Affordable Housing Agreement under section 173 of the Planning and Environment Act 1987 (Vic)

*Affordable Housing Contribution by way of Payment in Lieu*

Subject Land: [address]

**Minister for Planning**

and

**[Registered Proprietor(s) (ACN [insert])]**

[Notes to author:

The Owner has elected to satisfy its Affordable Housing Contribution by way of a Payment in Lieu, on the terms set out in this Agreement. This agreement must set out the total value of the Affordable Housing Contribution, and when and how the Payment in Lieu will be made. The Owner must provide a total Affordable Housing Contribution equal to three per cent of the estimated cost of development for accommodation within the proposed development, as approved by the Minister for Planning.]

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Agreement under section 173 of the Planning and Environment Act 1987

Dated

Parties

|  |  |
| --- | --- |
| Name | **Minister for Planning** |
| Address | **[\*\*\*]** |
| Short name | **Minister**  |

|  |  |
| --- | --- |
| Name | **[\*\*\*]**  |
| Address | **[\*\*\*]** |
| Short name | **Owner** |

Background

1. The Owner is or is entitled to be the registered proprietor of the Subject Land.
2. The Minister is the Responsible Authority for matters under Division 2 of Part 9 of the Act relating to an agreement in relation to Affordable Housing where clause 53.23 of the Planning Scheme is relied upon.
3. Planning Permit [No.] dated [date] was issued on [date] by the Minister. The Planning Permit allows [insert permitted use/development noted on planning permit].
4. Condition [x] of the Planning Permit requires the Owner to enter into an agreement with the Minister pursuant to Section 173 of the Act, which requires the Owner to make a contribution towards Affordable Housing.
5. The Parties have agreed that the Owner must deliver the Affordable Housing Contribution to the Minister in the form of a Payment in Lieu, according to the terms of this Agreement.
6. [As at the date of this Agreement, the Subject Land is encumbered by a mortgage and caveat in favour of the Mortgagee and Caveator. The Mortgagee and Caveator consent to the Owner entering into this Agreement.]

The Parties agree

# Definitions

In this Agreement unless the context admits otherwise:

**Act** means the *Planning and Environment Act* *1987* (Vic).

**Affordable Housing** has the meaning given to it under section 3AA of the Act.

**Affordable Housing Contribution** means the sum at Item 12 of Schedule 1.

**Agreement** means this Agreement and includes this Agreement as amended from time to time.

**Breach Notice** means a notice issued for the purposes of clause 15 that specifies a breach and requires its rectification within a number of days that is reasonable in the circumstances (which, except in an emergency, will not be less than 14 days).

**Building Permit** means a building permit under the *Building Act 1993* (Vic).

**Caveator** means the person registered as caveator of the Subject Land.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**CPI** means the annual Consumer Price Index (All Groups-Melbourne) as published by the Australian Bureau of Statistics, or, if that index number is no longer published, its substitute as a cumulative indicator of the inflation rate in Australia, as determined by the Minister from time to time.

**Current Address** means:

1. for the Minister, the address shown at Schedule 1 of this Agreement for the Minister’s representative, or any other address provided by the Minister to the Owner for any purpose relating to the Subject Land; and
2. for the Owner, the address shown at Schedule 1 of this Agreement for the Owner’s representative or any other address provided by the Owner to the Minister for any purpose relating to the Subject Land.

**Current Email** means:

1. for the Minister, the email address shown at Schedule 1 for the Minister’s representative, or any email address provided by the Minister to the Owner for the express purpose of electronic communication regarding this Agreement; and
2. for the Owner, the email address shown at Schedule 1 for the Owner’s representative, or any email address provided by the Owner to the Minister for the express purpose of electronic communication regarding this Agreement.

**Development** means the development approved by the Planning Permit. [Drafting Note: if desired for clarity, describe the exact development that was valued by the quantity surveyor in determining the affordable housing contribution].

