



Victorian Government
Solicitor's Office

Agreement under Section 49 of the *Development Victoria Act 2003 (Vic)*

Development Victoria

and

[Future Owner]

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Date**2020****Development Victoria** established under section 5 of the *Development Victoria Act 2003* (Vic)

of Level 9, 8 Exhibition Street, Melbourne Vic 3000

(Development Victoria)

and

[Future Owner]of **[Address]****(Owner)****Background**

- A. The Ballarat West Employment Zone is a declared project under the DV Act.
- B. Development Victoria has the power to enter into this Agreement under section 49 of the DV Act.
- C. The Owner is or anticipates becoming the registered proprietor of the Subject Land.
- D. The Owner has agreed to enter into this Agreement to confirm the commitment of the Owner and the Owner's successors in title to use and develop the Subject Land for the purposes of the Project for the Moratorium Period in accordance with the objectives of the State Government of Victoria for the development of the Ballarat West Employment Zone.
- E. The Parties enter into this Agreement to give effect to and promote the objectives of the State Government of Victoria for the Ballarat West Employment Zone.

Agreed terms**1. Definition and Interpretation****1.1 Definitions**

In this Agreement, the words and expressions set out in this clause have the following meanings, unless the context admits otherwise:

Agreement means this Agreement and any agreement executed by the Parties expressed to be supplemental to this Agreement.

Ballarat West Employment Zone means the Ballarat West Employment Zone delineated on a plan incorporated into the Old Order.

Certificate of Occupancy means an occupancy permit issued under the *Building Act 1993* (Vic).

Commencement Date means the date on which this Agreement commences under clause 9 of this Agreement.

Development Victoria has the meaning given to that term in the DV Act.

DV Act means the *Development Victoria Act 2003* (Vic).

Full Time Position means a position of employment filled by either an employee or independent contractor whereby the worker works 38 hours per week or such other maximum number of working hours for a full time position as determined under the *Fair Work Act 2009* (Vic).

Full Time Equivalent Position means a position which meets the parameters of a Full Time Position that is constituted by two or more part time positions of employment whereby the combined number of hours of work performed by the part time employees and/or independent contractors is equivalent to those applicable for a Full Time Position.

Lot has the meaning given to that term in the *Subdivision Act 1988* (Vic).

Moratorium Period means the period beginning on the Commencement Date and ending on the later of:

- (a) the date that is [TBC] years, after the Commencement Date; and
- (b) the Revised Milestone Date, if clause 2.4(c) applies.

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 Subject Land or any part of it.

Old Order means the application order made under section 8 of the *Project Development and Construction Management Act 1994* (Vic) published at pages 2358-2359 of Victoria Government Gazette G 41 dated 9 October 2014.

Owner means the person or persons registered or entitled from time to time to be registered by the Registrar of Titles as proprietor or proprietors of an estate in fee simple in the Subject Land or any part thereof and includes any Mortgagee-in-possession.

Party or Parties means the Owner and Development Victoria as dictated by the context.

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

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

Project means the Owner's project to develop the Subject Land for the purposes of conducting a commercial enterprise involving [insert details regarding the purchaser's project].

Register means the register of proprietary interests in land maintained by the Registrar of Titles for the State of Victoria under the *Transfer of Land Act 1958* (Vic).

Reserve has the meaning given to that term in the *Subdivision Act 1988* (Vic).

Subject Land means the land delineated in Certificate of Title Volume _____ Folio _____, and any references to the Subject Land in this Agreement include any Lot or Lots created by subdivision of the Subject Land.

