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Date / /2018

Heads of Agreement

Sale and redevelopment of 46 – 58 Marlborough Street, Balaclava

Port Phillip City Council
and

Port Phillip Housing Association Limited
ACN 116 093 004
in its capacity as trustee of the Port Phillip Housing Trust



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Heads of Agreement

Dated / /2018

Parties

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Facsimile	03 9236 2725
Email	anthony.savenkov@portphillip.vic.gov.au
Contact	Anthony Savenkov
Short name	Council
Name	Port Phillip Housing Association Limited (ACN 116 093 004) in its capacity as trustee of the Port Phillip Housing Trust
Address	Suite 6, 22-28 Fitzroy Street, St Kilda, Victoria 3182
Facsimile	03 9534 8636
Email	jpanton@ppha.org.au
Contact	Jack Panton
Short name	PPHA

Background

- A. Council is the owner in fee simple of the Site.
- B. Subject to compliance with its statutory obligations, Council proposes to sell that part of the Site constituted by the Development Land to PPHA on the basis that PPHA agrees to undertake the Development and to use the Development Land for the purposes specified by this Agreement.
- C. The parties have entered this Agreement to record their respective intentions and expectations in regard to the Development and to outline the process and documentation required to pursue the Development.



The Parties Agree

1. Definitions

In this document unless expressed or implied to the contrary:

Agreement means this heads of agreement.

Approved Variation means:

- (a) in respect of variations to the Works sought by PPHA, those variations to which PPHA has sought and obtained the approval in writing of Council, which approval must not be unreasonably withheld or delayed provided that:
 - (i) the variation to the Works does not detrimentally affect Council's interest in the Site;
 - (ii) the variations comply with any Planning Permit (or any variation of it); and
 - (iii) the variations are undertaken at PPHA's cost; and
- (b) in respect of variations to the Carpark Works sought by Council, those variations to which Council has sought and obtained the approval in writing of PPHA, which approval must not be unreasonably withheld or delayed provided that:
 - (i) the variations can be accommodated without amendment to any Planning Permit and will not result in any delays in the anticipated date for practical completion; and
 - (ii) the variations are undertaken at Council's cost.

Business Day means Monday to Friday excluding public holidays in Victoria.

Carpark Works mean that part of the Works for the Development relating to the construction of the Council Carpark.

Completion Date has the meaning given to that term under clause 4.7.

Concept Plans means the concept plans prepared by DOIG Architecture, a copy of which is attached in Schedule 1

Construction Funding has the meaning given to that in the term under clause 4.4.1.

Construction Funding Approval Date has the meaning given to that term under clause 4.4.1.

Contract of Sale means the contract of sale pursuant to which Council sells the Development Land to PPHA in accordance with the terms of this Agreement.

Council Carpark means the area shown as B01 in yellow on the Concept Plans, forming part of the Site.

Day of Sale means the day of sale specified in the Contract of Sale, being the date of execution and exchange of the Contract of Sale by the parties.

Default means any material breach of this Agreement.



Development means the development of the Site in accordance with the Planning Permit.

Development Land means all areas shown on the Concept Plans (excluding the Council Carpark and any other land which is to be vested in Council), forming part of the Site.

Force Majeure Event means:

- (a) an earthquake, act of God, natural disaster, fire, flood, riot, civil commotion, malicious damage, sabotage, act of public enemy, war, revolution or radioactive contamination;
- (b) any unreasonable delay by any authority in giving any necessary approval for consent or in carrying out any inspection of the Development provided that PPHA has taken or caused to be taken all reasonable steps to obtain such approval, consent or inspection; or
- (c) any other matter, cause or thing beyond the reasonable control of the PPHA provided that PPHA has used reasonable endeavours to overcome and keep any resulting delay to a minimum.

Insolvency Event in respect of a party means:

- (a) a receiver, controller, manager, trustee, administrator or liquidator is appointed over a party's assets or undertaking or a material part of them;
- (b) an application is presented against a party (that is not discharged or withdrawn within 10 days), an order is made, a resolution is passed or a meeting is ordered or convened to consider a resolution for the winding up of a party;
- (c) any execution or other process of any court is issued against or served upon any of a party's assets in excess of 10% of that party's shareholders' funds which is not discharged or withdrawn within 30 days; or
- (d) a party ceases or threatens to cease to pay its debts or suspends or threatens to suspend payment generally or ceases to threaten to cease to carry on its business or becomes insolvent.

LGA means the *Local Government Act 1989* (Vic).

