

Dated

2007

CITY OF JOONDALUP

AND

**WHITFORD COMMUNITY RATEPAYERS AND
RECREATION ASSOCIATION INC.**

DEED

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BETWEEN: CITY OF JOONDALUP of Boas Avenue, Joondalup, Western Australia 6027 (“the City”);

and WHITFORD COMMUNITY RATEPAYERS AND RECREATION ASSOCIATION INC. of P.O. Box 509, Hillarys, Western Australia 6025 (“the Association”);

RECITALS

A. The City and the Association have agreed that:

- (a) the Association will provide certain services in connection with the Association’s Bus;
- (b) the City will contribute towards certain costs associated with the Association’s Bus, subject to and upon certain terms and conditions.

B. The parties have agreed to record the terms and conditions of their agreement in this Deed.

OPERATIVE PROVISIONS

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Deed unless the contrary intention appears:

“**Bus**” means a 2006 model Toyota Coaster 20 seat 4.1 litre turbo diesel bus or a bus of any other model or year which is agreed in writing by the parties;

“**Dispute**” means a dispute or difference between the parties as to the construction of this Deed or as to any matter or thing of whatsoever nature arising under or in connection with this Deed;

“**Scheduled Maintenance**” means the scheduled servicing of the Bus as specified or recommended in the manufacturer’s handbook, manual or specification;

“**Term**” means the term specified in clause 2.

1.2 Interpretation

In this Deed, unless the contrary intention appears:

- (a) words suggesting the singular include the plural and vice versa;
- (b) words suggesting any gender include any other gender;
- (c) reference to a person includes a company, corporation, unincorporated or incorporated association or statutory authority;
- (d) references to clauses, paragraphs, subparagraphs and schedules are to clauses, paragraphs, and subparagraphs of, and schedules to, this Deed as amended from time to time in accordance with the terms of this Deed;

- (e) headings used for clauses, paragraphs, subparagraphs, schedules and the table of contents are for ease of reference only and will not affect the interpretation of this Deed;
- (f) references to laws include any modification or re-enactment of those laws, or any legislative provisions substituted for such laws, and all orders, local laws, planning schemes, by-laws, regulations and other statutory instruments issued under those laws;
- (g) use of the words “includes” or “including” means without limitation;
- (h) a reference to any body is:
 - (i) if that body is replaced by another organisation, deemed to refer to that organisation; and
 - (ii) if that body ceases to exist, deemed to refer to the organisation which most nearly or substantially serves the same purposes or objects as that body; and
- (i) all dollar amounts specified in this Deed are in Australian dollars.

2. TERM

2.1 Term

The term of this Deed is for a period of 5 years commencing on 1 July 2007 and expiring on 30 June 2012.

2.2 Discussions for extension of the Term

There is no compulsion on either the City or the Association to agree to an extension of the Term, however:

- (a) during the last year of the Term, when requested to do so by either party, the parties shall discuss the possibility of the parties entering into a new agreement for a further term with the intent of finalising those discussions prior to the expiry of the Term; and
- (b) in the event that the City and the Association agree to an extension of the Term, this document shall continue to apply unless varied in writing by the parties.

3. THE ASSOCIATION'S OBLIGATIONS

3.1 Scheduled Maintenance

The Association must caused to be carried out by an experienced motor mechanic all Scheduled Maintenance on the Bus at intervals recommended by the manufacturer of the Bus.

3.2 Licensing of the Bus

The Association must keep the Bus licensed as required by law.

3.3 Motor vehicle insurance

The Association must effect and maintain motor vehicle insurance in respect of the Bus for its full replacement cost.

3.4 Bus to be maintained in safe and roadworthy condition

- (1) The Association must maintain the Bus in a safe and roadworthy condition.
- (2) If the City considers that the Bus is not in a safe and roadworthy condition whether by reason of damage (insured or uninsured), want of maintenance or otherwise then the City may give to the Association notice in writing requiring the Association to carry out whatever repairs or other work is necessary to bring the Bus into a safe and roadworthy condition and to do so within a reasonable period. (not exceeding 3 months) specified in the notice.
- (3) If the Association fails to observe the notice then the City is entitled to terminate this Deed.

3.5 Third party insurance

The Association must effect and maintain third party insurance in respect of the Bus.

3.6 Garaging of the Bus

The Association must keep the Bus securely garaged at all times when not in use.

