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Maintenance Agreement

The Waterways Residential Development, Braeside

KINGSTON CITY COUNCIL
and

BODY CORPORATE (No. 1) PLAN No. 435322B

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IMPORTANT NOTE

The Developer of The Waterways Residential Subdivision ("the Developer") and Council have entered into agreements under the Planning and Environment Act 1987 in relation to the Waterways Residential Development. These agreements, amongst other things, discuss the public open space areas which are to be transferred to Council. The Developer has established a body corporate to ensure a certain level of maintenance over the public open space areas which are to be transferred to Council. The level of landscaping and maintenance within these public open space areas is to a higher standard than provided by Council generally in the municipality.

Council has requested that the Body Corporate be and will always remain responsible for adhering to the appropriate minimum standards referred to in this Agreement and the Body Corporate will become responsible for undertaking those maintenance works as well as the day to day maintenance of the public open space areas. A Responsibility Schedule is attached which shows where the obligations for maintenance fall as between Council and the Body Corporate. A Maintenance Schedule is also referred to which identifies the standard to which the Body Corporate must maintain the land.

In recognition of these works Council has agreed to reimburse the Body Corporate an amount as described under 'Proportion' in the Definitions section of this Agreement and further identified under the accompanying schedule to this Agreement. The Body Corporate and its members are responsible for financing the remainder of the cost of maintaining parks and open spaces in accordance with this Agreement. The capital cost of refurbishment and replacement of existing assets and any assets installed after the date of this agreement is the sole responsibility of the Body Corporate.

Maintenance Agreement

DATE / /2002

BETWEEN

KINGSTON CITY COUNCIL
of 34 Brindisi Street, Mentone, Victoria

(Council)

AND

BODY CORPORATE (No. 1) PLAN No. 435322B
of 8 Collins Street, Melbourne, Victoria

(the Body Corporate)

INTRODUCTION

- A. The Body Corporate was established by the registration of Stage 1 of the Plan of Subdivision on 16 October 2000.
- B. Council will become the registered proprietor of the Land on registration of each stage of the Plan of Subdivision by operation of the *Subdivision Act* 1988.
- C. Council and the Body Corporate have agreed as follows:
- The Land has been or will be developed by the Developer in accordance with plans approved by Council.
 - The Body Corporate will be responsible for the ongoing management and maintenance of the Land.
- D. The Body Corporate will be entitled to be paid by Council in respect of each lot in the subdivision an amount equivalent to what Council spends on average per rateable lot in its municipal district on the maintenance of open space.

THE PARTIES AGREE

1. DEFINITIONS

In this document unless expressed or implied to the contrary:

Budget Amount means the amount of money Council sets aside each year in its budget for the maintenance of open space in its municipality in accordance with the Budget Schedule;

Budget Schedule means the schedule attached to this Agreement setting out the components which make up the Budget Amount;

Council Lots means the number of rateable assessments in Council's municipality excluding those assessments in the Waterways Development;

Developer means The Waterways Residential Development Pty Ltd ACN 004 413 183;

Land means the public open space transferred to Council by operation of the *Subdivision Act 1988* on registration of each Plan of Subdivision and the Landscaped Areas being part of the land contained in the Plan of Subdivision;

Landscaped Areas means those parts of land other than public open space transferred to Council by operation of the *Subdivision Act 1988* on registration of each Plan of Subdivision that the Developer landscapes as agreed by the submission of landscaping plans to Council by the Developer and the approval of such plans by Council;

Maintenance Schedule means the document known as "Waterways Maintenance Schedule" dated July 2002 and endorsed by Council as being the Maintenance Schedule for the purposes of this Agreement;

Plan of Subdivision means Plan of Subdivision No. PS435322B and includes any stage of that plan of subdivision;

Proportion means the proportion of the Budget Amount calculated by application of the following formula:

$$\text{Proportion} = \frac{\text{Budget Amount} \times \text{Waterways Lots}}{(\text{Waterways Lots} + \text{Council Lots})};$$

Responsibility Schedule is the document identified as "Responsibility Schedule" attached to this Agreement setting out where responsibility falls as between the parties in respect of the maintenance of the Land;

Waterways Development means the staged subdivision development in Plan of Subdivision No. 435322B developed by the Developer; and

Waterways Lots means the number of assessments in the Waterways Development for which an individual title for each of those assessments exists and at least 2 years has elapsed since the registration date of the Plan of Subdivision that caused the individual titles for each of those assessments to issue.

