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**Date**        /        / 2015

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

**Subject Land: Growth Area 2, St Leonard**

**Purpose of Agreement: Growth Area 2, St Leonards  
Infrastructure Contributions**

**City of Greater Geelong  
and**

**The Owner set out in Schedule 1**

**EXHIBITION VERSION**

**MADDOCKS DRAFT No. 1 24 August 2015**

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

Dated        /        /

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## Parties

Name	<b>City of Greater Geelong</b>
Address	City Hall, 30 Gheringhap Street, Geelong, Victoria
Short name	<b>Council</b>

Name	<b>The Owner set out in Schedule 1</b>
Address	The address of the Owner as set out in Schedule 1.
Short name	<b>Owner</b>

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## Background

- A. Council is the responsible authority pursuant to the Act for the Planning Scheme. Council is also the planning authority for Amendment C325 to the Planning Scheme.
- B. The Owner is or is entitled to be the registered proprietor of the Subject Land.
- C. The Subject Land is within an area that is being developed for urban purposes. Amendment C325 proposes to:
  - C.1 rezone the Subject Land from Farming Zone to General Residential Zone Schedule 1 under the Planning Scheme; and
  - C.2 apply a Design and Development Overlay to the Subject Land and to 42 Pearl Bay Passage, St Leonards.
- D. The Draft Shared Infrastructure Funding Plan and the Final Shared Infrastructure Funding Plan require Infrastructure Contributions to be made to Council in respect of each Lot on the Charge Area Map including the Subject Land for the purposes of augmenting infrastructure in the vicinity of the Subject Land.
- E. As at the date of this Agreement, the Subject Land is encumbered by a mortgage in favour of the Mortgagee. The Mortgagee consents to the Owner entering into this Agreement.
- F. The parties enter into this Agreement to:
  - F.1 implement the Final Shared Infrastructure Funding Plan;
  - F.2 record the terms and conditions on which Council and the Owner have agreed for the Owner to pay the Infrastructure Contribution and facilitate delivery of the Infrastructure Projects; and

- F.3 achieve and advance the objectives of planning in Victoria and the objectives of the Planning Scheme in respect of the Subject Land.

## The Parties agree

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### 1. Definitions

In this Agreement unless the context admits otherwise:

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

**Adjustment Index** means the method of adjustment specified in the Final Shared Infrastructure Plan.

**Agreement** means this agreement.

**Amendment C325** means Amendment C325 to the Planning Scheme prepared by Council in its capacity as the Planning Authority.

**Charge Area** means the area identified and delineated on the Charge Area Map and that is subject to an Infrastructure Contribution under the Final Shared Infrastructure Funding Plan.

**Charge Area Map** means the charge area map included in the Shared Infrastructure Funding Plan which identifies and delineates the Lots in each Charge Area.

**Community Centre Cash Contribution** means the Community Centre Cash Contribution specified in Schedule 2 required to be made in respect of each hectare of NDA of the Subject Land and adjusted in accordance with clause 3.3.

**Draft Shared Infrastructure Funding Plan** means the shared infrastructure plan identified as 'St Leonards Growth Area 2 Draft Shared Infrastructure Funding Plan' prepared by Urban Enterprise and exhibited with Amendment C325 and incorporating modifications as required by Council as a result of consideration of submissions as part of Amendment C325.

**Final Shared Infrastructure Funding Plan** means the shared infrastructure plan identified as 'St Leonards Growth Area 2 Final Shared Infrastructure Funding Plan' prepared by Urban Enterprise.

**Infrastructure Contribution** means the Infrastructure Contribution specified in Schedule 2 required to be made in respect of each hectare of NDA of the Subject Land and adjusted in accordance with clause 3.3.

**Infrastructure Contribution Liability** means the Owner's liability for the Infrastructure Contribution in respect of the Subject Land under this Agreement.

**Infrastructure Project** means the shared infrastructure projects identified and included in the Final Shared Infrastructure Funding Plan.

**Lot** means a lot on the Charge Area Map.

**Mortgagee** means the person or persons registered or entitled from time to time to be registered by the Registrar of Titles as Mortgagee of the Subject Land or any part of it.

