

Amendments	
Issue	Description
A	TENDER - DRAFT
B	TENDER - DRAFT
C	TENDER - DRAFT
D	TENDER
E	REVISED TENDER

Planning	Date
Roberts Day 201-31 Omeau St, Southbank VIC 3200	01.03.2017
TGM Group Pty Ltd 170 Omeau St, Southbank VIC 3200	17.03.2017
MDG Landscape Architects Level 2/40 Victoria Ave, Albert Park VIC 3206	08.03.2018
	08.03.2019
	28.04.2018

Mechanical Services	Client
Jacobs Group (Australia) Pty Ltd 452 Rindlers Lane, Melbourne, VIC 3009	Stockland Level 17, 452 Rindlers Lane, Melbourne, VIC 3009
Incor Design Group GSA Level 11/90 William St, East Sydney, NSW 2011	

Client
Stockland Level 17, 452 Rindlers Lane, Melbourne, VIC 3009



Project Title
WATERLEA
Drawing Title
MASTERPLAN

Issue	Issue	Issue
15368	A-0001	E



**KNOX CITY COUNCIL**

and

**STOCKLAND DEVELOPMENT PTY LTD  
ACN 000 064 835**

**AGREEMENT MADE PURSUANT TO  
SECTION 173 OF THE PLANNING AND  
ENVIRONMENT ACT 1987**

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Property: Lot 2 (PS649607Q)  
980 Stud Road, Rowville, Victoria 3178

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Russell Kennedy Pty Ltd ACN 126 792 470 ABN 14 940 129 185  
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Liability limited by a scheme approved under Professional Standards Legislation

rk.com.au

Ref MJD 115608-00259



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**THIS AGREEMENT** is made on

2015

## **PARTIES**

- 1 **KNOX CITY COUNCIL**  
of 511 Burwood Highway, Wantirna South, Victoria, 3152  
("Council")
- 2 **STOCKLAND DEVELOPMENT PTY LTD**  
ACN 000 064 835  
of Level 25, 133 Castlereagh Street, Sydney, 2000  
("Owner")
- 3 **STOCKLAND CORPORATION LIMITED**  
ACN 000 181 733  
of Level 25, 133 Castlereagh Street, Sydney, 2000  
("Guarantor")

## **RECITALS**

- A The Council is the responsible authority under the Act for the Scheme.
- B The Owner is registered or is entitled to be registered as proprietor of the Land.
- C The Council sold the Land to the Owner and the Contract for the sale of the Land included obligations on the Owner to enter into this Agreement, the key components of which are:
  - specifying the nature of the Development proposed by the Owner on the Land, along with works to be constructed on the Council Homestead Land and the Council Park Land;
  - requiring the Owner to exercise its best endeavours to obtain all necessary planning permits and other approvals for the Development by a prescribed date;
  - specifying the date by which Substantial Commencement and Practical Completion (as defined in this Agreement) of the Development must be achieved;
  - requiring the Owner to comply with certain Requirements in respect of the Development and land in the vicinity of the Development;
  - securing registration of the First NICO Plan and First NICO Transfer;
  - undertaking the Development in a manner consistent with the provision of the Possible Future Link to the Kingston Links Golf Course Land across the Council Park Land;
  - entitling Council to specified rights as set out in this Agreement in the event that the Owner fails to provide Social Housing within the Development in accordance with the Requirements; and
  - providing a Bank Guarantee in favour of Council to secure performance of specified obligations of the Owner as contained in this Agreement.



- D This Agreement has been entered into in order to:
- restrict or regulate the use or development of the Land;
  - to comply with the conditions of the Contract; and
  - achieve and advance the objectives of planning in Victoria or the objectives of the Scheme in relation to the Land.

E This Agreement is made under Division 2 of Part 9 of the Act.

**THE PARTIES AGREE THAT:**

**1 DEFINITIONS**

In this Agreement:

- 1.1 "**Act**" means the *Planning and Environment Act 1987*.
- 1.2 "**Agreement**" means this Agreement, including the recitals and any annexures to this Agreement.
- 1.3 "**Annexure**" means an annexure to this Agreement.
- 1.4 "**Bank Guarantee**" means one or more bank guarantees as specified in accordance with clause 4.18.
- 1.5 "**Business Day**" means Monday to Friday excluding public holidays in Victoria.
- 1.6 "**Chief Executive Officer**" means the officer of the Council so designated or the acting Chief Executive Officer.
- 1.7 "**Concept Development Plan**" means an indicative plan provided by the Owner drawing from the Master Plan to form the basis of the development plan required under the Development Plan Overlay, a copy of which is attached as Annexure 5.
- 1.8 "**Construction Cost**" means the Owner's December 2015 construction cost estimate (including contingency allowance) being \$1,811,325.00, indexed as follows:
- 1.8.1 for the period from December 2015 until the date that the RFP is issued, indexed by the Australian Bureau of Statistics Index "30 Building Construction Victoria";
- 1.8.2 for the period from the date the RFP is issued until the forecast construction commencement date under the Social Housing Program, indexed at a 10 year average of the Australian Bureau of Statistics Index "30 Building Construction Victoria";
- 1.8.3 for the period from the forecast construction commencement date to the date of transfer of the Social Housing Dwelling to Council, indexed at the interest rate of 6.2% per annum.
- 1.9 "**Contract**" means the contract of sale of the Land made between the Council as vendor and the Owner as purchaser dated #[to be inserted].

