence of Failure of Condition:

- (1) The conditions set forth in Sections 0 to 0, both inclusive are for the sole benefit of the City and may be waived in whole or in part by the City by Notice to Castlepoint on or before 5:00 p.m. on the Closing Date. If the City does not notify Castlepoint on or before 5:00 p.m. on the Closing Date that a condition set forth in Sections 0 to 0, both inclusive has not been satisfied, such condition shall be deemed to have been satisfied.
- (2) In the event that any of the conditions set forth in Sections 0 to 0, both inclusive is not satisfied (or waived by the City as hereinbefore provided), this Agreement shall be terminated, in which event the City shall be released from all obligations under this Agreement and shall be entitled to retain the Deposit.

4.13 Conditions for Castlepoint:

If any of the conditions contained in Sections 0 to 0 are not performed or fulfilled on or before 5:00 p.m. on the Closing Date, Castlepoint may by Notice in writing to the City terminate this Agreement.

4.14 Development Approval:

On or before Closing, the Development Approval Condition shall have been satisfied.



4.15 Option B Development Approval:

If the Parties are proceeding with Option B, the Option B Development Approval Condition shall also have been satisfied on or before Closing.

4.16 Title:

On Closing title to the Private Lands (and the Commercial Component in the event the Parties proceed with Option B) shall be free and clear of all encumbrances, other than Permitted Encumbrances.

4.17 Closing Documents:

The City shall have delivered the City Closing Documents on Closing.

4.18 Consequence of Failure of Condition:

- (1) The conditions set forth in Sections 0 to 0, both inclusive are for the sole benefit of Castlepoint and may be waived in whole or in part by Castlepoint by Notice to the City on or before 5:00 p.m. on the Closing Date. If Castlepoint does not notify the City on or before 5:00 p.m. on the Closing Date that a condition set forth in Sections 0 to 0, both inclusive has not been satisfied, such condition shall be deemed to have been satisfied.
- (2) In the event that any of the conditions set forth in Sections 0 to 0, both inclusive are not satisfied (or waived by Castlepoint as hereinbefore provided), this Agreement shall be terminated, in which event the Parties shall be released from all obligations and liabilities under this Agreement and Castlepoint shall be entitled to the return of the Deposit, unless the condition contained in Section 0 or Section 0 was not satisfied and Castlepoint failed to use its commercial best efforts to satisfy such condition, in which case the City shall be entitled to retain the Deposit.

4.19 Commercial Component Lease:

This Agreement is conditional on the Parties agreeing in writing on the form of the Commercial Component Lease within 90 days from the Execution Date or such later date as the Parties shall agree in writing, failing which this Agreement shall be terminated and be of no further force or effect and the Deposit shall be returned to Castlepoint and the Parties shall have no further obligations or liabilities to each other of any nature or kind whatsoever.

5. Representations and Warranties:

5.1 Representations and Warranties of Castlepoint:

Castlepoint represents and warrants to the City that at the date of this Agreement:

- (a) Castlepoint is a duly incorporated and validly existing company under the Business Corporations Act (Ontario) and has full power and capacity to enter into, carry out the transactions contemplated by and duly observe and perform all its obligations contained in this Agreement;
- (b) the execution and delivery of this Agreement and all documents, instruments and agreements required to be executed and delivered by Castlepoint pursuant to this Agreement, and the completion of the transactions contemplated by this Agreement, have been duly authorized by all necessary corporate action on the part of Castlepoint, and this Agreement has been duly executed and delivered by Castlepoint and constitutes a legal, valid and binding obligation of Castlepoint enforceable in accordance with its terms, except as may be limited by bankruptcy, insolvency, liquidation, reorganization, reconstruction and other similar laws of general application affecting the enforceability of remedies and rights of creditors and except that equitable remedies such as specific performance and injunction are in the discretion of a court;
- (c) all required third party consents to the execution by Castlepoint of, and performance of its obligations under, this Agreement have been received;
- (d) except in respect of liabilities that have arisen in the ordinary course of the management of the affairs of Castlepoint in preparing to enter into this Agreement and all other agreements referred to herein, Castlepoint has no material financial obligations;
- (e) there are no current and, to the Knowledge of Castlepoint, there are no pending or threatened actions, claims, demands, lawsuits, assessments, arbitrations, judgments, awards, decrees, orders, injunctions, prosecutions, or other proceedings of, by, against, or relating to, Castlepoint which could have a material adverse effect on the ability of Castlepoint to perform its obligations under this Agreement and Castlepoint does not Have Knowledge of any basis for any such action, claim, demand, lawsuit, assessment, arbitration, judgment, award, decree, order, injunction, prosecution or other proceeding;
- (f) the information concerning the Castlepoint Principals and Castlepoint and the Directors, Officers and Shareholders of Castlepoint set out in Schedule "3" is true and accurate;

- (g) other than the Castlepoint Principals and Shareholders of Castlepoint set out in Schedule "3", there is no Person at the date of this Agreement or at any time entitled to or obligated to subscribe for or take by means of transfer or by conversion of any form of investment or security any securities or voting rights in Castlepoint (including any such entitlement or obligation that may arise in exercise of an option enforceable by or against Castlepoint), nor cause any alteration to the constitution or power of the board of directors of Castlepoint;
- (h) Castlepoint has satisfied itself as to the purposes of the Project and the nature and extent of the risks assumed by it in relation to the Project;
- (i) Castlepoint has delivered to the City copies of all agreements to which Castlepoint is a Party and which are material to the Project;
- (j) there has been no material adverse change in any of the information respecting financial or other matters provided by Castlepoint to the City in conducting due diligence of the City prior to entering into this Agreement; and
- (k) the Preliminary Architectural Agreement is unamended and in full force and effect.

## 5.2 No Representations by the City or Hummingbird:

Castlepoint acknowledges and agrees that it has entered into this Agreement on an "as is where is" basis and that the City and Hummingbird have made no representations or warranties of any nature or kind whatsoever to Castlepoint with respect to the Total Lands, the Project or otherwise and Castlepoint is relying solely on its own investigation with respect thereto, including, without limitation:

- (a) its environmental condition, state of repair, deficiencies and encroachments from and onto the Total Lands; and
  - (b) all existing buildings, fixtures, structures, infrastructure, equipment, improvements, installations or inclusions of any kind, whether below-grade or above-grade, and whether apparent on a visual inspection of the Total Lands or otherwise, and whether or not within the knowledge or imputed knowledge of the City, its officers, employees, agents, representatives, contractors or elected and appointed officials (collectively, the "Existing Improvements").
- (2) (a) The City has not made, does not make, and shall not be required to provide any warranty or representation with respect to the physical or environmental condition of the Total Lands or with respect to the condition or existence of any Existing Improvements thereon, including, but without

limitation, the condition of the soil or groundwater, both surface and subsurface, or the existence of any Hazardous Substance in, on, under or in the vicinity of the Total Lands, or with respect to any deficiencies encroachments affecting the Total Lands (environmental or otherwise).

- (b) The City shall have no liability or obligation with respect to the value, state or condition (environmental or otherwise) of the Total Lands or with respect to the existence, location, value, state or condition (environmental or otherwise) of any Existing Improvements on the Total Lands, subject only to responsibility for any environmental condition specifically identified in and existing as of the date of the environmental report to be prepared by Shaheen Peaker anticipated to be dated July 21, 2006 obtained by Castlepoint respecting the Total Lands, other than the Private Lands and that portion of the Total Lands containing shared structure. The obligation of Hummingbird shall be subject to the right of Hummingbird to cause a peer review of the report and to the extent that the consultant engaged by Hummingbird and Shaheen Peaker fail to agree on any aspect of the report, such dispute shall be resolved by determination of the Authority having jurisdiction with respect thereto. Responsibility for remediation of lands beneath the Public Component or Private Component shall be the responsibility of the City or Castlepoint, to the extent that each receives the benefit of the land being so remediated.
  - (c) To the extent that caissons or other supporting elements are required for the Project that benefit both the Public Component and the Private Component, the remediation costs resulting therefrom shall be shared between Castlepoint and Hummingbird according to the same principles as set out in Schedule 13.
- (3) The provisions of this Section 0 shall be accepted and assumed by Castlepoint on Closing.

## 6. Surveys and R-Plans:

### 6.1 Creation of Separate Parcels

- (1) In order to delineate the Total Lands for the purposes of this Agreement, the Parties shall cooperate in the preparation by the City Surveyor (the "Surveyor") of a three-dimensional survey defining the legal boundaries of each of the Public

Component (or the Commercial Component, as the case may be), the Private Component and the Easements.

- (2) The survey shall be prepared in accordance with the Initial Plans and such further plans and specifications respecting the Project as shall have been prepared by the Architect and Approved by the City (such Approval not to be unreasonably withheld or delayed) in accordance with Sections 0 and 0.
- (3) When the survey has been finalized and Approved by the Parties (acting reasonably), the Surveyor shall prepare a strata reference plan (the “R-Plan”) based on the survey and deposit same in the applicable Land Titles Office.
- (4) For clarity, the Parties shall cause the preparation of the survey to be commenced forthwith following the Execution Date and shall diligently and continuously use commercially reasonable efforts to cause the survey and R-Plan to be finalized as soon as possible and in any event not later than 15 Business Days prior to the Closing Date.
- (5) The reasonable costs of preparing the survey and the R-Plan shall be shared equally between Castlepoint and the City.

## 6.2 As-Built R-Plan

- (1) The MESFA Agreement shall provide that upon the Substantial Completion of the Project, the Parties shall cooperate so as to create a new strata reference plan reflecting the boundaries of the “as-built” Project (the “As-Built R-Plan”). It is anticipated that the As-Built R-Plan shall be prepared by a third party Ontario Land Surveyor Approved by the Parties, acting reasonably. The As-Built R-Plan shall be prepared at the expense of Castlepoint and shall be completed and registered in the applicable Land Titles Office as soon as possible after Substantial Completion of the Project.
- (2) Upon the registration of the As-Built R-Plan, the Parties shall effect such reconveyances as shall be necessary to readjust boundaries of the Private Component, the Public Component and the Easements to reflect the boundaries set forth in the As-Built R-Plan.

## 7. OPTION A

### 7.1 Scope of Article

The provisions contained in this Article 0 apply in the event that the City has exercised the Option A Election. The inclusion of certain provisions applicable to circumstances respecting Option A shall not derogate from provisions contained in other Articles of this Agreement relating to Option A (or which apply to either Option A or Option B), as the provisions respecting Option A are provided in this Article for convenience only and are not intended nor shall they be deemed to be restrictive.

## 7.2 Agreement of Purchase and Sale

The City agrees to sell the Private Lands to Castlepoint and Castlepoint agrees to purchase the Private Lands from the City for the Purchase Price and on and subject to the terms and conditions of this Agreement.

## 7.3 Purchase Price

- (1) The purchase price for the Private Lands (the “Purchase Price”) shall be equal to the sum of:
  - (a) Fifteen Million (\$15,000,000.00) Dollars; and
  - (b) Thirty-Five (\$35.00) Dollars multiplied by the number of square feet of GFA contained within the Approved GFA in excess of 428,571 square feet of GFA (the “Excess GFA”).
- (2) The Purchase Price shall initially be calculated as at the Closing Date. In the event that subsequent to Closing Castlepoint shall obtain a Planning Approval for additional Approved GFA in excess of 428,571 square feet of GFA or the Excess GFA if same was obtained prior to Closing (collectively, the “Additional GFA”), the Purchase Price shall be increased by Thirty-Five (\$35.00) Dollars multiplied by the number of square feet of Additional GFA, Adjusted for Inflation.

## 7.4 Deposit:

- (1) Castlepoint shall pay a deposit in the amount of One Million Five Hundred Thousand (\$1,500,000.00) Dollars by certified cheque or bank draft to the City (the “Deposit”) on account of the Purchase Price on the Execution Date.
- (2) The Deposit shall be held in trust by the City and placed in a Permitted Investment or Permitted Investments by the City in its Discretion.
- (3) On Closing, the Deposit shall be credited on account of the Purchase Price.
- (4) Subject to subparagraph (5) below, the Deposit shall be returned to Castlepoint in the event of a termination of this Agreement.
- (5) Notwithstanding subsection (4), if this Agreement is terminated as a result of a default by Castlepoint, the Deposit shall be retained by the City in addition to any other rights and remedies that the City may have under this Agreement or at Law.

#### 7.5 Balance of Purchase Price

The balance of the Purchase Price, subject to Adjustments (the “Balance”) shall be payable by certified cheque or bank draft by Castlepoint to the City on the Closing.

#### 7.6 Adjustments

Adjustments with respect to realty taxes and local improvement rates (the “Adjustments”) shall be made as at 11:59 p.m. on the day prior to the Closing Date (the “Time of Adjustments”).

#### 7.7 Legal Arrangements Regarding Option A

The legal structure and arrangements regarding Option A are set out in Article 7.

#### 7.8 Private Component Lease

On Closing, the City as landlord and Castlepoint as tenant shall enter into the Private Component Lease which, in addition to the terms and conditions of this Agreement, shall govern the relationship of the Parties with respect to the Private Component during the development phase and construction phase of the Project.

#### 7.9 Title Transfer of the Private Component

On that date which is 10 Business Days after the date on which Substantial Completion of the Private Component has been achieved (the “Title Transfer Date”) and provided Castlepoint is not in default, the City covenants and agrees to deliver the Transfer of the Private Lands to Castlepoint free from all encumbrances other than Permitted Encumbrances.

#### 7.10 Easements

On the Title Transfer Date, the Parties covenant and agree to complete all conveyances so that all Easements which benefit and burden the Private Lands and all Easements which benefit and burden the remainder of the Total Lands contemplated by the MESFA Agreement shall be created in priority to any financial encumbrances.

#### 7.11 MESFA Agreement

On Closing, the Parties shall enter into the MESFA Agreement, which agreement shall be amended and restated on the Title Transfer date to delete those provisions of the MESFA Agreement relating to matters that have been completed as of the Title Transfer Date and to accurately reflect the easements based on the As-Built R-Plan.

## 7.12 Closing

The Closing shall occur at 10:00 a.m. on the Closing Date.

## 7.13 Closing Documents

- (1) On Closing, the City shall deliver to Castlepoint (the “City Closing Documents”):
  - (a) the Private Component Lease;
  - (b) the MESFA Agreement;
  - (c) the Construction Procedures Agreement; and
  - (d) such other documentation as required by this Agreement as reasonably requested by Castlepoint or Castlepoint’s Solicitors.
- (2) On Closing, Castlepoint shall deliver to the City (the “Castlepoint Closing Documents”):
  - (a) the Private Component Lease;
  - (b) the MESFA Agreement;
  - (c) the Architectural Contract;
  - (d) the Construction Procedures Agreement;
  - (e) the Balance by certified cheque or bank draft;
  - (f) the Affordable Housing Contribution or a copy of the executed Affordable Housing Arrangement, as the case may be;
  - (g) an undertaking to readjust the Adjustments, if necessary; and
  - (h) such other documentation as shall be required by this Agreement as may be requested by the City or the City’s Solicitors or its Outside Counsel.

All documents in this Section 0 shall be in form and substance acceptable to the Parties, each acting reasonably.

## 7.14 Hummingbird Renovations

- (1) (a) The Schedule ”8” annexed hereto enumerates those of the Hummingbird Renovations required as a result of the development of the Private Component (the “Project Related Renovations”). The scope of the area to be included within the Project Related Renovations is generally shaded and outlined in red on the existing “as built” plans of the Hummingbird



Centre annexed hereto as Schedule “11”. The quality of the Project Related Renovations shall be comparable to the quality of the original improvements to the Hummingbird Centre being replaced by the Project Related Renovations, as at the time of the original installation of such original improvements in the Hummingbird Centre, provided that the Parties agree that the Project Related Renovations shall comply with the Public Component Plans and Specifications.

- (b) Castlepoint shall be responsible for all costs (both “hard” costs and “soft” costs) with respect to the design and construction of the Project Related Renovations.
- (2) (a) Schedule “9” annexed hereto sets out that portion of the Hummingbird Renovations relating to the improvements and rehabilitation to the mechanical, electrical and HVAC systems of the Hummingbird Centre immediately required regardless of the creation of the Private Component (the “Hummingbird Necessary Renovations”). Schedule “9” also provides for the allocation of costs of the Hummingbird Necessary Renovations between Castlepoint and the City, subject to amendments thereto as may be agreed on between the Parties, acting reasonably. To the extent that one of the Parties may be incurring costs for which the other is responsible, the Party responsible therefor shall pay the costs incurred on a monthly basis.
  - (b) It is presently anticipated that the Hummingbird Necessary Renovations shall be included in the Public Component Construction Contract.
- (3) (a) Schedule “10” annexed hereto enumerates the Hummingbird Preservation Measures and the allocation of the Hummingbird Preservation Costs between Castlepoint and the City.
  - (b) The Parties acknowledge that it may be beneficial to continue the operation of the Hummingbird Centre during construction of the Project (the “Continuous Operation”). The Parties shall in a bona fide manner use their respective reasonable best efforts to agree upon mutually satisfactory arrangements to permit the Continuous Operation (the “Continuous Operation Agreement”). In the event the Parties agree on the Continuous Operation Agreement, the principles of cost sharing set out in Schedule “10” shall apply to the costs required to achieve such Continuous Operation subject to such amendments thereto, as mutually agreed between the Parties, each acting reasonably, and failing agreement, as determined by the Dispute Resolution Procedure.
- (4) If the Hummingbird Necessary Renovations are constructed by Castlepoint or its general contractor (rather than a construction contract entered into directly by the City), Hummingbird shall be responsible for all “hard” costs and those “soft” costs referred to in Schedule 12 relating to the Hummingbird Necessary Renovations, as mutually agreed upon between Hummingbird and Castlepoint,

each acting reasonably, prior to entering into the Construction Contract in connection therewith, and failing agreement, as determined by the Dispute Resolution Procedure (the “Necessary Renovations Cost”) to the extent, and in accordance with the following principles:

- (a) In determining the “hard” and “soft” costs of the Hummingbird Necessary Renovations, there shall be no override or overhead charge of Castlepoint added to the cost. In determining “soft” costs of the Hummingbird Necessary Renovations, only those matters referred to in Schedule 12 shall be included (the “Permitted Soft Costs”);
- (5) If the Hummingbird Necessary Renovations are not constructed as part of the Public Component Construction Contract and are constructed by Castlepoint or its general contractor, the Necessary Renovations Cost, payable by the City shall be payable in monthly draws based upon the value of work in place as certified by Payment Certifier, subject to a construction lien holdback.
- (6) The MESFA Agreement shall identify the improvements which are facilities to be shared among the Hummingbird Centre, Public Component and Private Component (the “Shared Facilities”).

