

**FAR NORTH DISTRICT COUNCIL**

**MATAURI BAY PROPERTIES LIMITED**

**MATAURI X INCORPORATION**

**AGREEMENT TO ACQUIRE AN EFFLUENT  
TREATMENT SCHEME AT MATAURI BAY**

AGREEMENT dated

21st day of May

2009

**PARTIES:**

1. FAR NORTH DISTRICT COUNCIL ("Council")
2. MATAURI BAY PROPERTIES LIMITED ("MBPL")
3. MATAURI X INCORPORATION ("MX")

**BACKGROUND**

- A. MX is the beneficial owner of the MX Land situated at Matauri Bay, Northland. The MX Land is held by Public Trust in its capacity as trustee for MX pursuant to a certain deed of trust dated 18 April 2008. MX is entitled to receive the net rents from the leases of the land comprising the Development (via the Public Trust) to MBPL and its successors in title.
- B. MX has granted to MBPL a leasehold interest in the MX Land to enable MBPL to undertake the Development.
- C. The Council is the territorial local authority for the district within which the MX Land and the Development are located.
- D. MBPL has obtained from the Council and Northland Regional Council the Consents for the Development including the provision of a Scheme to service the Development.
- E. The Council proposes to purchase the Scheme to service the Development as well as other properties and facilities at Matauri Bay adjoining or proximate to the Development.
- F. MX acting through its trustee Public Trust as lessor of the MX Land is responsible for maintenance and repair of the Scheme and for that purpose will set aside a proportion of the rent it receives in respect of the Development for the purpose of contributing to the maintenance of the Scheme.
- G. The parties enter into this agreement to record their agreement in respect of the acquisition by the Council of the Scheme including contributions by MX to the shortfall in maintenance costs.

**AGREEMENT**

**1. DEFINITIONS AND INTERPRETATION**

- 1.1 In this agreement and its background unless the context otherwise requires:

"Cavalli Land" means the land being developed by Cavalli Coastal Villas Limited into fifteen (15) residential lots as contemplated by Digital Title Plan [T.B.A] being the lands currently comprised in Identifiers 34025 and 34026 (North Auckland Land District).

**"Consents"** means the resource consents for the Development granted by the Council under reference RC2060901, RC2080257 and RC2080881, and Northland Regional Council under reference CON20061596701 and includes any variations to such consents.

**"Contribution Period"** means the period of fifteen (15) years from the Settlement Date.

**"Development"** means the 139 leasehold residential lot subdivision at Matauri Bay being carried out by MBPL in two (2) stages on the MX Land and more particularly identified in the Consents.

**"Easements"** means all those areas of land subject to easements in gross marked with the letters "E", "G", "I" and "M" on DP393664 over Lot 191 DP393665 and with the letter marked "H" on DP393664 over Lot 192 DP393664 in favour of the Council and includes any other easements granted in addition to or in substitution therefor.

**"Financial Year"** means each twelve (12) month period commencing on 1 July in one year and ending on 30 June in the following year.

**"Further Purchase Price"** means the sum of four thousand dollars (\$4,000.00) plus GST subject to adjustment in accordance with clause 6.4 payable for each and every household unit equivalent connected to the Scheme but excluding:

- (i) the 139 residential lots comprising the Development;
- (ii) the public toilets located within the carpark area shown on Lot 189 Deposited Plan 393664; and
- (iii) up to fifteen (15) household unit equivalents located on the Cavalli Land.

Such sum shall be paid by the Council to MBPL within twenty (20) Working Days of the relevant household unit equivalent being connected to the Scheme.

**"GST"** means Goods and Services Tax arising pursuant to the Goods and Services Tax Act 1985.

**"Initial Purchase Price"** means the sum of one dollar (\$1.00) plus GST payable (if demanded by MBPL) on the Settlement Date.

**"MX Land"** means the freehold interest in Lots 191 and 192 on Deposited Plan 393664, Identifier 374727 upon which the Development has been, or is being, carried out, such freehold land being held by Public Trust in its capacity as trustee for MX.

**"Net Costs"** means:

- (a) all costs of operating and maintaining the Scheme including without limitation the costs of power supply to the Scheme and the depreciation amount that Council is required to set aside each Financial Year for the future replacement of the Scheme; less
- (b) all income received by Council in respect of the Scheme.

