



**Date:** March 8, 2012

**File No.:** SS-SUB-2011.8

**To:** Salt Spring Island Local Trust Committee for March 15, 2012 Meeting

**From:** Caitlin Brownrigg, Planner 1

**CC:** Robin Annschild, Salt Spring Island Conservancy

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**RE: Conservation Covenant, 195 Belvedere Road**

**Owner:** Phillip Whitfield

**Applicant:** Jordan Litke, Polaris Land Surveying

**Location:** Strata Lot 15 Section 38, 42, & 43 South Salt Spring Island Cowichan District Strata Plan VIS5021 Together With An Interest In The Common Property In Proportion To The Unit Entitlement Of The Strata Lot As Shown On Form V (See Plan As To Limited Access)

## THE PROPOSAL

This proposal is in response to a subdivision application (SS-SUB-2011.8) to create an additional conservation lot on Mount Tuam. The proposal is that the Local Trust Committee enter into a conservation covenant with the Islands Trust Fund and the Salt Spring Island Conservancy. The additional lot (13.4 ha, 33.1 acres) will be a nature reserve owned by the Salt Spring Island Conservancy and the remainder lot will remain in the existing residential strata.

## BACKGROUND

Prior to final approval of the proposed subdivision a conservation covenant is required to be registered under the Land Title Act in order to comply with Section 5.1.1 and 5.13 of Land Use Bylaw No. 355 and Section E.6 of the Salt Spring Island Official Community Plan, Bylaw No. 344 (see details on next page).

This subdivision application was initiated by the Salt Spring Island Conservancy. The proposed conservation lot is adjacent to the Mount Tuam ecological reserve and the Salt Spring Island Conservancy will purchase the proposed conservation lot if this subdivision application is approved.

The conservation covenant was developed by the Salt Spring Island Conservancy and the Islands Trust Fund. Land Use Bylaw No. 355, Section 5.1.1 enables relief from servicing requirements if the covenant is also held by the Salt Spring Island Local Trust Committee. The covenant has gone through legal and staff review by Islands Trust Fund. The other parties to the covenant are currently negotiating the rent charge and administration fees and a baseline report is forthcoming from the Salt Spring Island Conservancy.

**CURRENT PLANNING STATUS OF SUBJECT LANDS**

Land Use Bylaw No. 355

This property is zoned Rural Upland 1 (RU1) in the Salt Spring Island Land Use Bylaw No. 355.

- Section 5.1.1 of Salt Spring Island Land Use Bylaw No. 355 states: “*Subdivision* applications must comply with the regulations for minimum *service* levels set out in Part 9 of this Bylaw except in the following circumstances: if the *subdivision* creates a single *lot* that does not comply, and that *lot* is to be used solely as a *publicly owned park* or nature reserve and the owner grants to the **Salt Spring Island Local Trust Committee** a covenant under the Land Title Act restricting the *use* of the *lot* to that *use*.”
- Section 5.13 of Salt Spring Land Use Bylaw No. 355 states: “A *lot* that is to be used solely for conservation *use* may be created without *frontage* on a *highway*, provided the applicant grants a covenant complying with Section 2.7 of this Bylaw that restricts *use* of the *lot* for conservation purposes and prohibits the construction of any *structures* on the *lot*.”

Official Community Plan Bylaw No. 434

This property is designated Uplands (U) by the Official Community Plan, Bylaw No. 434. It is also subject to Development Permit Area 6- High Soil Erosion Hazard.

- Section E.6 of the Salt Spring Island Official Community Plan Bylaw No. 344 states: “The following activities are also exempted from the requirement to obtain a Development Permit: the subdivision of land parcels where a conservation covenant satisfactory to and in favour of the Salt Spring Island Local Trust Committee or the Islands Trust Fund Board has already been registered for the prevention of soil erosion and the protection of development from hazards due to slope instability.”

Islands Trust Fund

The Islands Trust Fund will also be a signatory to this covenant and has been involved in drafting the covenant. The Islands Trust Fund will conduct annual monitoring of the covenanted lands. The Islands Trust Fund Board meets on March 28, 2012 and staff will recommend that the draft covenant be accepted as written, subject to the inclusion of an acceptable baseline report.

Covenants

There is a geotechnical covenant registered on title.

Archaeological Sites

No archaeological sites have been identified on the subject property.

Riparian Area Regulations

The subject property is not in a RAR designated watershed.

**STAFF COMMENTS**

A registered conservation covenant will restrict building and ensure that the land is used for conservation purposes as a nature reserve and as such will satisfy the requirements of Section 5.1.1 and 5.13 of Land Use Bylaw No. 355. The conservation covenant will also satisfy the requirements of Section E.6 of the Official Community Plan concerning Development Permit Area 6 by ensuring that the land remains undisturbed.

The proposed nature reserve is adjacent to the Mt Tuam ecological reserve. If it becomes a nature reserve it will connect to lands already held by the Province of BC for conservation purposes. As such this proposal is consistent with the mandate of the Islands Trust as well as a benefit to the community.

**RECOMMENDATION**

**THAT** the Salt Spring Island Local Trust Committee accept the proposed conservation covenant to be registered on the severed lands subject to the inclusion of a baseline report in the covenant that is acceptable to the Islands Trust Fund (Salt Spring Island Conservancy, SS-SUB-2011.8, 195 Belvedere Road).

**THAT** the Salt Spring Island Local Trust Committee designate any member to sign the conservation covenant (Salt Spring Island Conservancy, SS-SUB-2011.8, 195 Belvedere Road).

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Respectfully submitted by:

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Caitlin Brownrigg  
Planner 1

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Date

Concurred by:

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Leah Hartley  
Regional Planning Manager

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Date

**Appendix A: Proposed Subdivision Layout**  
**Appendix B: Draft Conservation Covenant**



LAND TITLE ACT  
FORM C

# Draft 2

## March 1, 2012

(Section 219.81)

Province of  
British Columbia

**GENERAL INSTRUMENT - PART I** (This area for Land Title Office Use)

Page 1 of 2

1. Application: (Name, address, phone number and signature of applicant, applicant's solicitor or agent)

2. Parcel Identifier(s) and Legal Description(s) of Land

**(PID)**

**(LEGAL DESCRIPTION)**

3. Nature of Interest:\*

DESCRIPTION	DOCUMENT REFERENCE	PERSON ENTITLED TO INTEREST
Section 219 Covenant	Entire Instrument	Transferees
Rent Charge	Pages 10-11 Paragraph 12	Transferees
Section 218 Statutory Right of Way	Pages 8-9 Paragraph 10	Transferees

4. Terms: Part 2 of this instrument consists of (select one only)

- (a) Filed Standard Charge Terms D.F. No.  
 (b) Express Charge Terms **X** Annexed as Part 2  
 (c) Release There is no Part 2 of this instrument

A selection of (a) includes any additional or modified terms referred to in item 7 or in a schedule annexed to this instrument. If (c) is selected, the charge described in Item 3 is released or discharged as a charge on the Land described in Item 2.

