

# Variation Deed 2012

## Management Agreement

---

Australand Corporation (NSW) Pty Limited (**Australand**)

Shellharbour City Council (**Council**)

MinterEllison

---

L A W Y E R S

AURORA PLACE, 88 PHILLIP STREET, SYDNEY NSW 2000, DX 117 SYDNEY  
TEL: +61 2 9921 8888 FAX: +61 2 9921 8123  
[www.minterellison.com](http://www.minterellison.com)

# Variation Deed 2012

## Management Agreement

---

<b>Details</b>	<b>3</b>
<b>Agreed terms</b>	<b>3</b>
<b>1. Defined terms &amp; interpretation</b>	<b>3</b>
1.1 Annex A defined terms	3
1.2 Defined terms	3
1.3 Interpretation	3
<b>2. Variation</b>	<b>4</b>
<b>3. General provisions</b>	<b>4</b>
3.1 Consideration	4
3.2 Further action	4
3.3 Severability	4
3.4 Governing law and jurisdiction	4
3.5 Counterparts	4
<b>Signing page</b>	<b>5</b>

---

# Details

---

Date

25<sup>th</sup> May 2012

## Parties

Name **Australand Corporation (NSW) Pty Limited**  
ABN 57 001 022 117  
Short form name **Australand**  
Notice details Level 3, 1C Homebush Bay Road, Rhodes NSW 2138  
Facsimile: (02) 9767 2900  
Attention: Company Secretary

Name **Shellharbour City Council**  
Short form name **Council**  
Notice details Lamerton House, Lamerton Crescent, Shellharbour City Centre NSW 2529  
Facsimile: (02) 4221 6016  
Attention: General Manager

## Background

This document varies and restates the Management Agreement at the request of the Parties.

## Agreed terms

---

### 1. Defined terms & interpretation

#### 1.1 Annex A defined terms

Unless the context otherwise requires or the relevant term is defined in this document, terms defined in Annex A have the same meaning when used in this document.

#### 1.2 Defined terms

In this document:

**Management Agreement** means the deed titled '*Management Agreement*' between the Council and Australand, made on 24 December 1993 and varied by deeds made on 17 April 1996, 1 September 1997, 18 March 2002, 20 August 2002, 13 May 2004 and 29 April 2008 as novated and amended from time to time before the date of this document.

**Variation** has the meaning given in clause 2.

#### 1.3 Interpretation

- (a) Clause 4.1 (*Interpretation*) of Annex A applies to this document as if set out in full in this document, *mutatis mutandis*.

- (b) In this document, examples and use of the word including and similar expressions do not limit what else may be included.

## 2. Variation

With effect on and from the date of this document:

- (a) the Management Agreement is varied and restated as set out in Annex A (**Variation**); and
- (b) each Party agrees to be bound by the Management Agreement as varied and restated by the Variation.

## 3. General provisions

### 3.1 Consideration

Each Party acknowledges to each other Party that it enters into this document and incurs obligations and gives rights under it for valuable consideration provided by each other Party.

### 3.2 Further action

Each Party must do all things necessary or desirable to give full effect to the Variation and this document.

### 3.3 Severability

A provision of this document that is illegal or unenforceable in a jurisdiction is ineffective in that jurisdiction to the extent of the illegality or unenforceability. This does not affect the validity or enforceability of that provision in any other jurisdiction, nor the remainder of this document in any jurisdiction.

### 3.4 Governing law and jurisdiction

This document is governed by the laws of New South Wales. Each Party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of that place (and any court of appeal therefrom) and waives any right to object to an action being brought in those courts, including on the basis of an inconvenient forum or those courts not having jurisdiction.

### 3.5 Counterparts

This document may be executed in any number of counterparts. Each counterpart constitutes an original of this document, all of which together constitute one instrument. A Party who has executed a counterpart of this document may exchange it with another Party by faxing, or by emailing a pdf (portable document format) copy of, the executed counterpart to that other Party, and if requested by that other Party, will promptly deliver the original by hand or post. Failure to make that delivery will not affect the validity of this document.


# Signing page

**EXECUTED** as a deed.


Each attorney signing this document under a power of attorney certifies, by the attorney's signature, that the attorney has no notice of the revocation of the power of attorney.

## Australand

Executed by **Australand Corporation (NSW) Pty Limited** in accordance with Section 127 of the *Corporations Act 2001*

  
\_\_\_\_\_  
Signature of director  
**RODNEY VAUGHAN FEHRING**

\_\_\_\_\_  
Name of director (print)

  
\_\_\_\_\_  
Signature of director/company secretary  
(Please delete as applicable)  
**SERENA NG**


\_\_\_\_\_  
Name of director/company secretary (print)

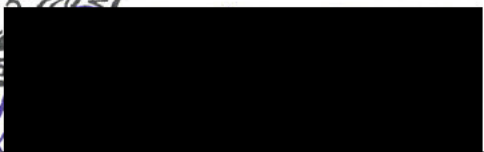
## Council

The common seal of **Shellharbour City Council** is fixed to this document on

25 May 2012  
pursuant to a resolution of the Council, in the presence of



  
\_\_\_\_\_  
Signature of Mayor  
**IRENE MARSH**  
\_\_\_\_\_  
Name of Mayor (print)

  
\_\_\_\_\_  
Signature of General Manager  
**MICHAEL WILLIS**  
\_\_\_\_\_  
Name of General Manager (print)



*Annex A to Variation Deed 2012*

# Management Agreement

**THIS DEED** is made on 24 December 1993, as varied by deeds made on 17 April 1996, 1 September 1997, 18 March 2002, 20 August 2002, 13 May 2004 and 29 April 2008, and as most recently varied by the Variation Deed 2012

## 1. PARTIES

- 1.1 **THE COUNCIL OF THE CITY OF SHELLHARBOUR** of Lamerton House, Lamerton Crescent, Shellharbour City Centre ("Council");
- 1.2 **AUSTRALAND CORPORATION (NSW) PTY LIMITED** (ABN 57 001 022 117) of Level 3, 1C Homebush Bay Road, Rhodes NSW 2138 ("Australand").

## 2. RECITALS

- 2.1 By deed made on 24 December 1993 ("Management Agreement") and varied by deeds made on 17 April 1996, 1 September 1997, 18 March 2002, 20 August 2002, 13 May 2004 and 29 April 2008 and by the Variation Deed 2012, Council appointed Australand to manage the development of a Boat Harbour, Golf Course and residential and commercial subdivisions on land owned by it and on adjoining land at Shellharbour.
- 2.2 Various – see deeds.

## 3. DEFINITIONS

In this deed, unless the context otherwise requires:

**"ACDC"** means Australian Commercial Dispute Centre Limited.

**"Administration Fee"** means the fee payable to Council under clause 14.2.

**"Agreement"** means the agreement between the Parties contained in this deed.

**"Annual Program"** means a works program and budget for the conduct of the Project prepared and approved in accordance with clause 19.

**"AUPC Schedule"** means the schedule of Australand's unpaid Project Costs in the form attached and marked "C".

**"Australand's Project Costs"** means the amount payable to Australand under clause 18.7.

**"Australand Side Deed"** means the deed between Council, Australand, Australand Property Limited and Australand Holdings Limited dated on or about the date of the Variation Deed 2012.

**"Authorisations"** means all authorisations, leases, licences, permits, approvals and consents of and from any government or governmental or other competent authority which are necessary or desirable to enable Australand to carry out the Project.

**"Boat Harbour"** means the harbour and marina described in Development Application No. 95/133, as amended by the Authorisations.

**"Business Day"** means a day that is not a Saturday, Sunday or public holiday in New South Wales.

**"Chairman"** means the chairman of meetings of the Committee from time to time.

**"Commission"** means the commission payable to Australand under clause 15.4 and paragraph 35.10.1.

**"Committee"** means the committee constituted under clause 17.

**"Confidential Information"** means all drawings, reports, information and data (and all copies and extracts made of or from such information and data) concerning:

- (a) the conduct of the Project;
- (b) the organisation, finance, and expertise of the Parties and of any Related Corporation of Australand; and
- (c) any operations and transactions with respect to the Project.

**"Consolidated Fund"** means Council's consolidated fund referred to in section 409 of the *Local Government Act 1993*.

**"Consumer Price Index"** means the Consumer Price Index (All Groups) for Sydney published from time to time by the Australian Bureau of Statistics.

**"Corporations Act" or "Corporations Law"** means the *Corporations Act 2001* (Cth).

**"Council Land"** means the land comprised in certificates of title folio identifiers 2/584291, 2/248002, 1/630517 and 1/624266 and any other land acquired for the purpose of the Project.

**"CUPC Schedule"** means the schedule of Council's unpaid Project Costs in the form attached and marked "B".

**"Development Costs"** means all capital costs and operating costs, charges, expenses, fees, taxes (including GST but excluding company taxes, capital gains taxes and other taxes on Council, Australand or Australand Related Corporations and also excluding any input tax credits under the GST Law claimed or claimable in respect of the GST payable) and other payments and expenditures of and incidental to the conduct of the Project except real estate agent's commissions or interest on loans, borrowings or other forms of finance (other than Capitalisation Draws as defined in the Facility Agreement).

**"Development Fee"** means the sum of the Management Fee, Sales Fee, Commission and Australand's Project Costs.

**"DOP Land"** means the land comprised in certificate of title folio identifier 1/715016.



**"Encumber"** means mortgage, pledge, charge, assign by way of security or otherwise encumber.

**"External Administrator"** means an administrator, controller or managing controller (each as defined in the Corporations Act), receiver, receiver and manager, trustee, provisional liquidator, liquidator or any other person (however described) holding or appointed to an analogous office or acting or purporting to act in an analogous capacity.

**"Facility"** has the same meaning as in the Facility Agreement.

**"Facility Agreement"** has the same meaning as in the Australand Side Deed.

**"Feasibility Study"** means the document titled "Shell Cove Revised Feasibility Report No.2", or the document most recently approved by Council under clause 19.9.

**"Finance Document"** has the same meaning as in the Facility Agreement.

**"Financial Year"** means a period of 12 consecutive Months ending on 30 June during the Term.

**"Force Majeure"** means any act, event or cause (other than lack of funds) which is beyond the reasonable control of the Party concerned, including:

- (a) act of God, peril of the sea, accident of navigation, war, sabotage, riot, insurrection, civil commotion, national emergency (whether in fact or law), martial law, fire, lightning, flood, cyclone, earthquake, landslide, storm or other adverse weather conditions, explosion, power shortage, strike or other labour difficulty (whether or not involving employees of the Party concerned), epidemic, quarantine, radiation or radioactive contamination;
- (b) action or inaction of any government or governmental or other competent authority (including any court of competent jurisdiction), including expropriation, restraint, prohibition, intervention, requisition, requirement, direction or embargo by legislation, regulation, decree or other legally enforceable order; and
- (c) breakdown of plant, machinery or equipment or shortages of labour, transportation, fuel, power, plant, machinery, equipment or material.

**"General Manager"** means:

- (a) in respect of Australand, a person whose title or acting title is 'Executive General Manager – Residential' or if that title no longer exists, the relevant successor title or a title of equivalent seniority within Australand Property Group; or
- (b) in respect of Council, a person whose title or acting title is 'General Manager' or if that title no longer exists, the relevant successor title or a title of equivalent seniority within Council.

**"Golf Course"** means the golf course described in Development Application No. 98/88, as amended by the Authorisations, together with the clubhouse described in the Feasibility Study.

**"Golf Range Residential Site"** means that part of the Land shown shaded on the plan attached and marked "H" and described as "The Site".

**"GST"** means the goods and services tax as provided for by the GST Law.

**"GST Law"** means A New Tax System (Goods and Services Tax Act) 1999 (Commonwealth) and any associated legislation and delegated legislation.

**"Harbour"** means that part of the Land containing the Boat Harbour, and the area extending for a distance of 6 metres or such less distance as the Committee decides beyond the top of the bank of the Boat Harbour.

**"Harbour Land"** means that part of the Land shown on the plan attached and marked "G" but excluding the Harbour.

**"Headline Condition"** means a condition precedent set out in clause 4.1(g) of the Facility Agreement.

**"Housing Bonus"** means the Housing Bonus determined under clause 35.8.

**"IE Land"** means the land comprised in certificates of title volume 1639 folio 134, volume 11090 folio 123 and volume 14804 folio 76, but excluding that part shown hatched black and labeled "IE DEPOT" in the plan attached and marked "F" or such other part as the Parties may agree.

**"Insolvency Event"** means, in respect of a person, any of the following occurring:

- (a) it becomes insolvent within the meaning of section 95A, or is taken to have failed to comply with a statutory demand under section 459F(1), or must be presumed by a court to be insolvent under section 459C(2), or is the subject of a circumstance specified in section 461 (whether or not an application to court has been made under that section) or, if the person is a Part 5.7 body, is taken to be unable to pay its debts under section 585, of the Corporations Act;
- (b) it is the subject of a Liquidation, or an order or an application is made for its Liquidation;
- (c) an effective resolution is passed or meeting summoned or convened to consider a resolution for its Liquidation;
- (d) an External Administrator is appointed to it or any of its assets or a step is taken to do so or, if the person is Australand, a Related Corporation requests such an appointment;
- (e) if a registered corporation under the Corporations Act, a step is taken under section 601AA, 601AB or 601AC of the Corporations Act to cancel its registration;
- (f) an analogous or equivalent event to any listed above occurs in any jurisdiction; or
- (g) it stops or suspends payment to creditors generally.