1.2 Interpretation

In this Agreement unless the context admits otherwise:

- (a) The singular includes the plural and vice versa.
- (b) A reference to a gender includes a reference to all other genders.
- (c) A reference to a person includes a reference to a firm, corporation or other corporate body and that person's successors in law.
- (d) If a Party consists of more than one person, this Agreement binds them jointly and each of them severally.
- (e) A term used in this Agreement has its ordinary meaning unless that term is defined in this Agreement. If a term is not defined in this Agreement and it is defined in the DV Act, it has the meaning given to it in the DV Act.
- (f) A reference to an Act, regulation or the Planning Scheme includes any Acts, regulations or amendments amending, consolidating or replacing the Act, regulation or Planning Scheme.
- (g) The Recital clauses to this Agreement are and will be deemed to form part of this Agreement.
- (h) The obligations of the Owner under this Agreement will take effect as separate and several covenants which are annexed to and run at law and equity with the Subject Land, provided that if the Subject Land is subdivided, this Agreement must be read and applied so that each subsequent owner of a Lot is only responsible for the covenants and obligations to the extent that they relate to that owner's Lot.
- (i) Any reference to a clause, page, condition, attachment or term is a reference to a clause, page, condition, attachment or term of this Agreement.

2. Specific Obligations of the Owner

2.1 Restriction on subdivision and the future use and development of the Subject Land

The Owner covenants that, during the Moratorium Period, unless with the prior written consent of Development Victoria (which may be given or withheld in its absolute discretion, and if given, may be granted subject to compliance with certain conditions), the Owner:

- (a) will not subdivide the Subject Land into two or more Lots and/or Reserves; and
- (b) may only use or develop the Subject Land for the purposes of the Project, to the exclusion of all other purposes.

2.2 Development of the Subject Land

The Owner covenants that the Owner will:

- (a) prior to commencing construction of the improvements required on the Subject Land for the purposes of the Project:
 - (i) obtain all permits and approvals required by law, including any permits required to be obtained in accordance with the Planning Scheme; and
 - (ii) submit draft plans and specifications to Development Victoria for Development Victoria's approval (such approval is not to be unreasonably withheld and may be deemed to have been given in accordance with clause 2.3 of this Agreement);
- (b) construct the improvements in a proper, continuous and workmanlike manner, using all due care and skill, strictly in accordance with the terms of any permits and approvals, all applicable laws and the plans and specifications approved by Development Victoria;
- (c) within **TBC (#)** years of the Commencement Date, complete the construction stage of the Project on the Subject Land as evidenced by the issue of all of the required Certificates of Occupancy for the works comprising the Project (including all buildings on the Subject Land);
- (d) within **TBC (#)** months of the Commencement Date, ensure that at least **TBC (#)** Full Time Equivalent Positions in the employ of the Owner are maintained on the Subject Land; and
- (e) within **TBC (#)** years of the Commencement Date, ensure that at least **TBC (#)** Full Time Equivalent Positions in the employ of the Owner are maintained on the Subject Land.

2.3 Approval of draft plans and specifications

The Parties agree that Development Victoria will be deemed to have given the approval required under clause 2.2(a)(ii) above if Development Victoria does not respond to a request for approval made by the Owner within 30 days.

2.4 Extension of Milestone Dates

- (a) Where the Owner considers that the Owner will be prevented from achieving an outcome by a milestone date set out in clause 2.2 (**Milestone Date**) because of an event beyond the Owner's reasonable control, no later than one month prior to the relevant Milestone Date, the Owner may give Development Victoria a written notice seeking an extension of time, setting out sufficient particulars of the circumstances for Development Victoria's consideration (**EOT Request**).
- (b) Development Victoria may grant or reject an EOT Request in its absolute discretion, and may grant an EOT Request subject to compliance with certain conditions by the Owner.
- (c) Where Development Victoria grants an EOT Request, the relevant Milestone Date will be revised to the date set out in Development Victoria's written response (**Revised Milestone Date**), subject to scrupulous compliance with any conditions specified by Development Victoria in that response.