5. Transferor(s): **Salt Spring Island Conservancy**, (Inc. No. S- 32945), Box 722, Ganges Post Office, Salt Spring Island, BC V8K 2W3.

6. Transferee(s): (Including occupation(s), postal address(es) and postal code(s))\*

**Trust Fund Board**, 200, 1627 Fort Street, Victoria, BC V8R 1H8

**Salt Spring Island Local Trust Committee**, 200, 1627 Fort Street, Victoria, BC V8R 1H8

7. Additional or Modified Terms:\*

N/A

LAND TITLE ACT  
FORM C

(Section 219.81)  
Province of  
British Columbia

**GENERAL INSTRUMENT - PART I**

8. Execution(s): **\*\*This instrument creates, assigns, modifies, enlarges, discharges or governs the priority of the interest(s) described in Item 3 and the Transferor(s) and every other signatory agree to be bound by this instrument, and acknowledge(s) receipt of a true copy of the filed standard charge terms, if any.**

Officer Signature(s):

EXECUTION DATE  
Y M D

Party(ies) Signature(s)

**TRANSFEROR**

\_\_\_\_\_  
(as to both signatures)  
print name and address below

12

\_\_\_\_\_  
print name:

\_\_\_\_\_  
print name:

**TRUST FUND BOARD**  
by its authorized signatory

\_\_\_\_\_  
print name and address below

12

\_\_\_\_\_  
print name:

**SALT SPRING ISLAND LOCAL  
TRUST COMMITTEE**  
by its authorized signatory

\_\_\_\_\_  
print name and address below

12

\_\_\_\_\_  
print name:

OFFICER CERTIFICATION: Your signature constitutes a representation that you are a solicitor, notary public or other person authorized by the Evidence Act, R.S.B.C. 1979, c. 116 to take affidavits for use in British Columbia and certifies the matters set out in Part 5 of the Land Title Act as they pertain to the execution of this instrument.

\* If space is insufficient, enter "SEE SCHEDULE" and attach schedule in Form E.

\*\* If space is insufficient, continue executions on additional pages in Form D

TERMS OF INSTRUMENT – PART 2

**Section 219 Conservation Covenant and  
Section 218 Statutory Right of Way**

This Agreement dated for reference March 1, 2012 is

AMONG:

Salt Spring Island Conservancy, a society registered in British Columbia (Registration No. S- 32945), with its registered office at #201 Upper Ganges Centre, 338 Lower Ganges Road, Salt Spring Island, and a mailing address of Box 722, Ganges Post Office, Salt Spring Island, BC V8K 2W3.

(the "Owner")

AND:

Trust Fund Board, a corporation under the *Islands Trust Act* (British Columbia) with its office at 200-1627 Fort Street, Victoria, B.C. V8R 1H8

(the "Board")

AND:

Salt Spring Island Local Trust Committee, a corporation under the *Islands Trust Act* (British Columbia) with its office at 200-1627 Fort Street, Victoria, B.C. V8R 1H8

(the "Co-covenant Holder")

(collectively, the "parties")

**WHEREAS:**

- A. The Owner is the registered owner in fee simple of the Land;
- B. The Land contains significant natural area values and amenities including flora, fauna and natural features of great importance to the Owner, the Covenant Holders and the public;
- C. The Owner wishes and has agreed to grant to the Covenant Holders a covenant pursuant to section 219 of the *Land Title Act*, to restrict the use of the Land, and a statutory right of way pursuant to section 218 of the *Land Title Act*;
- D. A statutory right of way in favour of each Covenant Holder is necessary for the operation and maintenance of the undertakings of each Covenant Holder;
- E. The Board and the Co-covenant Holder are Crown agents and are authorized to accept covenants and statutory rights of way under sections 219 and 218 of the *Land Title Act*, respectively.

In consideration of the payment of \$2.00 now paid by each of the Covenant Holders to the Owner, the receipt and sufficiency of which is acknowledged by the Owner, and in consideration of the promises exchanged below, the parties covenant and agree as follows, in accordance with sections 218 and 219 of the *Land Title Act*.

## 1. INTERPRETATION

- 1.1 In this Agreement, in addition to the words defined above:
- (a) "Administration Fee" means a fee of \$150.00 adjusted in each year as provided in section 13.2, charged by the Covenant Holders to cover the administration costs of providing approvals, inspections or other actions at the request of the Owner;
  - (b) "Amenities" includes those natural, scientific, environmental, wildlife, plant and cultural values relating to the Land as identified in the Report, including any natural area values and amenities of the Land as prescribed by regulation for the purposes of Part 7.1 of the *Islands Trust Act*;
  - (c) "Business Day" means any day other than Saturday, Sunday or British Columbia statutory holidays;
  - (d) "Certificate" means a certificate issued by the Covenant Holders under section 15.1;
  - (e) "Covenant Holders" means, unless the context otherwise requires, the Board and the Co-covenant Holder collectively and "Covenant Holder" means either of them, as the context may require;
  - (f) "CPI" means the All-Items Consumer Price Index published by Statistics Canada, or its successor in function, for Vancouver, BC, where 2012 equals 100;
  - (g) "Land" means the parcel of Land legally described as Parcel **Identifier** **INSERT PID AND LEGAL DESCRIPTION**;
  - (h) "Management Plan" means the Management Plan for the Land approved by all parties in accordance with Article 5, a copy of which is on file with each of the parties;
  - (i) "Notice of Enforcement of Rent Charge" means a Notice of Enforcement of Rent Charge given under section 12.6;
  - (j) "Notice of Breach" means a notice of breach given under section 11.1;
  - (k) "Rent Charge" means the rent charge granted by the Owner under section 12.1;
  - (l) "Rent Charge Amount" means the amount set out in Article 12, the payment of which is secured by the Rent Charge; and
  - (m) "Report" means the baseline documentation report that describes the Land and the Amenities in the form of text, maps, and other records of the Land as of the date of registration of this Agreement, a copy of which is on file with each of the parties at the addresses set out in Article 16, and a condensed version of which is attached as Schedule A.