2. RESPONSIBILITY AND MAINTENANCE

- 2.1 The Body Corporate and Council agree that the allocation of responsibilities for maintenance of the Land are as set out in the Responsibility Schedule.
- 2.2 The Body Corporate agrees that it will maintain the Land to at least the minimum acceptable standard required in the Maintenance Schedule.
- 2.3 The Body Corporate and Council agree that neither of them will install or construct any further building or structure or other equipment on the Land without the prior written agreement of the parties.
- 2.4 Council agrees that the standard of maintenance set out in the Maintenance Schedule will not be more onerous than standards adopted by Council in other similar parts of its municipal district.
- 2.5 To the extent this Agreement and the Maintenance Schedule are inconsistent, the terms of this Agreement prevail.

3. COUNCIL TO REIMBURSE THE BODY CORPORATE

Council and the Body Corporate acknowledge and agree:

- 3.1 Council determines the Budget Amount each year; and
- 3.2 Council must pay to the Body Corporate the Proportion on 1 November of each year during the term of this Agreement.

4. DEFAULT OF THE BODY CORPORATE

Council and the Body Corporate acknowledge and agree that:

- 4.1 where the Body Corporate fails to maintain any part of the Land to the standard set out in the Maintenance Schedule then Council may issue a written notice to the Body Corporate (**Maintenance Notice**) setting out the extent of the Body Corporate's failure to comply with the requirements of the Maintenance Schedule and demanding that such work be done within 21 days provided that in the event of emergency such shorter period to remedy critical items may be specified as is reasonably necessary;
- 4.2 where the Body Corporate has not satisfied all or any of its obligations as set out in the Maintenance Notice, Council may engage its own maintenance contractors to do such works as are reasonably necessary to comply with the standard set out in the Maintenance Schedule;
- 4.3 in the event of emergency, where it is not reasonably practical to notify the Body Corporate, Council may take such actions as are reasonably necessary to avoid the emergency; and
- 4.4 Council may recover all due and proper expenses incurred pursuant to this condition 4 by deducting such amounts from the Proportion payable to the Body Corporate pursuant to condition 3.2.

5. INTERESTS OF THE PARTIES

Council and the Body Corporate acknowledge and agree that:

- 5.1 the Body Corporate does not hold any interest in the Land by providing the management and maintenance services;
- 5.2 the Body Corporate has no right to exclude any member of the public from the Land by virtue of this Agreement; and
- 5.3 Council is the sole owner of the Land.

6. INSURANCE AND INDEMNITY

Council and the Body Corporate acknowledge and agree that:

- 6.1 the Body Corporate must maintain insurance noting the interest of Council with a reputable insurer for public liability in the amount of \$10,000,000 concerning one single event;

- 6.2 if demanded each year by Council, the provision to Council by the Body Corporate of evidence of the insurance required by this Agreement is a condition precedent to the payment of the Proportion for that year in accordance with condition 3 of this Agreement; and
- 6.3 the Body Corporate must indemnify and hold harmless Council against all claims resulting from any damage, loss, death or injury in connection with the Land whether caused or contributed to by it or its contractors except to the extent that Council causes or contributes to the damage, loss, death or injury.

7. TERMINATION

Council and the Body Corporate acknowledge and agree that:

- 7.1 this Agreement has effect from the date of execution and will survive in perpetuity subject to the parties agreeing to bring this Agreement to an end or this Agreement being terminable by operation of law;
- 7.2 if a resolution is made to dissolve or otherwise wind up the Body Corporate without the consent of Council or, if an application is made to a court or other body to wind up the Body Corporate then, the monies contributed towards the maintenance and management of the Land in the previous 5 years pursuant to clause 3 of this Agreement shall immediately become a debt payable by the Body Corporate to Council; and
- 7.3 where the Body Corporate winds itself up or this Agreement is terminated then Council as registered proprietor of the Land will become responsible for maintenance of the Land to the standard that it deems appropriate and Council may levy the differential or any other rates for each rateable assessment in the Waterways Development in order to recover compensation for expenditure in maintaining the Land.

