

# 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 3 Appendix 3 - Section 173 Agreement (AL377156U)

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**AL377156U**

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Application by  
Responsible Authority,  
Relevant Authority,  
Referral Authority or Council  
for the making of a recording of an  
agreement  
Section 181(1) Planning and Environment Act 1987

Lodged by:  
Name: Norton Rose Fulbright Australia  
Phone: 8686 6000  
Address: RACV Tower, 485 Bourke Street, Melbourne  
Ref: 2809997  
Customer Code: 1035773

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1724X

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, Lot No 1 on Plan of Subdivision  
526039P and generally known as 135 City Vista Court, Plumpton in the State of  
Victoria.

Authority: Melton City Council

Section and Act under which agreement made: Section 173 *Planning & Environment Act 1987*

A copy of the Agreement is attached to this Application.

Signature for the Authority: 

Name of Officer: 

Date: 16 September 2014

**AL377156U**



**NORTON ROSE FULBRIGHT**

Dated 16 September 2014

## Planning Agreement

### Parties

**Melton City Council**

**Melbourne Water Corporation**  
ABN 81 945 386 953

**Phenomenal Properties Pty Ltd**  
ABN 92 128 068 959

Elisa de Wit  
Norton Rose Fulbright Australia  
RACV Tower, 485 Bourke Street  
Melbourne VIC 3000  
Tel: +61 (0)3 8686 8000  
nortonrosefulbright.com  
Our ref: 2809997

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**AL377156U**



Deed dated 16 September 2014 under section 173 of the *Planning and Environment Act 1987 (Act)*

**Parties:**

**Melton City Council**  
of 232 High Street, Melton in the State of Victoria  
(Responsible Authority)

**Melbourne Water Corporation**  
of 990 Latrobe Street, Docklands in the State of Victoria  
(Melbourne Water)

**Phenomenal Properties Pty Ltd**  
of 3/17 Myamyn Street, Armadale in the State of Victoria  
(Owner)

## Introduction

- A The Responsible Authority is responsible for the administration and enforcement of the Planning Scheme under the provisions of the Act.
- B The Owner is the registered proprietor or entitled to be registered as the proprietor of an estate in fee simple of the Land.
- C The Land is subject to registered mortgage no. AH571927U in favour of the Mortgagee. The Mortgagee has consented to the Owner entering into this Agreement.
- D On 18 April 2013 the Responsible Authority issued the Planning Permit.
- E This Agreement arises from the requirements of condition 15 of the Planning Permit.
- F Condition 15 on the Planning Permit provides as follows:
- Prior to the issue of a Statement of Compliance for the subdivision, the owner shall enter into and comply with an agreement with Melbourne Water Corporation for the acceptance of surface and storm water from the subject land directly or indirectly into Melbourne Water's drainage systems and waterways, the provision of drainage works and other matters in accordance with the powers of Melbourne Water Corporation under the Water Act 1989.*
- G On 20 March 2014, pursuant to condition 15 of the Planning Permit Melbourne Water provided the Owner with an Offer of Proposed Conditions of Agreement applicable to the Land (Conditions of Agreement). On 15 April 2014 the Owner accepted the Conditions of Agreement, by signing the document entitled "Acceptance / Remittance Form".

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- H The Conditions of Agreement provide that the Owner must pay drainage contributions as follows:

<b>Drainage Contributions</b> <b>Scheme: Taylors Hill West DS</b> <b>Rate Type: Residential</b>	
<b>Hydraulic</b> 2.2110 ha @ \$37,768/ha	\$83,505.00
<b>Scheme Storm Water Quality</b> 2.2110 ha @ \$0/ha	\$0.00
<b>General Storm Water Quality</b> 2.2110 ha @ \$0/ha	\$0.00
<b>Total Payable:</b>	<b>\$83,505.00</b>

- I The Conditions of Agreement also provide that:

*"The owners request to defer payment of drainage contributions and the issue of a compliance letter to Council is acceptable to Melbourne Water subject to the owner entering into a 173 Agreement with Melbourne Water. A compliance letter will not be issued to Council until the 173 Agreement is signed by all parties."*

- J The parties enter into this Agreement to facilitate the requirements referred to in Recital I above.

