



**SERVICES AGREEMENT:  
CAPACITY [NEW SUPPLY DEVELOPMENT FUNDING AND CAPACITY]**

***[Drafting note: these provisions will be included in the relevant parts of the draft Capacity Agreement once that template is nearly finalised, to create a New Supply Development Funding and Capacity Services Agreement]***

**[Part B: Development Phase]**

Key Term	Description	
<b>Provider's External Financier(s) (if applicable)</b>	<i>[Insert name of Provider's External Financiers (if any)]</i>	
<b>Financier Direct Deed date and ref. no. (if applicable)</b>	<i>[Insert date and reference number of Financier Direct Deed (if any)]</i>	
<b>New Supply Housing Project</b>	The Provider is to deliver the New Supply Properties to be provided for IRRS tenancies at the Services Location, as further described in Schedule 9 and in accordance with the below configurations.  <i>[Insert high level configuration requirements, including in relation to minimum property size, relevant suburbs within the Services Location, number of bedrooms and minimum fit for purpose design requirements]</i>  <b>(Configurations)</b>	
<b>Plans and Specifications</b>	<i>[Refer to and/or attach a copy of the detailed plans and specifications for the New Supply Properties in the New Supply Housing Project, which are to be compliant with the Configurations and approved by MSD.]</i>	
<b>New Supply Housing Project Timeline and Key Milestone Dates</b>	<b>Milestone</b>	<b>Date</b>
	<i>[Insert relevant milestones from the separate example milestones document depending on procurement methodology.</i>  <i>It should be noted that the Drawdowns of Upfront Development Funding Costs are tied into milestones, i.e., the milestone will provide the date for drawdown of Upfront Development Cost Funding. This should be taken into account when developing milestones for the New Supply Housing Project.]</i>	

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Key Term	Description	
<b>Development Phase Reporting</b>	<p><b>Regular reporting</b></p> <p>During the Development Phase, the Provider must provide to MSD:</p> <ul style="list-style-type: none"> <li>the Quarterly Development Report on the last day of the calendar months of September, December, March, and June;</li> <li>copies of the Provider's audited annual financial accounts prepared in accordance with generally accepted accounting practice;</li> <li><i>[Insert any other regular reporting requirements]</i></li> </ul> <p><b>Ad Hoc reporting</b></p> <p>The Provider must provide to MSD:</p> <ul style="list-style-type: none"> <li>within 10 Business Days of a request to do so, any information MSD, acting reasonably, requires to satisfy itself that the terms of this Agreement are being complied with or any other related matter;</li> <li>immediately (or as soon as possible thereafter) upon becoming aware of any matter (including any variations to the New Supply Housing Project) that will, or is likely to, have a material impact on the New Supply Housing Project complying with the Project Management Plan, or the ability of the Provider to deliver the New Supply Housing Project;</li> <li>no less than 20 Business Days' notice of the estimated date of issue of [Code Compliance Certificate(s) for the New Supply Properties];</li> <li><i>[Insert any other ad hoc or irregular reporting requirements]</i></li> </ul>	
<b>Operating Supplement</b>	<p><i>[Insert any Operating Supplement payable in respect of relevant Properties. The Agreed Rent in Part A of these Key Terms should also refer to the Operating Supplement. If only an Operating Supplement is payable in respect of the New Supply Properties (rather than any Upfront Development Cost Funding Amount), then the following four Key Terms in square brackets should be removed, and Schedule 9 will need amending to remove the relevant Upfront Development Cost Funding Payment provisions.]</i></p>	
<b>[Upfront Development Cost Funding Amount]</b>	<p><i>[insert %] of Development Costs, up to [Insert cap on total amount] (inclusive of GST, if any)</i></p>	
<p><b>[Upfront Development Cost Funding Payments]</b></p> <p><i>[Insert relevant amounts which align with Milestone Dates]</i></p>	<b>Instalment Amount</b>	<b>Payment Date</b>
	<p>\$[●] (calculated at [●]% of the Upfront Development Cost Funding Amount)</p>	<p>Within seven Business Days of satisfaction of the Conditions Precedent for Drawdown for Milestone 1</p>
	<p>\$[●] (calculated at [●]% of the Upfront Development Cost Funding Amount)</p>	<p>Within seven Business Days of satisfaction of the Conditions Precedent for Drawdown for Milestone 2</p>