- 1.2 Where this Agreement provides that something is in the “sole discretion” of a party, that thing is within the sole, absolute and unfettered discretion of that party.
- 1.3 This Agreement must be interpreted in accordance with the laws of British Columbia and the laws of Canada applicable in British Columbia, and the parties agree that the courts of British Columbia have exclusive jurisdiction over any proceeding concerning this Agreement and to attorn to the jurisdiction of such courts.
- 1.4 This Agreement is comprised of the recitation of the parties, the recitals to this Agreement, the Schedules to this Agreement, Part 1 of the *Land Title Act* Form C to which this Agreement is attached, and these Terms of Instrument.
- 1.5 In this Agreement:
- (a) reference to the singular includes a reference to the plural, and vice versa, unless the context otherwise requires;
  - (b) where a word or expression is defined in this Agreement, other grammatical forms of the same word or expression have corresponding meanings;
  - (c) reference to a particular numbered Article or section, or to a particular lettered Schedule, is a reference to the correspondingly numbered or lettered Article, section or Schedule of this Agreement, except where otherwise provided;
  - (d) Article headings have been inserted for ease of reference only and are not to be used in interpreting this Agreement;
  - (e) the word “enactment” has the meaning given to it in the *Interpretation Act* on the reference date of this Agreement;
  - (f) reference to any enactment is a reference to that enactment as consolidated, revised, amended, re-enacted or replaced, unless otherwise expressly provided;
  - (g) reference to an enactment is to an enactment of the province of British Columbia except where otherwise provided;
  - (h) reference to a “party” or the “parties” is a reference to a party or the parties to this Agreement and their respective successors, assigns, trustees, administrators and receivers; and
  - (i) reference to a “day”, “month” or “year” is a reference to a calendar day, calendar month or calendar year, as the case may be, unless otherwise expressly provided.

## **2. REPRESENTATIONS AND WARRANTIES**

- 2.1 The Owner represents and warrants to the Covenant Holders that the facts set out in Recitals A and C are true as of the date of this Agreement.
- 2.2 The Covenant Holders represent and warrant to each other and the Owner that the facts set out in Recitals D and E are true as of the date of this Agreement.
- 2.3 Each party represents and warrants to each other party that the facts set out in Recital B are true as of the date of this Agreement.

### 3. INTENT OF AGREEMENT

3.1 The parties agree that the intent of this Agreement is:

- (a) to protect, preserve, conserve, maintain, enhance and, if applicable from time to time restore, the natural state of the Land and the Amenities as described on the Report; and
- (b) to prevent any occupation or use of the Land that will impair or interfere with the natural state of the Land or the Amenities as described on the Report,

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

3.2 This Agreement shall be perpetual to reflect the public interest in the protection, preservation, conservation, maintenance and enhancement of the Land and the Amenities.

### 4. RESTRICTIONS ON USE OF THE LAND

4.1 Except as expressly permitted in this Agreement, the Owner must not do anything, omit to do anything, allow anything to be done or allow the omission of anything, that does or could reasonably be expected to destroy, impair, diminish, negatively affect or alter the Land or the Amenities from the condition described in the Report.

4.2 Without restricting the generality of section 4.1, the Owner must not, except in accordance with the Management Plan, or with the prior written approval of both Covenant Holders, in the sole discretion of each of them:

- (a) use or permit the use of the Land for an activity or use which:
  - (i) causes or allows silts, leachates, fills or other deleterious substances to be released into any watercourse on the Land;
  - (ii) causes the erosion of the Land to occur;
  - (iii) causes or facilitates the loss of soil on the Land;
  - (iv) alters or interferes with the hydrology of the Land, including by the diversion of natural drainage or flow of water in, on or through the Land;
  - (v) causes or allows fill, rubbish, ashes, garbage, waste or other material foreign to the Land to be deposited in, on or under the Land;
  - (vi) causes or allows any component of the Land, including soil, gravel or rock, to be disturbed, explored for, moved, removed from or deposited in or on the Land;
  - (vii) causes or allows pesticides, including but not limited to herbicides, insecticides or fungicides, to be applied to or introduced onto the Land; or
  - (viii) causes or allows any indigenous flora on the Land to be cut down, removed, defoliated or in any way tampered with;

- (b) use or permit the use of the Land for hunting, fishing, gathering or grazing of domestic animals;
- (c) construct, build, affix or place on the Land any buildings, structures, fixtures or improvements of any kind;
- (d) lay out or construct any new roads or paths on the Land; and
- (e) lease or license the Land or any part thereof unless the lease or license is expressly made subject to the provisions of this Agreement and expressly entitles the Owner to terminate the lease or license if the tenant or licensee breaches any of the provisions of this Agreement.

## **5. MANAGEMENT PLAN**

- 5.1 The management of the Land shall be governed by the Management Plan.
- 5.2 The Owner must review and revise at least every 10 years, a Management Plan for the Land and submit the revised Management Plan to each Covenant holder. Each Covenant Holder must, within 25 business days of receipt of the proposed Management Plan, notify the Owner in writing whether or not that Covenant Holder, acting reasonably, approves the proposed Management Plan.
- 5.3 If a Covenant Holder does not approve the proposed revised Management Plan, the Covenant Holder will, in its notification to the Owner, provide written reasons for not approving the Management Plan and a description of changes to the Management Plan that are necessary for the Covenant Holder to approve the Management Plan.
- 5.4 The Owner must, within 25 Business Days of receipt of the Covenant Holders' requested changes to the Management Plan, notify the Covenant Holders in writing whether or not it accepts the proposed changes. If the Owner does not accept the requested changes, the Owner and the Covenant Holders must, within 30 Business Days of receipt of the notice, meet and attempt to resolve the outstanding issues, acting reasonably and in good faith.
- 5.5 If the parties are unable to resolve all outstanding issues under section 5.4, the Owner may notify the Covenant Holders that it elects to withdraw the Management Plan submission.

## **6. BASELINE DOCUMENTATION REPORT**

- 6.1 The parties each agree that the Land and the Amenities are described in the Report and that the Report provides an accurate description of the Land and its Amenities as of the date of this Agreement.
- 6.2 The parties agree that the Report is intended to serve as an objective information baseline for monitoring compliance with the terms of this Agreement.
- 6.3 The Covenant Holders will provide a copy of the full Report to the Owner upon request from the Owner from time to time.
- 6.4 The parties each acknowledge that the flora and fauna on the Land will evolve through natural succession over time and, unless otherwise expressly stated, references to the Report are intended to take into account the natural succession of the flora and fauna over time, without human intervention other than as expressly permitted by this Agreement.