2.5 Bank Guarantee

- (a) The Owner must deliver to Development Victoria a bank guarantee in favour of Development Victoria that meets the requirements described in subclause 2.5(b), in the amount of **[\$insert required value of bank guarantee]** on or before the Commencement Date.
- (b) The bank guarantee must be on terms acceptable to Development Victoria, which will include:
- (i) a discretionary ability to assign the bank guarantee;
 - (ii) no expiry date;
 - (iii) a requirement for the issuing party to be an Australian trading bank; and
 - (iv) an obligation on the issuing party to pay money to Development Victoria promptly on presentation and without further notice to the Owner
- (collectively the '**Bank Guarantee**').
- (c) Development Victoria may draw upon the Bank Guarantee without providing notice to the Owner if the Owner breaches any of its obligations under this Agreement, for the purposes of rectifying the Owner's breach at no cost to Development Victoria (and the Owner grants Development Victoria a licence to access the Subject Land as and when required for these purposes).
- (d) If Development Victoria has exercised its rights under clause 2.5(c), the Owner must, within 14 days of demand, provide a replacement or additional bank guarantee to Development Victoria, to ensure that the bank guarantee remains at the required level at all times.
- (e) Development Victoria will return the Bank Guarantee to the Owner within 60 days of the occurrence of the later of the following events:
- (i) the ending of this Agreement for any reason; or
 - (ii) Development Victoria, acting reasonably, being satisfied that the Owner has complied with all its obligations under this Agreement.
- (f) The Owner must provide a replacement bank guarantee to any future owner of the superlot extant for the balance of the "Ballarat West Employment Zone" development, if Development Victoria requires.

3. Further Obligations of the Owner

3.1 Notice and Registration

The Owner further covenants and agrees that the Owner will bring this Agreement to the attention of all prospective purchasers, lessees, Mortgagees, chargees, transferees and assigns of the Subject Land.

3.2 Further actions

The Owner further covenants and agrees that:

- (a) the Owner will do all things necessary to give effect to the Owner's obligations under this Agreement;
- (b) the Owner will:
 - (i) consent to Development Victoria making application to the Registrar of Titles for recording of this Agreement in the Register on the Certificate of Title/s for the Subject Land in accordance with section 49 of the DV Act and section 181 of the PE Act; and
 - (ii) do all things necessary to enable Development Victoria to do so, including signing any further agreement, acknowledgment or document, or procuring the consent to this Agreement of any Mortgagee or caveator to enable the recording to be made in the Register under that section.

3.3 Breach of the Owner's obligations

Without limiting Development Victoria's rights under clause 2.5 above in any way **[delete if the Owner is not required to provide a Bank Guarantee]**, the Parties agree that:

- (a) if the Owner breaches an obligation applicable under this Agreement, Development Victoria may:
 - (i) serve a notice on the Owner specifying the breach and requiring its rectification within a number of days that is reasonable in the circumstances (which, except in an emergency, will not be less than 14 days) (**Breach Notice**); and
 - (ii) enter the Subject Land to take action to rectify the default if the Breach Notice is not complied with within the time specified in the Breach Notice, at the Owner's expense;
- (b) any costs and expenses incurred by Development Victoria in enforcing its rights under this clause must be reimbursed by the Owner on a full indemnity basis within 14 days of demand.

4. Agreement under Section 49 of the DV Act

- (a) Development Victoria and the Owner agree that, without limiting or restricting their respective powers to enter into this Agreement and, insofar as it can be so treated, this Agreement is made as a Deed pursuant to section 49(1) of the DV Act, and the obligations of the Owner under this Agreement are obligations to be performed by the Owner as conditions subject to which the Owner may have use and enjoyment of the Subject Land.
- (b) The Owner acknowledges that Development Victoria consulted with Ballarat City Council prior to entering into this Agreement, in accordance with section 49(3) of the DV Act.

5. Owner's Warranties

The Owner further covenants and agrees that:

- (a) it is the registered proprietor (or anticipates so becoming) of the Subject Land;

- (b) save as shown in the certificate of title to the Subject Land, there are no mortgages, liens, charges, easements or other encumbrances or any rights inherent in any person affecting the Subject Land or any part of it and not disclosed by the usual searches (excluding always registered or unregistered interests created by Development Victoria); and
- (c) 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, to the best of the Owner's information, knowledge and belief, no other person has any interest, either legal or equitable, in the Subject Land which may be affected by this Agreement.

6. Successors in Title

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

- (a) give effect to and do all acts and sign all documents which are necessary to give effect to this Agreement; and
- (b) execute a deed agreeing to be bound by the terms of this Agreement.

