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Agreement under section 173 of the Planning and Environment Act 1987

Subject Land: 1 and 11 Harbourside Drive

Greater Geelong City Council
and

Balmoral Quay Pty Ltd
ACN 602 240 399

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Agreement under section 173 of the Planning and Environment Act 1987

Dated

Parties

Name	Greater Geelong City Council
Address	City Hall, 30 Gheringhap Street, Geelong, Victoria
Short name	Council

Name	Balmoral Quay Pty Ltd
Address	Level 2, 650 Chapel Street, South Yarra, Victoria
Short name	Owner

Background

- A. Council is the Responsible Authority for the Planning Scheme.
- B. The Owner is or is entitled to be the registered proprietor of the Subject Land.
- C. The Owner is proposing to develop the Subject Land for residential development.
- D. The proposed development of the Subject Land is to be facilitated by Amendment C436ggee to the Planning Scheme and planning permit application PP-573-2021. Amendment C436ggee will increase the maximum building height permitted on the Subject Land. Planning permit application PP-573-2021 will provide approval for the Development on the Subject Land.
- E. The Owner has agreed to provide Affordable Housing as part of the development of the Subject Land in accordance with this Agreement.
- F. The Affordable Housing provided under this Agreement is required to facilitate the Social Housing Plan.

The Parties agree

1. Definitions

In this Agreement unless the context admits otherwise:

Act means the *Planning and Environment Act 1987*.

Affordable Housing has the same meaning as in the Act.

Affordable Housing Dwelling means the Dwelling nominated as G11 on the Balmoral Quay Pty Ltd Liverpool Street, Rippleside plans (Job 21511) prepared by SJB Town Planning as amended and endorsed by Council from time to time, which is constructed on the Subject Land under the Planning Permit and provided as Affordable Housing in accordance with this Agreement.

Affordable Housing Lot means the Lot within which the Affordable Housing Dwelling is constructed on the Subject Land, as shown on the Endorsed Plans.

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

Amendment C436ggee means Amendment C436ggee to the Scheme.

Business Day means a day in Geelong that is not:

- (a) a Saturday or Sunday; or
- (b) a public holiday for Geelong pursuant to the *Public Holidays Act 1993 (Vic)*.

CPI means the annual Consumer Price Index (All Groups CPI-Melbourne Series IDA2325811C) as published by the Australian Bureau of Statistics, or, if that index number is no longer published, its substitute as a cumulative indicator of the inflation rate in Australia, as determined by Council from time to time.

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, contactus@geelongcity.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.

Development means the development of the Subject Land authorised by the Planning Permit.

Dwelling means a building used as a self-contained residence which includes a kitchen sink, food preparation facilities, a bath or shower and a closet pan and wash basin.

Endorsed Plans means the plans approved and endorsed pursuant to the Planning Permit.

Geelong Affordable Housing Trust means the trust of that name established by the Council.

Housing Act means the *Housing Act 1983* as amended from time to time.

Lot means a lot created by a subdivision of the Subject Land whether in accordance with the Planning Permit or otherwise.

Owner means:

- (a) Balmoral Quay Pty Ltd, ACN 602 240 399; or
- (b) if the context requires, any other person subsequently 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 but does not include a person who has transferred or otherwise disposed of all of their interests in the Subject Land.

Planning Permit means the planning permit issued for planning permit application PP-573-2021 which approves the development and a reduction in carparking on the Subject Land and any subsequent amendment to, or replacement of the Planning Permit.

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

Registered Housing Agency means a housing provider or association registered with Victoria's Registrar for Housing Agencies for the purposes of the Housing Act.

Responsible Authority means the responsible authority for the administration and enforcement of the Planning Scheme or provision of the Planning Scheme, as specified under the Planning Scheme.

Social Housing Plan means Council's Social Housing Plan 2020-2041 adopted by Council on 25 February 2020, as amended from time to time.

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

Subject Land means the land situated at 1 and 11 Harbourside Drive being the land referred to in certificate of title volume 11950 folio 750 and any reference to the Subject Land includes any Lot created by the subdivision of the Subject Land or any part of it.

VCAT means the Victorian Civil and Administrative Tribunal.

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 facilitate the provision of Affordable Housing in accordance with the Social Housing Plan; 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 pursuant to Amendment C436ggee and the Planning Permit.

4. 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.

5. Owner's specific obligations

5.1 Affordable Housing contribution

The Owner covenants and agrees that the Owner must make an Affordable Housing contribution by providing the Affordable Housing Dwelling:

- 5.1.1 to the Geelong Affordable Housing Trust or a Registered Housing Agency, as directed by Council; and
- 5.1.2 at no cost.

