



Department of Environment, Land, Water & Planning

Electronic Instrument Statement

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Status	Registered	Dealing Number	AW714518Q
Date and Time Lodged	11/04/2023 10:01:56 AM		

Lodger Details

Lodger Code	18776H
Name	HARWOOD ANDREWS
Address	
Lodger Box	
Phone	
Email	
Reference	AL - 22300851

APPLICATION TO RECORD AN INSTRUMENT

Jurisdiction	VICTORIA
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Estate and/or Interest

FEE SIMPLE

Land Title Reference

9969/938
10302/290

Instrument and/or legislation

RECORD - AGREEMENT - SECTION 173
Planning & Environment Act - section 173

Applicant(s)

Name	BRIMBANK CITY COUNCIL
Address	
Street Number	301
Street Name	HAMPSHIRE
Street Type	ROAD
Locality	SUNSHINE
State	VIC
Postcode	3020

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PLAN**



Department of Environment, Land, Water & Planning

Electronic Instrument Statement

Additional Details

Refer Image Instrument

The applicant requests the recording of this Instrument in the Register.

Execution

1. The Certifier has taken reasonable steps to verify the identity of the applicant or his, her or its administrator or attorney.
2. The Certifier holds a properly completed Client Authorisation for the Conveyancing Transaction including this Registry Instrument or Document.
3. The Certifier has retained the evidence supporting this Registry Instrument or Document.
4. The Certifier has taken reasonable steps to ensure that this Registry Instrument or Document is correct and compliant with relevant law and any Prescribed Requirement.

Executed on behalf of	BRIMBANK CITY COUNCIL
Signer Name	CLARE MARGARET MCKENNA
Signer Organisation	THE LANTERN LEGAL GROUP PTY LTD
Signer Role	LAW PRACTICE
Execution Date	11 APRIL 2023

File Notes:

NIL

This is a representation of the digitally signed Electronic Instrument or Document certified by Land Use Victoria.

Statement End.

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BRIMBANK CITY COUNCIL

and

SMA No. 18 Pty Ltd ACN 616 079 004

and

AUSNET GAS SERVICES PTY LTD ACN 086
015 036

AGREEMENT MADE PURSUANT TO
SECTION 173 OF THE PLANNING AND
ENVIRONMENT ACT 1987

Land: 99 Derby Road, Sunshine

**ADVERTISED
PLAN**

Russell Kennedy Pty Ltd ACN 126 792 470 ABN 14 940 129 185
Level 12, 469 La Trobe Street, Melbourne VIC 3000 Australia PO Box 5146, Melbourne VIC 3001 Australia
T +61 3 9609 1555 F +61 3 9609 1600 info@rk.com.au russellkennedy.com.au

Liability limited by a scheme approved under Professional Standards Legislation.

An international member of
Aiily Law

Ref MBM 307426-00026

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THIS AGREEMENT IS DATED

4/4/

2023

PARTIES

1. **BRIMBANK CITY COUNCIL**
of Brimbank Community and Civic Centre, 301 Hampshire Road, Sunshine, Victoria 3020
(Council)
2. **SMA NO. 18 PTY LTD**
ACN 616 079 004
of Suite 2, Level 2, 51-65 Clarke Street, Southbank, Victoria 3006
(Owner)
3. **AUSNET GAS SERVICES PTY LTD**
ACN 086 015 036
of Level 31, 2 Southbank Boulevard, Southbank, Victoria 3006
(AusNet)

RECITALS

- A. The Council is the responsible authority under the Act for the Scheme.
- B. The Owner is registered or is entitled to be registered as proprietor of the Land.
- C. Condition 64 of the First Permit and condition 18 of the Second Permit each provide as follows:
Before the Development starts, the Owner of the Land must enter into an agreement under Section 173 of the Planning and Environment Act 1987 with the Responsible Authority and Ausnet. The agreement must contain covenants to be registered on the Title of the property so as to run with the land, and must provide for the following:-
 - a. That upon subdivision of the Land the owners corporation responsible for the common property of the Land will provide unperfected easements to pipeline easements which benefit Ausnet at all times with any demolition and reconstruction costs being borne by the landholder at the time of those works.
 - b. The agreement will be registered on Title in accordance with Section 181 of the Planning and Environment Act 1987. A dealing number must be provided to the Responsible Authority and Ausnet.
- D. This Agreement has been entered into in order to:
 - (i) comply with condition 64 of the First Permit;
 - (ii) comply with condition 58 of the Second Permit;
 - (iii) achieve and advance the objectives of planning in Victoria or the objectives of the Scheme in relation to the Land.
- E. This Agreement is made under Division 2 of Part 9 of the Act.

