A picture containing text

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**Introduction**

One of the ways local councils and other landowners, such as charities, support the delivery of affordable housing is through contributing land to an affordable housing project led by a community housing organisation (CHO). In many cases the third party landowner does not want to relinquish title to the land, and would prefer to provide a long-term lease to the CHO at a peppercorn rent.

Community Housing Industry Association of Victoria (CHIA Vic) engaged Moores to develop this resource to assist CHOs and landowners to draft a lease that works for both parties – one that enables the CHO to apply for funding and debt while protecting the interests of the landowner, the funder and the CHO.

CHIA Vic would like to thank the National Housing Finance and Investment Corporation (NHFIC) for funding this work.

**Feedback on this document**

If your organisation has used this template, CHIA Vic would greatly appreciate your feedback – what worked, what didn’t work and what changes you would recommend.

Please email your feedback to [admin@chiavic.com.au](mailto:admin@chiavic.com.au).

**Guide to using this agreement for lease**

**What is this document?**

This Agreement for Lease (**AFL**) is designed for use by Community Housing Organisations (**CHOs**)when developing housing on land owned by another party (often a local council).

The AFL sets out the terms of the development of housing on third-party land by a CHO, the required milestones for the continuation of the project, and terms to end the agreement.

The AFL also binds the parties to enter into a lease of the property on pre-agreed terms from a date determined by the AFL (this deed assumes the lease will commence two weeks following practical completion of the development).

This AFL is designed to be used together with the Head Lease (for social housing development) template prepared by Moores.

**When should I start referring to this document?**

This AFL is a binding agreement to develop social housing. CHOs or landlords may wish to refer to this document:

* After establishing a clear plan for developing social housing on a specific parcel of land.
* At the point when the parties are considering the specific details of the project and what key obstacles, challenges and risks might be involved and need to be allocate or mitigated.
* After a set of general commercial terms have been discussed and accepted in principle by the CHO and landowner.

CHOs or landowners may wish to refer to this AFL together with the head lease template when considering the development and delivery of the housing outcomes over the life of both agreements. The AFL will govern the development of the Improvements on the Land, and the Lease will manage the ongoing use of the Improvements and the Land over the agreed term.

Some key terms and considerations that should be discussed before or during the adoption of this AFL template include:

* What due diligence is required for the land?
* How long will the lease term granted to the CHO be?
* What is the funding source for development?
* What are the preliminary designs of the Improvements?
* Whether the landlord will have any input into design?
* Who will have ownership of the Improvements following construction, and how will this affect how the properties are maintained over their life and at the end of the lease?

**How to use this document?**

This document comprises four sections:

*General Conditions* - which are general terms which will likely apply to each development project.

*Schedule* - which allows the parties to input variables unique to their commercial arrangement. We have highlighted in Green all variables which the parties will need to agree to and complete.

*Conditions precedent* – which are set out in Annexure B. Conditions precedent are milestones which, if not met despite the reasonable endeavours of the responsible party, allow one or both parties to end this agreement. For example, where planning permission cannot be obtained on acceptable terms in a certain timeframe following the execution of this deed, either party can terminate the agreement to avoid an intractable situation.

*Special conditions* - which are a number of options and conditions which the parties may wish to include in the agreement where they are appropriate. Delete all special conditions except those which the parties have expressly agreed to include.

***Note***: Yellow highlighted text, including drafting notes we have provided as guidance when referring to this lease, should be deleted from the final version of the document before execution.

**Councils**

Where a council is the landlord, it should be aware of the two separate roles they will play in relation to the development of the land:

* *Landowner* – As the owner of the land to be developed, council will need to negotiate the terms of the AFL and Lease in good faith with the CHO. In this capacity, the landlord is is trying to secure the best outcomes for the available land under its control, rather than assessing the merits of the planning application against the relevant scheme.
* *Statutory planning authority -* As the entity responsible for assessing planning applications in the local government area, council will need to approve the Housing Project, with any stipulations in the planning consent that it deems appropriate (planning applications may be streamlined for some social housing projects). In this capacity, Council will need to act impartially toward the Housing Project and the use of the Land.

Special condition 18 deals with this dual role and makes clear the division between council’s position as landlord and statutory planning authority. This special condition should always be used where council is the landlord.

**Key Assumptions**

We have made the following assumptions when preparing the general conditions of this lease:

* The land is situated in Victoria. This agreement is not suitable for use interstate without legal review and amendment.
* The default owner of the Improvements will be the CHO, and the CHO will therefore be responsible for the Improvements over the life of the lease.
* Once the Works are complete, the lease will run for a long term (10-50 years), so as to maximise housing outcomes.
* This AFL will be used together with the Moores template head lease developed with this document.
* Where finance is obtained from a lender or through a government funding stream, we have assumed that the lender will require a direct-deed with the landlord to secure step-in rights in the event of a default by the CHO so the housing outcome is not lost.
* This lease does not contain a renewal mechanism, as it is intended that the term of the lease will be long enough that an extension should warrant the execution of a new lease document.
* The Land has been provided by the Landlord for free or at a very low rent for the provision of social housing. As a result, no commercial rental provisions (e.g. rent reviews during the term, rent security by bank guarantee, etc) are required.
* The Landlord delivered the land either vacant or with buildings to be demolished, and expects to receive a vacant lot at the end of the lease.

|  |
| --- |
| **Agreement for Lease** |
| **(for Social Housing Development)** |
| [insert landlord] |
| [insert tenant] |

**MOORES**

Level 1

5 Burwood Road

Hawthorn Vic 3122

Tel: (03) 9843 2100

Fax: (03) 9843 2102

Ref: **APB/EHA 211027**

**Moores MDP Pty Ltd**

ACN 625 708 689

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**THIS AGREEMENT** is dated:

PARTIES

|  |  |
| --- | --- |
|  | **[INSERT LANDLORD NAME AND ABN OR ACN]**  of [insert landlord address]  (**Landlord**) |
|  | **[INSERT CHO NAME AND ABN or ACN]**  of [insert tenant address]  (**Tenant**) |

BACKGROUND

1. The Landlord owns the Land, or is otherwise entitled to enter into this agreement and grant the Lease.
2. The Tenant is a registered housing agency under the *Housing Act 1983*.
3. The Landlord and the Tenant have agreed to initiate a housing project on the Land under which the Tenant will:
   1. engage a Contractor to deliver the Dwellings on the Land;
   2. take a long term lease of the Land for charitable use (**Housing Project**) as set out in this agreement.

IT IS AGREED:

1. INTERPRETATION
   1. Definitions

In this agreement, unless the context clearly indicates otherwise:

**Address for Service** means the principal place of business or head office of the relevant party, as set out in Items 1 and 2 of the Reference Schedule.

**Annexure** means any document or additional special conditions attached to this agreement as an annexure.

**Approvals** means any consents, approvals, permits, licences and authorisations of any kind required under any Relevant Legislation, or by any Government Agency, and includes Planning Approval.

**Approved Design Documents** means Design Documents to which the Landlord has made no objection under clause 21.

**Builder** means the building contractor or contractors engaged by the Tenant or Contractor to carry out the Works.

**Building** **Contract** means the contract or contracts under which the Builder is engaged for the design and construction of the Dwellings.

**Business Days** means weekdays, excluding public holidays in Victoria, and each Business Day concludes at 5:00pm.

**Claim** includes any claim, proceeding, cause of action, action, demand or suit (including by way of contribution or indemnity):

* + 1. under, arising out of, or in connection with this agreement;
    2. arising out of, or in connection with, the Works; or
    3. otherwise at law or in equity including:
       1. by statute;
       2. in tort for negligence or otherwise, including negligent misrepresentation; or
       3. for quantum meruit or restitution, including restitution based on unjust enrichment.

**Conditions Precedent** means the conditions set out in Annexure B.

**Condition Precedent Date** meansthe latest date for completion of the relevant Condition Precedent, as set out in Annexure B.

**Confidential Information** means the terms of this agreement and all confidential information, material and technology disclosed or provided in any form by any party to any other party in connection with the subject matter of this agreement.

**Contamination** means a solid, liquid, gas, odour, heat, sound, vibration, radiation or substance of any kind which makes or may make the Environment unsafe, unfit or harmful for habitation, use or occupation by any person or animal or is such that any part of the Environment does not satisfy the contamination criteria or standards published or adopted by the Victorian Environment Protection Authority from time to time.

**Contractor** means:

* + 1. where the Tenant appoints a Developer, the Developer; or
    2. otherwise, the Builder.

