



Maddocks

Lawyers
140 William Street
Melbourne Victoria 3000 Australia

Telephone 61 3 9288 0555
Facsimile 61 3 9288 0666

info@maddocks.com.au
www.maddocks.com.au

DX 259 Melbourne

DRAFT: 19 JULY 2010

Date / /2010

Section 173 Agreement

Subject Land: Tynong Racecourse and Training Facility, Nar Nar Goon-Longwarry Road, Tynong

Cardinia Shire Council
and

Pakenham Racing Club Incorporated [##further details to be inserted]

Contents

1.	Definitions.....	2
2.	Agreement under Section 173 of the Act	3
3.	Effect of Agreement	3
4.	Owner's Warranties	3
5.	Successors in Title.....	4
6.	Covenants of Owner	4
7.	GST	6
8.	General.....	8
9.	Ending of Agreement	8
10.	Notices	8
11.	Interpretation	9

DRAFT

Section 173 Agreement

Dated / /2010

Parties

Name	Cardinia Shire Council
Address	Municipal Offices, Henty Way, Pakenham Victoria 3810 Victoria
Short name	Council

Name	Pakenham Racing Club Incorporated [##further details to be inserted]
Address	[##address to be inserted]
Short name	Owner

Background

- A. The Owner is entitled to be registered as proprietor of the subject land.
- B. The Council is the Responsible Authority pursuant to the Act for the Scheme.
- C. The subject land is within the SUZ Schedule under the Scheme.
- D. Clause 3 of the SUZ Schedule requires the Owner to do the following:
 - D.1 obtain a planning permit for the subdivision of the subject land; and
 - D.2 as a condition of any permit for subdivision issued, enter into an agreement pursuant to section 173 of the Act prior to the issue of a statement of compliance under the *Subdivision Act 1988*.
- E. Planning Permit [##insert no] was issued by Council on [##insert date], subject to a condition that the permit holder enter into an agreement with Council pursuant to section 173 of the Act.
- F. A statement of compliance has not been issued for the subdivision.
- G. The purpose of this Agreement is to restrict the use and development of the subject land to ensure that:
 - G.1 the Lots are used for the purposes of horse training and stables;
 - G.2 if the Lots are used for the purposes of a Dwelling, the use is restricted;
 - G.3 the use and development of the subject land is consistent with the values of the Special Use Zone.

The Parties Agree

1. Definitions

In this Agreement unless expressed or implied to the contrary:

Act means the *Planning and Environment Act 1987*.

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

Australian Rules of Racing means the Rules made by the Australian Racing Board Limited dated 26 September 2009 and as may be amended from time to time.

Balance Land means the subject land, excluding Precinct B (denoted 'Trainer Allotments') shown on the Incorporated Plan and any Lot.

Balance Land 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 Balance Land or any part of it.

Business day means Monday to Friday excluding public holidays in Victoria.

Dependent person's unit has the same meaning as in the Scheme.

develop and **development** have the same meaning as in section 3(1) of the Act.

Dwelling has the same meaning as in the Scheme.

Incorporated Plan means the plan incorporated in the Scheme called the 'Tynong Racecourse & Training Facility Incorporated Plan' as may be amended from time to time.

Lot means a lot resulting from the subdivision of that part of the subject land shown on the Incorporated Plan as Precinct B (denoted 'Trainer Allotments').

Lot Owner means 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 Lot or any part of it.

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 subject land or any part of it and includes the Balance Land Owner with respect to the Balance Land and the Lot Owner with respect to a Lot.

planning approval means and includes any planning permit issued in accordance with the Act.

Scheme means the Cardinia Planning Scheme.

Specified Consideration means the current market value of each Lot as agreed by the Balance Land Owner and the Lot Owner or, in the absence of agreement, as determined by the President for the time being of the Australian Property Institute (Victorian Division) Inc or his or her nominee, at the cost equally of the Balance Land Owner and the Lot Owner.

subject land means the whole of the land described in Certificates of Title Volume 8649 Folio 311, Volume 11027 Folio 368, Volume 10595 Folio 643 and Volume 10595 Folio 642 being situated at and known as Tynong Racecourse and Training Facility, Nar Nar Goon-Longwarry Road, Tynong or any part of that land.