Licence means the licence to occupy the Site on a non-exclusive basis which is to be granted by Council to PPHA for the purposes of constructing the Works in accordance with the terms of this Agreement.

Plan of Subdivision means the plan of subdivision to be prepared by PPHA after the date of this Agreement substantially in accordance with the Concept Plans.

Planning Permit means a planning permit issued under Division 5 of the *Planning and Environment Act 1987* which authorises the development and use of the Site for the Development, including plans endorsed or to be endorsed pursuant to such planning permit.

practically completed or **practical completion** means the issue of an occupancy permit or certificate of final inspection pursuant to the *Building Act 1993* in respect of the Development.

Section 173 Agreement means the section 173 agreement to be entered into by PPHA with Council pursuant to the terms of the Contract of Sale in respect of the use of the Development Land.



Seed Funding has the meaning given to that term under clause 4.3.1.

Seed Funding Date has the meaning give to that term under clause 4.3.1.

Settlement Date means the date specified in clause 4.2 of this Agreement.

Site means the land in certificates of title volume 3045 folio 919, volume 3652 folio 255, volume 8196 folio 673, volume 8958 folio 714, volume 5291 folio 118, volume 4573 folio 423 and volume 4573 folio 422 and known as 46-58 Marlborough Street, Balaclava.

Specified Consideration means 90% of the market value of the improvements constructed on the Development Land as at the date of exercise of the right of retransfer pursuant to the terms of the Section 173 Agreement.

substantially commence or **substantial commencement** means the construction of not less than 10% of the budgeted (building) construction works for the Development.

Target Program means the program attached in Schedule 2.

Works means all works required for the Development.

2. Nature of Agreement

The parties intend to be bound by the terms and conditions of this Agreement.

3. Conditional upon Council's exercise of Statutory Powers under the *Local Government Act 1989*

- 3.1 This Agreement is subject to and conditional upon Council giving public notice of the proposed sale of the Development Land under section 189 of the LGA, hearing any submissions made under section 223 of the LGA and resolving to sell the Development Land in accordance with the terms of this Agreement.
- 3.2 Council must give public notice of the proposed sale of the Development Land under section 189 of the LGA within sixty (60) days of PPHA obtaining Seed Funding or electing to proceed to this Agreement.
- 3.3 PPHA acknowledges that Council will not make a decision whether or not to sell the Development Land before the expiry of four weeks from the date of publication of a public notice of intention to sell the Development Land pursuant to section 189 of the LGA.
- 3.4 If, after having complied with sections 189 and 223 of the LGA, Council decides (in its absolute discretion) not to proceed with the sale of the Development Land, Council shall have the right to rescind this Agreement by giving notice in writing to that effect to PPHA within 7 days of Council deciding whether to proceed with the sale of the Development Land.
- 3.5 If, after having complied with sections 189 and 223 of the LGA, Council decides to proceed to the sale of the Development Land, Council shall no longer have the right to rescind this Agreement pursuant to this clause 3.
- 3.6 Upon rescission of this Agreement pursuant to clause 3.4, PPHA acknowledges that PPHA shall have no action, right, claim or demand against Council under this Agreement or arising from or out of the rescission by Council pursuant to this clause.



4. Contract of Sale

4.1 General

Subject to clause 3, the Development Land will be sold to PPHA under the terms and conditions of the Contract of Sale in accordance with clause 4.

4.2 Particulars of Sale

The particulars of sale contained in the Contract of Sale will be as follows:

Vendor	Port Phillip City Council
Purchaser	Port Phillip Housing Association Limited ACN 116 093 004 in its capacity as trustee of the Port Phillip Housing Trust
Land	Development Land
Price	The consideration is PPHA entering into the Contract of Sale and Section 173 Agreement

Settlement Date: 14 days after the last to occur of the following:

- PPHA achieving practical completion of the Development in accordance with the terms of this Agreement; and
- notification by PPHA or its solicitors to Council of registration of the Plan of Subdivision,

or earlier by agreement. Time will be of the essence under the Contract of Sale.

4.3 Seed Funding

4.3.1 Council and PPHA agree to use their reasonable endeavours to procure seed funding in the order of \$200,000 from the Victorian State Government for the Development (**Seed Funding**) within 90 days after the date of this Agreement (**Seed Funding Date**).

4.3.2 If the Seed Funding is not obtained by the Seed Funding Date, then PPHA must elect within 7 days after the Seed Funding Date to either rescind this Agreement or proceed with this Agreement, by giving notice in writing to that effect to Council.

