

MEMORANDUM OF AGREEMENT

entered into between

PROVINCIAL DEPARTMENT OF HOUSING KWAZULU-NATAL

(Represented herein by Ms D.N Mthembu
in her capacity as the Chief Director: Project Management
and duly authorised thereunto by resolution 18/11/2002
hereinafter referred to as “the DOH”)

and

represented herein by _____
and duly authorized thereto
by a resolution dated _____
a copy of which is annexed hereto marked “A”
(hereinafter referred to as “The Developer”)

PREAMBLE

Whereas Chapter 11 of the Code, read together with the Additional Rural Guidelines provides access to housing subsidies for beneficiaries in rural/tribal areas who enjoy functional security of tenure/informal land rights;

and whereas the Developer has applied to the DOH for approval for stages 1 & 2 comprising two tranches;

and whereas the DOH has approved the project described as the **IZIBONDA KWAMACHI RURAL HOUSING PROJECT** and referred to as Project No. **K041 10003**.

and whereas the DOH has agreed to make 1000 rural subsidies, informal land rights available to the intended beneficiaries of this project;

and whereas the parties wish to record their agreement in writing;

Annie/y. Users /rural version1/10.2004

NOW THEREFORE IT IS AGREED:-

1. INTERPRETATION

1.1 In this agreement and unless inconsistent with the context:

1.1.1 words of the one gender shall include words of the other gender;

1.1.2 words importing the singular shall be deemed also to import the plural and vice versa;

1.1.3 headings to clauses shall not serve as a means of interpretation of any such clause.

1.2 The following words and expressions shall, unless inconsistent with the context, have the meanings assigned to them hereunder;

1.2.1 “Additional Rural Guidelines” Provincial Policy supplementary to Chapter 11 of the Code, dealing specifically with the provision of *Rural Subsidies* on tribal land.

1.2.2 “Application” The application by the Developer to the DOH for the granting of Rural Subsidies in accordance with Part 3 of Chapter 3 of the Code and Provincial Policy thereon, including all annexures to that application;

- 1.2.3 “Area”** The area referred to in the diagram, prepared by a land surveyor,
- 1.2.4 “Beneficiaries”** An individual who holds informal rights to the land within the project area and who receives a Rural Subsidy;
- 1.2.5 “Code”** The National Housing Code in respect of the Department of Housing’s national housing policy and administrative guidelines, as amended from time to time;
- 1.2.6 “Development programme”** the programme for the development of the area in accordance with the provisions of this agreement, a copy of which is annexed hereto marked “C”;
- 1.2.7 “DOH”** The Department of Housing of KwaZulu-Natal or its successor-in-title;
- 1.2.8 “Effective date”** The date by which both parties have signed this agreement;
- 1.2.9 “External services”** All primary water, sewerage, electricity and stormwater services as well as the road network to which internal services are to be linked;
- 1.2.10 “Functional tenure”** Refers to informal rights in land as defined in section 30 of the Interim Protection of Informal Land Rights Act 31 of 1996;
- 1.2.11 “Global Positioning System”** This is technology using satellites to determine one’s position on the earth’s surface, rather than using conventional survey equipment and methods. The result is a number which represents the grid reference at the point at which the reading is taken. The advantage of using this technology is that the time taken to determine an accurate position is substantially reduced therefore is more cost effective. The high resolution machines can give an accuracy level sufficient for cadastral survey work.
- 1.2.12 “Housing Subsidy Scheme”** The housing subsidy scheme administered by the DOH in accordance with the requirements of the National Department of Housing;
- 1.2.13 “Internal services”** The services within the area, to be provided by the Developer, in accordance with the provisions of this agreement and the services agreement;

- 1.2.14 “Minister”** Means the Member of the Executive Council of the KwaZulu-Natal Provincial Government contemplated in section 132 of the Constitution whose portfolio includes responsibility for the provision of housing.
- 1.2.15 “Municipality”** The person, institution or body who initiates, designs and undertakes housing development projects. In this instance the developer will be the municipality who will be in consultation with the Traditional Authority.
- 1.2.16 “National database”** The database maintained by the National Department of Housing which contains the names and identity numbers of persons who have previously received financial assistance from the Government of the Republic of South Africa in order to acquire residential property;
- 1.2.17 “Progress payment”** Those payments to be paid to the Municipality as a phased payment in accordance with the provisions of Part 3 of Chapter 3 of the Code and the Provincial Policy, more fully described in the payment schedule annexed hereto marked “D”
- 1.2.18 “Project”** The development of the area as described in the project proposal.
- 1.2.19 “Provincial Policy”** The policy of the DOH with regard to the provision of subsidies and development of low income housing projects;
- 1.2.20 Rural Subsidy** (RS) means a subsidy that does not require as a precondition for payment that a beneficiary acquires title to a particular piece of Land;
- 1.2.21 “Residual”** The amount constituting a portion of the Tranche 2 payment” in annexure “D”;
- 1.2.22 “Resolution”** The resolution of the DOH setting out the terms and conditions upon which the application was approved, a copy of which is annexed hereto marked “E”;
- 1.2.23 “Residential Allotment ”** An allotment within the area, depicted on the settlement plan of the area, to which the basic level of services have been provided in accordance with the terms and conditions of this agreement;