**"Land"** means the Council Land, IE Land, DOP Land and NPW Land and any part or

parts of those lands.

**"Limit of Developable Land"** means the boundary shown as such on the plan attached and marked "G".

**"Liquidation"** means:

- (a) a winding up, dissolution, liquidation, provisional liquidation, administration, bankruptcy or other proceeding for which an External Administrator is appointed, or an analogous or equivalent event or proceeding in any jurisdiction; or
- (b) an arrangement, moratorium, assignment or composition with or for the benefit of creditors generally or any class or group of them.

**"Management Fee"** means the fee payable to Australand under clause 15.2.

**"Marketing Expenses"** means all expenses incurred in advertising and promoting the Project, except those expenses included in real estate agent's commissions.

**"Member"** means a person who is appointed to be a member of the Committee from time to time.

**"Month"** means a calendar month.

**"Net Income"** means Sales Revenue plus interest earned on moneys in the Trust Fund less Project Costs.

**"Net Sales Proceeds"** means the gross proceeds of sale of a lot after deducting GST payable in respect of those proceeds, the Administration Fee and Project Fees.

**"NPW Land"** means the land comprised in certificate of title volume 1339 folio 89.

**"Outstanding Amount"** has the same meaning as in the Facility Agreement.

**"Party"** means Council or Australand as the case may be and **"Parties"** means both of them.

**"Proceeds Account"** means the "Proceeds Account" as defined in the Australand Side Deed.

**"Project"** means the development and the sale of the Land in accordance with the "Baseline" option described in the Feasibility Study.

**"Project Agreements"** means this Agreement, and all other agreements in connection with the Project, except contracts for sale of land, all as amended from time to time.

**"Project Assets"** means the Land and all improvements to the Land made under this Agreement.

**"Project Cost"** means a Development Cost approved for payment by the Committee, or any amount deemed to be a Project Cost under this Agreement.

**"Project Fees"** means the Management Fee plus the Sales Fee.

**"Project Housing Site"** means a lot which is the subject of a recommendation which has been accepted under clause 35.3.

**"Quarry Buffer Area"** means that part of the DOP Land labled "Quarry Buffer Area" on sheet 1 of the map marked "Shellharbour Local Environmental Plan No. 25" deposited in Council's office.

**"Related Corporation"** means, in respect of a person, a related body corporate of that person as defined in section 50 of the Corporations Law.

**"Sales Fee"** means the fee payable to Australand under clause 15.3.

**"Sales Revenue"** means the gross proceeds of sale or lease of any part of the Land.

**"Section 94 Contributions"** means contributions required under section 93F, section 94 or section 94A of the Environmental Planning and Assessment Act, 1979 as a condition of an Authorisation.

**"Secured Debt"** has the same meaning as in the Australand Side Deed.

**"Separable Stage 1"** has the meaning given to it in clause 37.1.1.

**"Separable Stage 2"** has the meaning given to it in clause 37.1.2.

**"Separable Stage 3"** has the meaning given to it in clause 37.1.3.

**"Statute"** includes regulation, ordinance, by-law and any other delegated legislation.

**"Tax"** has the meaning given to it in the Facility Agreement.

**"Term"** means the period commencing on 24 December 1993 and ending on:

- (a) if contract documentation for construction of Separable Stage 1 has not been entered into by 31 December 2012 (or such later date in accordance with clause 37.1.1), 31 December 2020; or
- (b) if contract documentation for construction of Separable Stage 1 has been entered into by 31 December 2012 (or such later date in accordance with clause 37.1.1), the 10th anniversary of practical completion of Separable Stage 3 of the Boat Harbour construction works, as may be extended from time to time in accordance with clause 36.

**"Transaction Document"** has the meaning given to it in the Facility Agreement.

**"Trust Fund"** means Council's Trust Fund No. 2.

**"Variation Deed 2012"** means the deed so titled dated in or about May 2012 between the Council and Australand to which this document is annexed as Annex "A".

#### **4. INTERPRETATION**

**4.1** In this deed, unless the context otherwise requires:

- 4.1.1** reference to any Statute or any provision of any Statute includes any modification or re-enactment of the Statute or any legislative provision

substituted for the Statute;

- 4.1.2 words denoting the singular include the plural and vice versa;
- 4.1.3 words denoting individuals or persons include bodies corporate and trusts and vice versa;
- 4.1.4 headings are for convenience only and do not affect interpretation;
- 4.1.5 reference to a clause, paragraph or schedule is a reference to a clause, paragraph or schedule of this deed;
- 4.1.6 reference to any document or agreement includes reference to that document or agreement as amended, novated, supplemented, varied or replaced from time to time;
- 4.1.7 words denoting any gender include all genders;
- 4.1.8 where any word or phrase is given a definite meaning, any part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- 4.1.9 reference to an amount of money is a reference to the amount in the lawful currency of the Commonwealth of Australia;
- 4.1.10 where, by virtue of the provisions of this deed, the day on or by which any act, matter or thing is to be done is a Saturday, a Sunday or a public holiday in the place in which that act, matter or thing is to be done, that act, matter or thing is to be done on the next succeeding day which is not a Saturday, a Sunday or a public holiday.

## **5. GOVERNING LAW**

- 5.1 This Agreement is to be governed by, and construed in accordance with, the law for the time being in force in New South Wales and the Parties, by agreeing to enter into this Agreement, are deemed to have submitted to the non-exclusive jurisdiction of the courts of that state.

## **6. ACCOUNTS**

- 6.1 In this deed, unless the context otherwise requires, all accounts must be kept in accordance with the Australian Accounting Standards and such generally accepted accounting principles and practices in Australia as are not inconsistent with those standards.

## **7. CONDITIONS PRECEDENT**

- 7.1 This Agreement, with the exception of this clause 7, is subject to, and conditional on:
  - 7.1.1 making of a development application or development applications for construction and use of the Boat Harbour and Golf Course;

- 7.1.2 approval of the development application or development applications referred to in paragraph 7.1.1;
- 7.1.3 surrender of lease T551263 registered on certificate of title folio identifier 1/624266;
- 7.1.4 removal of restrictive covenants created by transfers H526767 and N993293 from certificates of title folio identifiers 2/584291 and 2/248002 respectively;
- 7.1.5 extinguishment of easements for pipeline created by transfers N993294 and N993293 registered on certificates of title folio identifiers 2/584291 and 2/248002 respectively;
- 7.1.6 extinguishment of right of way and easement for power lines in DP 624247 registered on certificate of title folio identifier 1/630517;
- 7.1.7 acquisition of DOP Land by Council and extinguishment of easement for power lines in DP 624247 over that land;
- 7.1.8 rezoning of that part of lots 15 and 16 in deposited plan 3710 indicated in the Feasibility Study to be developed for residential use to permit that use;
- 7.1.9 acquisition of IE Land by Council;
- 7.1.10 removal of the unhealthy building land declaration from the land in certificates of title folio identifiers 2/584291 and 2/248002;
- 7.1.11 rezoning of the Quarry Buffer Area to permit its development for residential use; and
- 7.1.12 due diligence reports on Australand satisfactory to Council.

**7.2 Council must:**

- 7.2.1 make and diligently pursue appropriate applications;
- 7.2.2 enter and complete appropriate contracts;
- 7.2.3 obtain execution and registration in the Land Titles Office of appropriate documents;
- 7.2.4 give an auditor instructions; and
- 7.2.5 do everything

necessary to satisfy the conditions specified in paragraphs 7.1.3, 7.1.4, 7.1.5, 7.1.6, 7.1.7, 7.1.8, 7.1.9, 7.1.11 and 7.1.12.

**7.3 Australand must:**

- 7.3.1 make and diligently pursue appropriate applications;
- 7.3.2 carry out work; and
- 7.3.3 do everything

necessary to satisfy the conditions specified in paragraphs 7.1.1, 7.1.2 and 7.1.10 and to permit Council to satisfy the conditions specified in paragraph 7.1.12.

- 7.4** Despite clause 7.2, Australand must obtain the agreements of the appropriate persons to enable Council to satisfy the conditions specified in paragraphs 7.1.3, 7.1.4, 7.1.5, 7.1.6 and 7.1.7.
- 7.5** If a condition specified in a paragraph referred to in column 1 of the following Table A is not satisfied by the time or event referred to in column 2 of that Table A, or by such later date as the Parties agree in writing, either Party, not being in default under this Agreement, can terminate this Agreement immediate by serving notice on the other Party.

**TABLE A**

<b>Column 1</b>	<b>Column 2</b>
<b>7.1.1</b>	Boat Harbour by 10 July 1995 and Golf Course by 1 June 1998.
<b>7.1.2</b>	(a) Refusal of the applications by the relevant consent authority; or (b) refusal of either of those applications by the relevant consent authority; or (c) approval of both the Boat Harbour by 30 June 1998 and the Golf Course by 1 September 1998; whichever occurs first.
<b>7.1.3</b>	1 April 1995.
<b>7.1.4</b>	Development approval for the Boat Harbour and Golf Course.
<b>7.1.5</b>	Development approval for the Boat Harbour and Golf Course.
<b>7.1.6</b>	28 February 1997.
<b>7.1.7</b>	3 Months after development approval for the Boat Harbour and Golf Course.
<b>7.1.8</b>	3 Months after development approval for the Boat Harbour and Golf Course.
<b>7.1.9</b>	The times specified in the agreement between Council and Illawarra Electricity for acquisition of the IE Land.
<b>7.1.10</b>	3 Months after completion of all actions required by the Environmental Protection Agency or other relevant authority on the subject land for removal of the declaration have been taken.
<b>7.1.11</b>	12 Months after all other parts of the Land proposed in the Feasibility Study to be developed for residential use

have been developed for that use and offered for sale.

**7.1.12**

On each occasion specified in clause 8.

**7.6** Despite clauses 7.5 and 15, if the approval referred to in paragraph 7.1.2 has not been granted by the event or time specified in clause 7.5:

**7.6.1** the Project then becomes the development and the sale of the land in stages 1, 2 and 3 as shown in the plan attached and marked "D";

**7.6.2** Australand is not entitled to:

**7.6.2.1** reimbursement of the costs referred to in clause 16.1.2; or

**7.6.2.2** reimbursement of the costs of and incidental to the development application for approval of the Boat Harbour;

**7.6.3** Council must pay to Australand:

**7.6.3.1** reimbursement of working capital provided and not previously reimbursed to Australand and interest determined under clause 18.11 and an amount equal to 50 per cent of Net Income of the Project as modified under this clause 7.6; or

**7.6.3.2** the balance in the Trust Fund on the date when this clause 7.6 applies,

whichever is less,

less the costs of and incidental to the development application for approval of the Boat Harbour, and Australand must accept that payment in full satisfaction of reimbursement, of that working capital and of payment of that interest and of any other amount payable to Australand under this Agreement;

**7.6.4** for the purpose of paragraph 7.6.3:

**7.6.4.1** the costs referred to in clause 16.1 and the costs of and incidental to the development application for approval of the Boat Harbour are deemed not to be Project Costs; and

**7.6.4.2** there is to be an additional Project Cost payable to Council for each lot sold calculated under the formula:

$$\$10,000 \times \frac{A}{B}$$

where:

A is the Consumer Price Index last published immediately before the date of completion of sale of the lot; and

B is the Consumer Price Index published immediately before the date of this Agreement,



and that Project Cost is to be paid to Council when this clause 7.6 commences to apply or on completion of the sale of each lot, whichever occurs later; and

- 7.6.5** Council must not negotiate with any other person to conduct any other development of any part of the Land within 5 Months after the event or time specified in clause 7.5.
- 7.7** Despite clause 7.5, if any report referred to in paragraph 7.1.12 is not satisfactory to Council, Council must not terminate this Agreement unless:
- 7.7.1** Council has served a copy of that report on Australand;
- 7.7.2** Council has considered any submission in respect of that report served by Australand on Council within 5 days after the date of service of that report on Australand; and
- 7.7.3** Australand has not rectified the unsatisfactory matters referred to in that report within 10 days after the date of service of that report on Australand.
- 7.8** Completion of the Project is subject to, and conditional on:
- 7.8.1** surrender of lease I191742 registered on certificates of title folio identifiers 2/584291 and 2/248002;
- 7.8.2** acquisition by Council of the NPW Land;
- 7.8.3** acquisition of the land or an appropriate interest in the land required for construction of the breakwaters described in the Feasibility Study.
- 7.9** Council must:
- 7.9.1** enter and complete appropriate contracts;
- 7.9.2** obtain execution and registration in the Land Titles Office of appropriate documents; and
- 7.9.3** do everything
- necessary to satisfy the conditions specified in clause 7.8.
- 7.10** If a condition specified in a paragraph referred to in column 1 of the following Table B is not satisfied by the time or event referred to in column 2 of that Table B, or by such later date as the Parties agree in writing, the Parties cannot terminate this Agreement but must negotiate between themselves in good faith to modify the Project to accommodate the failure to satisfy that condition.

**TABLE B**

**Column 1**

**Column 2**

**7.8.1**

Completion and occupation by Shellharbour Golf Club Limited of the Golf Course.