## **7. DISPUTE RESOLUTION**

- 7.1 If a breach of this Agreement occurs or is threatened, or if there is disagreement as to the meaning of this Agreement, either Covenant Holder or the Owner may give notice to the other parties requiring a meeting of all parties within 10 Business Days of receipt of the notice.
- 7.2 Upon receipt of a notice under section 7.1, all parties must immediately cease any activity giving rise to a breach or threatened breach of this Agreement, and any activity giving rise to a disagreement as to the meaning of this Agreement.
- 7.3 The parties must attempt to resolve the matter, acting reasonably and in good faith, within 20 Business Days of receipt of the notice under section 7.1.
- 7.4 If the parties are not able to resolve the matter within the time set out in section 7.3, the parties may, by agreement, appoint a mutually acceptable person to mediate the matter, and the parties must act reasonably and in good faith and cooperate with the mediator and with each other in an attempt to resolve the matter within 30 days after the mediator is appointed.
- 7.5 The costs of mediation under this section, not including costs incurred by a party for legal counsel, will be shared equally among the parties.
- 7.6 This Article does not affect the right of a Covenant Holder to pursue any other legal or equitable remedy in relation to a breach or a threatened breach of this Agreement, including without limitation under Articles 11 and 12, and a Covenant Holder may pursue other remedies concurrently with any dispute resolution under this Article.

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

- 8.1 Subject to Article 4, the Owner reserves all of its rights as owner of the Land, including the right to use, occupy and maintain the Land in any way that is not expressly restricted or prohibited by this Agreement, so long as the use, occupation or maintenance is consistent with the intent of this Agreement.
- 8.2 Without limiting the generality of section 8.1, the Owner may, subject to Article 4, install, maintain or replace a reasonable number of signs for the purposes of public safety or informing the public about the Land and the Amenities, so long as each sign is not larger than 1 metre by 1 metre in size.
- 8.3 Subject to section 8.4, nothing in this Agreement restricts or affects the right of the Owner to do anything reasonably necessary to:
- (a) prevent potential injury or death to any individual; or
  - (b) prevent, abate or mitigate any damage or loss to any real or personal property.
- 8.4 If the Owner intends to do, or permit to be done, anything described in section 8.3, the Owner must give at least 30 days' prior written notice to each Covenant Holder, describing in reasonable detail the intended action, the reason for it and its likely effect on the Land and the Amenities. Where the Owner gives notice under this section, the Owner must permit each Covenant Holder to enter upon the Land and inspect the Land. The Covenant Holders may comment on the proposed action and the Owner must take those comments into consideration before taking or permitting the proposed action to be taken under section 8.3.

- 8.5 Notwithstanding section 8.4, in the case of an emergency situation where the Owner must take immediate action under section 8.3, the Owner may take such necessary action without first notifying the Covenant Holders. As soon as possible after the action is taken, the Owner must notify each Covenant Holder of the circumstances of the action taken, including the actual or likely effect of the action on the Land and the Amenities. Where such emergency action is taken, the Owner must permit each Covenant Holder to enter upon the Land and inspect the Land.

## 9. OWNER'S OBLIGATIONS

- 9.1 The Owner retains all responsibilities and bears all costs and liabilities related to the ownership, use, occupation and maintenance of the Land.
- 9.2 The Owner must indemnify the Covenant Holders, their directors, officers, employees, agents and contractors, from and against any and all liabilities, damages, losses, personal injury or death, causes of action, actions, claims, and demands made, suffered or incurred by or on behalf of any person, arising out of any act or omission, negligent or otherwise, in the use, occupation and maintenance of the Land or its Amenities by the Owner or its officers, employees, contractors, invitees, licensees or agents.
- 9.3 The Owner is liable for any and all breaches of this Agreement, but the Owner is not liable for:
- (a) breaches of this Agreement which occurred prior to the Owner becoming the registered owner of any interest in the Land, provided the previous Owner has received a Certificate issued by the Covenant Holders under section 15.2 certifying that there were no violations of this Agreement immediately before the transfer of the interest in the Land to the Owner;
  - (b) injury or alteration to the Land and the Amenities resulting from natural causes, or causes beyond the Owner's reasonable control, including accidental fire, flood, storm, vandalism, trespass and earth movement, but excluding injury or alteration resulting from actions of the Owner or any other person with the actual or constructive knowledge of the Owner;
  - (c) any prudent action taken by the Owner under emergency conditions to prevent, abate, or mitigate significant injury to the Land (including improvements) or the Amenities, resulting from natural causes, including accidental fire, flood, storm and earth movement; or
  - (d) injury or alteration to the Land caused by the Covenant Holders exercising their rights under this Agreement.
- 9.4 Without limiting the generality of sections 9.1, 9.2 and 9.3, the Owner:
- (a) is solely responsible and liable for any loss or damage, or liability of any kind (whether civil, criminal or regulatory), in any way connected with the existence in, on, from, to or under the Land (whether through spill, emission, migration, deposit, storage or otherwise) of any pollutant, contaminant, waste, hazardous waste, or any matter that harms the environment; and
  - (b) must indemnify each Covenant Holder from and against any loss, fine, penalty, damage, liability, cause of action, action, proceeding, regulatory action, order, directive, notice or requirement, including those of any government agency, incurred, suffered or brought against the Covenant

Holders, or either of them, in any way associated with anything described in subsection (a).

- 9.5 Where, as provided in subsection 9.3(b), the Owner is not responsible for injury or alteration to the Land or the Amenities due to trespass or vandalism, the Owner will take all reasonable steps to identify and seek a prosecution of the person responsible and to seek financial restitution for the injury or alteration. On request by the Owner, a Covenant Holder may, in its sole discretion and on such terms and conditions it considers appropriate, provide financial assistance to the Owner where the costs associated with seeking such financial restitution are excessive.
- 9.6 The Owner must pay when due all taxes, assessments, levies, fees and charges of whatever description which may be levied on or assessed against the Land and must pay any arrears, penalties and interest in respect of any such unpaid amounts.
- 9.7 The Owner must indemnify each Covenant Holder from and against any fee, tax or other charge which may be assessed or levied against the Owner or a Covenant Holder pursuant to any enactment, including the *Income Tax Act* (Canada), with respect to the Land or this Agreement, including any fee, tax or other charge which may be assessed or levied against the Owner or Covenant Holder as a result of the amendment or termination of this Agreement.
- 9.8 Any debts or other amounts due from the Owner to the Covenant Holders under this Agreement, if not paid within 30 days after notice, will bear interest at the annual interest rate that is 1 per cent greater than the prime rate of interest. For the purposes of this section, the "prime rate of interest" is the annual rate of interest charged from time to time by the Bank of Montreal, at its main branch in Vancouver, BC, for demand Canadian dollar commercial loans and designated from time to time by the Bank of Montreal as its prime rate.
- 9.9 The indemnities granted by the Owner to the Covenant Holders under this Article are indemnities granted as an integral part of the section 219 *Land Title Act* covenant created by this Agreement.