**Date of Practical Completion** means the date specified in a Practical Completion Notice under clause 7.6(c).

**Defects** means any omissions or defects in the Works.

**Design Brief** means the preliminary designs and other documents describing the Dwellings and Works contained in Annexure A.

**Design Documents** means all drawings, specifications, samples, models, prototypes and other documents and things which depict or describe the design for the Works.

**Developer** means a developer engaged by the Tenant to deliver the Housing Project.

**Development Program** means the program for construction of the Works provided by the Tenant under clause 5.1 and updated from time to time.

**Dwellings** means the dwellings and other improvements to be constructed on the Land under this agreement.

**Environment** includes the meaning given to that term at common law and in any legislation in force in Victoria including any land, water, atmosphere, climate, sound, odours, tastes, the biological factors of animals and plants, natural, man-made or modified features or structures and the social factors of aesthetics.

**Environmental Law** means any Law relating to the Environment including any Law relating to land use, planning, heritage items or values, pollution of air, water, soil or groundwater, flora and fauna, chemicals, waste, the use of transport, the storage and handling of dangerous goods, the health or safety of any person, or any other matters relating to but not limited to the protection of the Environment, health or property.

**Estimated Date for Practical Completion** means the estimated date for Practical Completion set out in the Development Program.

**Execution Date** means the date on which the last of the parties to this agreement delivers the executed agreement to the other party, or if executed by exchange, the date on which the exchange occurs.

**Force Majeure Event** means any event which is beyond the reasonable control of a party to this agreement and which prevents that party from performing its obligations under this agreement where that event could not have been prevented, overcome, or remedied by the exercise of a standard of care and diligence consistent with that of a prudent person undertaking those obligations, including the expenditure of all reasonable sums of money. Force Majeure Event includes:

* + 1. fire, flood or explosion not arising from construction or other works being performed on any Approved Rental Dwelling, or hurricane, earthquake, natural disaster, radioactive contamination or toxic or dangerous chemical contamination;
    2. sabotage, act of public enemy, war (declared or undeclared), act of terrorism or revolution; or
    3. riot blockade or other civil commotion which is not related to industrial action or strikes.

**Government Agency** means a government or a governmental, semi-governmental, judicial, municipal, statutory or public entity or authority.

**GST** means any form of goods and services tax payable under the GST Law, and includes any applicable additional tax, penalty tax, fine, interest or other charge.

**GST Law** means the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.

**Housing Project** means the development and the use of the Land as anticipated by this agreement and the Lease.

**Improvements** means all permanent alterations and improvements made to the Land in the course of carrying out the Works, including the Dwellings.

**Insolvency Event** means any of the following:

* + 1. an application is made to a court for an order that the corporation be wound up and the corporation has not taken steps to set aside or to otherwise dispose of that application within 14 days of the application being made, or the application is not set aside, withdrawn or otherwise disposed of within 21 days of the application being made, or an order is made that the corporation be wound up;
    2. an application is made to a court for an order appointing a liquidator or provisional liquidator to the corporation and the corporation has not taken steps to set aside or to otherwise dispose of that application within 14 days of the application being made, or the application is not set aside, withdrawn or otherwise disposed of within 21 days of the application being made, or a liquidator or provisional liquidator is appointed, whether or not under that order, or the corporation resolves to appoint a liquidator or provisional liquidator;
    3. the corporation resolves to wind itself up, or otherwise dissolve itself, or gives notice of an intention to do so (except for the purposes of an amalgamating or reconstruction while solvent) or is otherwise would up or dissolved; and
    4. the corporation is or states that it is insolvent,

and the terms **insolvent** and **insolvency** have corresponding meanings.

**Insurances** means the insurances to be effected and maintained by the Tenant under clause 9.1.

**Key Consultants** means the consultants described in clause 9.1(d).

**Land** means the land described in Item 4 of the Reference Schedule.

**Landlord** means the landlord indicated in Item 1 of the Reference Schedule, and includes any agents and representatives appointed in relation to this agreement.

**Law** means any statute, regulation, order, rule, subordinate legislation or other document enforceable under any statute, regulation, order, rule or subordinate legislation and includes any Environmental Law.

**Lease** means the lease exhibited in Annexure B.

**Lease Commencement Date** means the date 14 days following the Date of Practical Completion.

**Liability** means any debt, obligation, cost, expense, loss, damage, compensation, charge or liability of any kind, including those that are prospective or contingent and those the amount of which is not ascertained or ascertainable.

**Local Government Act 1989** means the *Local Government Act 1989* (Vic), as amended or replaced from time to time.

**Local Government Act 2020** means the *Local Government Act 2020* (Vic), as amended or replaced from time to time.

**Planning Approval** means planning approval for the Housing Project obtained under the *Planning and Environment Act* 1987 (Vic).

**Practical Completion** means that stage in execution of the Works where:

* + 1. the Works are substantially complete and operational, but for minor omissions and defects that do not affect the use of the Dwellings for their intended purpose;
    2. all necessary Approvals for lawful use and occupation of the Dwellings have been obtained (including, but not limited to, a certificate of occupancy); and
    3. minor omissions and defects may be completed and rectified without undue interference with or disruption to the use and occupation of the Dwellings under the Lease.

**Practical Completion Notice** has the meaning given in clause 7.6(c).

**Pre-existing Contamination** means Contamination existing on, in or under the Land, as at the Execution Date.

**Reference Schedule** means the reference schedule attached to this agreement.

**Relevant Legislation** means all applicable Statutes, ordinances, regulations and by-laws issued thereunder, whether Federal, State or local.

**Site Conditions** has the meaning given in clause 6.1(a).

**Sunset Date** means the date specified in Item 5 of the Reference Schedule, subject to any extension in accordance with this agreement.

**Tenant** means the tenant indicated in Item 2 of the Reference Schedule, and where the context requires includes any agents and representatives appointed in relation to this agreement, including the Developer.

**Works** means the construction of the Improvements on the Land in accordance with the Design Brief, the Planning Approval and the Approved Design Documents, and includes both design and construction work.

**Works Commencement Date** means the date the construction of the Improvements commences on the Premises.

* 1. Interpretation

In this agreement, unless the context clearly indicates otherwise:

* + 1. a reference to this agreement or another document means this agreement or that other document and any document which varies, supplements, replaces, assigns or novates this agreement or that other document;
    2. a reference to legislation or a legislative provision includes any statutory modification, or substitution of that legislation or legislative provision and any subordinate legislation issued under that legislation or legislative provision;
    3. a reference to a body or authority which ceases to exist is a reference to either a body or authority that the parties agree to substitute for the named body or authority or, failing agreement, to a body or authority having substantially the same objects as the named body or authority;
    4. clause headings and the table of contents are inserted for convenience only and do not form part of this agreement;
    5. a reference to a natural person includes their personal representatives, successors and permitted assigns;
    6. a reference to a corporation includes its successors and permitted assigns;
    7. a reference to a right or obligation of a party is a reference to a right or obligation of that party under this agreement;
    8. an obligation or warranty on the part of 2 or more persons binds them jointly and severally and an obligation or warranty in favour of 2 or more persons benefits them jointly and severally;
    9. a requirement to do any thing includes a requirement to cause that thing to be done and a requirement not to do any thing includes a requirement to prevent that thing being done;
    10. including and includes are not words of limitation;
    11. a word that is derived from a defined word has a corresponding meaning;
    12. the singular includes the plural and vice-versa; and
    13. a reference to a thing includes each part of that thing.
  1. Construction

Neither this agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting.

1. housing Project
   1. Undertaking the Housing Project

The Tenant will:

* + 1. take all reasonable steps to obtain all necessary Approvals for the Works;
    2. take all reasonable steps to secure funding to undertake the Works, including all costs associated with obtaining all Approvals required for the Works; and
    3. (if the Works obtain Approval and funding) engage the Contractor to undertake the Works in compliance with the terms of this agreement.

1. conditions precedent
   1. Conditions Precedent

The Tenant must use all reasonable endeavours to ensure that the Conditions Precedent are satisfied by the Condition Precedent Date, and must keep the Landlord informed of progress in relation to satisfying these conditions.

[***Drafting note:*** *refer to the conditions precedent set out in Annexure B, selecting those which apply to your project].*

* 1. Benefit

The Conditions Precedent are for the benefit of both parties and cannot be waived unless agreed by both parties.

* 1. Termination

If any Conditions Precedent are not satisfied by the Condition Precedent Date, then either party may provide written notice to the other party terminating this agreement. Upon termination this agreement will be at an end and of no further effect, but termination shall be without prejudice to any existing rights or entitlements of the parties resulting from any prior breach of this agreement.

