

MINUTES OF THE SPECIAL MEETING OF COUNCIL

11 JULY 2016

Item 3.2 Application S173/2016/5 and S173/2016/8 - Ending of two
Section 173 Agreements At 135 City Vista Court, Plumpton
Appendix 2 Appendix 2 - Section 173 Agreement (AL177353H)

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Form 18

Section 181

APPLICATION BY A RESPONSIBLE AUTHORITY FOR THE MAKING OF A RECORDING OF AN AGREEMENT

Planning and Environment Act 1987

Lodged at the Land Titles Office by:

Name: Harwood Andrews
Phone: 5225 5225
Address: 70 Gheringhap Street, Geelong, 3220
DX 22019 Geelong
Ref: 3HPC:21400315
Customer Code: 2235J

The Authority having made an agreement referred to in section 181(1) of the
Planning and Environment Act 1987 requires a recording to be made in the
Register for the land.

Land: Certificate of title volume 10844 folio 147

Authority: Melton City Council of 232 High Street, Melton 3337

Section and Act under which agreement made: Section 173 of the Planning and
Environment Act 1987.

A copy of the agreement is attached to this application.

Brian Bennett

Signature for the Authority:

Brian Bennett
Coordinator Major Developments

Name of Officer and position held:

12/6/14
Date:

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THIS AGREEMENT is made the 6 day of June 2014



BETWEEN

1. **MELTON CITY COUNCIL** of 232 High Street, Melton in the State of Victoria (**Responsible Authority**) and
2. **PHENOMENAL PROPERTIES PTY LTD** ACN 128 068 959 of Suite 3, Level 1, 74 Doncaster Road, Balwyn North in the said State (**Owner**)

RECITALS:

- R.1. The Owner is the registered proprietor of the land known as 135 City Vista Court, Plumpton in the said State, being the land described in Certificate of Title Volume 10844 folio 147 and more particularly described as Lot 1 on PS 526039P (**Land**).
- R.2. The Responsible Authority is responsible for the administration and enforcement of the Planning Scheme pursuant to the provisions of the Act.
- R.3. The Responsible Authority issued planning permit number PA2013/3848/1 on 18 April 2013 allowing a two lot subdivision, creation of an easement and a reserve (**Permit**).
- R.4. Condition 3 of the Permit provides as follows:

"Prior to the issue of Statement of Compliance for the subdivision, the owner must enter into an agreement with Council made pursuant to Section 173 of the Planning and Environment Act 1987 to provide for the following:

(a) The Development Infrastructure Levy as required by the Taylors Hill West PSP, in relation to Lot 1, must be paid at the time of either the further subdivision of the lot, or the issue of a planning permit for the use of the land for a non-government school.

Prior to the issue of a Statement of Compliance for the subdivision, application must be made to the Registrar of Titles to register the Section 173 agreement on the title to the land under Section 181 of the Act.

The landowner under this permit must pay the reasonable costs of the preparation, execution and registration of the Section 173 agreement."
- R.5. This Agreement is entered into between the Responsible Authority and the Owner pursuant to section 173 of the Act in order to satisfy the requirement of condition 3 of the Permit, and to achieve the objectives of planning in Victoria.
- R.6. The Land is subject to registered mortgage number AH571927U registered on 21 October 2010 in favour of National Australia Bank Ltd, which mortgagee, as evidenced by its consent on the attestation pages, consents to this Agreement.

IT IS AGREED AS FOLLOWS:

Definitions

1. In this Agreement unless inconsistent with the context or subject matter:
 - 1.1. **Act** means the *Planning and Environment Act 1987*;
 - 1.2. **Agreement** means this Agreement and any agreement executed by the parties varying or expressed to be supplemental to this Agreement;