7. Call Option

- (a) Unless the context otherwise requires, in this clause 7:
 - (i) **Call Option** means the call option granted by the Owner to Development Victoria under clause 7(b).
 - (ii) **Call Option Contract** means a contract prepared in the form of General Conditions for the purchase of the Subject Land by Development Victoria from the Owner, amended by:
 - (A) inserting a purchase price made of the following two components determined by the Valuer General Victoria, being the sum of:
 - (I) the market value, as at the date on which Development Victoria exercises the Call Option, of any improvements then present on the Subject Land that have been constructed by the Owner (**New Improvements**); and
 - (II) the purchase price specified in the First Contract of Sale, adjusted to allow for any uplift or diminution in the re-sale value of the Subject Land caused by the presence of the New Improvements, assuming that the Subject Land will be used for something other than the Project or any other **[insert generic reference to similar development]**;
- less:
- (III) Development Victoria's reasonable costs and disbursements incurred in purchasing the Subject

Land (including reasonable legal costs and stamp duty); and

- (IV) the reasonable costs and disbursements incurred by the Development Victoria in subsequent resale of the Subject Land (including reasonable legal costs, selling agent's commission and advertising fees),

each on a full indemnity basis;

- (B) no deposit will be payable and the full purchase price is due at settlement;
- (C) deletion of General Condition 16; and
- (D) replacement of General Condition 28 with the following provision:

"The purchaser is responsible for any notice, order, demand or levy imposing liability on the property (**Notice or Order**) that is issued or made on or after Settlement. Any Notice or Order issued prior to Settlement must be complied with by the vendor at the vendor's expense, prior to and as a condition of Settlement".

- (iii) **Call Option Price** means the price determined in accordance with clause 7(a)(ii)(A) and stipulated by clause 7(f).
- (iv) **First Contract of Sale** means the contract of sale for the Subject Land from Development Victoria to the Owner.
- (v) **General Conditions** means the current edition of the general conditions of contracts of sale for real estate that the Law Institute of Victoria publishes from time to time.
- (vi) **Settlement** means the occurrence of final settlement under the First Contract of Sale, being the date that the Owner pays the balance of the purchase price to Development Victoria, and receives:
- (A) rents and profits from or vacant possession of the Subject Land (as applicable); and
- (B) all title documents needed to become the registered proprietor of the Subject Land.
- (vii) **Valuer-General Victoria** means the holder of the office of valuer-general under the *Valuation of Land Act 1960* (Vic).

- (b) The Owner grants Development Victoria (or its nominee) a Call Option to purchase the Subject Land for the Call Option Price on the terms set out in the Call Option Contract if the Owner breaches any of its obligations under clause 2 or 3 of this Agreement and fails to rectify the breach to Development Victoria's satisfaction prior to expiration of the later of:

- (i) **[No. of years to be inserted]** years after the Commencement Date; or

- (ii) any extended cure period that Development Victoria grants to the Owner under clause 2.4 of this Agreement,

(collectively, the '**Activation Date**').

[Drafting Note: The timeframe in clause 7(b) must be consistent with the furthest deadline for performance of the purchaser's positive obligations as set out in clause 2 of this Agreement, as agreed between Development Victoria and the Owner]

- (c) The Owner grants the Call Option:
 - (i) in consideration of Development Victoria executing this Agreement;
 - (ii) in consideration of Development Victoria executing the First Contract of Sale; and
 - (iii) in performance of the Owner's obligations under the First Contract of Sale.
- (d) The Call Option constitutes an irrevocable offer by the Owner to sell the Subject Land to Development Victoria in accordance with this clause 7.
- (e) To exercise the Call Option, Development Victoria must deliver the following items to the Owner at any time after the Activation Date but before the Owner has rectified the relevant breach of this Agreement:
 - (i) written notice of Development Victoria's decision to exercise the Call Option; and
 - (ii) two copies of the Call Option Contract executed by Development Victoria or its nominee and with all necessary details completed, including:
 - (A) the title particulars, land description and address of the Subject Land;
 - (B) the contract date (which is to be the day on which Development Victoria exercises the Call Option);
 - (C) the purchaser's details (being Development Victoria or its nominee);
 - (D) the Owner's details;
 - (E) the Call Option Price;
 - (F) the nil deposit; and
 - (G) the settlement date (being one (1) month after the day of sale).
- (f) If Development Victoria or its nominee exercises the Call Option in accordance with the requirements of clause 7(e), from the date that Development Victoria or its nominee does so, the Owner is bound to sell the Subject Land to Development Victoria or its nominee for the Call Option Price, on the terms specified in the Call Option Contract.