Key Term	Description		
	\$[●] (calculated at [●]% of the Upfront Development Cost Funding Amount)		Within seven Business Days of satisfaction of the Conditions Precedent for Drawdown for Milestone 3
[Conditions Precedent to Drawdown]	Drawdown Stage	Conditions	
	Every Drawdown	The Provider is to submit: <ul style="list-style-type: none"><li>a completed Drawdown Notice; and</li><li>a GST-compliant invoice (in a form previously approved by MSD) for the amount (if any) shown by the Drawdown Notice as owing to the Provider and to be paid by MSD to the Provider.</li></ul>	
	[Insert further relevant Conditions Precedent to Drawdown from separate Examples Conditions Precedent to Drawdown document, depending on procurement method.]		
[Security protection for MSD]	[Drafting note: form and content of security is still being considered by MSD]  [A registered encumbrance and/or registered land covenant in gross over each of the Properties in the form attached to this Agreement (if any) and in accordance with the provisions of Schedule 10.]		
Compensation payable by MSD for any earlier termination of this Agreement during Development Phase	The equivalent provision in Part A of these Key Terms will not apply during the Development Phase, and instead this Key Term will apply during the Development Phase only.  [Insert fair and reasonable compensation calculation, having regard to clause 23.1 of the Relationship Agreement and that the Provider is not at fault (if applicable) where MSD terminates this Agreement for convenience.]		
Insurances required during Development Phase	Insurance type	Required?	Amount of cover required
	Public liability	[Yes/No]	[Insert minimum amount of cover required], per event or series of related events
	Material loss/damage	[Yes/No]	Full replacement value of all buildings comprised in the New Supply Housing Project (including removal of debris and consultants, contractors, and legal fees), being at least  [Insert minimum amount of cover required]

Key Term	Description		
	Contract works (all risks) insurance	[Yes/No]	[Insert minimum amount of cover required]
	[Insert any others]	[Yes/No]	[Insert minimum amount of cover required]
<b>MSD Step-in Rights during Development Phase</b>	Yes / No [This may be covered in any applicable Financiers Direct Deed].		
<b>Sunset Date</b>	[Insert date by which the Development Phase must be completed and all New Supply Properties delivered. Failure to deliver by this date entitles MSD to terminate this Agreement, so there should be a reasonable allowance between this date and the expected date for completion, to give the Provider an opportunity to still complete the project even if there are delays.]		
<b>Further Deliverables</b>	<p>MSD and the Provider agree to the following further deliverables: [Insert any further documents, requirements to be met, or other items which are not covered elsewhere in the Key Terms or Schedules 9 and 10.</p> <p>For example, for Provider Lease developments: The Provider agrees to:</p> <ul style="list-style-type: none"> <li>• within 10 Business Days of the date of this Agreement, provide MSD with a draft copy of the agreement to lease/deed of lease between [Landlord Entity] as landlord and the Provider as lessee of the New Supply Properties, for MSD's approval (acting reasonably); and</li> <li>• on or before the issue of Code Compliance Certificates for the New Supply Properties, provide MSD with a copy of the signed agreement to lease/deed of lease between [Landlord Entity] as landlord and the Provider as lessee of the New Supply Properties substantially in the same form as approved by MSD.]</li> </ul>		

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## SCHEDULE 9: DEVELOPMENT PHASE OBLIGATIONS

This Schedule 9 describes the Development Phase obligations and related rights and obligations of the Parties during the Development Phase.

### 1 Additional definitions and interpretation

#### 1.1 The following words in this Schedule 9 are used with the meaning set out below:

**Capacity Phase** means the period during the term of this Agreement under which the Provider must make the Properties available for letting to Eligible Tenants;

***[Drafting note: changes will be required to the Capacity Services Agreement to refer to the Capacity Phase. These changes will be made to the template Capacity Services Agreement once it is near finalisation and these provisions have been added to it to make a New Supply Development Funding and Capacity Services Agreement.]***

**Certificate for Public Use** has the meaning set out in the Building Act 2004;

**Code Compliance Certificate** has the meaning set out in the Building Act 2004;

**Conditions Precedent to Drawdown** means the conditions precedent to Drawdown as set out further in the Key Terms and Schedule 10;

**Configurations** has the meaning set out in the Key Terms;

**Development Costs** means the Provider's costs of delivering the New Supply Properties in relation to the New Supply Housing Project;

**Development Phase** means the period leading up to, and including, the delivery of the New Supply Properties and ending in the issuance of a Code Compliance Certificate for, and availability for tenancy by Eligible Tenants under the Capacity Phase of, all the New Supply Properties (excluding any later additions or substitutions);

**Drawdown** means a permitted drawdown of Upfront Development Cost Funding against the stipulated milestone, as set out in the Key Terms;

**Drawdown Notice** means a Drawdown notice in (or substantially in) the form notified by MSD to the Provider from time to time;

**Good Industry Practice** means the degree of skill, care, prudence, foresight, and operating practice that would reasonably and ordinarily be expected of a skilled and competent supplier of goods and services engaged in the same type of undertaking as that of the Provider, contractors, subcontractors, consultants, or other such persons (as applicable), under the same or similar circumstances as those contemplated by this Agreement;

**New Supply Housing Project** means the development described in the Key Terms for the delivery of the New Supply Properties;

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**New Supply Properties** means those properties being delivered by the Provider as part of the New Supply Housing Project, as set out further in the Project Management Plan;

**Project Management Plan** means a suitable and robust development plan agreed between MSD and the Provider prior to the date of this Agreement;

**Quarterly Development Report** means the quarterly development report substantially in the form as notified by MSD to the Provider from time to time that the Provider is to provide to MSD as set out in the Key Terms;

**Sunset Date** means the date identified in the Key Terms;

**Upfront Development Cost Funding** means the contributions paid by MSD towards the Development Costs during the Development Phase under the terms and conditions contained in this Agreement; and

**Upfront Development Cost Funding Amount** means the percentage of the Provider's Development Costs MSD has agreed to pay, up to a maximum dollar figure amount, as Upfront Development Cost Funding as set out in the Key Terms.