4.3.3 Upon rescission of this Agreement pursuant to the preceding subclause, the parties acknowledge that neither party will have an action, right, claim or demand against the other under this Agreement or arising from or out of the rescission by PPHA pursuant to this clause.

4.4 Sale conditional upon PPHA obtaining Construction Funding

4.4.1 This Agreement is conditional on PPHA procuring construction funding sufficient for the undertaking of the Development on terms acceptable to PPHA acting reasonably (**Construction Funding**) by the date which is 30 months after the date of this Agreement or such later date as Council and PPHA may agree (**Construction Funding Approval Date**).

4.4.2 If PPHA has not procured Construction Funding by the Construction Funding Approval Date, either party may rescind this Agreement by giving notice in writing



to that effect to either party at any time after the Construction Funding Approval Date but before PPHA procures the Construction Funding.

- 4.4.3 Upon rescission of this Agreement pursuant to the preceding subclause, the parties acknowledge that neither party will have an action, right, claim or demand against the other under this Agreement or arising from or out of the rescission pursuant to this clause.

4.5 Execution of Contract of Sale

The parties must enter into the Contract of Sale within 28 days of the last of the following to occur:

- 4.5.1 Council giving notice of its decision to proceed with the sale of the Development Land after having complied with sections 189 and 223 of the LGA 89;
- 4.5.2 PPHA obtaining Seed Funding or electing to proceed with this Agreement in accordance with clause 4.3; and
- 4.5.3 PPHA obtaining Construction Funding in accordance with clause 4.4.

4.6 Sale condition upon grant of Planning Permit

- 4.6.1 The Contract of Sale is to be subject to and conditional upon PPHA obtaining a Planning Permit for the development and use and subdivision of the Site in accordance with the Concept Plans, on terms reasonably acceptable to Council and PPHA by the date which is 18 months from the date of the Application under clause 4.6.2(a) (**Approval Date**).

PPHA must make the application for the Planning Permit in accordance with the Concept Plans within 3 months after PPHA obtains Seed Funding or elects to proceed with this Agreement in accordance with clause 4.3 (**Application**).

- 4.6.2 PPHA is responsible for all costs and expenses associated with the Planning Permit (including all statutory fees) and Council shall not be obliged to make any payments on behalf of PPHA in relation to either the request for the Planning Permit or complying with any conditions of the Planning Permit.
- 4.6.3 If, as at the Approval Date:
 - (a) the Planning Permit has not been granted; or
 - (b) the Planning Permit has been granted subject to conditions which are in PPHA's or Council's reasonable opinion, unacceptable,

then PPHA, provided that it has complied with its obligations pursuant to this clause 4.6, or Council, may at their election rescind the Contract of Sale by giving notice in writing to that effect to the other party, provided always that the Planning Permit has not already been granted. Neither party shall have any action, right, claim or demand against the other under the Contract of Sale or arising from or out of the rescission by Council of the Contract of Sale.

4.7 Sale conditional upon practical completion of the Development

- 4.7.1 The Contract of Sale is to be conditional upon PPHA achieving practical completion of the Development by the date which is 24 months after the date of substantial commencement of the Development or such later date as the parties may agree to in writing (**Completion Date**).



- 4.7.2 In the event that the Development is not practically completed by the Completion Date, Council may at any time before the Development is practically completed rescind the Contract of Sale by giving notice in writing to PPHA of that effect.
- 4.7.3 In the event that Council rescinds the Contract of Sale pursuant to clause 4.7.2 the following shall apply:
- (a) within 90 days of the rescission of the Contract of Sale, Council shall make an election to either retain the dwellings constructed on the Development Land or to propose to sell the dwellings on the Development Land;
 - (b) if Council makes an election to retain the dwellings on the Development Land, then Council shall pay to PPHA a sum equal to 90% of the project costs incurred by PPHA on the Development Land, calculated on a cost to complete basis by an independent certifier, the cost of which shall be shared equally by the parties; and
 - (c) if Council makes an election to propose to sell the dwellings subject to Council complying with its obligations under section 189 and 223 of the LGA or such equivalent provisions and resolving to sell the dwellings, Council shall pay to PPHA a sum equal to 90% of the project costs incurred by PPHA on the Development Land, calculated on a cost to complete basis by an independent certifier, the cost of which shall be shared equally by the parties, payable in instalments at the time of settlement of each of the dwellings, on a pro rata basis.