- 1.3. **DCP** means the Taylors Hill West Precinct Structure Plan Development Contributions Plan dated July 2010 prepared by Growth Areas Authority as may be amended from time to time;
- 1.4. **Development Infrastructure Levy** means the levy to be paid with respect to the Lot A Land being an amount specified in the Taylors Hill West Development Contributions Plan as indexed from time to time;
- 1.5. **Land** means the land described in Recital R.1;
- 1.6. **Lot A Land** means the land described as 'Lot A' on proposed Plan of Subdivision number PS646839J prepared in accordance with the Permit;
- 1.7. **Mortgagee** means the person or persons registered or entitled from time to time to be registered by the Registrar of Titles as Mortgagee of the Land or any part of it;
- 1.8. **Owner** means the person or persons registered or entitled from time to time to be registered by the Registrar of Titles as the proprietor or proprietors of an estate in fee simple of the Land or any part of it, and includes a Mortgagee in possession;
- 1.9. **party or parties** means the Owner and the Responsible Authority under this Agreement as appropriate;
- 1.10. **Permit** means the planning permit issued by the Responsible Authority described in Recital R.3;
- 1.11. **Planning Scheme** means the Melton City Planning Scheme and any successor instrument or other planning scheme which applies to the Land;
- 1.12. **PSP** means the plan entitled 'Taylors Hill West Precinct Structure Plan (Including the Taylors Hill West Native Vegetation Precinct Plan)' prepared by the Growth Areas Authority and dated May 2010; and
- 1.13. **Responsible Authority** means Melton City Council as the authority responsible for administering and enforcing the Planning Scheme and includes its agents, officers, employees, servants, workers and contractors and any subsequent person or body which is the responsible authority for the Planning Scheme.

Interpretation

2. In the interpretation of this Agreement unless inconsistent with the context or subject matter:
 - 2.1. The singular includes the plural and the plural includes the singular;
 - 2.2. A reference to a gender includes a reference to all other genders;
 - 2.3. Words (including defined expressions) denoting persons will be deemed to include all trusts, bodies and associations, corporate or unincorporated, and vice versa;
 - 2.4. A reference to a person includes a reference to a firm, corporation, association or other entity and their successors in law;
 - 2.5. A reference to a statute includes any statute amending, consolidating or replacing that statute and includes any subordinate instruments made under that statute;
 - 2.6. The Recitals to this Agreement are and will be deemed to form part of this Agreement including any terms defined within the Recitals;
 - 2.7. References to the parties will include their transferees, heirs, assigns, and liquidators, executors and legal personal representatives as the case may be;

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- 2.8. Reference to a document or agreement includes reference to that document or agreement as changed, novated or replaced from time to time; and
- 2.9. Where a word or phrase is given a definite meaning in this Agreement, a part of speech or other grammatical form for that word or phrase has a corresponding meaning.

Specific Obligations of the Owner

3. The Owner covenants, acknowledges and agrees with the Responsible Authority that the Development Infrastructure Levy must be paid to the Responsible Authority to its satisfaction and in accordance with the DCP upon the occurrence of the first of the following events:
- i) The issue of a Statement of Compliance allowing the further subdivision of the Lot A Land; or
 - ii) The issue of a planning permit allowing the use of the Lot A Land for the purpose of a non-government school.

Further Covenants of the Owner

4. The Owner warrants and covenants with the Responsible Authority that:
- 4.1. It is the registered proprietor (or entitled to be so) of the Land;
 - 4.2. Save as shown in the certificate of title to the Land, there are no mortgages, liens, charges, easements or other encumbrances or any rights inherent in any person affecting the Land or any part of it and not disclosed by the usual searches;
 - 4.3. Neither the Land nor any part of it is subject to any right obtained by adverse possession or subject to any easements, rights or encumbrances mentioned in section 42 of the *Transfer of Land Act 1958* (Vic);
 - 4.4. It will not sell, transfer, dispose of, assign, mortgage or otherwise part with possession of the Land or any part of it without first providing to its successors a copy of this Agreement;
 - 4.5. It will within 28 days of written demand pay to the Responsible Authority the Responsible Authority's reasonable costs (including legal costs) and expenses of and incidental to the:
 - 4.5.1. negotiation, preparation, execution and recording of this Agreement; and
 - 4.5.2. assessment, negotiation, preparation, execution and recording of any proposed amendment to this Agreement.
- To the extent that such costs and expenses constitute legal professional costs, the Responsible Authority may at its absolute discretion have these costs assessed by the Law Institute of Victoria and in that event the parties shall be bound the amount of that assessment, with any fee for obtaining such an assessment being borne equally by the Responsible Authority and the Owner. Such costs payable by the Owner will include the costs and disbursements associated with the recording, cancellation or alteration of this Agreement in the Register;
- 4.6. It will do all that is necessary to enable the Responsible Authority to make application to the Registrar of Titles to record this Agreement in the Register in accordance with the Act, including the signing of any further agreement, acknowledgment or other document; and
 - 4.7. Until such time as this Agreement is recorded in the Register, the Owner must ensure that successors in title will give effect to this Agreement, and do all acts and

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sign all documents which will require those successors to give effect to this Agreement, including executing a deed agreeing to be bound by the terms of this Agreement.