**NDA** means the Net Developable Area of the Subject Land as reflected in the St Leonards Growth Area 2 Final Shared Infrastructure Funding Plan for the Subject Land.

**Owner** means the person or persons registered or entitled from time to time to be registered by the Registrar of Titles as proprietor or proprietors of an estate in fee simple of the Subject Land or any part of the Subject Land and includes any Mortgagee-in-possession.

**Party or parties** means the Owner and Council under this Agreement as appropriate.

**Plan of Subdivision** means a plan of subdivision of the Subject Land which is not a procedural plan but a plan that upon registration creates an additional lot which can be disposed of separately and is intended to be used for a dwelling or can be re-subdivided.

**Planning Scheme** means the Greater Geelong Planning Scheme and any other planning scheme that applies to the Subject Land.

**Project Land** means the land required for an Infrastructure Project.

**Registrar of Titles** means the Victorian Registrar of Titles.

**Residential Lot** means a lot which in the opinion of Council is of a size and dimension such that it is intended to be developed as a housing lot without further subdivision.

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

**Specified Value** means the amount specified in the Final Shared Infrastructure Funding Plan as being

- the capital cost of an Infrastructure Project; or
- the land value of the Project Land -

as the case may be subject to annual adjustment or indexation in the manner set out in the Final Shared Infrastructure Funding Plan.

**Statement of Compliance** means a statement of compliance issued by Council under the *Subdivision Act 1988*.

**Statement of Practical Completion** means a statement signed by Council's authorised representative stating that the Infrastructure Project has been practically completed to the satisfaction of Council.

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

**Total of the Community Infrastructure Cash Contribution** means the total Community Infrastructure Cash Contribution as specified in Schedule 2 required to be made in respect of the whole of the Subject Land and adjusted in accordance with clause 3.4.

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## 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 a reference to each other gender.

- 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 If the Owner comprises more than one party, then this Agreement binds them jointly and each of them severally.
- 2.5 A term used in this Agreement 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 Acts, Regulations or amendments amending, consolidating or replacing the Act, Regulation or Planning Scheme.
- 2.7 The introductory clauses to this Agreement are and will be deemed to form part of this Agreement.
- 2.8 The obligations of the Owner under this Agreement, will take effect as separate and several covenants which are annexed to and run at law and equity with the Subject Land provided that if the Subject Land is subdivided, this Agreement must be read and applied so that each subsequent owner of a lot is only responsible for those covenants and obligations which relate to that owner's lot.

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### **3. Obligations of the Owner**

#### **3.1 Final Shared Infrastructure Funding Plan**

The Owner covenants and agrees that subject to this Agreement, the Owner must pay the Infrastructure Contribution to Council and comply with and implement the Final Shared Infrastructure Funding Plan to the satisfaction of Council.

#### **3.2 Infrastructure Contribution Liability**

Prior to the issue of Statement of Compliance in respect of any Plan of Subdivision, the Owner must:

- 3.2.1 subject to the consent of Council which may include a requirement to enter into a further agreement, construct one or more of the Infrastructure Projects to the satisfaction of Council in return for a credit against the Owner's Infrastructure Contribution Liability; or
- 3.2.2 pay the Infrastructure Contribution to Council in cash subject to clause 3.3 and clause 3.4; or
- 3.2.3 subject to the consent of Council which may include a requirement to enter into a further agreement, undertake a combination of the obligations in clause 3.2.1 and clause 3.2.2.

#### **3.3 Amount of Infrastructure Contribution**

The Owner agrees that, upon approval by Council of the Final Shared Infrastructure Funding Plan:

- 3.3.1 the levies in the Final Shared Infrastructure Funding Plan will be deemed to be the Infrastructure Contribution for the Subject Land for the purposes of clause 3.1 and clause 3.2; and

- 3.3.2 the amounts specified in Schedule 2 will be deemed to be adjusted to reflect the levies specified in the Final Shared Infrastructure Funding Plan.

### **3.4 Indexation of Infrastructure Contribution**

The Parties agree that the amount of the Infrastructure Contribution will be adjusted each year by applying the Adjustment Index in the manner set out in the Final Shared Infrastructure Plan.

