|  |
| --- |
|  |
| **SECTION 173 AGREEMENT**  **PLANNING AND ENVIRONMENT ACT 1987**  **COLAC OTWAY SHIRE COUNCIL**  Responsible Authority  - and -  **sample owner**  Owner  in relation to land at:  **xx, sample street, sample SUBURB, Victoria** |
| Harwood Andrews  ABN 98 076 868 034  70 Gheringhap Street,  Geelong 3220, Victoria, Australia  DX 22019 Geelong  PO Box 101 Geelong Vic 3220  T 03 5225 5225 F 03 5225 5222 |

**THIS AGREEMENT** is made the day of

**PARTIES:**

1. **Colac Otway Shire Council** of 2-6 Rae Street, Colac, Victoria, 3250 (**Responsible Authority**)
2. **Sample Owner** of XX Sample Street, Sample Suburb, Victoria, postcode [note: if registered proprietor is a company include its ACN and registered address as noted on an ASIC company search] (**Owner**)

**RECITALS:**

1. The Owner is the registered proprietor of the Land.
2. The Responsible Authority is responsible for the administration and enforcement of the Planning Scheme pursuant to the provisions of the Act.
3. The Responsible Authority issued the Permit allowing quote what the planning permit allows – e.g ‘use and development of a dwelling’.
4. In October 2016 the document ‘Wye River and Separation Creek bushfire affected properties (October, 2016)’ was incorporated in the Planning Scheme (**Incorporated Document**).
5. The Land is within the area of Wye River and Separation Creek to which the Incorporated Document applies.
6. Clause 4.10 of the Incorporated Document provides as follows:

*For the purpose of regulation 811(1) of the Building Regulations 2006, the bushfire attack level for a site for which a permit for a dwelling has been granted under this incorporated document is:*

* *the bushfire attack level specified in the Wye River and Separation Creek bushfire attack level GIS data 2016 (Department of Environment, Land, Water and Planning)\*; or*
* *the next lower bushfire attack level to the bushfire attack level specified for the land in the Wye River and Separation Creek bushfire attack level GIS data 2016 (Department of Environment, Land, Water and Planning)\*, if the owner of the site has entered into an agreement with the responsible authority under section 173 of the Planning and Environment Act 1987 to require that:*
  + *the dwelling constructed in accordance with a permit granted under this incorporated document must not be occupied until a private bushfire shelter (a Class10c building within the meaning of the Building Regulations 2006) is constructed on the same land as the dwelling*
  + *the private bushfire shelter be available for use by the occupants of the dwelling at all times*
  + *the private bushfire shelter be maintained in accordance with the requirements of the building permit issued for that private bushfire shelter; or*
* *if a planning permit was issued between 10 March 2009 and 1 April 2016 for a dwelling on the same land and the permit specifies a bushfire attack level, the bushfire attack level specified in the permit; or*
* *if a building permit was issued under the Building Act 1993 between 10 March 2009 and 1 April 2016 for a dwelling on the same land, the bushfire attack level that the relevant building surveyor (as defined in section 3 of the Building Act 1993) determined for that building permit.*

*\* The Wye River and Separation Creek bushfire attack level GIS data 2016 (Department of Environment, Land, Water and Planning) is shown in the map in Schedule 2 and summarised in the table in Schedule 3 to this incorporated document.*

1. Condition xx of the Permit provides as follows:

*Before the development commences, the owner must enter into an agreement with the Responsible Authority in accordance with Section 173 of the Planning and Environment Act 1987. The agreement must provide that:*

1. *the dwelling constructed in accordance with this permit must not be occupied until a private bushfire shelter (a Class 10c building within the meaning of the Building Regulations 2006) is constructed on the same land as the dwelling.*
2. *the private bushfire shelter be available for use by occupants of the dwelling at all times.*
3. *the private bushfire shelter must be maintained in accordance with the requirements of the building permit issued for that private bushfire shelter.*

*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 same Act prior to the commencement of the development.*

*The owner must pay all costs (including Council’s costs) associated with the preparation, execution, registration and (if later sought) cancellation of the Section 173 Agreement.*

1. This Agreement is entered into between the Responsible Authority and the Owner pursuant to section 173 of the Act in order to meet the requirements of condition XX of the Permit and the Incorporated Document, and to achieve and advance the objectives of planning in Victoria.
2. DELETE IF NO MORTGAGEThe Land is subject to registered mortgage number xxxx registered on xx of Month 201x in favour of Xx Bank Pty 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.

## **Building Permit** means a building permit issued under the *Building Act 1993* (Vic).

## **Current Address for Service**

### for the Responsible Authority means the address shown under the heading “Parties” in this Agreement or any other address provided by the Responsible Authority to the Owner for any purpose or purposes relating to this Agreement; and

### for the Owner means the address shown under the heading “Parties” in this Agreement or any other address provided by the Owner to the Responsible Authority for any purpose or purposes relating to the Land or this Agreement.

