

Direct Agreement

in relation to [Development Address]

□

[Bank / Financier] (**Financier**)

[Developer] (**Developer**)

The Sovereign in right of New Zealand acting by and through the Chief Executive of
Te Tūāpapa Kura Kāinga - Ministry of Housing and Urban Development (**Crown**)

[TEMPLATE APPROVED 14 March 2025]

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Details

Date

Parties

Name **█**
Short form name **Financier**
Notice details Address:
Email:
Attention:

Name
Short form name **Developer**
Notice details Address:
Email:
Attention:

Name The Sovereign in right of New Zealand acting by and through the Chief Executive of Te Tūāpapa Kura Kāinga - Ministry of Housing and Urban Development
Short form name **Crown**
Notice details Address: Level 7, 7 Waterloo Quay
PO Box 82 WELLINGTON 6011
fiona.coughlan@hud.govt.nz and to
RDU@hud.govt.nz
Attention: Fiona Coughlan

Background

- A Each of the Developer and the Crown is party to an underwrite agreement dated on or about the date of this Deed (the **Underwrite Agreement**), pursuant which the Developer has provided certain undertakings to the Crown in respect of the Development.
- B The Financier has funded or proposes to fund costs associated with the Development, and will secure that funding by way of a mortgage over the Land and an assignment by way of security over certain contractual rights including under the Underwrite Agreement.
- C This document records the agreement reached between the Financier, the Developer, and the Crown in respect of certain matters relating to the completion of the Development should the Financier seek to enforce its security against the Developer.

Agreed terms

1. Interpretation

1.1 Defined terms

Unless the context otherwise requires, and except where specifically defined below, terms defined in this document have the same meaning given to them in the Underwrite Agreement and:

Default means any breach by the Developer of, or event of default or termination event (however called) under a Financier Document.

Default Action means any action by the Financier to enforce a Financier Document (or any of its rights under it) or otherwise to cancel or terminate the Facility Agreement or present any petition for, or take any other action with a view to, the receivership, statutory management, administration, liquidation or dissolution of the Developer or any of its assets.

Facility Agreement means the facility agreement dated on or about the date of this document between (among others) the Developer (as borrower) and the Financier (as lender).

Financier Documents means the Facility Agreement and the Financier Security Documents and **Financier Document** means any one of them.

Financier Indebtedness means, on any date, all indebtedness of the Developer (whether as principal or surety) to the Financier (whether actual or contingent) or incurred by the Financier on behalf of the Developer pursuant to the Financier Documents sustained in any way by the Financier in enforcement of any such indebtedness.

Financier Security Documents means the following documents:

- (a) the general security deed dated on or about the date of this document between the Developer and the Financier over all present and after-acquired property of the Developer;
- (b) any specific security deed dated on or about the date of this document between the Developer and the Financier in respect of any pre-sale agreement/s for any Lot in the Development;
- (c) any specific security deed dated on or about the date of this document between the Developer and the Financier in respect of the Underwrite Agreement; and
- (d) the mortgage over the Land.

Proceeds means all moneys received, realised or recovered by the Financier in the exercise of its rights, remedies, and powers, in relation to the Land (or any part of it), under the Financier Security Documents.

Quantity Surveyor means the quantity surveyor in relation to the Development appointed by the Financier and notified to the Developer.

Suitable Substitute Developer means a developer:

- (a) who undertakes to complete the Development in accordance with the Master Plan and in accordance with the Outline Plans and Specifications; and
- (b) who is a party of good reputation, with the necessary experience, financial standing and access to funding to complete the Development in accordance with the Master Plan and in accordance with the Outline Plans and Specifications; and
- (c) in respect of whom the Crown in its sole discretion has provided its consent to complete the Development.

Termination Date means the date on which the Financier gives written Notice to the Developer and the Crown that:

- (a) it has received final irrevocable payment in full of all of the Financier Indebtedness; and
- (b) it is not required to provide any further financial accommodation to, or to the account of, the Developer or any other person under the Financier Documents.