## 10. STATUTORY RIGHT OF WAY

- 10.1 The Owner grants to each Covenant Holder a licence, and a statutory right of way pursuant to section 218 of the *Land Title Act*, permitting each Covenant Holder to do the following:
- (a) enter upon the Land to access and inspect the Land at all reasonable times upon prior written notice by a Covenant Holder to the Owner of at least 24 hours, unless, in the opinion of a Covenant Holder, there is an emergency or other circumstance which makes giving such notice impractical;
  - (b) as part of inspection of the Land under subsection (a), take soil, water or other samples, photographs, and video and sound recordings as may be necessary to monitor compliance with and enforce the terms of this Agreement;
  - (c) enter upon and protect, preserve, conserve, maintain, enhance, rehabilitate or restore, in the Covenant Holder's sole discretion and at the Covenant Holder's expense, the Land or the Amenities to as near the condition described in the Report as the Covenant Holder considers is practicable or desirable, if an act of nature or of any person other than as described in

subsection (d) destroys, impairs, diminishes or negatively affects or alters the Land or the Amenities from the condition described in the Report;

- (d) in accordance with Article 11, enter upon and protect, preserve, conserve, maintain, enhance, rehabilitate or restore, in the Covenant Holder's sole discretion and at the Owner's expense, the Land or the Amenities to as near the condition described in the Report as in the Covenant Holder's sole discretion is practicable or desirable, if an action of the Owner or any other person acting with the actual or constructive knowledge of the Owner contravenes any term of this Agreement;
- (e) carry out or evaluate any program agreed upon by the parties for the protection, preservation, conservation, maintenance, restoration or enhancement of all or any portion of the Land or the Amenities;
- (f) place survey pegs or other markings on the Land to clearly identify the Land or access to the Land, or to increase the visibility of existing survey pegs or other markings; and
- (g) erect a plaque or other sign on the Land, in a tasteful manner and at the expense of the Covenant Holder, indicating that the Covenant Holder (or the Covenant Holders) holds a covenant on the Land, provided that the size, style and location of the plaque or sign must be approved by the Owner prior to its placement, such approval not to be unreasonably withheld.

10.2 The Covenant Holders may bring workers, contractors and employees, and vehicles, equipment and other personal property, onto the Land when exercising their rights under this Article.

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

11.1 If either Covenant Holder, in its sole discretion, believes that the Owner has failed to perform any of its obligations under this Agreement, or is otherwise in breach of any term of this Agreement, that Covenant Holder may give a Notice of Breach to the Owner and the other Covenant Holder setting out particulars of the breach, including the Covenant Holder's estimated maximum costs of remedying the breach.

11.2 On receipt of a Notice of Breach, the Owner must

- (a) immediately cease all activities giving rise to the breach; and
- (b) within 60 days remedy the breach or make arrangements satisfactory to the Covenant Holder to remedy the breach, including with respect to the time within which the breach must be remedied.

11.3 For clarity, the requirement in subsection 11.2(b) to remedy a breach requires the Owner to undertake such rehabilitation or restoration necessary to remedy any damage done to the Land contrary to this Agreement, at the Owner's sole expense.

11.4 If the Owner does not comply with the requirements of section 11.2 within the time required or agreed upon, either Covenant Holder may enter upon the Land and take any required actions to cease any activities giving rise to the breach, and to remedy the breach or carry out the arrangements referred to in section 11.2. The Owner must reimburse that Covenant Holder for any expenses incurred in taking any action under this section, up to the estimated maximum costs of remedying the breach as set out in the Notice of Breach.

- 11.5 Expenses incurred by the Covenant Holder under this Article, until paid, are a debt owed by the Owner to the Covenant Holder and the Owner agrees to indemnify the Covenant Holder for such expenses, which indemnity forms an integral part of the covenant under section 219 of the *Land Title Act* created by this Agreement.
- 11.6 By this section, each Covenant Holder appoints the other its agent for the purpose of recovering any debt owed by the Owner to the Covenant Holder who incurred expenses under this Article, including through legal proceedings, and the Covenant Holder who recovers the debt holds it, less reasonable legal fees and disbursements and other reasonable expenses of recovery, as agent for the Covenant Holder that incurred the expenses.

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

- 12.1 As security for the performance of the Owner's obligations under this Agreement, the Owner grants to the Covenant Holders a perpetual rent charge against the Land. The Rent Charge is granted both under section 219 of the *Land Title Act* as an integral part of the statutory covenant created by this Agreement and as a fee simple rent charge at common law.
- 12.2 The Rent Charge secures payment to the Covenant Holders by the Owner of the sum of \$5,000 per year, subject to adjustment under section 12.3.
- 12.3 The Rent Charge Amount will be adjusted on January 1 of each year by increasing or decreasing, as the case may be, the Rent Charge Amount by the amount determined by multiplying the Rent Charge Amount on December 31 immediately preceding by the percentage increase or decrease, as the case may be, in the CPI between the previous January 1 and that December 31, and adding the amount so determined to the Rent Charge Amount as it stands on that December 31. If Statistics Canada, or its successor in function, ceases to publish a CPI or comparable indicator as determined by the Covenant Holder in its sole discretion, the parties agree that the factor to be used in determining the annual increase in the Rent Charge Amount for each year is 3%.
- 12.4 For each breach of this Agreement, the Rent Charge Amount will be increased by a sum equal to 110% of the market value at the date of the breach of any flora or fauna, soil, rock, gravel or minerals which have been altered, damaged, destroyed, moved, harvested or removed in connection with the breach.
- 12.5 The Rent Charge is suspended unless and until the Owner is in breach of any provision of this Agreement.
- 12.6 A Covenant Holder that wishes to enforce the Rent Charge must give a Notice of Enforcement of Rent Charge to the Owner and the other Covenant Holder, stating the intention to enforce the Rent Charge and demanding immediate payment of the Rent Charge Amount. The Notice of Enforcement of Rent Charge may be given at any time after a Notice of Breach is given under section 11.1.
- 12.7 The Owner must, within 10 days of receipt of the Notice of Enforcement of Rent Charge, pay the full Rent Charge Amount to the Covenant Holder who delivered that notice.
- 12.8 The Covenant Holders may enforce the Rent Charge by any of the following:
- (a) an action against the Owner for the Rent Charge Amount;