SUZ Schedule means Schedule 3 to the Special Use Zone of the Cardinia Planning Scheme.

Termination Date means the date upon which this Agreement ends in accordance with the Act.

Trainer means a person licensed or granted a permit by a 'Principal Racing Authority' within the meaning of the *Australian Rules of Racing* as may be amended from time to time and includes any persons licensed to train as a training partnership and any employee of a Trainer engaged in employment in relation to horse training or horse stables.

2. Agreement under Section 173 of the Act

The Council and the Owner 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.

3. Effect of Agreement

- 3.1 This Agreement is effective from the date of the Agreement.
- 3.2 The Owner's use and development of the subject land is subject to the conditions and obligations set out in this Agreement for the purposes set out in this Agreement and which are intended to achieve or advance the objectives of the Scheme.
- 3.3 The Owner's obligations will take effect as separate and several covenants which will be annexed to and run at law and equity with the subject land to bind the Owner and each successor, assign or transferee of the Owner including the registered proprietor, the mortgagee in possession and the beneficial owner for the time being of the subject land.

4. Owner's Warranties

Without limiting the operation or effect of this Agreement, the Owner warrants that:

- 4.1 except for the parties to this Agreement, any mortgagee who has consented to this Agreement, and any other persons disclosed in writing to the Council before the signing of this Agreement, no other person has any interest either legal or equitable in the subject land which may be affected by this Agreement or by development or use of the subject land pursuant to the Scheme or any permit or approved plan under the Scheme; and
- 4.2 the Owner has obtained all necessary authorities and consents to bind all other persons who have any interest either legal or equitable in the subject land.

5. 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 subject land, the Owner's successors in title will:

- 5.1 give effect to, do all acts and sign all documents requiring those successors to give effect to this Agreement; and
- 5.2 execute a deed agreeing to be bound by this Agreement.

6. Covenants of Owner

6.1 Owner's Covenants

The Owner covenants that:

6.1.1 Restriction on sale of the Lots

every contract of sale for the sale of a Lot must include a special condition or special conditions to Council's satisfaction providing for the following:

- (a) the purchaser must not use the Lot otherwise than in accordance with clause 6.2.1 of this Agreement and the Scheme;
- (b) in the event that a Lot ceases to be used in accordance with clause 6.2.1 or the Scheme:
 - (i) the purchaser must within 14 days of the Lot ceasing to be used in accordance with clause 6.2.1 or the Scheme give to Council and the Balance Lot Owner the notifications required by clause 6.2.2 of this Agreement;
 - (ii) the purchaser must use its best endeavours to sell the Lot to a person or persons who are capable of using the Lot in accordance with clause 6.2.1 and the Scheme;
 - (iii) if after 6 months of endeavouring to sell the Lot, the Lot Owner is not able to sell the Lot to a person or persons capable of using the Lot in accordance with clause 6.2.1 and the Scheme, the purchaser must transfer the Lot to the Balance Lot Owner for the Specified Consideration; and

- 6.1.2 no less than 28 days prior to the sale of a Lot, the Owner must submit to Council for Council's approval, the special condition or conditions proposed to be included in the contract of sale in accordance with clause 6.1.1.

6.2 Lot Owner's Covenants

The Lot Owner covenants that with respect to the Lot which it owns:

6.2.1 Use and Development of the Lot

the Lot may:

- (a) only be used for the purposes of horse training and horse stables in conjunction with the racecourse and training facilities on the Balance Land; or
- (b) only be used for the purposes of a Dwelling if the following applies:
 - (i) the Dwelling is only used in conjunction with horse training and horse stables on the Lot;
 - (ii) the Dwelling is occupied by a Trainer or by a Trainer and the domestic partner and dependants (if any) of the Trainer; and
 - (iii) there is only one Dwelling on the Lot; or
- (c) only be used for the purposes of a Dependent person's unit if the land is being used for the purposes set out in subclause 6.2.1(b); and
- (d) only be developed in accordance with the subdivision and built form design guidelines approved by Council in accordance with clause 3.1 of SUZ Schedule;

6.2.2 Notification to the Council

the Lot Owner must:

- (a) notify Council in writing as soon as its Lot is no longer used for the purposes set out in clause 6.2.1;
- (b) provide evidence to Council's satisfaction as to the steps it proposes to take to sell the Lot in an orderly and timely manner within 6 months of the Lot ceasing to be used in accordance with clause 6.2.1 or the Scheme; and
- (c) if the Lot has not been sold within 6 months, provide evidence to Council's satisfaction of compliance with clause 6.1.1;

6.2.3 Ongoing management arrangements

The Lot Owner must operate and manage the Lot in accordance with the Environment Management Plan endorsed by Council in accordance with clause 2.1 of the SUZ Schedule.

6.3 Continuing obligation to comply with the Scheme

For the avoidance of doubt, the requirements of the Scheme (including the SUZ Schedule provisions of the Scheme) and clause 6.2.1 apply and must be complied with notwithstanding any non-compliance with the obligations set out in clauses 6.1.1, 6.2.2 and 6.2.3. If the requirements of the Scheme conflict or are inconsistent with this Agreement, the provisions of the Scheme prevail.

6.4 Notice

The Owner covenants to bring this Agreement to the attention of all prospective purchasers, mortgagees, transferees and assigns.

6.5 Compliance

The Owner covenants to:

- 6.5.1 comply with the requirements of all statutory authorities in relation to the development of the subject land;
- 6.5.2 comply with all statutes, regulations, local laws and planning controls in relation to the subject land; and
- 6.5.3 take all necessary steps to comply with the obligations of each clause in this Agreement;

6.6 Registration

The Owner covenants to:

- 6.6.1 consent to the Council making application to the Registrar of Titles to make a recording of this Agreement in the Register on the folio of the Register which relates to the subject land in accordance with section 181 of the Act; and
- 6.6.2 do all things necessary to enable the Council to do so including signing any further agreement, acknowledgment or document or procuring the consent to this Agreement of any mortgagee or caveator to enable the recording to be made in the Register under that section.

6.7 Mortgagee to be Bound

The Owner covenants to obtain the consent of any mortgagee to be bound by the covenants in this Agreement if the mortgagee becomes mortgagee in possession of the subject land.

6.8 Council's Costs to be Paid

The Owner covenants to pay immediately on demand to the Council the Council's reasonable costs and expenses (including legal expenses) incidental to the preparation, drafting, finalisation, engrossment, execution, registration and enforcement of this Agreement which (until paid) are and remain a charge on the subject land.

7. GST

7.1 GST Exclusive

Except as otherwise provided by this clause, all Consideration payable under this Agreement in relation to any Supply is exclusive of GST.

7.2 Increase in Consideration

To the extent that any Supply under this Agreement constitutes a Taxable Supply, the Consideration payable by the Recipient to the Supplier will be increased by the applicable amount of GST (GST Amount), which shall be calculated by multiplying the amount upon which GST is payable by the prevailing rate of GST.

7.3 Payment of GST

Any GST Amount must be paid by the Recipient to the Supplier at the same time and in the same manner as the relevant Consideration is paid or given under this Agreement, without any right of set-off or deduction (unless otherwise provided in this Agreement).

7.4 Reimbursements

If this Agreement requires the Recipient to pay, reimburse or contribute to any expense, loss or outgoing suffered or incurred by the Supplier, the amount which the Recipient must pay, reimburse or contribute will be the amount net of any Input Tax Credits to which the Supplier is entitled in respect of the Relevant Expense, together with any GST Amount if the payment, reimbursement or contribution constitutes a Taxable Supply by the Supplier to the Recipient.

7.5 Tax Invoice

The Supplier must provide to the Recipient a valid Tax Invoice at or prior to the time of payment of any GST Amount.

7.6 Adjustments and Adjustment Notes

To the extent that any Adjustment occurs in relation to a Taxable Supply, the Supplier must issue an Adjustment Note to the Recipient within 7 days of becoming aware of the Adjustment, and any payment necessary to give effect to such Adjustment must be made within 7 days after the date of receipt of the Adjustment Note.

7.7 Definitions

For the purposes of this clause:

Adjustment has the same meaning given to that term in the GST Act.