1. PLANNING APPROVAL
   1. Application for Planning Approval

The Tenant must seek Planning Approval for the Housing Project in a timely manner.

* 1. Parties may withdraw
     1. In the event that:
        1. Planning Approval is not granted for the Housing Project consistent in all material respects with purposes expressed under this agreement, the Tenant having used all reasonable endeavours to obtain the Planning Approval; or
        2. Planning Approval is granted on conditions which are not acceptable to either or both the Tenant and the Landlord (acting reasonably), the Tenant having used all reasonable endeavours to have those conditions amended or removed,

then either party may terminate this agreement by written notice to the other party. Upon termination this agreement will be at an end and of no further effect, but termination shall be without prejudice to any existing rights or entitlements of the parties resulting from any prior breach of this agreement.

*[****Drafting note:*** *This clause 4 should be used together with Condition Precedent 2 (Acceptability of Approvals) in Annexure B]*

1. Development program and site licence for CONSTRUCTION
   1. Development Program

Within 30 Business Days after the Execution Date, the Tenant must provide to the Landlord a program for obtaining all necessary Approvals and carrying out the Works (**Development Program**). The Development Program must:

* + 1. show the anticipated timing for obtaining the necessary Approvals required for the Housing Project, and for the sequencing and interdependency of all design and construction activities for the Works;
    2. specify an estimated date for commencement of construction of the Improvements on the Premises (**Works Commencement Date**); and
    3. show the date on which it is anticipated that the Works will reach Practical Completion (**Estimated Date for Practical Completion**).
  1. Inspection and testing

Prior to taking possession and control of the Land under this agreement, the Tenant and its consultants and advisors may have access to the Land to undertake inspections and tests, subject to the following conditions:

* + 1. the Tenant must give the Landlord prior notice of intended inspections and testing;
    2. in carrying out any testing and investigations the Tenant must not damage the Land, and must, on request, reinstate any damage that is caused by such testing and investigation;
    3. the Tenant agrees that any such access is taken at the sole risk of the Tenant and its consultants and advisors, and the Tenant:
       1. releases the Landlord from and in respect of all Claims it may have against the Landlord in relation to any and all death or injury suffered, or loss and damage incurred, howsoever resulting from, or in connection with such access, except to the extent caused or contributed to by the negligent act or default or breach of this agreement by the Landlord or its agents or advisors; and
       2. indemnifies the Landlord for all Claims made against the Landlord, and Liability incurred by the Landlord in connection with, or as a result of death or injury suffered, or loss and damage incurred, as a result of, or in connection with such access, except to the extent caused or contributed to by the negligent act or default or breach of this agreement by the Landlord or its agents or advisors.

[***Drafting note:*** *where the tenant requires this agreement to be subject to site due diligence and testing, special condition 20 should be used].*

* 1. Site possession and control

The Landlord grants to the Tenant and their agents an exclusive licence to occupy the Land from the Works Commencement Date on the following terms:

* + 1. the licence is only for the purposes of carrying out the Works and uses ancillary to this agreement and the Lease;
    2. the Tenant is responsible for safety and security on the Land, and without limiting the generality of that obligation must:
       1. establish, maintain and comply with appropriate emergency safety and security procedures;
       2. comply with all Laws relating to health and safety;
       3. do all things prudent and necessary to protect people and property including, but not limited to, erecting and maintaining appropriate fencing and hoardings;
       4. prevent nuisance and unreasonable noise and disturbance; and
       5. protect the Works and maintain security of the Land;
    3. the Landlord appoints and authorises the Tenant to be the Landlord’s agent specifically and solely for the purpose of appointing and authorising from time to time a suitability qualified person to be the principal contractor or person in control of construction projects pursuant to Part 5.1 of Chapter 5 of the *Occupational Health and Safety Regulations 2017* (Vic), for construction of all or part of the Works;
    4. the Tenant releases the Landlord from and in respect of all Claims it may have against the Landlord in relation to any and all death or injury suffered, or loss and damage incurred, howsoever resulting from, or in connection with its use and occupation of the Land, except to the extent caused or contributed to by the negligent act or default or breach of this agreement by the Landlord or its agents or advisors;
    5. the Tenant indemnifies the Landlord for all Claims made against the Landlord, and Liability incurred by the Landlord in connection with, or as a result of death or injury suffered, or loss and damage incurred, as a result of, or in connection with the Tenant’s use and occupation of the Land, except to the extent caused or contributed to by the negligent act or default or breach of this agreement by the Landlord or its agents or advisors;
    6. the Tenant must have and maintain, and procure the Contractor to have and maintain, all of the insurances required under clause 9 during the term of the licence;
    7. the Tenant must pay for all utilities consumed on the Land during the term of the licence, but will not be responsible for any rates or taxes relating to the Land;
    8. the Tenant may grant a sublicense to the Contractor and others to come on and/or occupy the Land or any part of it, for the purposes of carrying out the Works;
    9. the Tenant must (subject to the Tenant’s reasonable requirements and restrictions regarding health and safety) grant reasonable access to the Landlord and its agents and advisors for the purpose of inspection of the Works and assessing the Tenant’s compliance with its obligations under this agreement;
    10. the Landlord must not exercise any rights or grant any rights in respect of the Premises which are inconsistent with the full and free exercise of the Tenant’s rights under the licence; and
    11. the licence term ends on the earlier of:
        1. 11:59pm on the day before the Lease Commencement Date; or
        2. or if this agreement is terminated in accordance with its terms, upon such termination.

1. site conditions and ENVIRONMENTAL obligations
   1. Site Conditions
      1. Site Conditions means all circumstances and conditions on, in, around and affecting the Land, whether latent or otherwise, including (but not limited to):
         1. groundwater, groundwater hydrology and the effects of any dewatering;
         2. physical conditions on or below the surface of the Land;
         3. Contamination in, on, under the Land, or adjacent to or within the vicinity of the Land, or in groundwater in, under or adjacent to or within the vicinity of the Land;
         4. physical condition above the surface of the Land, including the condition of and circumstances affecting all improvements on the Land, equipment, goods, materials and other things on the Land;
         5. demography of the Land surface and sub-surface conditions and geology including rock or other materials encountered at the Land;
         6. climatic and weather conditions, rain surface water run-off and drainage, water seepage, wind, windblown, dust and sand in season; and
         7. all other physical conditions and characteristics of the Land above, on or below the surface of the Land, and other circumstances, which may affect the performance by the Tenant of its obligations under this agreement,

whether or not such conditions, characteristics and circumstances:

* + - 1. were apparent before or at the Execution Date;
      2. could have been ascertained by a competent contractor, or would have been anticipated or suspected by a competent contractor;
      3. were within the knowledge of the Landlord, or any of its associates, agents or consultants prior to the Execution Date; or
      4. were identified or anticipated by the Tenant at or prior to the Execution Date, or would or should reasonably have been anticipated or suspected by a competent contractor having carried out all prudent inspections, tests and assessments.
    1. Subject to inspection and testing by the Tenant pursuant to clause 5.2, the Tenant:
       1. accepts the condition of the Land at the Execution Date;
       2. agrees that it has management and control of the Land for the purposes of the *Environment Protection Act 2017;* and
       3. is responsible for the Land and the Site Conditions and will not be entitled to, and will not make, any Claim in connection with the Land or the Site Conditions.
    2. The Tenant acknowledges that clause 5.2 provides the opportunity to carry out its own investigations and assessments with regard to the existence, nature, extent and potential effect of Site Conditions prior to taking possession and control of the Land, and that it has entered into this agreement, and will enter into the Lease, in reliance upon its own assessment of such matters, and not in reliance, in any respect on any other information or material provided to it by the Landlord or any of its consultants, representatives or associates.
  1. Contamination

Without limiting clause 6.1, the Tenant:

* + 1. releases the Landlord and its officers and agents in relation to Claims by the Tenant arising out of or in respect of:
       1. any Contaminant in, on, under or which has or in the future does emanate from the Land; and
       2. any Contaminant in, on or under the Land to the extent that it is caused, contributed to or exacerbated in a material way by the Tenant or its servants, agents, employees or contractors; and
    2. indemnifies the Landlord, officers and agents against any Liability arising out of or in respect of:
       1. any Contamination in, on, under or which has or does in the future emanate from the Land (excluding Pre-existing Contamination); and
       2. any injury, loss or damage suffered by any occupier, user or visitor to the Land as a result of or in connection with any Contamination in, on or under the Land (excluding Pre-existing Contamination).
  1. Rectification Works
     1. If, following the Execution Date:
        1. the Tenant becomes aware of Pre-existing Contamination on the Land;
        2. the Pre-Existing Contamination prevents the completion of the Works; and
        3. the Tenant is not reasonably able to rectify, remove or make safe the Pre-existing Contamination (**Rectification Works**), having regard to the cost of the Rectification Works, insurance coverage, and delays to the Development Program,

the Tenant must provide the Landlord with written notice providing details of the Contamination and its impact on the Works (**Contamination Notice**) within 15 Business Days of becoming aware of the Contamination.