3.7 Bookings of the Bus by others

- (1) The Association must use reasonable endeavours to encourage and to permit the hire of the Bus by operating in the district of the City of Joondalup community, charitable and any other associations, bodies or persons.
- (2) The Association must consult with the City concerning the fees and conditions of hire of the Bus to the associations, bodies and persons referred to in subclause (1).

4. CITY'S OBLIGATIONS

4.1 Costs of Scheduled Maintenance, licensing and insurance

- (1) Subject to clause 4.2, the City must pay:
 - (a) the Association's costs incurred in causing Scheduled Maintenance to be carried out during each year of the Term; and
 - (b) the Association's costs incurred in licensing the Bus during each year of the Term; and
 - (c) the Association's costs incurred in insuring the Bus under clause 3.3 during each year of the Term,

provided that the Association gives to the City an invoice for the costs no later than 14 days after the end of the year.

- (2) In this clause "year" means a period of 12 months commencing on 1 July.

4.2 Limit of City's liability

The liability of the City under clause 4.1 does not exceed \$4500 in respect of any year of the Term.

4.3 Garaging at McDonald Park

The City must permit the Association to garage the Bus at the Fleur Freame Pavilion in Padbury subject to reasonable terms and conditions.

5. TERMINATION

5.1 Termination by City

If:

- (a) the Association fails to perform or observe any of the Association's obligations under this Deed and the failure continues for 14 days; or
- (b) the Association:
 - (i) enters into liquidation other than for the purpose of amalgamation or reconstruction; or
 - (ii) is wound up or dissolved; or
 - (iii) enters into a scheme of arrangement with creditors; or
 - (iv) is placed under official management; or
 - (v) a receiver and/or manager of any of its assets is appointed; or
 - (vi) an administrator is appointed,

then the City may immediately or at any time following without any notice or demand and despite any prior waiver or failure to take action by the City in respect of any previous breach by the Association the City may terminate this Deed.

5.2 City's right to remedy

- (1) If the Association is in breach of this Deed the City may, but is not obliged to, rectify the breach.
- (2) Any amount incurred by the City in rectifying the breach shall be paid by the Association to the Council on demand.

5.3 Accrued rights

Termination of this Deed will not affect any accrued rights of either party.

6. GENERAL

6.1 No waiver

- (1) A party's failure to take advantage of any default or breach by the other party will not be construed as a waiver of that breach.

- (2) Any custom or practice which may occur between the parties during the Term will not be construed as a waiver of or as decreasing a party's right to insist on performance of this Deed by the other party.
- (3) A waiver by a party of a particular breach will not be deemed a waiver of any subsequent identical breach.

6.2 Notices

- (1) Any notice required to be served will be sufficiently served if:
 - (a) delivered personally; or
 - (b) left addressed to the party, in the case of the Association at the registered office of the Association and in the case of City at the City's offices at Boas Avenue, Joondalup; or
 - (c) forwarded by pre-paid post to the party, in the case of the Association to the office of the Association as specified in this Deed and in the case of the Association to the City at Boas Avenue, Joondalup.
- (2) Any notice that is served in accordance with the provisions of this clause will be valid and effective even if the Association is in liquidation, wound up, under official management or dissolved.
- (3) Any notice sent by pre-paid post will be deemed to be served on the date on which it would normally have been delivered in the ordinary course of post.

6.3 Partnership negatived

Nothing in this Deed will be deemed or construed by the parties or any third party as creating the relationship of partnership, principal and agent or joint venture.

6.4 Exclusion of implied terms

The provisions of this Deed comprise the whole of the agreement between the parties and the parties acknowledge that no further or other provisions will be implied in the Deed or arise between the parties by any:

- (a) collateral or other agreement; or
- (b) any promise, representation, warranty or undertaking given or made by either party to the other on or prior to the execution of the Deed,

and the existence of any implication or collateral or other agreement is expressly negatived.

6.5 Proper law

This Deed is governed by the laws of the State of Western Australia and the parties submit to the jurisdiction of the courts of that State.

6.6 Severability

- (1) All provisions of this Deed shall, so far as possible, be construed so as not to be invalid, illegal or unenforceable in any respect.

- (2) If any provision on its true interpretation is illegal, invalid or unenforceable that provision will so far as possible be read down to the extent necessary to ensure that it is not illegal, invalid or unenforceable.
- (3) If the provision or part of it cannot be read down the provision or part will be deemed to be void and severable and the remaining provisions of this Deed will not in any way be affected or impaired.