#### 7.15 Construction of Shared Facilities

- (1) The responsibility for constructing the Shared Facilities shall be allocated between the Private Component Construction Contract and the Public Component Construction Contract on a reasonable and equitable basis, as mutually agreed upon between the Parties, each acting reasonably, and failing agreement as determined in accordance with the Dispute Resolution Procedure.
- (2) Castlepoint shall pay its share of the cost of the Shared Facilities as provided in subsection (1) above to the City on a monthly basis (the “Castlepoint Shared Facilities Costs”).
- (3) In addition, if the Parties determine that it is expeditious to include construction of the basement of the Private Component (being under the Public Component) pursuant to the Public Component Construction Contract, Castlepoint shall pay costs incurred by the City in connection therewith on a monthly basis as certified by Payment Certifier, subject to a construction lien holdback (the “Private Component Basement Costs”).
- (4) The City shall pay to Castlepoint the City’s share of the cost of the Shared Facilities as such costs are incurred, on a monthly basis as certified by Payment Certifier, subject to a construction lien holdback.

## 7.16 City Security

- (1) Prior to Commencement of Construction of the Project, Castlepoint shall deliver a Letter of Credit to the City in the amount of \$10,000,000 (the “Security LC”).
- (2) The Security LC shall be security in favour of the City with respect to funds available to be drawn by the City:
  - (a) in the event that Castlepoint fails to complete construction of the Project Related Renovations;
  - (b) in the event that Castlepoint fails to complete construction of the Private Component (in the Option A scenario) or fails to complete the Private Component and/or the Commercial Component (in the Option B scenario) and the City elects to complete the Commercial Component and/or reconstruct the portions of Hummingbird Centre and related building systems demolished by Castlepoint and/or rectify and restore excavation and demolition by Castlepoint in connection with the intended construction of the Private Component and/or Commercial Component;
  - (c) in the event that Castlepoint fails to make any payment on account of the Castlepoint Shared Facilities Costs or the Private Component Basement Costs; and
  - (d) as security for the requisite holdbacks required pursuant to the Construction Lien Act (Ontario) with respect to construction of the Private Component and/or the Commercial Component and/or the Project Related Renovations (the “Required Holdbacks”).
- (3) In the event of a default by Castlepoint with respect to any of the matters for which the Security LC is held as security as contemplated in subsection (2) above, which default has not been cured within the applicable Cure Period pursuant to this Agreement, the City shall be entitled to draw upon the Security LC, in its Discretion and utilize the funds received in connection therewith to rectify any such default by Castlepoint.
- (4) (a) For the purposes hereof, “Reduction Commencement Occurrence” means that stage at which improvements created by the construction of the Project by Castlepoint commence to reduce the potential liability and remedial costs to the City, if there is an uncured Event of Default by Castlepoint, as such stage is mutually agreed on between the Parties, each acting reasonably, and failing agreement, as determined by the Dispute Resolution Procedure.

- (b) Following the Reduction Commencement Occurrence, the amount of the Security LC shall be reduced by \$100,000 for each \$100,000 certified by the Payment Certifier to the City as paid by Castlepoint to its general contractor following the Reduction Commencement Occurrence with respect to “supplies of services or materials” (as such expressions are defined in the Construction Lien Act) to the Project, to a maximum amount of \$8,000,000 (such that the Letter of Credit shall not be reduced to less than \$2,000,000) until the Substantial Completion of the Private Component and the expiry of the lien period relating thereto and upon there being no liens registered, the Letter of Credit shall thereupon be released.
  - (c) The City shall execute such documentation as shall, from time to time, be reasonably required to effect reductions in the Security LC provided for in this Agreement.
- (5) Prior to Commencement of Construction, Castlepoint shall have entered into the following arrangements to the satisfaction of the City, acting reasonably:
- (a) The Project Lender shall have agreed with Castlepoint to advance to a separate trust account (the “Trust Account”), holdbacks required pursuant to the Construction Lien Act with respect to supplies of services or materials for which the Project Lender makes advances pursuant to the construction loan for the Project (the “Holdbacks”).
  - (b) The Holdbacks in the Trust Account shall be deemed to be a trust fund pursuant to Section 7 of the *Construction Lien Act*.
  - (c) The amount of Holdbacks required from time to time shall be determined by the Payment Certifier as evidenced by a certificate of the Payment Certifier (a “Holdback Certificate”), whose determination shall be final and binding between the Project Lender and Castlepoint and between Castlepoint and the City.
  - (d) If a construction lien is registered or notice thereof is provided to Castlepoint or the City, the Payment Certifier shall be notified and investigate same and if, or to the extent that a Holdback has been established for such lien claimant, the Payment Certifier shall issue a certificate (the “Payment Certificate”) confirming the amount of the Holdback held in the Trust Account notionally allocated to such lien claimant based on the Payment Certifier’s current books and records. If the lien claim is not otherwise vacated by Castlepoint within the time period provided in Section 11.6, then the Payment Certifier shall direct the Project Lender in writing to pay the amount identified on the Payment Certificate into Court to the credit of the construction lien action commenced by the lien claimant. The determination of the Payment Certifier as evidenced by a Payment Certificate shall be final and binding

between the Project Lender and Castlepoint and between Castlepoint and the City.

- (e) The Payment Certifier shall provide the City with certified copies of all Holdback Certificates and Payment Certificates issued to the Project Lender and/or Castlepoint, as well as all certificates which form the basis of monthly draws pursuant to the construction loan.
  - (f) The Payment Certifier shall covenant with the City to fulfill its obligations provided for in subsections (c), (d) and (e) hereof.
  - (g) Castlepoint shall use its commercially reasonable efforts to cause the Project Lender to provide a covenant in the loan agreement respecting the construction financing (the "Loan Agreement") that the provisions of subsection (d) shall apply regardless of any default or an event of default by Castlepoint under the Loan Agreement.
  - (h) Castlepoint shall forthwith provide the City with a true copy of the provisions of the Loan Agreement relevant to the provisions of this subsection (5), and any agreements thereto from time to time which amendments shall be subject to the approval of the City, acting reasonably (the "Relevant Provisions") and a covenant of Castlepoint in favour of the City not to amend the Relevant Provisions (including any amendments thereto) without the prior written approval of the City, acting reasonably.
  - (i) Castlepoint covenants with the City to pay amounts due and payable to its general contractor as required in accordance with the construction contract to be entered into by Castlepoint with respect to all components of the Project.
- (6) For the purposes of this Agreement, the expression "City Security" means the Security LC and the arrangements contemplated in subsection (5) hereof, having been entered into, to the satisfaction of the City, acting reasonably.

#### 7.17 The Public Component

- (1) The City shall be responsible for the Public Component and shall enter into a Public Component Construction Contract on terms and conditions satisfactory to the City in its Discretion.
- (2) Castlepoint shall be responsible for obtaining all Development Approvals necessary to proceed with the Public Component. The City and Castlepoint shall comply with the Construction Procedures Agreement. The City shall be responsible for coordinating the construction of the Public Component and of any other portion of the Project for which it has entered into a construction contract pursuant to this Agreement. Castlepoint shall be responsible for coordinating construction of the Private Component and of any other portion of the Project for

which it has entered into a construction contract pursuant to this Agreement. Each Party shall be responsible for coordinating its construction obligations with the remainder of the Project (which shall include the construction of all portions of the Project for which the other Party has entered into a construction contract pursuant to this Agreement).

- (3) Each of Hummingbird and Castlepoint shall be responsible for their equitable share of structural and support elements contained in each of the Private Component and the Public Component that benefits Hummingbird and Castlepoint respectively, based on those principles enumerated in Schedule “13”, as mutually agreed upon between the Parties, and failing agreement as determined by Payment Certifier whose decision shall be final and binding upon the Parties.
- (4) The quality of construction and such construction being in accordance with Plans and Specifications respecting the Project Related Renovations shall require the approval of the City, acting reasonably (the “Construction Approval”). Hummingbird at its sole cost and expense, shall be entitled to engage a monitor on behalf of the City respecting Construction Approval. The details of the arrangement of the monitor in connection with Construction Approval shall be included in the Construction Procedures Agreement.

#### 7.18 Prerequisites to Construction

Prior to Commencement of Construction of any portion of the Project, the following conditions precedent shall have been satisfied to the satisfaction of the City:

- (a) Castlepoint shall provide evidence satisfactory to the City, acting reasonably, confirming that Castlepoint has secured financing for the Private Component (the “Private Component Financing”). With respect to the Private Component Financing, the following conditions in favour of the City and obligations of Castlepoint shall apply:
  - (i) all equity and security requirements shall be Castlepoint’s responsibility;
  - (ii) security in favour of the Project Lender shall consist of Castlepoint’s covenant, a mortgage of Castlepoint’s leasehold interest in the Project Lands (as described below) and an assignment of this Agreement, but may not involve any security granted or covenant provided by the City to the Project Lender;
  - (iii) Castlepoint shall have provided reasonable evidence to the City that it has satisfied all conditions of the Private Component Financing required to be satisfied for the advancing of funds in accordance with the Private Component Financing including, without limitation, the satisfaction of any minimum presale of units threshold to be achieved by Castlepoint; and

- (iv) the Project Lender shall have entered into an agreement with the City and Castlepoint, in form mutually agreed upon among the Parties acting reasonably, providing the Project Lender with the right by it or its receiver or receiver manager as agent to complete the Project on behalf of Castlepoint (the “Step-In Agreement”); the rights of the Project Lender pursuant to the Step-In Agreement, if exercised by the Project Lender, shall take priority to the City’s right to terminate this Agreement and the City’s right of self help contained in Section 0 of this Agreement and any right of self help contained in the Private Component Lease;
- (b) The Final Plans shall have been Approved by the City, acting reasonably;
- (c) Castlepoint shall have entered into the Private Component Construction Contract;
- (d) The City shall have entered into the Public Component Construction Contract;
- (e) The Parties shall have entered into the Construction Procedures Agreement;
- (f) Castlepoint shall have delivered the 50 percent performance bond and the 50 percent labour and material bonds as required in accordance with the Construction Contract relating to the Private Component and the Project Related Renovations;
- (g) Castlepoint shall have delivered the Security LC;
- (h) Castlepoint shall have obtained all Permits, including all demolition and building permits required for the Private Component and the Project Related Renovations and Shared Facilities in accordance with the *Building Code Act* and as otherwise required in accordance with Law;
- (i) Castlepoint shall have assigned to the City, as collateral security (ranking immediately subsequent to security granted to the Project Lender), the Architectural Contract, the Final Plans, the Project Intellectual Property, the Private Component Construction Contract and the Parking Garage Contract - Castlepoint and the City shall be made a joint obligee with respect to the performance bond and labour and material bonds respecting the Private Component (immediately subsequent to the rights of the Project Lender); and
- (j) Castlepoint shall have obtained the insurance enumerated in Schedule ”7” and complied with obligations relating thereto as set out in Schedule ”7”, including causing the City and Hummingbird to be named insureds.

### 7.19 Timing of Construction

- (1) Castlepoint shall Commence Construction of the Project on January 1, 2008 subject to the following subsections (2) to (6), both inclusive of this Section 7.1.
- (2) If, following the Execution Date there has been one or more “Delay(s)” (which shall be defined as an OMB Extension or a Relief Event resulting in Time Relief) then Castlepoint shall be entitled to elect, pursuant to the terms of this Agreement, that the Required Construction Commencement Date shall be postponed by the term of such Delay(s). Castlepoint may make such election by Notice to Hummingbird and the City (the “Delay Notice”) not later than 10 Business Days from the occurrence of the Delay(s). In such case, Hummingbird may book performances to take place in the period starting on January 1, 2008 and extending for a period of time equal to the Delay(s). For purposes of example only, if Castlepoint has delivered a Delay Notice in respect of one or more Delay(s) that endure for a cumulative period of four weeks, then Hummingbird may book performances that would take place from January 1, 2008 through January 28, 2008.
- (3) Commencing on November 1, 2006 Castlepoint shall have the right by Notice to Hummingbird to elect one of the following options:
  - (a) if on November 1, 2006 there has been no Relief Event resulting in Time Relief but Castlepoint wishes to postpone the Required Construction Commencement Date beyond January 1, 2008, Castlepoint may postpone the Construction Commencement Date for one 6-month-period to June 30, 2008 upon giving Hummingbird Notice thereof and making a Postponement Payment of \$250,000. Hummingbird may thereupon book performances that would take place throughout such 6-month period. Thereafter, and provided that Castlepoint has elected and paid for the initial 6-month postponement, Castlepoint may further postpone the Required Construction Commencement Date as follows: on or before June 1, 2007, Castlepoint may give Hummingbird Notice that it wishes to postpone the Required Construction Commencement Date from June 30, 2008 on a month-to-month basis through August 31, 2008 (and the applicable Postponement Payment shall be \$100,000 per month). Hummingbird may book performances that would take place throughout the period that is subject to such further postponement. The next period for which Castlepoint may postpone the Required Construction Commencement Date shall be for the period from September 1, 2008 through June 30, 2009 and to do so Castlepoint must give Hummingbird Notice of such postponement on or before November 1, 2007 (and the applicable Postponement Payment shall be \$800,000 for this period). Castlepoint shall have the right to further postpone the Required Construction Commencement Date in successive years by following the same timing of notices and quantum of payments as set forth in this subsection i.e. Castlepoint shall have the right to postpone the Required



Construction Commencement Date on a month-to-month basis from June 30 to August 31 of each successive year and then again for the period from September 1 to June 30 of each successive year upon giving the appropriate notice for the period of such postponement. All such postponements of the Required Construction Commencement Date shall be subject to the Outside Construction Commencement Date by which the Commencement of Construction must occur. If Castlepoint does not so exercise the option to postpone as set forth in this subsection, the Required Construction Commencement Date shall be January 1, 2008 subject to Delay(s) and subject to Castlepoint exercising its option set forth in the next subsection.

- (b) Commencing on November 1, 2006, whether or not there has been a Delay(s) and in lieu of the option set forth in the preceding subsection, Castlepoint may postpone the Required Construction Commencement Date by giving Hummingbird Notice to remain available for a Required Construction Commencement Date that would occur during the 6-month period commencing on January 1, 2008 and continuing until June 30, 2008 (the "Blackout Period") and upon making payment of \$1,800,000 (the "Blackout Period Payment"), which payment shall be made on or before November 1, 2006. Hummingbird agrees not to book any performances that would occur during such Blackout Period. Thereafter, and provided that Castlepoint has elected and paid for the 6-month Blackout Period, Castlepoint may further extend the Blackout Period for consecutive weeks from June 30, 2008 to August 31, 2008, on a week by week basis by giving Hummingbird prior Notice on or before the day that is at least 12 months prior to the week for which the extension is sought and upon making a further Blackout Period Payment of \$75,000 for each week that the Blackout Period is so extended, each such additional Blackout Period Payment shall be made on or before that date which is 30 days prior to commencement of the applicable Blackout Period. The next period for which Castlepoint may postpone the Required Construction Commencement Date is from September 1, 2008 to June 30, 2009 and to do so Castlepoint must give Hummingbird written notice of such postponement on or before November 1, 2007 and make a further Blackout Period Payment of \$3,000,000, which Blackout Period Payment shall be made on or before August 1, 2008. Castlepoint shall have the right to further extend the Blackout Period in successive years by following the same timing of notices and quantum of payments as set forth in this subsection. All such postponements of the Required Construction Commencement Date shall be subject to the Outside Construction Commencement Date by which the Commencement of Construction must occur. If, after having paid for any Blackout Period Castlepoint wishes to have the Required Construction Commencement Date occur anytime within such period, then upon the Required Construction Commencement Date, Hummingbird will repay to Castlepoint a pro rata share of the

Blackout Period Payment representing that portion of the Blackout Period that was not used.

- (4) Castlepoint may elect to postpone the Required Construction Commencement Date by making one or more Postponement Payments described in subsection (a) above and may thereafter elect to further postpone the Required Construction Commencement Date by making Blackout Payments described in subsection (b) above; however once Castlepoint makes a Blackout Payment it may not elect to further postpone the Required Construction Commencement Date by making Postponement Payments pursuant to subsection 3(a) above.
- (5) The initial Postponement Payment of \$250,000 referenced in subsection (a) above or \$1,800,000 referenced in subsection (b) above shall be made upon Castlepoint giving Hummingbird Notice thereof. All other payments to subsection (a) and (b) above shall be made not later than 30 days prior to the date that Required Construction Commencement Date is being postponed to, notwithstanding any provision in subsections (a) or (b) above to the contrary.
- (6) For purposes of clarity, unless there has been a Delay(s) or unless Castlepoint has properly given written notice pursuant to subsections (a) or (b), the Required Construction Commencement Date will continue to be January 1, 2008. The provisions respecting payment obligations contained in this Section 0 are not subject to Relief Events or Time Relief, except as expressly provided in subsections (2) and (3). However, Relief Events and Time Relief shall be applicable to obligations respecting the Required Construction Commencement date provided for in this Section 0.

#### (7.20) Intended Construction Date

- (1) Subject to the provisions of Section 0, commencing on the Execution Date, Castlepoint shall notify Hummingbird of its intention regarding the intended date for Commencement of Construction (the "Intended Construction Date") on a quarterly basis. If Castlepoint desires to Commence Construction prior to the date for Commencement of Construction contained in a Notice previously provided by Castlepoint to Hummingbird and the City in accordance with Section 0 or desires to provide less notice than required in accordance with Section 0, the City, in conjunction with Hummingbird shall negotiate in a bona fide and reasonable manner, without legal obligation, to resolve an alternative arrangement with Castlepoint that permits Castlepoint to commence construction on a date earlier than otherwise permitted in accordance with Section 0.
- (2) If Castlepoint has provided written notice to the City of the Intended Construction Date and has satisfied the conditions in Section 0 and is not in default under this Agreement and conditional upon the City having made the Option A Election, the City shall proceed with the Public Component subject to the terms and conditions of Council approval with respect to the Option A Election.

## 7.21 Construction of Project

- (1) Castlepoint shall cause the Total Completion of the Private Component, the Project Related Renovations and those elements of the Shared Facilities for which it is responsible (the “Castlepoint Shared Facilities”) substantially in accordance with the Final Plans, with such amendments thereto as may be Approved by the City. Having Commenced Construction, Castlepoint shall construct the Private Component, the Project Related Renovations and the Castlepoint Shared Facilities diligently, continuously, in a good worker like manner until Total Completion has been achieved.
- (2) Castlepoint shall cause the Substantial Completion of the Project Related Renovations and Castlepoint Shared Facilities within 24 months from the Commencement of Construction, subject to extensions resulting from Time Relief.
- (3) Castlepoint shall cause Substantial Completion of the Private Component within 42 months from the Commencement of Construction, subject to extensions resulting from Time Relief and subject to the provisions of Section 0.
- (4) Castlepoint shall cause Total Completion of the Castlepoint Shared Facilities and the Project Related Renovations within 30 months of Commencement of Construction of the Project.
- (5) Castlepoint shall complete all elements of the Project Related Renovations (such as structure, HVAC, mechanical, electrical, life safety and access to the loading area) and the Castlepoint Shared Facilities which are required to be completed so that the Hummingbird Centre can reopen for business including issuance of a certificate of occupancy and full functionality of operational areas within 21 months from the date of the closure of the Hummingbird Centre to the public, subject to extensions resulting from Time Relief. For the purposes hereof, the period of 21 months shall be deemed to include the recommissioning and testing required in preparation for the opening of the Hummingbird Centre. The Parties acknowledge that, if necessary, temporary measures may be implemented by Castlepoint so as to permit the Hummingbird Centre to reopen for business in accordance with the requirements of this subsection 0, provided that such temporary measures are Approved by the City and Hummingbird, acting reasonably, and further provided that such temporary measures shall be replaced by Castlepoint at its expense and by completion of the Project Related Renovations and the Castlepoint Shared Facilities as soon as reasonably possible and in any event in compliance with the provisions of this Section 0.
- (6) Castlepoint shall complete all elements of the Project Related Renovations and the Castlepoint Shared Facilities so that the City can complete the Public Component as soon as reasonably possible.