- 1.2 In Schedule 9 , unless specifically stated otherwise, "deliver" includes all actions required to fully deliver, including where appropriate development, construction, refurbishment, procurement and acquisition.
- 2 **New Supply Properties**
  - 2.1 The Provider is to deliver the New Supply Properties at the Services Location for Eligible Tenants by the end of the Development Phase and in accordance with the Project Management Plan. For this purpose, New Supply Properties can include relocation and/or refurbishment of an existing structure provided it is of a standard acceptable to MSD.
  - 2.2 By the end of the Development Phase, the Provider is to ensure that each New Supply Property:
    - (a) is suitable as public housing and for the intended purpose of the New Supply Housing Project;
    - (b) complies with the Project Management Plan (including in relation to compliance with the Configurations and Plans and Specifications);
    - (c) is delivered in accordance with all relevant resource and building consents, has a Code Compliance Certificate, and complies with all relevant Laws;
    - (d) without limiting the warranties and guarantees implied at law, is delivered in accordance with Good Industry Practice;
    - (e) will be available, upon completion, for letting to Eligible Tenants approved by MSD, in accordance with Schedule 1; and
    - (f) complies with all other terms and conditions of this Agreement.

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- 2.3 If during the Development Phase a New Supply Property is completed and complies with clause 2.2(a) to (f) of this Schedule 9 except for issue of a Code Compliance Certificate, MSD and the Provider agree that the Capacity Phase can commence in respect of that New Supply Property, provided that:
- (a) the Provider has obtained a Certificate for Public Use for that New Supply Property;
  - (b) the Provider can safely and effectively carry out all of its duties during the Capacity Phase in respect of that New Supply Property;
  - (c) occupation and use of the New Supply Property for the Capacity Phase will not materially interfere with the Provider's ability to deliver the New Supply Housing Project;
  - (d) the New Supply Property can be safely occupied without undue interference with any occupants' use and enjoyment of the New Supply Property (including interference by noise, dust, vibrations, or smells from any source); and
  - (e) the Provider obtains a Code Compliance Certificate for the New Supply Property as soon as possible.

- 2.4 Following completion of the Development Phase in respect of a New Supply Property, the Provider is to provide that New Supply Property as a Property in accordance with Schedule 1, and manage it, for the remainder of the Term and in accordance with this Agreement and the Contract Documents.

- 2.5 Notwithstanding completion of the Development Phase, any minor omissions or defects in the New Supply Properties must be rectified within 28 days of the issue of the relevant Code Compliance Certificate(s).

### 3 **Project Management Plan**

- 3.1 The Provider is to deliver the New Supply Housing Project in accordance with the Project Management Plan.

- 3.2 The Project Management Plan is to incorporate:

- (a) the Configurations and Plans and Specifications; and
- (b) a project timeline which includes expected timeframes and dates for obtaining all relevant documentation, delivery of key parts of the New Supply Housing Project, and a due date for completion of the New Supply Housing Project,

and shall require the delivery of the New Supply Properties in accordance with the Configurations, Plans and Specifications, and project timeline.

- 3.3 For the purposes of this Agreement and the Project Management Plan, in the event of any conflict between the Configurations and the Plans and Specifications or any other documents, the Configurations will prevail unless MSD has expressly provided its prior written consent to such conflict.

#### 4 **Project timeline**

4.1 Notwithstanding clause 2.1 of this Schedule 9 and without limiting clause 11.5 of this Schedule 9:

- (a) the Provider is to use all reasonable endeavours to meet the project timeline and key milestone dates for the New Supply Housing Project delivery as set out in the Key Terms and the Project Management Plan; and
- (b) if the Provider considers that it will not, or is unlikely to, meet such project timeline and key milestone dates, it will notify MSD in writing as soon as practicable and the Provider is to minimise the delay in meeting such project timeline and key milestone dates.

