

## **Agreement under section 173 of the Planning and Environment Act 1987**

### **Subject Land:**

5-7 Sutton Street, South Kingsville

**Hobsons Bay City Council**

and

**Brymart Pty Ltd**  
ACN 004 785 077

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# AGREEMENT UNDER SECTION 173 OF THE PLANNING AND ENVIRONMENT ACT 1987

DATED     /     /

## PARTIES

Name	<b>Hobsons Bay City Council</b>
Address	115 Civic Parade, Altona, Victoria 3018
Short name	<b>Council</b>

Name	<b>Brymart Pty Ltd ACN 004 785 077</b>
Address	5-7 Sutton Street, South Kingsville, Victoria 3015
Short name	<b>Owner</b>

## BACKGROUND

- A. Council is the responsible authority for the Planning Scheme.
- B. The Subject Land forms part of the Precinct 16 West Land, being the subject of a forthcoming combined application under s 96A of the Act:
- (i) to amend the Planning Scheme by (among other things):
    - (a) rezoning the Subject Land from Industrial 3 Zone and part General Residential Zone to part Schedule 4 to the General Residential Zone and part Schedule 2 to the Residential Growth Zone under the Planning Scheme;
    - (b) applying Schedule 2 to the Development Plan Overlay under the Planning Scheme to the Subject Land; and
    - (c) subdividing part of the Subject Land to align with the proposed re-zoning;
  - (ii) for two planning permit applications relating to the Precinct 16 West Land, specifically:
    - (a) planning permit application no. PA1943532 seeking permission to subdivide the land at 9A Sutton Street, South Kingsville into 2 lots; and
    - (b) planning permit application no. PA1943533 seeking permission to subdivide the land at 41-59 Stephenson Street, South Kingsville into 2 lots.
- C. Authorisation has not yet been sought for, or granted to the Amendment.
- D. The Owner is or is entitled to be the registered proprietor of the Subject Land.
- E. The registered proprietors of the Precinct 16 Land entered into/will enter into [##Delete whichever is inapplicable prior to exhibition] the Memorandum of Understanding.
- F. The parties have agreed to enter into this Agreement to record the terms and conditions by which Council agrees to the Owner constructing and completing the Infrastructure Projects in accordance with the Memorandum of Understanding.

- G. The Parties agree that this Agreement will only commence if and when the Minister for Planning approves the Amendment and the associated Ministerial Notice is published.
- H. The Owner acknowledges and agrees that the Owner is not entitled to any reimbursement or compensation if the Amendment is not approved.

## **The Parties agree**

### **1. DEFINITIONS**

In this Agreement unless the context admits otherwise:

**Act** means the *Planning and Environment Act 1987*.

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

**Amendment** means the proposed Amendment C114 to the Planning Scheme to (among other things):

- a. rezone the Precinct 16 West Land from Industrial 3 Zone and part General Residential Zone to part Schedule 4 to the General Residential Zone and part Schedule 2 to the Residential Growth Zone;
- b. apply Schedule 2 to the Development Plan Overlay to the Precinct 16 West Land;
- c. subdivide part of the Precinct 16 West Land to align with the proposed zoning; and
- d. amend the Schedule to Clause 53.01 of the Planning Scheme to provide for a 5 percent public open space requirement.

**Building** has the same meaning as in the Act and includes any Building in a Stage.

**Current Address** means:

- a. for Council, the address shown on page one of this Agreement, or any other address listed on Council's website; and
- b. for the Owner, the address shown on page one of this Agreement or any other address provided by the Owner to Council for any purpose relating to the Subject Land.

**Current Email** means:

- a. for Council, [strategicplanning@hobsonsbay.vic.gov.au](mailto:strategicplanning@hobsonsbay.vic.gov.au), or any other email address listed on Council's website; and
- b. for the Owner, any email address provided by the Owner to Council for the express purpose of electronic communication regarding this Agreement.

**Indexation** means an adjustment to an amount carried out:

- a. using the PPI – Road and Bridge Construction Victoria as the adjustment index; and
- b. on the 1<sup>st</sup> of July each year.

**Infrastructure Levy** means a contribution to the cost of infrastructure projects relating to the Precinct 16 West Land equal to the sum of \$364,781.13 subject to Indexation.

**Memorandum of Understanding** means the memorandum of understanding entered into between Council and the registered proprietors of the Precinct 16 Land on [##Insert date] relating to the provision of infrastructure for the Precinct 16 Land.

**Ministerial Notice** means the Ministerial notice approving the Amendment and published in the Victorian Government Gazette in accordance with the Act.

**Occupancy Permit** has the same meaning as in the *Building Act 1993* (Vic).

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

**Party or Parties** means the Parties to this Agreement.

**Planning Scheme** means the Hobsons Bay Planning Scheme and any other planning scheme that applies to the Subject Land or Precinct 16 West Land.

**Precinct 16 Land** means the land identified as 'Precinct 16' in the Hobsons Bay Industrial Land Management Strategy – June 2008, being the land bounded by Blackshaws Road, Stephenson Street and the railway line in South Kingsville.

**Precinct 16 West Land** means the land described in Schedule 1 of this Agreement and any reference to the Precinct 16 West Land includes any Lot created by the subdivision of the Precinct 16 West Land or any part of it.

**Schedule** means a schedule to this Agreement.

**Stage** followed by a reference to a stage number is a reference to a specified stage of the development of the Subject Land as identified in any staging plan forming part of the plans endorsed under a future planning permit granted for the Subject Land.

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

**Subject Land** means the land described as 5-7 Sutton Street, South Kingsville being Lot 1 on Plan of Subdivision TP513994B in Certificate of Title Volume 8355, Folio 010.