* + 1. Within 10 Business Days of the Landlord receiving a Contamination Notice, the parties must meet and negotiate in good faith a reasonable financial contribution or other material assistance from the Landlord to allow the Tenant to reasonably complete the Rectification works (**Landlord Contribution**).
    2. Nothing in this clause 6.2 will require the Landlord to make a Landlord Contribution, except where the parties have otherwise agreed in writing.
    3. If the parties do not agree to a Landlord Contribution to the Rectification Works within 15 Business Days of the Contamination Notice or such later date agreed between the parties, either party may provide written notice to the other party terminating this agreement. Upon termination this agreement will be at an end and of no further effect, but termination shall be without prejudice to any existing rights or entitlements of the parties resulting from any prior breach of this agreement.

[***Drafting note:*** *where there is an external funder, the finance direct deed/funding agreement will likely require the funder to be consulted in relation to pre-existing contamination and rectification*.]

* + 1. If this agreement is terminated under this clause 6.3, the Tenant must promptly return possession of the Land to the Landlord, having made good any damage caused to the Land as a result of any Works, but without any obligation to reinstate improvements removed from the Land in the course of the Works. Any dispute regarding returning possession of the Land must be referred to expert determination in accordance with clause 13.3.

1. DESIGN AND CONSTRUCTION OF Dwellings
   1. Design Brief
      1. The layout and design of the Dwellings and their situation on the Land will be generally in accordance with the Design Brief. The Landlord acknowledges that the Tenant may, as it develops its plans for the Dwellings and seeks the necessary Approvals, modify the Design Brief accordingly, subject to this clause 7.1.
      2. Any modifications to the Design Brief under this clause 7.1, and all Design Documents prepared by the Tenant, must be consistent with all relevant Approvals and legal requirements, and otherwise comply with this agreement in all respects.

[***Drafting note:*** *where the parties agree that the Landlord will have the right to approve the Design Brief and Development Program (i.e. the high level building concept and development timeframe), condition precedent 3 should be used*

*Where the parties agree that the Landlord will have a right of approval for Design Documents (i.e. detailed drawings and plans), special condition 21 should be used as well.]*

* 1. Approvals

The Tenant must, at its own cost and expense, obtain all necessary Approvals in sufficient time to enable the Tenant to complete the Works in accordance with the Development Program.

* 1. Design Warranties
     1. The Tenant warrants that the design for the Works and all the Design Documents will:
        1. be prepared professionally, in accordance with good standards of design and practice and be of high quality;
        2. comply with all Approvals and Relevant Legislation;
        3. be consistent with, and in all respects meet and achieve the requirements and objectives described in this agreement;
        4. be fit for any purpose stated or implied by this agreement.
     2. The Tenant agrees that the warranties given under clause 7.3(a) will not be discharged or affected in any way by any of the following:
        1. that the Design Brief, or any part of it, was prepared or approved by the Landlord or the Landlord’s consultants; or
        2. that the Landlord has reviewed and/or approved any Design Documents.
  2. Building Contract and Funding Disclosure
     1. The Tenant will, on request, provide the Landlord with a copy of the Building Contract.
     2. The Landlord may, at any time, request the Tenant to provide it with such information and documents as are necessary to satisfy it that the Tenant has secured sufficient funding to complete the Works.
     3. The Landlord agrees to keep confidential any information and materials provided by the Tenant under this clause, and not to copy or disclose that document to any other party except for legitimate purposes of or associated with this agreement and the performance by the Tenant of its obligations under this agreement.
  3. Construction of Works
     1. The Tenant will, or will procure the Contractor to:
        1. carry out the Works in a good and workmanlike manner;
        2. use only those materials and equipment specified in the Design Documents (if any) and where materials and equipment are not specified, the Tenant will use new materials and equipment of high quality suitable for the intended purpose;
        3. ensure that the Works are carried out in accordance with the Design Documents and all Approvals and Relevant Legislation;
        4. use its best endeavours to bring the Works to Practical Completion by the Estimated Date for Practical Completion; and
        5. in any case, ensure that the Works reach Practical Completion by the Sunset Date.
     2. The Works will be under the control and management of the Tenant or its appointed Contractor, and the Tenant or the Contractor shall be entitled to employ such person and/or consultants (including the Builder) as it chooses in connection with the design and carrying out of the Works.
     3. The Tenant will permit the Landlord and any of its consultants and other representatives to inspect the Works on reasonable notice, subject to complying with the reasonable requirements of the Tenant and the Contractor with regard to safety and security on or at the Land.
     4. The Tenant warrants that the Works, when completed, will:
        1. comply with all Approvals and Relevant Legislation;
        2. conform with all Design Documents;
        3. be consistent with and meet the requirements of the Design Brief;
        4. be in accordance with the requirements of this agreement in all respects; and
        5. be fit for the purpose stated or implied by this agreement.
     5. The Tenant must not make material changes to the Works depicted in the Design Documents provided to the Landlord, without the approval of the Landlord. The Landlord must act reasonably in giving or withholding its approval to any requested change.
  4. Progress of works toward Practical Completion
     1. The Tenant must:
        1. make all reasonable efforts to commence the Works on the date referred to in clause 5.1(b);
        2. carry out the Works diligently, and generally in accordance with the Development Program;
        3. make all reasonable efforts to ensure that the Works are brought to Practical Completion by the Estimated Date for Practical Completion.
     2. The Tenant must:
        1. use its best endeavours to minimise any delay which does or may result from such events or circumstances; and
        2. keep the Landlord informed of progress of the Works generally and of when it anticipates the Works will reach Practical Completion.
     3. When the Tenant considers that the Works have reached Practical Completion, it must notify the Landlord in writing (**Practical Completion Notice)**. The Practical Completion Notice must specify the Date of Practical Completion and the Lease Commencement Date.
  5. Drawings and specifications as constructed

The Tenant must procure and provide to the Landlord within 30 days after the Date of Practical Completion:

* + 1. a complete set of architectural and engineering drawings and detailed specifications of the Works as constructed in hard and soft copy;
    2. copies of all Approvals (including any developmental permits) in relation to the Works; and
    3. maintenance and operating manuals for the maintenance and operation of the completed Works.
  1. Defects
     1. To avoid any doubt, the Landlord has no responsibility for rectifying any Defects in the Works.
     2. The Tenant must ensure that, under the Building Contract, the Contractor has an obligation to rectify Defects notified to it within the period of 12 months after the Works reach Practical Completion.
  2. Sunset Date

[***Drafting note:*** *The parties should carefully consider an appropriate Sunset Date, having regard to the realistic timeframe for project delivery (with allowance for delays), as well as any deadlines specified in funding arrangements from lenders or stat government*.]

* + 1. The Sunset Date will not be extended except as provided in this clause 7.9.
    2. The Tenant will be entitled to an extension to the Sunset Date if the Works are delayed by any one or more of the following:
       1. a Force Majeure Event; and
       2. any act or default on the part of the Landlord under this agreement.
    3. If the Tenant wishes to claim an extension to the Sunset Date, it must, promptly after the occurrence of the relevant event, or promptly after the Tenant becomes aware of such event, give written notice to the Landlord (**Notice of Delay**) specifying:
       1. the nature of the relevant event;
       2. the measures taken, or which the Tenant proposes to take, to minimise any resulting delay;
       3. the anticipated extent of the delay; and
       4. the period of the extension sought to the Sunset Date.
    4. If the Landlord (acting reasonably) considers that it requires more information in order to properly assess the Tenant’s claim for an extension to the Sunset Date, then it must, as soon as practical, and in any case not later than 14 days after receiving the Notice of Delay, advise the Tenant, in writing, of the additional information required.
    5. If the Landlord disputes that the Tenant is entitled to an extension to the Sunset Date, or the period of the extension to which the Tenant is entitled:
       1. the Landlord must provide the Tenant with notice in writing to that effect, giving particulars;
       2. the parties must then liaise and consult, in good faith, with a view to agreeing on what, if any, extension will be granted to the Sunset Date, within 14 days of such notice; and
       3. if, following such liaison and consultation, the parties have not agreed on what, if any, extension of time to the Sunset Date will be granted, then either party may refer the matter for expert determination in accordance with clause 13.3.
    6. If the Landlord does not respond to the Tenant within 21 days after receiving the Notice of Delay, or any additional information requested under clause 7.9(d), then the Landlord will be deemed to have approved the extension claimed by the Tenant.
    7. If the Landlord agrees that the Tenant is entitled to any extension claimed, the Sunset Date will be extended by the period approved, agreed or determined in accordance with this clause 7.9.