1.2 References

A reference in this document to:

- (a) **\$** means the lawful currency of New Zealand;
- (b) an **agreement** includes any legally enforceable arrangement, understanding, undertaking or representation whether or not in writing;
- (c) **at any time** includes from time to time;
- (d) a **consent** includes an approval, authorisation, exemption, filing, licence, order, permit, recording or registration;
- (e) **costs** incurred by a person include all commissions, charges, losses, expenses (including legal fees on a solicitor and own client basis) and taxes incurred by that person;
- (f) **indebtedness** includes any obligation (whether present or future, actual or contingent, secured or unsecured, joint or several, as principal, surety or otherwise) relating to the payment of money;
- (g) **law** includes any common law, equity and any statute;
- (h) the **liquidation** of a person includes the dissolution, winding-up and bankruptcy of that person and any analogous procedure under the law of any jurisdiction in which that person is incorporated, domiciled, carries on business or has property;
- (i) **loss** includes loss of profit and loss of margin;
- (j) a **person** includes an individual, body corporate, association of persons (whether corporate or not), trust, state, agency of state and any other entity (in each case, whether or not having separate legal personality);
- (k) **property** includes the whole and any part of the relevant person's business, assets, undertakings, revenues, and rights (in each case, present and future), and reference to any property includes any legal or equitable interest in it;
- (l) **tax(es)** means charges, deductions, duties (including stamp duty, financial institutions duty, transaction duty and bank account debit tax), fees, imposts, levies, taxes (including any consumption tax, goods and services tax and value added tax) and withholdings (together with any interest, penalties, fines and expenses in connection with any of them); and
- (m) **writing** includes a facsimile transmission, an email communication and any means of reproducing words in a tangible and permanently visible form.

1.3 Interpretation

In this document:

- (a) headings are for reference only and do not affect interpretation;
- (b) references to clauses, schedules and appendices are to those in this document, and a reference to this document includes any schedule or appendix;
- (c) reference to a document or agreement includes that document or agreement as extended, novated, altered, amended, supplemented or replaced from time to time;
- (d) the word **including** when introducing an example does not limit the meaning of the words to which the example relates;
- (e) the singular includes the plural and *vice versa*;
- (f) any gender includes the other gender;
- (g) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (h) unless stated otherwise, anything (other than making a payment) required to be done on or by a day which is not a Working Day, will be done on or by the next Working Day;

- (i) reference to time is to New Zealand time, unless stated otherwise; and
- (j) no provision or expression is to be construed against a party on the basis that the party (or its advisers) was responsible for its drafting.

2. Default

2.1 No Surprises

- (a) The Financier will:
 - (i) keep the Crown informed about any act or omission by the Developer, or any matter or thing that in the Financier's opinion (acting reasonably) is likely to give rise to a Default under any Financier Document; and
 - (ii) use its best endeavours to make available to the Crown promptly upon request, that information relevant to the Development under the Financier Documents as may be reasonably requested by the Crown, including any Quantity Surveyor reports.

For the avoidance of doubt, the Financier will not have any liability to the Crown if it fails to comply with clause 2.1(a) above, and such failure will not preclude the taking of Default Action by the Financier.

- (b) In the event that the Financier proposes to take Default Action following any Default, the Financier will as soon as practicable keep the Crown informed and consult with the Crown at the Crown's request (acting reasonably) as to the steps being taken pursuant to any such Default Action (including any receivership). The Financier's agreement under this clause is strictly without prejudice to its rights, powers and remedies under the Financier Security Documents and at law.

2.2 Notice of Default and consultation

- (a) The Financier agrees with the Crown to promptly provide to the Crown, any notice relating to a Default that is sent or received by the Developer in relation to a Financier Document. In particular, the Financier will, following a Default, give to the Crown a copy of any notification of that Default at the same time as notice of the relevant Default is given to the Developer.
- (b) The Financier will promptly, after the Developer's failure to remedy any Default, notify the Crown in writing of that failure. If the Financier intends to take Default Action, the Financier will give at least 10 Working Days' prior notice to the Crown of the proposed Default Action, or any shorter period as may be agreed.
- (c) Subject to paragraph (d) below, in the event that the Financier proposes to appoint a receiver of the Developer or any of its assets, the receiver to be appointed will not be so appointed unless and until there has been prior consultation with the Crown, and a period of at least five Working Days has passed since the first consultation.
- (d) The prior consultation and notice period specified in paragraph (c) above will not be required if the Financier, acting reasonably, believes that there is an immediate risk of diminution in value of any property subject to the Financier Security Documents or any such property is at risk of being seized, becoming subject to a security interest or otherwise being dealt with in contravention of the Financier Documents.