**Endorsed Plans** means any plans, diagrams or similar endorsed under the Planning Permit, including any amendments made from time to time;

**Index** means CPI applied in accordance with clause 8.

**Loss** means any loss, damage, cost, expense, or liability incurred by the person concerned, however it arises and whether it is present or future, fixed or unascertained, actual, or contingent.

**Mortgagee** means the person registered or entitled from time to time to be registered as mortgagee of the Subject Land.

**Notice** has the meaning given to that term in clause 16.1.

**Owner** means the person registered or entitled from time to time to be registered as proprietor of an estate in fee simple of the Subject Land and includes a mortgagee-in-possession.

**Owner's obligations** include the Owner's specific obligations and the Owner's further obligations.

**Party** or **Parties** meansthe Parties to this Agreement but does not include a person who has transferred or otherwise disposed of all of their interests in the Subject Land.

**Payment in Lieu** means the sum set out in Schedule 1.

**Planning Approval** means and includes any planning permit issued in accordance with the Act, excluding the Planning Permit.

**Planning Permit** means the permit identified at Item 7 of Schedule 1 as amended from time to time.

**Planning Scheme** means the Planning Scheme identified at Schedule 1Item 6 of Schedule 1.

**Registrar of Titles** has the meaning given to it by section 5 of the *Transfer of Land Act 1958* (Vic).

**Social Housing Growth Fund** means the Victorian Government fund of that name, established in 2018 to allow Homes Victoria to partner with the community housing sector to build more and better homes.

**Statement of Compliance** means a Statement of Compliance under the *Subdivision Act 1988* (Vic).

**Subject Land** means the land identified at Item 5 of Schedule 1, and any reference to the Subject Land includes any lot created by the subdivision of the Subject Land or any part of it.

**VCAT** means the Victorian Civil and Administrative Tribunal.

# Interpretation

In this Agreement unless the context admits otherwise:

the singular includes the plural and vice versa;

a reference to a gender includes all genders;

a reference to a person includes a reference to a firm, corporation or other corporate body and that person's successors in law;

any agreement, representation, warranty, or indemnity by 2 or more persons (including where 2 or more persons are included in the same defined term) binds them jointly and severally;

a term used has its ordinary meaning unless that term is defined in this Agreement. If a term is not defined in this Agreement and it is defined in the Act, it has the meaning as defined in the Act;

a reference to an Act, regulation or the Planning Scheme includes any Act, regulation or amendment amending, consolidating, or replacing the Act, regulation, or Planning Scheme;

the Background forms part of this Agreement;

the Owner's obligations take effect as separate and several covenants which are annexed to and run at law and equity with the Subject Land; and

any reference to a clause, page, condition, attachment, or term is a reference to a clause, page, condition, attachment, or term of this Agreement.

# Purposes of Agreement

The Parties acknowledge and agree that the purposes of this Agreement are to:

set out the delivery mechanism for the Affordable Housing Contribution;

give effect to the Planning Permit;

satisfy and give effect to the requirements of Clause 53.23 of the Planning Scheme;

facilitate the provision of Affordable Housing in Victoria; and

achieve and advance the objectives of planning in Victoria and the objectives of the Planning Scheme in respect of the Subject Land.

# Reasons for Agreement

The Parties acknowledge and agree that the Minister has entered into this Agreement for the following reasons:

The Minister would not have issued the Planning Permit without the condition requiring this Agreement, as this Agreement is required by the mandatory condition at clause 53.23 of the Planning Scheme and replicated in the Planning Permit;

the Owner has elected to enter into this Agreement in order to take the benefit of the Planning Permit; and

to receive contributions for the benefit of the Social Housing Growth Fund and support the delivery of affordable housing in the State of Victoria.

# Agreement required

The Parties agree that this Agreement will continue to be required until the Owner has complied with all of the Owner's obligations to the satisfaction of the Minister.