- 1.10 **"Council Carpark"** means the Council carpark to be constructed in the location shown on the Council Carpark Plan in such manner as agreed to by the parties in accordance with clause 4.17.
- 1.11 **"Council Carpark Plan"** means the plan of the proposed Council owned carpark, a copy of which is attached as Annexure 4.
- 1.12 **"Council Homestead Land"** means lot 3 on Plan of Subdivision No. 649607Q, being the whole of the land more particularly described in certificate of title volume 11601 and folio 646 known as Lot 3 (PS649607Q), Emmeline Row, Rowville, Victoria, 3178.
- 1.13 **"Council Park Land"** means lot 1 on plan of subdivision no. PS649607Q, being the whole of the land more particularly described in certificate of title volume 11601 and folio 644 known as Lot 1 (PS649607Q), 970 Stud Road, Rowville, Victoria, 3178.
- 1.14 **"Current Market Land Value"** means the current market value of the land upon which the Social Housing Apartments are located as at the date of service of a notice to the Owner pursuant to clause 4.24, as agreed to in writing by the parties or, in the absence of such agreement, as determined by the President or his or her nominee of the Australian Property Institute (Victorian Chapter) at the cost of the Owner.
- 1.15 **"Development"** means the development and use of the Land in accordance with the following:
- 1.15.1 the Development Plan Overlay;
  - 1.15.2 the Concept Development Plan;
  - 1.15.3 the Master Plan;
  - 1.15.4 the Master Plan Report;
  - 1.15.5 the Permit;
  - 1.15.6 the Requirements;
  - 1.15.7 the Endorsed Plan; and
  - 1.15.8 the terms of this Agreement,
- and includes works to be constructed in accordance with the Requirements on the Council Homestead Land and the Council Park Land.
- 1.16 **"Development Plan"** means a development plan for the Development referred to in the Requirements for the approval of the Council as responsible authority pursuant to the Development Plan Overlay.
- 1.17 **"Development Plan Overlay"** means Schedule 9 to the Development Plan Overlay in the Scheme.
- 1.18 **"Endorsed Plan"** means the plan or plans endorsed from time to time with the stamp of Council as the plan which forms part of the Permit.
- 1.19 **"Force Majeure"** means any event or cause which is not reasonably within the control of the party affected, including any Act of God (including, without limiting



the generality of the expression an "Act of God", lightning, earthquakes, storms, landslides, floods, fires and washouts); strikes, lockouts, bans, go-slow actions, limitations of work or other industrial disturbances (whether or not involving the Owner's employees), acts of enemies, sabotage, wars (whether declared or undeclared), blockades, insurrections, riots, epidemics, arrests and restraints of lawful authority; expropriation, confiscation or requisitioning of materials or of any equipment or other property; civil disturbances; any explosion or other accident; or any other event or cause, whether of a kind referred to above or not, where the event or cause is outside the reasonable control of the Owner and could not have been avoided or overcome by the Owner by the exercise of reasonable care or due diligence **AND INCLUDES** the inability of the Owner to comply with clause 4.1 of this Agreement other than in circumstances of breach by the Owner of its obligations pursuant to clause 4.1.

- 1.20 **"GST Act"** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (as amended).
- 1.21 **"GST"** means the goods and services tax as defined in the GST Act and also includes penalties and interest and any notional tax payable pursuant to the GST Act and the *National Taxation Reform (Consequential Provisions) Act 2000*.
- 1.22 **"Homestead"** means the existing Stamford Park Homestead located on the Council Homestead Land.
- 1.23 **"Housing Association"** means a registered housing association under the *Housing Act 1983* nominated by the Owner from a list of housing associations provided to the Owner by the Council and selected in accordance with the Social Housing Selection Process.
- 1.24 **"Housing Association Contract"** means the intended contract between the Owner and the Housing Association via which:
- 1.24.1 funding toward the Social Housing Dwelling will be provided; and
  - 1.24.2 the Social Housing Lots (incorporating the Social Housing Dwellings) will be transferred to the Housing Association.
- 1.25 **"Housing Contract Date"** means the earlier of the "Final Milestone Date" as described in the Social Housing Selection Process or 1 June 2019.
- 1.26 **"Input Tax Credit"** in relation to a supply, means a credit under the GST Act for the GST payable by the recipient in respect of the supply.
- 1.27 **"Interest Rate"** means the 90 day Bank Bill Swap Rate published by the Australian Financial Markets Association, plus 2%.
- 1.28 **"Kingston Links Golf Course Land"** means the land adjoining the Council Park Land to the west, being the land in certificate of title volume 10425 folio 232 known as 1 Corporate Avenue, Rowville, Victoria 3178.
- 1.29 **"Land"** means the land within the Scheme described as lot 2 on plan of subdivision no. PS649607Q being the whole of the land more particularly described in certificate of title volume 11601 folio 645 known as Lot 2 (PS649607Q), 980 Stud Road, Rowville, Victoria, 3178.
- 1.30 **"Lots"** means the number of separately transferrable residential lots permitted by the Permit for the Land.



- 1.31 "**Master Plan**" means both the Stamford Park Master Plan 2010 previously included in the Scheme and the Stamford Park Master Plan prepared by Tract Consultants dated July 2014 recently incorporated in the Scheme. To the extent of any inconsistency, the 2014 plan is to prevail.
- 1.32 "**Master Plan Report**" means a report entitled "Stamford Park Master Plan Report" prepared by Tract Consultants dated July 2014, and being an updated version of the Stamford Park Master Plan Report 2010 presently incorporated in the Scheme.
- 1.33 "**Mortgagee**" means the person or persons registered or entitled from time to time to be registered by the Registrar of Titles as mortgagee of the Land or any part of it.
- 1.34 "**Owner**" means the party so denoted in this Agreement.
- 1.35 "**Permit**" means the planning permit or planning permits authorising the residential use and development of the Land for the Development.
- 1.36 "**Possible Future Link**" means the provision of a possible future pedestrian and local vehicular link between the Land and the Kingston Links Golf Course Land (including any future residential development of the Kingston Links Golf Course Land) across the Council Park Land denoted as "Possible Future Link" on the Master Plan and referred to in the Master Plan Report, which assumes public access across the Land to Stud Road.
- 1.37 "**Practical Completion**" means the date of practical completion of the Development or a Stage of the Development, being the last to occur of the following:
- 1.37.1 compliance with clause (a) of EM1.1 of the Requirements in accordance with clause 4.4 of this Agreement;
  - 1.37.2 compliance with all Requirements for the Development or as may be relevant to a Stage of the Development (as the case may be) other than EM1.1(b) in accordance with clause 4.11 of this Agreement,
  - 1.37.3 certification by a qualified civil engineer with at least 5 years' experience in residential development projects of this kind appointed by agreement between the parties, or in the absence of agreement, as determined by the President or his or her nominee of Engineers Australia (Victorian Division) at the cost equally of both parties, that the Development or a Stage (as the case may be) is practically complete in all respects.
- 1.38 "**Practical Completion Date**" means, subject to clause 4.12, the date by which the Owner must achieve Practical Completion of the Development, namely 4 years after the Substantial Commencement Date.
- 1.39 "**Price**" means the price specified in the Contract (inclusive of GST).
- 1.40 "**Public Open Space**" has the same meaning as in the *Subdivision Act 1988*.
- 1.41 "**Requirements**" means the Requirements specified in Annexure 1.
- 1.42 "**Residential Lots**" means each lot which contains a dwelling or dwellings and which cannot be re-subdivided other than in strata

