

Related Report / Additional Information

Meeting:	Ordinary Meeting	Date:	6 December 2018
Item:	9.2.1 Brisbane Road Car Park, Mooloolaba		
Circulation	8/4/2022		
Officer:	Project Manager Civic Governance	Approving GE:	Group Executive Civic Governance

In response to Council Resolution OM18/206

That Council authorise the Chief Executive Officer to release all documentation and costings related to the Abacus Pty Ltd proposal for the development of the Brisbane Road Car Park site once –

- (a) the procurement process for the design and construction of the multi-deck car park on a portion of the Brisbane Road Car park site has been concluded and the tender has been awarded and*
- (b) development approval has been granted for the remaining portion of the Brisbane Road Car Park site.*

**The accompanying Heads of Agreement was
never executed by the parties**

Sunshine Coast Regional Council

Abacus Funds Management Limited ACN 007 415 590
as trustee for Abacus Mooloolaba Trust

Draft

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Details

Date

Parties

Name **Sunshine Coast Regional Council**
ABN 37 876 973 913
Description **Council**
Address Locked Bag 72
Sunshine Coast Mail Centre QLD 4560

Name **Abacus Funds Management Limited as trustee for the Abacus Mooloolaba Trust**
ACN 007 415 590
Description **Abacus**
Address Level 34, Australia Square, 264-278 George Street, Sydney, NSW 2000

Background

- A. Council wishes to have the Project carried out.
- B. Abacus and Council propose an extensive urban renewal project over the existing Brisbane Road Carpark Mooloolaba.
- C. The parties have entered into this HOA in order to facilitate the carrying out of the project

Execution

SIGNED by **SUNSHINE COAST REGIONAL**)
COUNCIL by its authorised signatory:)
)
)

Authorised Signatory

Print name of Authorised Signatory

SIGNED by **ABACUS FUNDS MANAGEMENT**)
LIMITED ACN 007 415 590 by its attorneys who)
confirm that they have not received notice of the)
revocation of the power of attorney dated 15)
February 2017 registered no. 717877760 under)
which this document is signed:)

Signature of Attorney

Signature of Witness

Print name of Attorney

Print name of Witness

Signature of Attorney

Signature of Witness

Print name of Attorney

Print name of Witness

1. Definitions

Abacus Licence Car Spaces	has the meaning set out in clause 6(c) of this HOA.
Agreed Third Party Costs	means the costs paid by Abacus to persons other than Council, reasonably incurred for the preparation and approval of the development application and the preparation and negotiation of the Project Documents including the creation of plans and specifications required for the Construction Contract since the submission of the DA to Council on 11 December 2017 as assessed by the Quantity Surveyor.
Allocated Construction Costs	means the Allocated Construction Costs and Consultants costs (ACC) which will be the cost apportioned by the Quantity Surveyor for the particular part of the development in accordance with clause 11 of this HOA.
Basement 1	means the first basement level containing approximately 121 car spaces.
Basement 2	means the second basement level containing approximately 179 car spaces.
Basement Public Car Park	means the area located over the basement of the development and comprises an estimated 300 car parks. These car parks form part of the Council Public Car Park.
BMS	means the building management statement referred to in clause 6(e) of this HOA.
Construction Contract	means the construction contract referred to in clause 8 of this HOA.
Construction Contract Sum	means the price payable to the Contractor under the Construction Contract and the Early Works Agreement at the time the Construction Contract is entered into plus any approved variations.
Cost Overrun	means an overrun of the type referred to in clause 11.6 of this HOA.
Contractor	means the entity nominated as the "Contractor" in the Construction Contract.

Council DA Fees	means the fees of \$199,965 paid by Abacus to Council for the DA submission.
Council Public Car Park	means the 700 (704 contained in the DA to provide for contingency) car park spaces to be owned by the Council and includes the Basement Public Car Park (Basement 1 and Basement 2) and the Podium Public Car Park (Podium 1, 2 & part 3).
Council's Public Car Park Total Cost	means the amount calculated in accordance with clause 11.4 of this HOA.
DA / development approval	means the development approval with conditions issued by Council on 22 February 2018.
Development Agreement	means the development agreement referred to in clause 7 of this HOA.
Development Manager	means the entity which is to provide development management services in respect of the delivery of Stage 1 and Stage 2 of the Project.
Development Management Agreement	means the development management agreement referred to in clause 3.1(a) of this HOA.
Directly Attributable Costs	means the car park costs that are additional to the main works and include car park equipment, all wayfinding signage other than statutory, all wayfinding technology, all costs associated with the controlled parking.
Draft Program	means the initial program which details the works and time lines for the Project which is attached in Schedule 2 .
Early Works Agreement	means the early works agreement referred to in clause 8 of this HOA.
Final Milestone Dates	means the dates for commencement and completion of Stage 1 and the date for commencement of the Hotel Lot in respect of Stage 2, as agreed between the Council and Abacus once the Stage 1 CPs are met. The Final Milestone Dates are to be incorporated into the Development Agreement.
Final Milestone Program	means the program that will meet the Final Milestone Dates, which will form part of the Development Agreement and will include the relevant milestone dates from the Construction Contract.