**"Scheme"** means the community effluent treatment system provided by MBPL at Matauri Bay to service the Development, such effluent treatment system being located on the Society Land, and includes the wastewater reticulation network servicing the Development, the benefit of the Easements, all irrigation lines, pipelines and pipes making up the scheme but excluding individual septic tanks located on private land and connections from septic tanks to the boundary of the lot on which such septic tanks are located which tanks and pipes are the property of the individual lot owner.

**"Settlement Date"** means the date of this agreement.

**"Society"** means the Matauri Bay Residents Society Incorporated.

**"Society Land"** means Lot 191 on Deposited Plan 393665 comprised in Identifier 374814 (North Auckland Land District) together with any future land within the Development transferred to the Society;

**"Working Day"** has the same meaning as in the Property Law Act 2007.

## 2. SALE AND PURCHASE OF SCHEME

- 2.1 In consideration of the Initial Purchase Price to be paid by the Council to MBPL on the Settlement Date MBPL agrees to sell and the Council agrees to acquire the Scheme on the terms set out in this agreement.
- 2.2 MBPL will at all times up to the Settlement Date maintain the Scheme to the highest possible standards and in particular will comply with the conditions of the Consents.

## 3. PROCESS OF ACQUISITION

- 3.1 The parties acknowledge that:
  - (a) this agreement is an agreement for the purposes of section 17 of the Public Works Act 1981;
  - (b) the Council will acquire the Scheme by transfer from MBPL or by declaration pursuant to section 20 of the Public Works Act 1981;
  - (c) the Council, having complied with the provisions, of section 462 of the Local Government Act 1974, may declare any specified part of parts of the Scheme to be a public drain or public drain and
  - (d) MBPL shall execute such documents and do such things as may be required to enable the Council to acquire full and unencumbered ownership of every part of the Scheme.

## 4. USE OF SCHEME

- 4.1 Upon the Settlement Date and subject to payment of the Initial Purchase Price MBPL shall transfer the Scheme to the Council and shall assign, novate or transfer the benefit of all warranties and guarantees it holds in respect of the Scheme to the Council provided that where any warranty or guarantee is not

capable of assignment, novation or transfer, MBPL shall hold the same on trust for the benefit of the Council.

- 4.2 From and including the Settlement Date the Council shall operate and maintain the Scheme for the benefit of the Development, the Cavalli Land, the public toilets located within the carpark area shown on Lot 189 Deposited Plan 393664, and for any other land connected to the Scheme from time to time and the Council shall receive the benefit of the Easements for the treatment and disposal of effluent from the Scheme.

## 5. OPERATION AND MAINTENANCE OF SCHEME

- 5.1 In consideration of the Council purchasing the Scheme pursuant to this agreement, MX agrees to contribute to the operation and maintenance of the Scheme throughout the Contribution Period to cover the Net Costs incurred by the Council provided that MX's liability for such Net Costs shall, subject to clause 5.4, be limited to a maximum of fifty-five thousand dollars (\$55,000.00) plus GST in any Financial Year during the Contribution Period.
- 5.2 Within twenty (20) Working Days of the end of each Financial Year the Council shall provide MBPL and MX with a detailed statement of the Net Costs in respect of the Scheme and a GST invoice in respect of the contribution payable by MX pursuant to clause 5.1 of this agreement. MX shall pay such Net Costs to the Council within twenty (20) Working Days of receiving an invoice from the Council.
- 5.3 Except as provided in clause 5.1 and for the avoidance of doubt, MX will not be liable for any costs in connection with the replacement or renewal of the Scheme, such costs to be borne by the Council.
- 5.4 The maximum contribution payable by MX pursuant to clause 5.2 shall be subject to review on each anniversary of the Settlement Date as follows:
- (a) The maximum contribution payable by MX shall be reviewed to an amount equal to the maximum contribution payable during the twelve (12) month period immediately prior to the date of review increased by a percentage equal to the aggregate percentage increase (if any) in the Consumer Price Index (all groups) over the period from the Settlement Date or the last review date as the case may be to the date of review.
  - (b) For the purposes of clause 5.4(a) the aggregate percentage increase in the Consumer Price Index (as published from time to time by Statistics New Zealand) or as substituted in accordance with clause 5.4(d) shall be calculated as follows:
    - (i) by determining the last one (1) year period commencing with the last appropriate quarterly date preceding the last review date prior to the current review date or the Settlement Date as the case may be and ending with the last appropriate quarterly date preceding the current review date.
    - (ii) by determining in respect of each of those quarterly periods making up the one (1) year period so ascertained the percentage