# Owner’s obligations

## Payment in Lieu

The Owner covenants and agrees that it must pay the Affordable Housing Contribution:

### prior to the earlier of -

#### the issue of a Building Permit in respect of development on the Subject Land; or

#### The issue of a Statement of Compliance for any stage of the subdivision of the Subject Land.

### to the Minister as directed, for the benefit of the Social Housing Growth Fund, as follows:

#### The Owner must seek a tax invoice from the Minister for the Affordable Housing Contribution sum;

#### The Owner must pay the tax invoice in full on the terms set out therein; and

#### The Minister will issue the Owner with a receipt of payment, at which point the Owner’s Affordable Housing Contribution will be satisfied.

# Owner's further obligations

## Loss and indemnity

### The Owner indemnifies and keeps indemnified the Minister and the Minister’s agents in relation to all costs, expenses, losses or damages whatsoever which the Minister or its agents may sustain, incur or suffer or be or become liable for in respect of any suit, action, proceeding, judgment or claim brought by any person whatsoever arising from or referable to the matters referred to in this Agreement or any breach of this Agreement, but excluding any costs, expenses, losses or damages caused by the negligence or reckless act of the Minister.

### The Parties agree that each will conduct itself in a manner that ensures mitigation of its loss in respect of any claim, suit, action, proceeding, or judgment brought by any person.

## Notice and registration

The Owner must bring this Agreement to the attention of all prospective occupiers, purchasers, lessees, licensees, mortgagees, chargees, transferees and assigns.

## Further actions

The Owner:

### must do all things necessary to give effect to this Agreement;

### consents to the Minister applying to the Registrar of Titles to record this Agreement on the certificate of title of the Subject Land in accordance with s 181 of the Act; and

### agrees to do all things necessary to enable the Minister to do so, including:

#### sign any further agreement, acknowledgment, or document; and

#### obtain all necessary consents to enable the recording to be made.

## Minister's costs to be paid

The Owner must pay to the Minister within 14 days after a written request for payment, costs, and expenses (including legal expenses) relating to this Agreement, including:

### preparing, drafting, finalising, signing, recording, and enforcing this Agreement;

### preparing, drafting, finalising, and recording any amendment to this Agreement;

### determining whether any of the Owner's obligations have been undertaken to the Minister’s satisfaction; and

### preparing, drafting, finalising, and recording any document to give effect to the ending of this Agreement.

## Notification of compliance with Owner's obligations

The Owner must notify the Minister of its compliance with all of the Owner's obligations.

# Indexation Adjustment

With effect from the first anniversary of the Commencement Date and once each year thereafter, the Affordable Housing Contribution outstanding balance will be adjusted (**Adjusted Sum**) to reflect movements in the CPI, calculated in accordance with the following formula:

**Adjusted Sum** = AHCB + (AHCB x CPI Rate)

Where:

**AHCB** means the Affordable Housing Contribution Balance;

**CPI Rate** means the percentage rise in CPI for the twelve (12) month period ended at the end of the published quarter preceding the date that is 30 days prior to the relevant anniversary of the Commencement Date; and

**CPI** means the annual Consumer Price Index (All Groups-Melbourne) as published by the Australian Bureau of Statistics, or as otherwise determined in accordance with clause 8.2.

If the CPI ceases to be published or its method of calculation substantially alters, then it is to be replaced by the nearest equivalent index as selected in good faith by the Minister.

# Agreement under s 173 of the Act

Without limiting or restricting the respective powers to enter into this Agreement, and insofar as it can be so treated, this Agreement is made as a deed in accordance with s 173 of the Act.

# Agreement runs with the Subject Land

This Agreement shall be deemed to come into force and effect upon the date of this Agreement and shall run with and be annexed to the Subject Land.

# Owner's warranties

The Owner warrants that apart from the Owner and any other person who has consented in writing to this Agreement, no other person has any interest, either legal or equitable, in the Subject Land which may be affected by this Agreement.