- (g) If Development Victoria or its nominee has exercised the Call Option, the notice and the Call Option Contract delivered by Development Victoria under clause 7(e) constitute evidence of the contract arising on exercise of the Call Option.
- (h) Although a binding contract exists between Development Victoria or its nominee and the Owner upon exercise of the Call Option as set out in clause 7(e), within 5 Business Days after the Call Option is exercised, the Owner must execute the Call Option Contract and have one executed copy delivered to Development Victoria's solicitors.
- (i) Subject always to the mechanics of the formula for calculating the Call Option Price, the parties will bear their own expenses (including legal expenses) if Development Victoria exercises the Call Option.
- (j) The Call Option ends on the earlier of the date that:
 - (i) Development Victoria delivers a notice to the Owner stating that Development Victoria will not exercise the Call Option; or
 - (ii) Development Victoria (acting reasonably) accepts that the Owner has fulfilled all of its obligations under this Agreement.

8. General Matters

8.1 Notices

A notice or other communication required or permitted to be served by a Party on another Party must be in writing and may be served:

- (a) by delivering it personally to that Party;
- (b) by sending it by prepaid post addressed to that Party at the address set out in this Agreement or subsequently notified to each Party from time to time; or
- (c) by sending it by facsimile, provided that a communication sent by facsimile shall be confirmed immediately in writing by the sending Party by hand delivery or prepaid post.

8.2 Service of Notice

A notice or other communication is deemed served:

- (a) if delivered, on the next following business day;
- (b) if posted, on the expiration of 5 business days after the date of posting; or
- (c) if sent by facsimile, on the next following business day, unless the receiving Party has requested retransmission before the end of that business day.

8.3 No Waiver

Any time or other indulgence granted by Development Victoria to the Owner or any variation of the terms and conditions of this Agreement or any judgment or order obtained by Development Victoria against the Owner will not in any way amount to a waiver of any of the rights or remedies of Development Victoria in relation to the terms of this Agreement.

8.4 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 will remain operative.

9. Commencement of Agreement

This Agreement commences on the date that Settlement occurs, as defined in subclause 7(a)(vi).

10. Ending of Agreement

- (a) If the Owner considers that it has performed all of the Owner's obligations set out in clause 2.2, it may apply to Development Victoria under section 178A of the PE Act to end this Agreement.
- (b) Development Victoria may, in its absolute discretion, waive the Owner's obligation to pay any fee prescribed to accompany an application under section 178A of the PE Act.
- (c) Development Victoria will consider and determine the Owner's application under section 178A of the PE Act in accordance with Subdivision 2 of Division 2 of Part 9 of the PE Act, and if applicable, notify the Owner of any outstanding Owner obligations or other circumstances preventing ending of the Agreement.
- (d) The Owner indemnifies Development Victoria against all costs incurred in connection with an application to end this Agreement and amend the Register to cancel the recording of the Agreement in accordance with section 49 of the DV Act and section 178A of the PE Act, including costs incurred in meeting Development Victoria's notice, natural justice and procedural fairness obligations under sections 178C to 178F (inclusive) of the PE Act in connection with the proposal to end the Agreement.

Signing page

Executed as a deed.

In accordance with the *Development Victoria Act 2003* the official seal of **Development Victoria** is affixed in the presence of:)
)
)

Signature

Signature

Name and position (print)

Name and position (print)

Executed by **[Future Owner]** in accordance with section 127(1) of the *Corporations Act 2001* (Cth) in the presence of:

Signature of director

Signature of director/company secretary
(Please delete as applicable)

Name of director (print)

Name of director/Company secretary
(Please delete as applicable) (print)