## It is agreed

### 1 Definitions and interpretation

#### 1.1 Definitions

In this Agreement:

- (1) **Act** means the *Planning and Environment Act 1987* (Vic);
- (2) **Agreement** means this document and any agreement executed by the parties expressed to be supplemental to this document;
- (3) **Conditions of Agreement** has the meaning given in Recital G;
- (4) **Drainage Contributions** means the hydraulic drainage contributions relating to Lot 1;
- (5) **GST Act** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (as amended) from time to time;
- (6) **Land** means the land described in certificate of title volume 10844 folio 147, lot no 1 on Plan of subdivision 526039P and generally known as 135 City Vista Court, Plumpton in the state of Victoria;
- (7) **Letter of Release** means a letter from Melbourne Water certifying that all applicable conditions of the Conditions of Agreement have been complied with;
- (8) **Lot 1** means lot 1 on the Proposed Plan of Subdivision;

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- (9) **Melbourne Water** means Melbourne Water Corporation (ABN 81 945 386 953) and includes its agents, officers, employees, servants, workers and contractors;
- (10) **Mortgagee** means National Australia Bank Ltd being the person registered or entitled to be registered as the mortgagee of the Land or any part of it;
- (11) **Owner** means the person or persons registered or entitled to be registered by the Registrar of Titles as proprietor or proprietors of an estate in fee simple of the Land or any part of it and includes a mortgagee in possession;
- (12) **Planning Permit** means the Planning Permit number PA2013/3848/1 for 135 City Vista Court Plumpton, including any plans endorsed under it;
- (13) **Planning Scheme** means the Melton Planning Scheme and any successor instrument or other planning scheme which applies to the Land;
- (14) **Proposed Plan of Subdivision** means the proposed plan of subdivision PS646839J prepared by Cardno, Ref: CG130246-2, version D, a copy of which is attached at Schedule 1 to this Agreement;
- (15) **Responsible Authority** means Melton City Council or its successor as the authority responsible for administering and enforcing the Planning Scheme and includes its agents, officers, employees, servants, workers and contractors; and
- (16) **Tribunal** means the Victorian Civil and Administrative Tribunal.

## 1.2 Interpretation

- (1) Reference to:
  - (a) one gender includes the others;
  - (b) the singular includes the plural and the plural includes the singular;
  - (c) a person includes a body corporate;
  - (d) a party includes the party's executors, administrators, successors and permitted assigns;
  - (e) a thing includes the whole and each part of it separately;
  - (f) a statute, regulation, code or other law or a provision of any of them includes:
    - (i) any amendment or replacement of it; and
    - (ii) another regulation or other statutory instrument made under it, or made under it as amended or replaced; and
  - (g) dollars means Australian dollars unless otherwise stated.
- (2) "Including" and similar expressions are not words of limitation.
- (3) Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
- (4) Headings and any table of contents or index are for convenience only and do not form part of this Agreement or affect its interpretation.

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- (5) A provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the Agreement or the inclusion of the provision in the Agreement.
- (6) If an act must be done on a specified day which is not a Business Day, it must be done instead on the next Business Day.
- (7) This Agreement does not in any way limit the application of the Act.

### 1.3 Parties

- (1) If a party consists of more than 1 person, this Agreement binds each of them separately and any 2 or more of them jointly.
- (2) An obligation, representation or warranty in favour of more than 1 person is for the benefit of them separately and jointly.
- (3) A party which is a trustee is bound both personally and in its capacity as a trustee.

## 2 Obligations run with the Land

- 2.1 The obligations of the Owner under this Agreement, take effect as separate and several covenants which are annexed to and run at law and equity with the Land. If the Land is subdivided, this Agreement must be read and applied so that each subsequent owner of a lot is only responsible for those covenants and obligations which relate to that owner's lot.

## 3 Specific Obligations of the Owner

- 3.1 The Owner covenants and agrees with Melbourne Water that it will pay the Drainage Contributions to Melbourne Water upon request prior to a Letter of Release being issued or within 30 days of:
  - (1) a contract of sale of Lot 1 being entered into;
  - (2) a planning permit being issued for any development on Lot 1; or
  - (3) a planning permit being issued or consent to the certification of a plan of subdivision being given for any future subdivision of Lot 1;
 whichever of these events occurs first.
- 3.2 Melbourne Water and the Owner agree that the Drainage Contributions shall be calculated on 2.2110ha of land and the contribution rates current at the time of payment.
- 3.3 Upon any of the events described in clause 3.1 occurring, the Owner will immediately provide Melbourne Water with written notification of such event, in accordance with clause 11.1.
- 3.4 Melbourne Water and the Owner agree that this Agreement satisfies condition 15 of the Planning Permit.

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**4 Further Obligations of the Owner****4.1 Notice and registration**

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

**4.2 Mortgagee to be bound**

The Owner must obtain the consent of any mortgagee to be bound by the covenants in this Agreement if the Mortgagee becomes mortgagee in possession of the Land.

**4.3 Registration of Agreement**

The Owner must do all things necessary to enable the Responsible Authority to make an application to the Registrar of Titles to make a recording of this Agreement on the Certificate of Title to the Land in accordance with section 181 of the Act including the signing of any further agreement, acknowledgement or other document.

