Deed of Agreement – Section 173 Agreement

South East Water Corporation

and

Mornington Peninsula Shire Council
ABN 53 159 890 143

Kanya Rd, Mount Eliza
2014
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THIS DEED is made on 2014

BETWEEN:

(1) Mornington Peninsula Shire Council ABN 53 159 890 143 whose registered office is at 90 Besgrove Street, Rosebud, Victoria (the "Responsible Authority"); and

(2) South East Water Corporation of 20 Corporate Drive, Heatherton, Victoria (the "Owner");

RECITALS:

(A) The Owner is or is entitled to be the registered proprietor of an estate in fee simple of the Land.

(B) The Responsible Authority is the responsible authority under the Act for the purposes of the Scheme. The Land is affected by the provisions of the Scheme.

(C) The Land is to be rezoned to a residential zone as part of Amendment C184 to the Scheme.

(D) The Responsible Authority and the Owner have agreed to enter into this Agreement pursuant to section 173 of the Act to achieve or advance the objectives of planning in Victoria, and the objectives of the Scheme in relation to the Land.

THE PARTIES AGREE AS FOLLOWS:

1. INTERPRETATION

1.1 Definitions

The following definitions apply in this Agreement.

"Act" means the Planning and Environment Act 1987 (Vic).

"Agreement" means this Deed of Agreement.

"Business Day" means a day that is not a Saturday, Sunday or public holiday in Melbourne.


"Claim" means any claim, action, proceeding or demand made against the person concerned, however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

"Land" means the land in Kanya Rd, Mt Eliza, being the land described in certificates of title with the following volume and folio numbers:


"Loss" means any loss, damage, cost, expense or liability incurred by the person concerned, however it arises and whether it is present or future, fixed or unascertained, actual or contingent.
"Phase 1 Environmental Assessment" means a preliminary review of the site history (including current and previous uses and activities), site inspection and some limited soil sampling by a suitably qualified environmental professional.

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

"Scheme" means the Mornington Peninsula planning scheme.


1.2 Rules for interpreting this Agreement

Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this Agreement, except where the context makes it clear that a rule is not intended to apply.

(a) A reference to:
   (i) legislation (including subordinate legislation) is to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
   (ii) a document or agreement, or a provision of a document or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;
   (iii) a party to this Agreement or to any other document or agreement includes a permitted substitute or a permitted assign of that party;
   (iv) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person; and
   (v) anything (including a right, obligation or concept) includes each part of it.

(b) A singular word includes the plural, and vice versa.

(c) A word which suggests one gender include the other genders.

(d) If a word is defined, another part of speech has a corresponding meaning.

(e) If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.

(f) The word "agreement" includes an undertaking or other binding arrangement or understanding, whether or not in writing.

(g) Words defined in A New Tax System (Goods and Services Tax) Act 1999 (Cth) have the same meaning in clauses about GST.

1.3 Business Days

If the day on or by which a person must do something under this Agreement is not a Business Day:
(a) if the act involves a payment that is due on demand, the person must do it on or by the next Business Day; and

(b) in any other case, the person must do it on or by the previous Business Day.

1.4 **Multiple parties**

If a party to this Agreement is made up of more than one person, or a term is used in this Agreement to refer to more than one party:

(a) an obligation of those persons is joint and several;

(b) a right of those persons is held by each of them severally; and

(c) any other reference to that party or term is a reference to each of those persons separately, so that (for example) a representation, warranty or undertaking is given by each of them separately.

2. **CONFIRMATION OF RECITALS**

Each of the parties to this Agreement confirms the recitals that relate to that party.

3. **COMMENCEMENT OF AGREEMENT**

This Agreement comes into force from the date of execution.

4. **EFFECT OF THE AGREEMENT AND REGISTRATION**

4.1 **Agreement under section 173 of the Act**

The parties agree that, without limiting or restricting their respective powers to enter into this Agreement and, in so far as it can be so treated, this Agreement is made pursuant to section 173 of the Act.

4.2 **Covenants to run with the Land**

The parties agree that the obligations imposed on the Owner under this Agreement are intended to take effect as covenants which are annexed to and run at law and equity with the whole or any part of the Land and bind the Owner, its successors, transferees and permitted assigns, the registered proprietor or proprietors for the time being of the Land.

4.3 **Registration Memorandum**

(a) The Responsible Authority must make an application pursuant to section 181 of the Act to the Registrar of Titles for the entry of a memorandum of this Agreement upon the certificate of title to the Land.