- 1.2.24 “Services agreement”** The agreement to be entered into between the Developer, the municipality and any other external service providers relating to the design and standard of internal and bulk services to be provided to the area and the responsibility for the provision and maintenance thereof;
- 1.2.25 “Social compact”** An undertaking between stakeholders about commitment to undertake a housing project according to an agreed development vision.
- 1.2.26 “State”** The National, Provincial or Local Government, or an entity wholly owned by any of them, as the context may indicate;
- 1.2.27 “Top-structure”** A dwelling or building materials constructed on or supplied to a residential allotment erf in order to render it an improved erf.
- 1.2.28 “Traditional/Tribal Authority”** Means a Tribal Authority established in terms of Section 5(1) of the Kwazulu Amakhosi and Iziphakanyiswa Act, no. 90 of 1990.

2. CONTRACT DOCUMENTS

- 2.1 The contract between the parties in respect of the implementation of the project is contained in the following documents:

	This agreement	
<	Annexure A.....	Developer’s Resolution
<	Annexure B.....	Development Proposal
<	Annexure C.....	Development Programme
<	Annexure D.....	Progress Payment Schedule
<	Annexure E.....	Project Approval
<	Annexure F	Proforma’s of Project Certificates

- 2.2 In the event of any conflict between the provisions of any documents contained in the contract documents, those documents shall prevail over one another in the sequence set out in 2.1 above.

The entire agreement (including all the documents contained in the contract document) is subject to the provisions of part 11. of the Code and the Additional Rural Guidelines. If there is any conflict between any provisions contained in the contract document and the provisions of Part 11 and the Additional Rural Guidelines, the provisions of part 11 and the Additional Rural Guidelines shall prevail.

3. APPROVED SUBSIDIES

- 3.1 The DOH has approved that a provisional amount of R825 000.00 inclusive of geotech is set aside to implement the project consisting of 1100 residential units (annexure hereto)
- 3.2 Notwithstanding the provisions of clause 3.1 above this project shall be implemented in two stages and the funding thereof shall be advanced in tranches. This stage A funding (tranche 1) is limited to R825 000.00 or R750.00 per site.
- 3.3 The tranche 1 payment will be paid to the Developer at the times and in the manner set out in this agreement.

2. IMPLEMENTATION

- 4.1 The Developer undertakes to implement the project:-
- 4.1.1 substantially in accordance with the contract documents;
- 4.1.2 particularly, but without limitation, within the period set out in the development programme (annexure C hereto)
- 4.2 The Developer acknowledges that adherence to the development programme is a material term of this agreement and hereby undertakes:
- 4.2.1 to commence and complete the project within the periods provided for in the development programme;
- 4.2.2 to meet any interim time periods provided for in the development programme.
- 4.3 If, at any time, it appears to the Developer that it will be necessary to amend the project programme, the Developer shall :-
- 4.3.1 request an amendment of the project programme from the DOH;
- 4.3.2 substantiate that request.
- 4.4 On receipt of any written request from the Developer to amend the project programme, the DOH may, acting in its discretion and if it is of the opinion that there are valid reasons for any such an extension, grant it. Any extension granted by the DOH shall be recorded

in writing.

- 4.5 Should the Developer fail to apply in writing for an extension of the development programme or any time period provided therein within the said twenty-one days or should the DOH not grant an extension of the time period, then the development programme referred to in clause 4.1 hereof shall not be exceeded nor the Developer exonerated from liability to pay the penalty stipulated in clause 4.7 hereof.
- 4.6 If the Developer fails to complete the project within the development programme or any time period or any extension thereof, the DOH shall have the right without prejudice to any other rights available to the DOH, to recover a penalty of four cents per one hundred rand of the development milestone sum per day for each day on which the completion of the project milestone may be in arrear as provided for in clause 4.1 hereof. Such penalty may be recovered or may be deducted as from the day following the date of completion stated in the development programme, or any extension thereof, from any payment due or to become due under the development programme.
- 4.7 The Developer undertakes, on a monthly basis, to deliver detailed written reports in regard to the implementation of the project to the DOH. In particular any such a report shall indicate:-
- 4.7.1 the progress made in the undertaking of the activities listed in paragraph 3.4 of the approval
 - 4.7.2 any difficulties experienced by the Developer in implementing the project;
- 4.8 The DOH shall at all and any times be entitled to:-
- 4.8.1 request the Developer to report to it in writing in regard to such aspects of the implementation of the project as the DOH may deem necessary;
 - 4.8.2 inspect all documents and works related to the project, in order to satisfy itself in regard to the progress made by the Developer in implementing the project.
 - 4.8.3 request any information from the Developer pertaining to the project which the Developer must supply;
 - 4.8.4 call meetings which the Developer shall be obliged to attend in order to deal with any queries of the DOH pertaining to the project.