- 7.8.2** 3 Months after development approval for the Boat Harbour and Golf Course.
- 7.8.3** Commencement of construction of the Boat Harbour.
- 7.11** Despite anything in the Feasibility Study, Australand can commence development of that part of the Land in stages 1, 2 and 3 as shown in the plan attached and marked "D", after obtaining the appropriate Authorisations, but must not carry out any other development of the Land until the development approval for the Boat Harbour has been granted.

## **8. DUE DILIGENCE**

- 8.1** When required by Council in accordance with this clause, Australand must submit to due diligence, being a review by a consultant appointed by Council, of Australand's:
  - 8.1.1** financial capacity to conduct the Project;
  - 8.1.2** corporate structure;
  - 8.1.3** business and other operations; and
  - 8.1.4** audit processes.
- 8.2** Council must determine, in Council's absolute discretion, the nature and extent of each review following consultation with Council's consultant. For that purpose, Council may request Australand to provide such information as Council specifies in respect of any of the matters listed in clause 8.1 and Australand must provide that information within the time specified by Council. Council can waive the requirement that Australand submit to due diligence following its consideration of the information provided by Australand.
- 8.3** For the purpose of this clause, Australand must provide, at Australand's cost:
  - 8.3.1** access to:
    - 8.3.1.1** Australand's executives, bankers and other financial institutions, solicitors, accountants, auditors, consultants and other advisors;
    - 8.3.1.2** financial and operational information; and
    - 8.3.1.3** taxation information and details of any disputes Australand has with the Australian Tax Office; and
  - 8.3.2** written confirmation of any oral representations made on behalf of Australand in the course of due diligence investigation;
  - 8.3.3** all financial information necessary for the due diligence;
  - 8.3.4** adequate accounting records and internal controls; and
  - 8.3.5** auditing of Australand's accounts throughout the Term.
- 8.4** Council is entitled to conduct a due diligence investigation of Australand at any time

when:

- 8.4.1** Australand receives a qualified audit report;
- 8.4.2** the Australian Stock Exchange suspends Australand's share trading;
- 8.4.3** Australand's activities are queried by the Australian Stock Exchange or the Australian Securities and Investment Commission; or
- 8.4.4** there are significant adverse movements in Australand's shareholders funds.

**8.5** If an event specified in clause 8.4 occurs:

- 8.5.1** Australand must notify Council of that event within 2 Business Days;
- 8.5.2** Council can notify Australand that Council requires a due diligence investigation of Australand;
- 8.5.3** within 14 days after receipt of Council's notification, Australand can provide certification from an independent consultant approved by Council that Australand has the ability to complete the Project;
- 8.5.4** Council can notify Australand that Council:
  - 8.5.4.1** accepts that certification in lieu of a due diligence investigation of Australand; or
  - 8.5.4.2** requires a due diligence investigation of Australand; and
- 8.5.5** in either case, the cost incurred by Australand in providing the certification is not to be a Development Cost.

**8.6** For the purpose of due diligence investigation, Australand must provide the access, documents and information referred to in clause 8.3 to Council's employees, accountants, auditors, solicitors, valuers or other consultants as reasonably required by Council.

**8.7** Each report prepared following due diligence investigation becomes the property of Council alone but must not be made available to any other person without the prior written consent of the author of the report, except under paragraph 7.7.1.

**8.8** All costs incurred by Council in connection with the due diligence investigation, including fees paid to accountants, auditors, solicitors, valuers and other consultants, are to be Development Costs.

**8.9** In this clause 8, a reference to Australand includes a reference to Australand's Related Corporations.

## **9. ACQUISITION OF LAND**

**9.1** Subject to this Agreement, Council must acquire the IE Land, DOP Land and NPW Land, free from any Encumbrance or other interest, except any reservation or exception contained in the relevant Crown Grant or any interest determined by the Committee to be acceptable.

- 9.2** The acquisition of the DOP Land is subject to, and conditional on, the acceptance by the Minister administering the Environmental Planning and Assessment Act, 1979, as the consideration for that acquisition, of substantially that part of the land in certificate of title folio identifier 1/624266, labled "Deferred" on sheet 1 of the map marked "Shellharbour Local Environmental Plan No. 25" deposited in the Council's office, and the whole of the land in certificate of title folio identifier 3/248002.
- 9.3** All costs reasonably incurred by Council in connection with the acquisitions referred to in this clause 9, including purchase price, valuation fees, and legal costs and disbursements, are to be Development Costs.
- 9.4** Despite clause 9.3:
- 9.4.1** Australand must provide a bank cheque for the amount of the purchase price to Council at the time of completion of acquisition of each parcel of IE Land; and
- 9.4.2** the amounts in paragraph 9.4.1 are Development Costs of Australand.
- 9.5** It is acknowledged by the Parties that:
- 9.5.1** no part of the Council Land, DOP Land or NPW Land; and
- 9.5.2** unless Council otherwise consents in writing, no part of the IE Land, while in Council's ownership, is to be Encumbered during the Term.

**10. APPOINTMENT AND DUTIES OF MANAGER**

- 10.1** Council appoints Australand as manager for the Term to conduct the Project for and on behalf of, and for the account of Council, and Australand accepts that appointment.
- 10.2** Australand must, either itself or, subject to clause 12, through such agents or independent contractors as it may engage, do all things necessary or advisable for the efficient and economic conduct of the Project. For that purpose Australand must, as and when necessary:
- 10.2.1** subject to clause 18, pay those Development Costs which it is required by this Agreement to pay;
- 10.2.2** obtain the Committee's approval of Development Costs as Project Costs;
- 10.2.3** administer the Project Agreements on behalf of the Parties;
- 10.2.4** ensure that the Authorisations are applied for, obtained, complied with and maintained;
- 10.2.5** ensure compliance with all applicable Statutes and lawful directions of any governmental or other competent authority having jurisdiction concerning the Project;
- 10.2.6** effect and maintain all usual insurances, for reasonable and prudent amounts, in relation to the Project Assets, the conduct of the Project and

employees or agents engaged in any way in the Project (including all necessary workers' compensation insurances);

- 10.2.7** keep the Committee fully informed of all matters of which Australand is or becomes aware relating to the Project;
  - 10.2.8** ensure that Confidential Information is not transmitted to any third party;
  - 10.2.9** ensure that Members appointed by Australand attend meetings of the Committee;
  - 10.2.10** subject to the terms of this Agreement, ensure that Council's assets are developed, by subdivision of the Land, construction of the improvements and the doing of all other things described in the Feasibility Study, and used for the purpose of the Project;
  - 10.2.11** sell the residential lots developed and the Harbour Land, subject to clause 13; and
  - 10.2.12** provide the staff, equipment, materials and resources to satisfy its obligations under this Agreement.
- 10.3** Australand must carry out Australand's duties and obligations in accordance with:
- 10.3.1** the Feasibility Study;
  - 10.3.2** this Agreement;
  - 10.3.3** the Authorisations;
  - 10.3.4** established, modern, scientific and good management methods and practices, with due skill, expertise, diligence and vigour, using good and sufficient materials and services;
  - 10.3.5** Annual Programs;
  - 10.3.6** all applicable Statutes; and
  - 10.3.7** all instructions it receives from the Committee.
- 10.4** Without limiting clause 10.3, Australand must comply with the conditions of approval of Development Application No. 95/133 for the Boat Harbour. The cost of complying with those conditions is to be a Development Cost.
- 10.5** During the Term, Australand and Australand's Related Corporations must not, without the Committee's prior approval, directly or indirectly carry on or be interested in any business or activity within Council's local government area other than under this Agreement or the Australand Side Deed.
- 10.6** Australand acknowledges that:
- 10.6.1** Council is the relevant consent authority in respect of various Authorisations required under this Agreement;
  - 10.6.2** Council is obliged to determine applications for those Authorisations having

regard to the provisions of the Statutes under which those applications are made in respect of the matters to be taken into consideration and the formal procedures to be undertaken; and

- 10.6.3** a failure by Council to grant an Authorisation is not a breach of this Agreement.

## **11. POWERS OF MANAGER**

- 11.1** Australand is to have possession and control, but not ownership, of the Land and is to have charge of, and responsibility for, the conduct of the Project. Despite any other term or condition of this Agreement, Australand must not record the Land or any interest in the Land as an asset of Australand in any of Australand's financial statements or accounts.
- 11.2** Australand is to have such powers, functions and authorities from Council as are necessary to enable Australand to carry out Australand's duties and obligations set out in clause 10, including the powers to:
- 11.2.1** develop and use the Project Assets for the purposes of the Project;
  - 11.2.2** repair and maintain the Project Assets;
  - 11.2.3** employ, engage, appoint and contract with surveyors, geologists, engineers, project managers, accountants and other professional or technical advisors, consultants, contractors and experts to do all things usual or desirable to be done for the purpose of conducting the Project;
  - 11.2.4** negotiate and enter into (and renew, extend or vary) contracts for the supply (by purchase or lease) of materials, equipment, buildings and services in connection with the Project;
  - 11.2.5** institute, prosecute, defend and compromise legal proceedings;
  - 11.2.6** in the case of any emergency or accident, take such action as is necessary for the protection of life and property;
  - 11.2.7** do any other act or thing which is required of Australand by this Agreement or which the Committee authorises or requires; and
  - 11.2.8** offer for sale the residential lots developed and the Harbour Land, subject to clause 13.
- 11.3** The grant of powers, functions and authorities under this clause 11 are not revocable or variable by Council without the prior written consent of Australand.
- 11.4** Except as authorised or required by Council, Australand must not Encumber any of the Project Assets.
- 11.5** Australand and any Related Corporation of Australand can purchase any lot developed as part of the Project if the Committee approves. The price to be paid for that purchase is the value of the lot as determined by a valuer appointed by the Committee or such other price as the Committee decides.

## **12. SUB-CONTRACTING**

- 12.1** Australand must invite tenders before entering into any contract to carry out any works required for the purposes of the Project, except a contract involving an estimated expenditure of an amount which is less than that referred to in section 55 of the Local Government Act, 1993. Those tenders must be invited, considered and determined, as far as practicable, following the procedures specified in the Local Government (Tendering) Regulation, 1993 as if Australand is a council referred to in that Regulation.
- 12.2** Subject to clause 12.1, the Committee may determine the manner in which Australand enters into contracts.
- 12.3** Australand must ensure that, at any time, not less than 50 per cent of labour employed to carry out Project works are residents of the combined local government areas of Shellharbour, Wollongong, Kiama, Shoalhaven and Wingecarribee.

## **13. HARBOUR LAND**

- 13.1** Unless the Committee determines otherwise, Australand must offer the Harbour Land for sale in one lot or more lots, as and when decided by the Committee in accordance with clauses 13.2 to 13.6 inclusive.
- 13.2** As soon as practicable after making a decision under clause 13.1, the Committee must obtain a market valuation of each lot or lots being offered for sale at that time and serve a copy of that valuation on each Party. Each valuation of a lot must be determined according to its market value at the date of the decision made by the Committee, or the expected date of registration of the plan creating that lot, whichever occurs later.
- 13.3** If Council desires to retain a lot or lots, Council must:
- 13.3.1** serve on Australand notice of that desire within a period of 90 days after service of the copy of the valuation under clause 13.2; and
  - 13.3.2** pay the amount of the valuation of that lot or those lots into the Trust Fund within a period of 90 days after service of the copy of the valuation under clause 13.2, or within 30 days after registration of a plan of subdivision creating that lot or those lots, whichever occurs later.

Australand must not offer for sale the Harbour Land or any part of it until the expiration of the relevant period set out in clause 13.3 or if the payment is made under clause 13.3, whichever occurs later.

- 13.4** The payment under clause 13.3 is deemed to be a sale of all or that part of the Harbour Land for which the payment is made and the amount of that payment is deemed to be gross proceeds of sale for the purpose of calculating and paying the Administration Fee, the Project Fees and the Commission.
- 13.5** If Council does not serve the notice and make the payment referred to in clause 13.3, Australand can, within 30 days after expiration of the relevant period in clause 13.3, offer to purchase the lot or lots for the amount of the valuation of that lot or those lots. Australand must enter into a binding contract to purchase that lot or those lots within 14 days after service of that contract by Council on Australand.

- 13.6** If the Harbour Land or any part of it which the Committee has decided to sell is not retained by Council under clause 13.3 or purchased by Australand under clause 13.5, Australand must offer it for sale on the open market.

**14. DUTIES AND REMUNERATION OF COUNCIL**

- 14.1** For the purpose of enabling Australand to carry out Australand's duties and to exercise Australand's powers under this Agreement, Council must, in addition to Council's duties specified elsewhere in this Agreement:

**14.1.1** acquire the IE Land, DOP Land and NPW Land;

**14.1.2** give Australand possession and control of the Land;

**14.1.3** take all necessary action for the making of local environmental plans that:

**14.1.3.1** vary the zoning of the IE Land to zone 2(f) or other zone or zones in Shellharbour Local Environmental Plan Number 16 which permit the Project to be conducted; and

**14.1.3.2** permit development of the Quarry Buffer Area for residential use; and

**14.1.4** ensure that Members appointed by Council attend meetings of the Committee.

- 14.2** For the performance of Council's duties under this Agreement, Council can deduct from the Trust Fund an Administration Fee. That fee is to be:

**14.2.1** where the lot is created by a subdivision while any Secured Debt remains outstanding, 2.5 per cent; or

**14.2.2** otherwise, 1.75 per cent,

of the gross proceeds of sale of each lot created as part of the Project. The Administration Fee is deemed to be a Project Cost.