(b) The Owner must do all things necessary to enable the Responsible Authority to make the application referred to in clause 4.3(a), including signing any further agreement, acknowledgment or document, or procuring the consent to this Agreement of any Mortgagor or caveator, to enable this Agreement to be recorded in the Register under section 181 of the Act.

4.4 **Subdivision**

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.
5. **OWNER'S COVENANTS**

5.1 **Covenants regarding Environmental Assessments**

The Owner covenants and agrees that:

(a) it must undertake a Phase 1 Environmental Assessment prior to selling the Land;

(b) if the Phase 1 Environmental Assessment identifies any contamination that could potentially affect residential use of the Land, then the Owner must prior to selling the Land also obtain either:

(i) a Certificate of Environmental Audit; or

(ii) a Statement of Environmental Audit that the environmental conditions of the Land are suitable for residential use;

from an environmental auditor appointed under the *Environment Protection Act 1970*;

(c) if the Phase 1 Environmental Assessment does not identify any contamination that could potentially affect residential use of the Land then the Owner is not required to undertake any further environmental assessments or obtain a Certificate of Environmental Audit or Statement of Environmental Audit prior to selling the Land;

(d) if a Statement of Environmental Audit is issued then all of the conditions of the Statement of Environmental Audit must be complied with to the satisfaction of the responsible authority, prior to commencement of residential use of the site. Written confirmation of compliance must be provided by a suitably qualified environmental professional or other suitable person acceptable to the responsible authority. In addition, sign off must be in accordance with any requirements in the Statement of Environmental Audit conditions regarding verification of works; and

(e) it will provide copies of the Phase 1 Environmental Assessment and any other environmental assessments obtained to the Responsible Authority and to any prospective purchasers of the Land.

5.2 **Covenants regarding works on the Land**

The Owner covenants and agrees that, prior to the use or development of the land for the purposes of accommodation, it will undertake the following works to the satisfaction of the Responsible Authority:

(a) drainage of the reservoir, and the cleaning out and filling of it under the supervision of an approved National Association of Testing Authorities Australia (NATA) registered testing laboratory;

(b) on completion of the filling, the testing laboratory issuing a certificate attesting that the requisite standard of compaction has been achieved;

(c) the provision of sewerage and water supply to the satisfaction of South East Water Corporation;

(d) the construction of Bethanga Street, drainage and associated works;

(e) the provision of building envelopes for protection of significant trees;

(f) the planting of street trees; and
(g) the protection of assets owned by the Responsible Authority.

5.3 **Covenants regarding costs of works on Land**

The Owner covenants and agrees that:

(a) the works in clause 5.2(a), (b) will be at the cost of South East Water Corporation; and

(b) the works in clause 5.2 (c), (d), (e), (f) and (g) will be at the cost of the Owner.

6. **OWNER’S WARRANTIES**

Without limiting the operation or effect of this Agreement, 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 which may be affected by this Agreement.

7. **NOTICE OF AGREEMENT**

The Owner agrees that it will bring this Agreement to the notice of all prospective purchasers, lessees, Mortgagees, chargees, transferees and assigns of the Land.

8. **OWNER’S DEFAULT**

(a) If the Owner fails to comply with the provisions of this Agreement, the Responsible Authority may serve a notice on the Owner specifying the works, matters and things in respect of which the Owner is in default.

(b) If the alleged default continues for 60 days after the service of such notice, the Responsible Authority may, by its officers, employees, agents and contractors, enter the Land and ensure that the works, matters and things are carried out.

(c) The reasonable costs incurred by the Responsible Authority in undertaking the works as a result of the Owner’s default will be payable by the Owner.

9. **SUCCESSORS IN TITLE**

Without limiting the operation or effect of this Agreement, the Owner must ensure that until this Agreement is recorded on the folio of the register which relates to the Land, the Owner's successors in title will:

(a) give effect to and do all acts and sign all documents which require those successors to give effect to this Agreement; and

(b) execute under seal a deed agreeing to be bound by the terms of this Agreement.

10. **NO FETTERING**

The parties acknowledge 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 relating to the Land or relating to any use or development of the Land.
11. **TERMINATION**

(a) This Agreement ends on the date that the Responsible Authority issues a letter confirming that the Owner has complied with all of its obligations under this Agreement.

(b) The Responsible Authority must not unreasonably withhold or delay issuing a letter confirming that the Owner has complied with its obligations under this Agreement.