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OPERATIVE PROVISIONS

1 DEFINITIONS

In this Agreement:

- (a) **Act** means the *Planning and Environment Act 1987* (Vic).
- (b) **Agreement** means this Agreement, including the recitals and any annexures to this Agreement.
- (c) **Business Day** means Monday to Friday excluding public holidays in Victoria.
- (d) **First Permit** means planning permit P96/2020 issued in respect of certificate of title volume 10302 folio 290 which forms part of the Land by Council on 18 August 2021 as amended on 20 September 2022 allowing for "use and development of part of the land for a residential hotel in accordance with the endorsed plans".
- (e) **Land** means the land known as 99 Derby Road, Sunshine being the whole of the land more particularly described in certificate of title volume 10302 folio 290 and volume 9969 folio 938.
- (f) **Mortgagee** means the person or persons registered or entitled from time to time to be registered by the Registrar as mortgagee of the Land or any part of it.
- (g) **Owner** means the person or persons who are registered or are entitled to be registered as proprietor of fee simple in fee simple in the Land or any part thereof, and includes a mortgagee in possession.
- (h) **Register** means the register of land kept and maintained by the Registrar pursuant to the *Transfer of Land Act 1958* (Vic).
- (i) **Registrar** means the Registrar of titles for the purpose of the *Transfer of Land Act 1958* (Vic).
- (j) **Scheme** means the *Brimbank Planning Scheme* or any other planning scheme which applies to the Land from time to time.
- (k) **Second Permit** means planning permit P780/2021 issued in respect of the Land by Council on 23 December 2022 allowing for "development and use of the Land for dwellings in townhouse and apartment built forms, development of a food and drink premises and a reduction in the associated car parking requirement in accordance with the endorsed plans".

2 COMMENCEMENT

This Agreement comes into force on the date it was made as set out above.

3 ENDING OR AMENDING AGREEMENT

3.1 Ending or amending

This Agreement may be ended by mutual agreement between the parties. Otherwise, this Agreement ends or may be amended in accordance with the Act.

3.2 Cancellation or alteration of recording

As soon as reasonably practicable after this Agreement has ended or has been amended, the Council must, at the request and at the cost of the Owner, apply to the Registrar under the Act to cancel or alter the recording of this Agreement on the folio of the Register to the Land. Ausnet must promptly and at its own cost consent to any such dealing.

4 OWNER'S COVENANTS

4.1 Owner's covenants regarding the Land

4.1.1

Upon subdivision of the Land from time to time, the relevant owners corporation(s) responsible for the relevant common property of the Land will provide unfettered access to any gas pipeline easements registered over that Land (or part thereof) which benefit Ausnet (each being an Ausnet Easement) at all times.

4.1.2

Ausnet may demolish or remove any improvements owned or constructed by or on behalf of the Owner (or the Owner's predecessor in title) on the Land reasonably necessary for Ausnet to access an Ausnet Easement or any gas pipeline within an Ausnet Easement (Demolition Works). Where Ausnet does so:

- (a) any Demolition Works must only relate to Ausnet completing necessary works on the gas pipeline within the Ausnet Easement;
- (b) Ausnet must only reinstate the Land by way of backfilling any trench to make the Works area safe;
- (c) The reinstatement of improvements removed as part of the Demolition Works with like-for-like replacement as to quality and specifications as to materials (Reinstatement Works) is the responsibility of the relevant Owner;
- (d) costs which are required and incurred due to Demolition Works and/or Reinstatement Works within an Ausnet Easement must be borne by the relevant Owner of the affected part of the Land within the Ausnet Easement on which those works have occurred. Otherwise all parties are to bear their own costs in all respects, subject at all times to the terms of any Ausnet Easement; and
- (e) Ausnet must use reasonable endeavours to minimise the extent of any Demolition Works required, and to carry out any Demolition Works and Reinstatement Works in an expedient manner.

4.2 Successors in title

Until this Agreement is recorded on the folio of the Register which relates to the Land pursuant to section 181 of the Act, the Owner must ensure that the Owner's successors in title give effect to and do all acts and sign all documents which will require those successors to give effect to this Agreement including requiring the successors in title to execute a deed agreeing to be bound by the terms of this Agreement. Until that deed is executed, the Owner, being a party to this Agreement, remains liable to perform all of the Owner's obligations contained in this Agreement.

4.3 Further assurance

The Owner must do all things necessary (including signing any further agreement, acknowledgment or document) to enable the Council to record this Agreement on the folio of the Register which relates to the Land.