Final Plans	means the Project Plans and the specifications included as part of the construction contract with the Contractor.
HOA	means this heads of agreement.
Hotel and Pad Sites	means the sites designated as hotel and pad sites in the Project Plans.
Hotel Buyout Price	<p>means the sum of the actual cost to Abacus of the following items escalated at 3.5%pa:</p> <ul style="list-style-type: none"> (a) land purchase price of \$1,000,000.00; (b) stamp duty for the acquisition of the Hotel Lot; (c) legal costs (up to a maximum value of \$20,000.00); (d) the third party consultant costs for the preparation of the development application assessed by the Quantity Surveyor; and (e) the relevant proportion of the statutory fees applicable to the Hotel Lot.
Hotel Lot	means the lot designated as the hotel lot on the plan which is attached as Schedule 3 to this HOA.
Land	means the property situated at 10 & 16 Brisbane Road, 7-15 First Avenue and 7 & 11 Smith Street, Mooloolaba Qld 4557.
Other Costs	<p>means all the development costs required to complete the development assessed by the Quantity Surveyor to be reasonable, excluding:</p> <ul style="list-style-type: none"> the land or pad purchase cost and acquisition costs (stamp duty and legal), the Allocated Construction Costs for that part of the development and GST (if any). <p>The Other Costs will include (but are not limited to):</p> <ul style="list-style-type: none"> statutory approval costs, relevant property holding costs, design and consultancy fees and development and project management fees.
Pad Sites Structure and Cores Costs	means the TDC for additional structure/cores required for the proposed development on the pad sites (but does not include the land purchase price).

Podium Public Car Park	means the area which is located over the four podium levels and comprises 650 parking spaces of which 400 parking spaces from part of the Council Public Car Park.
Preferred Milestone Dates	means the Preferred Milestone Dates referred to in clause 9 of this HOA.
Project	means the project comprising Stage 1 and Stage 2.
Project Documents	means all agreements or documents required in relation to the Project.
Project Plans	means the plans submitted for development approval on the 8 December 2017 and the additional plans and information in response to Council's Information Request, which are attached as Schedule 1 to this HOA.
Put and Call Option Agreements	means the put and call option agreements referred to in clause 3 of this HOA.
Quantity Surveyor	means an independent quantity surveyor that is jointly appointed by the parties.
Residential Lot	means the lots identified as residential lots in the Project Plans.
Retail Lot	means the lots identified as retail lots in the Project Plans.
Retirement Buyout Price	means the sum of the actual cost to Abacus of the following items escalated at 3.5%pa: <ul style="list-style-type: none"> (a) land purchase price of \$2,000,000.00; (b) stamp duty for the acquisition of the Retirement Lot; (c) legal costs (up to a maximum value of \$20,000.00); (d) the third party consultant costs for the preparation of the development application assessed by the Quantity Surveyor; and (e) the relevant proportion of the statutory fees applicable to the Retirement Lot.
Retirement Lot	means the lot designated as the retirement lot on the plan which is attached as Schedule 3 to this HOA
Services Relocations	means any services or telecommunication relocations that are required due to the proposed Project.

Site Conditions / Land Owner's Obligations

means that:

- (a) the site will be treated as not contaminated (and any contamination costs are to be met by Council);
- (b) services will be available to the site adequate for the proposed development (and if adequate services are not available to the site the Council will be responsible for the provision of these services) save for any additional requirements in the development approval in relation to the services;
- (c) Council and Abacus will enter into an infrastructure agreement in relation to any conditions of the DA relating to works external to the Land; and
- (d) The parties acknowledge that the HOA does not diminish the requirements detailed in the DA.

Stage 1

means the stage of the Project described in clause 2.2 of this HOA.

Stage 2

means the stage of the Project described in clause 2.3 of this HOA

Stage 2 Abacus Car Park

means an estimated 245 car spaces contained in part Podium 3 and all of Podium 4 owned by Abacus to be located over the podium levels.

Stage 2 Pad Sites / Pad Sites

means the development sites that are created by the construction of the podiums as detailed in attached plans.

Total Development Cost (TDC)

means the total development cost including all costs associated with the development of a certain part of the development. The TDC will include but not limited to land or pad purchase cost plus acquisition costs, the Allocated Construction Costs for that part of the development, GST (if any), all reasonable finance costs, statutory approval costs, relevant property holding costs, design and other consultancy fees and development and project management fees. The TDC for the relevant part of the development will be established by the Quantity Surveyor.

Third Party Cost Sharing Agreement

means the agreement made in the HOA whereby the Agreed Third Party Costs for the preparation and approval of the development approval and the preparation and negotiation of the Project Documents including the development of plans and specifications required for the

Construction Contract post the application of the DA in respect of the Project as incurred by Abacus will be shared equally between Abacus and Council.

Tripartite Agreement

means the tripartite agreement referred to in clause 8 of this HOA.

2. General

2.1 Project

The Project is a staged development at Brisbane Road, Mooloolaba, comprising of two stages, Stage 1 and Stage 2.

2.2 Stage 1

(a) Is the development of:

- (i) Basement Public Car Park (Basement 1, Basement 2);
- (ii) Ground floor retail plus residential/retirement cold shell lobbies, loading docks and Car Park access;
- (iii) Podium Public Car Park (Podium 1, Podium 2, Part Podium 3); and
- (iv) Structure for the Stage 2 Pad Sites and the structure for the Stage 2 Abacus Car Parks.

(b) Abacus is to act as the Development Manager for Stage 1.

(c) The Council and Abacus will negotiate in good faith and execute the agreements referred to in clause 3.1 of this HOA in relation to Stage 1.