- 14.3** Council can withdraw from the Trust Fund:

**14.3.1** Administration Fees payable in accordance with clause 14.2 of this Agreement;

**14.3.2** reimbursement of Council's Project Costs under clause 18.7;

**14.3.3** when Council pays Commission to Australand, an amount equal to the amount of that Commission; and

**14.3.4** the balance in the Trust Fund when this Agreement is terminated, provided that Council has paid all moneys owing to Australand under this Agreement.

- 14.4** Development Costs are to include costs incurred by Council:

**14.4.1** in connection with any commission of inquiry in respect of the development application for approval of the Boat Harbour;



- 14.4.2** for an independent report by a consultant in respect of that application if that commission of inquiry is not held; and
- 14.4.3** in connection with any local environmental study required for the purposes of paragraphs 7.1.8 and 7.1.11.

## **15. REMUNERATION OF MANAGER**

- 15.1** For the services rendered by Australand under this Agreement, Council must pay to Australand the Development Fee.
- 15.2** The Management Fee is to be 3.25 per cent of the gross proceeds of sale of each lot developed as part of the Project and must be paid within 28 days after completion of each sale. The Management Fee is deemed to be a Project Cost.
- 15.3** The Sales Fee is to be 1.75 percent of the gross proceeds of sale of each lot developed as part of the Project and must be paid within 28 days after the completion of each sale. The Sales Fee is deemed to be a Project Cost. Australand acknowledges that the Sales Fee includes any real estate agent's commission payable on each sale. That commission must be paid by Australand.
- 15.4** The Commission is to be 50 per cent of the Net Income in each Financial Year and must be paid within 14 days after service on Council of notification of approval by the Committee. If the Net Income in any Financial Year is negative:
  - 15.4.1** no Commission is payable for that Financial Year; and
  - 15.4.2** any Commission subsequently payable is to be reduced by an amount equal to 50 per cent of that negative Net Income.
- 15.5** Despite clause 15.4, the Committee must not approve payment of Commission unless:
  - 15.5.1** the balance in the AUPC Schedule is nil; and
  - 15.5.2** the Committee is satisfied that the construction of the Boat Harbour and the Golf Course has been completed.
- 15.6** Australand's Project Costs must be paid in the manner specified in paragraph 18.7.2.
- 15.7** Australand is not entitled to claim or receive any remuneration, fee or other payment for, or in connection with, the conduct of the Project and Australand's services, other than the payments referred to in this clause 15 and in paragraph 35.10.1. Those payments constitute full and complete compensation for Australand's services under this Agreement.

## **16. PRELIMINARY COSTS**

- 16.1** The Parties acknowledge that, prior to the date of this Agreement:
  - 16.1.1** Council has incurred Project Costs of \$75,850.48; and
  - 16.1.2** Australand has incurred Project Costs of \$228,898.98.

**16.2** Those Project Costs must be reimbursed from the Trust Fund:

**16.2.1** only if approval of the development application for the Boat Harbour is granted by the event or time specified in clause 7.5; and

**16.2.2** as and when as approved by the Committee.

**17. COMMITTEE**

**17.1 Constitution**

For the purpose of the Project there is to be a committee.

**17.2 Membership**

**17.2.1** The Committee is to comprise:

**17.2.1.1** 3 Members appointed by Council; and

**17.2.1.2** 3 Members appointed by Australand.

**17.2.2** The first Members of the Committee are:

**17.2.2.1** William Miller, Kevin James and Philip Woodcock appointed by Council; and

**17.2.2.2** Lang Walker, Peter Dransfield and Paul McKenna appointed by Australand.

**17.2.3** Each Party can appoint one alternate Member for the Members appointed by that Party, and in that case:

**17.2.3.1** each Party must give notice to the other Party of the appointment of the alternate Member; and

**17.2.3.2** an alternate Member can act only if a Member for whom the alternate Member is appointed alternate is not present at a meeting of the Committee and then that alternate Member is, for the purposes of this Agreement, deemed to be that Member and can exercise all powers of the Member for whom the alternate Member is appointed alternate to the extent that the Member has not exercised those powers.

**17.2.4** Each Party can remove and replace with another person any Member or alternate Member appointed by that Party from time to time but must serve notice of that removal and replacement on the other Party before that person can exercise the powers and duties of a Member.

**17.2.5** Each Member or alternate Member must be appointed by Council from Council's senior staff or appointed by Australand from the directors or senior management staff of Australand or of Australand Holdings Limited (ACN 008 443 696).

**17.2.6** A Member ceases to be a Member if the Member:

**17.2.6.1** dies;

**17.2.6.2** resigns from membership by notice in writing to the Parties; or

**17.2.6.3** is removed and replaced by the Party which appointed the Member.

**17.2.7** Costs and expenses incurred by the Parties relating to the attendance of the respective Members appointed by them at meetings of the Committee must be borne by them and are not Development Costs.

### **17.3 Quorum**

**17.3.1** At a meeting of the Committee, the number of Members whose presence is necessary to constitute a quorum is 4 provided that there are at least 2 Members of Australand and 2 Members of Council present.

**17.3.2** If a quorum is not present within 30 minutes after the time appointed for the meeting:

**17.3.2.1** the meeting stands adjourned to the same day in the next week at the same time and place; and

**17.3.2.2** if at the adjourned meeting a quorum is not present within 30 minutes after the time appointed for the meeting, the meeting is to be dissolved.

### **17.4 Chairman**

**17.4.1** The Chairman during the first year of the Term and every second year afterwards must be appointed from the Members by Council.

**17.4.2** The Chairman during the second year of the Term and every second year afterwards must be appointed from the Members by Australand.

**17.4.3** The Chairman has a deliberative vote but not a casting vote in the case of equality of votes.

**17.4.4** If at any meeting the Chairman is not present at the time appointed for holding the meeting, the Members present can choose one of their number to preside at that meeting.

### **17.5 Proceedings at Meetings**

**17.5.1** At any meeting of the Committee a resolution put to the vote of the meeting must be decided on a show of hands unless a poll is, before or on the declaration of the result of the show of hands, demanded by the Chairman or by any other Member.

**17.5.2** Unless a poll is demanded, a declaration by the Chairman that a resolution has on a show of hands been carried or lost, and an entry to that effect in the book containing the minutes of the proceedings of the Committee, is conclusive evidence of the fact without proof of the number or proportion of

the votes recorded in favour of or against the resolution.

- 17.5.3** The demand for a poll may be withdrawn.
- 17.5.4** If a poll is properly demanded, it must be taken in such manner and, subject to sub-clause 17.5.5, either at once or after an interval or adjournment or otherwise as the Chairman directs, and the result of the poll is the decision of the meeting at which the poll is demanded.
- 17.5.5** A poll demanded on a question of adjournment must be taken immediately.
- 17.5.6** The number of Members appointed by a Party voting on any resolution must not exceed the number of Members appointed by the other Party voting on that resolution.
- 17.5.7** All questions arising at a meeting of the Committee must be determined by unanimous decision of the Members present and entitled to vote.
- 17.5.8** The loss of a resolution proposed at a meeting of the Committee is deemed to be a dispute arising under this Agreement.

#### **17.6 Frequency of meetings**

- 17.6.1** The Committee must meet at 2.30pm on the 2nd Thursday of every Month or at such other times as the Committee determines.
- 17.6.2** The Committee must meet at such other times as required by the Chairman.
- 17.6.3** The Chairman must convene a meeting of the Committee within 14 days after service on the Chairman of written notice from either Party requesting a meeting and specifying the business to be conducted at the meeting.

#### **17.7 Notice of meetings**

- 17.7.1** The Chairman must give not less than 7 days' previous written notice of each meeting of the Committee to each Party.
- 17.7.2** The Chairman must serve notice of a meeting of the Committee in the manner prescribed in clause 34 for the service of notices by one Party on the other Party.

#### **17.8 Venue of meetings**

- 17.8.1** Meetings of the Committee must be held at Council's address unless the Members decide to meet elsewhere.
- 17.8.2** A meeting of the Committee can be held using any technology consented to by all the Members. The consent can be a standing one. A Member can only withdraw consent a reasonable time before the meeting.

#### **17.9 Powers of Committee**

- 17.9.1** The Committee has the power to give all approvals, other than Authorisations, and to make all decisions and determinations required or

permitted to be given or made by the Parties under this Agreement with respect to the Project, including, but not limited to, the power:

- 17.9.1.1** to adopt, with or without amendment, or modify each proposed Annual Program;
  - 17.9.1.2** to modify, cease, curtail, suspend or resume the Project or any part of it;
  - 17.9.1.3** to supervise the activities of Australand as Project manager;
  - 17.9.1.4** to approve Development Costs as Project Costs;
  - 17.9.1.5** to approve each statement of account furnished under clause 20.5;
  - 17.9.1.6** to approve the Commission;
  - 17.9.1.7** to resolve disputes between the Parties;
  - 17.9.1.8** to approve a business or activity under clause 10.5; and
  - 17.9.1.9** to determine the amounts payable under clause 18.7 and the Housing Bonus.
- 17.9.2** All approvals, decisions and determinations given or made by the Committee are to be binding on the Parties.

#### **17.10 Record of meetings**

- 17.10.1** The Chairman must keep a written record of decisions made at each meeting of the Committee and must serve notice, including a copy of that record, on each Party within 14 days following the meeting.
- 17.10.2** If a Party has not notified the Chairman and the other Party of an objection to the written record within 14 days of service of that notice, the Party is deemed to have accepted that record as an accurate recording of the decisions noted in that record.
- 17.10.3** On the written record being accepted by the Parties under sub-clause 17.10.2 and being signed by the Chairman, it becomes prima facie evidence of the decisions and proceedings of the meeting to which it relates.

#### **17.11 Staff, facilities, equipment and materials**

- 17.11.1** Unless the Committee decides otherwise:
  - 17.11.1.1** Australand must provide the staff, facilities, equipment and materials necessary for the purpose of recording decisions made at meetings of the Committee, giving notices under this clause 17 and keeping the records of the Committee; and
  - 17.11.1.2** the costs incurred by Australand in complying with paragraph 17.11.1.1 are not to be Development Costs.

**18. FUNDING**

- 18.1** The working capital necessary to conduct the Project is to come from Sales Revenue but, until sufficient working capital to meet all Development Costs of the then current Annual Program is available from that source, Australand must meet all costs incurred in complying with Australand's duties under this Agreement up to a maximum aggregate amount, at any time, of \$20,000,000 of such costs that have not been reimbursed out of the Trust Fund at that time.
- 18.2** Council must pay all Sales Revenue into the Trust Fund.
- 18.3** While the Secured Debt remains outstanding, Council must pay that portion of the Net Sales Proceeds resulting from the sale of a lot which is required by the Australand Side Deed to be paid from the Trust Fund to the Proceeds Account, from the Trust Fund to the Proceeds Account (receipt of which, to avoid doubt, constitutes payment to Australand) at the times expressly contemplated in the Australand Side Deed.
- 18.4** At the beginning of each Month, each Party must submit to the Committee for approval a schedule of Development Costs (if any) paid by them respectively:
- 18.4.1** during the previous Month;
  - 18.4.2** more than 1 Month but less than 2 Months previously, if not included in a previous schedule for some reason acceptable to the Committee; and
  - 18.4.3** during the previous 3 Months, if included in a previous schedule but not previously approved by the Committee.
- 18.5** The Committee must approve Council's schedule of Development Costs as Project Costs if Council has:
- 18.5.1** demonstrated its authority to incur those Development Costs to the reasonable satisfaction of the Committee; and
  - 18.5.2** proved payment of those Development Costs.
- 18.6** The Committee must approve Australand's schedule of Development Costs as Project Costs if Australand has:
- 18.6.1** completed, to the reasonable satisfaction of the Committee, the works in respect of which those Development Costs have been incurred;
  - 18.6.2** proved payment of those Development Costs; and
  - 18.6.3** delivered to the Committee a written statement signed on behalf of Australand that no wages are due and owing by Australand in respect of those works at the time of payment of those Development Costs in compliance with section 127 of the Industrial Relations Act, 1996.
- 18.7** On approval by the Committee under clauses 18.5 and 18.6 of Development Costs as Project Costs, the Committee must:
- 18.7.1** make the adjustments to the CUPC Schedule and AUPC Schedule under clauses 18.9 and 18.10; and

- 18.7.2** determine the amounts H1, H2 and H3 by reference to the formulas in Column 2 appearing opposite the relevant circumstances in Column 1 of Table C:

**TABLE C**

<b>Column 1</b>	<b>Column 2</b>
$K \leq L$	H1 = K H2 = nil H3 = nil
$L < K \leq L + (11/10 \times M)$	H1 = L H2 = $10/11 \times (K - L)$ H3 = nil
$K > L + (11/10 \times M)$	H1 = L H2 = M H3 = $K - L - (11/10 \times M)$

where:

- K1 = the amount in the Trust Fund;
- K2 =  $10/11 \times K1$ ;
- K = K2 less the amount which is required to be paid to the Proceeds Account under clause 18.3;
- L = the current balance in the CUPC Schedule;
- M = the current balance in the AUPC Schedule;
- H1 = the amount to be paid to Council;
- H2 = the amount to be paid to Australand;
- H3 = the amount which is to remain in the Trust Fund until the next meeting held for the purpose of clause 18.4 or to be applied in any manner authorised by this Agreement.