### **3.5 Credit or reimbursement for Infrastructure Project**

The Parties agree that entitlement to a credit or payment in respect of the Specified Value of an Infrastructure Project arises after the issue of a Statement of Practical Completion in respect of the Infrastructure Project.

### **3.6 Credit or reimbursement for Project Land**

3.6.1 The Parties agree that entitlement to a credit or payment in respect of the Specified Value of the Project Land arises after the Project Land has been transferred to or vested in Council;

3.6.2 The Parties agree that all land transferred to or vested in Council or any other authority specified in Final Shared Infrastructure Funding Plan must be:

- (a) free of all encumbrances and graded except as agreed by Council; and
- (b) sown to grass to the satisfaction of Council;

### **3.7 Payment of Claims**

3.7.1 The Parties agree that when an entitlement arises under clause 3.5 or 3.6 an amount up to the maximum of the Specified Value is to be provided to the Owner as a credit, or if the value of all credits provided to the Owner will exceed that Owner's Infrastructure Contributions Liability, then as a cash payment upon the latter of the:

- (a) the issue of a Statement of Practical Completion in respect of the final Infrastructure Project(s) which Council has agreed the Owner may construct; or
- (b) issue of a Statement of Compliance for the final stage of subdivision in the development of the Subject Land.

3.7.2 The Parties agree that where a monetary payment is to be paid to the Owner it will be paid;

- (a) within 120 days of the issue of a Certificate of Title or registration of a plan of subdivision showing that the Project Land has been registered in the name of or vested in Council; or
- (b) in such other manner as is specified in any future Section 173 Agreement as required under clause 3.10.

### **3.8 Facilitation of Infrastructure Projects**

The Owner covenants and agrees that:

- 3.8.1 it is the Owner's responsibility to facilitate the delivery of all Infrastructure Projects required to service the development of the Subject Land;
- 3.8.2 in exceptional circumstances, and provided the Owner has demonstrated to Council's satisfaction that it has made all reasonable endeavours to facilitate delivery of the Infrastructure Projects, Council will initiate the delivery of the Infrastructure Projects based on the criteria in clause 3.8.3 and clause 3.8.4;
- 3.8.3 Council will only facilitate an Infrastructure Project at a time when Council determines there are sufficient funds in Council's infrastructure contributions account, collected under the St Leonards Growth Area 2 Final Shared Infrastructure Funding Plan, to meet the cost of delivering the Infrastructure Project(s); and
- 3.8.4 Council's delivery of any Infrastructure Project will be subject to:
  - (a) Council's normal budgetary cycles;
  - (b) normal legislative processes and timeframes for any acquisition of land that may be required to facilitate the Infrastructure Project; and
  - (c) all costs and scope beyond those specified in the Final Shared Infrastructure Funding Plan relating to an Infrastructure Project being met by the Owner.

### **3.9 St Leonards Early Learning Community Centre Cash Contribution**

The Owner agrees that the payment of the Community Centre Cash Contribution will be as follows:

- 3.9.1 An amount being 20% of the Total Community Infrastructure Cash Contribution must be paid to Council prior to the Statement of Compliance which provides for the subdivision of a total of 20% of the Net Developable Area of the Subject Land;
- 3.9.2 An amount being 30% of the Total Community Infrastructure Cash Contribution must be paid to Council prior to the Statement of Compliance which provides for the subdivision of a total of 35% of the Net Developable Area of the Subject Land; and
- 3.9.3 The balance of the Total Community Infrastructure Cash Contribution must be paid to Council prior to Statement of Compliance for the subdivision of a total of 50% of the Net Developable Area of the Subject Land.

### **3.10 Further section 173 agreement**

The Owner acknowledges that the Owner may be required to enter into a further agreement under section 173 of the Act with Council as a condition of Council consenting to the Owner delivering an Infrastructure Project as envisaged in clause 3.2 of this Agreement.

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## **4. Acknowledgements of Council**

Council acknowledges that Council will:

- 4.1 apply any amount received under this Agreement for the purpose of the Infrastructure Projects as detailed in the Final Shared Infrastructure Funding Plan;

- 4.2 apply any remaining funds after the delivery of the Infrastructure Projects as detailed in the Final Shared Infrastructure Funding Plan to other infrastructure projects in or around the area at the complete discretion of Council.