- (b) distraint against the Land to the extent of the Rent Charge Amount;
  - (c) an action for appointment of a receiver in respect of the Land; or
  - (d) an order for sale of the Land.
- 12.9 The Covenant Holders are entitled to recover from the Owner all reasonable expenses incurred as a result of enforcement of the Rent Charge.
- 12.10 The Covenant Holder receiving the Notice of Enforcement of Rent Charge has 30 days from receiving it to send notice to the notifying Covenant Holder that it wishes to enforce the Rent Charge jointly and, if it does not do so, it is deemed to have elected not to enforce the Rent Charge.
- 12.11 If the Rent Charge is enforced jointly:
- (a) reasonable expenses incurred as a result of the enforcement of the Rent Charge must be shared equally between the Covenant Holders, and
  - (b) the net proceeds obtained as a result of the enforcement of the Rent Charge must be shared equally between the Covenant Holders,
- unless otherwise agreed in writing between the Covenant Holders.
- 12.12 If the Covenant Holder receiving the Notice of Enforcement of Rent Charge does not wish to enforce the Rent Charge jointly, that Covenant Holder is not entitled to the Rent Charge unless otherwise agreed in writing between the Covenant Holders.
- 12.13 A Covenant Holder who declines to enforce the Rent Charge jointly must execute all documents which may be necessary for the enforcement and collection of the Rent Charge by the notifying Covenant Holder.

### **13. ADMINISTRATION FEE**

- 13.1 The Owner agrees that the Covenant Holders may charge an Administration Fee to the Owner in each and any case where the Covenant Holders are requested to provide any review, approval or assessment of any action of the Owner. This Administration Fee applies whether or not the Covenant Holders grant the approval requested.
- 13.2 The Administration Fee will be adjusted on January 1 of each year by increasing or decreasing, as the case may be, the Administration Fee by the amount determined by multiplying the Administration Fee on December 31 immediately preceding by the percentage increase or decrease, as the case may be, in the CPI between the previous January 1 and that December 31, and adding the amount so determined to the Administration Fee as it stands on that December 31. If Statistics Canada, or its successor in function, ceases to publish a CPI or comparable indicator as determined by the Covenant Holder in its sole discretion, the parties agree that the factor to be used in determining the annual increase in the Administration Fee for each year is 3%.

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

- 14.1 This Agreement is assignable by a Covenant Holder, but a Covenant Holder may only assign its rights and obligations under this Agreement to a person or entity authorized

to hold statutory rights of way under section 218 of the *Land Title Act* and covenants under section 219 of the *Land Title Act*.

- 14.2 Each Covenant Holder agrees that before it assigns this Agreement under this Article, it must notify the Owner and the other Covenant Holder with respect to the proposed assignee.
- 14.3 In the event of a pending winding-up or dissolution of a Covenant Holder, that Covenant Holder must use its best efforts to assign and transfer all of its interest under this Agreement to a person or entity authorized to accept statutory rights of way under section 218 of the *Land Title Act* and covenants under section 219 of the *Land Title Act*.

## 15. NOTICE OF CHANGE IN OWNERSHIP BY OWNER

- 15.1 The Owner must notify the Covenant Holders of any change of ownership prior to the registration of any such change in the land title office.
- 15.2 Prior to a proposed transfer of any interest in the Land, the Owner may request that the Covenant Holders visit the Land and jointly issue a Certificate indicating whether or not there are any violations of this Agreement as of the date of the Certificate. Each Covenant Holder may charge the Administration Fee plus expenses for this visit and Certificate.
- 15.3 Failure by the Owner to comply with section 15.1 does not affect the enforceability of this Agreement against the Owner or its successors in title to the Land.

## 16. NOTICE

- 16.1 Any notice or other communication (collectively a "notice") required or permitted under this Agreement must be in writing and must be:
- (a) delivered in person;
  - (b) sent by facsimile to the parties at their respective facsimile numbers set out in section 16.3, followed by a copy sent by ordinary mail; or
  - (c) sent by pre-paid registered mail addressed to the parties at their respective addresses set out in section 16.3.
- 16.2 Unless otherwise provided, a notice
- (a) delivered in person is deemed received on delivery;
  - (b) sent by facsimile is deemed received on the day indicated on the confirmation of transmission; and
  - (c) sent by pre-paid registered mail is deemed received on the fourth Business Day following the day on which the notice was sent.
- 16.3 The addresses of the parties for notices under this Article are as follows:
- (a) The Owner:  
#201 Upper Ganges Centre  
338 Lower Ganges Road  
Salt Spring Island, BC

and a mailing address of:  
 Box 722  
 Ganges Post Office  
 Salt Spring Island, BC V8K 2W3  
 Fax: (250) 538-0319

- (b) The Board:  
 Trust Fund Board  
 200-1627 Fort Street  
 Victoria, BC V8R 1H8  
 Fax: 250-405-5155
- (c) Co-covenant Holder:  
 Salt Spring Island Local Trust Committee  
 200-1627 Fort Street  
 Victoria, BC V8R 1H8  
 Fax: 250-405-5155

16.4 Each party agrees to give written notice immediately to the other parties of any change in its address or facsimile number from those set out in section 16.3.

## **17. ACCESS**

17.1 Except if expressly provided in this Agreement, no right of access by the general public to any portion of the Land is conveyed by this Agreement.

## **18. NOTICE OF COVENANT**

18.1 The Owner agrees that the Covenant Holders may publicize the existence of this Agreement in a tasteful manner.

## **19. NO LIABILITY IN TORT**

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

## **20. WAIVER**

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

20.2 The failure for any reason of either or both Covenant Holders to require performance by the Owner at any time of any obligation under this Agreement does not affect either Covenant Holder's right to subsequently enforce that obligation.

**21. JOINT AND SEVERAL OBLIGATIONS**

21.1 Where at any time there is more than one Owner in this Agreement, the obligations of those Owners are joint and several.

**22. REMEDIES NOT EXHAUSTIVE**

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

**23. COVENANT RUNS WITH THE LAND**

23.1 Every obligation and covenant of the Owner in this Agreement constitutes both a personal covenant and a covenant granted under section 219 of the *Land Title Act* in respect of the Land, and the provisions of Article 10 constitute a statutory right of way granted under section 218 of the *Land Title Act*. This Agreement burdens the Land and runs with it and binds the successors in title to the Land and each and every part into which the Land may be subdivided by any means and any parcel with which the Land or any part of it is consolidated.