#### 5 **Building contract and other contracts**

5.1 In relation to any contract (including any construction contract(s) and subcontracts) for the delivery of any part of the New Supply Housing Project, the Provider:

- (a) is not to enter into a material contract in relation to any part of the New Supply Housing Project without MSD's prior written approval;
- (b) is to ensure the contract:
  - (i) is in writing;
  - (ii) is consistent, and requires the delivery of the New Supply Housing Project in accordance, with the terms of this Agreement; and
  - (iii) requires the contracting third party to exercise Good Industry Practice in delivering its part of the New Supply Housing Project;
- (c) is to ensure each contracting third party is:
  - (i) suitably experienced and qualified, and has sufficient capacity and capability to deliver that part of the New Supply Housing Project contracted to them; and
  - (ii) fully aware of the Provider's obligations during the Development Phase;
- (d) is not relieved from any liability or obligation to deliver the New Supply Housing Project; and
- (e) in respect of any construction contract, is to ensure that the contractor is a licenced building practitioner (as that term is defined in the Building Act 2004) [and the price is a fixed lump sum].

5.2 For the avoidance of doubt, in this clause 5 of this Schedule 9 "contract" includes any contract, agreement, or arrangement with any third party for the delivery of any part of the New Supply Housing Project, and may include a development agreement with a developer, design services agreement with a design consultant, or agreement for sale and purchase of any land or properties.

## 6 Risks and insurance

- 6.1 The Provider is to ensure all risks of the New Supply Housing Project are adequately and suitably covered, whether by insurance or otherwise.
- 6.2 Where any insurance policies are identified in the Key Terms, the Provider is to:
- (a) effect and maintain, or cause to be effected and maintained, the identified insurance policies:
    - (i) for at least the minimum amount specified in the Key Terms for any one occurrence and in the aggregate;
    - (ii) with a reputable and financially sound insurer;
    - (iii) on terms which a prudent and experienced person performing work of a nature similar to the work the subject of the insurance could reasonably be expected to obtain; and
    - (iv) from the date of the commencement of any construction works in relation to the New Supply Housing Project until the completion of the Development Phase;
  - (b) within 10 Business Days of a request by MSD, provide MSD with evidence that the identified insurance policies are effected and maintained;
  - (c) except for an amount of less than \$10,000.00 and where the claim is in relation to an event which does not affect the safe occupation of the New Supply Properties or delivery of the New Supply Housing Project, notify MSD of any claims under any of the identified insurance policies;
  - (d) use the proceeds of any claim under any of the identified insurance policies to reinstate the New Supply Properties, or as otherwise agreed by MSD and the Provider.
- 6.3 Without limiting the obligations of the Provider in clause 6.2 of this Schedule 9, the Provider is to ensure that any contractors, subcontractors, consultants, or other third parties involved with the delivery of the New Supply Housing Project effect insurance policies on terms and covering risks that a prudent and experienced person performing work of a nature similar to the work the subject of the insurance could reasonably be expected to maintain obtain.

## 7 Upfront Development Cost Funding

- 7.1 MSD will provide the Upfront Development Cost Funding Amount to cover the agreed percentage of the Provider's Development Costs (up to a maximum amount) as set out in the Key Terms, subject to the Provider satisfying any Conditions Precedent to Drawdown and otherwise complying with the terms and conditions of this Agreement.
- 7.2 The Upfront Development Cost Funding Amount will be paid by MSD in one or more separate Drawdowns against the specified milestones in the Key Terms.

7.3 The Provider acknowledges MSD's rights to withhold Upfront Development Cost Funding or seek repayment (in part or in full) in accordance with this Agreement and the Relationship Agreement.

7.4 Nothing in this Agreement is to be interpreted as requiring MSD to increase its contribution towards the New Supply Housing Project beyond the Upfront Development Cost Funding Amount, and the Provider acknowledges that it is to meet any additional or unforeseen costs of completing the New Supply Housing Project that may arise.

## 8 **Payment of Upfront Development Cost Funding**

8.1 MSD will pay to the Provider the amount set out in the Drawdown Notice (up to the amount of the Upfront Development Cost Funding the Provider may drawdown at the relevant milestone) within the timeframe set out in the Key Terms, provided that the Conditions Precedent to Drawdown have been satisfied in full.

8.2 No money is payable by MSD until the Provider has satisfied all relevant Conditions Precedent to Drawdown. If the Provider fails to submit any documentation required under, or otherwise comply with or satisfy, any Condition Precedent to Drawdown, MSD may (at its sole discretion) withhold payment of any Upfront Development Cost Funding.

8.3 If the portion able to be drawn upon at any given milestone is not fully drawn, the balance can be drawn upon at the next Drawdown (if any).

8.4 Unless MSD agrees otherwise, a Drawdown Notice must be submitted within 12 months of the milestone date for the relevant Drawdown, and in any event prior to the completion of the Development Phase.

8.5 Any dispute arising in relation to a payment under a Drawdown or Drawdown Notice shall be resolved in accordance with clause 13.5 of the Relationship Agreement, as if the Drawdown Notice was an invoice.

## 9 **Management of Upfront Development Cost Funding payments**

The Provider recognises that it needs to be a prudent and transparent manager of Upfront Development Cost Funding and will therefore:

- (a) keep clear records of and account separately for all receipts of, and expenditure of, the Upfront Development Cost Funding; and
- (b) only expend the Upfront Development Cost Funding in or towards meeting its actual out of pocket expenses incurred in connection with the New Supply Housing Project.