Adjustment Note has the same meaning given to that term in the GST Act.

Consideration means, except as otherwise provided, any consideration payable under this agreement in return for a Taxable Supply, but does not include any amount on account of GST.

GST Act means the *A New Tax System (Goods and Services Tax) Act 1999* (as amended).

GST has the same meaning given to that term in the GST Act.

Input Tax Credit has the same meaning given to that term in the GST Act, but also includes a reduced input tax credit under Division 70 and an adjusted input tax credit under Division 132 of the GST Act.

Real Property has the same meaning given to that term in the GST Act.

Recipient has the same meaning given to that term in the GST Act.

Supply has the same meaning given to that term in the GST Act.

Supplier means the entity making a Supply to the Recipient.

Tax Invoice has the same meaning given to that term in the GST Act.

Taxable Supply has the same meaning given to that term in the GST Act.

8. General

8.1 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.

8.2 No Waiver

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

8.3 Severability

If a court, arbitrator, tribunal or other competent authority determines that a word, phrase, sentence, paragraph or clause of this Agreement is unenforceable, illegal or void then it must be severed and the other provisions of this Agreement remain operative.

8.4 No Fettering of Council's Powers

This Agreement does not fetter or restrict the power or discretion of the Council to make or impose requirements or conditions in connection with any use or development of the subject land or the granting of any planning approval, the approval or certification of any plans of subdivision or consolidation applicable to the subject land or the issue of a Statement of Compliance in connection with any such plans.

9. Ending of Agreement

9.1 This Agreement ends on the Termination Date.

9.2 As soon as reasonably practicable after the Termination Date, the Council will at the request and at the cost of the Owner make application to the Registrar of Titles under Section 183(2) of the Act to cancel the recording of this Agreement on the register.

10. Notices

10.1 Service of Notice

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

10.1.1 personally on the party; or

10.1.2 by sending it by pre-paid post, addressed to that party at that party's address specified in this document or subsequently notified to each party as that party's address for service; or

10.1.3 by facsimile to the person's number for service specified in this document or subsequently notified to each party.

10.2 Time of Service

A notice or other communication is deemed served:

- 10.2.1 if served personally, upon service;
- 10.2.2 if posted within Australia to an Australian address, 2 business days after posting and in any other case, 7 business days after posting;
- 10.2.3 if served by facsimile, at the time indicated on the transmission report produced by the sender's facsimile machine indicating that the facsimile was sent in its entirety to the addressee's facsimile; or
- 10.2.4 if received after 6.00 pm in the place of receipt or on a day which is not a business day, at 9.00 am on the next business day.

11. Interpretation

In this Agreement, unless expressed or implied to the contrary:

- 11.1 undefined terms or words have the meanings given in the Act or the Scheme;
- 11.2 the singular includes the plural and the plural includes the singular;
- 11.3 a reference to a gender includes a reference to the other genders;
- 11.4 a reference to a person includes a reference to a firm, corporation or other corporate body;
- 11.5 if a party consists of more than one person this Agreement binds them jointly and each of them severally;
- 11.6 a reference to a 'planning scheme' or 'the Scheme' includes any amendment, consolidation, or replacement of such scheme and any document incorporated by reference into such scheme;
- 11.7 a reference to a statute includes any statutes amending, consolidating or replacing those statutes and any regulations made under the statutes;
- 11.8 where, in this Agreement, the Council may exercise any power, duty or function, that power may be exercised on behalf of the Council by an authorised or delegated officer;
- 11.9 all headings are for ease of reference only and do not affect the interpretation of this Agreement;
- 11.10 the Recitals to this Agreement form part of this Agreement.

Signing Page

Executed by the parties

The Common Seal of the **Cardinia Shire Council** was affixed in the presence of:)
)
)

.....
Mayor

.....
Chief Executive Officer

##Execution clause for the Pakenham Racing Club Inc to be inserted

##[Insert this clause only if mortgagee's consent is required, otherwise delete] ##[Name of mortgagee] as Mortgagee under Instrument of Mortgage No. ##[mortgage number] dated ##[date of mortgage] which encumbers the subject land consents to the Owner entering into this Agreement and agrees to be bound by the terms and conditions of this Agreement.