- 1.43 **"Restriction"** means the restriction created on registered plan of subdivision no. PS649607Q.
- 1.44 **"RFP"** has the same meaning as in the Social Housing Selection Process.
- 1.45 **"Scheme"** means the Knox Planning Scheme or any other planning scheme which applies to the Land from time to time.
- 1.46 **"Settlement Date"** means the date of settlement of the Contract.
- 1.47 **"Site"** means the whole of the land in registered plan of subdivision no. PS649687Q.
- 1.48 **"Social Housing"** means the provision and continued use of Social Housing Lots within the Development, in accordance with Social01-Social07 (inclusive) of the Requirements to Council's satisfaction.
- 1.49 **"Social Housing Dwelling"** means a dwelling within the meaning of the Act and Scheme, utilised for Social Housing.
- 1.50 **"Social Housing Lot"** means a separate transferable lot on a registered plan of subdivision within or upon which a Social Housing Dwelling is located or is to be located.
- 1.51 **"Social Housing Plan"** means the indicative plan of Social Housing for the Development, a copy of which is attached as Annexure 3 or such other plan as may be agreed by Council which accords with the Requirements.
- 1.52 **"Social Housing Selection Process"** means the process for selection of the Housing Association attached as Annexure 7 or such amended process as the parties may agree to in writing.
- 1.53 **"Social Housing Program"** has the same meaning as in the Social Housing Selection Process.
- 1.54 **"Stage"** means any part of the Land in respect of which the Owner seeks the issue of a statement of compliance for a plan of subdivision creating some of the Lots for part of the Development.
- 1.55 **"Stormwater Drains"** means the existing underground stormwater drains which traverse the Land and which require redesign and relocation in order for the Development to proceed.
- 1.56 **"Substantial Commencement"** means that the Land has been filled in accordance with the terms of the Restriction to the satisfaction of Council and Melbourne Water Corporation.
- 1.57 **"Substantial Commencement Date"** means, subject to clause 4.12, the earlier to occur of the following:
- 1.57.1 the date which is six months from the date which is the later of:
- (a) the date of issue of the Permit; and
  - (b) the date of issue of a building permit for the filling of the Land in accordance with the terms of the Restriction; or
- 1.57.2 thirty (30) months from the date of this Agreement,



or such other date as the parties may agree to in writing.

- 1.58 **"Tax Invoice"** in relation to a supply, means an invoice for the supply required by the GST Act to support a claim by the recipient for an Input Tax Credit for the GST on the supply.
- 1.59 **"Termination Date"** means the date upon which Council notifies the Owner in writing that the Owner has fully satisfied the Owner's obligations pursuant to this Agreement or that the Council no longer requires the Owner to comply with the obligations specified in this Agreement.
- 1.60 **"Transfer Land"** means the land so denoted on the plan attached in Annexure 2 to this Agreement.

## **2 COMMENCEMENT**

This Agreement comes into force on the date it was made as set out above.

## **3 TERMINATION OF AGREEMENT**

### **3.1 Termination**

This Agreement shall end on the Termination Date provided that the Owner has complied with all of its obligations under this Agreement by that date.

### **3.2 Cancellation of Agreement**

As soon as reasonably practicable after this Agreement has ended, the Council must, at the request and at the cost of the Owner, apply to the Registrar of Titles under section 183(2) of the Act to cancel the recording of this Agreement on the Register.

## **4 OWNER'S COVENANTS**

### **4.1 Application for Permit and other approvals**

The Owner must lodge its application for the Permit within 6 months from the date of this Agreement and exercise its best endeavours to obtain the Permit and all other permits and approvals necessary for the development and use of the Land for the Development within 18 months after the date of this Agreement.

### **4.2 Substantial commencement of the Development**

The Owner must procure the Substantial Commencement of the Development by the Substantial Commencement Date.

### **4.3 Practical completion of the Development**

The Owner must procure Practical Completion of the Development by the Practical Completion Date.

### **4.4 Provision of Social Housing**

The Owner must provide Social Housing as part of the Development, as follows:

- 4.4.1 the Owner will procure the construction of the Social Housing Dwellings, prior to Practical Completion;

- 4.4.2 the number of Social Housing Dwellings must be not less than 5% of the total number of Dwellings in the Development;
- 4.4.3 each Social Housing Dwelling is to be located on a separate title, namely a Social Housing Lot;
- 4.4.4 each Social Housing Dwelling is to be located within the Development as noted on the Social Housing Plan.
- 4.4.5 each Social Housing Lot, incorporating a completed Social Housing Dwelling, must be transferred to the selected Housing Association, as provided in this Agreement;

provided, however, this Agreement sets out what is to occur if the Social Housing is not or cannot be, provided as required.