4.8 PPHA to construct Development

PPHA agrees to do the following in respect of the construction of the Development:

- 4.8.1 prepare and obtain the approval of all plans for endorsement pursuant to the Planning Permit at PPHA's own cost;
- 4.8.2 carry out the Development at its own cost and must:
- (a) substantially commence the Development by the date which is 12 months after the date of issue of the Planning Permit (**Substantial Commencement Date**); and
 - (b) practically complete the Development by the Completion Date;
- 4.8.3 construct, at its own cost, the Development in a proper and workmanlike manner in accordance with the following:
- (a) the Planning Permit; and
 - (b) any Approved Variations;
- 4.8.4 be responsible at PPHA's own cost for the construction of the Carpark Works which form part of the Development on the Council Carpark;
- 4.8.5 be responsible for all design and construction risks in relation to the Works;
- 4.8.6 effect the following insurances in respect of the Works with the interests of Council and any subcontractor noted on the policy:
- (a) contractors all risk insurance for the full reinstatement and replacement cost;



- (b) public liability insurance for a sum of not less than \$20 million for any one event;
 - (c) all relevant worker's compensation insurance; and
 - (d) professional indemnity insurance for a sum not less than \$10 million for any one claim;
- 4.8.7 engage a reputable builder to construct the Works who is suitably qualified and experienced and who will be obliged to exercise a standard of skill, care and diligence in the execution and construction of these Works consistent with good industry practice;
- 4.8.8 indemnify Council in respect of all costs, expenses, losses or damages which Council sustains or incurs arising out of the construction of the Works and/or a breach by PPHA of its obligations under the Contract of Sale or Licence (as the case may be) except to the extent that these costs, losses or damages are sustained or incurred as a result of the negligence or default of Council, its officers or contractors;
- 4.8.9 rectify the following defects in respect of the Works within a defects liability period of 1 year following the date upon which the Works are practically completed (**Defects Liability Period**):
- (a) all defects in the Carpark Works identified and notified in writing to PPHA during the Defects Liability Period, to the satisfaction of Council acting reasonably; and
 - (b) all defects in other Works which may impact in any way on the Carpark Works or Council's use and enjoyment of the Carpark Works identified and notified in writing to PPHA during the Defects Liability Period,
- to the satisfaction of Council acting reasonably;
- 4.8.10 comply with the *Occupational Health and Safety Act 2004 (Vic) (OHS Act)* and any other relevant statutory requirements dealing with occupational health and safety, including but not limited to the following:
- (a) comply with all relevant compliance codes approved under Part 12 of the OHS Act;
 - (b) implement and maintain a system of obtaining and updating information on statutory requirements and Codes of Practice dealing with occupational health and safety;
 - (c) assume or contract with its builder to assume responsibility for the Site as the principal contractor as defined under the *Occupational Health and Safety Regulations 2007 (OHS Regulations)*;
 - (d) manage or contract with its builder to manage the workplace comprising the Site to the extent necessary to discharge the duties of a principal contractor pursuant to the OHS Regulations; and
 - (e) indemnify Council in respect of all losses and liabilities incurred by Council arising directly or indirectly as a result of any duties of principal contractors pursuant to the OHS Regulations, except where such loss or liability is incurred as a result of acts or omissions of Council;



4.8.11 exercise its reasonable endeavours to construct the Development within the proposed title boundaries on the Plan of Subdivision.

4.9 Substantial commencement

In the event that the Development is not substantially commenced by the Substantial Commencement Date, Council may at any time before the Development is substantially commenced rescind the Contract of Sale by giving notice in writing to PPHA to that effect.

4.10 Target Program

PPHA agrees to use its reasonable endeavours to undertake the Development in accordance with the Target Program.

4.11 Force Majeure

4.11.1 Where PPHA is unable to comply with one or both of its obligations as specified in clause 4.8.2 (**the Specified Covenants**) and this is due to the occurrence of a Force Majeure Event, PPHA shall give prompt notice in writing to Council in accordance with this clause of the nature and effect of any Force Majeure Event affecting performance of PPHA's obligations pursuant to clause 4.8.2 of this Agreement and must use its reasonable endeavours to remove the effect of any such Force Majeure Event.

4.11.2 The effect of the notice given in accordance with the preceding clause is that the timeframe for performance of the relevant obligation set out in one or more of the Specified Covenants to which the particular Works relate is suspended so far as such obligation is affected by the Force Majeure Event.