***[Drafting note: The parties may want to consider greater control mechanisms around how and when money can be expended, to increase transparency and reduce waste. For example, Upfront Development Cost Funding payments could be advanced to a trust or similar account, and only drawn down against to cover permitted project costs.]***

## 10 **Repayment of Upfront Development Cost Funding**

10.1 The Provider agrees that all funds paid to it by MSD under this Agreement and not expended in accordance with this Agreement (together with any interest accrued in respect of such funds) are to be repaid as follows:

- (a) within 20 Business Days of completion of the Development Phase the Provider is to issue MSD a report in the form notified by MSD to the Provider from time to time, together with such other evidence as MSD may reasonably require, which illustrates:
  - (i) the Provider's total Development Costs; and
  - (ii) MSD's share of the Development Costs (calculated in accordance with clause 7.1 of this Schedule 9); and
- (b) in the event that the Upfront Development Cost Funding received by the Provider exceeds MSD's share of the Development Costs, the Provider must repay the difference, and issue a credit note (that meets the requirements of the Goods and Services Tax Act 1985), to MSD within 15 Business Days of issue of the report under clause 10.1(a) of this Schedule 9.

10.2 MSD may otherwise require the Provider to repay any portion of the Upfront Development Cost Funding:

- (a) reflective of the degree and materiality of any breach of this Agreement by the Provider, as determined by MSD in its sole discretion and acting reasonably (which determination may include agreement to provision of a lesser number of New Supply Properties than agreed or in a different configuration from that agreed);
- (b) in accordance with clause 12(b) or 13.1(b) of this Schedule 9; or
- (c) in accordance with this Agreement in the event of a Provider default during the Capacity Phase.

## 11 **Failure to meet its obligations during the Development Phase**

11.1 Without limiting any of its other rights or remedies under the Relationship Agreement or at law or equity, in the event that during the Development Phase:

- (a) the Provider has breached this Agreement;
- (b) the Provider has failed to meet the obligations to deliver the New Supply Housing Project as set out in this Agreement; or
- (c) the Provider has been required to repay any Upfront Development Cost Funding in accordance with this Agreement and fails to make such repayment,

MSD may give notice (with a copy to the Regulatory Authority) specifying the default in reasonable detail and requiring it to be remedied within an agreed timeframe following the process set out in this clause 11 of this Schedule 9.

- 11.2 Within 15 Business Days of receiving MSD's notice under clause 11.1 of this Schedule 9, the Provider is to:
- (a) propose a rectification programme that is reasonably acceptable to MSD, specifying:
    - (i) the timeframe within which the default will be remedied;
    - (ii) a work plan for remedying the default within that timeframe; and
    - (iii) any temporary measures being put in place to mitigate the effects of the default; and
  - (b) remedy the default within a timeframe reasonably acceptable to MSD.
- 11.3 During the implementation of such rectification programme:
- (a) the Provider is to keep MSD advised of progress against the agreed timeframes. MSD may agree to a reasonable variation of the relevant plan where circumstances beyond the Provider's reasonable control affect its implementation;
  - (b) MSD may withhold all or part of any payment otherwise due;
  - (c) MSD may, acting reasonably, require the Provider to withhold the expenditure of any Upfront Development Cost Funding that the Provider holds; and
  - (d) MSD, acting reasonably, may suspend the Provider's further performance of this Agreement, or the New Supply Housing Project (or any part of it).
- 11.4 If, after following the process in clauses 11.2 to 11.3 of this Schedule 9 above, the Provider still has not remedied the default specified in MSD's original notice, to MSD's satisfaction, then MSD may terminate this Agreement by giving 30 Business Days' notice to the Provider.
- 11.5 Despite anything to the contrary in this Agreement, if the Development Phase has not been completed and the Capacity Phase commenced for all New Supply Properties by the Sunset Date, MSD may terminate this Agreement by giving 30 Business Days' notice to the Provider.
- 12 **Additional Provider termination rights**
- In addition to the termination rights available under the Relationship Agreement:
- (a) the Provider may apply to MSD to terminate this Agreement at any time. MSD will give reasonable consideration to such request and the basis on which it can be agreed to; and
  - (b) the Provider may terminate MSD's involvement with the New Supply Housing Project on 15 Business Days' notice if MSD fails to pay any Upfront Development Cost Funding when due and payable, provided that the failure has not been remedied before the expiration of that notice period, subject

to immediate repayment by the Provider to MSD of all amounts (including earlier advances of Upfront Development Cost Funding) already received.

### 13 **Effect of termination**

13.1 In the event of termination of this Agreement for any reason:

- (a) termination will not affect any rights of a party against another which:
  - (i) accrued before the date of termination; or
  - (ii) otherwise relate to or may arise at any future time from any breach or non-observance of obligations under this Agreement which arose before the date of termination; and
- (b) the Provider is to repay all of the Upfront Development Cost Funding it has received, unless MSD agrees to a lesser amount, by the date of termination.