8. OTHER OBLIGATIONS OF THE BODY CORPORATE

The Body Corporate must:

8.1 Provision of information

on or about 1 July each year or such other time as Council agrees, provide Council with:

- 8.1.1 a copy of the audited financial statements of the Body Corporate;
- 8.1.2 a copy of a record of all office holders including their contact details

8.2 Meetings with Council

agree with Council upon a protocol for the conduct of regular meetings between representatives of the Body Corporate, its nominated contractor(s) and Council to review and oversee the implementation of the obligations of the Body Corporate under this Agreement

8.3 Reporting to Council

at least once per quarter report to Council, in such form as is directed by Council, upon the measures being undertaken to implement and give effect to its maintenance obligations under this Agreement.

9. COSTS

- 9.1 The Body Corporate must pay Council's legal costs for this Agreement incurred by Council up to 31 October 2001.
- 9.2 After 31 October 2001, each party is to pay its own legal costs.

10. GENERAL

10.1 Further Assurance

Each party must promptly execute and deliver all documents and take all other action necessary or desirable to effect, perfect or complete the transactions contemplated by this Agreement.

10.2 Assignment

10.2.1 The Body Corporate must not:

10.2.1.1 sell, transfer, delegate, assign, license; or

10.2.1.2 mortgage, charge or otherwise encumber

any right or obligation under this Agreement to any person (**Proposed Assignee**), without the prior written consent of Council.

10.2.2 Council must not unreasonably withhold consent under this clause.

10.2.3 The Body Corporate must pay the legal fees incurred by Council in connection with the proposed assignment.

10.2.4 The Body Corporate must deliver to Council:

10.2.4.1 the name, address and occupation of the Proposed Assignee;

10.2.4.2 two written references as to financial circumstances of the Proposed Assignee;

10.2.4.3 an agreement in a form approved by the non-assigning party, executed by the Proposed Assignee, in which the Proposed Assignee agrees to perform the obligations of the assigning party under this Agreement; and

10.2.4.4 if required by Council, a guarantee in a form approved by Council executed by persons approved by Council, guaranteeing the performance of the Proposed Assignee's obligations.

10.3 Agreement to Bind Future Body Corporates

Council and the Body Corporate acknowledge and agree that this Agreement will bind all successors of the Body Corporate and the Body Corporate will do everything in its power to ensure that any proposed body corporate in the Waterways Development will execute such agreements as are necessary to bind that body corporate to the terms and conditions of this Agreement.

10.4 Body Corporate to Distribute the Agreement

The Body Corporate acknowledges and agrees that the Body Corporate will make this Agreement available to its existing members and to all new members as it becomes aware of them.

11. DISPUTE RESOLUTION

11.1 Dispute Notice

If a dispute arises concerning this Agreement, either of the parties may serve a dispute notice on the other party. The dispute notice must state that a dispute has arisen and briefly identify the matter in dispute.

11.2 Appointment of Expert

The parties may elect to appoint an expert to determine the dispute after service of the dispute notice. If the parties cannot agree on the expert, any of the parties may request the President of the Law Institute of Victoria or nominate another person to appoint an expert.

11.3 Legal Representation before an expert

Each party is entitled to legal representation during the dispute resolution proceedings.

11.4 Role of Expert

The parties must instruct the expert to:

- seek any information and conduct investigations as the expert thinks fit and without being bound by the rules of natural justice;
- act as expert and not as an arbitrator;
- determine the dispute, including liability to pay legal costs, as the expert thinks fit; and
- advise the parties in writing of the determination.

11.5 Determination Binding

The determination of the expert is binding on the parties.

11.6 Costs of Expert

The parties to the dispute must pay the expert's costs and expenses equally, unless the expert determines otherwise.

