

Agreement to Build

PARTIES

Whai Rawa Kainga Development Limited

Builder

[Insert purchaser(s)]

Lessee

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AGREEMENT dated

2023

PARTIES

Whai Rawa Kainga Development Limited

("Builder")

[Insert purchaser(s)]

("Lessee")

BACKGROUND

- A. The Lessee is a Member of Ngāti Whātua Ōrākei or, where a Shared Ownership Agreement has been entered into, the Lessee comprises, as tenants in common, a Whanau Member and Ngāti Whātua Ōrākei Housing Trustee Limited (in its capacity as trustee of the Ngāti Whātua Ōrākei Housing Trust No. 2)
- B. The Lessee has entered into the Agreement to Lease with the Lessor
- C. The Builder has agreed to build a Home (to comprise a house on the principal unit and a carpark on the accessory unit) for the Lessee on the Premises as described in Schedule 1 and on the terms set out in this Agreement.

SIGNATURES

SIGNED by the **BUILDER** by:

Signature of Authorised Signatory

Name of Authorised Signatory

In the presence of:

Signature of witness

Name of witness

Occupation

City/town of residence

SIGNED by the **LESSEE** by:

Signature of Authorised Signatory

Name of Authorised Signatory

In the presence of:

Signature of witness

Name of witness

Occupation

City/town of residence

**SCHEDULE 1
PROJECT DETAILS**

WHANAU MEMBER

Whanau Member's Full Name:
Whanau Member's address:
Whanau Member's phone number:
Whanau Member's email:

(Whanau Member's address is Whanau Member's postal address, physical address and address for service unless otherwise stated)

BUILDER

Whai Rawa Kainga Development Limited
Level 1, 8 Mahuhu Crescent, Auckland Central
(09) 972 2363

www.ngatiwhatuaorakeiwhairawa.com

(Builder's address is Builders postal address, physical address and address for service unless otherwise stated)

PREMISES

That part of the Property identified as PU [Insert] and AU [Insert] and outlined on the Subdivision Plan (subject to final measure).

PROPERTY

The property owned by Ngāti Whātua Ōrākei Trustee Limited and leased to the Lessor and comprising Lot [] DP [], and identified on the Subdivision Plan.

HOME

[Example: Type "A" 3 bedroom home including all concrete paths/driveways and landscaping within that part of the Property identified as PU [Insert].

CARPARK

The carpark(s) to be constructed on that part of the Premises comprising the accessory unit.

CONTRACT PRICE

\$ [] (including GST)

PAYMENT CLAIM DUE DATES

First payment claim - \$5,000.00 on the date this
Deposit: Agreement is signed.

The Completion Date

Final payment claim -
Balance of Contract Price

EXPECTED START DATE

[Insert]

**EXPECTED PRACTICAL
COMPLETION DATE**

[Insert]

LEASE	The sublease of the Premises to be granted by the Lessor to the Lessee pursuant to the Agreement to Lease.
SUNSET DATE (Clause 4.3)	[Insert]
WHANAU MEMBER IS AN ELIGIBLE PERSON	Yes / No (Delete as applicable)
A SHARED OWNERSHIP AGREEMENT IS IN PLACE	Yes / No (Delete as applicable)

SCHEDULE 2

TERMS OF AGREEMENT

1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement, unless inconsistent with the context:

"Agreement" means this Agreement as varied from time to time by written agreement between the Builder and the Lessee and includes the recitals and schedules of this Agreement;

"Agreement to Lease" means the agreement to lease the Premises dated on or around the date of this Agreement between the Lessee and the Lessor;

"Approvals" means all necessary consents, authorities, and permits required for the Builder to complete the Works;

"Body Corporate" has the meaning set out in the Lease;

"Completion Date" means the date being 10 Working Days following the later of

(i) the date of Practical Completion as notified by the Builder pursuant to clause 4.5; and

(ii) the issue by LINZ of a separate record of title for the Lease;

"Development" means the development of 24 townhouses on the Property together with the common property, carparking and ancillary development in accordance with this Agreement and the Agreement to Lease;

"Eligible Person" has the meaning given to that term in the 'Progressive Home Ownership Fund – Guidance for responding to the Invitation to Participate in the Te Au Taketake pathway of the fund' as is amended from time to time;

"Home" means, the dwelling (and all ancillary buildings) and the carpark to be constructed on the Premises by the Builder;

"Lessor" means Ngāti Whātua Ōrākei Housing Trustee Limited (in its capacity as trustee of the Ngāti Whātua Ōrākei Housing Trust);

"Member" has the same meaning as set out in the Lease;

"Plans and Specifications" means the plans and specifications for the Works attached to this Agreement which have been approved by the Whanau Member;