(d) Funding for Stage 1 is set out in clause 11 of this HOA.

2.3 Stage 2

(a) Is the development of the Hotel Lots, Residential Lots and Retirement Lots, plus dedicated car parking (estimated around 245 car spaces but to be determined through the DA process) for the Residential Lots and Retirement Lots. Such car parking is to be located in the top levels of the podium levels (**Stage 2 Abacus Car Parks**).

(b) Abacus (or its nominee) is to act as the Development Manager for Stage 2. This is provided for in clause 7 of this HOA.

(c) Council is not liable for costs of the development of Stage 2 excluding Pad Sites Structure and Cores Costs.

(d) The development of the Hotel Lot is to commence within 5 years of development approval. If Abacus (or its nominee as set out in clause 10 of this HOA) does not

commence the hotel development within this timeframe, the Council has the right to buy Abacus out at the Hotel Buyout Price.

- (e) The development of the Retirement Lots is to commence within 5 years of development approval. If Abacus does not commence the Retirement Lots or is unable to demonstrate that it is actively pursuing the development of the Retirement Lots (which may include a change of use to residential), within this timeframe, the Council has the right to buy Abacus out at the Retirement Buyout Price.

3. Other agreements

3.1 Subsequent Agreements

- (a) The parties will negotiate in good faith and execute the Development Agreement, the Development Management Agreement for Stage 1, the Construction Contract, the Carpark Licence, the Put and Call Option Agreements, the Tripartite Agreement, the Early Works Agreement (if required) and any other ancillary agreement.
- (b) The parties will negotiate in good faith to agree, by the date for satisfaction of the Abacus CPs and the Council CPs, the form of the BMS (which is to be executed by the parties and registered when the land is reconfigured in accordance with clause 6(e)).
- (c) Abacus must ensure that the terms of the Construction Contract and the project management consultancy agreement contain a provision that the agreement may be novated to Council without the consent of the other party to preserve Council's rights under clause 4(c)(i)(C) of this HOA.
- (d) Prior to entering any agreement with any other party other than Council pursuant to the terms of this HOA, Abacus will provide Council with a copy of the proposed agreement.
- (e) Abacus must use reasonable endeavours that the terms of any agreement nominated by Council and entered into by Abacus with any party other than Council pursuant to the terms of this HOA contain a provision that the agreement may be novated to Council without the consent of the other party to preserve Council's rights under clause 4(c)(i)(C) of this HOA.
- (f) Neither party will introduce any new terms or conditions to any agreement entered into pursuant to the terms of this HOA, including the Third Party Cost Sharing Agreement, which have a material adverse effect on the Project or the other party's position.

3.2 Third Party Cost Sharing Agreement

- (a) Council agrees to pay Abacus 50% of the Agreed Third Party Costs (except as otherwise provided in this HOA), provided that:
 - (i) Abacus provides Council evidence of the costs incurred and proof of payment of those costs;

- (ii) the Agreed Third Party Costs are assessed by the Quantity Surveyor and the Quantity Surveyor considers those costs to be necessary and reasonable.
- (b) Council's share of the Agreed Third Party Costs becomes due and payable 28 days after the Quantity Surveyor notifies Council of the costs.

4. Right to terminate

(a) Abacus CPs

- (i) The following are collectively known as **Abacus CPs**:
 - (A) conditional approval by the board of Abacus Group Holdings Limited ACN 080 604 619 to enter into the Development Agreement by 31 July 2018;
 - (B) the obtaining of a development approval relating to the Project (or such parts of the Project as may be agreed to by the parties), on terms satisfactory to Abacus by 30 June 2018; and
 - (C) execution of the documents referred to in clause 3.1(a) must occur contemporaneously and before construction commences (save for Early Works) but in any event no later than [date to be discussed].

Council may, under the Early Works Agreement, elect to commence construction prior to the date on which all documents referred to in clause 3.1(a) have been executed, but Council does so at its own risk and Abacus has no liability or risk until such time as those documents are executed.

- (ii) If the Abacus CPs are not met by the above dates then Abacus can terminate this HOA without any liability or obligation to the Council other than the obligation to transfer to the Council the interest of Abacus in the material referred to in clause 4(d).

(b) Council CPs

- (i) The following are collectively known as **Council CPs**:
 - (A) approval to enter into the Development Agreement from the Elected Council or CEO at its direction by 31 July 2018; and
 - (B) execution of the agreements referred to in clause 3.1(a) must occur contemporaneously and before construction commences (save for Early Works) but in any event no later than [date to be discussed].
- (ii) If the Council CPs are not met by 31 July 2018 then the Council can terminate the HOA without any liability or obligation to Abacus other than an obligation incurred pursuant to the Third Party Cost Sharing Agreement.

- (iii) If this HOA is terminated in accordance with this clause, Council will reimburse any Council fees paid by Abacus in relation to the development approval for the Project.