4.12 Survey of the Site

PPHA must do the following at PPHA's own cost and expense:

4.12.1 immediately upon practical completion of the Development, provide Council with a boundary check survey prepared by a licensed surveyor of all of the land in the Plan of Subdivision accurately defining all discrepancies between the proposed title boundaries of the land in the Plan of Subdivision and the 'as built' form of the Development; and

4.12.2 if required in writing by Council or at its own initiative, arrange at PPHA's own cost for any required minor amendments to the Plan of Subdivision so as to ensure that the boundaries of the lots on the Plan of Subdivision coincide with the built form of the Development.

4.13 Sale conditional upon Registration of Plan of Subdivision

4.13.1 The Contract of Sale is to be conditional upon PPHA procuring registration of the Plan of Subdivision within ninety (90) days of the Completion Date, or such other date as the parties may agree to in writing (**Registration Date**).

4.13.2 PPHA must exercise its reasonable endeavours to procure registration of the Plan of Subdivision by the Registrar of Titles by the Registration Date.

4.13.3 In the event that the Plan of Subdivision cannot be registered by the Registration Date, Council may (provided that such party is not otherwise in breach of its obligations pursuant to the Contract of Sale) rescind the Contract of Sale by giving written notice of that effect to PPHA, whereupon neither party will have any action, right, claim or demand against the other party under the Contract of Sale or arising



from or out of the rescission of the Contract of Sale or the failure of PPHA to procure registration of the Plan of Subdivision.

- 4.13.4 In the event that Council rescinds the Contract of Sale pursuant to clause 4.13.3, then the provisions of 4.7.3 shall apply.
- 4.13.5 Council will on request by PPHA sign all documents, applications and consents and do all acts, matters and things at PPHA's own cost which may reasonably be required to enable PPHA to obtain registration of the Plan of Subdivision.

4.14 Other Terms and Conditions of Sale

- 4.14.1 PPHA shall purchase the Development Land on the basis of the following:
 - (a) the present condition of the Development Land, including any contamination which may exist on the Development Land on the Day of Sale; and
 - (b) PPHA releasing and indemnifying Council from all liabilities in respect of any actions, proceedings, claims and demands of any nature whatsoever which may be made or prosecuted against PPHA or Council after the Day of Sale arising out of the condition of the Development Land, except in respect of any claims which relate to exposure to contamination prior to the Day of Sale.
- 4.14.2 PPHA will be liable for the payment of any GST payable under the Contract of Sale, which (if applicable) is to be calculated on a full GST basis not using the margin scheme.
- 4.14.3 A failure by either party to remedy a breach of the terms and conditions of the Licence within thirty (30) days of being notified of the breach by the other party is deemed to be a breach by that party of its obligations pursuant to the Contract of Sale.
- 4.14.4 The Contract of Sale will contain such other standard special conditions for a contract of sale appropriate for the Development as agreed by the parties, acting reasonably.

5. Licence

5.1 As a condition of the sale of the Development Land to PPHA, Council and PPHA must enter into the Licence.

5.2 The terms of the Licence will be as follows:

Licensor:	Port Phillip City Council
Licensee:	Port Phillip Housing Association Ltd ACN 116 093 004 in its capacity as trustee of the Port Phillip Housing Trust
Licensed Area:	Site
Licence Fee:	\$10.00 plus GST (if demanded)
Permitted Use:	To construct the Works
Commencement Date:	Date of Contract of Sale or such other date as the parties may agree to in writing (Commencement Date)



Term of Licence: From the Commencement Date until the first to occur of the following:

- settlement of the Contract of Sale; and
- the Licence is terminated for breach by either party of its obligations pursuant to the Licence and/or the Contract of Sale.

5.3 The Licence will also include the following terms:

- 5.3.1 PPHA must obtain all approvals, permits and consents necessary for construction of the Works (including the Planning Permit) and comply with all relevant laws in respect of the Works;
- 5.3.2 PPHA must release and discharge Council to the full extent permitted by law from any risk associated with the performance or non-performance of PPHA's obligations pursuant to the Licence and the construction of the Works;
- 5.3.3 PPHA must release and indemnify Council in respect of all risk associated with the use of the Licensed Area and/or the construction of the Works;
- 5.3.4 a failure to remedy a breach by one party of its obligations pursuant to the Contract of Sale within fourteen (14) days of being notified of the breach by the other party is deemed to be a breach of that party's obligations pursuant to the Licence;
- 5.3.5 PPHA is liable to pay any GST arising in respect of any taxable supply under the Licence; and
- 5.3.6 such other licence terms and conditions as may be reasonably required by Council or its solicitors or agreed to in writing by the parties.