# Successors in title

Until such time as a memorandum of this Agreement is recorded on the certificate of title of the Subject Land, the Owner must require successors in title to:

give effect to this Agreement; and

enter into a deed agreeing to be bound by the terms of this Agreement.

# Debt owing

Any monies owing by the Owner to the Minister under this Agreement:

are due and payable in accordance with this Agreement.

attract interest at the rate of 2% above the rate prescribed under s 2 of the *Penalty Interest Rates Act 1983* (Vic) but still remain owing until they are paid in full.

are a charge on the Subject Land until they are paid in full.

# Disputes

If there is a dispute between the Parties concerning the interpretation or implementation of this Agreement, other than a dispute referred to in clause 14.2, that dispute may be referred to VCAT for resolution to the extent permitted by the Act.

If there is a dispute concerning any matter which is not referrable to VCAT under the Act, that dispute may be referred for arbitration by an arbitrator agreed upon in writing by the Parties, or, in the absence of such agreement, the Chairman of the Victorian Chapter of the Institute of Arbitrators, Australia or their nominee for arbitration.

Where provision is made in this Agreement that any matter be done to the satisfaction of the Minister or must not be done without its consent and a dispute arises in relation to such provision, the dispute may be referred to VCAT in accordance with s 149(1)(b) of the Act.

The parties are entitled to legal representation for the purposes of any arbitration or referral referred to in this clause.

Unless the mediator or VCAT shall otherwise direct, each party must bear its own costs.

# Breach of the Owner’s Obligations

The Parties agree that if the Owner breaches an obligation applicable under this Agreement the Minister may:

serve a Breach Notice on the Owner; and

if necessary, enter the Subject Land to take action to rectify the default if the Breach Notice is not complied with within the time specified in the Breach Notice, at the Owner's expense; and

recover any reasonable costs and expenses incurred by the Minister in enforcing its rights under this clause by way of reimbursement by the Owner within 14 days of demand.

# General matters

## Notices

A notice or other communication required or permitted to be served by a Party on another Party must be in writing and may be served:

### personally on the other Party;

### by leaving it at the other Party's Current Address;

### by posting it by priority prepaid post addressed to the other Party at the other Party's Current Address; or

### by email to the other Party's Current Email.

## Counterparts

This Agreement may be executed in counterparts, all of which taken together constitute one document.

## No waiver

Any time or other indulgence granted by the Minister to the Owner or any variation of this Agreement or any judgment or order obtained by the Minister against the Owner does not amount to a waiver of any of the Minister’s rights or remedies under this Agreement.

## Severability

If a court, arbitrator, tribunal, or other competent authority determines that any part of this Agreement is unenforceable, illegal, or void then that part is severed with the other provisions of this Agreement remaining operative.

## No fettering of the Minister’s powers

This Agreement does not fetter or restrict the Minister’s power or discretion to make decisions or impose requirements or conditions in connection with the grant of planning approvals or certification of plans subdividing the Subject Land or relating to use or development of the Subject Land.

## Inspection of documents

A copy of any planning permit, document or plan referred to in this Agreement is available for inspection at the offices of the Minister or any relevant Department during normal business hours upon giving the Minister reasonable notice.

## Governing law

This Agreement is governed by and is to be construed in accordance with the laws of Victoria.

## Electronic execution

### Each Party consents to the signing of this Agreement by electronic means. The Parties agree to be legally bound by this Agreement signed in this way.

### Each Party reserves the right to sign this Agreement by electronic means, including by use of software or an online service for this purpose.

# GST

In this clause words that are defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the same meaning as their definition in that Act.

Except as otherwise provided by this clause, all consideration payable under this Agreement in relation to any supply is exclusive of GST.

If GST is payable in respect of any supply made by a supplier under this Agreement, subject to clause 17.4 the recipient will pay to the supplier an amount equal to the GST payable on the supply at the same time and in the same manner as the consideration for the supply is to be provided under this Agreement.