1. ownership of Improvements
   * 1. The Tenant will own the Improvements, which remain at the Tenant’s risk.
     2. The parties acknowledge that from the Lease Commencement Date, the Improvements will be dealt with in accordance with the Lease.

[***Drafting note:*** *As a default position, we suggest that the Tenant will own the Improvements as the party responsible for their construction. Where the parties agree that the Landlord will own the Improvements upon completion, special condition 22 should be used (which voids this general condition)]*

1. Insurance
   1. Insurance
      1. The Tenant must effect or cause to be effected the following insurances (and noting, where applicable, the interest of the Landlord) for the period from commencement of the Works until midnight on the day before the Lease Commencement Date:
         1. contractors all risk insurance to cover the Works against loss, destruction or damage for the full reinstatement and replacement cost;
         2. public liability insurance to cover personal injury to, or the accidental death of any person and any injury, loss or damage caused by accident to any property (other than the Works) which arises out of or is caused by the execution of the Works for a sum of not less than $20 million for any one occurrence (and unlimited in the aggregate); and
         3. insurance for the sum required by Law against any Liability suffered or incurred by any person employed by the Tenant in respect of the execution of the Works (whether arising by virtue of any Law relating to workers' or accident compensation or employers' liability or at common law) .
      2. The Tenant must ensure that its consultants and other advisors, the Contractor and the Builder (as relevant) each effect and maintain similar insurances required under this clause in respect of any period during which they provide services in relation to the Works.
      3. The Tenant must:
         1. ensure that the Key Consultants engaged by it to provide professional services in connection with the Works effect and maintain professional indemnity insurance cover in respect of those services, for a sum not less than $10 million for any one claim and not less than $20 million in aggregate for claims made in any year, and that those consultants are obligated to maintain that cover for a period of not less than 7 years after Practical Completion of the Works;
         2. ensure that the Contractor effects and maintains professional indemnity insurance cover on the same terms and for the same period, in respect of any professional services which it provides or is required to provide in connection with the Works; and
         3. ensure that the Key Consultants engaged by the Contractor, or novated to the Contractor, to provide professional services to the Contractor in connection with the Works, effect and maintain professional indemnity insurance cover on the same terms and for the same period.
      4. For the purposes of this clause the Key Consultants are the consultants providing services in relation to the following:
         1. architectural;
         2. civil and structural; and
         3. fire and mechanical services.
   2. Tenant’s duties

The Tenant must ensure that in relation to the Insurances it does not do anything or fail to do anything or (insofar as it is reasonably within its power) permit anything to occur which prejudices any insurance and, if necessary, rectifies anything which might prejudice any insurance.

* 1. Damage prior to Practical Completion
     1. If any Works are destroyed or damaged (whether wholly or in part) prior to the Date of Practical Completion, the Tenant must, subject to clause 9.3(c) and:
        1. fully reinstate the Works after the damage is caused; and
        2. apply any insurance proceeds it receives under any of the Insurances in relation to the damage to reinstate the Works and for no other purpose.
     2. Nothing in this clause has the effect of varying, waiving or otherwise restricting any of the Landlord's rights under this agreement arising as a result of, or in relation to, the destruction or damage to the Works or otherwise.
     3. Where any of the Works are damaged or destroyed and, for whatever reason, no or insufficient insurance proceeds are available, then the Tenant must use its own funds to make up any shortfall in insurance money received (if any) to reinstate the Works and must apply those funds to reinstate the Works.

[***Drafting note:*** *In the circumstance where the Tenant’s insurance is not sufficient to remedy the damage to the Premises, the funder will likely rely on finance direct deed/funding agreement to step in and ensure the Housing Project is completed].*

* 1. Limit of Liability

Neither failure to comply nor full compliance by the Tenant with the insurance provisions of this agreement will limit or relieve the Tenant of its liabilities and obligations under any other term of this agreement.

* 1. Tenant Indemnifies against Damage, etc

The Tenant must indemnify and keep indemnified the Landlord against any Liability:

* + 1. for any injury, loss or damage to any property (real or personal); or
    2. arising under any statute or at common law for personal injury to or death of any person,

which is caused or to the extent contributed to by the execution of the Works or the performance or non-performance of the Tenant’s obligations under this agreement, except to the extent caused or contributed to by a default or wrongful or negligent act or omission of the Landlord or its employees, consultants or agents.

* 1. Contractor’s insurance

To the extent that the Contractor has and maintains any of the insurances required by clause 9.1, and such insurance complies with the requirements set out above, the Tenant will be taken to have satisfied its obligations to effect and maintain those insurances for so long as the Contractor maintains such insurances.

1. GRANT OF LEASE
   1. Grant of Lease

The Landlord will grant and the Tenant will accept the Lease.

*[****Drafting note:*** *the Lease will be attached to this AFL as Annexure D. The terms of the Lease should have been agreed prior to execution of this AFL, subject to minor items to be inserted such as the Commencement Date].*

* 1. Preparation of Lease
     1. The Lease will be prepared in duplicate by the Landlord’s solicitors by inserting:
        1. the date of the Lease, being the date of execution (which will be inserted after the Landlord executes the Lease);
        2. the date of commencement of the term of the Lease (being the Lease Commencement Date); and
        3. all other details necessary to complete the Lease.
     2. If any of the details in clause 10.2(a) cannot be determined at the Lease Commencement Date, the Landlord or the Landlord’s solicitors may complete the Lease by inserting those details as soon as they have been determined or become known.
     3. The Tenant must execute both copies of the Lease and deliver them to the Landlord as soon as practicable, but no later than 10 Business Days after the Lease is provided to the Tenant for execution. The Landlord will then execute the Lease and deliver one fully executed counterpart to the Tenant as soon as practical.
     4. Regardless of any delay in preparing and executing the Lease, the parties will be bound from the Lease Commencement Date by the terms and conditions contained in the Lease as if the Lease had been duly prepared, completed, executed and delivered on or before the Lease Commencement Date. Where any term or condition cannot be given effect until one or more of the details referred to in clause 10.2(a) are determined, the term or condition will be given effect retrospectively from the Lease Commencement Date once the necessary details have been determined.
     5. The Tenant is liable for any and all stamp duty on the Lease and must pay that duty in full when it is due.

1. ASSIGNMENT or MORTGAGE by Tenant
   1. Consent to assignment

The Tenant may not, prior to the Lease Commencement Date:

* + 1. assign any of its rights or obligations under this agreement; or
    2. grant any mortgage, charge, interest, or other encumbrance over any of its rights under this agreement,

without the prior written consent of the Landlord, which must not be unreasonably withheld or delayed.

* 1. Consent not to unreasonably be withheld

The Landlord's consent to an assignment under clause 11.1 will not be unreasonably withheld if:

* + 1. the Tenant has requested consent to the assignment by notice in writing to the Landlord before the assignment is proposed to take effect, and in such notice provided the full name and address of the proposed assignee (“Proposed Assignee”);
    2. the Tenant has provided the Landlord with all such information and material as the Landlord reasonably requires in order to assess and satisfy itself that the Proposed Assignee is a suitable assignee;
    3. having had a reasonable time to consider the information and material provided under clause 11.2(b), the Landlord is satisfied that the Proposed Assignee is a suitable assignee, having regard to:
       1. its experience and reputation as an operator of facilities similar to the Premises;
       2. its philosophy and approach to the management and operation of similar to the Premises;
       3. the experience and qualifications of its staff, and the availability of sufficient staff for the proper management and operation of the Premises;
       4. whether it holds the necessary license and permits to operate the Premises;
       5. its financial resources; and
       6. its capacity and ability generally to perform the obligations of the Tenant under this agreement and the Lease;
    4. the Proposed Assignee has, or has agreed to, execute a deed in a form reasonably required by the Landlord under which the Proposed Assignee covenants with the Landlord to perform all of the obligations of the Tenant under this agreement;
    5. the Tenant has remedied any default specified in a Default Notice that has been issued at the date the request is made and as at the date the proposed assignment is to take effect, or the Landlord's rights arising out of such default have been waived in writing by the Landlord; and
    6. the Tenant and the Proposed Assignee comply with all other reasonable requirements of the Landlord.
  1. Expert determination

Any dispute between the parties regarding whether the Landlord’s requirements, delay or withholding of consent are reasonable or unreasonable must be referred for expert determination under clause 13.3.

