

Agreement under section 173 of the Planning and Environment Act 1987

Subject Land:

9 and 9A Sutton Street, South Kingsville

41-59 Stephenson Street, South Kingsville

5-7 Sutton Street, South Kingsville

Hobsons Bay City Council

and

Alceon Group No. 67 Pty Ltd
ACN [##Owner to confirm ACN]

and

Newport Apartments Vic Pty Ltd
ACN 154 781 094

and

Brymart Pty Ltd
ACN 004 785 077

CONTENTS

Background	3
1. Definitions	4
2. Interpretation	6
3. Purposes of Agreement	6
4. Reasons for Agreement	6
5. Agreement required	6
6. Owner's specific obligations	7
6.1 Social Housing Dwellings	7
7. Owner's further obligations	7
7.1 Notice and registration	7
7.2 Further actions	7
7.3 Council's costs to be paid	8
7.4 Time for determining satisfaction	8
7.5 Interest for overdue money	8
8. Agreement under s 173 of the Act	8
9. Owner's warranties	8
10. Successors in title	8
11. General matters	8
11.1 Notices	8
11.2 Counterparts	9
11.3 No waiver	9
11.4 Severability	9
11.5 No fettering of Council's powers	9
11.6 Inspection of documents	9
11.7 Governing law	9
12. Commencement of Agreement	9
13. Ending of Agreement	9
Schedule 1 – Description Of Subject Land	11
Schedule 2 – Engagement Principles	12
Signing Page	13

AGREEMENT UNDER SECTION 173 OF THE PLANNING AND ENVIRONMENT ACT 1987

DATED / /

PARTIES

Name	Hobsons Bay City Council
Address	115 Civic Parade, Altona, Victoria 3018
Short name	Council

Name	Alceon Group No. 67 Pty Ltd ACN [##Owner to confirm ACN]
Address	[##Owner to confirm address]
Short name	Owner

Name	Newport Apartments Vic Pty Ltd ACN 154 781 094
Address	Unit 2401, 68-70 Dorcas Street, Southbank, Victoria 3006
Short name	Owner

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

BACKGROUND

- A. Council is the responsible authority for the Planning Scheme.
- B. The Subject Land forms part of the Subject 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 Subject 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 parties have agreed to enter into this Agreement to record the terms and conditions by which Council agrees to the Owner providing Social Housing.
- F. 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.
- G. The Owner acknowledges and agrees that the Owner is not entitled to any reimbursement or compensation if the Amendment is not approved.
- H. As at the date of this Agreement, the Subject Land is encumbered by mortgages in favour of the Mortgagees. The Mortgagees consent to the Owner entering into this Agreement.

The Parties agree

1. DEFINITIONS

In this Agreement unless the context admits otherwise:

Act means the *Planning and Environment Act 1987*.

Affordable Housing Trust means the Hobsons Bay Affordable Housing Trust.

Affordable Housing Trustee means Housing Choices Australia Limited as Trustee of the Hobsons Bay Affordable Housing Trust or any other trustee appointed by Council in writing.

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

Amendment means the proposed Amendment C114hbay to the Planning Scheme to (among other things):

- a. rezone 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;
- b. apply Schedule 2 to the Development Plan Overlay to the Subject Land;
- c. subdivide part of the Subject 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.

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, 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.

Engagement Principles means the principles set out in Schedule 2 of this Agreement, as amended from time to time.

Market Value means average price (including GST) in the preceding 12 months for a two-bedroom dwelling in the area of Precinct 16.

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

Mortgagees means the persons registered or entitled from time to time to be registered as mortgagees of the Subject Land.

Not-for-Profit means a Not-for-Profit charity registered with the Australian Charities and Not-for-Profits Commission.

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 Subject Land.

Precinct 16 means the Subject Land and the land also comprising Precinct 16 for the purposes of the Hobsons Bay Industrial Land Management Strategy, 2008 located to the east of the Subject Land with a frontage to Sutton Street and Blackshaws Road, South Kingsville.

Registered Agency means a registered agency as defined in section 4 of the *Housing Act 1983* (Vic) as approved by Council in writing.

Residential lot means a lot improved with, or capable of being improved with, a dwelling.

Schedule means a schedule to this Agreement.