3. TERMS AND CONDITIONS

5.1 It is agreed that payments to be made by the DOH to the developer , subject to the availability of funds, for each respective tranche shall be strictly in accordance with the progress payment milestones applicable to that tranche.

5.2 Notwithstanding the provisions of clause 6.1 below , the funds shall not be advanced to the Developer until satisfactory proof of the opening of the dedicated account contemplated in clause 6.1 below has been presented to the DOH.

5.3 The payment of any milestone payments in respect of each tranche is subject to the developer complying with the requirements for that tranche as elaborated in annexure D.

5.4 In the management of the account so opened the Developer undertakes to comply with the provisions of the Local Government: Municipal Finance Management Act, 2003.

4. TRANCHE PAYMENTS

6.1 The DOH shall subject to the availability of funds, within 14 days from the date of signature of this agreement and subject to the provisions of this agreement, advance to the developer an amount of which amount must be deposited by the developer into a dedicated account which must be opened by the developer specifically for this purpose. The funds so advanced must be utilised by the Developer in accordance with the provisions of Chapter 3 of the Code.

6.2 Any interest accruing to the account referred to in clause 9.1 above must be deposited into the Municipal Housing Operating Account which must be opened in terms of section 16(2) of the Housing Act 107 of 1997 as amended.

6.3 In the event that the DOH pays the Developer an amount in excess of the amount to which the Developer is entitled, then:

6.3.1 the Developer shall, within 14 (fourteen) days of receipt of a demand from the DOH, refund any excess payment to the DOH, provided that in the event that the developer fails to make such payment then:

6.3.1.1 The amount owing shall attract interest at the prime overdraft rate charged by First National Bank of South Africa to its most favoured customers, calculated and compounded monthly in arrears, with effect from date of demand of payment to the date of payment, both days inclusive;

6.3.1.2 the DOH shall be entitled to set off the amount of any over-payment together with the interest due thereon against later payments due in respect of the project;

6.4 the failure by the Developer to repay such amount shall constitute a material breach of this agreement.

6.5 It is recorded that examples of the certificates required in order to draw down payments in terms of the progress payment schedule are annexed hereto marked "...D...".

7. PAYMENTS TO SERVICE PROVIDERS

7.1 The parties agree that the Developer may make payments to service providers as and when the payment milestones are achieved;

7.2 The Developer shall however not be entitled to make any payments in respect of any claims from the funds advanced unless, the Developer has first submitted invoices and obtained certified approval thereof from the DOH authorising payment to the service

provider. Such payments shall be made within 7 days from the date upon which the Developer receives the authority to make payment.

8. **PROFESSIONAL INDEMNITY INSURANCE**

8.1 It is recorded that the professional engineer, land surveyor and conveyancer employed by the Developer are covered by professional indemnity insurance sufficient to cover any claims which may arise specific to their services.

8.2 It is recorded further that proof of the abovementioned professional indemnity insurance is annexed hereto marked Appendix 1.15.

9. **REPORTING PROCEDURE**

9.1 The Developer shall submit progress reports to the DOH at the end of each consecutive month with effect from the effective date, which report shall set out the status of the project, whether the Developer is adhering to the programme and the reasons for any delays which have been experienced.

9.2 In addition to the reports required in terms of clause 9.1 above, the Developer shall provide the DOH with cash flow projections with each claim submitted by it.

9.3 Upon completion of the project, the Developer and the DOH shall sign a completion certificate as proof of completion of the project.

10. **ACCOUNTS**

10.1 The Developer shall cause proper books of account to be kept in accordance with generally accepted accounting principals.

10.2 The DOH shall at any time and if it deems appropriate to do so, have the right to appoint an auditor to undertake a detailed audit of the books of account of the Developer in so far as those books of account related to the project. The DOH shall meet the costs of such

audit and the Developer shall give full and complete access to all its relevant books of account and documents to the appointed auditor.