### 14 **Review of documents by MSD**

- 14.1 The Provider has sole responsibility for the delivery of the New Supply Housing Project in accordance with this Agreement irrespective of any receipt, review, inspection, approval, consent, or acceptance by MSD of any documents or information supplied by the Provider, including Plans and Specifications, any documentation required under the Conditions Precedent to Drawdown, or other documentation or information required under this Agreement.
- 14.2 MSD assumes no responsibility or liability to the Provider or to any other person for the engineering or architectural soundness, safety, compliance with Laws, compliance with this Agreement, or suitability of any of the Configurations, Plans and Specifications or other plans and specifications, of the New Supply Housing Project, which remain the sole responsibility of the Provider.

### 15 **General**

- 15.1 MSD and the Provider agree to do all things necessary to perform or fulfil the Further Deliverables as set out in the Key Terms (if any).
- 15.2 Without limiting any of the Provider's obligations under this Agreement and the Relationship Agreement, the Provider is to deliver the New Supply Housing Project:
  - (a) in accordance with all Laws;
  - (b) in accordance with the terms of this Agreement;
  - (c) diligently, efficiently, and without undue delay.

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**[Drafting note: Form and content of security still being considered by MSD]**

## **SCHEDULE 10: SECURITY PROTECTION FOR MSD**

### **1 Encumbrance and land covenant**

To protect MSD's interests under this Agreement (during both the Development Phase and the Capacity Phase), MSD will, if provided for in the Key Terms, register an encumbrance in the form attached to this Schedule 10 or a land covenant in gross against the computer registers and/or records of titles to the Properties. The encumbrance or land covenant in gross must rank first in priority to any mortgage or security to be provided in favour of another financier of the Provider.

MSD may, acting reasonably, change the form of encumbrance and/or land covenant in gross that MSD proposes to register pursuant to this Agreement by prior written notice to the Provider.

### **2 No objection**

The Provider will do everything necessary to support the registration of any encumbrance or land covenant in gross pursuant to clause 1 of this Schedule 5 and the Key Terms, including execution of all necessary documents required for registration, and will procure such written consents and binding agreements as may be necessary from any security holder, financier or other third party having or seeking a security interest or other interest or estate in the Properties as are necessary. The overall security positions of MSD and any other security holder or financier to the Provider may require the entry into by the Provider, MSD and any other security holder or financier of a tripartite or multiparty security deed regulating those parties' respective rights and security positions. MSD may at its discretion require entry into such a deed as a condition of Upfront Development Cost Funding.

### **3 Discharge**

MSD will discharge any encumbrance or land covenant in gross in respect of a Property that permanently ceases to be subject to this Agreement.



ATTACHMENT TO SCHEDULE 10: FORM OF ENCUMBRANCE

**Encumbrance instrument**  
**Section 101, Land Transfer Act 1952**

Computer register(s)	All/part	Area/description of part or stratum
[ CFRs ]	All	
<b>Encumbrancer</b> <span style="float: right;"><i>Surname(s) must be <u>underlined</u>.</i></span>		
[ TBC ]		
<b>Encumbrancee</b> <span style="float: right;"><i>Surname(s) must be <u>underlined</u>.</i></span>		
HER MAJESTY THE QUEEN in right of New Zealand acting by and through the Chief Executive of the MINISTRY OF SOCIAL DEVELOPMENT		
<b>Estate or interest to be encumbered</b> <span style="float: right;"><i>Insert, eg. fee simple, leasehold in lease number, etc.</i></span>		
Fee simple		
<b>Encumbrance memorandum number</b>		
N/A		
<b>Nature of security</b> <span style="float: right;"><i>State whether sum of money, annuity, or rentcharge, and amount.</i></span>		
As set out in the Annexure Schedule		
<b>Operative clause</b> <span style="float: right;"><i>Delete words in [ ], as appropriate.</i></span>		
<p><b>The Encumbrancer encumbers for the benefit of the Encumbrancee</b> the land in the above computer freehold register(s) with the above sum of money, annuity, or rentcharge to be raised and paid in accordance with the terms set out below and in the <del>{above encumbrance memorandum}</del> Annexure Schedule and so as to incorporate in this encumbrance the terms and other provisions set out below and in the <del>{above encumbrance memorandum}</del> [and] Annexure Schedule for the better securing to the Encumbrancee the payment(s) secured by this encumbrance, and compliance by the Encumbrancer with the terms of this encumbrance.</p>		
<b>Terms</b> <span style="float: right;"><i>Continue in Annexure Schedule if required</i></span>		
1	<b>Length of term:</b> [insert length of term of Services Agreement] years commencing on [insert date of commencement of Services Agreement]	
2	<b>Payment date(s):</b> As set out in the Annexure Schedule	
3	<b>Rate(s) of interest:</b> An interest rate being three (3) percentage points above the 90 day bank bill rate (expressed as a percentage per annum), as displayed at or about 10.45am on page BKBM (or its successor page) of the Reuters Monitor Screen (or an equivalent) on each day during which the default continues	
4	<b>Event(s) in which the sum, annuity, or rentcharge becomes payable:</b> As set out in the Annexure Schedule	
5	<b>Event(s) in which the sum, annuity, or rentcharge ceases to be payable:</b> Upon expiry of the term	
<b>Covenants and conditions</b> <span style="float: right;"><i>Continue in Annexure Schedule if required</i></span>		
See Annexure Schedule		
<b>Modification of statutory provisions</b> <span style="float: right;"><i>Continue in additional Annexure Schedule if required</i></span>		