The supplier must provide a tax invoice to the recipient before the supplier will be entitled to payment of the GST payable under clause 17.3.

# Commencement of Agreement

This Agreement commences on the date specified on page one or, if no date is specified on page one, the date the Minister executes this Agreement.

# Ending of Agreement

This Agreement ends:

### at the date upon which upon the Minister provides written notice to the Owner that all of the requirements of this Agreement have been fulfilled, including but not limited to satisfaction of the Affordable Housing Contribution; or

### by agreement between the Parties, pursuant to s 177(2) of the Act; or

### when a decision to end the Agreement is made under Part 9 Division 2 of the Act.

After this Agreement has ended, the Minister will, at the Owner's written request, apply to the Registrar of Titles under s 183(1) of the Act to cancel the record of this Agreement.

1. Particulars of Agreement

|  |  |  |
| --- | --- | --- |
| Item  | Subject  | Particulars |
| * 1.
 | Owner  | [Name] of [address] |
| * 1.
 | Owner’s representative | [Name] of [address]. Phone: [phone]Address: [address] |
|  | Minister | Minister for Planning |
| * 1.
 | Minister’s representative | [Name], [position], [Department]Phone: [phone]Address: [address] |
| * 1.
 | Subject Land  | The land situated at [street address], being the land contained in certificate of title volume [x] folio [x], more particularly described as [formal land description per title]. |
| * 1.
 | Planning Scheme | [Municipality] Planning Scheme, and any other planning scheme that applies to the Subject Land. |
| * 1.
 | Planning Permit  | Planning Permit No. [number], as amended from time to time, issued on [date], authorising [description] on the Subject Land in accordance with the Endorsed Plans. |
| * 1.
 | Mortgagee  | Mortgage No. [registered instrument number] in favour of [bank]. |
|  | Other registered interest holder (caveator, chargee, etc) | [Name of interest holder], [nature of interest], registered dealing number [x]. |
|  | Commencement Date | The date of this Agreement. |
|  | Ending Date | Refer to clause 19. |
| * 1.
 | Affordable Housing Contribution | [Insert agreed sum], with the balance outstanding indexed annually in accordance with clause 8. |

1. Signing Page

**Signed, sealed and delivered** as a deed by the Parties.

|  |  |
| --- | --- |
| **Signed sealed** and **delivered** by [insert delegate], [insert delegate title] on behalf of **the Minister** pursuant to an Instrument of Delegation in the presence of: | )))))) |

 Witness

This document was witnessed by audio visual link in accordance with the requirements of s12 of the *Electronic Transactions (Victoria) Act 2000.*

|  |  |
| --- | --- |
| **Signed sealed and delivered** by **\*\*\*** in the presence of: | )))  Signature of **\*\*\*** |

Signature of witness

Print full name of witness

|  |  |
| --- | --- |
| **Executed as a deed** by **\*\*\*** in accordance with s 127(1) and s 127(3) of the *Corporations Act* *2001*: | )) |

Signature of Sole Director ***##opt [***and Sole Company Secretary***]***

Print full name

[Notes to reader:

Use this signing clause only if:

* the company has a sole director and no company secretary; or
* the same person is both sole director and company secretary.

If the company has a sole director and a different person as the company secretary, then do not use this signing clause. Instead, use the ‘2 directors’ signing clause that has 2 signature panels: one for a director, and a second one for a company secretary or director.]

|  |  |
| --- | --- |
| **Executed** **as a deed** by **\*\*\*** in accordance with s 127(1) and s 127(3) of the *Corporations Act* *2001*: | )) |

Signature of Director Signature of Director/Company Secretary

Print full name Print full name

**Mortgagee's Consent**

\*\*\* as Mortgagee under registered mortgage no. \*\*\* consents to the Owner entering into this Agreement.

**Caveator's Consent**

\*\*\* as Caveator of registered caveat no. \*\*\* consents to the Owner entering into this Agreement.

##Insert appropriate signing clause