- (7) Castlepoint acknowledges and agrees that after reopening of the Hummingbird Centre to the public, all continuing construction activities with respect to the Private Component that shall have the potential to disrupt a performance at the Hummingbird Centre or interfere with patrons of the Hummingbird Centre shall be stopped during the performance and for a reasonable period of time prior to and after the performance. In addition, Castlepoint shall ensure that safe access to and egress from the Hummingbird Centre and the Public Component shall be maintained for all patrons, employees, agents and invitees of the Hummingbird Centre. The Parties acknowledge and agree that the provisions of this subsection (7) shall be elaborated on plus embodied in the Construction Procedures Agreement.

#### 7.22 Delay in Commencement of Construction

- (1) Subject to the provisions of Section 0, Castlepoint shall not be entitled to delay Commencement of Construction if the following preconditions have been satisfied:
  - (a) if the Private Component is a residential condominium where dwelling units are sold to third Party purchasers, the date on which Castlepoint has entered into agreements of purchase and sale for 50 percent of the units available for sale in the Private Component or such other similar condition as shall be contained in the financing commitment obtained by Castlepoint for the financing of the Private Component (the “Presale Condition”);
  - (b) if the Private Component is in part a hotel and in part a residential condominium, the date on which Castlepoint has entered into an agreement with a hotelier and with respect to the hotel component and achieves the Presale Condition for the condominium component; andif the Private Component is all or substantially all a rental residential project, the date on which Castlepoint is satisfied that it is economically prudent to proceed with construction.
- (2) Following the date on which the Development Approval Condition is achieved, Castlepoint shall diligently and continuously use commercially reasonable efforts to satisfy the pre-conditions expressed in subsection (1) above. In the event that Castlepoint proceeds with a Project containing all or a portion thereof as a residential condominium, Castlepoint shall provide evidence to the City on a monthly basis in form satisfactory to the City, acting reasonably, with respect to satisfaction of the Presale Condition.
- (3) If Castlepoint does not Commence Construction of the Project by the Required Construction Commencement Date, subject to extensions as a result of Time Relief (the “Commencement of Construction Obligation”), Castlepoint shall be in default and there shall be deemed to be an Event of Default under this Agreement.

- (4) If Castlepoint is in default of the Commencement of Construction Obligation, the City shall be entitled to send Notice to Castlepoint terminating this Agreement (subject to the rights of the Project Lender pursuant to the Step-In Agreement), in which event:
- (a) Castlepoint shall have a period of 180 days to cure the default (the “Cure Period”), provided that Castlepoint makes a further Postponement Payment of \$500,000.00 (the “Further Postponement Payment”) on or before the date of commencement of the Cure Period, and provided that during the Cure Period Castlepoint continually and diligently takes all reasonable steps to cure the default as soon as possible;
  - (b) If the default has not been cured within the Cure Period, then (subject to the rights of the Project Lender pursuant to the Step-In Agreement) this Agreement shall be terminated and:
    - (i) the City shall be entitled to retain the Deposit and all Postponement Payments as liquidated damages;
    - (ii) the City shall be entitled to retain the Balance of the Purchase Price, and use the proceeds thereof to apply on account of operating losses and capital expenditures required for repairs and replacements respecting the Hummingbird Centre from time to time (collectively, the “Amounts”). The audited financial statements of Hummingbird shall be conclusive evidence of the Amounts. Hummingbird shall be entitled to deduct the Amounts incurred from time to time following the termination of this Agreement, from the Balance until that date (the “Settlement Date”) which shall be the earlier of: (1) the date by which the Amounts plus the amount of the Deposit total the sum of Five Million (\$5,000,000.00) Dollars; or (2) the date by which Hummingbird has completed a transaction with a third Party for the creation of a project upon the Private Lands (if such shall be the case) and received all of the consideration to which it is entitled with respect thereto from the third party. On the Settlement Date, Hummingbird shall deliver to Castlepoint the sum of Ten Million (\$10,000,000.00) Dollars or the remaining portion of the Balance in the possession of Hummingbird, whichever shall be the greater.

Following the termination of this Agreement, there shall be no obligation on the City to seek to sell or lease, or to sell or lease all or any portion of the Private Lands to a third Party, nor shall there be any obligation on Hummingbird to seek to enter or to enter into an agreement with a third Party to create a project on all or any portion of the Private Lands;

- (iii) In the event that the City shall have terminated this Agreement in accordance with this provision, the City shall be entitled to absolute ownership of Project Intellectual Property, the Construction Security and an absolute assignment of all of Castlepoint's right, title and interest in the Parking Garage Contract – Private Component to use same on behalf of itself or a third party and its lenders;
  - (iv) The City shall be entitled to terminate the Private Component Lease; and
  - (v) The City shall return the Security LC to Castlepoint.
- (c) If Castlepoint shall have made the Further Postponement Payment and shall have cured the relevant default prior to the expiry of the Cure Period, the City shall repay a portion of the Further Postponement Payment equal to the amount of the Further Postponement Payment multiplied by a fraction the numerator of which is the number of days remaining in the Cure Period on the date that the relevant default was cured and the denominator of which is 180.

#### 7.23 Failure to Complete Construction

In the event that Castlepoint shall have failed to fulfill any of its obligations contained in Section 0 any such matter being referred to as a "Completion Default", the City shall be entitled to send Notice to Castlepoint terminating this Agreement (subject to the rights of the Project Lender pursuant to the Step-In Agreement) (the "Termination Notice"), in which event:

- (a) Castlepoint shall have a period of 180 days from the receipt of the Termination Notice to cure the Completion Default (the "Cure Period"), provided that Castlepoint makes a further non-refundable payment of \$1,000,000.00 (the "Postponement of Completion Payment") on or before the 10<sup>th</sup> Business Day from the receipt of the Termination Notice;
- (b) If the Construction Default has not been cured within the Cure Period, then this Agreement shall be terminated and:
  - (i) the City shall be entitled to call upon the Security LC;
  - (ii) The City shall be entitled to terminate the Private Component Lease;
  - (iii) The City shall be entitled to absolute ownership of the Construction Security and an absolute assignment of the Parking Garage Contract - Private Component to use same on behalf of itself or a third Party and the third Party's lender together with an assignment to such third Party and its lenders of the Project Intellectual Property;

- (iv) In addition, the City shall be entitled to retain the full amount paid on account of the Purchase Price;

Following the termination of this Agreement, there shall be no obligation on the City to seek to sell or lease, or to sell or lease all or any portion of the Private Lands and/or the Commercial Lands to a third Party, nor shall there be any obligation on Hummingbird to seek to enter or to enter into an agreement with a third Party to create a project on all or any portion of the Private Lands and/or the Commercial Lands.

- (c) If there is a Completion Default, prior to the City terminating this Agreement in accordance with this Section 0, the provisions of Article 9 shall apply.
- (d) If Castlepoint shall have made the Postponement of Completion Payment and have cured the Construction Default prior to the expiry of the Cure Period, the City shall repay a portion of the Postponement of Completion Payment equal to the amount of the Postponement of Completion Payment multiplied by a fraction the numerator of which is the number of days remaining in the Cure Period on the date that the Construction Default was cured and the denominator of which is 180.

#### 7.24 Affordable Housing

- (1) Subject to Subsection 0, on Closing, Castlepoint shall pay \$500,000 to the City, which funds shall be used by the City for the purposes of the Capital and Revolving Fund for Affordable Housing (the “Affordable Housing Contribution”). The Affordable Housing Contribution shall be an absolute payment obligation by Castlepoint and shall be retained by the City.
- (2) Notwithstanding Subsection 00, in the event that Castlepoint has entered into the Affordable Housing Arrangement prior to the expiry of one year from the Execution Date and the Affordable Housing Arrangement remains in effect on Closing, Castlepoint shall not be obligated to pay the Affordable Housing Contribution on Closing.
- (3) Notwithstanding the provisions of Subsection 00 if the Affordable Housing Arrangement has been entered into but is terminated before or after Closing, or if notwithstanding the Affordable Housing Arrangement, the Affordable Housing Project is not included in the Private Component, Castlepoint shall forthwith pay the Affordable Housing Contribution to the City.

#### 7.25 Shared Facilities

Schedule ”H” to the MESFA Agreement sets out the improvements which are facilities to be shared amongst the Hummingbird Centre, the Private Component and the Public Component (the “Shared Facilities”). Responsibility for constructing the Shared Facilities shall be allocated amongst the Private Component Construction Contract and the Public Component Construction Contract in a reasonable and equitable manner as

mutually agreed upon between the Parties, and failing agreement as determined in accordance with the Dispute Resolution Procedure. The costs associated with the Shared Facilities shall be allocated among the Parties in a reasonable and equitable manner as mutually agreed upon between the City and Castlepoint and failing agreement, as determined by the Dispute Resolution Procedure.

#### 7.26 Alternative Construction Responsibilities Option

The Parties shall be entitled, on or before December 15, 2006, to elect by mutual agreement in writing, an alternative allocation of responsibilities for the construction of the Project, such that:

- (a) the City shall be responsible for the construction of the Public Component, the Project Related Renovations, the Private Component Basement and the Castlepoint Shared Facilities and shall enter into a construction contract on terms and conditions satisfactory to the City in its Discretion; and
- (b) In such event, Castlepoint shall be responsible for the costs of the Project Related Renovations, the Private Component Basement and the Castlepoint Shared Facilities, and the time periods for completion of construction of those portions of the Project for which Castlepoint is responsible for construction shall be amended accordingly, as mutually agreed upon between the parties in writing

(the “Alternative Construction Option”), failing which the allocation of construction responsibilities as set out in this Agreement as of the Closing Date shall apply. An election in favour of the Alternative Construction Option shall be subject to the Approval of each Party, acting reasonably. In the event that the Parties elect to implement the Alternative Construction Option, the Parties agree that they shall expeditiously amend the provisions of this Agreement as necessary to accommodate the Alternative Construction Option, but only to the extent of such necessary amendments.

#### 7.27 Option to Proceed with Public Component Alone

- (1) If the City shall have made the Option A Election, the City shall have the right by notice in writing to Castlepoint at any time thereafter and before Castlepoint shall be obligated to Commence Construction, to proceed to construct the Public Component in any event (the “Public Component Election”).
- (2) In the event that the City has sent the Public Component Election, Castlepoint and Hummingbird shall enter into an agreement respecting the matters referred to in Subsection 0 below on terms and conditions mutually agreed upon between the Parties, each acting reasonably, and failing agreement with respect to any issues, as such issues may be determined by Arbitration (the “Accommodation Agreement”).



- (3) The Accommodation Agreement shall include provisions respecting the following:
  - (a) minimizing interruption with the operations of Hummingbird Centre upon Castlepoint proceeding with the Private Component;
  - (b) the protection of persons and property respecting the Public Component and the Hummingbird Centre upon Castlepoint proceeding with the Private Component;
  - (c) such amendments to the Public Component Plans and Specifications required as a result of the subsequent Commencement of Construction of the Private Component after the Substantial Completion of the Public Component, which matters shall be at the expense of Castlepoint;
  - (d) alternative construction details; and
  - (e) such other matters as the circumstances may require or as Hummingbird may reasonably request.
- (4) Subject to Subsection 00, if the City has delivered the Public Component Election, Castlepoint shall fulfill its financial and construction obligations in accordance with the requirements of Option A as set out in this Agreement, except that the Security LC to be delivered shall be reduced by \$100,000.00 for each \$100,000.00 by which Castlepoint's obligations for which the Security LC is provided as security is reduced, to a maximum amount of \$8,000,000.00 (such that the Letter of Credit shall not be reduced to less than \$2,000,000.00) until the Substantial Completion of the Public Component and shall be returned on Substantial Completion of the Public Component and the Security LC shall be re-delivered in the amount of \$2,000,000 prior to Commencement of Construction by Castlepoint of the Private Component.
- (5) In the event that the City has delivered the Public Component Election and Castlepoint shall have used its commercial best efforts to satisfy the Presale Condition and Castlepoint has failed to satisfy the Presale Condition by the Required Construction Commencement Date and provided that it is not in default under this Agreement, Castlepoint shall not be deemed to be in default of the Commencement of Construction Obligation if on or before the Required Construction Commencement Date Castlepoint shall have satisfied the conditions in subsections 00 and 00 and shall have sent notice to the City that it is electing to delay construction of the Private Component (the "Market Delay Election").
- (6) In the event that Castlepoint exercises the Market Delay Election, Castlepoint shall deliver the Security LC referred to in Subsection 00 at least 30 days prior to the commencement of construction of the Public Component. The City shall repay a proportionate share of the Postponement Payment relative to the number of days remaining in the period covered by the Postponement Payment.

- (7) In the event that Castlepoint shall exercise the Market Delay Election, there shall be a requirement that Castlepoint:
- (a) Commence Construction of the Private Component by the earlier of:
    - (i) the Outside Construction Commencement Date; and (ii) date upon which the Presale Condition is satisfied; and
  - (b) complete same in accordance with the requirements of Section 0,
- failing which the provisions of Sections 0, 0 and 0 of this Agreement shall thereupon apply with respect to the Private Component.
- (8) After reopening of the Hummingbird Centre and/or the Public Component to the public, all continuing construction activities with respect to the Private Component that shall have the potential to disrupt a performance at the Hummingbird Centre or interfere with patrons of the Hummingbird Centre shall be stopped during the performance and for a reasonable period of time prior to and after the performance. In addition, Castlepoint shall ensure that safe access to and egress from the Hummingbird Centre and the Public Component shall be maintained for all patrons, employees, agents and invitees of the Hummingbird Centre. The Parties acknowledge and agree that the provisions of this subsection 00 shall be elaborated on plus embodied in the Construction Procedures Agreement.

## 8. OPTION B

### 8.1 Scope of Article

The provisions contained in this Article 8 apply in the event that the City elects to proceed with Option B. The inclusion of certain provisions applicable to circumstances respecting Option B, shall not derogate from the provisions contained in other Articles of this Agreement relating to Option B (or which apply to either Option A or Option B), as the provisions respecting Option B are provided in this Article for convenience only and are not intended to and shall not be deemed to be restrictive.

### 8.2 Agreement of Purchase and Sale

The City agrees to sell the Private Lands to Castlepoint and Castlepoint agrees to purchase the Private Lands from the City for the Purchase Price and on and subject to the terms and conditions of this Agreement.

### 8.3 Purchase Price

- (1) The purchase price for the Private Lands (the "Purchase Price") shall be equal to the sum of:
- (a) Fifteen Million (\$15,000,000.00) Dollars; and

- (b) Thirty-Five (\$35.00) Dollars multiplied by the number of square feet of GFA contained within the Approved GFA in excess of 428,571 square feet of GFA (the “Excess GFA”).
- (2) The Purchase Price shall initially be calculated as at the Closing Date. In the event that subsequent to Closing Castlepoint shall obtain a Planning Approval for additional Approved GFA in excess of 428,571 square feet of GFA or the Excess GFA if same was obtained prior to Closing (collectively, the “Additional GFA”), the Purchase Price shall be increased by Thirty-Five (\$35.00) Dollars multiplied by the number of square feet of Additional GFA, Adjusted for Inflation.

#### 8.4 Lease Payment

In consideration for the grant of the Commercial Component Lease, on Closing, Castlepoint shall pay to the City as a rent payment pursuant to the Commercial Component Lease the amount of Three Million Five Hundred Thousand (\$3,500,000) Dollars (the “Rental Payment”).

#### 8.5 Deposit

- (1) Castlepoint shall pay a deposit in the amount of One Million Eight Hundred Fifty Thousand (\$1,850,000.00) Dollars (the “Deposit”) on account of the Purchase Price and the Rental Payment. The Deposit shall be paid by certified cheque or bank draft to the City as follows:
  - (a) One Million Five Hundred Thousand (\$1,500,000.00) Dollars on the Execution Date; and
  - (b) Three Hundred Fifty Thousand (\$350,000.00) Dollars on the date which is 30 days following receipt by Castlepoint of the Option B Notice.
- (2) The Deposit shall be held in trust by the City and placed in a Permitted Investment or Permitted Investments in its Discretion.
- (3) On Closing, the Deposit shall be credited on account of the Purchase Price and the Rental Payment.
- (4) Subject to subsection 0 below, the Deposit shall be returned to Castlepoint in the event of a termination of this Agreement.
- (5) Notwithstanding subsection 0, if this Agreement is terminated as a result of a default by Castlepoint, the Deposit shall be retained by the City in addition to any other rights and remedies that the City may have under this Agreement or at law.

#### 8.6 Balance of Purchase Price

The balance of the Purchase Price, subject to Adjustments and the balance of the Rental Payment (collectively, the “Balance”) shall be payable by certified cheque or bank draft by Castlepoint to the City on the Closing.

#### 8.7 Adjustments

Adjustments with respect to realty taxes and local improvement rates (the “Adjustments”) shall be made as at 11:59 p.m. on the day prior to the Closing Date (the “Time of Adjustments”).

#### 8.8 Legal Arrangements Regarding Option B

The legal structure and arrangements regarding Option B are set out in this Article 8.

#### 8.9 Private Component Lease

On Closing, the City as the landlord and Castlepoint as tenant shall enter into the Private Component Lease which, in addition to the terms of this Agreement, shall govern the relationship of the Parties with respect to the Private Component during the development and construction phase of the Project.

#### 8.10 Commercial Component Lease

On Closing, the City and Castlepoint shall enter into the Commercial Component Lease which, in addition to the terms of this Agreement, shall govern the relationship of the Parties during the development phase, construction phase and post-construction phase of the Commercial Component.

#### 8.11 Title Transfer of the Private Component

On that date which is 10 Business Days after the date on which Substantial Completion of both the Private Component and the Commercial Component has been achieved (the “Title Transfer Date”) and provided Castlepoint is not in default, the City covenants and agrees to deliver the Transfer of the Private Lands to Castlepoint free from all encumbrances other than Permitted Encumbrances.

#### 8.12 Easements

On the Title Transfer Date, the Parties covenant and agree to complete all conveyances so that all Easements which benefit and burden the Private Lands and all Easements which benefit and burden the remainder of the Total Lands contemplated by the MESFA Agreement shall be created in priority to any financial encumbrances.

### 8.13 MESFA Agreement

On Closing, the Parties shall enter into the MESFA Agreement. The MESFA Agreement shall contain a provision, *inter alia*, identifying the improvements which are facilities to be shared among the Hummingbird Centre, Commercial Component and Private Component (the “Shared Facilities”). In addition, MESFA Agreement shall be amended and restated on the Title Transfer Date to delete those provisions of the MESFA Agreement relating to matters that have been completed as of the Title Transfer Date and to accurately reflect the easements based on the As-Built R-Plan.