4.4 Payment of costs

The Owner agrees to pay on demand to the Council the Council's reasonable costs and expenses (including any legal fees incurred on a solicitor-client basis) of and incidental to the preparation, execution, recording, removal, amendment and enforcement of this Agreement. All other parties must pay their own costs of and incidental to the preparation, execution, recording, removal, amendment and enforcement of this Agreement.

4.5 Mortgagee to be bound

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

4.6 Covenants run with the Land

The Owner's obligations in this Agreement are intended to take effect as covenants which shall be annexed to and run at law and in equity, with the Land and every part of it, and bind the Owner and its successors, assignees and transferees, the registered proprietor or proprietors for the time being of the Land and every part of the Land.

4.7 Owner's warranty

The Owner warrants and covenants that:

4.7.1 the Owner is the registered proprietor of the Land;

4.7.2 there are no mortgages, charges or other encumbrances or leases or any rights inherent in any part of the Land which have not been disclosed by the Owner to the Council or notified to the Council;

4.7.3 no part of the Land is subject to any rights obtained by adverse possession or subject to any easements or rights described or referred to in the *Transfer of Land Act 1958* (Vic); and

4.7.4 until this Agreement is recorded on the folio of the Register which relates to the Land, the Owner will not effect a settlement, transfer, dispose of, assign, mortgage or otherwise part with possession of the Land or any part of the Land without first disclosing to any intended transferee, assignee or mortgagee the existence and nature of this Agreement.

5 GENERAL

5.1 No fettering of Council's powers

This Agreement does not fetter or restrict the Council's power or discretion in respect of any of the Council's decision making powers including but not limited to an ability to make decisions under the *Local Government Act 2020* (Vic), and the Act or to make or impose requirements or conditions in connection with any use or development of the Land or the granting of any planning permit, the approval or certification of any plans of subdivision or consolidation relating to the Land or the issue of a statement of compliance in connection with any such plans.

5.2 Time of the essence

Time is of the essence as regards all dates, periods of time and times specified in this Agreement.

5.3 Governing law and jurisdiction

This Agreement is governed by and is to be construed in accordance with the laws of Victoria. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts and tribunals of Victoria and waives any right to object to proceedings being brought in those courts or tribunals.

5.4 Enforcement and severability

5.4.1 This Agreement shall operate as a contract between the parties and be enforceable as such in a court of competent jurisdiction regardless of whether, for any reason, this Agreement were held to be unenforceable as an agreement pursuant to Division 2 of Part 9 of the Act.

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

6 ELECTRONIC EXECUTION, WITNESSING AND EXCHANGE OF AGREEMENT

6.1 This clause applies if this Agreement has been executed, witnessed and/or exchanged by using electronic means, including an electronic execution service (EES) and/or witnessing over audio visual link.

6.2 By signing this Agreement, the parties consent to this Agreement being executed, witnessed and exchanged by way of electronic means.

6.3 Each party and any witness may execute the Agreement in physical paper format or electronically or a combination of both. This Agreement may be exchanged electronically or in physical paper format or a combination of both. In each case this Agreement will be legally binding upon the parties.

6.4 If using an EES, the parties:

6.4.1 must comply, and must ensure that its authorised representatives comply with all processes and instructions concerning the use of the EES to execute and to give effect to this Agreement;

6.4.2 must refrain from engaging in any conduct which may place any party in breach of their obligations under any agreement with the provider of the EES for the provision of the EES; and

6.4.3 acknowledge and agree that the date, time and location of the electronic execution by or on behalf of the parties may be recorded by the provider of the EES and may be used by the parties in establishing when and where this Agreement was executed by or on behalf of other parties.

6.5 Each party must do all things necessary and must ensure that party's employees and agents do all things necessary in order to give effect to this Agreement, including signing and delivering to other parties electronic or hard copies of this Agreement.

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6.6 If a party is a company and execution of this Agreement under section 127 of the *Corporations Act 2001* (Cth) (**Corporations Act**) is void or not enforceable:

6.6.1 the signatories for that party sign this Agreement pursuant to sections 126 and 127(4) of the *Corporations Act*; and

6.6.2 that party warrants (and the signatories for that party separately warrant) to the other parties that the other parties may rely on the assumptions in section 129 of the *Corporations Act*.