1. Default and termination
   1. Default

If:

* + 1. either the Landlord or the Tenant is in default of this agreement (**Defaulting Party**); and
    2. the Defaulting Party does not remedy that default within the time specified in a written notice given by the other party (which must be a reasonable time having regard to the nature of the relevant obligation and the default, and in any event no less than 20 Business Days),

then the other party may at any time thereafter, unless the requirements of the default notice are satisfied in the meantime, issue a further written notice to the Defaulting Party (**Notice of Intention to Terminate**) specifying the intention of the other party to terminate this agreement if the relevant requirement is not satisfied within a further period of 20 Business Days.

* 1. Termination

*[****Drafting note****: Where the Housing Project is funded by a lender or government grant, the finance/funding agreement will typically be conditional on a direct deed with the landlord, and requiring certain step-in rights where a default event occurs and prior to enforcement action by the Terminating Party].*

A party (**Terminating Party**) may immediately terminate this agreement by written notice to the Defaulting Party if:

* + 1. the Defaulting Party has not complied with a Notice of Intention to Terminate given under clause 12.1; or
    2. an Insolvency Event occurs in relation to the other party.
  1. Consequences of Termination
     1. The Landlord must:
        1. together with the Notice of Intention to Terminate, if it is the Terminating Party; or
        2. by written notice to the Terminating Party within 5 Business Days of receiving a Notice of Intention to Terminate, if it is the Defaulting Party;

inform the Tenant that:

* + - 1. the Improvements must be removed from the Land, and the Land returned to it as a vacant lot; or
      2. if the Landlord is the Terminating Party, ownership of the Improvements will vest in the Landlord upon termination.

[***Drafting note:*** *If termination occurs, the funder will have already had an opportunity to step in and remedy the situation, and presumably will not have succeeded in ensuring the Housing Project continues. Demolition or transfer of the Improvements to the landlord will therefore be the very last resort for the parties to end the AFL].*

* + 1. The Defaulting Party will be responsible for all costs incurred in complying with clause 12.3(a) and indemnifies the Terminating Party in this regard.
    2. Subject to clauses 12.3(a) and 12.3(b), the Tenant and the Landlord have no further obligations or liabilities under this agreement other than those resulting from any breach by the other party.
  1. Other Remedies

The rights of the parties under this clause 11.2 are in addition to and without prejudice to any other rights and remedies which they may have at law or in equity as a consequence of any breach, default or other conduct of another party.

1. Dispute Resolution
   1. Negotiation

If there is a dispute between any of the parties relating to or arising out of this agreement (other than a dispute to which clause 13.3 applies), then within 5 Business Days after a party provides written notice of that dispute to the other party, senior representatives of the parties must meet and use their reasonable endeavours, acting in good faith, to resolve the dispute by joint discussions.

* 1. Urgent Relief

Nothing in this clause 13 will prevent or limit the right of either party to apply to call for injunctive or urgent relief.

* 1. Expert Determination

If this agreement expressly provides for a dispute to be resolved in accordance with this clause 13.3 or the parties otherwise agree that a dispute should be resolved by an independent expert, the parties will submit to the following procedure to resolve the dispute.

* + 1. The parties will liaise and consult, in good faith, with a view to agreeing on an independent expert to resolve the relevant dispute, and the parties will jointly appoint that person for the purposes of resolving the relevant dispute under this clause 13.3.
    2. In the absence of appointment of an independent expert in accordance with clause 13.3(a) within 10 Business Days after written notice of a dispute to which this clause 13.3 applies, the independent expert will be appointed on the application of either party by, unless otherwise agreed, the chairperson or other senior office bearer for the time being of the Resolution Institute (Victoria).
    3. The independent expert must:
       1. have reasonable qualifications and commercial and practical experience in the area of the dispute;
       2. have no interest or duty which conflicts or may conflict with his or her functions as an independent expert, he or she being required to fully disclose any such interest or duty before his or her appointment; and
       3. not be an employee or former employee of the Landlord or the Tenant.
    4. The independent expert will act as an expert and not as an arbitrator and may adopt such procedures as he or she sees fit, including as to:
       1. fixing a time and place or receiving submissions or information from the Landlord, the Tenant or any other person; and
       2. the form of any submissions or information required by the independent expert from the Landlord, the Tenant or any other person.
    5. The independent expert will have the following powers:
       1. to inform themselves independently as to all matters relevant to the dispute;
       2. to request and receive submissions (whether oral or in writing) or other information from the Landlord or the Tenant; and
       3. to consult with any other persons as the independent expert in their absolute discretion thinks fit in relation to resolving the dispute, provided that such person provides to the Landlord and the Tenant an undertaking to keep confidential all matters coming to the person's knowledge by reason of their consultation with the independent expert.
    6. The Landlord and the Tenant must cooperate fully with the independent expert and promptly give the independent expert all of the information, submissions and assistance which they may reasonably require.
    7. The independent expert must make a determination or finding on the issues in dispute as soon as practicable and in any event within 30 Business Days after the date of the independent expert's acceptance in writing of his or her appointment or such longer period as may be agreed between the parties.
    8. The independent expert's decision will be final and binding on the parties.
    9. The independent expert will be required to undertake to the Landlord and the Tenant to keep confidential all matters coming to the independent expert's knowledge by reason of his or her appointment, the performance of his or her duties and the exercise of his or her powers.
    10. The costs of the independent expert will be borne by the parties equally.
  1. Amalgamation of Disputes

The parties may by agreement permit a dispute being dealt with under clause 13.3 to be amalgamated with any other dispute or disputes between the parties.

* 1. Continue to Perform

Notwithstanding the existence of a dispute, each party must continue to perform its obligations under this agreement.

1. GST
   1. Definitions

Words used in this clause that are defined in the GST Law have the meaning given in that legislation.

* 1. Consideration is GST-exclusive

Unless otherwise specified, all amounts payable under this agreement are exclusive of GST and must be calculated without regard to GST.

* 1. GST payable on taxable supply
     1. If a supply made under this agreement is a taxable supply, the recipient of that taxable supply (**Recipient**) must, in addition to any other consideration, pay to the party making the taxable supply (**Supplier**) the amount of GST in respect of the supply.
     2. The Recipient will only be required to pay an amount of GST to the Supplier if and when the Supplier provides a valid tax invoice to the Recipient in respect of the taxable supply.
     3. If there is an adjustment to a taxable supply made under this agreement then the Supplier must provide an adjustment note to the Recipient.
     4. The amount of a party’s entitlement under this agreement to recovery or compensation for any of its costs, expenses or liabilities is reduced by the input tax credits to which that party is entitled in respect of those costs, expenses or liabilities.

1. CONFIDENTIAL INFORMATION
   1. Obligation

Subject to this clause, each party must maintain in confidence all Confidential Information and ensure that the Confidential Information is kept confidential.

* 1. Exceptions to confidentiality

A party (**Recipient**) may reveal Confidential Information of another party (**Provider**):

* + 1. if required by law to disclose, in which case the Recipient must immediately notify the Provider of the requirement and must take lawful steps and permit the Provider to oppose or restrict the disclosure to preserve, as far as possible, the confidentiality of the Confidential Information;
    2. if the Confidential Information is in or enters the public domain for reasons other than a breach of this agreement;
    3. if the Confidential Information is disclosed to the Recipient by a third party legally entitled to disclose that information and who is not under an obligation of confidentiality to the Provider; or
    4. to its professional advisers to obtain professional advice.
  1. Survival of clause

This clause 15 will survive the termination of this agreement.

1. WARRANTIES OF CAPACITY
   1. General warranties

Each party warrants to each other party that:

* + 1. it has full legal capacity and power to enter into, exercise its rights and perform its obligations under this agreement;
    2. all conditions and things required by applicable Law to be fulfilled or done (including the obtaining of any necessary Approvals) in order:
       1. to enable it lawfully to enter into, and exercise its rights and perform its obligations under this agreement; and
       2. to make this agreement admissible in evidence in court,

have been fulfilled or done;

* + 1. this agreement creates legal, valid and binding obligations, enforceable against the relevant party in accordance with its terms; and
    2. unless otherwise stated, it has not entered into this agreement in the capacity of trustee of any trust.
  1. Power of attorney

If an attorney executes this agreement on behalf of any party, the attorney declares that it has no notice of the revocation of that power of attorney.