#### **4.5 Housing Association Selection**

- 4.5.1 the Owner will seek to contract with a selected Housing Association in accordance with the Social Housing Selection Process;
- 4.5.2 the Council will co-operate and participate in the selection of the relevant Housing Association in accordance with the Social Housing Selection Process;
- 4.5.3 the parties may agree to in writing to vary the Social Housing Selection Process, including its selection criteria; and
- 4.5.4 prior to the transfer of the Social Housing Lots to the Housing Association, the Owner must enter into an agreement pursuant to Section 173 of the Act to be recorded on the title to the Social Housing Lots which requires the continued use of the Social Housing Lots for Social Housing and imposes other relevant obligations upon the Owner in respect of the Social Housing Lots as contemplated by the Requirements and to the satisfaction of the Council.

#### **4.6 No Housing Association Contract**

If the Owner does not enter into the Housing Association Contract by the Housing Contract Date:

- 4.6.1 the Owner may, within fourteen (14) days of the Housing Contract Date, request the Council to extend the date for entering into the Housing Association Contract as is reasonable in the circumstances, pursuant to Clause 4.9;
- 4.6.2 the Council must elect within a period of sixty (60) days from the Housing Contract Date, or such later date as the Council may agree under Clause 4.6.1, and the Owner must comply with one of the following options:
  - (a) the Owner must pay to the Council an amount calculated as otherwise specified in clause 4.6; or
  - (b) the Council must contribute to the construction cost of the Social Housing Dwellings and receive a transfer of the relevant Social Housing Lots, both as otherwise specified in clause 4.6.



4.6.3 if the Council elects under Clause 4.6.2(a) to receive a payment then this must occur as follows:

- (a) such payment must be made within thirty (30) days of the Council's election and notice of same to the Owner;
- (b) the amount of the payment is:
  - (1) \$31,600 in respect of each proposed Social Housing Dwelling for which a Housing Association Contract has not been entered into, which is intended to be located within an apartment complex; and
  - (2) \$120,500 in respect of each proposed Social Housing Dwelling for which a Housing Association Contract has not been entered into which is not intended to be located within an apartment complex;

subject to indexation in accordance with clause 4.6.5(c).

4.6.4 if the Council elects, under Clause 4.6.2(b) to make a contribution towards the cost of, and receive a transfer of, the Social Housing, this must occur as follows:

- (a) the transfer of the relevant Social Housing Lot(s), including a completed Social Housing Dwelling, to the Council or other nominated entity is to occur within sixty (60) days of the later of:
  - (1) registration of the Plan of Subdivision which creates the relevant Social Housing Lot(s); and
  - (2) issue of an Occupancy Permit for the relevant Social Housing Dwelling.
- (b) the transfer of the relevant Social Housing Lot is subject to the payment by the Council on the date of such transfer of its contribution towards the Construction Cost of the completed relevant Social Housing Dwelling(s), as follows:
  - (1) \$230,000 for each completed Social Housing Dwelling intended to be located within an apartment complex;
  - (2) \$146,000 for each completed Social Housing Dwelling which is not intended to be located within an apartment complex and which includes a loft (lower);
  - (3) \$184,000 for each completed Social Housing Dwelling which is not intended to be located within an apartment complex and which includes a loft (upper).

4.6.5 for the avoidance of doubt:

- (a) the Council may make its election under clause 4.6.2 in respect of any one or more of the proposed Social Housing Lots (including Social Housing Dwellings); and
- (b) if the Council seeks to make a contribution and receive a transfer of all Social Housing Dwellings, then the total

contribution shall be the Construction Cost as defined in this Agreement;

- (c) any specific amounts specified in clause 4.6.3 are calculated as at 1 July 2018 and are subject to indexation up or down at the rate of 6.2% per annum depending upon whether the payment is made before or after 1 July 2018, with such indexation applicable to the period for which payment occurs before or after 1 July 2018;
- (d) any specific amounts specified in clause 4.6.4(b) are calculated as at December 2015 and are to be indexed by the method set out in the definition of "**Construction Cost**", having regard to the time for payment.

4.6.6 In any case where the Council elects to take a transfer of the relevant Social Housing Lots, the Owner agrees:

- (a) it must complete the construction of the relevant Social Housing Dwelling(s);
- (b) effect the necessary plan(s) of subdivision to create the separate Social Housing Lot; and
- (c) it must procure the occupancy permit for the relevant Social Housing Dwelling.

#### 4.7 Housing Association – Failure

In any case where, due to no fault of the Owner, the Housing Association either fails or refuses to meet its obligations under the Housing Association Contract (including a failure to pay any relevant financial contribution), such that the Owner is no longer obligated to transfer the Social Housing Lots (including a Social Housing Dwelling) to the Housing Association, then the following must occur:


- 4.7.1 the Owner must provide written notice of the failure of the Housing Association to the Council ("**Failure Notice**").
- 4.7.2 the Council must elect, within a period of sixty (60) days from the date of the Failure Notice and the Owner must comply with one of the following options:
  - (a) the Owner must pay to the Council an amount calculated as otherwise specified in clause 4.7.3; or
  - (b) the Council may elect to contribute to the construction cost of the Social Housing Dwellings and receive a transfer of the relevant Social Housing Lots, both as otherwise specified in clause 4.7.3.
- 4.7.3 the provisions and process set out under Clause 4.6, in particular Clauses 4.6.3 to 4.6.6 (inclusive), apply subject to any necessary consequential changes to give them effect, to a Council election under this Clause 4.7.



#### 4.8 Social Housing – Not Constructed or Transferred

4.8.1 After entry into the Housing Association Contract, if the Owner does not:

- (a) complete the construction of the Social Housing Dwelling(s) on or before the earlier of the issue of a statement of compliance for the relevant Stage containing the Social Housing or the Practical Completion Date for the Development; or
- (b) transfer to the Housing Association the Social Housing Dwelling(s) on or before the earlier of sixty (60) days of Practical Completion of the relevant Stage or the Development (as the case may be) containing the Social Housing or the Practical Completion Date for the Development,

 ~~4.8.2~~ then the balance of this clause 4.8 will apply <sup>4.8.2</sup> the Owner may, request, the Council to extend the date for completion or transfer, as is reasonable in the circumstances pursuant to clause 4.9;

4.8.3 if, within 30 days of the event specified in clause 4.8.1(a) or 4.8.1(b) or such later date as Council may agree under clause 4.8.2, the Owner has still not constructed any one of more of the Social Housing Dwellings the Owner must pay to the Council within 10 Business Days of a demand by Council:

- (a) \$60,000 in respect of each Social Housing Dwelling, proposed to be located within an apartment complex; and
- (b) \$200,000 in respect of each Social Housing Dwelling, not proposed to be located within an apartment complex.