(c) As soon as reasonably practicable after the Agreement has ended, the Responsible Authority must, at the request and cost of the Owner, make application to the Registrar of Titles under section 183(2) of the Act and do everything else reasonably necessary to cancel the recording of this Agreement on the Register.

(d) This clause survives the end of this Agreement.

12. **NOTICES**

12.1 **How to give a notice**

A notice, consent or other communication under this Agreement is only effective if it is:

(a) in writing, signed by or on behalf of the person giving it;

(b) addressed to the person to whom it is to be given; and

(c) either:

(i) delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that person's address; or

(ii) sent by fax to that person's fax number and the machine from which it is sent produces a report that states that it was sent in full.

12.2 **When a notice is given**

A notice, consent or other communication that complies with this clause is regarded as given and received:

(a) if it is delivered or sent by fax:

(i) by 5.00 pm (local time in the place of receipt) on a Business Day – on that day; or

(ii) after 5.00 pm (local time in the place of receipt) on a Business Day, or on a day that is not a Business Day – on the next Business Day; and

(b) if it is sent by mail:

(i) within Australia – 3 Business Days after posting; or

(ii) to or from a place outside Australia – 7 Business Days after posting.

13. **GENERAL**

13.1 ** Governing law**

This Agreement is governed by the law in force in Victoria.
13.2 **Liability for expenses**

The Owner must pay the Responsible Authority's reasonable costs and expenses, including legal expenses, in relation to the preparation, drafting, finalisation, engagement, execution, and registration of this Agreement which are, and until paid remain, a debt due to the Responsible Authority.

13.3 **Giving effect to this Agreement**

Each party must do anything (including execute any document), and must ensure that its employees and agents do anything (including execute any document), that the other party may reasonably require to give full effect to this Agreement.

13.4 **Variation of rights**

The exercise of a right partially or on one occasion does not prevent any further exercise of that right in accordance with the terms of this document. Neither a forbearance to exercise a right nor a delay in the exercise of a right operates as an election between rights or a variation of the terms of this document.

13.5 **Operation of this Agreement**

(a) Any right that a person may have under this Agreement is in addition to, and does not replace or limit, any other right that the person may have.

(b) Any provision of this Agreement which is unenforceable or partly unenforceable is, where possible, to be severed to the extent necessary to make this Agreement enforceable, unless this would materially change the intended effect of this Agreement.

13.6 **GST gross up and GST on claims**

(a) If a party makes a supply to another party under or in connection with this Agreement, then (unless the consideration is expressly stated to be inclusive of GST) the consideration for that supply is exclusive of GST, and in addition to paying or providing that consideration the recipient must:

   (i) pay to the supplier an amount equal to any GST for which the supplier is liable on that supply, without deduction or set-off of any other amount; and

   (ii) make that payment as and when the consideration or part of it must be paid or provided, except that the recipient need not pay unless the supplier has issued to the recipient a tax invoice (or an adjustment note) for that supply.

(b) The Supplier must promptly create an adjustment note for, or apply to the Commissioner for, a refund of, and refund to the recipient any overpayment by the recipient for GST, but the supplier need not refund to the recipient any amount for GST paid to the Commissioner unless the supplier is entitled to a refund or credit of that amount.

(c) If a party provides a payment for or any satisfaction of a claim or a right to claim under or in connection with this Agreement (for example, for misrepresentation or for a breach of any warranty or for indemnity or for reimbursement of any expense) that gives rise to a liability for GST, the provider must pay, and indemnify the recipient on demand against, the amount of that GST.

(d) If a party has a claim under or in connection with this Agreement for a cost on which that party must pay an amount for GST, the claim is for the cost plus the

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amount for GST (except any amount for GST for which that party is entitled to an input tax credit).

13.7 **Counterparts**

This Agreement may be executed in counterparts.

13.8 **Attorneys**

Each person who executes this Agreement on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney.
EXECUTED as a deed.

SIGNED, SEALED AND DELIVERED on behalf of MORNINGTON PENINSULA SHIRE COUNCIL ABN 53 159 890 143, pursuant to the power delegated to him/her by an instrument of delegation dated 2012:

Witness

Name of witness

Signature of delegate

Name of delegate

EXECUTED by SOUTH EAST WATER CORPORATION by being signed sealed and delivered in Victoria by its Attorney ANTHONY WILLIAM KELLY who holds the position of LEGAL COUNSEL under the Power of Attorney dated 1/07/2012 in the presence of:

Signature of witness

Name of witness

Signature of attorney

Anthony William Kelly
Legal Counsel
South East Water Corporation