6.7 Any witness, by signing this Agreement and having witnessed the execution of a party over audio visual link, is taken to have confirmed the following when signing or applying any form of electronic or digital signature:

6.7.1 the witness witnessed the relevant signatory sign this document over audio visual link;

6.7.2 the witness was reasonably satisfied that the document they signed as witness was the same document as a copy of the document signed by the relevant signatory;

6.7.3 all requirements for witnessing the signing of this document by the relevant signatory by audio visual link have occurred on the same day,

in accordance with section 12 of the *Electronic Transactions (Victoria) Act 2000* (Vic) and any other prescribed requirements.

7 NOTICES

7.1 Service of notice

A notice or other communication received or permitted, under this Agreement, to be served on a person must be in writing and may be served:

7.1.1 personally on the person;

7.1.2 by leaving it at the person's address set out in this Agreement;

7.1.3 by posting it by prepaid post addressed to that person at the person's current address for service;

7.1.4 by email to the person's current email address notified to the other party; or

7.1.5 by facsimile to the person's current number notified to the other party.

7.2 Time of service

A notice or other communication is deemed served:

7.2.1 if served personally or left at the person's address, upon service;

7.2.2 if posted within Australia to an Australian address by express post, two Business Days; by standard post, six Business Days after posting;

7.2.3 if sent by email, subject to the clause 7.2.5, at the time of receipt as specified in section 13A of the *Electronic Transactions (Victoria) Act 2000* (Vic);

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7.2.4

if served by facsimile, subject to the clause 7.2.5, at the time indicated on the transmission report produced by the sender's facsimile machine indicating that the facsimile was sent in its entirety to the addressee's facsimile; and

7.2.5

if received after 5.00 pm in the place of receipt or on a day which is not a Business Day, at 9.00 am on the next Business Day.

7.3

Proof of receipt of notice by email

In proving that a notice given by email has been received by the recipient, it is sufficient to produce an acknowledgement or receipt that the email has reached the recipient's email address.

8

INTERPRETATION

In this Agreement, unless the contrary intention appears:

8.1

the singular includes the plural and vice versa;

8.2

a reference to a document or instrument including this Agreement, includes a reference to that document or instrument as novated, altered or replaced from time to time;

8.3

a reference to an individual or person includes a partnership, body corporate, government authority or agency and vice versa;

8.4

a reference to a party includes that party's executors, administrators, successors, substitutes and permitted assigns;

8.5

other grammatical forms of defined words or expressions have corresponding meanings;

8.6

a covenant, undertaking, representation, warranty, indemnity or agreement made or given by:

8.6.1

two or more parties; or

8.6.2

a party comprised of two or more persons,

is made or given and binds those parties or persons jointly and severally;

8.7

a reference to a statute, code or other law includes regulations and other instruments made under it and includes consolidations, amendments or replacements of any of them;

8.8

a recital, schedule, annexure or description of the parties forms part of this Agreement;

8.9

if an act must be done on a specified day that is not a Business Day, the act must be done instead on the next Business Day;

8.10

if an act required to be done under this Agreement on a specified day is done after 5.00 pm on that day in the time zone in which the act is performed, it is taken to be done on the following day;

8.11

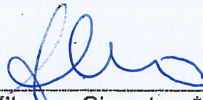
a reference to an authority, institution, association or body (original entity) that has ceased to exist or been reconstituted, renamed or replaced or whose powers or functions have been transferred to another entity, is a reference to the entity that most closely serves the purposes or objects of the original entity;

8.12

headings and the provision of a table of contents are for convenience only and do not affect the interpretation of this Agreement.

EXECUTED pursuant to Division 2 of Part 9 of the Act.

SIGNED SEALED AND DELIVERED BY
and on behalf of BRIMBANK CITY
COUNCIL by the Manager City Planning
pursuant to an S6 Instrument of Delegation
from Council to Members of Council Staff
dated 20 September 2022:



Witness Signature*

SARAH ALESSI

Witness Name*

301 HAMPSHIRE RD SUNSHINE 3020

Usual address

By witnessing the Agreement, the above witness confirms that either:

- this Agreement was signed physically in their presence; or
- where this Agreement was witnessed via audio-visual link, the requirement for witnessing by audio-visual link under section 12 of the *Electronic Transactions (Victoria) Act 2000* (Vic) have been met.

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EXECUTED by SMA NO. 18 PTY LTD ACN
616 079 004 in accordance with section
127(1) of the *Corporations Act 2001* (Cth) by:

Martin Anthony Storde, sole director and sole
company secretary

Date:

4/4/2023

SIGNED, SEALED and DELIVERED by
AUSNET GAS SERVICES PTY LTD ACN
086 015 036 by:

Signature of Director

Name of Director

Date

30/3/2023

Signature of Director/ Company Secretary

Name of Director/ Company Secretary

Date

4/10/2023

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