#### 4.9 Extension of time for provision of Social Housing

In any of clauses 4.6, 4.7 and 4.8 where the Council is asked to extend the time for the Owner to achieve a particular outcome, where the substantive cause for the relevant delay has been beyond the reasonable control of the Owner, the presumption is that the Council will, unless there is no reasonable prospect of the outcome being achieved, agree to such an extension. Such a request may be made at any time before the Council exercises any of its rights pursuant to clauses 4.6, 4.7 and 4.8 to a payment or a transfer of a Social Housing Lot(s) (as the case may be).

#### 4.10 Termination of Social Housing obligations

In any case where pursuant to clauses 4.6, 4.7 or, 4.8 the Council has elected to require a payment in respect of a particular Social Housing Dwelling, or a transfer of the relevant Social Housing Lot (as the case may be), any obligations of the Owner in respect of the relevant proposed Social Housing Dwelling or Social Housing Lot (as the case may be) are at an end.

#### 4.11 Compliance with the Requirements

The Owner must, as part of the construction of the Development and of each Stage, comply with each of the Requirements (to the extent applicable) to the satisfaction of Council, acting reasonably.

#### 4.12 Delayed Substantial Commencement or delayed Practical Completion

The Owner may request the Council to extend either or both of the Substantial Commencement Date or the Practical Completion Date (as the case may be) due to a Force Majeure for a maximum period of 12 months and the Council will consider any such request pursuant to clause 5.1. Such a request may be made at any time before the Council exercises any of its rights to draw down the Bank Guarantee pursuant to clause 4.18.

#### 4.13 Transfer Land

4.13.1 The Owner must, at the Owner's cost, procure the registration of the following within 12 months of the date of this Agreement ("**Registration Date**");

- (a) a "not in common ownership" plan of subdivision ("**First NICO Plan**") of the Land and the Council Homestead Land which consolidates the titles to the Transfer Land and the Council Homestead Land and which removes the existing registered easement of carriageway encumbering the Transfer Land; and
- (b) a "not in common ownership" transfer of land ("**First NICO Transfer**") of the consolidated title comprising of the Transfer Land and the Council Homestead Land to the Council for the nominal consideration of \$1.00 (inclusive of GST).

4.13.2 The Owner must use all reasonable endeavours to cause the First NICO Plan and the First NICO Transfer to be registered by the Registration Date.

4.13.3 The Owner must, at the Owner's own cost, promptly do the following:

- (a) procure the consents of any mortgagee, chargee, caveator and any other person having an interest in the Land whose consent is necessary to procure the registration of the First NICO Plan and the First NICO Transfer;
- (b) attend to any dealing refusal and answering any requisitions raised by the Registrar of Titles regarding the First NICO Plan or the First NICO Transfer as soon as reasonably possible after being received by the Owner or its solicitors and, in any event, within the time limit prescribed by the Registrar of Titles for answering that requisition, provided that such requisition is capable of being answered by the Owner or any other person on behalf of the Owner; and
- (c) forward the certificate of title for the Transfer Land to Council or its solicitors in the event that such certificate issues to the Owner.

4.13.4 The Council must, at the Owner's cost, do the following:

- (a) within 14 days of being requested to do so by the Owner or its solicitors, ensure that a nomination request form is completed in accordance with the requirements of the Registrar of Titles and the title to the Council Homestead Land is produced at the Office of Titles in order to procure registration of the First NICO Plan and First NICO Transfer;



- (b) within 14 days of being requested to do so by the Owner or its solicitors, procure the consent of any person who has an interest in the Council Homestead Land whose consent is necessary to procure registration of the First NICO Plan and the First NICO Transfer; and
- (c) exercise its reasonable endeavours to assist the Owner in attending to any dealing refusal and answering any requisition raised by the Registrar of Titles regarding the First NICO Plan or the First NICO Transfer as soon as reasonably possible after being requested to do so by the Owner or its solicitors and, in any event, within the time limit prescribed by the Registrar of Titles for answering that requisition, provided that such requisition is capable of being answered by the Council or any other person on behalf of the Council.

#### **4.14 Relocation of Stormwater Drains**

The Owner must, at the Owner's cost and to the satisfaction of the Council during the early phase of construction of the Development when top soil is removed, relocate and redesign the Stormwater Drains as open swale drains to a location approved by the Council, which approval the Council will not unreasonably withhold provided that the location is to the south of the Land, or another location agreed to in writing by the parties.

#### **4.15 Possible Future Link**

The Owner must:

- 4.15.1 develop the Land in a manner consistent with the provision of the Possible Future Link;
- 4.15.2 if the Possible Future Link is required by Council, allow free and unimpeded public access from Stud Road through the Land to the Possible Future Link, including the creation of such registered easements of carriageway and/or the vesting in Council of such roads and public highways (at no cost to Council) with a minimum width of 20 metres sufficient to accommodate the specifications for a "Residential Collector Road", a copy of which specifications are attached as Annexure 6, except for where the road alignment adjoins the Council Park Land where the road reservation can be reduced to a minimum width of 17 metres, as may be necessary to facilitate such public access to the Possible Future Link; and
- 4.15.3 not use or develop or allow the Land to be used or developed in a manner inconsistent with the provision of the Possible Future Link.

#### **4.16 Provision of Public Open Space**

The Owner must, as part of the Development, provide a minimum of 8.5% Public Open Space for the Development in compliance with clause 52.01 of the Scheme, such Public Open Space to be provided as part of the public space contemplated in the Master Plan.