## 2. INTERPRETATION

In this Agreement unless the context admits otherwise:

- 2.1 the singular includes the plural and vice versa;
- 2.2 a reference to a gender includes all genders;
- 2.3 a reference to a person includes a reference to a firm, corporation or other corporate body and that person's successors in law;
- 2.4 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;
- 2.5 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;

- 2.6 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;
- 2.7 the Background forms part of this Agreement;
- 2.8 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
- 2.9 any reference to a clause, page, condition, attachment or term is a reference to a clause, page, condition, attachment or term of this Agreement.

### **3. PURPOSES OF AGREEMENT**

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

- 3.1 record the terms and conditions by which Council agrees to the Owner paying the Infrastructure Levy; and
- 3.2 achieve and advance the objectives of planning in Victoria and the objectives of the Planning Scheme in respect of the Subject Land.

### **4. REASONS FOR AGREEMENT**

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

- 4.1 the Owner and Council agreed that the Owner would enter into this Agreement as a condition of Council supporting the Amendment; and
- 4.2 the Owner has elected to enter into this Agreement in order to secure Council's support of the Amendment.

### **5. 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.

### **6. OWNER'S SPECIFIC OBLIGATIONS**

#### **6.1 Payment of Infrastructure Levy**

The Owner covenants and agrees that the Owner must pay the Infrastructure Levy to Council prior to the issue of a Statement of Compliance in respect of any plan of subdivision for the Subject Land or any plan of subdivision, or the issue of an Occupancy Permit for any Building if there is no subdivision.

### **7. OWNER'S FURTHER OBLIGATIONS**

#### **7.1 Notice and registration**

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

## **7.2 Further actions**

The Owner:

- 7.2.1 must do all things necessary to give effect to this Agreement;
- 7.2.2 consents to Council 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
- 7.2.3 agree to do all things necessary to enable Council to do so, including:
  - (a) sign any further agreement, acknowledgment or document; and
  - (a) obtain all necessary consents to enable the recording to be made.

## **7.3 Council's costs to be paid**

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

- 7.3.1 preparing, drafting, finalising, signing, recording and enforcing this Agreement;
- 7.3.2 preparing, drafting, finalising and recording any amendment to this Agreement;
- 7.3.3 determining whether any of the Owner's obligations have been undertaken to Council's satisfaction; and
- 7.3.4 preparing, drafting, finalising and recording any document to give effect to the ending of this Agreement.

## **7.4 Time for determining satisfaction**

If Council makes a request for payment of any costs or expenses under clause 7.3, the Parties agree that Council will not decide whether the Owner's obligation has been undertaken to Council's satisfaction, or whether to grant the consent sought, until payment has been made to Council in accordance with the request.

## **7.5 Interest for overdue money**

- 7.5.1 The Owner must pay to Council interest in accordance with s 227A of the Local Government Act 1989 on any amount due under this Agreement that is not paid by the due date.
- 7.5.2 If interest is owing, Council will apply any payment made to interest and any balance of the payment to the principal amount.

# **8. 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.

# **9. 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.

## **10. 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:

- 10.1 give effect to this Agreement; and
- 10.2 enter into a deed agreeing to be bound by the terms of this Agreement.

## **11. GENERAL MATTERS**

### **11.1 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:

- 11.1.1 personally on the other Party;
- 11.1.2 by leaving it at the other Party's Current Address;
- 11.1.3 by posting it by priority prepaid post addressed to the other Party at the other Party's Current Address; or
- 11.1.4 by email to the other Party's Current Email.

### **11.2 Counterparts**

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

### **11.3 No waiver**

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

### **11.4 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.

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

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

### **11.6 Inspection of documents**

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

### **11.7 Governing law**

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



## 12. COMMENCEMENT OF AGREEMENT

This Agreement commences when:

- 12.1 Council executes this Agreement; and
- 12.2 the Ministerial Notice is published.

## 13. ENDING OF AGREEMENT

This Agreement ends:

- 13.1 when the Owner has complied with all of the Owner's obligations under this Agreement; or
- 13.2 otherwise by agreement between the Parties in accordance with section 177 of the Act.

After this Agreement has ended, Council 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.

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## SCHEDULE 1 – DESCRIPTION OF PRECINCT 16 WEST LAND

The whole of the land described as:

41-59 Stephenson Street, South Kingsville	Land in Plan of Consolidation 163945E	Volume 09735, Folio 412
5-7 Sutton Street, South Kingsville	Lot 1 on Plan of Subdivision TP513994B	Volume 8355, Folio 010
9 and 9A Sutton Street, South Kingsville	Lot 1 on Plan of Subdivision 336144B	Volume 10213, Folio 045
	Lot 2 on Plan of Subdivision 336144B	Volume 11586, Folio 288
	Lot 10 Block C on Plan of Subdivision 001015	Volume 07129, Folio 697

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## SIGNING PAGE

**Signed, sealed and delivered as a deed by the parties**

**Signed sealed and delivered** by Mr Arthur )  
Vatzakis, Manager Planning, Building and )  
Health on behalf of the **Hobsons Bay City** )  
**Council** pursuant to the power delegated ) .....  
to that person by an Instrument of )  
Delegation in the presence of: )

\_\_\_\_\_  
(Signature of independent adult witness)

\_\_\_\_\_  
(name of signatory)

\_\_\_\_\_  
Name of witness  
(BLOCK LETTERS)

**EXECUTED** by **BRYMART PTY LTD** (ACN )  
004 785 077) in accordance with section )  
127 (1) of the *Corporations Act 2001* (Cth) )  
)

\_\_\_\_\_  
Signature of Sole Director and Sole  
Company Secretary

\_\_\_\_\_  
Full name

\_\_\_\_\_  
Usual address