"Practical Completion" means the stage when the Works, in the opinion of the Builder's registered engineer or registered architect, acting in a professional capacity, are complete and only items of a comparatively minor nature require finishing, alteration or remedial action and a code compliance certificate has issued in respect of the Works;

"Put Option" means the put option dated on or around the date of this Agreement between the Whanau Member and the Lessor;

"Relevant Authority" means any government, local statutory or non-statutory authority or body having jurisdiction over the Property or Development;

"Shared Ownership Agreement" means a written agreement (if any) dated on or around the date of this Agreement between the Whanau Member and Ngāti Whātua Ōrākei Housing Trustee Limited (in its capacity as trustee of the Ngāti Whātua Ōrākei Housing Trust No. 2) to assist the with the purchase of the Home and providing for the shared ownership of the Lease between the Whanau Member and Ngāti Whātua Ōrākei Housing Trustee Limited (in its capacity as trustee of the Ngāti Whātua Ōrākei Housing Trust No. 2) as tenants in common;

"Subdivision Plan" means the plan attached to this Agreement and labelled Subdivision Plan;

"Whanau Member" means:

- (i) where no Shared Ownership Agreement has been entered into, the Lessee; and;
- (ii) where a Shared Ownership Agreement has been entered into, that party comprising the Lessee who is a Member;

"Working Day" has the meaning in the Property Law Act 2007; and

"Works" means the design and construction of the Home for the Lessee.

1.2 Whenever words appear in this Agreement that also appear in Schedule 1 then those words shall mean and include the details supplied after them in Schedule 1.

1.3 In this Agreement, unless the context otherwise requires:

- (a) the illegality, invalidity, or unenforceability of any provision in this Agreement shall not affect the legality, validity, or enforceability of any other provision;
- (b) singular words shall include the plural and vice versa;
- (c) one gender shall include the other genders;
- (d) words referring to persons shall include any individual, company, corporation, firm, partnership, joint venture, association, organisation, trust, state, agency of a state, municipal authority, government or any statutory body, in each case whether or not having a separate legal identity;
- (e) any covenant or agreement on the part of two or more persons shall bind those persons jointly and severally;
- (f) reference to anything of a particular nature following upon a general statement shall not in any way derogate from or limit the application of the general statement, unless the particular context requires such derogation or limitation;
- (g) any reference to month or monthly shall mean respectively calendar month or calendar monthly;
- (h) references to sections, clauses and schedules are references to sections, clauses and schedules in this Agreement;

- (i) the index, the section headings and clause headings have been inserted for convenience only and must be ignored in construing the Agreement; and
- (j) reference to any statute, regulation, ordinance or bylaw is a reference to all statutes, regulations, ordinances or bylaws as amended, consolidated, or substituted from time to time and shall include any regulations that may be passed under that statute.

2. DESIGN AND BUILD

Builder to Obtain Approvals

- 2.1 The Builder has obtained or will obtain all Approvals necessary for the Works.
- 2.2 The Builder shall provide a copy of all Approvals to the Lessee on request, or where this is not practicable, the Builder shall make a copy of the Approvals available for the Lessee to view at the Builder's office on request.

Builder to Design and Build

- 2.3 The Builder must design and build the Works:
 - (a) in a good and workmanlike manner;
 - (b) in general accordance with the Plans and Specifications;
 - (c) to sound and accepted architectural and engineering standards using contractors, designers and suppliers selected by the Builder;
 - (d) in accordance with all Approvals; and
 - (e) within a reasonable time.

Design Development

- 2.4 The Builder reserves the rights to make substitutions, make or incorporate additional work, and make changes to any item or thing expressed in or implied by the Plans and Specifications if:
 - (a) required to accommodate the requirements of any Approval;
 - (b) required due to the unavailability of materials, plant or equipment;
 - (c) required for the effective and timely construction of the Works; or
 - (d) in the Builder's reasonable opinion it is necessary to do so.
- 2.5 The Builder is not required to obtain the Lessee's approval to any substitution, additional work or change. However so far as practicable the Builder shall preserve the quality and intent of the Works as set out in the Plans and Specifications, and the Builder shall advise the Lessee of any material changes to the Plans and Specifications.

Subcontracting

- 2.6 The Builder may subcontract the Works. The Builder remains responsible for all subcontracted work.

Insurance

- 2.7 The Builder shall arrange contractors all risk insurance in respect of the Works and shall procure that the completed Works are insured during the period to the Completion Date.

Intellectual property

- 2.8 The intellectual property in the design of the Works is and remains the property of the Builder (or any party from whom the Builder holds a licence). The Builder grants the Lessee a licence to use the design to alter, maintain and repair the Works only.

