|  |
| --- |
|  |
| **SECTION 173 AGREEMENT**  **PLANNING AND ENVIRONMENT ACT 1987**  Open Space  **HUME CITY COUNCIL**  Council  - and -  **maizwest pty ltd (ACN 627 827 016)**  **zaram pty lyd (ACN 006 251 636)**  Registered Land Owner  in relation to land at:  **140-204 Western avenue, westmeadows**  **66-99 wright street, westmeadows**  **47-67 wright street, westmeadows** |
| 1KXP:22004060  Harwood Andrews  ABN 98 076 868 034  Level 5, 707 Collins Street,  Melbourne 3008, Victoria, Australia  DX 30970 Stock Exchange  PO Box 633 Collins Street West Vic 8007  T 03 9620 9399 F 03 9620 9288 |

**THIS AGREEMENT** is made the day of

**PARTIES:**

1. **Hume City Council** of 1079 Pascoe Vale Road, Broadmeadows, 3047

(**Council**)

1. **Maizwest Pty Ltd** ACN 627 827 016 of Level 5, 441 St Kilda Road, Melbourne 3004
2. **Zaram Pty Ltd** ACN 006 251 636 of 56 Eglinton Street, Moonee Ponds 3039

(**Owner**)

**RECITALS:**

1. Council is responsible for the administration and enforcement of the Planning Scheme pursuant to the provisions of the Act.
2. Council is also the planning authority under the Act for proposed Amendment C250 to the Planning Scheme.
3. Council enters into this Agreement in its capacity as a responsible authority and in its capacity as planning authority for Amendment C250 to the Planning Scheme.
4. The Owner is or is entitled to be the registered proprietor of the Land.
5. Council has prepared Amendment C250 at the request of the Owner. The amendment proposes to rezone that part of the Land within the Urban Growth Boundary from Farming Zone – Schedule 3 to Industrial 3 Zone and General Residential Zone – Schedule 1 and apply the Development Plan Overlay – Schedule 31 to the whole of the Land.
6. The Owner has agreed to enter into this Agreement with Council prior to Council submitting Amendment C250 to the Minister for approval. The Agreement sets out the terms on which the Owner has voluntarily agreed to provide for the vesting of open space land and the delivery of open space improvements.
7. This Agreement is entered into between the Parties pursuant to section 173 of the Act in order to facilitate Amendment C250 and to achieve the objectives of planning in Victoria.
8. Part of the Land is subject to registered mortgage number AT1580109H in favour of Australia and New Zealand Banking Group Ltd, which mortgagee, as evidenced by its consent on the attestation pages, consents to this Agreement.

**IT IS AGREED AS FOLLOWS:**

# Definitions

In this Agreement unless inconsistent with the context or subject matter:

## **Act** means the *Planning and Environment Act* *1987* (Vic).

## **Agreement** means this Agreement and any agreement executed by the parties varying or expressed to be supplemental to this Agreement.

## **Council** means Hume 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.

## **Current Address for Service**

### for Council means the address shown on page 1 of this Agreement, or any other principal office address listed on the website of Council; and

### for the Owner means the address shown on page 1 of this Agreement or any other address provided by the Owner to Council for any purpose or purposes relating to the Land.

## **Current Email Address for Service**

### for Council means contactus@hume.vic.gov.au, or any other email address listed on the website of Council; and

### for the Owner means any email address provided by the Owner to Council for the express purpose of electronic communication regarding this Agreement.

## **Development Plan** means the development plans approved by Council under to clause 43.04 of the Planning Scheme for the Land.

## **GAIC** means the Growth Areas Infrastructure Contribution under the Act.

## **GST Act** means the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) as amended from time to time.

## **Industrial Precinct** means the part of the Land identified as the Industrial Precinct in the Development Plan.

## **Land** means the land contained within the following Certificates of Title:

### Volume 11379 Folio 866;

### Volume 8871 Folio 259;

### Volume 8871 Folio 260;

## and includes any lots created by the subdivision of the Land or any part of it.

## **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.

## **Open Space Land** means that part of the Land identified as Open Space on the Development Plan.

## **Open Space Maintenance Period** means 24 months from the date of a written notice from Council confirming satisfactory completion of the landscape and works for the Open Space identified in the Development Plan.

## **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.

## **Owner's Obligations** means the covenants, promises, agreements, indemnities, undertakings and warranties given by the Owner under this Agreement including the specific obligations imposed under clause 3.

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

## **Planning Scheme** means the Hume Planning Scheme and any successor instrument or other planning scheme which applies to the Land.

## **Residential Lot** means a lot created as a result of the subdivision of the Land which in the opinion of Council is of a size and dimension that it is intended to be developed as a housing lot without further subdivision and includes a super lot intended to be developed for medium density housing as identified in the Development Plan.