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## **5. Further obligations of the Parties**

### **5.1 Notice and registration**

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

### **5.2 Further actions**

The Owner:

- 5.2.1 must do all things necessary to give effect to this Agreement;
- 5.2.2 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 section 181 of the Act and do all things necessary to enable Council to do so, including:
- (a) sign any further agreement, acknowledgment or document; and
  - (b) obtain all necessary consents to enable the recording to be made.

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

The Owner further covenants and agrees that the Owner will immediately pay to Council, Council's reasonable costs and expenses (including legal expenses) of and incidental to the execution and registration of this Agreement which are and until paid will remain a debt due to Council by the Owner.

### **5.4 Interest for overdue moneys**

- 5.4.1 Any amount due under this Agreement but unpaid by the due date incurs interest at the rate prescribed under section 227A of the *Local Government Act 1989* and any payment made shall be first directed to payment of interest and then the principal amount owing.
- 5.4.2 Notwithstanding anything contained in this Agreement, no interest will begin to accrue unless the person obliged to make a payment has been specifically notified in writing by the other party of the event which gives rise to the obligation to make the payment.

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## **6. Agreement under section 173 of the Act**

Council and the Owner agree that 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 pursuant to Section 173 of the Act, and the obligations of the Owner under this Agreement are obligations to be performed by the Owner as conditions subject to which the Subject Land may be used and developed.

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**7. Owner's warranties**

Without limiting the operation or effect which this Agreement has, the Owner warrants that apart from 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.

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**8. 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:

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

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**9. General matters****9.1 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:

- 9.1.1 personally on the person;
- 9.1.2 by leaving it at the person's current address for service;
- 9.1.3 by posting it by prepaid post addressed to that person at the person's current address for service;
- 9.1.4 by facsimile to the person's current number for service; or
- 9.1.5 by email to the person's current email address for service.

**9.2 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.

**9.3 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.

**9.4 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.

## **9.5 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.

## **9.6 Governing law**

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

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## **10. GST**

### **10.1 GST Act**

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

### **10.2 Exclusive of GST**

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

### **10.3 Recipient must pay**

If GST is payable in respect of any supply made by a supplier under this Agreement, subject to clause 10.4 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.

### **10.4 Tax invoice**

The supplier must provide a tax invoice to the recipient before the supplier will be entitled to payment of the GST payable under clause 10.3.

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## **11. Commencement of Agreement**

Unless otherwise provided in this Agreement, this Agreement commences from the date of this Agreement.

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## **12. Ending of Agreement**

12.1 On the issue of a Statement of Compliance for a Plan of Subdivision for Residential Lots created over the Subject Land or earlier by agreement with Council, the Agreement ends in respect of that part of the Subject Land in the Plan of Subdivision in accordance with section 177 of the Act provided that at all times, the Agreement must remain registered on the balance of the Subject Land.

12.2 Once this Agreement ends as to part of the Subject Land in accordance with clause 12.1 Council will, within a reasonable time, following a request from the Owner and at the cost of the Owner, execute all documents necessary to make application to the Registrar of Titles under section 183 of the Act to cancel the recording of this Agreement on the register as to that part of the Subject Land.



- 12.3 On completion of all the Owner's obligations in accordance with this Agreement, Council must as soon as practicable following the ending of this Agreement and at the request and at the cost of the Owner, execute all documents necessary to make application to the Registrar of Titles under section 183 of the Act to cancel the recording of this Agreement on the register.



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## Schedule 1

### Subject Land

Address:

Land known as ##

Title Details:

Certificate of Title ##

## Schedule 2

Infrastructure Contribution and Community Centre Cash Contribution (as detailed within the Draft Shared Infrastructure Funding Plan)

Summary	Infrastructure Contribution	Community Centre Cash Contribution	Total
Estimated Lots	974	974	-
Total Area	73.78 ha	73.78 ha	-
NDA	64.92 ha	64.92 ha	-
<b>Total</b>	<b>\$13,212,438</b>	<b>\$2,518,896</b>	<b>\$15,731,210</b>
Contribution per hectare of NDA.	\$203,528.79	\$38,800.00	\$242,328.79

\* Note- XXXX