Warranties

- 2.9 The Lessee is entitled to rely upon the implied warranties for household units set out in Sections 362I to 362K of the Building Act 2004 and the guarantees set out in the Consumer Guarantees Act 1993 and the Builder agrees to remedy any defects in the Works in accordance with these statutory requirements. The Builder shall provide the Lessee with guarantees and warranties issued directly by suppliers and contractors involved in the design or construction of the Works and capable of being assigned to the Lessee.
- 2.10 If the Builder is unable to assign a guarantee or warranty held with respect to the Works then the Builder agrees it holds those rights on trust for the Lessee. The Builder will from time to time, when requested by the Lessee, take reasonable steps to enforce such guarantees and warranties for the benefit of the Lessee at the Lessee's cost in all respects.

3. PAYMENT**Contract Price**

- 3.1 The Lessee shall pay the Contract Price (subject to clause 3.2).
- 3.2 Where the parties comprising the Lessee have entered into a Shared Ownership Agreement, the Contract Price payable by the Lessee (other than the Deposit to which clause 3.3 shall apply) to the Builder under this Agreement shall be paid in accordance with the Shared Ownership Agreement.

Deposit

- 3.3 The Whanau Member shall pay the Deposit on the date of this Agreement.

Payment claims

- 3.4 This is a construction contract for a residential occupier and the relevant provisions of the Construction Contracts Act 2002 apply.
- 3.5 The Lessee must pay the Contract Price to the Builder in cleared funds on the payment claim due dates stated in Schedule 1. For the final payment claim, the Builder shall first provide an invoice to the Lessee.

GST

- 3.6 All monetary amounts included in this Agreement include GST unless stated otherwise.

4. COMPLETION**Expected dates**

- 4.1 Expected start dates and completion dates are provided in Schedule 1 however the Builder is unable to guarantee these dates will be achieved.

Progress

- 4.2 The Builder will keep the Lessee informed of progress and will notify the Lessee from time to time of any change to the date on which it expects to achieve Practical Completion. The Builder will not be responsible for any delays in the completion of the Works for any reason beyond its control.

Sunset Date

- 4.3 The parties acknowledge that pursuant to the Put Option, if Practical Completion of the Works has not been achieved by the Sunset Date then the Lessee may at any time prior to Practical Completion occurring (time being of the essence), by notice in writing to the Lessor (in accordance with the Put Option), exercise the Put Option and, upon settlement of the Put Option, this Agreement shall automatically terminate and the Lessee shall be entitled to the return of the deposit paid (if any).

Code compliance certificate

- 4.4 The Builder will apply for a code compliance certificate from the Relevant Authority in respect of the Works as soon as it can practically do so.

Practical Completion

- 4.5 The Builder must advise the Lessee when it considers Practical Completion has been achieved. The Builder's registered engineer or registered architect shall issue a Certificate of Practical Completion once achieved and the Builder shall provide a copy of that to the Lessee.

Completion Date

- 4.6 The Builder must advise the Lessee of the Completion Date once Practical Completion has been achieved and a separate record of title has issued for the Lease.

Access After Completion

- 4.7 The Lessee acknowledges that the Builder has the right after the Completion Date to enter onto the Property to finish any incomplete works or rectify defects. In doing so the Builder may use contractors and agents and must cause as little inconvenience to the Lessee as is reasonably practicable.

Prescribed Information and Documentation

- 4.8 On or promptly following the Completion Date the Builder shall supply to the Lessee:

- (a) copies of guarantees and warranties referred to in clauses 2.9 and 2.10 (including information as to whether the guarantees or warranties are transferable, how to make claims and whether documentation needs to be signed and returned to issuers for the guarantees and warranties to be valid); and
- (b) information about the processes and materials to be used in maintaining elements of the Works, if maintenance is required to meet the durability requirements of the building code or the validity of a guarantee or warranty could be affected by how and whether maintenance is carried out.

Insurance

- 4.9 The Lessor shall procure that the Works are insured by the Body Corporate on and from the Completion Date.

5. GENERAL

Legal Costs

- 5.1 Each party shall be responsible for their own legal costs in relation to this Agreement.
- 5.2 Clause 5.1 shall be without prejudice to clause 11.2 of the Agreement to Lease.

Waiver

- 5.3 A waiver by any party of any breach of any of the obligations of any other party under this Agreement shall not prevent the subsequent enforcement of those obligations and shall not be deemed a waiver of any subsequent breach.

Notices

- 5.4 All notices must be in writing and may be served to the addresses set out in Schedule 1. The Whanau Member must notify the Builder if any of the Whanau Member's contact details change.
- 5.5 A notice is deemed to be received:
- (a) if it is personally delivered, when delivered;
 - (b) if it is posted, 3 Working Days after posting; or
 - (c) if it is sent by email, when the email is acknowledged by the recipient as received.
- 5.6 Any notice received after 5pm or received on a day that is not a Working Day, is deemed not to have been received until 9am on the next Working Day.