1. GENERAL PROVISIONS
   1. Entire agreement

This agreement constitutes the entire agreement between the parties regarding the matters set out in it and supersedes any prior representations, understandings or arrangements made between the parties, whether orally or in writing.

* 1. Variation

This agreement must not be varied except by a later written document executed by all parties.

* 1. Waiver

A right created by this agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right does not constitute a waiver of that right, nor will a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.

* 1. Further assurances

Each party must promptly execute all documents and do everything necessary or desirable to give full effect to the arrangements contained in this agreement.

* 1. Time for doing acts
     1. If:
        1. the time for doing any act or thing required to be done; or
        2. a notice period specified in this agreement,

expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.

* + 1. If any act or thing required to be done is done after 5 pm on the specified day, it is taken to have been done on the following Business Day.
  1. Governing law and jurisdiction
     1. The laws applicable in the state of Victoria govern this agreement.
     2. The parties submit to the non-exclusive jurisdiction of the courts of the Victoria and any courts competent to hear appeals from those courts.
  2. Severance

If any clause or part of any clause is in any way unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid and legal. If this is not possible, the clause (or where possible, the offending part) is to be severed from this agreement without affecting the enforceability, validity or legality of the remaining clauses (or parts of those clauses) which will continue in full force and effect.

* 1. Preservation of existing rights

The expiration or termination of this agreement does not affect any right that has accrued to a party before the expiration or termination date.

* 1. No merger

Any right or obligation of any party that is expressed to operate or have effect on or after the completion, expiration or termination of this agreement for any reason, will not merge on the occurrence of that event but will remain in full force and effect.

* 1. Special conditions

The special conditions set out in Annexure C form part of this agreement and will prevail to the extent of any inconsistency with the general conditions.

* 1. Relationship of parties

Unless otherwise stated:

* + 1. nothing in this agreement creates a joint venture, partnership, or the relationship of principal and agent, or employee and employer between the parties; and
    2. no party has the authority to bind any other party by any representation, declaration or admission, or to make any contract or commitment on behalf of any other party or to pledge any other party’s credit.
  1. Legal expenses
     1. Each party must pay its own legal costs and disbursements in connection with the negotiation, preparation, execution and carrying into effect of this agreement.
     2. The Tenant must pay, when due, all stamp duty and registration fees incurred, due or payable on or in connection with this agreement.
  2. No fetter

Nothing in this agreement will fetter or prejudice the exercise by the Landlord of any discretion or right it has under any Law.

* 1. Notices

Any notice, demand, consent, approval, request or other communication (notice) to be given under this agreement must be in writing and must be given to the recipient at its Address for Service by being:

* + 1. hand delivered;
    2. sent by email;
    3. sent by prepaid ordinary mail within Australia; or
    4. sent by prepaid Express Post International airmail to the Address for Service of the recipient party, if the Address for Service of the sender and the recipient are in different countries.

A notice is given if:

* + 1. hand delivered, on the date of delivery;
    2. sent by email, on the date the date the email enters an information system which is under the control of the intended recipient;
    3. sent by prepaid ordinary mail within Australia, on the date that is 2 Business Days after the date of posting; or
    4. sent by prepaid Express Post International airmail between countries, on the date that is 10 Business Days after the date of posting.
  1. Electronic execution
     1. A party may electronically sign a soft copy of this agreement and by doing so:
        1. will bind itself to this agreement: and
        2. satisfy any statutory or other requirements for this agreement to be in writing and signed by that party.
     2. Each party warrants that immediately prior to entering into this agreement, it has unconditionally consented to:
        1. the requirement for a signature under any law being met; and
        2. any other party to this deed executing it,

by any method of electronic signature that other party uses (at that other party's discretion), including signing on an electronic device or by digital signature.

* + 1. A soft copy of this agreement signed by all parties will constitute an executed original counterpart and if that document is printed with the parties’ electronic signatures appearing that print-out will also constitute an executed original counterpart.
    2. This agreement may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes the agreement of each party who has executed and delivered that counterpart. All such counterparts taken together will be deemed to constitute one and the same agreement.
    3. Without limitation, the parties agree that this agreement may be exchanged by hand, post, facsimile or any electronic method that evidences a party's execution of this agreement, including by a party forwarding a copy of its executed counterpart by hand, post, facsimile or electronic means to the other party.

REFERNCE SCHEDULE

|  |  |  |  |
| --- | --- | --- | --- |
| **Item** | **Subject** | **Particulars** | |
|  | **Landlord** | Name | [insert] |
| Address | [insert] |
| Email | [insert] |
| Principal contact | [insert] |
|  | **Tenant** | Name | [insert] |
| Address | [insert] |
| Email | [insert] |
| Principal contact | [insert] |
|  | **Land** | The land described as [insert street address] being the land contained in certificate(s) of title volume [insert] folio [insert]. | |
|  | **Sunset Date** | [insert] | |

**EXECUTED** as an agreement.

**Execution by the Landlord**

**Execution by the Tenant**

*\*Sample common seal execution*

|  |  |  |
| --- | --- | --- |
| The **COMMON SEAL** of **[INSERT ORGANISATION NAME AND ABN/ACN]** was hereto affixed in the presence of: | )  )  ) |  |
|  |  |  |
|  |  |  |
|  |  |  |
| [insert signatory position] |  | Full name |
|  |  |  |
|  |  |  |
|  |  |  |
| [insert signatory position] |  | Full name |

*\*Sample corporations act execution*

|  |  |  |
| --- | --- | --- |
| **EXECUTED** by **[INSERT COMPANY NAME AND ACN]** in accordance with section 127 of the *Corporations Act 2001* (Cth): | )  )  ) |  |
|  |  |  |
|  |  |  |
|  |  |  |
| Director |  | Full name |
|  |  |  |
|  |  |  |
| Usual address |  |  |
|  |  |  |
|  |  |  |
| Director/Secretary |  | Full name |
|  |  |  |
|  |  |  |
| Usual address |  |  |

|  |
| --- |
| annexure A |
| Housing Project Design Brief |

|  |
| --- |
| annexure B |
| Conditions Precedent   1. Confirmation of funding   The Tenant must confirm in writing to the Landlord that the Tenant has secured adequate funding to enable the Tenant to complete the Works in accordance with this agreement and to operate the Housing Project.  Condition Precedent Date: [insert either date (xx/xx/xxxx) or number of weeks/months following execution of this Agreement]   1. Acceptability of Approvals   Any Approvals necessary to lawfully commence the Works and operate the Housing Project must be obtained by the Tenant on terms acceptable to both the Tenant and the Landlord (acting reasonably).  Condition Precedent Date: [insert either date (xx/xx/xxxx) or number of weeks/months following execution of this Agreement]   1. Landlord approval of Works.   The Landlord must provide to the Tenant a written endorsement of the Development Program and Design Brief.  Condition Precedent Date: [insert either date (xx/xx/xxxx) or number of weeks/months following execution of this Agreement]   1. Nomination Agreement   The parties agree to enter into a nomination agreement in respect of the Dwellings, allowing the Landlord to nominate residents to occupy a certain number of those Dwellings.  The parties will agree to the conditions and form of the nomination agreement on or before the Condition Precedent Date.  Condition Precedent Date: [insert either date (xx/xx/xxxx) or number of weeks/months following execution of this Agreement] |

|  |
| --- |
| annexure C |
| Special Conditions |

*\*For use where landlord is a Council*

1. Local government lease
   1. The Landlord’s authority

The Tenant acknowledges that the Landlord enters into this agreement in accordance with the requirements of the Local Government Act 1989 and the Local Government Act 2020. Without limiting the warranties given by the Landlord in clause 16, if and to the extent to which any obligation of or undertaking by the Landlord is not authorised or permitted by the terms of the Local Government Act 1989 or the Local Government Act 2020, that obligation or undertaking will be void as against the Landlord, will be severed from the remaining provisions of this agreement and will be of no force or effect.

* 1. Reservations for the Landlord

This agreement does not fetter or restrict the powers or discretions of the Landlord in relation to any powers or obligations the Landlord has under any Act, regulation, local law or by-law that may apply to the subject matter of this agreement or to any party to this agreement.