### 8.14 Closing

The Closing shall occur at 10:00 a.m. on the Closing Date.

### 8.15 Closing Documents

- (1) On Closing, the City shall deliver the following documents (the “City Closing Documents”) to Castlepoint:
  - (a) the Private Component Lease;
  - (b) the Commercial Component Lease;
  - (c) the MESFA Agreement;
  - (d) the Construction Procedures Agreement;
  - (e) an undertaking to readjust the Adjustments, if necessary; and
  - (f) such other documentation as required by this Agreement as reasonably requested by Castlepoint or Castlepoint’s Solicitors.
- (2) On Closing, Castlepoint shall deliver the following documents to the City (the “Castlepoint Closing Documents”):
  - (a) the Private Component Lease;
  - (b) the Commercial Component Lease;
  - (c) the MESFA Agreement;
  - (d) the Construction Procedures Agreement;
  - (e) the Balance and the Rental Payment by certified cheque or bank draft;
  - (f) the Affordable Housing Contribution or a copy of the executed Affordable Housing Agreement, as the case may be;

- (g) an undertaking to readjust the Adjustments, if necessary; and
- (h) such other documentation as shall be required by this Agreement as may be requested by the City or the City's Solicitors or its Outside Counsel.

All documents in this Section 0 shall be in form and substance acceptable to the Parties, each acting reasonably.

#### 8.16 Prerequisites to Construction

Prior to Commencement of Construction of any portion of the Project, the following conditions precedent shall have been satisfied to the satisfaction of the City:

- (a) Castlepoint shall provide evidence satisfactory to the City, acting reasonably, confirming that Castlepoint has secured financing for the Private Component and the Commercial Component (the "Castlepoint Financing"). With respect to Castlepoint Financing, the following conditions in favour of the City and the obligations of Castlepoint shall apply:
  - (i) all equity and security requirements shall be Castlepoint's responsibility;
  - (ii) security in favour of the Project Lender shall consist of Castlepoint's covenant, a mortgage of Castlepoint's leasehold interest in the Project Lands (as described below) and an assignment of this Agreement, but may not involve any security granted or covenant provided by the City to the Project Lender;
  - (iii) Castlepoint shall have provided reasonable evidence to the City that it has satisfied all conditions of the Castlepoint Financing required to be satisfied for the advancing of funds in accordance with the Castlepoint Financing including, without limitation, the satisfaction of any minimum presale of units threshold to be achieved by Castlepoint;
  - (iv) the Project Lender shall have entered into an agreement with the City and Castlepoint, in form mutually agreed upon among the Parties, providing the Project Lender with the right by it or its receiver or receiver manager as agent to complete the Project on behalf of Castlepoint (the "Step-In Agreement"); the rights of the Project Lender pursuant to the Step-In Agreement, if exercised and in good standing shall take priority to the City's right to terminate this Agreement pursuant to Sections 0 and 0 and the City's right of self help contained in Section 0 of this Agreement and any right of self help contained in the Private Component Lease.
- (b) The Final Plans shall have been Approved by the City, acting reasonably;
- (c) Castlepoint shall have entered into the Private Component Construction Contract and the Commercial Component Construction Contract;

- (d) The Parties shall have entered into the Construction Procedures Agreement;
- (e) Castlepoint shall have delivered the City Security;
- (f) Castlepoint shall have obtained all Permits, including all demolition and building permits required for the Project in accordance with the *Building Code Act* and as otherwise required in accordance with Law;
- (g) Castlepoint shall have assigned to the City, as collateral security (ranking subsequent to security granted to the Project Lender), the Architectural Contract, the Final Plans, the Project Intellectual Property, the Private Component Construction Contract, the Commercial Component Construction Contract and the Parking Garage Contract – Castlepoint and the City shall be made a joint obligee with respect to the performance bond and labour and material bonds respecting the Private Component and the Commercial Component (subsequent to the rights of the Project Lender); and
- (h) Castlepoint shall have obtained the insurance enumerated in Schedule "7" and complied with obligations relating thereto as set out in Schedule "7", including causing the City and Hummingbird to be named insureds.

#### 8.17 Hummingbird Option B Renovations

Castlepoint shall effect the Option B Renovations, in accordance with a construction contract relating thereto which shall be in a form mutually agreed by the Parties.

#### 8.18 Timing of Construction

In the event that the Parties proceed with Option B, the provisions contained in Section 0 (Timing of Construction) shall apply mutatis mutandis.

#### 8.19 Construction of Project

- (1) Castlepoint shall cause the Total Completion of the Private Component, the Commercial Component, the Option B Renovations and the Shared Facilities substantially in accordance with the Final Plans, with such amendments thereto as may be Approved by the City. Having Commenced Construction, Castlepoint shall construct the Private Component, the Commercial Component, the Option B Renovations and the Shared Facilities diligently, continuously, in a good worker like manner until Total Completion has been achieved.
- (2) Castlepoint shall cause the Substantial Completion of the Option B Renovations and Shared Facilities within 24 months from the Commencement of Construction, subject to extensions resulting from Time Relief.

- (3) Castlepoint shall cause the Substantial Completion of the Commercial Component within 30 months from the Commencement of Construction, subject to extensions resulting from Time Relief.
- (4) Castlepoint shall cause Substantial Completion of the Private Component within 42 months from the Commencement of Construction, subject to extensions resulting from Time Relief and subject to the provisions of Section 0.
- (5) Castlepoint shall cause Total Completion of the Shared Facilities and the Option B Renovations within 30 months of Commencement of Construction of the Project.
- (6) Castlepoint shall cause the Total Completion of the exterior and all exterior landscaping of the Commercial Component within 36 months from the Commencement of Construction, subject to extensions resulting from Time Relief.
- (7) Castlepoint shall complete all elements of the Option B Renovations (such as structure, HVAC, mechanical, electrical, life safety and access to the loading area) and the Shared Facilities which are required to be completed so that the Hummingbird Centre can reopen for business including issuance of a certificate of occupancy and full functionality of operational areas within 21 months from the date of the closure of Hummingbird Centre to the public, subject to extensions resulting from Time Relief. For the purposes hereof, the period of 21 months shall be deemed to include the recommissioning and testing required in preparation for the opening of the Hummingbird Centre. The Parties acknowledge that, if necessary, temporary measures may be implemented so as to permit the Hummingbird Centre to reopen for business in accordance with the requirements of this subsection 00, provided that such temporary measures are Approved by the City and Hummingbird, acting reasonably, and further provided that such temporary measures shall be replaced by Castlepoint at its expense by completion of the Option B Renovations and the Shared Facilities as soon as reasonably possible and in any event in accordance with the provisions of this Section 0.
- (8) Castlepoint acknowledges and agrees that after reopening of the Hummingbird Centre to the public, all continuing construction activities with respect to the Private Component that shall have the potential to disrupt a performance at the Hummingbird Centre or interfere with patrons of the Hummingbird Centre shall be stopped during the performance and for a reasonable period of time prior to and after the performance. In addition, Castlepoint shall ensure that safe access to and egress from the Hummingbird Centre and the Commercial Component shall be maintained for all patrons, employees, agents and invitees of the Hummingbird Centre. The Parties acknowledge and agree that the provisions of this subsection 0 shall be elaborated on plus embodied in the Construction Procedures Agreement.



- (9) Hummingbird at its sole cost and expense, shall be entitled to engage a monitor with respect to the approval, acting reasonably, of the quality of construction and such construction being in accordance with the Commercial Component Plans and Specifications as same relate to Hummingbird Design Matters – Commercial Component and the costs of the Commercial Component, the details of which shall be included in the Construction Procedures Agreement.

#### 8.20 Delay in Commencement of Construction

- (1) Subject to the provisions of Section 0 (Timing of Construction) Castlepoint shall not be entitled to delay Commencement of Construction if the following preconditions have been satisfied:
  - (a) if the Private Component is a residential condominium where dwelling units are sold to third Party purchasers, the date on which Castlepoint has entered into agreements of purchase and sale for 50 percent of the units available for sale in the Private Component or such other similar condition as shall be contained in the financing commitment obtained by Castlepoint for the financing of the Private Component (the “Presale Condition”);
  - (b) if the Private Component is in part a hotel and in part a residential condominium, the date on which Castlepoint has entered into an agreement with a hotelier and with respect to the hotel component and achieves the Presale Condition for the condominium component; and
  - (c) if the Private Component is all or substantially all a rental residential project, the date on which Castlepoint is satisfied that it is economically prudent to proceed with construction.
- (2) Following the date on which the Development Approval Condition is achieved, Castlepoint shall diligently and continuously use commercially reasonable efforts to satisfy the pre-conditions expressed in subsection (1) above. In the event that Castlepoint proceeds with a Project containing all or a portion thereof as a residential condominium, Castlepoint shall provide evidence to the City on a monthly basis in form satisfactory to the City, acting reasonably, with respect to satisfaction of the Presale Condition.
- (3) If Castlepoint does not Commence Construction of the Project by the Required Construction Commencement Date, subject to the extension of the date for Commencement of Construction in accordance with Section 0, and subject to extensions as a result of Relief Events (the “Commencement of Construction Obligation”), Castlepoint shall be in default and there shall be deemed to be an Event of Default under this Agreement.

- (4) If Castlepoint is in default of the Commencement of Construction Obligation, the City shall be entitled to send Notice to Castlepoint terminating this Agreement (subject to the rights of the Project Lender pursuant to the Step-In Agreement), in which event:
- (a) Castlepoint shall have a period of 180 days to cure the default (the “Cure Period”), provided that Castlepoint makes a further Postponement Payment of \$500,000 (the “Further Postponement Payment”) on or before the date of commencement of the Cure Period, and provided that during the Cure Period Castlepoint continually and diligently takes all reasonable steps to cure the default as soon as possible;
  - (b) If the default has not been cured within the Cure Period, then (subject to the rights of the Project Lender pursuant to the Step-In Agreement) this Agreement shall be terminated and:
    - (i) the City shall be entitled to retain the Deposit and all Postponement Payments as liquidated damages;
    - (ii) the City shall be entitled to retain the Balance of the Purchase Price and the Rental Payment, and use the proceeds thereof to apply on account of operating losses and capital expenditures required for repairs and replacements respecting the Hummingbird Centre from time to time (collectively, the “Amounts”). The audited financial statements of Hummingbird shall be conclusive evidence of the Amounts. Hummingbird shall be entitled to deduct the Amounts incurred from time to time following the termination of this Agreement, from the Balance until that date (the “Settlement Date”) which shall be the earlier of: (1) the date by which the Amounts plus the amount of the Deposit total the sum of Five Million (\$5,000,000.00) Dollars; or (2) the date by which Hummingbird has completed a transaction with a third Party for the creation of a project upon the Private Lands (if such shall be the case) and received all of the consideration to which it is entitled with respect thereto from the third Party. On the Settlement Date, Hummingbird shall deliver to Castlepoint the sum of Thirteen Million Five Hundred Thousand (\$13,500,000) Dollars or the remaining portion of the Balance in the possession of Hummingbird, whichever shall be the greater.

Following the termination of this Agreement, there shall be no obligation on the City to seek to sell or lease, or to sell or lease all or any portion of the Private Lands to a third Party, nor shall there be any obligation on Hummingbird to seek to enter or to enter into an agreement with a third Party to create a project on all or any portion of the Private Lands;

- (iii) In the event that the City shall have terminated this Agreement in accordance with this provision, the City shall be entitled to absolute ownership of Project Intellectual Property and an absolute assignment of all of Castlepoint's right, title and interest in the Parking Garage Contract - Castlepoint to use same on behalf of itself or a third party and its lenders;
  - (iv) The City shall be entitled to terminate the Private Component Lease; and
  - (v) The City shall return the Security LC to Castlepoint.
- (c) If Castlepoint shall have made the Further Postponement Payment and shall have cured the relevant default prior to the expiry of the Cure Period, the City shall repay a portion of the Further Postponement Payment equal to the amount of the Further Postponement Payment multiplied by a fraction the numerator of which is the number of days remaining in the Cure Period on the date that the relevant default was cured and the denominator of which is 180.

#### 8.21 Failure to Complete Construction

In the event that Castlepoint shall have failed to fulfill any of its obligations contained in Section 0 (Construction of Project) any such matter being referred to as a "Completion Default", the City shall be entitled to send Notice to Castlepoint terminating this Agreement (subject to the rights of the Project Lender pursuant to the Step-In Agreement) (the "Termination Notice"), in which event:

- (a) Castlepoint shall have a period of 180 days from the receipt of the Termination Notice to cure the Completion Default (the "Cure Period"), provided that Castlepoint makes a further non-refundable payment of \$1,000,000 (the "Postponement of Completion Payment") on or before the 10<sup>th</sup> Business Day from the receipt of the Termination Notice;
- (b) If the Construction Default has not been cured within the Cure Period, then this Agreement shall be terminated and:
  - (i) The City shall be entitled to call upon the Security LC;
  - (ii) The City shall be entitled to terminate the Private Component Lease;
  - (iii) The City shall be entitled to absolute ownership of the Construction Security and an absolute assignment of the Parking Garage Contract - Private Component to use same on behalf of itself or a third Party and the third Party's lender together with an assignment to such third Party and its lenders of the Project Intellectual Property;

- (iv) In addition, the City shall be entitled to retain the full amount paid on account of the Purchase Price and the Rental Payment;

Following the termination of this Agreement, there shall be no obligation on the City to seek to sell or lease, or to sell or lease all or any portion of the Private Lands and/or the Commercial Lands to a third Party, nor shall there be any obligation on Hummingbird to seek to enter or to enter into an agreement with a third party to create a project on all or any portion of the Private Lands and/or the Commercial Lands.

- (c) If there is a Completion Default, prior to the City terminating this Agreement in accordance with this Section 0, the provisions of Article 9 shall apply.
- (d) If Castlepoint shall have made the Postponement of Completion payment and have cured the Construction Default prior to the expiry of the Cure Period, the City shall repay a portion of the Postponement of Completion Payment equal to the amount of the Postponement of Completion Payment multiplied by a fraction the numerator of which is the number of days remaining in the Cure Period on the date that the Construction Default was cured and the denominator of which is 180.

## 8.22 Affordable Housing

- (1) Subject to Subsection 00, on Closing, Castlepoint shall pay \$500,000 to the City, which funds shall be used by the City for the purposes of the Capital and Revolving Fund for Affordable Housing (the “Affordable Housing Contribution”). The Affordable Housing Contribution shall be an absolute payment obligation by Castlepoint and shall be retained by the City.
- (2) Notwithstanding Subsection 00, in the event that Castlepoint has entered into the Affordable Housing Arrangement prior to the expiry of one year from the Execution Date and the Affordable Housing Arrangement remains in effect on Closing, Castlepoint shall not be obligated to pay the Affordable Housing Contribution on Closing.
- (3) Notwithstanding the provisions of Subsection 00 if the Affordable Housing Arrangement has been entered into but is terminated before or after Closing, or if notwithstanding the Affordable Housing Arrangement, the Affordable Housing Project is not included in the Private Component, Castlepoint shall forthwith pay the Affordable Housing Contribution to the City.

## 8.23 Option to Proceed with Commercial Component Alone

- (1) If Castlepoint shall have used its commercial best efforts to satisfy the Presale Condition, but shall have failed to satisfy the Presale Condition by October 1, 2008 and provided that it is not in default under this Agreement, Castlepoint shall be entitled to send notice to the City that it intends to proceed with Commencement of Construction of only the Commercial Component [and not the

Private Component until the date specified in Subsection 0 below] on or before the Required Construction Commencement Date (the “Commercial Component Election”) and shall thereafter Commence Construction of the Commercial Component on the Required Construction Commencement Date, Castlepoint shall not be deemed to be in default of the Commencement of Construction Obligation if it shall have satisfied the conditions in subsections (2) and (4) below. Notwithstanding any other provisions of this Agreement, Castlepoint shall not exercise the Commercial Component Election prior to October 1, 2008.

- (2) In the event that Castlepoint has sent the Commercial Component Election, Castlepoint and Hummingbird shall enter into an agreement respecting the matters referred to in Subsection 0 below on terms and conditions mutually agreed upon between the Parties, each acting reasonably, and failing agreement with respect to any issues, as such issues may be determined by Arbitration (the “Accommodation Agreement”).
- (3) The Accommodation Agreement shall include provisions respecting the following:
  - (a) minimizing interruption with the operations of Hummingbird Centre;
  - (b) the protection of persons and property respecting the Hummingbird Centre upon Castlepoint proceeding with the Private Component;
  - (c) Castlepoint leasing to Hummingbird space within the Commercial Component for a banqueting facility and patio on commercial terms to be Approved by the Parties, acting reasonably; and
  - (d) such other matters as the circumstances may require or as Hummingbird may reasonably request.
- (4) Prior to Commencement of Construction, Castlepoint shall have satisfied all of its obligations pursuant to Section 0 which relate to the Commercial Component.
- (5) Castlepoint shall cause the Substantial Completion of the Commercial Component within 30 months from the Commencement of Construction, subject to extensions caused by Relief Events and shall cause the completion of the exterior and all exterior landscaping of the Commercial Component within 36 months from the Commencement of Construction, subject to the extensions caused by Relief Events. In addition, Castlepoint shall complete those elements of the Hummingbird Renovations and the Commercial Component necessary for the Hummingbird Centre to reopen to the public within 21 months of Commencement of Construction.

- (6) In the event that Castlepoint shall exercise the Commercial Component Election, there shall be a requirement:
- (a) to Commence Construction of the Private Component by the earlier of (i) the Outside Construction Commencement Date; and (ii) the date upon which the Presale Condition is satisfied; and
  - (b) to complete same in accordance with the requirements of Section 0,
- failing which the provisions of Sections 0, 0 and 0 of this Agreement shall thereupon apply with respect to the Private Component.
- (7) After reopening of the Hummingbird Centre to the public, all continuing construction activities with respect to the Private Component that shall have the potential to disrupt a performance at the Hummingbird Centre or interfere with patrons of the Hummingbird Centre shall be stopped during the performance and for a reasonable period of time prior to and after the performance. In addition, Castlepoint shall ensure that safe access to and egress from the Hummingbird Centre shall be maintained for all patrons, employees, agents and invitees of the Hummingbird Centre. The Parties acknowledge and agree that the provisions of this subsection 00 shall be elaborated on plus embodied in the Construction Procedures Agreement.

#### 8.24 Commercial Component Lease Insurance Requirements

The Parties acknowledge and agree that the Commercial Component Lease shall contain provisions respecting the insurance which Castlepoint shall be required to obtain with respect to the Commercial Component as tenant under the Commercial Component Lease, and its obligations relating thereto, and Castlepoint shall comply with all of its obligations pursuant to such insurance provisions.