Council must pay from the Trust Fund, as soon as practicable after that determination, the amounts determined as H1 and H2.

- 18.8** For the purposes of calculating the amount, if any, payable to the Parties under this Agreement from time to time, the Committee must establish and maintain:

**18.8.1** the CUPC Schedule; and

**18.8.2** the AUPC Schedule.

The Parties agree that the Schedules attached and marked "B" and "C" respectively incorporate the adjustments made to the CUPC Schedule and the AUPC Schedule at the meeting of the Committee held on the date shown in those Schedules in accordance with clauses 18.9, 18.10 and 18.11.

- 18.9** At each meeting of the Committee, the CUPC Schedule must be adjusted by:

- 18.9.1** inserting the amount of any payment to Council under clause 18.7 since the previous meeting and the date of that payment and deducting that amount from the balance;
  - 18.9.2** inserting the rate of interest determined at the previous meeting under clause 18.11;
  - 18.9.3** inserting the amount of interest, at the rate referred to in paragraph 18.9.2, on the balance from time to time since the previous meeting, calculated on a daily basis, from the day after that meeting to the day of the meeting at which the adjustment is made, and adding that amount to the balance; and
  - 18.9.4** inserting the amount of the Development Costs approved under clause 18.5 at the meeting and the date of that approval and adding that amount to the balance.
- 18.10** At each meeting of the Committee, the AUPC Schedule must be adjusted by:
- 18.10.1** inserting the amount of any payment to Australand under clause 18.7 since the previous meeting and the date of that payment and deducting that amount from the balance;
  - 18.10.2** inserting the amount of each payment to the Proceeds Account under clause 18.3 since the previous meeting and the date of each payment and deducting each amount from the balance;
  - 18.10.3** inserting the rate of interest determined at the previous meeting under clause 18.11;
  - 18.10.4** inserting the amount of interest, at the rate referred to in paragraph 18.10.3, on the balance from time to time since the previous meeting, calculated on a daily basis, from the day after that meeting to the day of the meeting at which the adjustment is made, and adding that amount to the balance; and
  - 18.10.5** inserting the amount of the Development Costs approved under clause 18.6 at the meeting and the date of that approval and adding that amount to the balance.
- 18.11** Unless the Committee determines otherwise, at each meeting of the Committee, the interest rate to apply to the CUPC Schedule and the AUPC Schedule must be:
- 18.11.1** for the AUPC Schedule while the Outstanding Amount remains outstanding, nil; or
  - 18.11.2** otherwise, the Westpac Banking Corporation interest rate per year on a business overdraft of \$4,000,000.00, on the Business Day last preceding the relevant Committee meeting.
- 18.12** The interest rate determined under clause 18.11 is to apply from the day immediately following the meeting at which it is determined until the day of the next meeting at which that interest rate is changed.
- 18.13** Interest credited to the CUPC Schedule and the AUPC Schedule is deemed to be a Project Cost.



- 18.14** Council must use the Trust Fund exclusively for the purposes of the Project.
- 18.15** Council must withdraw and pay from the Trust Fund the following amounts for payment in accordance with this Agreement:
- 18.15.1** Administration Fees;
  - 18.15.2** Project Fees;
  - 18.15.3** Commission payable to Australand;
  - 18.15.4** amounts payable under paragraph 14.3.3;
  - 18.15.5** amounts payable to the Proceeds Account under clause 18.3;
  - 18.15.6** amounts payable under clause 18.7;
  - 18.15.7** GST payable in respect of Sales Revenue; and
  - 18.15.8** the balance in the Trust Fund when this Agreement is terminated, provided that Council has paid all moneys owing to Australand under this Agreement.
- 18.16** Council must deliver to Australand all information regarding the Trust Fund as and when necessary to enable Australand to satisfy Australand's obligations under this Agreement or as may be requested by Australand from time to time to audit and review the balance and transactions on the Trust Fund.
- 18.17** To enable the Committee to comply with its obligations under this clause 18, Australand must provide to the Committee all relevant details of all of its financing and borrowings effected for the purpose of the Project, and must notify the Committee of any changes.
- 18.18** It is a fundamental condition of this Agreement that the working capital provided by Australand is to be repaid from Net Income only and that Council cannot be required to repay that working capital, even after termination of this Agreement for any reason, from any other source. In particular, Council cannot be required to Encumber the Land or any other real property of Council to repay working capital. In this clause 18.18, "working capital" includes interest referred to in paragraph 18.10.4.
- 18.19** Australand must provide to Council a bank guarantee or insurance bond which is acceptable to Council in an amount of \$500,000 to secure the performance of Australand's obligations under this Agreement. The bank guarantee or insurance bond can be used by Council to meet the cost of rectifying any default by Australand under this Agreement.
- 18.20** Fees and charges incurred in keeping the Trust Fund are deemed to be Project Costs.
- 18.21** The schedule of Development Costs referred to in clause 18.4 must include, in respect of each Development Cost, the amount of GST payable and the input tax credit under the GST Law claimed or claimable by the Party paying that Development Cost.
- 18.22** The amount of GST payable in respect of Sales Revenue is deemed to be a Project Cost.

**18.23** All costs and expenses of Council and Australand arising in connection with:

- 18.23.1 the negotiation, preparation, execution, delivery, registration and completion of, and payment of Taxes on, each Transaction Document;
- 18.23.2 a variation, release or discharge of or under any Transaction Document; or
- 18.23.3 giving a consent or approval or waiving a requirement in connection with a Transaction Document,

are deemed to be Project Costs, except to the extent of any such costs and expenses relating to termination of this Agreement and the consequential operation of the Australand Side Deed.

## **19. ANNUAL PROGRAMS AND FEASIBILITY STUDIES**

**19.1** Within 2 Months after commencement of the Term, Australand must prepare and submit to the Committee a proposed Annual Program for the period commencing on the date of that submission and ending on 30 June 1994 for approval by the Committee.

**19.2** At least 2 Months prior to commencement of each Financial Year, Australand must prepare and submit to the Committee a proposed Annual Program for that Financial Year for approval by the Committee.

**19.3** Each proposed Annual Program must include:

- 19.3.1** a description of the progress of the Project up to commencement of that Financial Year;
- 19.3.2** a plan for the future progress of the Project from the commencement of that Financial Year;
- 19.3.3** suitable details of all construction, operating and maintenance works to be carried out in that Financial Year;
- 19.3.4** a suitably itemised budget for the Project for that Financial Year; and
- 19.3.5** an estimate of the final amount of all the Project income and costs.

**19.4** Each proposed Annual Program must be considered and adopted by the Committee, with or without amendment, before the beginning of the Financial Year to which it relates, except the Annual Program referred to in clause 19.1 which must be adopted by the Committee before any Project works are commenced.

**19.5** The Chairman must deliver a copy of each Annual Program in the form adopted by the Committee to the Parties.

**19.6** At the time of considering and adopting each Annual Program, the Committee can adopt proposals involving expenditures necessarily extending beyond the Financial Year to which the Annual Program relates.

**19.7** Any Annual Program can be revised and modified, from time to time before or during the subject Financial Year by the Committee and the Chairman must deliver copies of any revision and modification to the Parties. Australand may at any time propose a

revision and modification to an Annual Program by notice to the Committee in writing that, based on independent consultant advice received by Australand and provided to the Committee, any of the subject matter, data, assumptions, estimates or forecasts in the Annual Program are not valid, feasible or accurate, or have changed, in a material respect. Council may make representations and suggestions to the Committee concerning the matters notified by Australand to the Committee.

**19.8** During the Financial Year to which an Annual Program relates, Australand must conduct the Project in accordance with the activities and expenditures set out in that Annual Program.

**19.9** When required under clause 19.10, Australand must prepare revised feasibility studies for the balance of the Project and must submit those studies to Council for approval. In preparing each study, Australand must comply with any directions of the Committee. Council can undertake an independent review of each study, and the cost of any review is to be a Development Cost. Council can require reasonable amendments to each study before its approval. On Council's approval of each study, that document becomes the Feasibility Study for the purposes of this Agreement.

**19.10** Unless the Committee determines otherwise, each revised feasibility study must be prepared within 2 Months after:

**19.10.1** 1 July in the years 2000, 2003, 2006, 2009, 2011, 2014 and 2017;

**19.10.2** 1 July in each subsequent year occurring at 3 year intervals after 2017 during the Term;

**19.10.3** any date Australand notifies the Committee in writing that based on independent consultant advice received by Australand and provided to the Committee any of the subject matter, data, assumptions, estimates or forecasts in the Feasibility Study are not valid, feasible or accurate, or have changed, in a material respect; and

**19.10.4** any other date determined by the Committee.

## **20. PROGRESS REPORTS**

**20.1** Within 7 days, or such other time period that the Committee decides, following the end of each Month, Australand must deliver to the Committee:

**20.1.1** a progress report:

**20.1.1.1** outlining the work performed in connection with the Project during that Month;

**20.1.1.2** summarising all income received and costs incurred or accrued during that Month;

**20.1.1.3** comparing that work and that income and those costs with estimates made in the current Annual Program; and

**20.1.1.4** outlining the further work to be performed in completing the current Annual Program.

- 20.1.2** an unaudited profit and loss statement and Monthly cashflow statement, with projections for the balance of the then current Financial Year, for the last preceding Month and for the current Financial Year to date which:
  - 20.1.2.1** are prepared in reasonable detail and in accordance with clause 6.1; and
  - 20.1.2.2** include comparisons of the actual results with the projections set out in the current Annual Program.
- 20.2** Each progress report must contain the detail necessary for an adequate analysis and be prepared in such a way as to meet the accounting, statutory and taxation requirements of the Parties.
- 20.3** If requested by the Committee, Australand must prepare and submit to the Committee, on a Monthly basis, reports which must include, but not be limited to:
  - 20.3.1** industrial relations;
  - 20.3.2** government affairs;
  - 20.3.3** staff organisation;
  - 20.3.4** all agreements which Australand has entered into; and
  - 20.3.5** matters relating to the Project which have been reasonably requested by a Party.
- 20.4** In addition to the reports and statements referred to in clauses 20.1 and 20.3, Australand must provide to the Committee such statements and other information relating to the Project as the Committee reasonably requests from time to time.
- 20.5** Within 3 Months after the end of each Financial Year, Australand must furnish to the Committee for its approval a statement of account audited by an auditor appointed by Council, reflecting for that Financial Year:
  - 20.5.1** all transactions in connection with the Project during that Financial Year, as disclosed by the records and accounts kept or caused to be kept by Australand under clause 21.1;
  - 20.5.2** all Project income received and costs incurred or accrued during that Financial Year; and
  - 20.5.3** all Project Assets in the possession or control of Australand as at the end of that Financial Year.

## **21. RECORDS AND ACCOUNTS**

- 21.1** Australand must:
  - 21.1.1** keep or cause to be kept separately from any other of Australand's records and accounts comprehensive, true and accurate records and accounts of:
    - 21.1.1.1** the Project;

- [illegible]

## 22. LIABILITY AND INDEMNITY

- 22.1** Australand is not responsible to Council for any liability, loss, harm, damage, cost or expense, including legal fees, that Council suffers, incurs or sustains arising out of the Project or Australand's activities in performing Australand's obligations under this Agreement, except to the extent that such liability, loss, harm, damage, cost or expense arises directly from Australand's wilful misconduct, bad faith or negligence.
- 22.2** Australand must effect professional indemnity insurance for the sum of \$20,000,000 or for any greater amount specified by the Committee from time to time.

**23. PARTNERSHIP, JOINT VENTURE AND AGENCY NEGATIVED**

- 23.1** The Parties agree that the relationship between them is one of Project owner and manager and is limited to conducting the Project so that nothing contained in this Agreement constitutes either of them as a joint venturer or partner of the other or creates any joint venture or partnership for any purpose.
- 23.2** Except as otherwise specifically provided in this Agreement a Party has no authority to act for, or to create or assume any responsibility or obligation on behalf of, the other Party.

## 24. TRANSFER OF RIGHTS AND OBLIGATIONS

- 24.1** Neither Party can, without the prior written consent of the other Party, transfer any of its rights or obligations under this Agreement.
- 24.2** A Party must pay the other Party's reasonable legal and other costs of considering and giving consent under this clause 24, including any costs which that Party incurs in making enquiries as to the respectability, solvency, responsibility, stature, experience and capability of any proposed transferee. The costs payable under this clause 24 are not to be a Development Cost.
- 24.3** Nothing in this clause 24 prevents a Party from employing or engaging advisers, consultants, contractors and experts for the purpose of discharging that Party's duties and obligations under this Agreement.