increase in the Consumer Price Index (or equivalent) for that period; and

(iii) by adding together each of the aggregate percentage increases in the Consumer Price Index (as so determined) for each of those quarterly periods making up the one (1) year period.

(c) For the purpose of this clause "last appropriate quarterly date" means the 31st day of March, the 30th day of June, the 30th day of September or the 31st day of December or such other quarterly dates upon which the Consumer Price Index may be published by the Statistics New Zealand, and in each case whichever of those immediately precedes the relevant review date or the Settlement Date as the case may be.

(d) If Statistics New Zealand ceases for any reason to publish the Consumer Price Index (all groups) for any quarterly period, then the Council may at its option apply an appropriate alternative price increase index and all references to the Consumer Price Index in this agreement shall be deemed to be references to the alternative price increase index as so determined in accordance with this clause.

5.5 In order to better secure MX's obligations pursuant to this clause 5 MX shall enter into and execute a separate bond in its own capacity, such bond to be in the form annexed to this agreement as Schedule 1.

## 6. FUTURE CONNECTIONS TO SCHEME AND FURTHER PURCHASE PRICE

6.1 MBPL and MX acknowledge that upon the Council acquiring the Scheme pursuant to this agreement the Council may at any time thereafter and subject to payment of the Further Purchase Price and obtaining all necessary consents connect additional household unit equivalents to the Scheme.

6.2 For the avoidance of doubt the initial connection of the Cavalli Land to the Scheme is on the basis that the Cavalli Land comprises fifteen (15) household unit equivalents. In the event that at any time the Cavalli Land comprises more than fifteen (15) household unit equivalents the Further Purchase Price shall be payable for each household unit equivalent on the Cavalli Land in excess of the fifteen (15) household unit equivalents contemplated by this agreement.

6.3 The Council acknowledges that the Scheme has been established primarily for the benefit of the Development but has sufficient capacity to connect to the fifteen (15) household unit equivalents on the Cavalli Land and to the public toilets located within the carpark area as shown on Lot 189 Deposited Plan 393864. The Council further acknowledges that in the event that the Council wishes to provide future connections to the Scheme this may require an upgrade of the Scheme to provide additional capacity. The Council will be liable for payment of all costs incurred in connection with any upgrade of the Scheme required as a result of such further connections including any operation and maintenance costs attributable to such further connections. For the avoidance of doubt, MX and MBPL shall not be liable for any such costs pursuant to clause 5.1 or otherwise.

6.4 The Further Purchase Price shall be subject to review on each anniversary of the Settlement Date as follows:

- (a) The Further Purchase Price shall be reviewed to an amount equal to the Further Purchase Price payable during the twelve (12) month period immediately prior to the date of review increased by a percentage equal to the aggregate percentage increase (if any) in the Consumer Price Index (all groups) over the period from the Settlement Date or the last review date as the case may be to the date of review.
- (b) For the purposes of clause 6.4(a) the aggregate percentage increase in the Consumer Price Index (as published from time to time by Statistics New Zealand) or as substituted in accordance with clause 6.4(d) shall be calculated as follows:
  - (i) by determining the last one (1) year period commencing with the last appropriate quarterly date preceding the last review date prior to the current review date or the Settlement Date as the case may be and ending with the last appropriate quarterly date preceding the current review date.
  - (ii) by determining in respect of each of those quarterly periods making up the one (1) year period so ascertained the percentage increase in the Consumer Price Index (or equivalent) for that period; and
  - (iii) by adding together each of the aggregate percentage increases in the Consumer Price Index (as so determined) for each of those quarterly periods making up the one (1) year period.
- (c) For the purpose of this clause "last appropriate quarterly date" means the 31st day of March, the 30th day of June, the 30th day of September or the 31st day of December or such other quarterly dates upon which the Consumer Price Index may be published by the Statistics New Zealand, and in each case whichever of those immediately precedes the relevant review date or the Settlement Date as the case may be.
- (d) If Statistics New Zealand ceases for any reason to publish the Consumer Price Index (all groups) for any quarterly period, then MBPL may at its option apply an appropriate alternative price increase index and all references to the Consumer Price Index in this agreement shall be deemed to be references to the alternative price increase index as so determined in accordance with this clause.