Assignment

- 5.7 The Lessee may not assign this Agreement except that:
- (a) the Lessee shall assign this Agreement to an assignee of its interests in the Agreement to Lease; and

- (b) the Lessee shall comply with clause 8 of the Agreement to Lease.

Disclaimer

- 5.8 The Plans and Specifications and all of the marketing material of whatever nature have all been prepared prior to commencement of construction of the Works. While every reasonable effort has been made to ensure the information is correct they are subject to amendment under the terms of this Agreement, and are intended for guidance only. No responsibility will be taken for any differences, errors or omissions which may become apparent upon completion of the Works.

Force Majeure

- 5.9 In the event that war, civil disorder, monetary or economic developments adversely affecting financial markets in New Zealand and elsewhere, acts of government, fire, earthquake or other factors beyond the reasonable control of the Builder whether similar or not ("**Specified Event**") shall prevent or render it impracticable for the Builder to commence or continue construction of the Works then the Builder may by notice in writing to the Lessee advise of the Specified Event and cancel this Agreement and, subject to clause 5.10, neither party shall have any right or claim against the other.

Assignment and repayment of Deposit

- 5.10 In the event that this Agreement is cancelled in accordance with clause 5.9:
- (a) the Lessee shall enter into such documents as the Lessor may require to assign to the Lessor or its nominee its interest in the Agreement to Lease and the Lease granted pursuant to it; and
- (b) the Builder shall, upon the Lessee entering into such documents, repay the Deposit to the Whanau Member.
- 5.11 For the purposes of the Contract and Commercial Laws Act 2017, clause 5.10(a) is inserted for the benefit of the Lessor.

6. RESOLUTION OF DISPUTES

Negotiation

- 6.1 If a dispute arises, the parties agree that before exercising any rights they may have at law, each of them must use their best efforts to resolve the dispute through good faith negotiations. A party seeking resolution of a dispute must give a notice to the other party to the dispute and the parties' representatives must meet within 5 Working Days after that notice is given to attempt to resolve the dispute.
- 6.2 If a dispute cannot be resolved within 10 Working Days of notice being given under clause 6.1, either party may serve written notice on the other referring the dispute to mediation.
- 6.3 The mediator must be agreed between the parties. However, if the parties cannot agree on a mediator within 5 Working Days of the matter being referred to mediation, a mediator must be appointed by the President of the New Zealand Law Society.
- 6.4 Each party must pay its own costs associated with the mediation.

- 6.5 Despite the dispute, each party must continue to perform its obligations under this Agreement as far as practicable given the nature of the dispute.

Adjudication

- 6.6 For the purposes of the Construction Contracts Act 2002 the parties agree that the Building Disputes Tribunal is an agreed nominating body should either party wish to use adjudication to resolve a dispute.

New Zealand Law

- 6.7 This Agreement shall be governed by New Zealand law. The parties accept the non-exclusive jurisdiction of the court of New Zealand to determine any claim, dispute or other matter arising whatsoever out of this Agreement.

7. CANCELLATION

Non-payment of deposit

- 7.1 If the deposit is not paid on the due date, the Builder may at any time serve a notice on the Whanau Member requiring payment. If the Whanau Member fails to pay the deposit on or before the fifth Working Day after service of the notice, time being of the essence, the Builder may cancel this Agreement by serving notice of cancellation on the Whanau Member.

Cancellation of Agreement to Lease

- 7.2 If the Agreement to Lease is cancelled or terminated then this Agreement shall be deemed to have been cancelled with effect from the date the Agreement to Lease is cancelled or terminated.

8. ACKNOWLEDGEMENTS

Building (Residential Consumer Rights and Remedies) Regulations 2014

- 8.1 The Lessee acknowledges the Builder has supplied and the Lessee has received, the disclosure information and checklist prescribed in Regulation 5 of the Building (Residential Consumer Rights and Remedies) Regulations 2014 in the form attached to this Agreement as Annexure 1.

Acknowledgement of Crown contribution

- 8.2 Where the Whanau Member is identified as an Eligible Person in Schedule 1, the Whanau Member acknowledges that it is receiving the benefit (directly or indirectly) of funding via the Progressive Home Ownership Fund administered by Te Tūāpapa Kura Kāinga – Ministry of Housing and Urban Development.

PLANS AND SPECIFICATIONS

1. Subdivision Plan
2. Plans and Specifications for the Home

ANNEXURE 1
FORM OF PRESCRIBED DISCLOSURE INFORMATION