### 9. Events of Default

#### 9.1 Event of Default

For the purposes of this Agreement, an “Event of Default” means any of the following events or circumstances:

- (a) Castlepoint committing a breach of any of its obligations under this Agreement, the Private Component Construction Contract, the Commercial Component Construction Contract, the Private Component Lease, the Commercial Component Lease, the Architectural Contract, or the MESFA Agreement (not otherwise referred to in this Section 0);
- (b) Castlepoint failing to construct the Project in accordance with the Final Plans.

- (c) as of Closing the representations and warranties of Castlepoint contained in Section 0 no longer being true in all material respects;
- (d) following Closing the representations and warranties contained in Sections 0, 0 and 0 no longer being true in all material respects;
- (e) the occurrence of any of the following events in respect of Castlepoint:
  - (i) any arrangement or composition with or for the benefit of creditors being entered into by or in relation to Castlepoint;
  - (ii) any proceedings with respect to Castlepoint being commenced under the *Companies' Creditors Arrangement Act*;
  - (iii) a receiver, receiver manager or other encumbrance holder taking possession of or being appointed over, or any distress, execution or other process being levied or enforced upon, the whole or any material part of the assets of Castlepoint;
  - (iv) Castlepoint ceasing to carry on business;
  - (v) Castlepoint making an assignment for the benefit of its creditors, being declared bankrupt or committing an act of bankruptcy, becoming insolvent, making a proposal or otherwise taking advantage of provisions for relief under the Bankruptcy and Insolvency Act or similar legislation in any jurisdiction, or any other type of insolvency proceedings being commenced by or against Castlepoint under the Bankruptcy and Insolvency Act or otherwise and, if commenced against the Castlepoint, not stayed within 30 days of its commencement; or
  - (vi) a petition being filed (and not being contested in good faith using all reasonable efforts for a period not exceeding 30 days), or a resolution being passed or an order being made for the winding-up, liquidation or dissolution of Castlepoint;
- (f) the occurrence of a Disposition not permitted in accordance with this Agreement;  
or
- (g) the occurrence of a matter defined as an Event of Default elsewhere in this Agreement or in any of the Project Agreements.

## 9.2 Commercial Component Lease Defaults

Matters respecting default and “events of default” of Castlepoint as tenant under the Commercial Component Lease shall be restricted to those matters referred to as a “Default” and/or “Event of Default” in accordance with the Commercial Component Lease.

### 9.3 Notification

Castlepoint will notify the City of the occurrence, and details, of any Event of Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to an Event of Default, in either case promptly on Castlepoint becoming aware of its occurrence. However, a failure to provide such notice shall not derogate from the rights of the City as provided in this Agreement.

### 9.4 Rights of City

- (1) On the occurrence of an Event of Default, or any time thereafter while it is subsisting, the City may:
  - (a) serve notice of default on Castlepoint requiring Castlepoint at Castlepoint's option either:
    - (i) (A) to remedy the Event of Default referred to in such notice of default (if it is continuing) within 30 days of such notice of default or such shorter or longer cure period as may be expressly provided elsewhere in this Agreement (the "Cure Period");
    - (B) the Cure Period to remedy an Event of Default shall be extended to a greater period than 30 days as shall be reasonable in the circumstances approved by the City, such approval not to be unreasonably withheld or delayed provided that during such additional period Castlepoint continually and diligently uses its best efforts to remedy the Event of Default;
    - (C) notwithstanding anything contained in this subsection (i), the Cure Period to remedy an Event of Default may be shortened in the event that the City, acting reasonably, determines that an emergency exists, in which event the City shall so notify Castlepoint; or
  - (ii) to put forward within 30 days of such notice of default or such lesser period of time as shall be required in the circumstances, as determined by the City in its Discretion a reasonable program (set out, if appropriate, in stages) for remedying the Event of Default. The program will specify in reasonable detail the manner in, and the latest date by, which such Event of Default is proposed to be remedied (Castlepoint will only have the option of putting forward such a program if it first notifies the City within 10 Business Days of such notice of default that it proposes to do so), and during the Cure Period specified in the program Castlepoint shall continually and diligently use its best efforts to remedy the Event of Default.



- (2) In the event that the City has served notice of default on Castlepoint in accordance with Subsection 0, the City shall notify the Project Lender of Castlepoint's default and provide the Project Lender the opportunity to exercise its remedies, all of which shall be reflected in the Step-In Agreement. If the Project Lender fails to exercise its remedies within the time period specified in the Step-In Agreement and cure the Event of Default, the City may terminate this Agreement in its entirety.
- (3) On the occurrence of an Event of Default, or any time thereafter while it is subsisting, the City may exercise any other rights or remedies expressly provided for in this Agreement or be entitled to any damages or compensation, without derogating from the other elections provided for in favour of the City in this Article.

#### 9.5 City Termination Right

Subject to the exercise of the rights of the Project Lender and the curing of the Event of Default pursuant to the Step-In Agreement, if an Event of Default notified in a notice of default served under Section 0 is not remedied before the expiry of the period referred to in Section 0 (the "Default Date"), then at any time after the Default Date while such Event of Default is in existence, the City may terminate this Agreement in its entirety by notice to Castlepoint with immediate effect, in which event the rights of the City contained in this Agreement on termination and those rights continuing notwithstanding termination shall thereupon apply or continue to apply.

#### 9.6 Right of Self Help

- (1) Subject to the rights of the Project Lender pursuant to the Step-In Agreement, in the event that there shall be an Event of Default, and provided that Castlepoint is not using its best efforts to remedy the default during the applicable Cure Period in accordance with Section 0, at any time thereafter while it is subsisting the City may, on 10 Business Days prior notice enter into and upon the Project or appoint an agent on behalf of the City to enter upon the Project to rectify the matter in default or appoint a receiver by instrument in writing to enter upon the Project to rectify the default (the "Receiver").
- (2) If the City shall appoint a Receiver in accordance with Subsection 0, the Receiver shall be deemed to be the agent of Castlepoint and not of the City and the City shall not in any way be responsible for any misconduct or negligence on the part of the Receiver, save for acts of gross negligence or fraud.
- (3) Subject to the rights of the Project Lender pursuant to the Step-In Agreement, in order to facilitate the rights of the City contained in this Section, on Closing, Castlepoint shall assign to the City, as collateral security subsequent to security granted to any surety with respect to a Performance Bond, all of the right, title and interest of Castlepoint in and to all existing and future contracts, and all design drawings, documents and specifications (the "Project Documents"), not otherwise

assigned to the City in accordance with Section 0, or 0 which Project Documents shall provide for the collateral assignment to the City and which drawings, plans and specifications shall provide a license to the City to utilize same in the event that the City or its agent or Receiver requires same to enforce the collateral security provided herein.

## 9.7 Alternative Remedies

Except as otherwise expressly provided in this Agreement, all of the rights and remedies of the City under this Agreement are cumulative and not alternative. Subject to the rights of the Project Lender pursuant to the Step-In Agreement, in addition to the right to terminate as provided for in this Agreement and any other rights pursuant to this Agreement or at Law, at any time after the Default Date while an Event of Default is in existence, the City may exercise, either separately or simultaneously, any of the following remedies:

- (a) bring any proceedings in the nature of specific performance, injunction or other equitable remedy, it being acknowledged by each of the Parties that damages at law may be an inadequate remedy for a default or breach of this Agreement;
- (b) on behalf of Castlepoint, to remedy such Event of Default, and also bring any action at law or otherwise to be reimbursed by Castlepoint for any monies expended to remedy such Event of Default and any other expenses incurred by the City, together with interest at the rate of 15 percent per annum, calculated monthly on the amount outstanding from time to time, *mutatis mutandis*; or
- (c) bring any action at law as may be necessary or advisable in order to recover damages.

## 9.8 City Costs

Castlepoint will reimburse the City for all reasonable costs incurred by the City in exercising any of its rights (including any relevant increased administrative expenses and actual legal expenses) under this Article 9. In addition, in the event that the City exercises any of its rights contained in this Article, Castlepoint will reimburse the City for all reasonable costs incurred by the City in connection therewith together with an administrative fee of 15 percent on costs incurred, together with the fees and expenses incurred by the Receiver, if appointed by the City in accordance with Section 0. The City will take reasonable steps to mitigate such costs.

## 9.9 Exercise of Termination Rights

The rights of the City to terminate or otherwise under this Article 9 are in addition, and without prejudice, to any other right which the City may have under this Agreement or at Law to claim the amount of loss or damage suffered by the City on account of the acts or

omissions of Castlepoint or to take any action under this Agreement other than termination of this Agreement.

#### 9.10 Indemnity

Castlepoint shall indemnify and keep the City Indemnified Parties and the Hummingbird Indemnified Parties indemnified at all times from and against all claims, demands, causes of action, suits, judgements and costs of any nature or kind whatsoever at any time suffered, incurred by, brought or made against the City Indemnified Parties and the Hummingbird Indemnified Parties or any of them out of or in course of or in connection with construction of the Private Component, the Public Component, or the Commercial Component, or any act or omission of Castlepoint, its agents, employees, officers, or independent contractors or any breach of any representation, warranty or covenant of Castlepoint under this Agreement or any document, instrument, or agreement delivered pursuant to this Agreement. The provisions respecting the indemnity by Castlepoint in favour of the City Indemnified Parties and the Hummingbird Indemnified Parties shall not apply with respect to any negligence, fraud or wilful misconduct by any of the City Indemnified Parties nor the Hummingbird Indemnified Parties.

#### 10. Assignment

##### 10.1 No Disposition

There shall be no Disposition of this Agreement or any of the Project Agreements except as expressly provided in this Article 10, or except as otherwise Approved by the City.

##### 10.2 Permitted Transfers

For the purposes of this Agreement, there shall be permitted a transfer or issuance of shares of Castlepoint:

- (a) to one or more Castlepoint Principals; or
- (b) Taylor Woodrow PLC, Alberta Finance and/or Standard Life Assurance Company or any Affiliate of any of the foregoing, provided that any such transfer does not result in a Change of Control of Castlepoint.

##### 10.3 Project Lender

This Agreement and the Project Agreements may be assigned as collateral security to the Project Lender or Project Lenders, provided that as a condition precedent thereto each Project Lender shall enter into a Step-In Agreement with the City.

11. Miscellaneous

11.1 Relief Event and Time Relief

In the event that there shall be a Relief Event, and a Party claiming the Relief Event shall have used commercial best efforts to mitigate the consequences of any time delay resulting therefrom and shall have provided Notice to either of the City (or Hummingbird) or Castlepoint, as the case may be, with respect to the occurrence of the Relief Event within fifteen (15) days of its occurrence, Castlepoint or the City (or Hummingbird), as the case may be, shall be entitled to an extension of time (“Time Relief”) with respect to the obligations of Castlepoint or the City (or Hummingbird), as the case may be, directly, adversely affected by the Relief Event equal to the time during which the Relief Event occurred. For clarity, it is acknowledged that the provisions of this Section 0 shall apply with respect to all time periods referenced in this Agreement.

11.2 Compliance with City Labour Trade Policy

Castlepoint acknowledges and agrees that in connection with the Project, it shall be bound by collective agreements to which the City and/or Hummingbird is bound which agreements are listed in Schedule “18”. Castlepoint shall indemnify and save harmless the City for all costs, obligations and liabilities of any nature or kind arising out of a failure by Castlepoint to comply with the provisions of this Section 0.

11.3 Compliance with City Fair Wage Policy

Castlepoint agrees that with respect to the Project, it shall comply with the Fair Wage Policy of the City as amended from time to time, a current version is attached as Schedule “17”.

11.4 Arbitration

Any Dispute other than an Excluded Dispute or any matter provided for in this Agreement to be resolved by Arbitration shall be subject to arbitration in accordance with the following provision. The Parties expressly agree that the provisions of the *Municipal Arbitrations Act*, R.S.O. 1990, Chap. M.48 shall not apply at any time to any arbitration whatsoever initiated pursuant to this Agreement. Arbitration initiated pursuant to this Agreement shall proceed in accordance with the provisions of the *Arbitration Act, 1991*, S.O. 1991, Chap. 17, except as provided for herein. The arbitration will be conducted by a sole arbitrator. Arbitration shall be initiated by the Party desiring arbitration (the “Initiating Party”) delivering Notice to the other Party or all other Parties (the “Responding Party / Parties”) referring a matter in dispute to arbitration and providing the name or names of a proposed arbitrator or arbitrators. Upon receiving such Notice, the Responding Party / Parties will have seven (7) Days to deliver to the Initiating Party and all other Responding Parties a response, either agreeing to one of the proposed arbitrators, or proposing a different arbitrator or arbitrators that are acceptable to that Responding Party (the “Response”). If the Initiating Party and all of the Responding Parties cannot agree on an arbitrator within seven (7) Days of delivery of all of the

Responses, or if one or more of the Responding Parties fails to deliver a Response within the time required in this provision, then an arbitrator shall be appointed by a judge of the Superior Court of Justice upon the application of either Party to the arbitration.

## 11.5 Approvals

Where, by a provision of this Agreement, an approval, consent or agreement of a Party (hereinafter in this Section individually or collectively referred to as an “approval”) is required, unless the contrary is expressly provided in this Agreement:

- (a) receipt of a written request for approval shall be required;
- (b) the Party whose approval is required will within five (5) Business Days after receipt of a request for approval, accompanied in all cases by reasonable detail if the circumstances require, notify the requesting Party in writing either that it approves, or that it withholds its approval, setting forth in reasonable detail its reasons for withholding;
- (c) if the notification referred to in subsection (b) is not given within the applicable period of time, the Party whose approval is requested will be deemed conclusively not to have given its approval;
- (d) an approval of the City (or Hummingbird) may be withheld or delayed in its Discretion (whether or not reference is specifically made to such approval being withheld in the Discretion of the City (or Hummingbird)) unless expressly provided to the contrary in this Agreement;
- (e) an approval by Castlepoint may not be unreasonably withheld or delayed (whether or not reference is specifically made to such approval not being unreasonably withheld); and
- (f) a dispute as to whether or not the approval has been unreasonably withheld or whether or not such approval ought to have been provided in accordance with the requirements of this Agreement shall be resolved by the Dispute Resolution Procedure.

## 11.6 Construction Liens

- (1) Castlepoint shall promptly pay all its contractors and suppliers and shall use all reasonable efforts to avoid any lien under the *Construction Lien Act* (Ontario) being filed or registered against any portion of the Total Lands or any part thereof by reason of work, labour, services or material supplied or claimed to have been supplied to Castlepoint, its general contractor, or any other contractor or agent of Castlepoint. If any such lien shall at any time be filed or registered it shall be discharged or vacated within thirty (30) days after the same has come to the notice or knowledge of Castlepoint. In the event that Castlepoint wishes to contest the amount or validity of any lien in good faith, Castlepoint shall so notify the City in

writing and in such event Castlepoint may cause the discharge of such lien by payment into court or the provision of permitted security in accordance with any applicable statute.

- (2) Castlepoint shall comply with the requisite holdbacks pursuant to the *Construction Lien Act* (Ontario) with respect to construction of the Private Component and/or the Commercial Component and/or the Project Related Renovations.

#### 11.7 No Partnership or Agency

The Parties expressly disclaim any intention to create a partnership or joint venture or to constitute the other Party as its agent. Nothing in this Agreement shall constitute the Parties, partners or joint venturers, nor constitute one Party, the agent of the other Party.

#### 11.8 Publication of Notice

The Parties acknowledge that Notice in compliance with Chapter 213 of the City of Toronto Municipal Code was published in the Toronto Star on December 14, 2005.

#### 11.9 Review, Approval, Inspection or Audit by the City

If any review, approval, inspection, examination, audit, determination or acceptance is provided, performed or made by or on behalf of the City or Hummingbird under, pursuant to or in respect of this Agreement, then with the exception of any express written consent or approval by the City in case of a specific act or conduct by Castlepoint that, in the absence of such consent or approval, would constitute a breach by Castlepoint of any of its obligations under this Agreement:

- (a) such review, approval, inspection, examination, audit, determination or acceptance will be for general compliance only; and
- (b) no such review, approval, inspection, examination, audit or determination or acceptance now or in the future, and whether or not negligent on the part of the City (including the City Indemnified Parties):
  - (i) shall relieve or exempt Castlepoint from any of its obligations under this Agreement or at Law or in equity;
  - (ii) shall constitute a waiver or release by the City of any duty or liability owed by Castlepoint to the City under this Agreement or of any indemnity given by Castlepoint to the City under this Agreement;
  - (iii) shall not constitute an approval by the City of any plans or specifications; or

- (iv) shall create or impose any requirement, liability, covenant, agreement or obligation on the City.

#### 11.10 City as Municipal Corporation

- (1) Nothing in this Agreement derogates from, or interferes with or fetters the exercise by the City of all of its rights and responsibilities as a municipality, or imposes any obligations on the City, in its role as a municipality, and the City shall not be prevented from or prejudiced in carrying out its statutory rights and responsibilities, including (whether discretionary or mandatory) rights and responsibilities. Nothing contained in this Agreement derogates from or interferes with or fetters the exercise by the City's officers, employees, agents, representatives or elected and appointed officials of all of their rights and responsibilities, or imposes any obligations on the City's officers, employees, agents, representatives or elected and appointed officials, other than as expressly set out in this Agreement.
- (2) No communication or dealing between Castlepoint and any department, committee, body, officer, employee, agent, representative or elected or appointed official of the City shall be deemed to be a communication or dealing under the provisions of this Agreement between Castlepoint and the City as Parties to this Agreement, or to affect the City with notice of any such communication or dealings. It is intended and agreed that the City acts solely in a private capacity under this Agreement and any communication or dealing between the City and Castlepoint as Parties to this Agreement will only be effective if delivered in accordance with the notice provisions set out in this Agreement. No communication or dealing between the City as a Party to this Agreement and Castlepoint as a Party to this Agreement will relieve Castlepoint from the responsibility of discharging its lawful obligations to the City imposed by statute, regulation, by-law or any other Law or in any other lawful manner separate and apart from the obligation of the Purchaser imposed by this Agreement.
- (3) Any of the rights and obligations of the City under this Agreement may be exercised and performed, respectively, by the Chief Corporate Officer from time to time, or by his or her successors and designate(s) from time to time.
- (4) Nothing contained in this Agreement shall derogate from the obligations of Castlepoint and the rights of the City as a planning authority pursuant to the *Planning Act* including obligations of Castlepoint to enter into agreements respecting Section 37 and Section 41 of the *Planning Act*, and complying with exterior signage by-laws of the City, the Canadian Code of Advertising Standards and all other City policies in effect from time to time with respect to signage.





If to Hummingbird: Hummingbird Centre for the Performing Arts  
One Front Street East  
Toronto, Ontario  
M5E 1B2

Attention: Daniel D. Brambilla, CEO  
Fax: 416-393-7425

with a copy to: Borden Ladner Gervais LLP  
Scotia Plaza, 40 King Street West  
Toronto, Ontario  
M5H 3Y4

Attention: Morton G. Gross  
Fax: 416-361-2429

or to any other address, fax number, e-mail address or individual that the Party designates. Any Notice:

- (a) if validly delivered, or if validly transmitted electronically before 5:00 p.m. (Toronto time) on a Business Day, will be deemed to have been given on the Business Day; and
- (b) if validly delivered, or if validly transmitted electronically after 5:00 p.m. (Toronto time) on a Business Day, will be deemed to have been given on the Business Day after the date of transmission.