2.3 Consent to release

The Developer consents to the release of information (including financial information) to the Crown for the purpose of clauses 2.1 and 2.2 above.

3. Sale

3.1 Mortgagee sale of Land

If the Financier or any receiver appointed by the Financier intends to exercise any accrued power of sale in respect of the Land, then it will give at least 15 Working Days' notice to the Crown of the proposed exercise of that power of sale, and will continue to keep the Crown informed of the key steps involved in the exercise of that power of sale, including:

- (i) the appointment of an agent and commencement of a sale campaign;
- (ii) details as to whether or not the sale is by way of auction, tender, or deadline treaty, and key dates in respect of same;
- (iii) as soon as possible following entry into an agreement for sale and purchase for the Land (or any part thereof) by the Financier (as Vendor):
 - (A) details of the successful purchaser;
 - (B) timeframe for settlement; and
 - (C) confirmation as to whether or not the Land is proposed to be transferred to a Suitable Substitute Developer.

3.2 Sale to Suitable Substitute Developer

- (a) The Financier acknowledges that the Crown will not be bound by the covenants relating to the purchase of certain Unsold Homes pursuant to (and as defined in) the Underwrite Agreement, unless the purchaser of the Land (or any part of thereof) pursuant to an agreement for sale and purchase under any power of sale is a Suitable Substitute Developer.
- (b) For the avoidance of doubt if the purchaser of the Land (or any part thereof) pursuant to an agreement for sale and purchase under any power of sale:
 - a is a Suitable Substitute Developer:
 - i the Financier will procure that the Suitable Substitute Developer enters into a deed of covenant with the Crown, pursuant to which the Suitable Substitute Developer covenants with the Vendor to perform Developer's obligations in accordance with the Underwrite Agreement; and
 - ii the Crown will continue to be bound by the covenants contained in the Underwrite Agreement, and will enter into an agreement with the Suitable Substitute Developer on substantially the same terms as the Underwrite Agreement; or
 - b is not a Suitable Substitute Developer, the Crown will not be bound by the covenants contained in the Underwrite Agreement, and each of the Financier and the Developer will confirm in writing the Crown's release from same

4. Representations and warranties

4.1 By each party

Each party makes the following representations and warranties in respect of itself in favour of each other party:

- (a) (other than in the case of the Crown) it is duly incorporated and validly existing under the laws of its place of incorporation;
- (b) it has the power to enter into and perform its obligations under this document, to carry out the transaction contemplated by the documents and (other than in the case of the Crown) to carry on its business as now conducted or contemplated;

- (c) it has taken all necessary action to authorise the entry into and performance of this document and to carry out the transactions contemplated by this document, including obtaining all authorisations required to ensure the validity and enforceability of this document and all such authorisations and orders remain in full force and effect; and
- (d) this document creates valid and binding obligations enforceable in accordance with its terms.

4.2 By the Financier

The Financier represents and warrants to the Crown that:

- (a) to the extent that any deposits are paid to the Financier pursuant to clause 5 below, those deposits are not available to, and will not be applied in reduction of Financier Indebtedness, unless:
 - (i) the Pre-sale Settlement Conditions are satisfied; or
 - (ii) the Developer becomes entitled to the deposit following valid cancellation of the Pre-sale Agreement; and
- (b) either the Financier:
 - (i) has obtained consent to enter into the Financier Security Documents under the *Overseas Investment Act 2005*; or
 - (ii) does not require consent under the *Overseas Investment Act 2005* to enter into the Financier Security Documents.

5. Developer undertakings

- (a) The Developer undertakes to the Crown that any deposit paid pursuant to a Pre-Sale Agreement for the purchase of an Underwritten Home within the Development will be paid to an interest bearing account with the Developer's solicitor's trust account, and held as stakeholder undistributed until such time as:
 - (i) the Pre-sale Settlement Conditions are satisfied; or
 - (ii) the Pre-sale Agreement is validly cancelled by either the Developer, or the Purchaser.
- (b) In the event that the Pre-sale Agreement is validly cancelled, the deposit will be paid, together with interest earned, to the party entitled to the deposit under the Pre-Sale Agreement.