## **25. CONFIDENTIALITY**

- 25.1** All Confidential Information acquired by a Party under or by virtue of the Project Agreements must be treated as confidential by that Party and must not be divulged by that Party in whole or in part to third persons without the prior written consent of the other Party, except:
- 25.1.1** that Australand can divulge Confidential Information to a Related Corporation of Australand or to a bank or other lending agency to the extent necessary for arranging financing of Australand's obligations under this Agreement;
  - 25.1.2** to the extent necessary to ensure the efficient operation of this Agreement;
  - 25.1.3** to the extent required to be disclosed by the law, including any timely disclosure law, applicable to that Party or by any authority or regulatory body having jurisdiction over that Party, including any stock exchange;
  - 25.1.4** to the extent that Confidential Information lawfully is or becomes within the public domain; or
  - 25.1.5** as is properly and reasonably required for the purpose of review by any advisor, consultant, expert, contractor or subcontractor employed or retained by the Party.
- 25.2** Each Party must take all steps reasonably necessary to ensure that Confidential Information is known only to those persons, including any employees of that Party, as reasonably require knowledge of Confidential Information in the course of their duties or functions. Despite clause 25.1, each Party must, to the extent permitted by law, require any person to whom it intends to disclose Confidential Information and who is not under a statutory, professional or contractual duty to keep Confidential Information confidential to give a written undertaking to keep Confidential Information confidential in accordance with clause 25.1.

## **26. FORCE MAJEURE**

- 26.1** If Australand becomes unable, wholly or in part, by Force Majeure, to carry out any duty or obligation under this Agreement, Australand:
- 26.1.1** must give Council prompt written notice of the Force Majeure with reasonably full particulars of it and, so far as known, the probable extent to which

Australand will be unable to perform, or be delayed in performing, that duty or obligation;

- 26.1.2** cannot be required to carry out that duty or obligation so far as it is affected by the Force Majeure during, but no longer than, the Force Majeure continues; and
  - 26.1.3** must do everything possible to overcome or remove the Force Majeure as quickly as possible.
- 26.2** The requirement that any Force Majeure must be overcome or remedied by doing everything possible does not require Australand to settle any strike, or other labour dispute on terms contrary to Australand's wishes or to contest the validity or enforceability of any law, regulation or order by way of legal proceedings.

## **27. DEFAULT**

**27.1** A Party is in default under this Agreement if:

- 27.1.1** that Party continues to breach any obligation of that Party under this Agreement for 14 days after receiving notice from the other Party of that breach;
- 27.1.2** that Party repeats a breach after having received notice from the other Party warning that repetition of the breach will, or is likely to, result in the other Party regarding that Party as being in default under this clause 27 of that Party's obligations under this Agreement;
- 27.1.3** a petition is presented or an application is made or a resolution is passed for the winding up of that Party, other than for the purposes of reconstruction or where such petition is withdrawn or satisfied within 14 days of service or for the reduction of its capital, or if proceedings are initiated or threatened with a view to obtaining an order for the winding up of that Party or if a meeting is called for the purpose of passing any such resolution;
- 27.1.4** a liquidator, provisional liquidator, official manager, administrator, controller, receiver or receiver and manager is appointed for all or any part of the undertaking or assets or income of that Party;
- 27.1.5** any part of the assets of that Party are confiscated or forfeited;
- 27.1.6** that Party enters into a scheme of arrangement with creditors generally or with any class of creditors;
- 27.1.7** any distress or execution or other process of any court or authority for an amount exceeding \$500,000 is issued or levied against that Party or any of its assets and is not stayed or satisfied within 14 days;
- 27.1.8** in relation to that Party, any act or event mentioned in Section 461 of the Corporations Law occurs, or if that Party proposes or makes a composition or arrangement with its creditors or any of them, except that, where the act is a breach of Section 461(b) of the Corporations Law, that Party is deemed not to be in breach if that Party complies with that section within 14 days of the earlier of:

- 27.1.8.1** the date of notification of that breach by the other Party to that Party; or
- 27.1.8.2** the date on which that Party first becomes aware of that breach;
- 27.1.9** any inspector is appointed or proposed to investigate the affairs of that Party under Section 14 of the Australian Securities Commission Act;
- 27.1.10** without the prior written consent of the other Party, which consent must not be unreasonably withheld, that Party passes any resolution effecting any change to the memorandum or articles of association of that Party which change, in the reasonable opinion of the other Party, detrimentally affects the other Party; or
- 27.1.11** that Party ceases to carry on business.

## 28. DISPUTE RESOLUTION

- 28.1** Unless a Party has complied with clauses 28.2 to 28.8 inclusive, that Party cannot commence litigation relating to any dispute arising under this Agreement except where that Party seeks urgent interlocutory relief. If a Party fails to comply with clauses 28.2 to 28.8 inclusive, the other Party need not comply with this clause 28 before referring the dispute to arbitration or commencing litigation relating to that dispute.
- 28.2** Either Party claiming that a dispute has arisen under this Agreement must serve written notice on the Chairman specifying details of that dispute and requesting a meeting of the Committee.
- 28.3** At the meeting of the Committee convened by the Chairman under sub-clause 17.6.3, the Committee must seek to resolve the dispute.
- 28.4** If the dispute is not resolved at that meeting or at any adjourned meeting of the Committee held within 10 days after that meeting, or within such further period as the meeting or the adjourned meeting resolves, the Committee must, at that meeting or adjourned meeting, request that the General Manager of each Party attend a without prejudice meeting (**General Manager Meeting**) with the objective of settling the dispute, giving the General Managers not less than 15 Business Days' written notice of the proposed time and place for the meeting.
- 28.5** Each Party must procure that:
- 28.5.1** the General Manager Meeting takes place within the notice period under clause 28.4 or on such later date the Parties agree;
- 28.5.2** its General Manager attends the General Manager Meeting and has authority to negotiate and settle the issues in dispute; and
- 28.5.3** its General Manager negotiates in good faith and uses his or her best endeavours to resolve the dispute.
- 28.6** If the General Managers agree on a course of conduct or other solution to the dispute, then that agreed course of conduct or other solution must be recorded in writing and signed by both General Managers, following which that agreed course of conduct or



other solution must be implemented by the Parties.

**28.7** If no General Manager Meeting takes place as required under clause 28.5.1 or the General Managers fail to settle the dispute within 10 Business Days after the General Manager Meeting, a Party may within a further 10 Business Day period serve a notice on the other Party requiring the dispute to be determined by an independent expert (**Expert**). If such a notice for Expert determination is served then, subject to clause 28.7.8:

**28.7.1** the Parties must endeavour to agree, within 10 Business Days of the service of the notice, on an independent person to serve as the Expert, such person to be agreed between and appointed jointly by the Parties or appointed by the president or other senior officer for the time being of the body administering the relevant field. If the Parties are unable to agree on an independent person to serve as the Expert or as to the relevant field, then a Party may request the president (or person of an equivalent position) of the Law Council of Australia, or any body which is a successor or equivalent of it, to appoint a suitably qualified person to act as the Expert. The Parties may make written submissions to that person on the choice of candidate;

**28.7.2** the Parties agree that the person appointed as the Expert must be appropriately qualified by their education, experience and training to determine the issues in dispute, have at least 10 years' experience in the relevant field and not have any relationship or association with the Parties or their Representatives which may affect their impartiality;

**28.7.3** the Parties agree that for a dispute in relation to Tax, the Parties can agree to make an application to the Commissioner of Taxation for a private binding ruling which will be treated for the purposes of this clause 28 as the appointment of an Expert;

**28.7.4** the Parties must enter into an agreement with the Expert appointed pursuant to this clause 28.7 setting out the terms of the Expert's engagement and the fees and expenses payable to the Expert, and the Parties agree to instruct the Expert that the Expert:

**28.7.4.1** acts as an expert and not an arbitrator;

**28.7.4.2** may decide on rules of conduct in their absolute discretion and enquire into the matter to be determined as the Expert thinks fit, including receiving submissions and taking advice from any persons that the Expert considers appropriate and requiring the Parties to provide any material in their possession or control which is reasonably relevant to the issues in dispute;

**28.7.4.3** must give a written decision (including reasons); and

**28.7.4.4** must endeavour to give that decision as soon as practicable;

**28.7.5** the Parties may make submissions to the Expert including the provision of expert reports and the Parties agree to give every assistance that the Expert requires, including providing copies of relevant documents with a view to reaching a decision without delay. However, the Parties may not make oral submissions unless all Parties are present, and copies of written submissions from one Party to the Expert must be given promptly to the other Party;

- 28.7.6** each Party is to bear its own costs in relation to the dispute. The Expert must decide the proportions in which the Parties will bear the costs of the Expert having regard to the extent to which the Parties may have acted unreasonably or been at fault;
- 28.7.7** the Expert's determination will be conclusive and binding on the Parties in the absence of manifest error; and
- 28.7.8** the provisions of this clause 28.7 do not apply where the nature of the dispute makes expert determination inappropriate.
- 28.8** If no notice for Expert determination is served by a Party pursuant to clause 28.7 or if the dispute is not appropriate for expert determination, the Parties must decide on a process for resolving the whole or part of the dispute through means other than litigation or arbitration, such as further negotiation, mediation, conciliation or mini-trial, including:

  - 28.8.1** the procedure and timetable for any exchange of documents and other information relating to the dispute;
  - 28.8.2** procedural rules and a timetable for the selected process;
  - 28.8.3** a procedure for selection and compensation of any neutral person to be employed by the Parties; and
  - 28.8.4** whether the Parties should seek the assistance of a dispute resolution organisation.
- 28.9** The Parties acknowledge that the purpose of any exchange of information or documents or the making of any offer of settlement under this clause 28 is to attempt to settle the dispute between the Parties. Neither Party can use any information or documents obtained through the dispute resolution process established by this clause 28 for any purpose other than an attempt to settle a dispute between the Parties.
- 28.10** If the dispute has not been resolved by the process specified above in this clause 28 within 20 Business Days after the General Manager Meeting, or such period as agreed to in writing between the Parties, the dispute must be submitted for arbitration administered by and in accordance with the arbitration rules of ACDC. The arbitrator must be a person agreed between the Parties. ACDC will assist the Parties by providing a list of suggested arbitrators. Failing agreement within 14 days of ACDC serving the list of suggested arbitrators, the arbitrator is to be a person appointed by ACDC. The arbitrator must not be the same person as a mediator or other person who has been engaged by the Parties under clause 28.8.
- 28.11** The arbitration must be held in Shellharbour, or in such other place as the Parties agree, in accordance with and subject to the laws of New South Wales.
- 28.12** Despite the Parties being in dispute or taking steps to comply with this clause 28, the Parties must continue to perform their respective obligations under this Agreement, but will not be required to complete any matter the subject of the dispute unless each Party indemnifies the other Party against costs (including consultant's costs), damages and all losses suffered in completing the disputed matter if the dispute is not resolved in favour of the indemnifying Party.

**29. TERMINATION**

**29.1** This Agreement will terminate:

- 29.1.1** at the end of the Term, unless the Parties previously agree to extend the Term;
- 29.1.2** on completion of the Project; or
- 29.1.3** by agreement between the Parties,

whichever occurs first, unless previously terminated under clause 29.2.

**29.2** Either Party can terminate this Agreement immediately, by service of notice on the other Party:

- 29.2.1** under clause 7.5; or
- 29.2.2** in the case of termination by Australand, if:
  - (a) an Insolvency Event occurs with respect to the Council; or
  - (b) the Council has engaged in, or acted or omitted to act in any way which constitutes, fraud, gross negligence or willful default in respect of this Agreement, the Australand Side Deed or the Project;
- 29.2.3** in the case of termination by the Council only if:
  - (a) an Insolvency Event occurs with respect to Australand, Australand Property Limited and/or Australand Holdings Limited; or
  - (b) Australand, Australand Property Limited and/or Australand Holdings Limited has engaged in, or acted or omitted to act in any way which constitutes, fraud, gross negligence or willful default in respect of this Agreement, the Australand Side Deed, any Finance Document or the Project; or
  - (c) Australand Property Limited terminates the Facility Agreement or terminates any of its obligations under the Facility Agreement consequent on or following the occurrence of a Default (as defined in the Facility Agreement) or any other event of default under the Facility Agreement or any other Finance Document;
  - (d) Australand Property Limited enforces any of its Security consequent on or following the occurrence of a Default (as defined in the Facility Agreement) or any other event of default under the Facility Agreement or any other Finance Document;
  - (e) Australand Property Limited does not provide all or part of a Draw (as defined in the Facility Agreement) when requested to do so pursuant to a Draw Notice (as defined in the Facility Agreement) for any reason for a period of 6 months or more; or
  - (f) a breach by Australand of clause 18.1 which continues unremedied

for 6 months or more,

without prejudice to the rights or obligations of either Party arising prior to termination.

**29.3** On termination of this Agreement, Australand must:

**29.3.1** relinquish possession and control to Council, or as Council directs, of all Project Assets; and

**29.3.2** deliver to Council, or as Council directs, all documents, books, technical information, accounts and other records relating to the Project or the performance of Australand's duties under this Agreement.

**29.4** The drawings, specifications, contracts and other documents prepared for the purposes of the Project are the property of Council whether or not the purposes for which those documents are prepared are carried out. Those documents must not be used for other purposes without the previous written consent of Council. Copyright in those documents and in any works executed from them remains the property of Council. The provisions of this clause 29.4 are to continue after termination of this Agreement.