Any Notice permitted or required to be given by the City may be given by the Chief Corporate Officer, his or her successor, or his or her designate(s) from time to time (collectively, for purposes of this clause, the “CCO”). However, the CCO specifically reserves the right to submit the issue of the giving of any Notice, or of the contents of any Notice, to City Council for its determination.

#### 11.12 Confidentiality and Access to Information

- (1) (a) Castlepoint, for itself, its shareholders, employees, engineers, surveyors, consultants and agents, agrees that it shall not at any time subsequent to the Execution Date, except as required by Law, disclose to anyone or use for any purpose other than the purpose contemplated by this Agreement or the development of the Total Lands by Castlepoint any information concerning the City, Castlepoint and the Total Lands, whether such information was disclosed by the City or obtained by Castlepoint, its employees, engineers, surveyors, consultants and agents through its investigations and inquiries, where such information was not or will not be a matter of public record. If, prior to Closing, the Agreement is terminated, Castlepoint shall return all documents and materials obtained

by it from the City in connection with this Agreement. This Section 00 shall not expire with or be terminated or extinguished by or merged in the Closing of the transaction of purchase and sale contemplated by this Agreement, and shall survive the termination of this Agreement for any reason or cause whatsoever and the Closing of this transaction.

- (b) Notwithstanding subsection 11.12(1)(a), Castlepoint shall be permitted to disclose the information described in subsection 11.12(1)(a) to a Project Lender or Project Lenders or to a permitted transferee in accordance with Section 0, for the purposes contemplated in this Agreement.
- (2) (a) Castlepoint acknowledges that all information, documents and correspondence provided by Castlepoint to the City in connection with this Agreement and the transaction provided for in this Agreement (collectively, the “Castlepoint’s Information”) will become the property of the City, subject to the *Municipal Freedom of Information and Protection of Privacy Act* (Ontario) as amended (“MFIPPA”) and subject to any other obligations of the City to disclose information in its possession or control. Therefore, Castlepoint acknowledges that all or some of Castlepoint’s Information may be reproduced or otherwise copied by the City, may become part of the public record of the transaction provided for in this Agreement, and consents to the disclosure of Castlepoint’s Information by the City pursuant to MFIPPA or otherwise. Castlepoint should assume that the name of Castlepoint will be, in every case, a matter of public records.
- (b) Castlepoint agrees to identify those portions, if any, of Castlepoint’s Information which contain any scientific, technical, commercial, proprietary, financial or labour relations information, any trade secrets or any information of a similar confidential nature the disclosure of which could cause Castlepoint any harm. Castlepoint agrees that any of Castlepoint’s Information which is not expressly identified to the City as confidential information at the time that it is received by the City will be treated as public information.

#### 11.13 Land Transfer Taxes, Retail Sales Taxes and GST

- (1) Castlepoint shall pay, in addition to the Purchase Price:
  - (a) all land transfer taxes, as required pursuant to the *Land Transfer Tax Act* (Ontario);
  - (b) all retail sales taxes, as required pursuant to the *Retail Sales Tax Act* (Ontario); and

- (c) all goods and services tax (“GST”), as required pursuant to the Excise Tax Act (Canada) (the “ETA”), payable in connection with the transfer of the Private Lands pursuant to this Agreement.
- (2) (a) Castlepoint represents and warrants to the City that Castlepoint is entering into this Agreement and acquiring the rights in the Private Component and Commercial Component as provided herein as principal, for its own account, and that Castlepoint does not act as agent, trustee or otherwise on behalf of any principal, beneficiary or other person or entity. Castlepoint acknowledges that this representation and warranty will survive Closing. Castlepoint agrees to deliver on Closing a certificate in the form attached as Schedule ”15” (the “GST Certificate”), confirming that this representation and warranty is true on Closing, will survive Closing, and will not merge in the completion of the transactions provided for in the Agreement.
- (b) If Castlepoint is not a registrant under the ETA, or is a registrant who is not permitted to self-assess and remit GST under subsections 221(2) and 228(4) of the ETA, Castlepoint shall pay GST to the City on Closing, in addition to the Purchase Price, in accordance with subsections 165(1) and 221(1) of the ETA, and the GST Certificate will not contain section 2 as set out in Schedule ”15”.
- (c) If Castlepoint is a registrant required to self-asses and remit GST under subsection 221(2)(b) and 228(4) of the ETA:
  - (i) Castlepoint shall execute and deliver on Closing a GST Certificate including section 2 as set out in Schedule ”15”; and
  - (ii) Castlepoint shall provide to the City Solicitor, at least ten (10) days prior to Closing, written confirmation of Castlepoint’s GST registration number.

#### 11.14 No Registration

- (1) Castlepoint agrees not to register this Agreement or notice of this Agreement or a caution, certificate of pending litigation, or any other document providing evidence of this Agreement or of any interest of Castlepoint in the Total Lands against title to the Total Lands (collectively, “Castlepoint’s Registration”). Castlepoint irrevocably nominates, constitutes and appoints the City as its agent and attorney in fact and in Law to cause the removal of Castlepoint’s Registration from title to the Total Lands. Should Castlepoint be in default of its obligations under this Section, the City may (as agent and attorney of Castlepoint) cause the removal of Castlepoint’s Registration from the title to the Total Lands.

- (2) The Parties acknowledge that Castlepoint may register the Private Component Lease and the Commercial Component Lease, or notice of same, against title to, respectively, the Private Lands and the Commercial Lands.

#### 11.15 Tender and Electronic Registration

- (1) The Parties waive personal tender, and agree (subject to subsection 00, next following) that:
  - (a) if they have not agreed otherwise prior to Closing, tender may be effectively made if the Party wishing to tender attends at the Land Registry office in which title to the Total Lands is registered (the “LRO”) at or before 4:00 p.m. Toronto time on Closing and remains ready, willing and able to complete the transaction until 4:30 p.m. Toronto time; and
  - (b) alternatively, tender may be validly and effectively made on the lawyer acting for Castlepoint or the City Solicitor, as the case may be. If Castlepoint or Castlepoint’s lawyer provides Notice to the City prior to Closing that Castlepoint is unwilling or unable to complete the transaction, the City will be relieved of any obligation to tender upon Castlepoint or Castlepoint’s lawyer, and the City may immediately begin to exercise all of its rights under this Agreement in respect of breach by Castlepoint.
- (2) If the LRO provides for electronic registration of conveyancing documents in respect of the transfer of title to the Total Lands on Closing (“Teraview Electronic Registration System” or “TERS”), the following provisions shall apply:
  - (a) Castlepoint agrees to retain a lawyer who is both an authorized TERS user and in good standing with the Law Society of Upper Canada to represent Castlepoint in connection with the completion of this transaction, and shall authorize such lawyer to enter into an escrow closing agreement with the City Solicitor in the form recommended from time to time by the Law Society of Upper Canada or in such other form as is required by the City Solicitor (hereinafter referred to as the “Document Registration Agreement” or “DRA”) establishing the procedures and timing for completing this transaction and to be executed by Castlepoint’s lawyer and returned to the City Solicitor at least ten (10) days prior to Closing.
  - (b) Castlepoint and the City agree that the delivery and exchange of documents and monies and the release thereof to the City and Castlepoint, as the case may be:
    - (i) shall not occur contemporaneously with the registration of the Transfer/Deed (and other registrable documents); and

- (ii) shall be governed by the DRA, pursuant to which the lawyer receiving the documents, and/or certified funds, will be required to hold them in strict accordance with the DRA.
- (c) if Castlepoint's lawyer is unwilling or unable to complete the transaction using TERS, in accordance with the provisions of the DRA, then Castlepoint's lawyer (or their agent) shall be obliged to personally attend at the office of the City Solicitor, at such time on the day scheduled for Closing as the City Solicitor may direct, in order to complete this transaction using TERS on the computer facilities in the City Solicitor's office, and shall pay a fee as determined by the City Solicitor, acting reasonably, for the use of the City's computer facilities.
- (d) Castlepoint agrees that it will not be entitled to receive the Transfer/Deed to the Total Lands for registration until the balance of funds due on Closing, in accordance with the statement of adjustments, is remitted by bank draft or certified cheque (from a Schedule "1" Canadian chartered bank) via personal delivery to the City Solicitor (or in such other manner as the City Solicitor may direct).
- (e) notwithstanding anything contained in this Agreement to the contrary, it is agreed by the City and Castlepoint that an effective tender shall be deemed to have been validly made by the City upon Castlepoint when the City Solicitor has:
  - (i) caused all closing documents to be delivered to Castlepoint's lawyer in accordance with the provisions of the DRA;
  - (ii) advised Castlepoint's lawyer by Notice that the City is ready, willing and able to complete the transaction in accordance with the terms and provisions of this Agreement; and
  - (iii) has completed steps required by TERS in order to complete this transaction that can be performed or undertaken by the City Solicitor without the cooperation or participation of Castlepoint's lawyer, and specifically when the "completeness signatory" for the transfer/deed has been electronically "signed" by or on behalf of the City Solicitor, without personally attending upon Castlepoint or Castlepoint's lawyer with the documents or funds required to be delivered by the City for Closing, and without any requirement to have an independent witness to confirm any of (i), (ii) or (iii), immediately preceding.

#### 11.16 Waivers

No waiver of any provision of this Agreement is binding unless it is in writing and signed by all the Parties to this Agreement except that any provision which does not give rights or benefits to particular Parties may be waived in writing, signed only by those Parties who have rights under, or hold the benefit of, the provision being waived if those Parties promptly send a copy of the executed waiver to all other Parties. No failure to exercise, and no delay in exercising, any right or remedy under this Agreement will be deemed to be a waiver of that right or remedy. No waiver of any breach of any provision of this Agreement will be deemed to be a waiver of any subsequent breach of that provision or of any similar provision.

#### 11.17 Further Assurances

Each Party will promptly execute and deliver all further documents and take all further action reasonably necessary or appropriate to give effect to the provisions and intent of this Agreement and to complete the transactions contemplated by this Agreement.

#### 11.18 Remedies Cumulative

The rights and remedies under this Agreement are cumulative and are in addition to and not in substitution for any other rights and remedies available at Law or in equity or otherwise. No single or partial exercise by a Party of any right or remedy precludes or otherwise affects the exercise of any other right or remedy to which that Party may be entitled.

#### 11.19 Amendments

No amendment, supplement, restatement or termination of any provision of this Agreement is binding unless it is in writing and signed by each Party to this Agreement at the time of the amendment, supplement, restatement or termination.

#### 11.20 Enurement

This Agreement enures to the benefit of and binds the Parties and their respective successors and permitted assigns.

IN WITNESS WHEREOF the Parties have executed this Agreement as of the day and year first above written.

CITY OF TORONTO

Per: \_\_\_\_\_

Name: Ulli S. Watkiss  
Title: City Clerk

Per: \_\_\_\_\_

Name: Joseph P. Pennachetti  
Title: Chief Financial Officer and Treasurer

I/We have authority to bind the Corporation

CASTLEPOINT REALTY PARTNERS  
LIMITED

Per: \_\_\_\_\_

Name: Alfredo Romano  
Title: President and Secretary

I have authority to bind the Corporation

THE BOARD OF DIRECTORS OF THE  
HUMMINGBIRD CENTRE FOR THE  
PERFORMING ARTS

Per: \_\_\_\_\_

Name: Daniel D. Brambilla  
Title: Chief Executive Officer

I have authority to bind the Corporation

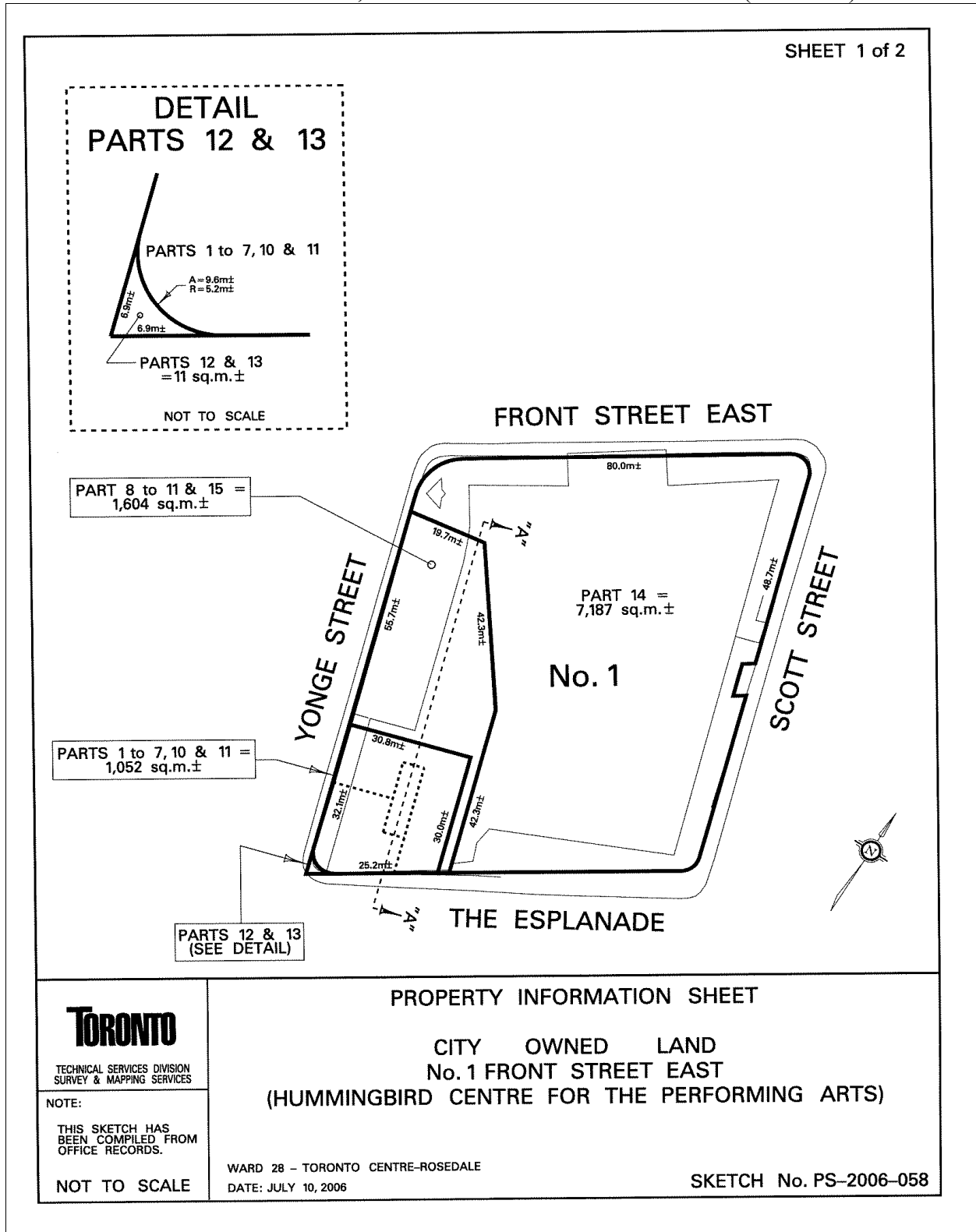
Schedule 1  
Total Lands

Legal Description of Total Lands

Firstly: Parcel 1-4, Section Y1, PIN No. 21400-0010 (LT); and

Secondly: Parts of Water Lots 1 and 36, Plan 5A, Part of the Walks and Gardens on Plan 5A, and Part of the bank of Toronto Bay lying between the southerly or south-easterly limits of the Walks and Gardens and the northerly or north-easterly limits of Water Lots 1 and 36, PIN No. 21400-0050 (LT).

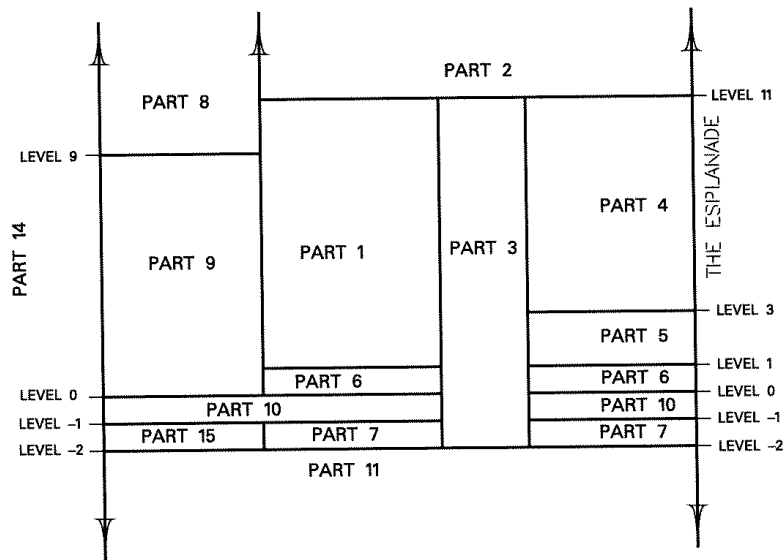
Schedule 2  
Sketch – Private Lands, Public Land And Commercial Lands (2 PAGES)





SHEET 2 of 2

### DETAIL SECTION "A" (LOOKING EAST)



NOTE: SUBJECT TO APPROVAL OF THE PARTIES IN ACCORDANCE WITH THE UMBRELLA AGREEMENT, THERE MAY BE A SECOND LEVEL OF BASEMENT SPACE FOR THE PROPOSED CONDOMINIUM TOWER, BENEATH PART 7.

SKETCH No. PS-2006-058

Schedule 3

Castlepoint Principals

CONFIDENTIAL INFORMATION ON FILE IN THE OFFICE OF THE CITY CLERK

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Schedule 4

Principles Respecting Termination Options in Commercial Component Lease

Hummingbird Commercial Component Lease Principles for Calculating the Termination Amount

1. General

(1) The City of Toronto (the “City”) shall have the right to terminate the Commercial Component Lease (the “Termination Option”) as follows:

(a) On the 10th through 15th anniversaries of the Stabilization Date; and

(b) On the 26th through 30th anniversaries of the Stabilization Date,

hereinafter collectively referred to as the “Termination Dates” or individually as a “Termination Date”.

For purposes of the foregoing, the “Stabilization Date” of the Commercial Component means the earlier of:

(c) The first day of the month immediately following the month in which the first anniversary of the Substantial Completion of the Commercial Component Building occurs; and

(d) The first day of the month immediately following the month during which 95 percent of the rentable area of the Commercial Component Building is leased and occupied (or full rent is otherwise being paid for any unoccupied space) by tenants of the Commercial Component Building.

(2) If the Termination Date occurs on any date specified in sub-paragraph (1)(a) above, the City will provide Castlepoint not less than 12 months written notice prior to the Termination Date of its intention to exercise its Termination Option. In such case, the Closing Date shall be the Termination Date. If the Termination Date occurs on any date specified in sub-paragraph (1)(b) above, the City shall provide Castlepoint not more than 12 months written notice prior to the Termination Date that it intends to call for its own appraisal of the Commercial Component. In such case, and subject to sub-paragraph (2) of Section 2 below, the City shall notify Castlepoint in writing not less than 6 months

prior to the Termination Date of its intention to exercise the Termination Option and the Closing Date shall occur 60 days after the Termination Date. Should the City decide prior to the above-noted notice periods that it will not be exercising the Termination Option on any one or more of the Termination Dates it shall notify Castlepoint of its decision.