10.3 At the termination of the project, the Developer shall prepare a reconciliation of the project in accordance with the procedures laid down by the DOH from time to time

11. **CESSION OF AGREEMENT**

The Developer shall not be entitled to cede and assign its rights and obligations in terms of this agreement to a third party without the prior written consent of the DOH.

12. **VAT**

The Developer hereby acknowledges that services rendered in accordance with the provision of the Housing Subsidy Scheme are zero-rated for value-added tax in accordance with section 11(2)(p) of the Value-added Tax Act, 89 of 1991.

13. **BREACH**

13.1 In the event of any party committing a breach of this agreement and failing to remedy such breach within 14 (fourteen) days of the receipt of a notice of such breach, the aggrieved party shall, if such breach is material, be entitled to cancel this agreement and claim damages without prejudice to any of its other rights in law. If the breach is not material, the aggrieved party shall be entitled to sue for specific performance and claim damages without prejudice to any other rights it has in law.

13.2 This agreement shall immediately terminate:

13.2.1 should any judgment in respect of any debt in any Court of Law be obtained against any party and remain unsatisfied for a period of 14 (fourteen) days after notice of such judgement has come to the attention of the judgment debtor;

13.2.2 should any application be made for the sequestration or liquidation of any party.

14. **CONSENT TO JURISDICTION**

The DOH and the Developer hereby consent to the jurisdiction of the Magistrate’s Court notwithstanding the amount in dispute may exceed the jurisdiction of that court.

15. **DOMICILIUM CITANDI ET EXECUTANDI**

15.1 For the purpose of this agreement the parties choose their respective *domicilium citandi et executandi* as follows:

15.1.1 the DOH: **14th floor, Tolaram House, cnr Esplanade and Aliwal Street, Durban;**

15.1.2 The Developer:

.....
.....
.....
.....

15.2 Written notice of any change in *domicilium citandi et executandi* shall be delivered by hand or sent by prepaid registered certified post to the intended recipients.

15.3 Every notice to be given in terms of this agreement shall be in writing and shall be:

15.3.1 delivered by hand to the *domicilium citandi et executandi* of the intended recipient in which event it shall be irrefutably presumed to have been served and the intended recipient to have been informed of the contents of such notice when such notice is so delivered; or

15.3.2 posted by prepaid registered or certified post to the *domicilium citandi et executandi* or the last known address of the intended recipient in which event it shall be presumed to have been served and the intended recipient to have been informed of the contents of such notice on the fifth day, excluding Saturdays, Sundays, unless the contrary is proved.

15.3.3 Either party hereto shall be entitled to change its *domicilium citandi et executandi*

from time to time provided that any new *domicilium* selected by it shall be situated in the Republic of South Africa and shall be an address other than a box number and any such change shall only be effective upon receipt of notice in writing by the other party of such change.

16. **VARIATIONS**

No variation, modification or waiver of any provision of this agreement or consent to any departure therefrom shall in any way be of any force or effect unless confirmed in writing and signed by the parties and then such variation, modification, waiver or consent shall be effective only in the specific instance and for the purpose and to the extent for which it was made or given.

17. **WAIVER**

17.1 The waiver (whether express or implied) by either party of any breach of the terms or conditions of this agreement by another party shall not prejudice any remedy of the waiving party in respect of any continuing or other breach of the terms and conditions thereof.

17.2 No favour, delay or relaxation or indulgence on the part of any party in exercising any power or right conferred on each party in terms of this agreement shall operate as a waiver of such power or right nor preclude any other or further exercises thereof or the exercise of any other power or right under this agreement.

17.3 This expiry or termination of this agreement shall not prejudice the rights of either party in respect of any antecedent breach or non-performance by another party of any of the terms or conditions hereof.

18. **SPECIAL CONDITION**

The payment of the Tranche 1 payment by the Developer to the service provider is subject to the submission of a signed Development Rights Agreement between the Developer and the Ingonyama Trust Board.

19. SUSPENSIVE CONDITION

The parties hereby agree that notwithstanding the provisions of paragraph 9,of this agreement and Chapter 3 of the Code, the up-front advance of funds (tranche payment)is subject to the availability of funds

20. WHOLE AGREEMENT

This agreement constitutes the whole agreement between the parties in relation to its subject matter and supersedes all prior agreements and no documentation, representation, warranty or agreement not contained herein shall be of any force between the parties.

Thus done and signed at _____ on this _____ day of _____ 2004
in the presence of the undersigned witnesses.

AS WITNESSES:

- 1.
- 2.

**For and on behalf of the
PROVINCIAL DEPARTMENT OF HOUSING
KWAZULU-NATAL**

Thus done and signed at _____ on this _____ day of _____ 2004 in the
presence of the undersigned witnesses.

AS WITNESSES:

- 1.
.....

For and on behalf of the Municipality

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