11.7 Definition of Expert

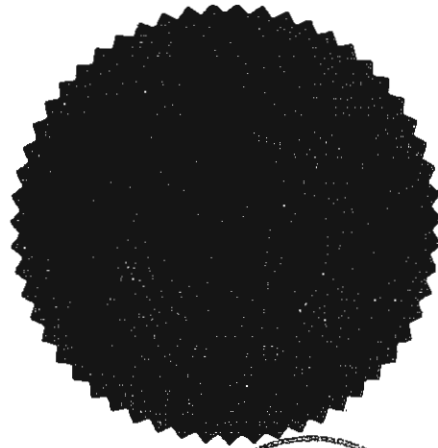
An expert for the purposes of this clause means a person holding the position of Senior Counsel and experienced in planning law.

EXECUTED as a Deed by the parties on the _____ day of _____ 2002

THE COMMON SEAL of the KINGSTON CITY COUNCIL was hereunto affixed in the presence of:)
)
)

.....
Councillor

.....
Chief Executive Officer



EXECUTED by BODY CORPORATE (No. 1) PLAN No. 435322B by being signed by the person who is authorised to sign for the body corporate as an officer duly appointed under the Subdivision (Body Corporate) Regulations 2001 in accordance with a special resolution dated 17 May 2001:)
)
)
)
)
)



.....
x

Officer

.....
Ian Kiefel

Full name

.....
12 Gillies Place, Hillingwood
V.P. 3134

Usual address



City of
KINGSTON

RESPONSIBILITY SCHEDULE

SCHEDULE OF MAINTENANCE RESPONSIBILITIES

For the activities the responsibility of Council, the minimum maintenance standards are those covered by Council's service specifications for Parks Maintenance, Road Infrastructure Maintenance and Litter Bin Clearances Services.

For those activities the responsibility of the Body Corporate, the minimum standards are those set out in the Waterways Maintenance Schedule for Parks Maintenance.

BODY CORPORATE RESPONSIBILITY

The Body Corporate is responsible for all activities inclusive and implied in the establishment, replacement, refurbishment, upgrading and maintenance, including paying all fees, head works fees and development contribution fees, energy usage and other utility service consumption fees, associated with the following.

- All horticultural assets and features, including trees and street trees, all nature strips, weed control, including weed control from all footpath paving both in the public road network and in open space areas, garden beds, including mulch, in both the road reservation and open space areas and reserves.
- All footpaths and shared bicycle paths, both sealed and unsealed, in open space areas or open space areas of the road network, except public footpaths immediately fronting residential properties in the public road network.
- Irrigation systems and drainage systems for all open space areas, including the recurrent water rates and water consumption charges.
- Feature lighting, including any feature lighting in the public road network which is primarily for open space areas.
- Non standard street name signs and associate posts.
- Footbridges, retaining walls, shelters, wharves and jetties, and other structures, garden bed retaining edges, signs, bollards and other urban design elements, furniture playground equipment [and associated infrastructure] in open space areas contained within the road reservation network and/or open space reserves.
- Litter bins and clearance of litter bins in all open space areas.

COUNCIL RESPONSIBILITY

Council is responsible for the care and management including maintenance, replacement, refurbishment and upgrading of –

- standard concrete footpaths in the road reservation fronting private property.
- municipal underground drainage [being the reticulated main drainage for private land and the road network] including associated drainage pits for the management of the municipal drainage network.
- concrete kerb and channel for the public road network.
- public road pavement including surfacing.
- public road street signage for standard municipal purposes.
- standard street lighting of the public road network.
- bench seats, bollards, litter bins and litter bins' clearances, bus shelters for municipal public purposes in the public road network.
- public road bridges.

RESIDENT RESPONSIBILITY

Residents are responsible for the provision, replacement and maintenance, along with paying all Council fees and other associated fees for –

- vehicle crossings over the road reservation to private property, in accordance with Council's standards and permits.
- private drainage connecting to municipal drainage, including necessary fittings and pits, across or within the road reservation.



City of
KINGSTON

BUDGET SCHEDULE

Waterways Estate Maintenance Agreement

Relevant Council Budget Allocations

account no. description

123 0010128 Parks water usage
123 0010132 Parks energy supply
123 0051,128 Ancillary maintenance
123 0110028 Scheduled works - Parks maint
123 0120028 Unshed works - Parks maint