Sections 23, 185, 203-205, 289, 302-306 and Schedule 4 of the Property Law Act 2007 and sections 97, 154 and 156 of the Land Transfer Act 1952 apply to this instrument but otherwise (and without prejudice to the Encumbrancee's rights of action at common law as a rentchargee) the Encumbrancee is entitled to none of the powers and remedies given to encumbrances or mortgagees by the Land Transfer Act 1952 and the Property Law Act 2007.

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### Continuation of "Covenants and Conditions"

#### BACKGROUND

- A. The Encumbrancer is the registered proprietor of the Land.
- B. The Encumbrancee has provided or is providing funding to the Encumbrancer to enable the development of the Land and/or the use of the Land for public housing and requires this Encumbrance to be registered on the Land to ensure that the Land continues to be used for public housing purposes including on any transfer of the Land by the Encumbrancer to a third party.
- C. The Encumbrancer has agreed to encumber the Land for the benefit of the Encumbrancee as set out in this Encumbrance.

#### DEFINITIONS AND INTERPRETATION

- 1 **Definitions:** In this Encumbrance, unless the context indicates otherwise:
- (a) **Business Day** means a day (other than a Saturday or a Sunday) on which registered banks are open for general banking business in Wellington and Auckland;
  - (b) **Encumbrance** means this encumbrance instrument;
  - (c) **Encumbrancee** means Her Majesty the Queen in right of New Zealand acting by and through the Ministry of Social Development and includes such other New Zealand government agency or Crown entity as may assume the role of purchaser of public housing provision on behalf of the New Zealand government in place of the Ministry of Social Development;
  - (d) **Encumbrancer** means the person named as the Encumbrancer in this Encumbrance and includes any subsequent assignee of or successor to the party named as Encumbrancer;
  - (e) **GST** means goods and services tax or any tax imposed pursuant to the provisions of the *Goods and Services Tax Act 1985* (or any act in substitution thereof);
  - (f) **Land** means [insert legal description];
  - (g) **Purpose** means:
    - (i) using the Land for public housing purposes in accordance with the terms of the Services Agreement; or
    - (ii) where there is no Services Agreement in place between the Encumbrancer and the Encumbrancee, using the Land in accordance with any public housing parameters notified in writing to the Encumbrancer by the Encumbrancee; or
    - (iii) such other purpose as may be agreed in writing between the Encumbrancer and the Encumbrancee;
  - (h) **Rentcharge** means a rental charge of the higher of:
    - (i) \$[1.00] plus GST (if applicable) per day for each unit or dwelling located on the Land (including in a multi-storey development) in respect of which the Encumbrancer is in breach of its obligations and covenants under this Encumbrance, for the duration of any breach; and

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(ii) the amount payable (if any) by the Encumbrancer to the Encumbrancee under the Services Agreement for any breach of the Encumbrancer's obligations and covenants under this Encumbrance; and

(i) **Services Agreement** means the [*insert name*] Agreement dated [•] between the Encumbrancee and the Encumbrancer for the properties on the Land to be developed or refurbished and/or for the properties on the Land to be used for public housing purposes, including as renewed, amended or replaced from time to time.

2 **Interpretation:** In this Encumbrance, unless the context indicates otherwise:

- (a) **Defined expressions:** expressions defined in the main body of this Encumbrance have the defined meaning throughout this Encumbrance, including the background;
- (b) **Headings:** clause and other headings are for ease of reference only and will not affect the interpretation of this Encumbrance;
- (c) **Parties:** references to any party include that party's executors, administrators, successors and assigns;
- (d) **Persons:** references to a person include an individual, company, corporation, partnership, firm, joint venture, association, trust, unincorporated body of persons, governmental or other regulatory body, authority or entity, in each case whether or not having a separate legal identity;
- (e) **Plural and singular:** references to the singular include the plural and vice versa;
- (f) **Clauses/schedules/attachments:** references to clauses, schedules and attachments are to clauses in, and the schedules and attachments to, this Encumbrance. Each such schedule and attachment forms part of this Encumbrance;
- (g) **Statutory provisions:** references to any statutory provision are to statutory provisions in force in New Zealand and include any statutory provision which amends or replaces it, and any by-law, regulation, order, statutory instrument, determination or subordinate legislation made under it; and
- (h) **Negative obligations:** any obligation not to do anything includes an obligation not to suffer, permit or cause that thing to be done.