## 7. COUNCIL'S CAPACITY

- 7.1 MBPL and MX acknowledge that nothing in this agreement is to be construed as constituting a fetter or limitation on the exercise of any discretion or power of decision by the Council in its capacity as a consent authority or any other regulatory capacity which the Council occupies in connection with the Scheme or the Development.
- 7.2 MBPL and MX further acknowledge that if the Council, in properly carrying out its duties as a consent authority or in any regulatory capacity acts in a manner which is contrary to the interests of MBPL or MX under this agreement, MBPL and MX will not seek to recover any losses or damages or seek an injunction against the Council under this agreement.

## 8. ASSIGNMENT

- 8.1 MBPL and MX may not assign their respective interests under this agreement without first obtaining the consent in writing of the Council which consent shall not be unreasonably or arbitrarily withheld. The Council as a condition of its consent to assignment may require that any assignee enter into a deed of accession covenanting with the Council to be bound by complying with the assignor's obligations under this agreement. For the purposes of this clause a change in the effective control of MBPL amounts to an assignment of this agreement and requires compliance with the requirements of this clause.
- 8.2 Other than by an assignment under this clause, MBPL and MX shall not assign this agreement.

## 9. ANNOUNCEMENTS

- 9.1 Except as may be required by law neither party to this agreement will make any announcements or disclosures as to the subject matter of this agreement, but shall be entitled to make all disclosures, including to professional advisors, for the purposes of implementing and administering this agreement.

## 10. FURTHER ASSURANCE

- 10.1 Each party will do all things and execute all documents reasonably required in order to give effect to the provision and intent of this agreement.

## 11. DISPUTES

### Reference to Alternative Dispute Resolution

- 11.1 Unless a party has first complied with clauses 11.1 to 11.4 (inclusive) that party may not commence court proceedings or arbitration relating to any dispute arising from this agreement (except where the party seeks urgent interlocutory relief, in which case that party need not comply with this clause before seeking such relief) and where that party fails to so comply with those clauses, the other party need not comply with those clauses before referring the dispute to arbitration or commencing court proceedings relating to that dispute.

### Parties to Designate Representatives

- 11.2 Either party (referred to in this clause as "**First Party**") claiming that a dispute has arisen under this agreement between the parties shall give written notice to the other party (referred to in this clause as "**Second Party**") designating as its representative in negotiations relating to the dispute a person with authority to settle the dispute. The Second Party shall, within five (5) Working Days after receipt of the First Party's notice, give written notice to the First Party, designating as its representative in negotiations relating to the dispute, a person with similar authority.



### **Attempt to Resolve Dispute**

- 11.3 The parties shall use their reasonable endeavours to procure that the persons designated under clause 11.2 shall, within ten (10) Working Days after the last designation required by clause 11.2, make whatever investigations each such person deems appropriate and seek to resolve the dispute.

### **Failure to Resolve Disputes**

- 11.4 If the dispute is not resolved within the period referred to in clause 11.3 (or within such longer period as the parties' respective representatives may agree is appropriate) the parties shall within a further period of ten (10) Working Days (or such longer period as the representatives may agree is appropriate) use their reasonable endeavours to agree, in good faith, on a process for resolving the whole or part of the dispute through means other than litigation or arbitration (including, without limitation, further negotiations, mediation, conciliation, or independent expert determination) and on:
- (a) the procedure and timetable for any exchange of documents and other information relating to the dispute;
  - (b) procedural rules and a timetable for the conduct of the selected mode of proceedings;
  - (c) a procedure for selection and compensation of any neutral person who may be engaged by the parties in relation to the dispute;
  - (d) whether the parties should seek the assistance of a dispute resolution organisation.