(c) Termination and novation of other agreements

- (i) Should either party terminate this HOA pursuant to this clause 4:
 - (A) any agreements made between Council and Abacus pursuant to the terms of this HOA will be automatically terminated (in which case each party is released from liability under the agreements except to the extent that this HOA specifies otherwise);
 - (B) Abacus's obligation to novate any subsequent agreements to Council pursuant to clause 3.1 survives termination of any agreements between Council and Abacus pursuant to this clause, and Abacus remains liable under the subsequent agreements until the date of novation; and
 - (C) Council may notify Abacus in writing that it wishes to replace Abacus as a party to any agreements made between Abacus and third parties which have been negotiated and agreed pursuant to the terms of this HOA, in which case Abacus will take all reasonable steps to novate those agreements with the effect that the agreements will operate as if Council had entered into the agreement in the place of Abacus (and Abacus has no liability under those agreements).
- (ii) Nothing in the clause shall affect the parties' obligations under the Third Party Cost Sharing Agreement.

(d) Ownership of material and IP in event of termination by either party

If this HOA is terminated by either party, any and all Project designs, Project Plans, Project Documents, third party reports, approvals and any other material relevant to the Project will be owned by Council together with any and all intellectual property in the material and the Project.

(e) Rights on termination

- (i) If this HOA is terminated by Council, the parties remain subject to the Third Party Cost Sharing Agreement, and Council will be liable to reimburse Abacus for its Agreed Third Party Costs pursuant to that agreement and the costs referred to in clause 4(b)(iii).
- (ii) If the Council decides not to proceed with the Project for any reason or if Council breaches clause 3.1(f) and this is the cause for Abacus to terminate, then the Council will reimburse Abacus for Abacus's 50% share of the Agreed Third Party Costs. That is the Council will be obligated to reimburse Abacus for 100% of the Third Party Costs incurred by Abacus up to the date of termination.

5. Project Plans and Draft Program

- (a) Within 10 working days after execution of the HOA, Abacus will provide Council with an updated version of the Project Plans, and a draft program (including a construction program).
- (b) The parties acknowledge and agree that the Final Milestone Dates can only be determined post satisfaction of the Abacus CPs and the Council CPs.
- (c) Council is to review the updated Project Plans and programme provided by Abacus pursuant to clause 5(a) of this HOA and provide Council's reasonable comments on those documents to Abacus within 7 working days of Council's receipt of the documents.
- (d) Abacus will incorporate Council's reasonable comments in the plans so long as they do not have any material adverse impact on the obligations of Abacus under this HOA and the agreements contemplated by clause 3.1.
- (e) Prior to the execution of the Construction Contract, Abacus will provide the Council with the Final Plans and the Final Milestone Program.
- (f) The Final Plans shall be generally in accordance with the Project Plans.

6. Project Ownership and subdivision of Land

- (a) Abacus and the Council will (at the same time as entering into the Development Agreement) negotiate and enter into Put and Call Option Agreements whereby Abacus shall agree to purchase the following Project components from the Council:
 - (i) the Retail Lots for the agreed price under clause 13; and
 - (ii) the Hotel and Pad Sites (Stage 2 lots) for the agreed price under clause 13.

LESS the Funding Obligations of Abacus as detailed in clause 11.3 (**Cost Component A**).

The aggregate of the amounts in clauses 6(a)(i) and 6(a)(ii) is referred to as the Land Acquisition Amount (refer to clause 13).

The aggregate of the amounts in clauses 6(a)(i) and 6(a)(ii) less Cost Component A is referred to as the Land Acquisition Settlement Amount (refer to clause 13).

- (b) Council is to have ownership of the Council Public Car Park and Abacus will own the rest of the Project, except as provided for in clause 6(f).
- (c) Under the BMS, Council will grant a licence in favour of Abacus to allow Abacus to have the right to use an allocation of car spaces (with the final number to be agreed between the parties based on the Town Planning regulations) in the Basement Public Car Park at no cost to Abacus (**Abacus Licence Car Spaces**). The licence will

commence from the date the retail commences for trade. Council will not revoke the licence unless the use of the Retail Lot ceases to be used for a predominately retail use.

The Abacus Licence Car Spaces comprise:

- (i) Retail car spaces will be allocated on Basement 1 and part Basement 2, which will have a designated sign post to identify right to use and have a maximum time limit of 60 minutes for free parking (extended to 90min with a valid supermarket shopping docket). In addition, any required push bike and motor bike requirements will be included in the public car park. All parking fees charged will accrue to the Council and any other income derived from the operation of the Council Car Park.
- (ii) The remaining car spaces for use as hotel, residential and retirement visitor parking will need to be sign posted to identify visitor rights to park with the final number of spaces and sign posting to be determined by Town Planning regulations. The free period/user rights will need to be agreed. Any parking fees charged will accrue to the Council and any other income derived from the operation of the Council Car Park.
- (iii) In addition, an agreement between the Hotel Operator and the Council established on commercial terms will be entered into in order to provide hotel guests with the right to use some of the Council Public Car Park spaces based on a user pays system. The Hotel Operator and the Council will negotiate in good faith and on commercial terms the sharing of the customer fee payment.

It is agreed that the licence to Abacus for the Abacus Licence Car Spaces does not confer on Abacus:

- (iv) Any right of exclusive occupation of these car spaces, and the Council may from time to time exercise all of its rights as owner, including the Council's right to use the car spaces provided that it does not prevent or restrict the operation of the licence; and
- (v) any estate or interest in the Abacus Licence Car Spaces and subject to the licence, legal possession of these car spaces at all times remains vested in the Council.

The parties agree there will be up to 10 days per calendar year that the Basement Public Car Park will be closed for certain events (such as the Mooloolaba Triathlon). This will be dealt with in the car parking Licence. The Council will not have any liability to Abacus in this regard but Council will arrange suitable temporary arrangements to accommodate the retail centre at no additional cost to the Supermarket Operator and at no cost to Abacus.