6. Section 173 Agreement

- 6.1 As a condition of the sale of the Development Land to PPHA, Council and PPHA must enter into a Section 173 Agreement which will be registered on the title to the Development Land.
- 6.2 The terms of the Section 173 Agreement will be as follows:
 - 6.2.1 the agreement will be an agreement pursuant to section 173 of the *Planning and Environment Act 1987*;
 - 6.2.2 the agreement will be registered on the title to the Development Land and will bind PPHA and all successors in title to the Development Land;
 - 6.2.3 PPHA shall covenant with Council to only develop or use the Development Land for a purpose which is consistent with the following:
 - (a) the owner of the Development Land being a registered housing agency under part 8 of the *Housing Act 1983*; and
 - (b) the provision of affordable housing in accordance with the obligations of a registered housing agency under part 8 of the *Housing Act 1983*;
 - 6.2.4 if PPHA breaches its obligation pursuant to the preceding clause of this Agreement, PPHA shall (at Council's option) retransfer the Development Land to Council for the Specified Consideration. The exercise of such a right of retransfer is conditional upon Council giving 90 days' notice in writing to PPHA and PPHA



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failing to remedy its breach within the specified 90 days and Council having given such notice within 90 days of Council first becoming aware of the relevant breach. The transfer of the title for the Development Land must be effected within 30 days of expiration of the specified 90 day notice period; and

6.2.5 the agreement will terminate on the date which is 50 years after the date of the agreement.

6.3 The Section 173 Agreement will be in the form required by Council and its solicitors.

7. Council Covenant

Council covenants not to do the following for the period of this Agreement

7.1 negotiate with any third party in respect of any development proposals for the Development Land; or

7.2 transfer, assign or otherwise dispose of its interest or agree to transfer, assign or otherwise dispose of its interest in the Development Land.

8. Completion of Documentation

The parties agree to do all things necessary to complete the transaction set out in this Agreement, including entering into the Contract of Sale, Licence and Section 173 Agreement and arranging for registration of the Plan of Subdivision, subject to the proper exercise by Council of its statutory functions, duties and powers.

9. No Fettering of Council's Powers

This Agreement does not fetter or restrict the power or discretion of Council to make or impose requirements or conditions in connection with any use or development of the Site or the granting of any planning approval, the approval or certification of any plans of subdivision or consolidation applicable to the Site or the issue of a statement of compliance in connection with any such plans.

10. No Warranties

PPHA acknowledges and declares that in entering this Agreement it does not rely on any representation or warranty of any nature made by or on behalf of Council.

11. Termination

11.1 This Agreement will terminate on:

11.1.1 an Insolvency Event happening in respect of either party;

11.1.2 a breach of this Agreement if the breach is not remedied within 30 days' written notice; or

11.1.3 the date that is twelve (12) months following the date of this Agreement if Council and PPHA have not entered into the Contract of Sale and Licence, unless otherwise agreed.

11.2 On termination of this Agreement, the rights and obligations of the parties will cease except for:



- 11.2.1 any rights or obligations accrued as a result of a Default under this Agreement; and
- 11.2.2 any rights or obligations which are expressed to continue after termination of this Agreement.

12. GST

12.1 Definitions

In this clause:

- 12.1.1 words and expressions that are not defined in this Agreement but which have a defined meaning in the GST Law have the same meaning as in the GST Law. If under or in relation to the *National Taxation Reform (Consequential Provisions) Act 2000* (Vic) or a direction given under s 6 of that Act, the supplier makes voluntary or notional payments, the definition of GST includes those voluntary or notional payments and expressions containing the term 'GST' have a corresponding expanded meaning; and
- 12.1.2 GST Law has the meaning given to that term in the *A New Tax System (Goods and Services Tax) Act 1999*.

12.2 GST Exclusive

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

12.3 Increase in Consideration

If GST is payable in respect of any supply made by a supplier under this Agreement (**GST Amount**), the recipient will pay to the supplier an amount equal to the GST payable on the supply.

12.4 Payment of GST

Subject to clause 12.5 the recipient will pay the GST Amount at the same time and in the same manner as the consideration for the supply is to be provided under this Agreement.

12.5 Tax Invoice

The supplier must provide a tax invoice to the recipient before the supplier will be entitled to payment of the GST Amount under clause 12.4.

12.6 Reimbursements

If this Agreement requires a party to reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:

- 12.6.1 the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party is entitled; and
- 12.6.2 if the payment or reimbursement is subject to GST, an amount equal to that GST.