5.2 Construction of Affordable Housing Dwelling

The Owner covenants and agrees that the Owner must construct the Affordable Housing Dwelling:

- 5.2.1 in a proper and workmanlike manner;
- 5.2.2 in accordance with:
 - (a) all applicable laws;
 - (b) all necessary permits and approvals, including the Endorsed Plans;
- 5.2.3 using due care and skill;
- 5.2.4 with:
 - (a) a minimum floor area of 50 square metres;
 - (b) one or more bedrooms; and
- 5.2.5 to the satisfaction of Council.

5.3 Delivery of Affordable Housing Dwellings

The Owner covenants and agrees that the Owner must:

- 5.3.1 prior to the occupation of any part of the Development or prior to the issue of a Statement of Compliance for the Development, whichever comes first, produce evidence to the satisfaction of Council that the Owner has entered into a legally binding agreement to transfer the Affordable Housing Dwelling and Affordable Housing Lot to either the Geelong Affordable Housing Trust or a Registered Housing Agency; and
- 5.3.2 complete the transfer of the Affordable Housing Dwelling and Affordable Housing Lot to the Geelong Affordable Housing Trust or Registered Housing Agency by providing good title to the Affordable Housing Lot and Affordable Housing Dwelling, including all necessary title documents in registrable form, in accordance with the relevant Agreement referred to in clause 5.3.1.

6. Owner's further obligations

6.1 Notice and registration

The Owner must bring this Agreement to the attention of all prospective occupiers, lessees, licensees, mortgagees, and charges.

6.2 Further actions

The Owner:

- 6.2.1 must do all things necessary to give effect to this Agreement;
- 6.2.2 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

- 6.2.3 agree to 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.

6.3 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:

- 6.3.1 preparing, drafting, finalising, signing, and recording this Agreement;
- 6.3.2 preparing, drafting, finalising and recording any amendment to this Agreement; and
- 6.3.3 preparing, drafting, finalising and recording any document to give effect to the ending of this Agreement.

7. Dispute resolution

- 7.1.1 If there is a dispute between the parties concerning the interpretation or implementation of this Agreement, other than a dispute referred to in clauses 7.1.2 or 7.1.3, that dispute may be referred to VCAT for resolution to the extent permitted by the Act.
- 7.1.2 If there is a dispute concerning any matter which is not referable to VCAT under the Act, the Owner's and Council's representatives must meet within 10 Business Days of a notice of that dispute from either party to attempt in good faith to resolve the dispute.
- 7.1.3 If the dispute remains unresolved within 10 Business Days of a meeting under clause 7.1.2, the dispute may be referred for arbitration by an arbitrator agreed upon in writing by the parties, or, in the absence of such agreement the Chairman of the Victorian Chapter of the Institute of Arbitrators, Australia or their nominee for arbitration.
- 7.1.4 Where provision is made in this Agreement that any matter be done to the satisfaction of the Responsible Authority or must not be done without its consent and a dispute arises in relation to such provision, the dispute may be referred to VCAT in accordance with s 149(1)(b) of the Act.
- 7.1.5 The parties are entitled to legal representation for the purposes of any arbitration or referral referred to in clauses 7.1.3 or 7.1.4 above.
- 7.1.6 Unless the mediator or VCAT shall otherwise direct, each party must bear its own costs.

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

- 9.1.1 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.
- 9.1.2 The Owner further covenants and agrees that:
- (a) it is, or is entitled to be registered as, the registered proprietor of the Subject Land; and
 - (b) save as shown in the certificate of title to the Subject Land, there are no mortgages, liens, charges, easements or other encumbrances or any rights inherent in any person affecting the Subject Land or any part of it and not disclosed by the usual searches.

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:

- 10.1.1 give effect to this Agreement; and
- 10.1.2 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 on the date specified on page one or if no date is specified on page one, the date Council executes this Agreement.

13. Ending of Agreement

13.1.1 This Agreement ends upon transfer of the fee simple title to the Affordable Housing Lot to the Geelong Affordable Housing Trust or a Registered Housing Association.

13.1.2 Once this Agreement ends as to part of the Subject Land, 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 an application to the Registrar of Titles under section 183(2) of the Act to cancel the recording of this Agreement on the register as to that part of the Subject Land.

13.1.3 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.

14. Electronic Execution

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

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



Signing Page

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

Signed sealed and delivered by Gareth Smith,)
 Director City Planning and Economy on behalf of)
Greater Geelong City Council pursuant to an)
 Instrument of Delegation authorised by Resolution of)
 Council in the presence of:)
)

.....Witness



Executed as a deed by Balmoral Quay Pty Ltd in)
accordance with s 127(1) and s 127(3) of the)
Corporations Act 2001:

.....
Signature of Director

.....
Signature of Director/Company Secretary

.....
Print full name

.....
Print full name



Mortgagee's Consent

National Australia Bank as Mortgagee under instrument of mortgage no. AN244658U consents to the Owner entering into this Agreement and in the event that the Mortgagee becomes mortgagee-in-possession, agrees to be bound by the covenants and conditions of this Agreement.

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