- (3) If the Termination Date occurs on the 15th anniversary of the Stabilization Date, the Commercial Component shall be transferred to the City free and clear of all mortgages and the terms of all tenant leases, including renewal option terms, shall have expired.
- (4) If the Termination Date occurs on any date specified in sub-paragraph (1)(a) above other than the 15th anniversary of the Stabilization Date, the Commercial Component shall be transferred to the City subject to all existing tenant leases provided that:
  - (a) all existing mortgages shall not have terms that extend beyond the 15th anniversary of the Stabilization Date;
  - (b) the outstanding mortgage balances shall not exceed the Termination Amount, as hereinafter defined;
  - (c) the tenant leases shall not have terms, including renewal options, which extend beyond the 15th anniversary of the Stabilization Date; and
  - (d) all existing mortgages shall have prepayment provisions which will permit prepayment of the outstanding mortgage balances and discharges of the mortgages on the Closing Dates, subject to the payment by Castlepoint, if required by the terms of the mortgages, of all amounts owing to mortgagees, including yield maintenance payments, arising from such prepayment of the mortgages.
- (5) If the Termination Date occurs on any date specified in sub-paragraph (1)(b) above, the Commercial Component shall be transferred to the City subject to all existing tenant leases provided that:
  - (a) all existing mortgages shall not have terms that extend beyond the 40<sup>th</sup> anniversary of the Stabilization Date;
  - (b) the outstanding mortgage balances shall not exceed the Termination Amount;
  - (c) the tenant leases shall not have terms, including renewal options, which extend beyond the 40th anniversary of the Stabilization Date; and
  - (d) all existing mortgages shall have prepayment provisions which will permit prepayment of the outstanding mortgage balances and discharges of the mortgages on the Closing Dates, subject to the payment by Castlepoint, if required by the terms of the mortgages, of all amounts owing to mortgagees,

including yield maintenance payments, arising from such prepayment of the mortgages.

- (6) The terms of any prepayment and yield maintenance provisions pursuant to sub-paragraphs (4)(d) and (5)(d) above shall be consistent with those generally imposed by Institutional Lenders in the prevailing marketplace at the time of such mortgages are granted by Castlepoint.

## 2. Termination Amount

- (1) If the Termination Date occurs on any of the dates specified in sub-paragraph (1)(a) of Section 1, the amount to be paid to Castlepoint by the City (the "Termination Amount") shall be the sum of the following amounts calculated or determined as at the Termination Date:
  - (a) the unamortized balance of the Mortgage as defined in sub-paragraph (4) below;
  - (b) any unamortized leasing cost balances referred to in sub-paragraph (5)(b) below;
  - (c) any unamortized recoverable and non-recoverable capital expenditure balances referred to in sub-paragraph (6)(c) below;
  - (d) the balance of Castlepoint's Cumulative Equity calculated in accordance with sub-paragraph (5) below; and
  - (e) subject to sub-paragraph (3) and (6) of Section 1 above, all amounts owing to mortgagees pursuant to sub-paragraph (4)(d) of Section 1 above.
- (2) If the Termination Date occurs on any of the dates specified in sub-paragraph (1)(b) of Section 1 above, the Termination Amount shall be the sum of the "Fair Market Value" of the Commercial Component as shall be more particularly defined in the Commercial Component Lease and, subject to sub-paragraph (6) of Section 1 above, all amounts owing to mortgagees pursuant to sub-paragraph (5)(d) of Section 1 above. With respect to the determination of the Fair Market Value:
  - (a) the evaluator will be provided instructions (the "Instructions");
  - (b) the Instructions shall provide that the determination of Fair Market Value shall be based upon a leasehold rather than a freehold interest of Castlepoint; and
  - (c) the Instructions shall provide that the evaluator shall not take into account any limitation on the term of subleases that may be granted by Castlepoint.
- (3) The initial creation costs of the Commercial Component shall include all costs properly allocable to the Commercial Component as shall be more particularly defined in the Commercial Component Lease. Any costs to be allocated between the initial creation costs of the Private Component and the Commercial Component and the Shared Facilities and the Commercial Component shall be done on a fair and equitable basis as mutually

agreed upon between the Parties and, failing agreement, as determined in accordance with the Dispute Resolution Procedure.

- (4) Construction financing for the Commercial Component shall be by way of third-party financing and by way of equity. Castlepoint's equity during the construction of the Commercial Component shall accrue interest at the rate of 10 percent per annum from the date at which Castlepoint's equity is invested in the Commercial Component to and including the day prior to the Stabilization Date. Castlepoint's equity during the construction period shall be deemed to equal 25 percent of the initial creation costs. Permanent financing of the initial creation costs of the Commercial Component shall be by way of third-party mortgage financing ("Mortgage"), which component shall be deemed to be 75 percent of the initial creation costs of the Commercial Component (the "Deemed Mortgage"), and by way of equity ("Equity"), which component shall be deemed to be 25 percent of the initial creation costs of the Commercial Component (the "Deemed Equity"). The Deemed Mortgage shall not have a term to maturity that extends beyond the 15th anniversary of the Stabilization Date and the amortization period shall be deemed to be 30 years. The Deemed Equity shall be increased by equity infusions and reduced by an amount equal to the greater of 10 percent of the initial creation costs, excluding land costs and Rent pursuant to the Commercial Component Lease, of the Commercial Component or \$3,000,000.00. The foregoing reduction shall be effective at the end of Castlepoint's second full taxation year after the Stabilization Date.
- (5) For purposes of calculating the Termination Amount, Castlepoint shall be entitled to receive an annual cash return of 10 percent on its weighted average Deemed Equity, as shall be more particularly defined in the Commercial Component Lease, from the Stabilization Date to the Termination Date ("Castlepoint's Annual Required Cashflow"). To the extent that Castlepoint's actual cashflow ("Castlepoint's Annual Actual Cashflow") is more or less than Castlepoint's Annual Required Cashflow in any year, there shall be an adjustment to Castlepoint's weighted average Deemed Equity (the "Annual Equity Adjustment") equal to Castlepoint's Annual Required Cashflow minus Castlepoint's Annual Actual Cashflow. The sum of Castlepoint's weighted average Deemed Equity for the year plus the Annual Equity Adjustment for the same year shall constitute Castlepoint's Cumulative Equity at the end of each fiscal year. As an example, assuming Castlepoint's weighted average Deemed Equity at the end of the first fiscal year is \$7,000,000, Castlepoint's Annual Required Cashflow shall equal \$700,000 (\$7,000,000 multiplied by 10 percent). If Castlepoint's Annual Actual Cashflow is -\$175,000, the Annual Equity Adjustment shall equal \$875,000 (\$700,000 minus -\$175,000) and Castlepoint's Cumulative Equity at the end of the first fiscal year shall equal \$7,875,000 (\$7,000,000 plus \$875,000). Assuming there are no other adjustments (e.g. equity infusions or the reduction referred to in sub-paragraph (4) above), Castlepoint's weighted average Deemed Equity for the second fiscal year shall equal \$7,875,000 and Castlepoint's Annual Required Cashflow shall equal \$787,500 (\$7,875,000 multiplied by 10 percent). If Castlepoint's Annual Actual Cashflow is \$196,875 for the second fiscal year, the Annual Equity Adjustment shall equal \$590,625 (\$787,500 minus \$196,875) and Castlepoint's Cumulative Equity at the end of the second fiscal year shall equal \$8,465,625 (\$7,875,000 plus \$590,625). The foregoing calculation shall be made each fiscal year from the Stabilization Date to the Termination Date.

Castlepoint's Cumulative Equity on the Termination Date shall be included in the Termination Amount.

- (6) For purposes of calculating Castlepoint's Annual Actual Cashflow in any fiscal year, the following shall apply:
  - (a) revenues and operating expenses prior to the Stabilization Date will be included in the initial creation costs of the Commercial Component;
  - (b) leasing costs (e.g. tenant allowances and leasing commissions), including those included in the initial creation costs of the Commercial Component, will be amortized with interest, without duplication, over the lease terms of the respective tenant leases to which the leasing costs apply and any unamortized leasing cost balances on the Termination Dates specified in sub-paragraph (1)(a) of Section 1 above shall be added to the Termination Amount, it being understood that the leasing costs included in the initial creation costs shall be deemed to be notional loans which shall be deducted from the 75 percent Deemed Mortgage component of the permanent financing, such notional loans to be amortized at the same interest rate as the Mortgage;
  - (c) recoverable and non-recoverable capital expenditures incurred on or after the Stabilization Date will be amortized with interest, without duplication, over the useful life of the respective capital expenditure and any unamortized recoverable and non-recoverable capital expenditure balances on the Termination Dates specified in sub-paragraph (1)(a) of Section 1 above will be included in the Termination Amount;
  - (d) annual revenues and operating expenses shall be determined in accordance with generally accepted accounting principles, consistently applied, except that non-cash items such as stepped-rent adjustments, free rent and similar amounts shall be excluded from revenues; and
  - (e) all calculations will be prorated for any fiscal periods less than 12 months.
- (7) In order to facilitate the calculation of the Termination Amount on the Termination Dates specified in sub-paragraph (1)(a) of Section 1 above, an audited statement showing the calculation of Castlepoint's Annual Actual Cashflow and Castlepoint's Cumulative Equity shall be provided to the City within 120 days after the end of each fiscal year. For purposes of closing, an estimate of the Termination Amount shall be agreed to by the Parties and be used as the basis for amounts due to Castlepoint on the Closing Date. Such estimate shall be subject to post-closing adjustment based on the final audited statement as at the Closing Date.

## Schedule 5 Parking Garage Principles

Subject to agreement with GO Transit:

- (1) Subject to section (7), the arrangement will not prevent Hummingbird from acquiring at least 100 commercial parking spaces in an agreement with GO Transit nor will Hummingbird prevent Castlepoint from acquiring the residential parking spaces required for the Private Component.
- (2) Castlepoint will not seek to operate commercial parking spaces in the Parking Garage unless it receives notice from Hummingbird that Hummingbird will not be operating commercial parking spaces in the Parking Garage, and Castlepoint shall not operate any commercial parking spaces in the Parking Garage if Hummingbird has entered into agreement with GO Transit pursuant to which Hummingbird shall operate commercial parking spaces in the Parking Garage.
- (3) The Parking Garage Contract – Private Component shall be assignable to the City in the event that Castlepoint does not build the Private Component. In the event that Castlepoint has entered into the Parking Garage Contract – Private Component and does not construct the Private Component, Castlepoint shall assign the Parking Garage Contract – Private Component to the City.
- (4) Castlepoint requires off-site parking for use by condominium purchasers.
- (5) Hummingbird requires 100 off-site parking spaces for its purposes (the "Hummingbird Parking Spaces").
- (6) Subject to section (7) below, it is anticipated that the requirements of both Castlepoint and Hummingbird will be satisfied by an arrangement with GO Transit for lands owned by GO Transit on the south side of The Esplanade.
- (7) In the event that there shall be inadequate parking spaces available to satisfy the requirements of both Castlepoint and Hummingbird, after reasonable alternatives such as adding an additional underground floor, have been investigated and reasonably rejected, the priorities respecting parking shall be satisfied in the following order of priority:
  - (a) satisfaction of by-law requirements respecting the residential component of the Private Component;
  - (b) parking spaces for the residential component of the Private Component based on 0.8 parking spaces per residential unit;
  - (c) Hummingbird's parking requirements.

- (8) Castlepoint shall, with the facilitation of Hummingbird, use its commercially reasonable efforts to enter into the Parking Garage Contract – Private Component whereby:
- (a) subject to the provisions of section (7) above, the requirements of each of Castlepoint and Hummingbird will be satisfied;
  - (b) Hummingbird shall be entitled to 100 parking spaces, as close to grade as possible;
  - (c) Castlepoint shall construct or arrange for construction of, the Parking Garage;
  - (d) Hummingbird shall be responsible for its proportionate share of the cost of the Hummingbird Parking Spaces, subject to an agreement with GO Transit; and
  - (e) Hummingbird's rights and obligations in any Parking Garage Contract shall be subject to Hummingbird obtaining any necessary approvals with respect thereto and Hummingbird shall be entitled, within a time period to be contained in any Parking Garage Contract, to terminate its rights and obligations in any Parking Garage Contract.

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Schedule 7  
Insurance Requirements During Demolition  
and Construction Phase Of Project

- (1) During the demolition and construction phase of the Project:

Prior to commencement of demolition and construction, Castlepoint shall provide to the City, satisfactory evidence of the following:

- (a) Single Project Wrap-up Liability - not less than \$25 million per occurrence with the City added as an additional insured; including Completed Operations Liability extended to cover a 24 month period after Total Completion of the Project
- (b) Errors and Omissions Liability – not less than \$5 million per claim limit with the City added as an additional insured and including a 2 year extended reporting period from Total Completion of the Project;
- (c) Contractor's Pollution Liability – not less than \$5 million per claim. If single project, the policy should include an extended reporting period of 24 months. If annual policy, it should be kept in force for 24 months from the date of Substantial Completion of the Project. The City should be named as an additional insured on this policy.



- (d) Builder's Risk – All Risk physical damage insurance as opposed to a named peril covering all property and equipment that is to form part of the Project. This policy should have limits not less than the full contract price or the equivalent replacement cost and include Business Interruption coverage including Delay/Start-Up and additional soft costs;
- (e) Automobile - for contractor's licensed vehicles insuring third party bodily injury and property damage as well as physical damage to the vehicle with limits of not less than \$2 million per occurrence; and
- (f) Contractor's Equipment – The contractor will be expected to take out 1st party property insurance on its tools and equipment used in the performance of the contract;

(2) Insurance Terms and Conditions

(a) Waiver of Subrogation

All policies of insurance required to be taken out by Castlepoint, except automobile insurance, shall contain a waiver of any subrogation rights that Castlepoint's insurers may have against the City and against those for whom it is in law responsible, whether any such damage is caused by the act, omission or negligence of the City or those for whom it is in law responsible.

(b) Approval of Insurers

All policies of insurance required to be taken out by Castlepoint shall be placed with insurers to be approved by the Deputy City Manager & Chief Financial Officer of the City, acting reasonably.

(c) Notice of Material Change or Cancellation

Each policy shall contain an endorsement requiring the insurers to notify the City in writing, by registered mail, at least thirty (30) days prior to any material change that restricts or reduces the insurance required under this clause, or cancellation thereof.

(d) Breach of Conditions

Each policy will contain a waiver in favour of the City of any breach of a policy condition or warranty such that the insurance policy in question will not be invalidated in respect of the interest of the City by reason of a breach of any condition or warranty contained in such policies.

(e) Deductibles

The parties agree that insurance policies may be subject to deductible amounts, such amounts to be subject to the approval of the Deputy City Manager and Chief Financial Officer of the City, and which amounts shall be borne by Castlepoint.

(f) Primary Coverage

The insurance policies required pursuant to this clause shall be primary and shall not call into contribution any insurance available to the City.

(g) Limits of Insurance

The City, acting reasonably, may require the limits of the insurance policies provided by Castlepoint to be increased from time to time. Castlepoint shall cause the limits of its insurance on its physical assets located on the Project to be adjusted for inflation from time to time.

(3) Failure to Maintain Insurance

(a) Castlepoint shall promptly advise the City of any cancellation, material alteration or lapse of any policies of insurance required under this clause. If Castlepoint fails to obtain and keep in force the aforesaid policies of insurance, or should any such insurance not be approved by the City not acting unreasonably, the City may obtain such policies and shall give Castlepoint a written notice setting out the amount and dates of payment of all costs and expenses incurred by the City in connection therewith to the date of such notice. Any sum so expended by the City shall be due and payable on demand without prejudice to any other rights or recourse of the City hereunder.

(b) No such insurance taken out by the City shall relieve Castlepoint of its obligation to insure hereunder and the City shall not be liable for any loss or damage suffered by Castlepoint in connection therewith.

(c) If Castlepoint fails to obtain and keep in force the insurance required herein and, if any similar insurance maintained by the City shall be called into contribution at either or both of their option, and as a consequence thereof the City's cost of effecting such insurance increases, any such additional cost shall be payable by Castlepoint to the City forthwith upon production of reasonable proof of such additional cost, without prejudice to any other rights of the City as a result of Castlepoint's failure to keep such insurance in place.

(4) Increase in Insurance Premiums and Cancellation of Insurance

Castlepoint agrees that it, its employees, agents, occupants and invitees will not keep in or upon the Project any article or substance which may be prohibited by the insurance policies mentioned above, or do or omit, or permit to be done or omitted anything which

will cause any increase in the insurance premiums or the cancellation of any insurance policy. If any insurance policy should be cancelled or the coverage reduced or a threat of cancellation or reduction of coverage made by reason of anything arising out of the use or occupation of the Project by Castlepoint, whether or not the first sentence of this section has been complied with, and if Castlepoint fails to remedy the condition giving rise to such cancellation, reduction or threat, upon ten (10) days' notice thereof by the City, the City may enter the Project and remedy the condition at the sole cost and expense of Castlepoint which cost and/or expense shall be payable to the City forthwith on demand as rent in arrears, and in addition or in the alternative, may exercise any other remedy available to it.

(5) Payment of Premiums

Castlepoint shall duly and punctually pay all premiums under the aforesaid policies as they become due and payable. In the event of default of payment by Castlepoint, the City may pay same and the amount so paid shall be forthwith payable by Castlepoint to the City.

(6) Evidence of Insurance

Prior to commencement of demolition or construction, Castlepoint shall deliver to the City evidence of the insurance required hereby in the form of Certificates of Insurance, in form and detail satisfactory to the City, acting reasonably, signed by an authorized representative of the insurer. Castlepoint will make available the complete original certified copies of all applicable policies delivery to the City if required. Certificates of insurance evidencing renewal or replacement of policies shall be delivered to the City fifteen (15) days prior to the expiration of then current policies, without demand having to be made therefore by the City.

(7) Fire Protection Systems

Castlepoint shall ensure that the Project is equipped with up-to-date fire protection systems in compliance with the Ontario Building Code and Ontario Fire Code , as same may be amended from time to time, and all other laws, by-laws, rules and regulations governing same, which fire protection systems are part of the Landlord's Work. Castlepoint shall permit the City to inspect Castlepoint's records relating to fire safety and compliance with the Ontario Building Code and Ontario Fire Code at any time upon forty-eight (48) hours advance notice.

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## Schedule 8 Project Related Renovations

Castlepoint's construction of the Private Component on the Southwest corner of the Hummingbird property requires the demolition of substantially all of the backstage area for the theatre including, without limitation, the following functionalities: rehearsal hall, dressing rooms, bathrooms, offices, stage door, mechanical and electrical rooms and equipment, life safety control systems, security systems, general control systems, theatrical equipment rooms and equipment, hydro vaults and water tower.