The parties will, immediately upon execution of this HOA, negotiate (in good faith and in a timely manner) a licence reflecting the matters referred to in this clause 6(c).

- (d) Abacus will own the Stage 2 Abacus Car Parks and these will form part of the development lots.
- (e) Abacus (or any nominees nominated under clause 6 of this HOA) will arrange for the Land to be reconfigured by the creation of separate volumetric lots for the following components:
 - (i) Council Public Car Park (comprising the basement and podium public car park areas, but excluding the Stage 2 Abacus Car Parks);
 - (ii) Retail Lot;
 - (iii) Retirement Lot;
 - (iv) Hotel Lot; and
 - (v) Residential Lot.

The volumetric lots may be in any number of parts that will be established with all parties working in good faith to provide an integrated solution.

The Hotel Component and the Residential Component will be titled as a layered arrangement community titles scheme with the volumetric lot for each component being a lot in a principal scheme. A subsidiary scheme will be created for the Residential Component (which will comprise approximately 100 apartments).

A building management statement is to be recorded over the whole of the development to deal with the supply of services to lots, rights of access to lots, rights of support and shelter, insurance arrangements, imposition of levies, property maintenance, architectural and landscaping standards, rules for common services and facilities and proposed future development.

- (f) Despite any other provision of this HOA or any agreement contemplated by this HOA, Council will continue to own such of the Land as is:
 - (i) above 45 metres from ground level, adjusted by any allowed use of the roof top area above 45 metres; and
 - (ii) below the underside of the slab which forms the bottom of Basement 2.

Abacus agrees that should Abacus dispose of its interest in the Land, it will only do so on the basis that any entity acquiring such an interest executes a deed requiring the acquiring entity to comply with the terms of the HOA (to the extent applicable) as if that entity had been a party to this HOA in place of Abacus.

7. Development Agreement

- (a) The parties agree that the Development Agreement between the parties is to be the governing document for the Project.

- (b) Council will, upon fulfilment of the Abacus CPs and the Council CPs, grant Abacus a form of development lease (on terms acceptable to Council and Abacus).
- (c) Abacus will charge a development management fee of \$420,000 in respect of the Council Public Car Park.

8. Construction Contract with Contractor

- (a) Abacus will retain the Contractor pursuant to the Construction Contract.
- (b) Abacus, Council and the Contractor will if required be the parties to the Early Works Agreement.
- (c) Upon execution of this HOA, Abacus will give to Council copies of the following documents for review and comment:
 - (i) a draft Construction Contract;
 - (ii) a draft Early Works Agreement; and a draft Tripartite Agreement.
- (d) The parties acknowledge and agree that the Construction Contract must contain a clause which shall require the Contractor to accelerate in the event that Final Milestone Dates are not able to be met.
- (e) Abacus must take all reasonable steps to ensure that the documents referred to in clause 8(c) of this HOA are amended to reflect any comments made by Council.
- (f) Abacus acknowledges and agrees that it must not enter into any of the agreements referred to in clause 8(c) of this HOA until the terms of the agreements have been agreed to by Council.
- (g) Council indemnifies Abacus in relation to any claims against Abacus arising out of the Construction Contract and the Early Works Agreement up to the value of the Construction Contract Sum plus 15% but does not indemnify Abacus for any costs incurred by or claimed against Abacus to the extent they arise as a result of:
 - (i) Abacus's negligent acts or omissions that give rise to additional costs or claims arising under or out of the Construction Contract and the Early Works Agreement;
 - (ii) Abacus's breach of the Construction Contract and the Early Works Agreement (except to the extent the breach is caused or contributed to by the Council);
 - (iii) Abacus's failure to take all reasonable steps to minimise the risk of variation claims, delay cost claims and extension of time claims not approved by Council and the failure to minimise any costs arising out of the Construction Contract or Early Works Agreement which have not been approved by Council; and
 - (iv) Abacus's breach of any obligation under this HOA.

9. The Preferred Milestone Dates

- (a) The parties acknowledge and agree that the Council wants construction of the Council Public Car Park to commence on [1 August 2018] and that Council wants the Basement Public Car Park (less any car park spaces reasonably required for construction purposes) to be opened by [1 July 2019].
- (b) Abacus agrees to use its reasonable endeavours to meet this time frame. However the parties acknowledge these dates are contingent on agreement of the final plans and timing of approvals. The Final Milestone dates will be established once the CPs to Stage 1 are satisfied.

10. Development Rights

- (a) If Abacus decides to sell its development rights for Stage 2 (which Abacus may only do if the contract for sale of those rights contains a clause which requires the nominee to observe the terms of this HOA as those terms apply to Stage 2, including clause 10 of this HOA, as if the nominee had been a party to this HOA in place of Abacus) such that it may not be the Development Manager for Stage 2 of the Project, then Abacus must obtain the consent of the Council for its nominee to act as the Development Manager.

Council cannot unreasonably withhold its consent of the nominee if Abacus provides reasonable evidence that the nominee:

- (i) is capable of performing the development management services for Stage 2;
- (ii) is adequately experienced to undertake a development of this scale;
- (iii) is financially capable of performing the obligation being taken on;
- (iv) has a sound reputation; and

has no past or present legal dispute with Council on this site, whether on foot or resolved.