#### 4.17 Council Carpark

The parties acknowledge and agree to do the following as part of the Owner's compliance with clause 4.1 of this Agreement and in any event within 14 months after the date of this Agreement:

4.17.1 Negotiate bona fide and in good faith with respect to the reconfiguration of the Council Carpark, at the Owner's cost, having regard to the following criteria for the reconfiguration of the Council Carpark:

- (a) Site views of the Homestead to the east of Emmeline Row must be maintained.
- (b) The Council Carpark must be of a sufficient size to accommodate 45 car parking spaces plus one bus parking bay, to Council's satisfaction.
- (c) There must be minimal impact on existing trees within the Site.

4.17.2 In the event that agreement is reached with respect to the relocation of the Council Carpark in accordance with the preceding clause, exercise their best endeavours at the Owner's cost, to secure registration of the following:

- (a) A "not in common ownership" plan of subdivision (**Second NICO Plan**) of the Land and the Council Park Land for the Council Carpark, which creates a consolidated lot for the Council Park Land and such part of the Land upon which the Council Carpark is to be relocated.
- (b) A "not in common ownership" transfer of land (**Second NICO Transfer**) of the consolidated title comprising of the Council Park Land and such part of the Land upon which the Council Carpark is to be relocated to the Council for nominal consideration of \$1.00 (inclusive of GST), at no cost to Council.

4.17.3 For the purposes of the preceding clause, the following applies:

- (a) The Owner must use all reasonable endeavours to cause the Second NICO Plan and the Second NICO Transfer to be registered within 18 months after the date of this Agreement.
- (b) The Owner must at the Owner's own cost perform the same obligations specified in clause 4.13.3 as if those obligations applied to the Second NICO Plan and Second NICO Transfer.
- (c) The Council must, at the Owner's cost, perform the same obligations as imposed by clause 4.13.4 of this Agreement as if those obligations applied to the Second NICO Plan and Second NICO Transfer.

#### 4.18 Bank Guarantee

The Owner shall provide to the Council on the date of this Agreement and maintain in accordance with this clause a Bank Guarantee given by a bank as defined in the *Banking Act 1959* (Cth) or any Act amending or replacing that Act or by a bank established by an Act of the Parliament of Victoria ("**Bank**") for the



amount of 30% of the Price for the due performance of the Owner's obligations under clauses 4.1 to 4.16 inclusive ("**Guaranteed Obligations**") which shall be in the form of an unconditional and irrevocable undertaking or certificate given by the Bank, to which the following provisions shall apply:

- 4.18.1 the Bank Guarantee shall be in favour of the Council;
- 4.18.2 subject to the other provisions of this clause 4.18, the Bank Guarantee shall be maintained effective until Council is satisfied that the Guaranteed Obligations have been fully complied with;
- 4.18.3 if the Owner defaults in respect of its performance of any of the Guaranteed Obligations of this Agreement, the Council may, without prejudice to all other rights and remedies of the Council and after giving the Council's notice referred to in clause 4.24 in respect of such default, and the Owner fails to remedy such default within the period specified in the notice, draw down the whole or any part of the Bank Guarantee and apply the moneys drawn down to compensate the Council for the default;
- 4.18.4 a draw down by the Council under the Bank Guarantee shall not prevent Council from seeking alternative or additional remedies or from claiming from the Owner losses, expenses, costs or damages in excess of the amount drawn down,

and the Bank Guarantee shall be released to the Owner as follows:

- 4.18.5 such amount of the Bank Guarantee as equals 10% of the Price upon achieving Substantial Commencement of the Development;
- 4.18.6 such amount of the Bank Guarantee as equals 10% of the Price upon compliance with clause 4.4 in respect of Social Housing or the termination of the obligations of the Owner in respect of Social Housing pursuant to clause 4.10;
- 4.18.7 such amount of the Bank Guarantee as equals 5% of the Price upon Practical Completion of a Stage of the Development nominated by the Owner and agreed to in writing by the Council, provided that all Guaranteed Obligations have been fully complied with in respect of such Stage; and
- 4.18.8 the remaining amount of the Bank Guarantee equalling 5% of the Price upon Practical Completion of the Development and compliance with clause (b) of EM1.1 of the Requirements, provided that all Guaranteed Obligations have been fully complied with in respect of the Development.

#### **4.19 Successors in title**

Until this Agreement is recorded on the folio of the Register which relates to the Land pursuant to section 181 of the Act, the Owner must ensure that the Owner's successors in title give effect to and do all acts and sign all documents which will require those successors to give effect to this Agreement, including requiring the successors in title to execute a deed agreeing to be bound by the terms of this Agreement. Until that deed is executed, the Owner, being a party to this Agreement, remains liable to perform all of the Owner's obligations contained in this Agreement.

**4.20 Further assurance**

The Owner must do all things necessary (including signing any further agreement, acknowledgment or document) to enable the Council to record this Agreement on the folio of the Register which relates to the Land.

**4.21 Payment of Council's costs**

The Owner agrees to pay on demand to the Council the Council's costs and expenses (including any legal fees incurred on a solicitor-client basis) of and incidental to the preparation, execution, recording and enforcement of this Agreement.

**4.22 Mortgagee to be bound**

The Owner covenants to obtain the consent of any Mortgagee to be bound by the covenants in this Agreement if the Mortgagee becomes mortgagee in possession of the Land.

**4.23 Indemnity**

The Owner covenants to indemnify and keep the Council, its officers, employees, agents, workmen and contractors indemnified from and against all costs, expenses, losses or damages which they or any of them may sustain incur or suffer or be or become liable for or in respect of any suit action proceeding judgement or claim brought by any person arising from or referable to this Agreement or any non-compliance with this Agreement.