## **Residential Precinct** means the part of the Land identified as the Residential Precinct in the Development Plan.

## **Statement of Compliance** means a statement of compliance issued under the *Subdivision Act 1988* (Vic).

## **Tax Act** means the *Taxation Administration Act* 1953 (Cth).

# Interpretation

In the interpretation of this Agreement unless inconsistent with the context or subject matter:

## The singular includes the plural and the plural includes the singular.

## A reference to a gender includes a reference to all other genders.

## Words (including defined expressions) denoting persons will be deemed to include all trusts, bodies and associations, corporate or unincorporated, and vice versa.

## A reference to a person includes a reference to a firm, corporation, association or other entity and their successors in law.

## A reference to a statute includes any statute amending, consolidating or replacing that statute and includes any subordinate instruments made under that statute.

## The Recitals to this Agreement are and will be deemed to form part of this Agreement including any terms defined within the Recitals.

## References to the parties will include their transferees, heirs, assigns, and liquidators, executors and legal personal representatives as the case may be.

## Reference to a document or agreement includes reference to that document or agreement as changed, novated or replaced from time to time.

## 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.

## Where a word or phrase is not defined in this Agreement, it has the meaning as defined in the Act, or, if it is not defined in the Act, it has its ordinary meaning.

# open space

## **Vesting of Open Space Land**

## The Owner agrees that it must vest the Open Space Land in Council:

### at its cost;

### in accordance with the following timeline:

#### in respect of the area of Open Space Land identified as the Neighbourhood Park on the Development Plan, upon or prior to the issue of a Statement of Compliance for the 100th Residential Lot within the Residential Precinct;

#### in respect of that part of the area of Open Space Land along the Moonee Ponds Creek that contains drainage works that are to be vested in Council, upon the completion of such drainage works to Council’s satisfaction;

#### in respect of the area of Open Space Land along the Moonee Ponds Creek that does not contain drainage works, upon or prior to the earlier of the following events:

##### (a) prior to the issue of a Statement of Compliance for the 150th Residential Lot within the Residential Precinct;

##### (b) prior to the development or the issue of a Statement of Compliance that results in the subdivision of 50% of the Industrial Precinct.

#### for any other Open Space Land, as part of the subdivision of any part of the Land that contains the Open Space Land; and

### in accordance with clause 3.2.

## **Condition of land**

## The Owner agrees that prior to vesting the Open Space Land in Council, the Owner must ensure that:

### it has complied with clause 6 and 7 of this Agreement;

### unless otherwise agreed to by Council in writing, the land being vested is free from contamination, free of all encumbrances and is serviceable;

### all at the cost of the Owner and to the satisfaction of Council.

## **Landscaping and Works**

## The Owner agrees that it must complete all landscaping and works specified in the Development Plan for the Open Space Land and approved under any planning permit issued for the Land:

### at their cost;

### in accordance with designs prepared:

#### at their cost;

#### in accordance with any planning permit issued by Council;

#### to Council’s satisfaction;

### in accordance with all laws and approvals;

### in accordance with any conditions of Council’s consent to access the Open Space Land to undertake the landscaping and works;

### upon or prior to the earlier of the following events:

##### (a) prior to the issue of a Statement of Compliance for the 150th Residential Lot within the Residential Precinct;

##### (b) prior the development or the issue of a Statement of Compliance that results in the subdivision of 50% of the Industrial Precinct;

### to Council’s satisfaction.

## **Maintenance**

## The Owner agrees that, following the completion of the landscaping and works in accordance with clause 3.3, it must maintain such landscaping and works in accordance with any planning permit and the designs approved in accordance with clause 3.3.2 at their own cost for the Open Space Maintenance Period.

# Further Covenants of the Owner

The Owner warrants and covenants with Council that:

## it is the registered proprietor (or entitled to be so) of the Land;

## 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;

## 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);

## 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;

## it will within 28 days of written demand pay to Council the Council’s reasonable costs (including legal or other professional costs) and expenses of and incidental to the:

### negotiation, preparation, execution and recording of this Agreement;

### assessment, negotiation, preparation, execution and recording of any proposed amendment to this Agreement; and

### determination of whether any of the Owner's obligations have been undertaken to the satisfaction of Council or to give consent to anything under this Agreement.

To the extent that such costs and expenses constitute legal professional costs, Council may at its absolute discretion have these costs assessed by the Law Institute of Victoria and in that event the parties will be bound by the amount of that assessment, with any fee for obtaining such an assessment being borne equally by Council 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;

## it will do all that is necessary to enable Council 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

## 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 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.

# GST

## 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.

## Except where express provision is made to the contrary, and subject to this clause, any consideration that may be provided under this Agreement is exclusive of any GST. If a party makes a taxable supply in connection with this Agreement for a consideration which represents its value, then the recipient of the taxable supply must also pay, at the same time and in the same manner as the value is otherwise payable, the amount of any GST payable in respect of the taxable supply.

## To the extent that one party is required to reimburse another party for costs incurred by the other party, those costs do not include any amount in respect of GST for which the other party is entitled to claim an input tax credit.

## A party's right to payment of GST is subject to a tax invoice being delivered to the recipient of the taxable supply.

# GAIC

## All land transferred to or vested in Council must have any liability for GAIC discharged prior to it being transferred to or vested in Council and to the extent it is not, the Owner shall remain liable to Council for any GAIC liability incurred by Council.