- (b) Abacus will have the right to take in a JV investment partner provided that Abacus retains all liability for obligations under the HOA and any other agreement entered into pursuant to the HOA. Abacus must obtain Council's approval of the JV investment partner which will not be unreasonably withheld.

Council cannot unreasonably withhold its consent of the nominee if Abacus provides reasonable evidence that the nominee:

- (i) has a sound reputation; and
- (ii) has no past or present legal dispute with Council on this site, whether on foot or resolved.

The parties acknowledge and agree that they will negotiate in good faith a Development Management Agreement and ancillary agreements in relation to Stage 2.

- (b) Abacus may novate its rights and obligations under this HOA to a nominee by giving to the Council a deed of novation signed by that nominee under which the nominee agrees in favour of the Council to be bound by all obligations of Abacus under this HOA. The Council will consent to the nomination and that consent cannot be unreasonably withheld subject to the provision of reasonable evidence by Abacus that the nominee:

- (iii) is capable of performing the development management services for Stage 1 and Stage 2;
- (iv) is adequately experienced to undertake a development of this scale;
- (v) is financially capable of performing the obligation being taken on;
- (vi) has a sound reputation; and

has no past or present legal dispute with Council on this site, whether on foot or resolved.

Once the signed deed of novation has been delivered, Council must perform its obligations under this HOA in favour of the approved nominee and Abacus is released from all its obligations under this HOA (including clause 18).

11. Stage 1 Project – Funding Obligations

Car park funding comprises both the Council Public Car Park (no less than 700 spaces) and the Stage 2 Abacus Car Park (estimate of 245 spaces).

Stage 1 of the Project comprises and will be funded as follows:

- (i) Basement Public Car Park (Basement 1, Basement 2);
- (ii) Podium Public Car Park (Podium 1, Podium 2, Part Podium 3); and
- (iii) The structure for the Stage 2 Pad Sites and the structure for the Stage 2 Abacus Carparks (Pad Site Structures and Core Costs).

In relation to (i), (ii) and (iii) above, these funding requirements will be allocated in accordance with clauses 11.1 and 11.3.

- (iv) Ground floor retail plus residential/retirement cold shell lobbies and Car Park access (funded by Abacus).

In relation to (iv) above, these costs will be funded by Abacus in accordance with clause 11.7.

11.1 Council Funding Obligation is to Fund

- (a) Council will provide funding for Stage 1 of the Project of \$21 million of costs. That amount will be allocated to Council's Net Contribution (clause 11.5 of this HOA) and such funding shall include payment of a development fee to Abacus of \$420,000.
- (b) In addition, the Council will pay for:
 - (i) all costs required and associated with Site Conditions / Land Owner's Obligations that have been certified by the QS as true, correct and reasonable (but excluding those caused by Abacus or Abacus Consultants);
 - (ii) the cost overruns as per clause 11.6.
- (c) This funding cost is based on the Project Plans for the Council Public Car Park as at the date of this HOA but will also apply to the Final Project Plans.

11.2 Council's Costs pre CPs approvals

Council is to pay the following costs that may be incurred before or after (in part or in full) the CPs are approved:

- (a) 100% of the services and telecommunications relocations (not provision) to the boundary of the site up to a cap of \$800,000.00 (Council will consider costs in excess of the cap following approval of works);
- (b) subject to clause 8 of this HOA, 100% of the pre-Construction Contract costs paid to the Contractor as separately approved by Council and supported by QS certification.

11.3 Abacus Car Park Funding Obligation

Abacus will fund and pay the first \$10million following this Council will fund \$21million, that will bring the total funding to \$31million in respect of Project Stage 1 funding requirements 11(i) and 11(ii) and 11(iii). **THIS IS COST COMPONENT A.**

Once Abacus has paid its \$10million, it will have Council's consent to process a subdivision of the title to create lots for the hotel, the retail and the council's carpark. This will create the ability for Abacus to have a mortgage on its land for the purpose of raising debt finance. The details of the security will be agreed in the Triparted Agreement.

Abacus is to be repaid this cost via a deduction from the Land Acquisition Amount.

In addition, Abacus will pay for the Stage 2 Abacus Car Parks.

11.4 Costs Allocation

The Quantity Surveyor is to calculate the costs as follows:

Council's Public Car Park Total Cost

- Cost component (a):** The Allocated Construction Cost of all the car parks (which are detailed in attached plans as "car parks" and equates to the number of car parks as defined in (d) below) as determined by the QS. Note – If Abacus decides to defer the construction of the Stage 2 Abacus Car Parking then the QS will assess the estimated cost of the carparks for the use in this calculation)
- Cost component (b):** The actual consultant costs allocated by the QS to the car parks detailed in (a)
- Cost component (c):** Allocation by the QS of Other Costs to the car park
- Cost component (d):** the total number of car parks including the Councils 700 car parks and Abacus's residential & retirement car parks (estimated at 245).

The **average cost per car space** being: $((a) + (b) + (c)) / (d)$

The Council's Public Car Park Total Cost will be calculated as follows:

The average cost per car park space multiplied by 700 = **Cost component (e)**

Public Car park foyer and all costs associated with the Council's lifts = **Cost component (f)**

Council's Directly Attributable Costs = **Cost component (g)**

Cost Component (e) + Cost Component (f) + Cost Component (g) = Council's Public Car park Total Cost

11.5 Calculation of Council's Net Contribution

The Council's Net Contribution equals

Council's Public Car Park Total Cost plus the Pad Sites Structure and Cores cost less Abacus Funding Obligation under clause 11.3.