### **Reference to Court Proceedings/Arbitration**

- 11.5 After the expiry of the time established by or agreed under clause 11.4 for agreement on a dispute resolution process, a party which has complied with the provisions of clauses 11.1 to 11.4 (inclusive) may, by written notice to the other party, terminate the dispute resolution process provided for in those clauses and may then require that such dispute be submitted for determination by arbitration pursuant to clause 11.6 or resolved by litigation. Once any such notice has been given, both parties shall do all things reasonably possible to comply with that notice at the earliest available opportunity, and neither party shall have the right to give any subsequent notice under this clause 11.5.

### **Conduct of Arbitration**

- 11.6 In the event of a submission to arbitration pursuant to clause 11.5 the arbitration shall be conducted by a single arbitrator, pursuant to the Arbitration Act 1996 (referred to in this clause as the "**Arbitration Act**") provided that:
- (a) for the purposes of the following articles in the First Schedule to the Arbitration Act:
    - (i) **Article 11(2):** The arbitrator shall be such person as may be agreed upon in writing by the parties within three (3) Working Days after the expiry of any notice given pursuant to clause 11.5 or, failing such agreement being reached within that three (3)

Working Day period, shall be the person appointed, at the request of either party as arbitrator by the President for the time being of The Arbitrators' and Mediators' Institute of New Zealand Incorporated (referred to in this clause as "**President**") following such consultation with the parties as the President considers appropriate;

- (ii) **Article 20(1):** The place of arbitration shall be Kaikohe, New Zealand;
- (iii) **Article 21:** The date on which the arbitral proceedings shall commence shall be the date on which the dispute between the parties is submitted to arbitration in accordance with clause 11.5;
- (iv) **Article 22(1):** The language used in the arbitral proceedings shall be English;
- (v) **Article 28(1):** The law applicable to the substance of the dispute shall be New Zealand law;
- (b) such arbitration shall be deemed to not be an international arbitration for the purposes of the Arbitration Act;
- (c) for the purposes of clause 5 of the Second Schedule to the Arbitration Act, either party may appeal to the High Court on any question of law arising out of an award of the arbitrator.

## 12. NOTICES

12.1 Any written notice required to be given pursuant to this agreement shall (without limitation) be deemed validly given if:

- (a) signed by the party giving that notice; and
- (b) delivered by hand or sent by facsimile transmission (provided that the sender's facsimile machine confirms transmission to the intended recipient) to the intended recipient's physical address or facsimile number, as set out in schedule 1 (or to such other physical address or facsimile number as the intended recipient shall notify to the other party by written notice from time to time):

12.2 For the purposes of this agreement, any notice transmitted by facsimile or delivered after 5.00pm on a Working Day, or at any time on a non Working Day, shall be deemed received at 9.00am on the next Working Day.

## 13. GENERAL

### Expenses

13.1 Each party will pay its own costs and expenses (including legal expenses) sustained or incurred in connection with the preparation and execution of this agreement.

### Enforcement and Costs

- 13.2 Where one party ("**Defaulting Party**") has committed a default under this agreement the other party ("**Non Defaulting Party**") may, subject to clause 11.0, enforce this agreement by such action including an action for specific performance as it sees fit and the Defaulting Party shall pay all costs and expenses (including legal expenses on a solicitor and own client basis) sustained or incurred by the Non Defaulting Party in connection with the exercise of, or in protecting or enforcing or otherwise in connection with, the Non Defaulting Party's rights under this agreement. Payment will be on demand and on a full indemnity basis.

#### **Amendments**

- 13.3 No amendment to this agreement will be effective unless it is in writing signed by both parties.

#### **Partial Invalidity**

- 13.4 The illegality, invalidity or unenforceability of a provision of this agreement under any law will not affect the legality, validity or enforceability of that provision under another law or the legality, validity or enforceability of another provision.

#### **No Merger**

- 13.5 The obligations of the parties to this agreement shall not merge insofar as they have not been fulfilled as at the Settlement Date but shall remain in full force and effect.

#### **Entire Agreement**

- 13.6 This agreement contain all the terms of the agreement between the parties and supersede all prior discussions and arrangements in relation to the subject of this agreement.

#### **Governing Law**

- 13.7 This agreement is governed by the laws of New Zealand and the parties submit to the non exclusive jurisdiction of the New Zealand courts in respect of all matters relating to this agreement.