**4.4 Responsible Authority's and Melbourne Water's Costs to be paid.**

The Owner must pay immediately on demand the reasonable costs of the Responsible Authority and Melbourne Water of and incidental to the:

- i) preparation, execution, registration, and enforcement of this Agreement; and
- ii) 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 by 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.

**4.5 Indemnity**

The Owner indemnifies the Responsible Authority and Melbourne Water against all costs, expenses, losses or damages that it may sustain, incur, suffer or be or become liable for or in respect of any suit, action, proceeding, judgment or claim brought by any person arising from or referable to this Agreement or any non-compliance with this Agreement.

**4.6 Access**

The Owner must allow the Responsible Authority and Melbourne Water to enter the Land at any reasonable time to assess compliance with this Agreement.

**5 Further assurance**

Each party must promptly at its own cost do all things (including executing and if necessary delivering all documents) necessary or desirable to give full effect to this Agreement.



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## 6 Agreement under section 173 of the Act

The parties acknowledge and agree that this Agreement is made under section 173 of the Act.

## 7 Owner's warranties

Without limiting the operation or effect which this Agreement has, the Owner warrants that apart from the Owner and any other person who has consented in writing to this Agreement, no other person has any interest, either legal or equitable, in the Land.

## 8 Planning objectives

The parties acknowledge that the provisions of this Agreement are intended to achieve or advance the objectives of planning in Victoria and the objectives of the Planning Scheme.

## 9 Successors in title

Without limiting the operation or effect which this Agreement has, the Owner must ensure that, until such time as a memorandum of this Agreement is registered on the title to the Land, successors in title must be required to:

- (1) give effect to and do all acts and sign all documents which will require those successors to give effect to this Agreement; and
- (2) execute a deed agreeing to be bound by the terms of this Agreement.

## 10 Goods and Service Tax

### 10.1 Definitions and Expressions

Expressions used in this Agreement that are defined in the *GST Act* have the same meaning as given to them in the *GST Act*, unless expressed to the contrary.

### 10.2 Amounts payable do not include GST

Each amount, of whatever description, specified as payable by one party to the other party under this Agreement is expressed as a GST exclusive amount unless specified to the contrary.

### 10.3 Liability to pay any GST

Subject to clause 10.4, in addition to any amount payable by one party to the other party under this Agreement in respect of a taxable supply, the party liable to pay the amount ("Recipient") must pay to the other party ("Supplier") a sum equivalent to the GST payable, if any, by the Supplier in respect of the taxable supply on the date on which the amount is otherwise payable.

### 10.4 Tax Invoice

A party's right to payment under clause 10.3 is subject to a Tax Invoice being delivered to the Recipient.

**AL377156U****11 General Matters****11.1 Service of Notice**

A notice or other communication required or permitted to be served by a party on another party must be in writing and in addition to any other method of service provided by law may be served:

- (1) by delivering it personally on that party; or
- (2) by sending it by pre paid post, addressed to that party at the address set out in this Agreement or subsequently notified to each party; or
- (3) by sending it by facsimile if it confirmed immediately in writing by the sending party by hand delivery or pre paid post.

**11.2 Time of Service**

A notice or other communication is deemed served:

- (1) if delivered personally, on the next following business day;
- (2) if posted within Australia to an Australian address, two business days after the date of posting and in any other case, seven business days after the date of posting;
- (3) if sent by facsimile, on the next following business day unless the receiving party has requested retransmission before the end of that day;
- (4) if received after 6.00pm in the place of receipt or on a day which is not a business day, at 9.00am on the next business day.

**11.3 No Waiver**

Any time or other indulgence granted by the Responsible Authority to the Owner or any variation of the terms and conditions of this Agreement or any judgement or order obtained by the Responsible Authority against the Owner do not in any way amount to a waiver of any of the rights or remedies of the Responsible Authority in relation to the terms of this Agreement.

**11.4 Jurisdiction**

- (1) The law of Victoria governs this Agreement.
- (2) The parties submit to the non-exclusive jurisdiction of the courts of Victoria and of the Commonwealth of Australia.

**11.5 Severability**

If a court, arbitrator, tribunal or other competent authority determines that a word, phrase, sentence, paragraph or clause of this Agreement is unenforceable, illegal or void then it must be severed and the other provisions of this Agreement remain operative.

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**11.6 Disputes**

- (1) If there is a dispute between the parties concerning the interpretation or implementation of this Agreement, that dispute may be referred to the Tribunal for resolution to the extent permitted by the Act.
- (2) If there is a dispute concerning any matter which is not referable to the Tribunal under the Act, that dispute may be referred for arbitration by an Arbitrator agreed upon in writing by the parties or, in the absence of such agreement the Chairman of the Victorian Chapter of the Institute of Arbitrators and Mediators, Australia or his nominee, for arbitration.
- (3) Where provision is made in this Agreement that any matter be done to the satisfaction of the Responsible Authority or any of its officers and a dispute arises in relation to such provision, the dispute may be referred to the Tribunal in accordance with section 149(1)(b) of the Act.
- (4) The parties are entitled to legal representation for the purposes of any arbitration or referral referred to in clauses (2) and (3). Unless the Arbitrator, Chairman, nominee or the Tribunal otherwise directs, each party must bear its own costs.