* 1. Reasonable endeavours

If there is any statement in this agreement to the effect that the Landlord must use reasonable endeavours in relation to any obligation, objective or other matter, or if there is any such obligation implied by law, the Landlord is not obliged to:

* + 1. interfere with or influence the exercise of any statutory power or discretion by any body, including another governmental agency;
    2. exercise a power or discretion in a manner that promotes the objectives and expected outcomes of this agreement if the Landlord regards that exercise as not in the public interest;
    3. develop or implement new policy in a manner that is only consistent with the objectives and expected outcomes of this agreement;
    4. procure legislation in the future in a manner that is only consistent with the objectives and expected outcomes of this agreement; or
    5. act in any other way that the Landlord regards as not in the public interest.
  1. The Landlord consents and approvals

Where, in this agreement, the Tenant is required to obtain or apply for the consent or approval of the Landlord and, under the relevant provision of this agreement, the Landlord is expressly required to act reasonably in considering any such application, or not to unreasonably withhold any such consent or approval, the Landlord may grant any such consent or approval subject to conditions which the Landlord considers, in good faith, are reasonable.

* 1. In the public interest

The Landlord considers that it is in the public interest to enter into this agreement and the Lease on the terms and conditions contained herein.

* 1. The Landlord’s statutory powers under the Local Government Act
     1. This agreement is subject to and conditional upon the Landlord giving public notice of the proposed Lease under section 115 of the Local Government Act 2020, hearing any submissions made under section 223 of the Local Government Act 1989 and resolving to enter into this agreement and lease the Land in accordance with the terms of this agreement.
     2. Where section 115 of the Local Government Act 2020 requires, the Landlord must undertake a community engagement process in relation to the proposed lease of the Land as soon as practicable after the parties have entered into this agreement.
     3. If, having complied with section 115 of the Local Government Act 2020 and section 223 of the Local Government Act 1989, the Landlord decides (in its absolute discretion) not to proceed with the lease of the Land, the Landlord shall have the right to rescind this agreement by giving notice in writing to that effect to the Tenant within 14 days of the Landlord deciding whether to proceed with the lease of the Land.
     4. If, after having complied with section 115 of the Local Government Act 2020 and section 223 of the Local Government Act 1989, the Landlord decides to proceed with the Housing Project and gives notice to the Tenant to that affect, the Landlord shall no longer have the right to rescind this Agreement pursuant to the provision.
     5. Upon rescission of this agreement pursuant to this provision, the Tenant acknowledges that the Tenant shall have no action, right, claim or demand against the Landlord under this agreement or arising from or out of the rescission by the Landlord pursuant to this clause.

*\*If landlord is a ACCO*

[insert ACCO requirements]

*\*If landlord is a head-tenant*

[insert head landlord requirements]

*\* Project control and oversight (note: subclause 19.1 and 19.2 may be used together or independently of each other, as the project requires).*

1. Project control
   1. Project Manager

The Tenant must appoint a Project Manager and procure the Project Manager to:

* + 1. provide the Tenant with advice when engaging the Contractor;
    2. negotiate the terms, conditions and particulars of the Works directly with the Contractor on behalf of the Tenant;
    3. keep the Landlord generally informed as to progress of the Works and of the anticipated dates for completion of the various stages of the Works; and
    4. take all reasonable steps to ensure any contractor or person engaged in relation to the Works, including the Contractor, is adequately insured in respect of Liability arising out of damage caused to the Land, the Dwellings, the Improvements or the Tenant’s property.
  1. Project Control Group
     1. As soon as practical after the Execution Date, the parties will establish a Project Control Group.
     2. The members of the Project Control Group will include a representative from:
        1. the Landlord;
        2. the Tenant; and
        3. the Contractor;
        4. the Project Manager; *\*delete if not applicable*
        5. the financier of the works; *\*delete if not applicable*
     3. The Project Control Group will act as a forum:
        1. for the provision of information pursuant to and in accordance with this agreement;
        2. to review the design development of the Project and the plans and specifications of the Works;
        3. to review all matters pertaining to obtaining a planning permit;
        4. for the purposes of discussing and reviewing all matters relating to the Works; and
        5. for the purposes of tracking compliance with this agreement.
     4. As and from the Execution Date, the Project Control Group will meet as frequently as agreed between the parties (acting reasonably).

*\*where CHO requires the ability to pre-inspect and test site for contamination*

1. agreement subject to site due diligence
   1. Variation of general conditions

The following general conditions are deleted:

* + 1. clause 5.2;
    2. clause 6.1(b); and
    3. clause 6.1(c).
  1. Site inspection and testing

The Landlord grants the Tenant and its consultants and advisors a licence to access to the Land to undertake inspections and tests, subject to the following conditions:

* + 1. the Tenant must give the Landlord prior notice of intended inspections and testing;
    2. the inspection and testing must occur within 20 Business Days of Execution Date;
    3. in carrying out any testing and investigations the Tenant must not damage the Land, and must, on request, reinstate any damage that is caused by such testing and investigation;
    4. the Tenant agrees that any such access is taken at the sole risk of the Tenant and its consultants and advisors, and the Tenant:
       1. releases the Landlord from and in respect of all Claims it may have against the Landlord in relation to any and all death or injury suffered, or loss and damage incurred, howsoever resulting from, or in connection with such access, except to the extent caused or contributed to by the negligent act or default or breach of this agreement by the Landlord or its agents or advisors; and
       2. indemnifies the Landlord for all Claims made against the Landlord, and Liability incurred by the Landlord in connection with, or as a result of death or injury suffered, or loss and damage incurred, as a result of, or in connection with such access, except to the extent caused or contributed to by the negligent act or default or breach of this agreement by the Landlord or its agents or advisors.
  1. Termination following site inspection

Where the inspection identifies Site Conditions which are unsatisfactory to the Tenant, the Tenant may provide written notice to the Landlord immediately terminating this Agreement:

* + 1. where the Tenant or its consultants and advisors have inspected the Land within the period specified in clause 20.2(b);
    2. no later than 10 Business Days following the inspection of the Land; and
    3. supported by reasonable evidence of the Site Conditions affecting the Land.
  1. Tenant accepts the Land and Site Conditions
     1. Subject to inspection and testing by the Tenant pursuant to this clause 20, the Tenant:
        1. accepts the condition of the Land at the Execution Date;
        2. agrees that it has management and control of the Land for the purposes of the *Environment Protection Act 2017;* and
        3. is responsible for the Land and the Site Conditions and will not be entitled to, and will not make, any Claim in connection with the Land or the Site Conditions.
     2. The Tenant acknowledges that it has carried out its own investigations and assessments with regard to the existence, nature, extent and potential effect of Site Conditions prior to taking possession and control of the Land, and that it has entered into this agreement, and will enter into the Lease, in reliance upon its own assessment of such matters, and not in reliance, in any respect on any other information or material provided to it by the Landlord or any of its consultants, representatives or associates.

\**For use where Landlord will have the right to approve the Design Documents*

1. landlord approval of design documents
   1. Design development and documentation

The Tenant must develop and document the design for the Works in accordance with the following provisions:

* + 1. The Tenant must promptly submit all Design Documents to the Landlord.
    2. If the Landlord has any objection to any Design Documents, it must respond within 10 Business Days of receipt of those documents, giving details of its objections (acting reasonably).
    3. If the Landlord raises an objection to any Design Document, the Tenant and the Landlord must negotiate in good faith to resolve the objection. If the Tenant and the Landlord are unable to resolve the objection within 10 Business Days, the objection must be referred to expert determination in accordance with clause 13.3.
    4. If the Landlord does not raise an objection to any Design Document, within the time specified in clause 21.1(b), the Landlord will be deemed to have no objection to that Design Document and may not raise any later objection.
    5. The Landlord may not raise any objection in relation to a Design Document unless the design or the works depicted by the document:
       1. is inconsistent with the Design Brief; or
       2. does not comply with the requirements of this agreement in any other respect.
    6. A dispute between the parties regarding whether an objection raised by the Landlord is properly made under clause 21(e) may be referred by either party for expert determination under clause 13.3.
    7. The Landlord is not required to check for or identify omissions, errors or inaccuracies in any Design Documents.

*\*For use where the Landlord will own and have responsibility for the Improvements following completion*

1. Landlord ownership of Improvements
   * 1. Clause 8 of the general conditions is deleted.
     2. As consideration for the Landlord entering into this agreement, the parties agree that ownership in the Improvements will vest in the Landlord from the Date of Practical Completion.
     3. Up to the Date of Practical Completion, the Improvements are at the risk of the Tenant and the Tenant must take all reasonable steps to preserve and protect the Improvements.
     4. The parties acknowledge that from the Lease Commencement Date, the Improvements will be dealt with in accordance with the Lease.

|  |
| --- |
| annexure D |
| Lease |