**24. REGISTRATION**

24.1 The Owner agrees to do everything necessary, at the Owner's expense, to ensure that this Agreement, and the interests it creates, are registered against title to the Land, with priority over all financial charges, liens and encumbrances, including options to purchase, rights to purchase and rights of first refusal, registered or pending registration in the applicable provincial land title office at the time of application for registration of this Agreement.

**25. SEVERANCE**

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

**26. NO OTHER AGREEMENTS**

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

**27. INDEPENDENT ADVICE**

27.1 The Owner acknowledges and agrees that the Owner has had an opportunity to seek and obtain, to the Owner's satisfaction, independent advice from an accountant or other tax expert with respect to the income tax and other tax implications of this Agreement and acknowledges that it does not rely and has not relied on either Covenant Holder for advice in this regard and that the Covenant Holders have given no representation or warranty in that regard.

27.2 The Owner acknowledges and agrees that the Owner has been advised by the Covenant Holders that the Owner should seek independent legal advice as to the meaning and effect of this Agreement, and the Owner further acknowledges and

agrees that no legal advisor of either of the Covenant Holders has advised the Owner on the meaning or effect of this Agreement or in connection with this Agreement.

**28. AMENDMENTS**

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

**29. DEED AND CONTRACT**

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

**30. RIGHTS OF COVENANT HOLDERS**

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

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

The schedules referred to throughout this document are attached after this page.

**SCHEDULE A**

**BASELINE REPORT**

Attached to and forming part of the Covenant Agreement between the Owner and the Covenant Holders dated for reference [REDACTED], 2012.

**INSERT REDUCED COPY OF BASELINE REPORT**

**END OF DOCUMENT**



March 8, 2012

File No.: SS-SUB-2011.8

**To:** Salt Spring Island Local Trust Committee

**From:** Caitlin Brownrigg, Planner 1

**Re: Exemption from the 10% lot frontage provisions of Section 994 of the Local Government Act, 195 Belvedere Road**

**Owner:** Phillip Whitfield

**Applicant:** Jordon Litke, Polaris Land Surveying

**Location:** Strata Lot 15 Section 38, 42, & 43 South Salt Spring Island Cowichan District Strata Plan VIS5021 Together With An Interest In The Common Property In Proportion To The Unit Entitlement Of The Strata Lot As Shown On Form V (See Plan As To Limited Access)

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## THE PROPOSAL

This request accompanies application SS-SUB-2011.8 to subdivide property at 195 Belvedere Road to create a conservation lot and a remainder residential strata lot. In order to proceed with the proposed subdivision, the property owners require a waiver from Section 944 of the *Local Government Act* that requires 10% of the perimeter of all lots to front on a highway.

## SITE CONTEXT

The subject property is on top of Mount Tuam at 195 Belvedere Drive, adjacent to the Mount Tuam Ecological Reserve. It is 59.843 hectares (147.813 acres) and is zoned Rural Upland 1 (RU1). The property is part of a strata serviced by Annas Drive, Chilton Road, and Belvedere Drive. The other lots in the strata to the north and east are also zoned Rural Upland 1. The adjacent lot to the South is Crown land that is part of the Mount Tuam ecological reserve zoned Parks and Reserves 6 (PR6) and the lots to the West are zoned Forestry 1 (F1) and Forestry 1(z). See Figure 1 for details.