12.7 Adjustment events

If an adjustment event occurs in relation to a taxable supply under this Agreement:



- 12.7.1 the supplier must provide an adjustment note to the recipient within 7 days of becoming aware of the adjustment; and
- 12.7.2 any payment necessary to give effect to the adjustment must be made within 7 days after the date of receipt of the adjustment note.

13. PPHA is a trustee

13.1 Definitions

In this clause 13:

- 13.1.1 **Trust** means the Port Phillip Housing Trust established by the Trust Deed;
- 13.1.2 **Trust Assets** mean the assets held on trust by PPHA as trustee of the Trust;
- 13.1.3 **Trust Deed** means the trust deed dated 9 December 2005 between City of Port Phillip and PPHA as amended from time to time.

13.2 Trustee capacity

PPHA enters this Agreement, the Contract of Sale, the Licence and any other arrangement contemplated by this Agreement as trustee of the Trust.

13.3 Limitation of liability

Council acknowledges that:

- 13.3.1 PPHA's liability under this Agreement is limited to the Trust Assets;
- 13.3.2 Council's rights against PPHA are solely in PPHA's capacity as trustee of the Trust and not against PPHA in PPHA's personal capacity;
- 13.3.3 only the Trust Assets are available to satisfy Council's rights against PPHA under this Agreement, the Contract of Sale, the Licence and any other arrangement contemplated by this Agreement;
- 13.3.4 Council will not call on PPHA to satisfy any of the PPHA's obligations under this Agreement, the Contract of Sale, the Licence and any other arrangement contemplated by this Agreement out of PPHA's personal assets; and
- 13.3.5 Council will not seek to appoint a liquidator, administrator, receiver or similar person to PPHA, or prove in any liquidation, administration or other similar arrangement affecting PPHA.

13.4 Limitation of liability may not apply

Clause 13.3 does not apply where PPHA is fraudulent, negligent or breaches the Trust or where the Trust Assets fall below a market value of \$20 million.

14. General

14.1 Amendment

This document may only be varied or replaced by a document duly executed by the parties.



14.2 Entire Understanding

This document contains the entire understanding between the parties as to the subject matter contained in it. All previous agreements, representations, warranties, explanations and commitments, expressed or implied, affecting this subject matter are superseded by this document and have no effect.

14.3 Further Assurance

Each party must promptly execute and deliver all documents and take all other action necessary or desirable to effect, perfect or complete the transactions contemplated by this document.

14.4 Legal Costs and Expenses

Each party must pay its own legal costs and expenses in relation to the negotiation, preparation and execution of this document and other documents referred to in it, unless expressly stated otherwise.

14.5 Stamp Duty

PPHA must pay all stamp duty (including all fines and penalties except those arising from the default of another party) in respect of the transfer of the Site to PPHA.

14.6 Waiver and Exercise of Rights

14.6.1 A single or partial exercise or waiver of a right relating to this document does not prevent any other exercise of that right or the exercise of any other right.

14.6.2 No party will be liable for any loss or expenses incurred by another party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

14.7 Assignment

14.7.1 A party must not:

- (a) sell, transfer, delegate, assign, licence; or
- (b) mortgage, charge or otherwise encumber

any right under this document to any person (**Proposed Assignee**), or permit a Proposed Assignee to assume any obligation under this document without the prior written consent of the other parties to this document (**Other Parties**).

14.7.2 The assigning party must pay all fees and expenses (including legal fees on a solicitor/own client basis) incurred by the Other Parties in connection with the proposed assignment and the investigation of the Proposed Assignee, whether or not consent is granted.

14.7.3 The assigning party must deliver to the Other Parties:

- (a) the name, address and occupation of the Proposed Assignee;
- (b) two written references as to financial circumstances of the Proposed Assignee;



- (c) as agreement in a form approved by the Other Parties, executed by the Proposed Assignee, in which the Proposed Assignee agrees to perform the obligations of the assigning party under this document; and
- (d) if required by the Other Parties, a guarantee in a form approved by the Other Parties executed by persons approved by the Other Parties, guaranteeing the performance of the Proposed Assignee's obligations.

14.8 Time of the Essence

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

14.9 No Relationship

No party to this document has the power to obligate or bind any other party. Nothing in this document will be construed or deemed to constitute a partnership, joint venture or employee, employer or representative relationship between any of the parties. Nothing in this document will be deemed to authorise or empower any of the parties to act as agent for or with any other party.