**29.5** If this Agreement terminates under clause 29.1,

**29.5.1** the Chairman must convene a meeting of the Committee within 2 weeks after the date of termination;

**29.5.2** before the meeting of the Committee, the Parties must prepare and submit to the Committee the schedules under clause 18.4;

**29.5.3** the Committee must follow the procedures in clauses 18.4 to 18.7 inclusive, and must determine the amount of any Commission then payable to Australand;

**29.5.4** Council must pay to Australand any Commission so determined; and

**29.5.5** Australand must accept that payment in full satisfaction for Australand's services under this Agreement.

**29.6** If this Agreement is terminated under clause 29.2, Council must:

**29.6.1** within 24 Months after the date of termination, decide whether or not Council will continue the Project or any part of the Project; and

**29.6.2** notify Australand of that decision within 7 days after making that decision;

and the provisions of clause 29.5 shall apply except that any reference to the date of termination shall mean the date of notification under paragraph 29.6.2.

**29.7** For the purpose of paragraph 29.6.1:

**29.7.1** the cost of any expert advice obtained by Council for the purpose of making the decision referred to in paragraph 29.6.1; and

**29.7.2** the cost of completion of works or rectification of discontinued works,

are deemed to be Development Costs.

**30. EFFECT OF AGREEMENT**

**30.1** This deed:

**30.1.1** comprises the entire Agreement between the Parties and no earlier representation or agreement, whether oral or in writing, in relation to any matter dealt with in this deed has any effect from the date of this deed; and

**30.1.2** cannot be varied in any way except with the written consent of both Parties.

**30.2** Each Party must do, or cause to be done, or refrain from doing, everything necessary to give effect to this Agreement.

**30.3** This deed can be executed in any number of counterparts and all of those counterparts when executed and taken together constitute this Agreement.

**30.4** None of the provisions of this deed, or any act, matter or thing done under or by virtue of this Agreement or any other agreement, instrument or document, or judgment or order of any court or judicial proceeding, operate as a merger of any of the rights and remedies of the Parties under this Agreement, and those rights and remedies continue in force at all times.

**31. SEVERABILITY**

**31.1** If any provision of this deed is void or voidable or unenforceable in accordance with its terms, but would not be void, voidable, unenforceable or illegal if it were read down and, it is capable of being read down, that provision is to be read down accordingly and the remaining provisions of this deed are of full force and effect.

**32. WAIVER**

**32.1** The failure, delay or omission by a Party to exercise any power or right conferred upon that Party by this Agreement does not operate as a waiver of that power or right, and any single exercise of any such power or right does not preclude any other exercise of the power, or the exercise of any other power or right under this Agreement.

**32.2** A waiver of any provision of this deed, or consent to any departure by a Party from any provision of this deed, must be in writing and signed by all Parties and is effective only to the extent to which it is given.

**33. COSTS**

**33.1** Australand must pay Council's usual and proper costs, on a solicitor and client basis, of and incidental to the preparation and completion of this deed together with all stamp duty and other disbursements properly incurred.

**33.2** Australand must also pay Council's costs, on a solicitor and client basis, in respect of any such costs arising from Australand's failure to comply with the terms of this Agreement.

**34. NOTICES**

**34.1** Where this Agreement provides that one Party is to notify the other, the notice must be in writing, signed by or on behalf of the Party serving it and can be served by any of the following methods:

**34.1.1** by leaving it at the other Party's address;

**34.1.2** by prepaid post to the other Party's address;

**34.1.3** by facsimile transmission to the facsimile machine of the other Party;

**34.1.4** by any other method authorised by law.

**34.2** Any notice sent by post is deemed to have been received in the ordinary course of post, whether or not it is in fact received by the Party to be served.

**34.3** Any notice sent by facsimile transmission to a Party is deemed to be received by that Party when the transmission has been completed, except where:

**34.3.1** the sender's machine indicates a malfunction in transmission or the recipient immediately notifies the sender of an incomplete transmission, in either of which cases the facsimile transmission is deemed not to have been given or made; or

**34.3.2** the time of despatch is not before 5.00 pm on a day on which business is generally carried on in the place to which the notice is sent, in which case the notice is deemed to be received at the commencement of business on the next business day in that place.

**34.4** For the purpose of this clause, each Party's address is the address shown in clause 1 or such other address as each Party notifies to the other from time to time.

## **35. PROJECT HOUSING SITES**

**35.1** When preparing an Annual Program under clause 19, Australand can recommend any current or proposed residential lot as a Project Housing Site.

**35.2** In that case, Australand must prepare a detailed proposal for the development of that lot, including the houses and strata units to be erected on it, and the subdivision of the lot to create a new lot for each house or parcel (as defined in the Strata Schemes (Freehold Development) Act 1973), and submit that proposal to the Committee for consideration.

**35.3** If the Committee accepts the recommendation, the development of the Project Housing Site is to be included in the Annual Program adopted by the Committee subject to any conditions imposed by the Committee.

**35.4** As soon as practicable after accepting the recommendation, the Committee must obtain a market valuation of the Project Housing Site and serve a copy of that valuation on each Party.

**35.5** Australand must develop and sell each Project Housing Site as part of the Project in accordance with any conditions imposed by the Committee.

**35.6** In respect of each Project Housing Site:

- 35.6.1** the Project Cost of the contract for the construction of houses and strata units is to be apportioned equally between the new lots created; and
- 35.6.2** for the purposes of clauses 14.2, 15.2 and 15.3, the gross proceeds of sale of each new lot created is to be reduced by the proportion determined under paragraph 35.6.1.
- 35.7** During the development of a Project Housing Site, the Committee must determine if:
- 35.7.1** each new lot created must be sold separately; or
- 35.7.2** the Project Housing Site must be sold in one or more parcels.
- 35.8** Following completion of all sales referred to in clause 35.7, the Committee must determine the Housing Bonus using the formula:
- $$HB = SR - HC - LV - I$$
- where:
- HB is the Housing Bonus;
- SR is the Sales Revenue received in respect of the Project Housing Site;
- HC is the Project Cost of the development referred to in clause 35.5 (but not the cost of creating the Project Housing Site as a lot in a deposited plan);
- LV is the amount of market valuation of the Project Housing Site obtained under clause 35.4; and
- I means the accumulated interest on that market valuation at a rate equivalent to 50% of the rate determined under clause 18.11 and calculated on a daily basis from the date of that market valuation to the date of determination of the Housing Bonus.
- 35.9** If the Housing Bonus is determined to be less than \$0.00, Australand must pay the difference into the Trust Fund within 30 days after the determination.
- 35.10** If the Housing Bonus is determined to be greater than \$0.00:
- 35.10.1** the Committee must approve the immediate payment to Australand of Commission equal to 50% of the Housing Bonus, despite clause 15.5; and
- 35.10.2** the Housing Bonus is deemed to be a Project Cost.
- 35.11** For the purposes of this clause 35, a reference to a new lot created includes a lot in a registered strata plan.

## **36. EXTENSION OF THE TERM**

- 36.1** If contract documentation for the construction of Separable Stage 1 has been entered into by 31 December 2012 (or such later date in accordance with clause 37.1.1) and either:

- 36.1.1 any sales rate targets for Project lots in the most recent Annual Program or Feasibility Study are not achieved, or are determined by the Committee as not being reasonably likely to be achieved, due to circumstances beyond the control of Australand (including but not limited to circumstances such as a change in sale market conditions); or
- 36.1.2 any sales rate targets for Project lots in the most recent Annual Program or Feasibility Study reflect completion dates later than the current expiry date of the Term,

the Parties agree that the Term is to be extended by an additional period (as independently assessed and determined by an independent market consultant agreed by both Australand and Council) necessary to achieve completion of the targeted sales in that Annual Program or Feasibility Study.

### 37. CONSTRUCTION OF THE BOAT HARBOUR

- 37.1 Unless the Committee determines otherwise or does not approve the relevant construction contract documentation, and subject to clause 37.2, Australand agrees to ensure that construction contract documentation is executed for the following works for the Project in separable stages as follows:
  - 37.1.1 sorting of existing stockpiled material for reuse, implementation of environmental controls, construction of the landward components of breakwater and groyne, placement of surcharge mounds P1 and P2A and excavation of the western portion of the boat harbour basin to rippable rock level (**Separable Stage 1**), with the relevant contract documentation to be executed by:
    - 37.1.1.1 31 December 2012; or
    - 37.1.1.2 where contract documentation has not been executed by 31 December 2012 because the procurement process for awarding the relevant contract has been extended or delayed to accommodate non-conforming tenders (including, but not limited to, requirements for additional tender analysis to ensure the most cost effective methodology is applied, protracted contract negotiations, or unacceptable price variance to Annual Program or Project Feasibility), and provided that Australand has and continues to diligently undertake the procurement process, such later date as necessary to allow for the orderly completion of the procurement process). Any such later date must be no later than 30 June 2013;
  - 37.1.2 placement of surcharge mounds P2B, P2C and P3, completion of harbour excavation and construction of basin revetment and vertical precast walls (**Separable Stage 2**), with the relevant contract documentation to be executed by the later of:
    - 37.1.2.1 30 June 2015;
    - 37.1.2.2 practical completion of the construction works for Separable Stage 1; and
    - 37.1.2.3 Cost Funding Satisfaction (as defined in the Facility Agreement) for Separable Stage 2; and
  - 37.1.3 construction of seaward component of breakwater and groyne, timber boardwalks, removal of surcharge material and haulage to form landscaped



mound, navigational aids and harbour entry (**Separable Stage 3**), with the relevant contract documentation to be executed by the later of:

- 37.1.3.1 30 June 2018;
- 37.1.3.2 practical completion of the construction works for Separable Stage 2; and
- 37.1.3.3 Cost Funding Satisfaction (as defined in the Facility Agreement) for Separable Stage 3.

**37.2** Australand and the Council agree that, notwithstanding any other requirement of this Agreement, construction contract documentation for the works for a **Separable Stage** (being any of Separable Stage 1, Separable Stage 2 or Separable Stage 3, as the context may require) are not to be entered into, or if already entered into, such construction works for that Separable Stage are not to be commenced, if at that time either:

**37.2.1** the forecast Net Income for the Project (as set out in the most recent Feasibility Study) is less than A\$60,000,000; or

**37.2.2** the aggregate of, without double counting, the forecast Development Costs (less the forecast GST payable in respect of gross proceeds of lot sales, Administration Fees and Project Fees) payable during the period of works of that Separable Stage (as set out in the most recent Annual Program and Feasibility Study) exceeds the aggregate of the following amounts (without double-counting) at that time:

**37.2.2.1** the unpaid principal amount of any infrastructure grant, loan or contribution that has been committed to be made available by any government agency for that Separable Stage during the Term;

**37.2.2.2** the available undrawn facility amount under the Facility Agreement;

**37.2.2.3** the balance of the Proceeds Account;

**37.2.2.4** the forecast Net Sales Proceeds during the period of works of that Separable Stage (as set out in the most recent Annual Program and the Feasibility Study, as may be adjusted in accordance with clause 19.7 or clause 19.10.3);

**37.2.2.5** the balance of the Trust Fund; and

**37.2.2.6** any other amount approved by the Committee and paid into the Trust Fund that the Council may provide or procures the provision of for funding the Development Costs during the period of works of that Separable Stage.

## **38. OPTIONAL COUNCIL FUNDING**

### **38.1 Acknowledgement**

**38.1.1** The Parties acknowledge that from time to time Council may receive or otherwise have available to it certain funds (including funds provided by way of State and/or Commonwealth grant, loans, and/or other contributions) that are available for use in

connection with the Project ("**Council Funds**").

**38.2 Council may allocate funds to Project**

- 38.2.1 From time to time, if approved by the Committee for payment into the Trust Fund, Council may, but shall not be obliged to, pay some or all of Council Funds into the Trust Fund ("**Relevant Council Funds**") to be used in connection with the funding of the Project.

**38.3 Funds to bear Interest**

- 38.3.1 Interest will accrue, and be deemed to accrue, daily on any Relevant Council Funds paid into the Trust Fund at an interest rate equal to:

38.3.1.1 in the case of Relevant Council Funds obtained from or contributed by a government or governmental body, department, commission, authority or agency, the interest rate (if any) charged to Council by the provider of the Relevant Council Funds; or

38.3.1.2 in any other case, the aggregate of 3.5% per annum plus the Westpac Business Overdraft rate as published by Westpac Banking Corporation from time to time as is applicable to that day.

- 38.3.2 Council agrees to provide evidence to Australand of any such interest rate charged to Council that is to apply under this clause 38.3.

**38.4 Repayment and payment**

- 38.4.1 Each Party acknowledges and agrees that on the earlier to occur of:

38.4.1.1 termination of this Agreement;

38.4.1.2 any date on which any Commission is payable under this Agreement; and

38.4.1.3 any other date agreed between the Parties,

all Relevant Council Funds, together with any accrued but unpaid interest thereon, must be paid or repaid, as applicable, to or at the direction of Council. All repayments of Relevant Council Funds and payments of accrued interest are deemed to be Development Costs.

**38.5 Repayment has priority**

- 38.5.1 Each Party acknowledges and agrees that the amount required to be paid or repaid under clause 38.4 must be paid or repaid prior to the payment of any Commission to Australand.