If the final calculation of the Council's Net Contribution is more than \$21million then this will be treated as a Cost Overrun.

11.6 **Cost Overrun**

Council and Abacus will work together to minimise the cost of the Council Public Total Car Park Cost and the Pad Sites Structure and Core Costs. If the Council's Net Contribution exceeds \$21million then Council will meet these Cost Overrun (clause 11.5) costs associated with the Project Stage 1 funding of the Council Public Carpark plus the Pad Site Structure and Cores Costs. Abacus has no obligation to pay for any Cost Overrun of the Council Public Car Park cost plus the Pad Sites Structure and Core Costs.

11.7 **Retail**

In addition to clause 11.3 funding obligations, Abacus is to fund:

The cost of the ground floor slab and the columns in the Retail Lot plus all services and fit out costs. This cost is not reimbursable as Abacus will own this retail component.

PLUS

Cold Shell for the retail, residential and retirement foyers (and floor slab and columns in retail, residential and retirement foyer lots) plus loading dock. This cost is not reimbursable as Abacus will own the lots on completion.

11.8 **Quantity Surveyor**

The final costs and costs allocation of cost components (a), (b), (c), (f), (g), will be determined by the Quantity Surveyor. The final costs are estimated to be determined for inclusion in the Development Agreement.

The allocation of these costs does not reduce the Council's funding obligations under clauses 11.1, 11.2 and 11.6 nor increase Abacus's maximum \$10m funding obligations under clause 11.3.

12. **Council Carpark**

- (a) The Council will grant Abacus a management contract for the Council Public Car Park for 8 years or until Stage 2 is completed (whichever is the earlier). The Abacus car park management fee will be 8% of the gross fees derived from the Council Public Car Park. Parking fees to be determined by the Council in consultation with Abacus.
- (b) The net income from the Public Car Park and any other revenue derived from the Council Public Carpark is to be retained by Council.

13. **Abacus Land Purchase, Settlement Amount and Shortfall Amount**

Abacus is to contract to purchase from the Council the freehold title of the Retail Lots and the Hotel Lot and the Pad Sites (Stage 2 Lots), subject to Abacus being able to develop the Pad Sites in line with the Project Plans and the Retail Lot on the basis of the supermarket and specialties. The acceptability of these plans and feasibilities will be at the absolute discretion of Abacus and will form part of the Abacus board approval process.

In addition, Abacus will have ownership over the Stage 2 Abacus Car Parks.

The Land Acquisition Settlement Amount comprises:

- **Retail** \$3million to be acquired on completion of the retail development or the issue of title (whichever the latter) (**E**).
- **Hotel and Pad sites** (Stage 2 Pad Site lots) to be acquired on the completion of Stage 1 and the provision of title for the Pad Site Lots at the prices detailed:
 - o Hotel: \$1million (**F**)
 - o Retirement: \$2million (**G**)
 - o Residential: \$4million (**H**)

The aggregate of E + F + G + H = \$10m = Land Acquisition Amount.

The Land Acquisition Settlement Amount will have the total of the Abacus Car park Funding obligation as per Clause 11.3 (A) deducted from it as defined below:

E + F + G + H – A. If the Land Acquisition Settlement Shortfall Amount is positive, then Abacus will on the land settlement date pay the Council the Land Settlement Shortfall Amount. If the Land Acquisition Settlement Shortfall Amount is negative then the Council will on the land settlement date pay Abacus the Land Settlement Shortfall Amount.

Land Settlement Shortfall Amount formula is as follows:

IF E + F + G + H – A = 0, no payment to be made

IF E + F + G + H – A > 0, then Abacus pays the Council this amount

Land settlement will occur immediately post practical completion and a construction certificate being issued for Stage 1, at which time the Land Settlement Shortfall Amount will be paid.

14. Parking Allocation and Staging

Stage 1 will provide the Council Public Car Park comprising 700 car park spaces and these car spaces will be provided in the Basement Public Car Park and in the Podium Public Car Park.

During the construction of the Stage 2 parking there will be a reduction in the number of the required 700 Council Public Car Park spaces which will be available for the Council. The construction management plan will be discussed with Council and managed in order to reasonably minimise the impact to the operations of the Council Public Car Park, and to the extent possible, the reduction will be to the parking on Podium 3.

15. Car Parking for Abacus Developments

Abacus will provide the required dedicated parking for the Stage 2 residential and retirement lots.

16. Extent to which HOA is binding

The parties agree that they are immediately legally bound by this HOA following signing of the HOA by both parties

17. Acknowledgement

- (a) Abacus acknowledges and agrees that it can only terminate this HOA if the Abacus CPs are not met.
- (b) Nothing in the clause shall be taken to limit the Council's right to terminate this HOA at common law.