## The Owner must provide a certificate of release under section 201SY of the Act confirming the release of land referred to in clause 6.1 from GAIC.

# FOREIGN RESIDENT CAPITAL GAINS WITHHOLDING TAX

## The parties agree that the words defined or used in Subdivision 14-D of Schedule 1 of the Tax Act have the same meaning in this clause unless the context requires otherwise.

## The Owner acknowledges and agrees that if Council is required to pay the Commissioner an amount in accordance with subdivision 14-D of Schedule 1 of the Tax Act for any transfer to or vesting of land by the Owner in Council under this Agreement (**the Amount**):

* + - 1. at least 60 days prior to the transfer to or vesting of such land in Council, the Owner must provide Council with a clearance certificate issued by the Commissioner under section 14-220 (1) of Schedule 1 to the Tax Act, which must be valid for the period within which the relevant land is to be vested in or transferred to Council and must be issued in the exact name of the Owner; or
      2. where a clearance certificate is not provided in accordance with (a):
         1. if the land is to be transferred or vested in Council in exchange for a cash payment to the Owner, then the Amount is to be deducted from the total cash payment;
         2. if the land is to be transferred or vested in Council in exchange for non-cash consideration, the Owner must pay the Amount to Council at least 30 days prior to the transfer to or vesting of the land in Council; and
      3. if the land is to be transferred or vested in Council in exchange for part cash payment and part non-cash consideration, then the Amount is to be deducted from the total cash payment and to the extent that the total cash payment is less than the Amount, the Owner must pay the difference to Council at least 30 days prior to the transfer to or vesting of the land in Council.

## The Owner acknowledges and agrees that it must provide Council with all information and assistance necessary to enable Council to comply with its obligation to make a payment under Subdivision 14-D of Schedule 1 of the Tax Actin respect to the transfer to or vesting of land in Council under this Agreement.

## the Owner acknowledges and agrees that it must provide Council with all information and assistance necessary to enable Council to comply with its obligation to make a payment under Subdivision 14-D of Schedule 1 of the Tax Actin respect to the transfer to or vesting of land in Council under this Agreement.

## The Owner indemnifies Council against any interest, penalty, fine or other charge or expense incurred by Council arising from a failure by Council to pay the Amount in accordance with Subdivision 14-D of Schedule 1 of the TaxAct as a result of the Owner’s failure to comply with its obligations under this clause of the Agreement.

# Further assurance

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

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

# No waiver

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 COUNCIL

The parties acknowledge and agree that this Agreement does not fetter or restrict the power or discretion of Council 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

All notices and other communications under this Agreement will be sent by prepaid mail, by hand delivery or email to the Current Addresses for Service or Current Email Address for Service of the 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:

## not later than two business days after being deposited in the mail with postage prepaid;

## when delivered by hand; or

## if sent by email, at the time of receipt in accordance with the *Electronic Transactions (Victoria) Act 2000* (Vic).

# Costs on Default

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

# Invalidity of any Clause

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

# Agreement Binding on Successors of Owners

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

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

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.

# COUNTERPARTS

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

## must be treated as an original counterpart;

## is sufficient evidence of the execution of the original; and

## may be produced in evidence for all purposes in place of the original.

# Commencement and Ending of Agreement

## This Agreement will commence on the date on which the notice of approval of Amendment C250 is published in the Government Gazette.

## This Agreement will end:

### if Council determines to abandon Amendment C250; or

### if Amendment C250 lapses; or

### if the Minister refuses to approve Amendment C250; or

### once the Owner has completed all of the obligations imposed upon it under this Agreement to the satisfaction of Council.

## As soon as reasonably practicable after the Agreement has ended, Council will at the Owner’s request and at the Owner’s cost, apply to the Registrar of Titles under section 183(1) of the Act to cancel the recording of the Agreement.

**EXECUTED AS A DEED**

|  |  |
| --- | --- |
| **THE COMMON SEAL of HUME CITY COUNCIL was hereto affixed on day of**  **in the presence of:** |  |
|  | |
| Councillor | |
|  | |
| Chief Executive Officer | |

|  |  |  |
| --- | --- | --- |
| **EXECUTED** by **MAIZWEST PTY LTD ACN 627 827 016** in accordance with Section 127 of the Corporations Act 2001: |  | |
| Director |  | Director / Secretary |
| Full Name |  | Full Name |
| Date: |  | Date: |

|  |  |  |
| --- | --- | --- |
| **EXECUTED** by **ZARAM PTY LTD ACN 006 251 636** in accordance with Section 127 of the Corporations Act 2001: |  | |
| Director |  | Director / Secretary |
| Full Name |  | Full Name |
| Date: |  | Date: |

|  |  |  |
| --- | --- | --- |
|  |  | |
|  |  |  |
|  |  |  |
|  |  |  |

**MORTGAGEE CONSENT**

Australia and New Zealand Banking Group Ltd as Mortgagee under Instrument of Mortgage No. AT158109H 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

**Australia and New Zealand Banking Group Ltd**