14.10 Rule of Construction

In the interpretation of this document, no rule of construction applies to the disadvantage of the party preparing the document on the basis that it prepared or put forward this document or any part of it.

15. Notices

15.1 Service of Notice

A notice or other communication required or permitted, under this document, to be served on a person must be in writing, must not be served by email and may be served:

- 15.1.1 personally on the person;
- 15.1.2 by leaving it at the person's current address for service;
- 15.1.3 by posting it by express post addressed to that person at the person's current address for service; or
- 15.1.4 by facsimile to the person's current number for service.

15.2 Particulars for Service

15.2.1 The particulars for service of Council are:

address: 99A Carlisle Street, St Kilda, Victoria 3182

facsimile number: (03) 9236 2725

attention: Manager, Property Services

15.2.2 The particulars for service of PPHA are:

address: Suite 6, 22-28 Fitzroy Street, St Kilda, Victoria 3182

facsimile number: (03) 9534 8636



attention: Development Manager

15.2.3 Any party may change the address or facsimile number for service by giving notice to the other parties.

15.2.4 If the person to be served is a company, the notice or other communication may be served on it at the company's registered office.

15.3 Time of Service

A notice or other communication is deemed served:

15.3.1 if served personally or left at the person's address, upon service;

15.3.2 if posted by express post within Australia to an Australian address, two Business Days after posting and in any other case, seven Business Days after posting;

15.3.3 if served by facsimile, subject to clause 15.3.4, 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

15.3.4 if received after 6.00pm in the place of receipt or on a day which is not a Business Day, at 9.00am on the next Business Day.

16. Interpretation

16.1 Governing Law and Jurisdiction

This document 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 of Victoria and waives any right to object to proceedings being brought in those courts.

16.2 Persons

In this document, a reference to:

16.2.1 a person includes a firm, partnership, joint venture, association, corporation or other corporate body;

16.2.2 a person includes the legal personal representatives, successors and permitted assigns of that person; and

16.2.3 any body which no longer exists or has been reconstituted, renamed, replaced or whose powers or functions have been removed or transferred to another body or agency, is a reference to the body which most closely serves the purposes or objects of the first-mentioned body.

16.3 Joint and Several

If a party consists of more than one person, this document binds them jointly and each of them severally.

16.4 Legislation

In this document, a reference to a statute includes regulations under it and consolidations, amendments, re-enactments or replacements of any of them. This Document, Clauses and Headings



In this document:

- 16.4.1 a reference to this or other document includes the document as varied or replaced regardless of any change in the identity of the parties;
- 16.4.2 a reference to a clause, schedule, appendix or annexure is a reference to a clause, schedule, appendix or annexure in or to this document all of which are deemed part of this document;
- 16.4.3 a reference to writing includes all modes of representing or reproducing words in a legible, permanent and visible form;
- 16.4.4 headings and sub-headings are inserted for ease of reference only and do not affect the interpretation of this document;
- 16.4.5 where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning; and
- 16.4.6 where the expression **including** or **includes** is used it means 'including but not limited to' or 'including without limitation'.

16.5 Severance

- 16.5.1 If a provision in this document is held to be illegal, invalid, void, voidable or unenforceable, that provision must be read down to the extent necessary to ensure that it is not illegal, invalid, void, voidable or unenforceable.
- 16.5.2 If it is not possible to read down a provision as required in this clause, that provision is severable without affecting the validity or enforceability of the remaining part of that provision or the other provisions in this document.

16.6 Counterparts

This document may be executed in any number of counterparts all of which taken together constitute one instrument.

16.7 Currency

In this document, a reference to '\$' or 'dollars' is a reference to Australian dollars.

16.8 Business Day

If a payment or other act is required by this document to be made or done on a day which is not a Business Day, the payment or act must be made or done on the next following Business Day.

16.9 Number and Gender

In this document, a reference to:

- 16.9.1 the singular includes the plural and vice versa; and
- 16.9.2 a gender includes the other genders.



Signing Page

Executed by the parties

Executed for and on behalf of **Port Phillip City Council** by its Chief Executive Officer pursuant to a resolution of Council dated 20 in the presence of:

)
)
)
) as Chief Executive Officer

.....

Witness

Executed by **Port Phillip Housing Association Limited ACN 116 093 004** in accordance with Section 127 of the Corporations Act 2001 in the presence of:

)
)
)
)

.....

Signature of Secretary/Director

Signature of Director

.....

.....

Name of Secretary/Director

Name of Director


Maddocks

Schedule 1

Concept Plans


Maddocks

Schedule 2

Target Program