**11.7 No Fettering of Responsible Authority's or Melbourne Water's powers**

The parties acknowledge and agree that this Agreement does not fetter or restrict the power or discretion of the Responsible Authority or Melbourne Water 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.

**12 Commencement of Agreement**

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

**13 Amendment**

The parties may agree in writing to amend this Agreement.

**14 Ending of Agreement**

- 14.1 This Agreement comes to an end within the meaning of section 177(1) of the Act when the Owner has completed, to the satisfaction of the Responsible Authority and Melbourne Water, all of the obligations imposed on it under this Agreement or otherwise by agreement between the parties in accordance with section 177(3) of the Act.
- 14.2 Once this Agreement ends, the Responsible Authority will, within a reasonable time, following a request from the Owner and at the cost of the Owner, complete and execute all documents necessary to make application to the Registrar of Titles under section 183(2) of the Act to cancel the recording of this Agreement on the Register.

**15 Counterparts**

This Agreement may be executed in counterparts. Each counterpart is an original but the counterparts together are one and the same agreement. This Agreement is binding on the parties on the exchange of the executed counterparts. A copy of the original executed counterpart sent by facsimile machine or email:

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- (1) must be treated as an original counterpart;
- (2) is sufficient evidence of the execution of the original; and
- (3) may be produced in evidence for all purposes in place of the original.

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**Executed** by the parties as a deed and delivered on the date shown on the first page.

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

Councillor

Chief Executive Officer



Signed sealed and delivered by  
Melbourne Water Corporation by its  
duly appointed attorney in the presence  
of:

Signature of witness

LIZ ARTHUR  
Name of witness (BLOCK LETTERS)

990 LA TROBE ST. DOCKLANDS  
Address of witness 3008

Signature of attorney

JANE DENTON  
Name of attorney (BLOCK LETTERS)

LEGAL COUNSEL & CORPORATE  
Position of attorney SECRETARY

Date of power of attorney: 21 March  
2014

By executing this deed the attorney states  
that the attorney has received no notice of  
revocation of the power of attorney.

Executed by Phenomenal Properties Pty  
Ltd ABN 92 128 068 959 in accordance  
with section 127 of the Corporations Act  
2001:

Name of sole director and sole company  
secretary (BLOCK LETTERS)

Sole director and sole company secretary

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## Mortgagee's consent

National Australia Bank Ltd as Mortgagee of registered Mortgage No. AH571927U consents to the Owner entering into this Agreement and in the event that the Mortgagee becomes Mortgagee in possession, agrees to be bound by the covenants and conditions of this Agreement.

### Executed by Mortgagee:

Signed sealed and delivered for and on  
behalf of National Australia Bank Ltd by  
its attorney under  
power of attorney number  
in the presence of:

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness (BLOCK LETTERS)

\_\_\_\_\_  
Address of witness

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Registrar of Titles  
Land Titles Office  
Marland House  
570 Bourke Street  
MELBOURNE

**APPLICATION TO REGISTER AN AGREEMENT UNDER SECTION 173 OF THE  
PLANNING AND ENVIRONMENT ACT 1987**

**Registered Proprietor: Phenomenal Properties Pty Ltd ACN 128 068 959**

National Australia Bank Limited A.B.N. 12 004 044 937 as Mortgagee pursuant to Registered Mortgage numbered AH571927U hereby consents to the within Agreement.

EXECUTED by NATIONAL AUSTRALIA BANK LIMITED by being signed sealed and delivered in Victoria by its Attorney Brown Peter Mark who holds the position of Level 3 Attorney under Power of Attorney dated 1/3/2007 (a certified copy of which is filed in Permanent Order Book No 277 Page No 025 Item 35) in the presence of:

) Attorney

Signature of Witness

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**Schedule 1**

Proposed Plan of Subdivision referred to in clause 1.1(14).

The plan which is Schedule 1 has been removed from this counterpart of the section 173 Agreement due to difficulties of the Titles Office with imaging for recording purposes.

A copy of the plan identified is included in each of the counterparts to this section 173 Agreement which are held by:

- The Responsible Authority;
- Melbourne Water Corporation; and
- The Owner of the Land as at the date the Agreement was executed.

A copy of the counterpart agreement together with Schedule 1 is available for inspection at the offices of the Responsible Authority during normal hours upon giving the Responsible Authority reasonable notice.