6. Notices

6.1 Service

A Notice given by a party in connection with this document must be:

- (a) in writing, in English and signed by an authorised representative of the party; and
- (b) hand delivered or sent by prepaid post (or airmail if applicable) or email to the recipient's address for notices specified in the "Details" section of this document, as varied by any Notice given by the recipient to the party.

6.2 Effective on receipt

A Notice given in accordance with clause 6.1 takes effect when received (or at a later time specified in it) and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by prepaid post, on the third Working Day after the date of posting (or on the tenth Working Day after the date of posting if posted to or from a place outside New Zealand); or

- (c) if sent by email, when the recipient acknowledges receipt (system generated read receipts excluded),

but if the delivery, receipt or transmission is not on a Working Day or is after 5pm on a Working Day, the Notice is taken to be received at 9am on the next Working Day.

6.3 Other methods

This clause does not limit any other method for giving Notices provided for by law.

7. Assignment

7.1 Developer and Crown

- (a) The Developer may not assign or transfer all or any of its rights, benefits and obligations under this document without the prior consent of the Financier and the Crown.
- (b) The Crown may assign and/or transfer the whole or any part of its rights and obligations under this document to any part of the Crown, as that term is defined in section 2 of the Public Finance Act 1989, without the prior written consent of any other party.

7.2 Financier

The Financier may assign or transfer all or any of its rights, benefits and obligations under this document provided that the Crown has received, prior to any assignment or transfer, an acknowledgement from the assignee or transferee that it is bound by the terms of this document.

8. General Provisions

8.1 Costs

- (a) The Developer will immediately on demand pay the Financier and the Crown the amount of all costs and expenses incurred by the Financier and the Crown in connection with the negotiation, preparation, execution and performance of this document.
- (b) The costs and expenses referred to above include, the fees and expenses of legal advisers and any goods and services tax or similar tax, and are payable in the currency in which they are incurred.

8.2 Termination

The rights and obligations of the parties under this document will terminate on the Termination Date.

8.3 Waiver

Any delay, failure or forbearance by a party to exercise (in whole or in part) any right, power or remedy under this document will not operate as a waiver of that right, power or remedy. A waiver of any breach of any provision of this document will not be effective unless that waiver is in writing and is signed by the party against whom that waiver is claimed. A waiver of any breach will not be, or be deemed to be, a waiver of any other or subsequent breach.

8.4 Severability

If any provision of this document is or becomes unenforceable, illegal or invalid for any reason, the relevant provision will be deemed to be modified to the extent necessary to remedy that unenforceability, illegality or invalidity. If that modification is not possible, then that provision will be severed from this document without affecting the enforceability, legality or validity of any other provision of this document.

8.5 Variation

A variation of this document must be in writing and signed by or on behalf of each party.

8.6 Entire Agreement

This document constitutes the entire agreement between the parties and supersedes all or any other prior oral or written understanding, representations or commitments at any time express or implied.

8.7 Further Assurances

Each party will do all acts and things, including the execution of all relevant documents, as may be reasonable to implement and carry out its obligations under, and contemplated by, this document.

8.8 Governing law

This document is to be governed by, and construed in accordance with, New Zealand law.

8.9 Counterparts

This document may be executed in any number of counterparts, each of which is deemed an original and all of which constitute one and the same document. This document will be effective upon the exchange (including by email) of executed signature pages.

Example

Signing page

EXECUTED as a deed

For and on behalf of [] by its duly authorised signatory:

Signature of witness

Name of witness

Occupation of witness

City/town of residence

[] by:

Signature of authorised signatory

Name of authorised signatory

Signature of authorised Director

Name of authorised signatory

Signature of authorised Director

Name of authorised signatory

**The Sovereign in right of New Zealand acting
by and through the Chief Executive of Te
Tūāpapa Kura Kāinga - Ministry of Housing and
Urban Development by:**

Signature of authorised signatory

Name of authorised signatory