**38.6 Relevant Council Funds and interest to be Project Cost**

- 38.6.1 Each Party acknowledges and agrees that, notwithstanding any other provision of this Agreement to the contrary, the Relevant Council Funds and any interest which accrues thereon will be, and will be deemed to be, Development Costs and Project Costs.

**39 GOLF RANGE RESIDENTIAL**

**39.1** In respect of the Golf Range Residential Site only, the following provisions of this Agreement are deemed to be amended as follows:

**39.1.1** The definition of Development Costs in clause 3 is amended to mean:

- 39.1.1.1** any Development Costs that the Committee determines are specific to the Golf Range Residential Site;
- 39.1.1.2** that proportion of the Development Costs of the acoustic barriers developed in stage 6 of the Project ("Stage 6 Barriers") as the area of the acoustic barriers adjoining the Golf Range Residential Site bears to the total area of the Stage 6 Barriers;
- 39.1.1.3** that proportion of the Development Costs of the sub-stage of stage 6 of the Project which includes the Golf Range Residential Site as the number of lots developed on the Golf Range Residential Site bears to the number of lots in that sub-stage;
- 39.1.1.4** that proportion of any other Development Costs of stage 6 of the Project (including the bridge over the quarry haul road) as the number of lots developed on the Golf Range Residential Site bears to the number of lots developed in stage 6,

but excludes any Development Costs for the purchase of the Land (or any part of the Land), the development of the Golf Course (including the clubhouse), the carrying out of works and services outside of stage 6 of the Project and the development of all sub-stages of stage 6 of the Project except the sub-stage containing the Golf Range Residential Site.

**39.1.2** Clauses 14.2, 14.3, 15.4 to 15.6 inclusive, 18.3, 18.5, 18.8 to 18.20 inclusive and 18.22 are deleted.

**39.1.3** Clauses 15.2 and 15.3 are amended by deleting the second sentence and by substituting:

"Council must pay that Fee to Australand from its Consolidated Fund".

**39.1.4** Clause 18.2 is amended to read:

"Council can pay all Sales Revenue into its Consolidated Fund and, subject to this Agreement, retain that Sales Revenue for its own purposes."

**39.1.5** Clause 18.4 is amended to read:

"At the beginning of each week, Australand must submit to Council for approval a schedule of Development Costs (if any) paid by Australand during the previous week."

**39.1.6** Clause 18.6 is amended by deleting the words "the Committee" and by substituting "Council".

**39.1.7** Clause 18.7 is amended to read:

"As soon as practicable after approval by Council under clause 18.6 of Australand's Development Costs as Project Costs, Council must pay those Development Costs to Australand from its Consolidated Fund."

**39.2** Nothing in clause 39.1 operates to amend any part of this Agreement other than solely in respect of the Golf Range Residential Site.

#### **40 GOLF COURSE COSTS**

**40.1** In respect of those Development Costs incurred by Australand in connection with the development of the Golf Course exceeding \$10,100,000.00 ("Additional Costs"):

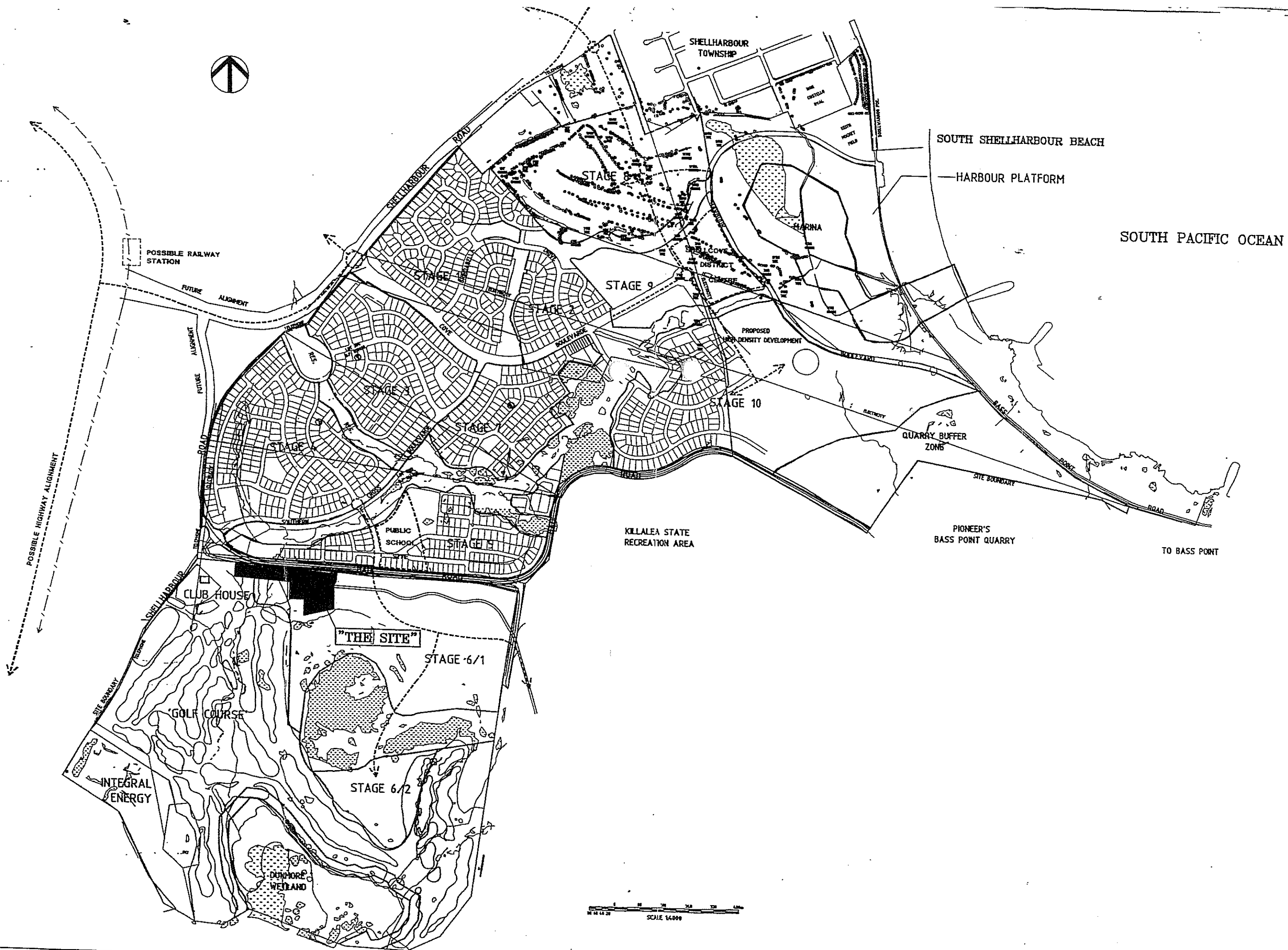
**40.1.1** clause 18.4 is amended to read:

"At the beginning of each week, Australand must submit to Council for approval a schedule of Additional Costs (if any) paid by Australand during the previous week.";

**40.1.2** clause 18.6 is amended by deleting the words "the Committee" and by substituting "Council";

**40.1.3** clauses 18.7 to 18.20 inclusive and 18.22 do not apply; and

**40.1.4** as soon as practicable after approval by Council under clause 18.6 of those Additional Costs as Project Costs, Council must pay those Additional Costs to Australand from its Consolidated Fund.



NO.	DATE	DESCRIPTION	BY	CHKD.
1	10/10/00	ISSUED FOR INFORMATION	JW	20.6.01
2	10/10/00			
3	10/10/00			
4	10/10/00			
5	10/10/00			
6	10/10/00			
7	10/10/00			
8	10/10/00			
9	10/10/00			
10	10/10/00			

THIS DRAWING CANNOT BE  
COPIED OR REPRODUCED IN  
ANY FORM OR USED FOR ANY  
OTHER PURPOSE OTHER THAN  
THAT ORIGINALLY INTENDED  
WITHOUT THE WRITTEN  
PERMISSION OF WALKER CIVIL  
ENGINEERING PTY LTD

CLIENT  
AUSTRALAND / WALKER  
CONSULTANT  
DATE 10/10/00  
DRAWN BY  
CHECKED BY  
APPROVED BY

**WALKER CIVIL ENGINEERING PTY. LTD.**  
INCORPORATED IN NEW SOUTH WALES  
CONTRACTORS & CIVIL ENGINEERS  
WALKER HOUSE, 608 BENTLEY RD HARCOTT, NSW 2208  
PHONE: (02) 8064 3000 FAX: (02) 8064 3005

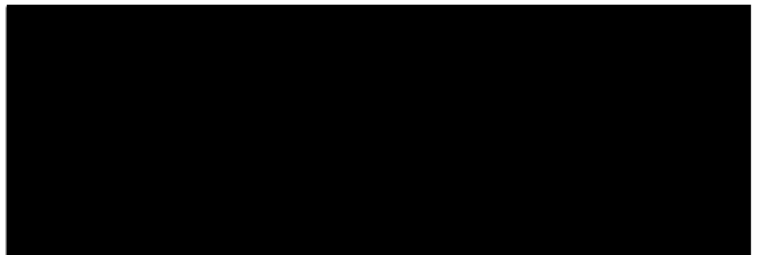
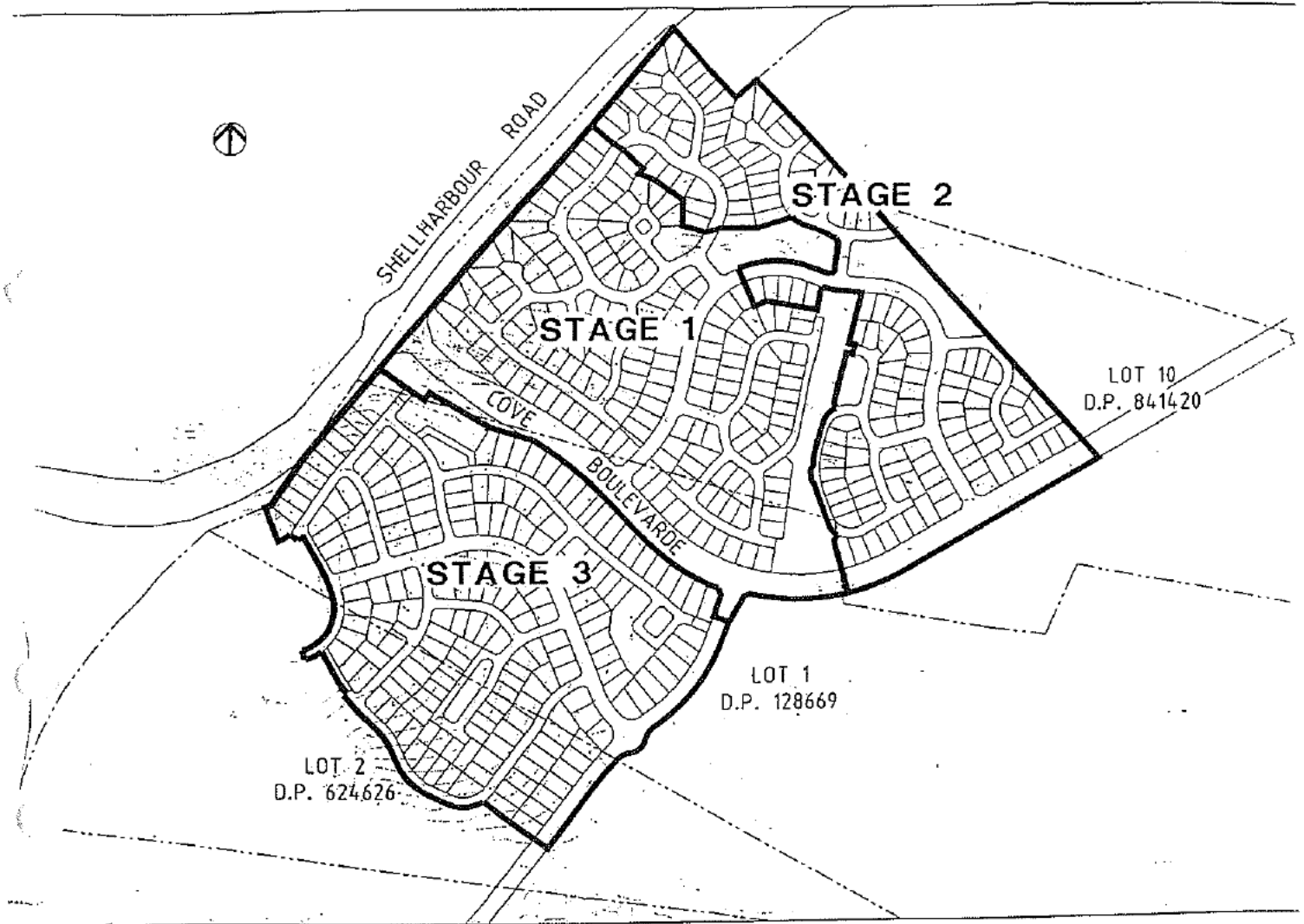
PROJECT  
**SHELLCOVE**  
STRUCTURE PLAN  
BASE MAP  
SCALE DO NOT SCALE  
1:14000  
1060-25-601 A

" C "

## WALKER UNPAID PROJECT COSTS SCHEDULE

[illegible]

" D "



' F '