### ENCUMBRANCER'S COVENANTS

- 3 The Encumbrancer must not without the Encumbrancee's prior written consent, during the term of this Encumbrance, use the Land, do anything on the Land or permit anything to be done on the Land, for any purpose other than the Purpose. Without limiting the rights of the Encumbrancee to recover the Rentcharge pursuant to this Encumbrance, any breach of this covenant will found an action for breach of covenant and the Encumbrancer and Encumbrancee agree will also provide grounds for injunctive relief to compel performance or to prevent any use of the Land other than for the Purpose.

### RENTCHARGE

- 4 Subject to clause 5 below, the Rentcharge is payable by the Encumbrancer to the Encumbrancee on 31 March every calendar year.

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- 5 If, during the 12 months preceding the day on which the annual Rentcharge under clause 4 is payable there has not been any breach by the Encumbrancer of any of the covenants under this Encumbrance, then the annual Rentcharge will be deemed to have been paid. However if the Encumbrancer is in breach of any of its obligations or covenants under this Encumbrance, the Encumbrancee shall be entitled to make demand for payment of the Rentcharge.
- 6 Regardless of any other rights or remedies available to or exercised by the Encumbrancee under the Services Agreement or otherwise at equity or at law, the Rentcharge shall be payable, if demand has been made in writing by the Encumbrancee, within ten (10) working days of the date of the demand, and in respect of continuing breaches a further Rentcharge shall be payable in arrears on the first working day of every month for as long as the breach remains unremedied. For the sake of clarity, a new Rentcharge will be payable for subsequent breaches.
- 7 Any failure by the Encumbrancee to make demand for payment of the Rentcharge in respect of any breach shall not operate as a waiver in respect of that or any other breach of the Encumbrancer's obligations.
- 8 The Encumbrancer shall be liable to pay interest to the Encumbrancee on demand, calculated daily, on any late payment of the Rentcharge by the Encumbrancer, at the Rate of Interest set out on the front page of this Encumbrance.
- 9 If a default is continuing on a day that is not a Business Day, the Rate of Interest to apply to that day shall be the Rate of Interest that was calculated on the immediately preceding Business Day.

### DELAY OR WAIVER

- 10 No delay or failure by the Encumbrancee to enforce any of the Encumbrancer's obligations or covenants and no indulgence granted to the Encumbrancer will prejudice the Encumbrancee's rights of enforcement under this Encumbrance.

### NOTICES

- 11 Any notice to be served on the Encumbrancer shall be served on the Encumbrancer at its head office or principal place of business.
- 12 Any notice to be served on the Encumbrancee shall be served on the then current chief executive (or current acting chief executive) of the Ministry of Social Development or such other New Zealand Government agency or Crown entity as may assume the role of purchaser of public housing provision on behalf of the New Zealand government in place of the Ministry of Social Development.

### COSTS

- 13 The Encumbrancer will pay the Encumbrancee's reasonable and proper legal costs attributable to the attempted enforcement, enforcement or discharge of this Encumbrance.

### GENERAL

- 14 This Encumbrance is intended to be registered at Land Information New Zealand ahead of, and will be binding on, all transferees, tenants, lessees, mortgagees, chargeholders and any other holder of any estate or interest in the Land and their respective successors in title and assigns.

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- 15 In particular, this Encumbrance is accordingly to rank in priority to any mortgage or other encumbrance over or interest in the Land in favour of a bank or other party.
- 16 The Encumbrancee consents to the registration of any subsequent mortgage, variation of a subsequent mortgage, discharge of a subsequent mortgage, easement, variation of easement and/or surrender of easement to be registered against the title of the Land (or any part of it).
- 17 Where this Encumbrance binds or benefits a party comprising more than one person, it shall bind or benefit those persons jointly and severally.
- 18 If at any time any provision of this Encumbrance is or becomes invalid, void, illegal or unenforceable in any respect whatsoever, then:
  - (a) that part or provision shall be severed from this Encumbrance;
  - (b) such invalidity and severing shall not in any way affect or impair the validity, legality and enforceability of any other part or provision of this Encumbrance; and
  - (c) in any event the parties shall enter into appropriate substitute instrument(s) to give full and proper effect to the agreements and understandings in this Encumbrance.
- 19 The Encumbrancer acknowledges that this Encumbrance has been granted for valuable consideration received, in full compensation for the grant of this Encumbrance.
- 20 The Encumbrancer and the Encumbrancee acknowledge that the primary purpose of this Encumbrance is to secure the covenants of the Encumbrancer as set out in this Encumbrance. Any payments made pursuant to this Encumbrance, including any payment of the Rentcharge, will not release the Encumbrancer from or constitute the satisfaction of, the Encumbrancer's obligations under this Encumbrance.
- 21 The Encumbrancer covenants not to take any steps whatsoever to redeem or purport to redeem the Rentcharge.

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