6.7 Assignment

The Association must not assign this Deed.

7. GST

- (1) If GST is imposed or levied in respect of any supply by a party under or in accordance with this Deed (including the supply of any goods, services, rights, benefits or other things) then the party making the supply may recover the GST Amount from the party receiving the supply in addition to the Consideration. The party making the supply shall provide such invoices to the party receiving the supply as are required pursuant to the GST Legislation.

- (2) In this clause:

“Consideration” means any amount or consideration payable or to be provided pursuant to any provision of this Deed other than this clause;

“GST” means any form of goods and services tax or similar value added tax;

“GST Amount” means the Consideration (after deducting the GST Exempt Component) multiplied by the Rate;

“GST Exempt Component” means any part of the Consideration which solely relates to a supply that is free or exempt from the imposition of GST;

“GST Legislation” means A New Tax System (Goods and Services Tax) Act 1999 and any other legislation or regulation which imposes, levies, implements or varies a GST or any applicable rulings issued by the Commissioner of Taxation;

“Rate” means the rate at which GST Legislation from time to time imposes or levies GST on the relevant supply under this Deed;

“supply” includes supply as defined under GST Legislation.

8. DISPUTE RESOLUTION

8.1 No proceedings

The parties agree that no Dispute under this Deed will be referred to the courts for resolution (except when necessary to preserve the subject matter of the action by way of injunctive or declaratory proceedings) until the process in this clause 8 has been complied with.

8.2 Notification of a Dispute

If any Dispute arises between the parties, either party must give written notice to the other party that a Dispute exists (“the Dispute Notice”).

8.3 Reasonable effort to resolve Dispute

- (1) Within 7 days of receipt of a Dispute Notice, the parties must ensure that a senior officer of each party meets to attempt to resolve the Dispute.
- (2) If the senior officers reach a resolution, the senior officers will give their recommendation for the resolution of the Dispute to the parties.
- (3) Any resolution of the Dispute must be reduced to writing on behalf of both parties, and will not be binding until so reduced to writing and signed on behalf of both parties.
- (4) If either of the parties do not agree with the resolution proposed by the senior officers, the Dispute is referred back to the parties for further consideration.
- (5) If the Dispute is not being resolved within 21 days of the date of receipt of the Dispute Notice, the Dispute may be referred for resolution in accordance clause 8.4.

8.4 Mediation

- (1) If a party refers the Dispute to mediation, the parties must attempt to resolve the Dispute in accordance with the mediation rules of the Institute of Arbitrators and Mediators Australia.
- (2) If the Dispute is not being resolved within 14 days of mediation being commenced, then either party may:
 - (a) refer the Dispute to arbitration, upon which clause 8.5 will apply; or
 - (b) commence court proceedings.

8.5 Arbitration

- (1) A Dispute may only be referred to arbitration if both of the parties agree. Reference to arbitration must be accordance with the Commercial Arbitration Act 1985.
- (2) The arbitration will be held in Perth, Western Australia or any other place as agreed by the parties.
- (3) The parties will appoint a person agreed between themselves to be the arbitrator of the Dispute.
- (4) If the parties fail to agree on a person to be the arbitrator under subclause (3), then the parties must request the Australian Commercial Dispute Centre to appoint an arbitrator.
- (5) Determination of the Dispute under this clause 8.5 is final and binding on the parties.

8.6 Breach

If a party breaches the requirements of this clause 8 the other party may immediately commence arbitration or court proceedings in order to resolve the Dispute.

8.7 Continued performance

Despite the provisions of this clause 8, both parties must (except as expressly stated otherwise in this Deed) continue performing their respective obligations under this Deed.

DRAFT

Executed as a Deed.

THE COMMON SEAL of CITY OF JOONDALUP)
was hereunto affixed pursuant to a resolution of the)
Council in the presence of:)

Mayor

Chief Executive Officer

THE COMMON SEAL of WHITFORD)
COMMUNITY RATEPAYERS AND)
RECREATION ASSOCIATION INC. was hereunto)
affixed by authority of the Board of Management in the
presence of:

Signature of authorised person

Signature of authorised person

Office held

Office held

Name of authorised person
(block letters)

Name of authorised person
(block letters)