**4.24 Non-compliance**

If the Owner has not complied with this Agreement within 14 days after the date of service on the Owner by the Council of a notice which specifies the Owner's failure to comply with any provision of this Agreement, the Owner covenants:

- 4.24.1 to allow the Council its officers, employees, contractors or agents to enter the Land and rectify the non-compliance;
- 4.24.2 to pay to the Council on demand, the Council's reasonable costs and expenses ("**Costs**") incurred as a result of the Owner's non-compliance;
- 4.24.3 to pay interest at the rate of 2% above the rate prescribed under section 2 of the *Penalty Interest Rates Act 1983* on all moneys which are due and payable but remain owing under this Agreement until they are paid in full;

and the Owner agrees:

- 4.24.4 to accept a certificate signed by the Chief Executive Officer of the Council (or any nominee of the Chief Executive Officer) as prima facie proof of the Costs incurred by the Council in rectifying the Owner's non-compliance with this Agreement;
- 4.24.5 that any payments made for the purposes of this Agreement shall be appropriated first in payment of any interest and any unpaid Costs of the Council and then applied in repayment of the principal sum;



4.24.6 that all Costs or other monies which are due and payable under this Agreement but which remain owing shall be a charge on the Land until they are paid in full; and

**4.25 Standard of works**

The Owner covenants to comply with the requirements of this Agreement and to complete all works required by this Agreement as expeditiously as possible at its cost and to the satisfaction of the Council.

**4.26 Council access**

The Owner covenants to allow the Council and its officers, employees, contractors or agents or any of them, to enter the Land (at any reasonable time) to assess compliance with this Agreement.

**4.27 Covenants run with the Land**

The Owner's obligations in this Agreement are intended to take effect as covenants which shall be annexed to and run at law and in equity with the Land and every part of it, and bind the Owner and its successors, assignees and transferees, the registered proprietor or proprietors for the time being of the Land and every part of the Land.

**4.28 Owner's warranty**

The Owner warrants and covenants that:

- 4.28.1 the Owner is the registered proprietor (or is entitled to become the registered proprietor) of the Land and is also the beneficial owner of the Land;
- 4.28.2 there are no mortgages, liens, charges or other encumbrances or leases or any rights inherent in any person other than the Owner affecting the Land which have not been disclosed by the usual searches of the folio of the Register for the Land or notified to the Council;
- 4.28.3 no part of the Land is subject to any rights obtained by adverse possession or subject to any easements or rights described or referred to in section 42 of the *Transfer of Land Act 1958*; and
- 4.28.4 until this Agreement is recorded on the folio of the Register which relates to the Land, the Owner will not sell, transfer, dispose of, assign, mortgage or otherwise part with possession of the Land or any part of the Land without first disclosing to any intended purchaser, transferee, assignee or mortgagee the existence and nature of this Agreement.

**5 COUNCIL'S COVENANTS**

**5.1 Substantial Commencement or Practical Completion – Extension**

In any case where Substantial Commencement or Practical Completion of the Development has not been achieved as required by clauses 4.2 and 4.3 respectively due to Force Majeure and the Owner has requested an extension of time pursuant to clause 4.12, the Council must consider any such request having

regard to the Owner's actions pursuant to clause 4.2 or 4.3 (as the case may be) and Council when considering such an extension request:

- 5.1.1 must respond to any such request from the Owner within 28 days of the receipt of the request; and
- 5.1.2 if any extension is granted, must not grant the extension for any period less than three months or greater than 12 months.

## **5.2 Effect of extension**

If any request for an extension is granted pursuant to clause 5.1, the Substantial Commencement Date or Practical Completion Date (as the case may be) is extended for all purposes of this Agreement.

## **6 GOODS AND SERVICES TAX**

### **6.1 Definitions and expressions**

Expressions used in this Agreement that are defined in the *GST Act* have the same meaning as given to them in the *GST Act*, unless expressed to the contrary.

### **6.2 Amounts payable do not include GST**

Each amount, of whatever description, specified as payable by one party to the other party under this Agreement is expressed as a GST exclusive amount unless specified to the contrary.

### **6.3 Liability to pay any GST**

Subject to clause 6.4, in addition to any amount payable by one party to the other party under this Agreement in respect of a taxable supply, the party liable to pay the amount ("**Recipient**") must pay to the other party ("**Supplier**") a sum equivalent to the GST payable, if any, by the Supplier in respect of the taxable supply on the date on which the Supplier makes a taxable supply to the Recipient irrespective of when the Supplier is liable to remit any GST under this Agreement in respect of a taxable supply to any governmental authority.

### **6.4 Tax Invoice**

A party's right to payment under clause 6.3 is subject to a Tax Invoice being delivered to the Recipient.

## **7 GUARANTEE AND INDEMNITY**

### **7.1 Guarantee and indemnity**

In consideration of the Council entering into this Agreement with the Owner at the Guarantor's request, the Guarantor:

- 7.1.1 guarantee that the Owner will perform all its obligations under this Agreement;
- 7.1.2 must pay the Council on demand any money owing to the Council by the Owner; and



- 7.1.3 indemnify the Council against all loss resulting from the Council having entered into this Agreement, whether from the Owner's breach of any provision of this Agreement, or from this Agreement being or becoming unenforceable against the Owner.

## **7.2 Guarantor's liability not affected**

The Guarantor's liability will not be affected by:

- 7.2.1 the Council granting the Owner or any Guarantor any time or other indulgence;
- 7.2.2 the Council agreeing not to sue the Owner, or any Guarantor;
- 7.2.3 any variation of this Agreement;
- 7.2.4 any provision of this Agreement being or being found to be unenforceable; and
- 7.2.5 this Agreement not being signed by any one Guarantor.

## **7.3 Covenants**

The Guarantor agrees:

- 7.3.1 not to seek to recover any money from the Owner by way of reimbursement for payments made by any Guarantor to the Council until the Council has been paid in full;
- 7.3.2 not to prove in the bankruptcy or winding up of the Owner for any amount which the Council has demanded from the Guarantor until the Council has been paid in full; and
- 7.3.3 to pay the Council any money which the Council is required to refund to the Owner's liquidator or trustee in bankruptcy as preferential payments received from the Owner.