## **Current Email Address for Service**

### for the Responsible Authority means [inq@colacotway.vic.gov.au](mailto:inq@colacotway.vic.gov.au) or any other email address provided by the Responsible Authority to the Owner for the express purpose of electronic communication regarding this Agreement; and

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

## **Current Number for Service**

### for the Responsible Authority means 03 5232 9586 or any other facsimile number provided by the Responsible Authority to the Owner for the express purpose of facsimile communication regarding this Agreement; and

### for the Owner means any facsimile number provided by the Owner to the Responsible Authority for the express purpose of facsimile communication regarding the Land or this Agreement.

## **Dwelling** means the dwelling constructed in accordance with the Permit.

## **Land** means the land known as XX Sample Street, Sample Suburb, Victoria, being the land described in Lot X on PS XXXXXX, Certificate of Title Volume xxx Folio xxx and includes any lot created from the subdivision of that land containing the Dwelling.

## **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. DELETE IF NO MORTGAGEE

## **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** includes the Owner's specific obligations and the further covenants of the Owner.

## **party** or **parties** means the Owner and the Responsible Authority under this Agreement as appropriate.

## **Permit** means planning permit number PPXXX/201X for the Land issued on xx Month201x including the plans endorsed under it and as amended from time to time.

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

## **Private Bushfire Shelter**means at Class 10c building within the meaning of the *Building Regulations 2006* (Vic).

## **Responsible Authority** means Colac Otway Shire Council in its capacity as:

### the authority responsible for administering and enforcing the Planning Scheme; and

### a municipal council within the meaning of the *Local Government Act 1989* (Vic),

and includes its agents, officers, employees, servants, workers and contractors, and any subsequent person or body which is the responsible authority or municipal council.

# 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.

# Specific Obligations of the Owner

The Owner covenants, acknowledges and agrees with the Responsible Authority that:

## the Dwelling must not be occupied until and unless a Private Bushfire Shelter is constructed on the Land;

## the Private Bushfire Shelter must be available for use by occupants of the Dwelling at all times;

## the Private Bushfire Shelter must be maintained in accordance with the requirements of the Building Permit issued for that Private Bushfire Shelter,

all to the satisfaction of the Responsible Authority.

# Further Covenants of the Owner

The Owner warrants and covenants with the Responsible Authority 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 the Responsible Authority the Responsible Authority’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 the Responsible Authority or to give consent to anything under 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 will 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.

## 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.

## 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.

# 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 Responsible Authority

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.

# INTEREST ON OVERDUE MONEYS

## Any amount due under this Agreement but unpaid by the due date incurs interest at the rate prescribed under section 227A of the *Local Government Act 1989* (Vic) and any payment made shall be first directed to payment of interest and then the principal amount owing.

# Notices

All notices and other communications under this Agreement will be sent by prepaid mail, by hand delivery, email or by facsimile to the Current Addresses for Service, Current Email Address for Service or Current Number 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 seven business days after being deposited in the mail with postage prepaid;

## when delivered by hand;

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

## 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

If the Owner defaults in the performance of any obligations under this Agreement the Owner will pay to the Responsible Authority 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.

# Commencement and Ending of Agreement

## This Agreement will commence on date that it bears.

## This Agreement will end in accordance with the provisions of the Act.

**EXECUTED AS A DEED**

Signed, sealed and delivered as a deed by the Parties.

|  |  |
| --- | --- |
| **SIGNED** on behalf of **COLAC** **OTWAY** **SHIRE** **COUNCIL** by the person holding the title of General Manager, Development and Community Services (or the person acting in that role from time to time), pursuant to an instrument of delegation authorised by a Council resolution, in the presence of: | Signature of delegate  Name of delegate |
| Signature of witness |  |
|  |  |
| Name of witness |  |

FOR AN INDIVIDUAL

|  |  |
| --- | --- |
| **SIGNED SEALED AND DELIVERED** by the saidinthe presence of: |  |
|  |
| Signature of witness |  |
|  |  |
| Name of witness |  |
|  |  |
| Address of witness |  |

FOR A MULTIPLE DIRECTOR COMPANY

|  |  |  |
| --- | --- | --- |
| **EXECUTED** by ACN in accordance with Section 127 of the Corporations Act 2001: | |  |
|  |  |  | |
| Director |  | Director/Secretary | |
|  |  |  | |
| Full Name |  | Full Name | |
|  |  |  | |
|  |  |  | |
| Address |  | Address | |

FOR A SOLE DIRECTOR/SECRETARY COMPANY

|  |  |
| --- | --- |
| **EXECUTED** by ACN in accordance with Section 127 of the Corporations Act 2001: |  |
|  | |
| Sole Director & Sole Company Secretary | |
|  | |
| Full Name | |
|  | |
| Address | |

**MORTGAGEE CONSENT**

*Xx Bank Pty Ltd*, as Mortgagee under Instrument of Mortgage No. xxxx 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

*Xx Bank Pty Ltd*