18. Guarantee

- (a) Abacus Group Holdings Limited ACN 080 604 619 will provide a guarantee (on terms acceptable to the Council acting reasonably) guaranteeing the obligations under this HOA of Abacus and will indemnify the Council against any breach of the HOA by Abacus up to the value of \$40 million.
- (b) Abacus must hold for the duration of the Project, and maintain for a period of a least 1 years following the completion of the Project, professional indemnity insurance to a minimum insured value per claim of \$20million and will arrange for Council to be named as a party of interest in its professional indemnity policy and guarantees.
- (c) Abacus indemnifies Council to the value of any amount to which Abacus becomes entitled under its professional indemnity insurance policy with respect to the Project. This indemnity is in addition to the guarantee provided under clause 18(a).
- (d) Abacus Group Holdings Limited's guarantee under this clause indemnifies Council in respect of any liability Abacus would have to Council but for the operation of the limitation in clause 22.
- (e) This clause takes precedence over clause 22 to the extent of any inconsistency.

19. Exclusivity

The parties agree to deal with each other exclusively in regard to the subject matter of this HOA until a date that is 6 months from the date of this HOA.

20. Confidentiality

- (a) Each party acknowledges that information disclosed to it by the other party pursuant to and in relation to the subject matter of this HOA or in the performance of this HOA is confidential.

- (b) Except as provided expressly in this HOA, each party agrees it will not and will not permit any of its officers, employees, agents, contractors, associates or anyone else to use or to disclose to any person the confidential information without the prior written consent of all other parties.
- (c) Any information disclosed to the public will be approved by the parties before release and only the Council CEO or the Mayor of the Sunshine Coast Council and Abacus Property Group's Managing Director or Head of Investor Relations is authorised to speak on behalf of the relevant party.
- (d) This clause does not apply to any information which:
 - (i) is generally available to the public (other than as a result of the breach by any party of the provisions of this clause); or
 - (ii) is required to be disclosed by law.

21. Dispute Resolution

- (a) Except as provided for in clause 21(b), a party may not commence Court proceedings in respect of a dispute arising out of this HOA (**Dispute**) unless it has complied with the succeeding clauses of this Dispute Resolution clause;
- (b) Despite clause 21(a), a party may commence court proceedings seeking interlocutory relief.
- (c) A party claiming that a Dispute has arisen must notify the other party to the Dispute.
- (d) Each party must ensure that during the 10 Business Day period after a notice is given under clause 21(c) (or such longer period as may be agreed in writing by the parties), its Chief Executive Officer (or their nominee) uses their best endeavours, together with the other party's Chief Executive Officer (or their nominee) to resolve the Dispute. If the parties are not unable to resolve the dispute then the parties are to agree on:
 - (i) a process to resolve all or at least part of the Dispute without court proceedings, (for example, mediation, conciliation, executive appraisal or independent expert determination);
 - (ii) the selection and payment of any third party to be engaged by the parties and the involvement of any dispute resolution organisation;
 - (iii) the procedural rules;
 - (iv) the timetable, including any exchange of relevant information and documents; and
 - (v) the place where meetings will be held.

- (e) The role of any third party will be to assist in negotiating a resolution of the Dispute. The decision of the third party will not be binding on a party unless that party's chief executive officer has so agreed in writing.
- (f) Each party:
 - (i) must keep confidential all information or documents disclosed by the other parties under this clause; and
 - (ii) not use that information or those documents except to attempt to settle the Dispute.
- (g) Each party will be responsible for their own costs of resolving a Dispute under this clause and the parties will be equally responsible for the costs of any third party engaged.
- (h) After the 10 Business Day period referred to in clause 21(d) (or such longer period as may be agreed by the parties), a party that has complied with clauses 21(c) – 21(g) inclusive may terminate the dispute resolution process by giving notice to the other party to the Dispute and may then act in whatever way it considers appropriate, including by commencing legal proceedings.

22. Limitation on AFML's Liability

- (a) AFML enters into this HOA only in its capacity as trustee of the Trust (and, if the Trust is a registered managed investment scheme, as responsible entity for that scheme). The liability of AFML arising under or in connection with this HOA is limited to and can be enforced against AFML only to the extent to which it can be satisfied out of property of the Trust out of which AFML is actually indemnified for the liability.
- (b) This limitation of AFML's liability:
 - (i) applies despite any other provision of this HOA and extends to all liabilities and obligations of AFML in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this HOA; and
 - (ii) survives termination of this HOA but does not apply to limit in any way the liability of Abacus Group Holdings Limited under the guarantee provided under clause 18.
- (c) The parties other than AFML may not sue AFML in any capacity other than as trustee of the Trust (and, if the Trust is a registered managed investment scheme, as responsible entity for that scheme), including seek the appointment of a receiver (except in relation to property of the Trust), a liquidator, an administrator or any similar person to AFML or prove in any liquidation, administration or arrangement of or affecting AFML (except in relation to property of the Trust).
- (d) The provisions of this clause shall not apply to any obligation or liability of AFML to the extent that it is not satisfied because under the constitution establishing the Trust or

by operation of law there is a reduction in the extent of AFML's indemnification out of the assets of the Trust, as a result of AFML's fraud, negligence or breach of trust.

- (e) For the purposes of clause 22(d), it is agreed that AFML cannot be regarded as being negligent or in breach of trust to the extent to which any failure by AFML to satisfy its obligations under this HOA has been caused or contributed to by a failure by the custodian of the Trust property (or its delegate) or any other person to fulfil its obligations in relation to the Trust or any other act or omission of that custodian (or its delegate) or any other person.
- (f) In this clause:
 - (i) **AFML** means Abacus Funds Management Limited ACN 007 415 590; and
 - (ii) **Trust** means Abacus Mooloolaba Trust.

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