The replacement of all the foregoing shall be designed to occupy as much of its former space as is possible. To the extent that such areas and equipment cannot practically be replaced in their former areas, Castlepoint must relocate same. It is presently anticipated that the rehearsal hall and other space that cannot be relocated because of the placement of the condo core will be replaced below grade along Yonge Street, in accordance with Final Plans reflecting agreement between the Parties, acting reasonably, as to such replacement and location. The goal is for Castlepoint to restore at its expense all of Hummingbird's square footage space requirements and functionalities lost due to the demolition, in a manner acceptable to Hummingbird, acting reasonably.

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## Schedule 9 Hummingbird Necessary Renovations

- (1) Hummingbird shall pay for the replacement costs of the air handling units being removed from the west mechanical room.
- (2) Castlepoint shall pay for the replacement costs of the hydro vaults.
- (3) The following list of equipment is required to be replaced by Hummingbird due to age and such equipment is therefore not included in the costs of the Project Related Renovations:
  - (a) Elevators
    - (i) Infrared multi-beam door protection – rear passenger.
    - (ii) Door operations – rear passenger.
    - (iii) Barrier – free access – front and rear passenger.
    - (iv) Major control modernization – rear passenger.
  - (b) Mechanical
    - (i) Replace system valves on main and branch steam lines.
    - (ii) Replace remaining steam traps.
    - (iii) Replace domestic water cooling 24/7 condenser water loop.
    - (iv) Replace coils for steam preheat multi zone reheat, AC reheat and add reheat filter coils.
    - (v) Bulk replacement of devices.
    - (vi) Replace actuator and valves throughout.

- (c) Mechanical Equipment List
    - (i) Centrifugal Chiller – Boiler Room.
    - (ii) Cooling Tower – Roof.
    - (iii) Chilled Water Pumps – Boiler Room.
    - (iv) Chilled Water Pumps – Boiler Room.
    - (v) Converter (Steam to Hot Water) – West Mechanical Room.
    - (vi) Condensate Pump – Boiler Room.
    - (vii) Flash Vessel – Boiler Room.
    - (viii) Condensate Tank – Boiler Room.
    - (ix) Diesel Tank – Generator Room.
    - (x) Air Storage Tank.
  
  - (d) Electrical
    - (i) Replace Motor Control Centres in southwest corner.
    - (ii) Replace Power Distribution Panels in southwest corner.
    - (iii) Replace Lighting and Power Distribution Panel Main Feeders in southwest corner.
    - (iv) Replace Feeders to Motor Control Centre in southwest corner.
    - (v) Install new fibre optic trunk feed for telephone/data.
    - (vi) Provide data/voice tray system for cabling.
    - (vii) Install swipe card access controls.
    - (viii) Replace Battery Unit for Emergency Lighting.
  
  - (4) The list set out in section (3) above shall constitute the Hummingbird Necessary Renovations, except as otherwise provided in this Schedule 9. The Parties may make adjustments to the list set out in section (3) pursuant to and in accordance with the Plans and Specifications, such adjustments to be Approved by the Parties, acting reasonably, provided that such list shall at all times be limited to Hummingbird Necessary Renovations.
  
  - (5) In addition to Castlepoint’s obligations under section (2) above, Castlepoint agrees to pay Hummingbird \$1,000,000 toward the cost of the Hummingbird Necessary Renovations (the “Hummingbird Necessary Renovations Contribution”), which amount shall be payable regardless of any adjustment(s) made to the list set out in section (3) and regardless of whether or not Hummingbird actually replaces all items of equipment listed in section (3). Advances shall be made from the Hummingbird Necessary Renovations Contribution from time to time as expenditures are made by Hummingbird on account of the Hummingbird Necessary Renovations. Hummingbird acknowledges that the Hummingbird Necessary Renovations Contribution of \$1,000,000 made by Castlepoint is for the benefit of the Public Component and the Private Component and is for the benefit of the Hummingbird Centre.
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Schedule 10  
Hummingbird Preservation Measures

- (1) The Parties acknowledge that during the construction period for the Project, the existing Hummingbird Centre must be protected in a manner to ensure that:
  - (a) its physical structure, both interior and exterior are not damaged;
  - (b) all of its operating systems that will remain after completion of construction continue to be operational during the construction period at the minimum standard necessary to ensure that, upon completion of the construction period, the operating systems can be brought to a full operational level with no additional cost other than normal maintenance costs;
  - (c) the Seven Lively Arts Mural is protected from damage of any kind; and
  - (d) the Hummingbird Centre staff can continue to work out of the existing offices, the cost of which continuing staff operations shall be at Hummingbird's expense.
  
- (2) In order to accomplish the foregoing the following is a list of some of the key elements to be addressed by a team of consultants which will need to be engaged to develop the strategies, criteria and conditions required in order to facilitate the foregoing:
  - (a) vibration limitations;
  - (b) temperature levels;
  - (c) security;
  - (d) dust and environmental matters;
  - (e) humidification levels;
  - (f) fire alarm systems;
  - (g) water, sanitary and occupation requirements;
  - (h) modification to existing facilities, where reasonably necessary;
  - (i) key responsibilities to existing facilities and "no go zones";
  - (j) re-start, start up and isolation of existing facilities and shared areas;
  - (k) corrective methods and requirements for "stop work" conditions; and

- (i) installation of temporary water, sanitary, electrical, mechanical, life safety and all other systems necessary to allow for the occupancy of the existing building during construction.
- (3) Cost sharing by the Hummingbird shall be based on the manner in which the Hummingbird makes productive use of the existing facilities during the construction period. Once this is determined, a fair and equitable allocation shall be made taking into account both this factor and the extent to which the preservation measures have been enhanced to allow for such productive use over and above what would have been required if there was no such productive use. The methods of implementing the Hummingbird Preservation Measures in accordance with this Schedule 10, and the costs thereof, shall be determined by the Parties, acting reasonably. Hummingbird acknowledges that the contribution made by Castlepoint to the Hummingbird Preservation Costs is necessary as a result of the development of the Public Component and the Private Component and is for the benefit of the Hummingbird Centre.

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Schedule 12  
Description of Items Included in Soft Costs

- (1) Consultants
- (a) Structural Engineer.
  - (b) Mechanical Engineer.
  - (c) Electrical Engineer.
  - (d) Structural Bracing – Engineers.
  - (e) Building Code Consultant.
  - (f) Survey Fees.
  - (g) Soils Consultant.
  - (h) Environmental Consultant.
  - (i) Elevator Consultant.
  - (j) Planning Engineer.
  - (k) Wind Studies.
  - (l) Shoring Engineer.
  - (m) Building Sciences (Envelope Analysis).
  - (n) Preconstruction Survey.
  - (o) Technical Audit (post construction).
  - (p) Inspection and Testing fees.
  - (q) Printing/Reproduction Changes.
  - (r) Peer Review Engineer.
  - (s) Landscape Architect and Traffic Engineer to the extent such costs relate to the construction involving the Hummingbird Centre and the Public Component.

- (2) Legal and Administration
  - (a) Audit/Accounting Fees.
  - (b) Project/Development Management Fees.
  - (c) General Administration.
  - (d) Operating Costs.
- (3) Municipal Levies/Charges
  - (a) Building Permit Fees.

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Schedule 13

Principles Respecting Allocation of Structural and Support Costs

- (1) The Parties have agreed with respect to the method of cost sharing of the architectural fees as set forth in the attached Agreement.
- (2) The Parties have agreed that the costs of the Project Related Renovations shall be the expense of Castlepoint.
- (3) The Parties have agreed that the costs of the Hummingbird Necessary Renovations with respect to the items described in Schedule 9 to the Agreement shall be the expense of Hummingbird except that Castlepoint shall contribute the sum of \$1 million thereto.
- (4) The parties have agreed that the costs related to the Hummingbird Preservation matters shall be determined and allocated as set forth in Schedule 10 to this Agreement.
- (5) All other costs relating to the construction of the Project shall be allocated in accordance with the following principles:
  - (a) The key concept for cost allocation shall be based on the idea that there are two major components being constructed as part of the overall Project;
  - (b) The 41 storey Private Component with structural support which exists within the Public (or Commercial) Component; and
  - (c) The 9 storey Commercial Component which has structural components which support the Private Component.
  - (d) The sharing of hard and soft costs shall recognize that the costs to Hummingbird shall be limited to the costs that Hummingbird would have incurred in building an equivalent 9 storey building on the property, without undertaking any of the impacts associated with the construction of the Private Component including without limitation, items relating to additional structural costs, timing and location (to the extent additional costs relating to timing and location can be quantified by



the Parties, acting reasonably) and servicing requirements that would not be required for the equivalent 9 storey building alone.

\_\_\_\_\_  
Schedule 14  
Form of Letter of Credit

Letter of Credit No. \_\_\_\_\_ Amount: \_\_\_\_\_

Issued subject to the Uniform Initial Expiry Date: \_\_\_\_\_

Customs and Practice for

Documentary Credits (1993 Revision)

ICC Publication No. 500 (UPC 500)

Beneficiary: City of Toronto  
City Hall, 100 Queen Street West  
5th Floor, East Tower  
Toronto, Ontario M5H 2N2

WE HEREBY AUTHORIZE YOU TO DRAW ON THE \_\_\_\_\_  
(Name of Bank)

\_\_\_\_\_  
(Address of Bank)

for the account of \_\_\_\_\_

(Name and Address of Customer)

UP TO AN AGGREGATE AMOUNT OF \_\_\_\_\_  
(Amount written in full)

DOLLARS (\$) \_\_\_\_\_ ) available on demand.

PURSUANT TO THE REQUEST OF our customer: \_\_\_\_\_  
(Customer Name)

we the \_\_\_\_\_  
(Name and Address of Bank)

hereby establish and give you an Irrevocable Letter of Credit in your favour in the above amount which may be drawn on in whole or in part by you at any time and from time to time, upon

written demand for payment, made upon us by you, which demand we shall honour without enquiring whether you have the right as between yourself and the said customer to make such demand, and without recognizing any claim of our said customer, or objection by it to payment by us.

THE LETTER OF CREDIT we understand relates to those municipal services or financial obligations, or both, set out in an Agreement between our customer and the Municipality as referred to as

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(Agreement name and date, brief description of project and project location)

THE AMOUNT of this Letter of Credit may be reduced from time to time as advised by notice in writing to the undersigned by the City of Toronto.

Partial drawings are permitted.

THIS LETTER OF CREDIT will continue in force for a period of one year; but shall be subject to the condition hereinafter set forth.

IT IS A CONDITION of the Letter of Credit that it shall be deemed to be automatically extended without amendment from year to year from the present or any future expiration date hereof, unless at least sixty (60) days prior to the present or any future expiration date we advise you by written notice, delivered by prepaid registered mail to the City of Toronto, City Treasurer, City Hall, 5th Floor, East Tower, Toronto, ON M5H 2N2, that we elect not to consider this Letter of Credit to be renewable for any additional period. Upon receipt by you of such notice, you may demand payment of the full amount outstanding under this Irrevocable Letter of Credit and we shall honour such demand upon the terms set out in this Irrevocable Letter of Credit.

DATED at \_\_\_\_\_ Ontario, this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_.

COUNTERSIGNED BY: \_\_\_\_\_

(Name of Bank)

\_\_\_\_\_ Per: \_\_\_\_\_

\_\_\_\_\_

Schedule 15  
GST Certificate

PURCHASER'S CERTIFICATE AND UNDERTAKING

TO: CITY OF TORONTO (the "City")

AND TO: ANNA KINASTOWSKI, CITY SOLICITOR

RE: The transfer of Lands municipally known as \_\_\_\_\_, described as Part of Lot \_\_\_\_\_, being Part \_\_\_\_\_ on Plan 66R\_\_\_\_\_ (the "Property") from the City to the undersigned (the "Purchaser") pursuant to an Agreement of Purchase and Sale dated \_\_\_\_\_ (the "Agreement")

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In consideration of and notwithstanding the closing of the above-noted transaction, the undersigned certifies that with respect to Goods and Services Tax ("GST") imposed under the *Excise Tax Act* (Canada) (the "Act") in respect of the transfer of the *Property* and all buildings, structures and improvements thereon, if any:

1. GST is payable in respect of this transaction in accordance with the *Act* and the undersigned, having agreed to pay consideration for the transfer, is liable for the payment of GST thereon;
2. The undersigned, at the time of closing the *Agreement*, is a registrant under the *Act* (GST Registration Number \_\_\_\_\_), which registration has not been withdrawn or revoked. The *Purchaser* shall file returns and remit on a timely basis any GST owing on the transfer, in the manner and to the extent required by the *Act*;
3. The undersigned shall indemnify and hold the *City*, its successors and assigns, harmless from any liability of the *City* under the *Act* arising because of any incorrect statement or breach of the obligations of the undersigned set out in this Certificate and Undertaking or the *Agreement* or arising under the *Act*, together with all fines, penalties, losses, costs and expenses resulting from such incorrect statement or breach.

DATED at Toronto this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

\*\*\*

By: \_\_\_\_\_  
Witness (if *Purchaser* an individual) Name:  
Title:

c/s

By: \_\_\_\_\_  
Name:  
Title:

\_\_\_\_\_  
Schedule 16  
Form of Solicitor's Opinion to City and Hummingbird

LETTERHEAD OF LAW FIRM GIVING OPINION

City of Toronto  
Legal Division  
Station 1260  
26th Floor, Metro Hall  
55 John Street  
Toronto ON M5V 3C6

Attention: Anna Kinastowski  
City Solicitor

Dear Sirs:

Re: [The reference line is to include the legal description of the Land]

We act as solicitors for • ("Castlepoint") in connection with an agreement with the City of Toronto (the "City") and The Hummingbird Centre for the Performing Arts.

We are solicitors qualified to carry on the practice of law in the Province of Ontario. The opinion expressed, extends only to the laws of the Province of Ontario and the federal laws of Canada applicable therein in force as of the date of this opinion.

Based upon the foregoing, we are of the opinion that:

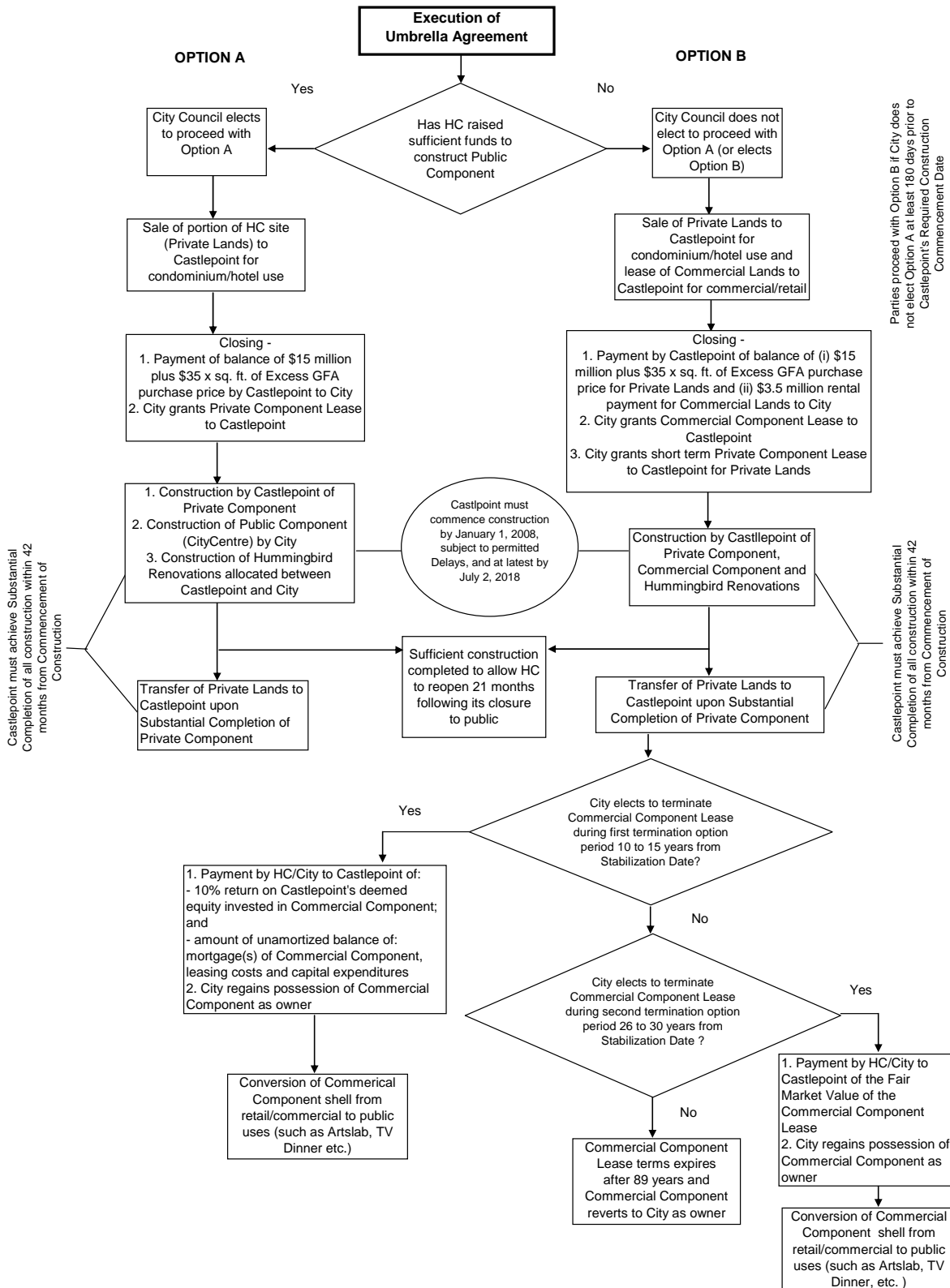
[Where Castlepoint is a Corporation]

1. Castlepoint is duly incorporated and organized, and is a valid and subsisting corporation in good standing under the laws of the [Province of Ontario];
2. Castlepoint has full power and authority to enter into an agreement with the City.

Notwithstanding that our fee for this opinion will be paid by Castlepoint, and that we have acted for Castlepoint in this transaction, we acknowledge that the City is relying upon this title opinion and the opinions expressed herein, and consent and agree to such reliance.

Yours truly,

**APPENDIX 4 - SUMMARY OF PROJECT OPTIONS A and B AS DETAILED IN UMBRELLA AGREEMENT**



Councillor Michael Thompson, Scarborough Centre, addressed the Policy and Finance Committee.

(Copies of Schedules 3, 6, 11 and 17 referred to in the aforementioned Umbrella Agreement was forwarded to all Members of Council with the July 18, 2006, agenda of the Policy and Finance Committee and a copy thereof is also on file in the Office of the City Clerk, City Hall.)

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***City Council – July 25, 26 and 27, 2006***

*Council also considered the following:*

- *Confidential Schedule 3 (undated), headed “Castlepoint Principals”, to the Umbrella Agreement [Confidential Communication C.17(a)]. This Schedule remains confidential, in its entirety, in accordance with the provisions of the Municipal Act, 2001, as it contains personal information about identifiable individuals.*