## **8 GENERAL**

### **8.1 No fettering of Council's powers**

This Agreement does not fetter or restrict the Council's power or discretion in respect of any of the Council's decision making powers including but not limited to an ability to make decisions under the *Local Government Act 1989*, and the Act or to make or impose requirements or conditions in connection with any use or development of the Land or the granting of any planning permit, the approval or certification of any plans of subdivision or consolidation relating to the Land or the issue of a Statement of Compliance in connection with any such plans.

### **8.2 Time of the essence**

Time is of the essence as regards all dates, periods of time and times specified in this Agreement.

### **8.3 Governing law and jurisdiction**

This Agreement is governed by and is to be construed in accordance with the laws of Victoria. Each party irrevocably and unconditionally submits to the

non-exclusive jurisdiction of the courts and tribunals of Victoria and waives any right to object to proceedings being brought in those courts or tribunals.

#### **8.4 Enforcement and severability**

8.4.1 This Agreement shall operate as a contract between the parties and be enforceable as such in a Court of competent jurisdiction regardless of whether, for any reason, this Agreement were held to be unenforceable as an agreement pursuant to Division 2 of Part 9 of the Act.

8.4.2 If a Court, arbitrator, tribunal or other competent authority determines that a word, phrase, sentence, paragraph or clause of this Agreement is unenforceable, illegal or void, then it shall be severed and the other provisions of this Agreement shall remain operative.

### **9 ENDING OF AGREEMENT**

#### **9.1 Ending of Agreement**

This Agreement ends

9.1.1 on the Termination Date; or

9.1.2 otherwise by agreement between the parties in accordance with Section 177(2) of the Act.

#### **9.2 Cancelling of Recording**

9.2.1 As soon as reasonably practicable after the ending of this Agreement, the Council will at the request and at the cost of the Owner make application to the Registrar of Titles under Section 183(2) of the Act to cancel the recording of this Agreement on the register.

9.2.2 The Owner may make more than one request of the Council to do so as the Owner's obligations are progressively satisfied.

9.2.3 If this Agreement relates to more than one lot after the subdivision of the Land, the Owner of that lot may request the Council to end this Agreement in relation to that lot if the Owner of that lot has complied with its obligations in relation to that lot.

#### **9.3 Removal of Residential Lots from Application of Agreement**

9.3.1 Notwithstanding that the Owner may still be in the course of complying with its obligations in this Agreement, the Council may at the request of the Owner, consent to removing particular Residential Lots from the application of this Agreement pursuant to Section 183 of the Act.

9.3.2 The Council will only provide its consent under this clause where it has issued a statement of compliance for a plan of subdivision for the Land that shows the Residential Lots.

9.3.3 If the Council provides its agreement under this clause, the Council will at the cost of the Owner expeditiously lodge an application in the prescribed form with the Registrar of Titles for the removal of those Residential Lots from the application of this Agreement.



- 9.3.4 For the avoidance of any doubt, the effect of Council's consent under this clause is that any Residential Lot created by the plan of subdivision to which Council's approval applies will not be affected by this Agreement.

## 10 NOTICES

### 10.1 Service of notice

A notice or other communication required or permitted, under this Agreement, to be served on a person must be in writing and may be served:

- 10.1.1 personally on the person;
- 10.1.2 by leaving it at the person's address set out in this Agreement;
- 10.1.3 by posting it by prepaid post addressed to that person at the person's current address for service; or
- 10.1.4 by facsimile to the person's current number notified to the other party.

### 10.2 Time of service

A notice or other communication is deemed served:

- 10.2.1 if served personally or left at the person's address, upon service;
- 10.2.2 if posted within Australia to an Australian address, two Business Days after posting;
- 10.2.3 if served by facsimile, subject to the next clause, at the time indicated on the transmission report produced by the sender's facsimile machine indicating that the facsimile was sent in its entirety to the addressee's facsimile; and
- 10.2.4 if received after 5.00pm in the place of receipt or on a day which is not a Business Day, at 9.00am on the next Business Day.

## 11 INTERPRETATION

In this Agreement, unless the contrary intention appears:

- 11.1 the singular includes the plural and vice versa;
- 11.2 a reference to a document or instrument, including this Agreement, includes a reference to that document or instrument as novated, altered or replaced from time to time;
- 11.3 a reference to an individual or person includes a partnership, body corporate, government authority or agency and vice versa;
- 11.4 a reference to a party includes that party's executors, administrators, successors, substitutes and permitted assigns;
- 11.5 words importing one gender include other genders;
- 11.6 other grammatical forms of defined words or expressions have corresponding meanings;

- 11.7 a covenant, undertaking, representation, warranty, indemnity or agreement made or given by:
  - 11.7.1 two or more parties; or
  - 11.7.2 a party comprised of two or more persons,
 is made or given and binds those parties or persons jointly and severally;
- 11.8 a reference to a statute, code or other law includes regulations and other instruments made under it and includes consolidations, amendments, re-enactments or replacements of any of them;
- 11.9 a recital, schedule, annexure or description of the parties forms part of this Agreement;
- 11.10 if an act must be done on a specified day that is not a Business Day, the act must be done instead on the next Business Day;
- 11.11 if an act required to be done under this Agreement on a specified day is done after 5.00pm on that day in the time zone in which the act is performed, it is taken to be done on the following day;
- 11.12 a party that is a trustee is bound both personally and in its capacity as trustee;
- 11.13 a reference to an authority, institution, association or body ("**original entity**") that has ceased to exist or been reconstituted, renamed or replaced or whose powers or functions have been transferred to another entity, is a reference to the entity that most closely serves the purposes or objects of the original entity;
- 11.14 headings and the provision of a table of contents are for convenience only and do not affect the interpretation of this Agreement.

**EXECUTED** as a deed of agreement under Division 2 of Part 9 of the Act.

**THE COMMON SEAL of KNOX CITY**                    )  
**COUNCIL** was affixed in the presence of:        )

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
Councillor

\_\_\_\_\_  
Chief Executive Officer