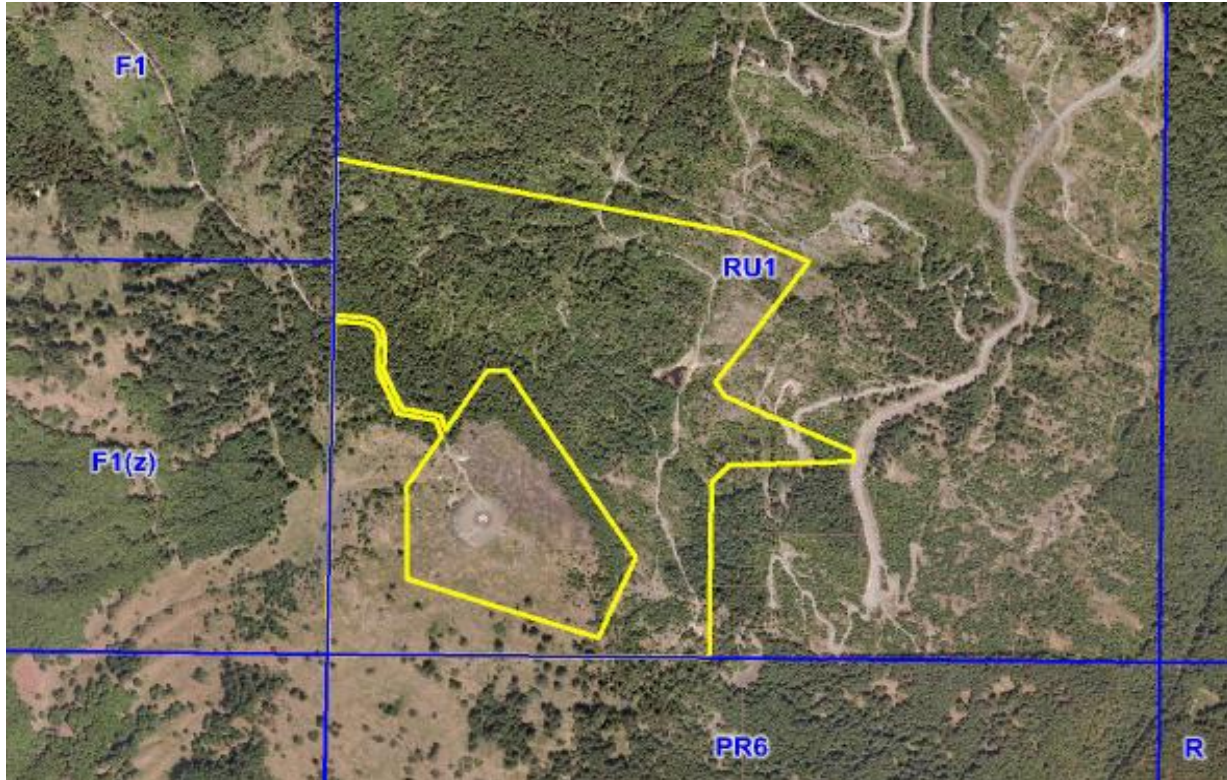


Figure 1: Subject Property and Zoning

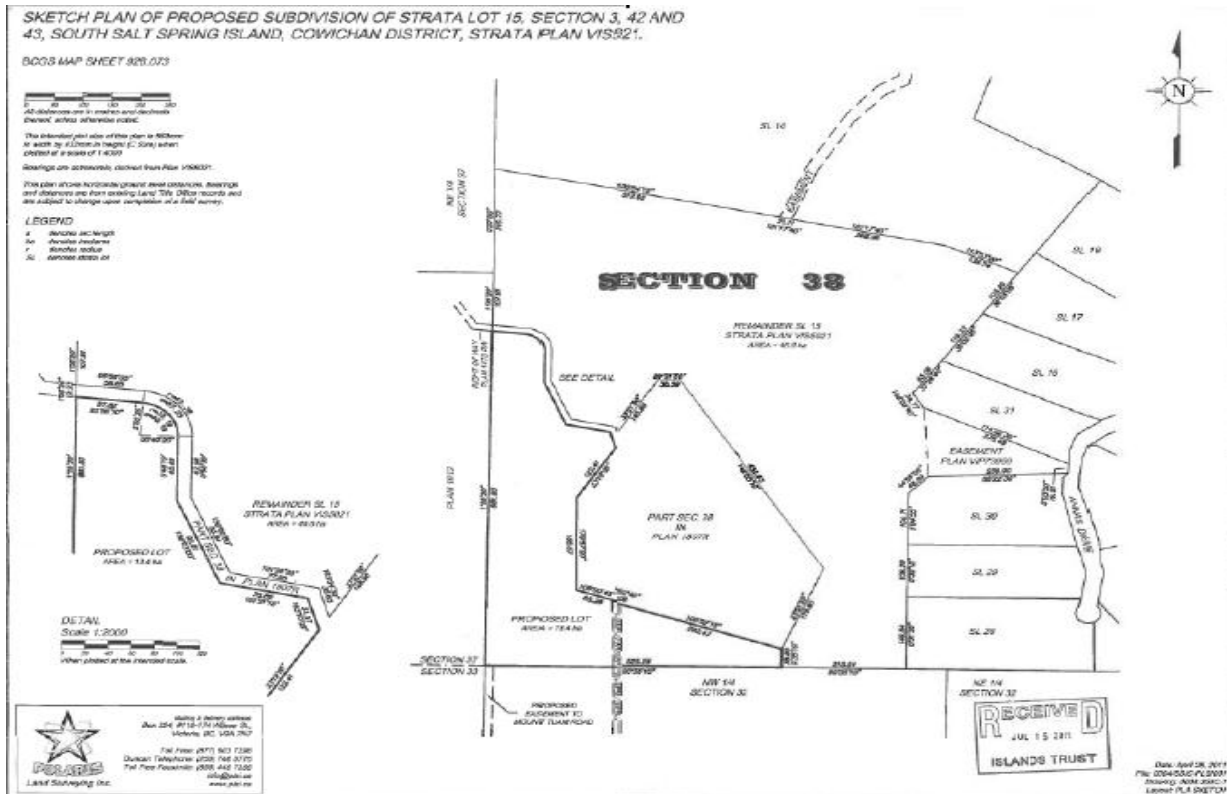


Figure 2: Proposed Subdivision Layout



**CURRENT PLANNING STATUS OF SUBJECT LANDS:**

Local Government Act

Section 944 of the *Local Government Act* states:

- (1) If a parcel being created by a subdivision fronts on a highway, the minimum frontage on the highway must be the greater of:
  - (a) 10% of the perimeter of the lot that fronts on the highway, and
  - (b) the minimum frontage that the local government may, by bylaw, provide.
- (2) A local government may **exempt** a parcel from the statutory or bylaw minimum frontage provided for in subsection (1).

Land Use Bylaw No. 355

Section 5.3.1 of the Land Use Bylaw requires that:

- The frontage of any lot in a proposed subdivision must be at least 10 per cent of its perimeter, provided that in no case may the frontage be less than 10 m.

Section 5.13.2 of the Land Use Bylaws states:

- A *lot* that is to be used solely for **conservation use** may be created without *frontage* on a *highway*, provided the applicant grants a covenant complying with Section 2.7 of this Bylaw that restricts *use* of the *lot* for conservation purposes and prohibits the construction of any *structures* on the *lot*.

The proposed subdivision (Figure 2) would create a conservation lot and remainder residential strata lot:

- Proposed conservation lot will have no highway access
- Remainder strata lot has already been granted a waiver for the 10% frontage requirement (SS-DVP-2002.2)

The Trust Fund Board has agreed to hold a covenant with the Salt Spring Island Conservancy and the Local Trust Committee on this proposed lot. The covenant designates the lot as a nature reserve and as such, the lot will be used solely for conservation. See Appendix A .

Official Community Plan Bylaw No. 434

The subject property is designated Uplands (U) and is in Development Permit Area 6.

Covenants

There is a geotechnical covenant registered on title.

Archaeological Sites

No archaeological sites have been identified on the subject property.

Riparian Area Regulations

The subject property is not in a RAR designated watershed.

**STAFF COMMENTS**

The proposed lot will be used for conservation purposes and so road access will not be necessary. Staff recommend granting the waiver because the creation of the proposed conservation lot is consistent with the Islands Trust's mandate. If this lot is dedicated as a nature reserve it will minimize environmental disturbance in a sensitive area.

This exemption in no way relieves the property owners from complying with all subdivision requirements, provisions and bylaws of the Islands Trust and other agencies.

If the LTC grants the 10% exemption, staff would inform the Ministry of Transportation and Infrastructure (MOTI) that the frontage waiver is granted together with and subject to a conservation covenant.

**RECOMMENDATION**

**THAT** THE Salt Spring Island Local Trust Committee **EXEMPT** the Proposed Conservation Lot of Strata Lot 15 Section 38, 42, & 43 South Salt Spring Island Cowichan District, Strata Plan VIS5021 from the minimum lot frontage requirements of Section 5.3 of Salt Spring Island Land Use Bylaw No. 355 and Section 944 of the Local Government Act for Jordan Litke (SS-SUB-2011.8, 195 Belvedere Drive).

Respectfully submitted by:

\_\_\_\_\_  
Caitlin Brownrigg, Planner 1 \_\_\_\_\_  
Date

Concurred by:

\_\_\_\_\_  
Leah Hartley, Regional Planning Manager \_\_\_\_\_  
Date