Social Housing means social housing as defined by section 3AA of the Act.

Social Housing Dwellings means 10% of the total number of dwellings constructed on the Subject Land by the Owner as Social Housing at a 50% discount to Market Value or a lesser discount as agreed in writing and to the satisfaction of the Responsible Authority provided in accordance with clause 6.1.1 of this Agreement.

Social Housing Land means the land forming part of the Subject Land on which the Social Housing Dwellings are constructed.

Stage refers to a stage of subdivision or development of the Subject Land.

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

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

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 providing Social Housing; 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 Social Housing Dwellings

The Owner covenants and agrees that:

- 6.1.1 the Owner must provide the Social Housing Dwellings in accordance with one of the following options (and in the following order):
- (a) Option 1 – making the Social Housing Dwellings available to the Affordable Housing Trust for purchase; or
 - (b) Option 2 – only in the event that the Affordable Housing Trust is not established or the Affordable Housing Trust elects not to purchase the Social Housing Dwellings and the Owner has followed the Engagement Principles, making a monetary contribution equal to the value of the Social Housing Dwellings to the Affordable Housing Trust or if the Affordable Housing Trust is not established, a Registered Agency.
- 6.1.2 unless with Council's prior written agreement, the Social Housing Dwellings must be:
- (a) not less than two-bedroom dwellings;
 - (b) of a quality, nature, size and of a construction standard and not otherwise externally distinguishable from, other dwellings in the relevant Stage; and
 - (c) of a quality, nature, size and standard of construction approved by the Responsible Authority or Registered Agency.
- 6.1.3 following the issue of a Statement of Compliance in respect of the plan of subdivision that creates the 50th Residential lot on the Subject Land, or the issue of an Occupancy Permit for any Building that contains the 50th dwelling constructed on the Subject Land, the Owner will construct and provide no less than 10% of the Social Housing Dwellings before the issue of a Statement of Compliance in respect of every subsequent Stage of the subdivision of the Subject Land.
- 6.1.4 the Owner must enter into an agreement under s 173 of the Act with the Council to be recorded on the title of the Social Housing Land restricting its development and use to social housing in accordance with relevant performance standards.

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 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 a fee under clause 7.3 **Error! Reference source not found.**, 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 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 SUBJECT 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

SCHEDULE 2 – ENGAGEMENT PRINCIPLES

The Owner must take the following steps in the performance of the Owner's obligations set out in clause 6.1.1. of the Agreement:

- The Owner must work with the Affordable Housing Trustee on grant funding applications, with grant funds to be paired with the affordable housing discount provided by the Owner in accordance with the Agreement.
- The Owner must provide, to the best of its ability and within the timeframes requested, all information requested by the Affordable Housing Trustee as needed to support and supplement any grant funding application.
- The Owner must ensure that the built form requirements outlined in any grant funding terms are incorporated into the design of the Social Housing Dwellings and that the requirements of clause 6.1.2 of the Agreement are otherwise met.
- The Owner must at all times comply with any milestone dates and funding terms for successful grant funding applications specified by the Affordable Housing Trustee.

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 **ALCEON GROUP NO. 67**)
PTY LTD (ACN **##Owner to confirm**) in)
 accordance with section 127 (1) of the)
Corporations Act 2001 (Cth))

.....
 Signature of Director

.....
 Signature of Director/Company
 Secretary
 (delete whichever is not applicable)

.....
 Full name

.....
 Full name

.....
 Usual address

.....
 Usual address

EXECUTED by **NEWPORT APARTMENTS**)
VIC PTY LTD (ACN 154 781 094) in)
accordance with section 127 (1) of the)
Corporations Act 2001 (Cth))

.....
Signature of Director

.....
Signature of Director/Company
Secretary
(delete whichever is not applicable)

.....
Full name

.....
Full name

.....
Usual address

.....
Usual address

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

Mortgagee's Consent

Perpetual Corporate Trust Ltd is the registered Mortgagee under instrument AT323762J and consents to the registration of this Agreement on the title to the Subject Land

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Mortgagee's Consent

National Australia Bank Ltd is the registered Mortgagee under instrument AL636812U and consents to the registration of this Agreement on the title to the Subject Land.

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