Further assurance

5. The parties to this Agreement will do all things necessary (including signing any further agreement, acknowledgement or document) to give full effect to the terms of this Agreement and to enable this Agreement to be recorded in the Register in accordance with the Act.

Amendment

6. This Agreement may be amended only in accordance with the requirements of the Act.

No waiver

7. No waiver by any party of any default in the strict and literal performance of or compliance with any provision, condition or requirement in this Agreement will be deemed to be a waiver of strict and literal performance of and compliance with any other provision, condition or requirement of this Agreement nor to be a waiver of or in any way release any party from compliance with any provision, condition or requirement in the future nor will any delay or omission of any party to exercise any right under this Agreement in any manner impair the exercise of such right accruing to it thereafter.

No Fettering of Powers of Responsible Authority

8. The parties acknowledge and agree that this Agreement does not fetter or restrict the power or discretion of the Responsible Authority to make any decision or impose any requirements or conditions in connection with the granting of any planning approval or certification of any plans of subdivision applicable to the Land or relating to any use or development of the Land.

Notices

9. All notices and other communications under this Agreement will be sent by prepaid mail, by hand delivery, email or by facsimile to the addresses of the parties as specified in this Agreement or to such other address or person as any party may specify by notice in writing to the other party or parties, and may be sent by an agent of the party sending the notice. Each notice or communication will be deemed to have been duly received:
- 9.1. not later than two business days after being deposited in the mail with postage prepaid;
 - 9.2. when delivered by hand;
 - 9.3. if sent by email upon production of a delivery confirmation report received by the sender which records the time the email was delivered unless the sender received a delivery failure notification; or
 - 9.4. if sent by facsimile transmission upon completion of that transmission and production of a transmission report stating that the facsimile was sent to the addressee's facsimile number.

Costs on Default

10. If the Owner defaults in the performance of any obligations under this Agreement it will pay to the Responsible Authority its reasonable costs of action taken to achieve compliance with this Agreement.

Invalidity of any Clause

11. Notwithstanding anything to the contrary in this Agreement, if any provision of this Agreement will be invalid and not enforceable in accordance with its terms, all other provisions which are

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self-sustaining and capable of separate enforcement without regard to the invalid provisions and will be and continue to be valid and enforceable in accordance with those terms.

Agreement Binding on Successors of Owners

12. This Agreement will extend to and bind the Owner's successors, assigns, administrators, transferees and legal personal representatives and the obligations imposed upon them will also be binding on their successors, transferees, purchasers, mortgagees and assigns as if each of them had separately executed this Agreement.

Joint Obligations

13. In the case of each party that consists of more than one person (including in that expression any corporation) each of those persons covenants, agrees and declares that all of the covenants, agreements, declarations and consents contained in this Agreement and made and given by that party have been entered into, made and given and are binding upon that person both severally and also jointly with the other person or persons constituting that party.

Entire Agreement

14. This Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all previous Agreements or understandings between the parties in connection with its subject matter.

Commencement and Ending of Agreement

15. This Agreement will commence on date that it bears.
16. This Agreement will end by agreement between the parties or otherwise in accordance with the provisions of the Act.

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EXECUTED AS A DEED

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THE COMMON SEAL of MELTON CITY
COUNCIL was affixed hereto in the presence of:

Mayor

Chief Executive Officer



EXECUTED by PHENOMENAL PROPERTIES
PTY LTD ACN 128 068 959 by being signed by
the authorised person, the company not having a
common seal:

JOHN DAVID WHEELER

Sole Director & Sole Company Secretary

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MORTGAGEE CONSENT

NATIONAL AUSTRALIA BANK as Mortgagee under Instrument of Mortgage No. AH571927U consents to the Owner entering into this Agreement and agrees to be bound by the terms and conditions of this Agreement.

DATED:

Executed for and on behalf of

NATIONAL AUSTRALIA BANK

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Attorney

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