

VOLUME 2 – PPP AGREEMENT

PUBLIC PRIVATE PARTNERSHIP AGREEMENT

Entered between

KNYSNA MUNICIPALITY

And

[PRIVATE PARTY]

For the development (Build), design, finance, maintenance & operations Manuals of ERF 3339
KNYSNA Social Housing Project.

ANNEXES

1. Subcontracts (Construction, Operations & Maintenance Manuals) (***Drafter's Note: Bidder to Prepare***)
2. Private Party Constitutive Documents (Memorandum of Incorporation, Certificate of Incorporation, Certificate to Commence Business) (***Drafter's Note: Bidder to Prepare***)
3. Shareholders Agreement (***Drafter's Note: Bidder to Prepare***)

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INTRODUCTION

This PPP Agreement regulates:

- i) The development (Build), design, finance, maintenance and operation of a new Social Housing Residential Housing complex, sell Houses to Beneficiaries earning between R3500.01 and R22000.00 monthly income, and open sites for self-construction Buyers.
- ii) The development and provision of middle earning (The GAP segment) Community. Output Specifications or as may be agreed in writing between the Parties after the Finance Close Date in accordance with the provisions of this PPP Agreement; and
- iii) The provision of expertise in similar Housing Development and Management. Compliance with all laws, Regulations and By-Laws of the Municipality, advertisement of Houses, Applications of the FLISP and Alienation of complete Houses to Buyers.

The Project's objectives have been approved by the Knysna Municipality and registered with the National Treasury in terms of the Municipal Systems Act, Municipal Finance Management Act and the Regulation 16 of the National Treasury in terms of the PFMA.

This PPP Agreement follows the Request for Proposals issued by the Knysna Municipality on [02 October 2025] inviting proposals from the private sector to undertake the development, design, financing, maintenance and operation of the Erf 3339 Fisherhaven, Knysna.

Pursuant to a competitive tender process, the Private Party (as defined in clause 1) was elected as the preferred bidder and its proposal negotiated. Following successful negotiations (and or BAFO), Knysna Municipality requested the Private Party, and the Private Party has agreed to undertake and provide the Project Deliverables (as defined in clause 1) on the terms and conditions set out in this PPP Agreement.

Now it is agreed as follows:

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This PPP Agreement confirms the meeting of the minds (consensus) between the Parties as follows:

- iv) The Private Developer will take over the Site, design the Site Layout, Design the Houses, Build, Finance, Sell Complete Houses (Sectional Titles) & Sub divided (Full Title) Erfs, provide Maintenance & Operations Manuals, Advertise Sales of Houses & assist in all Buyers Applications of Banks Home Loans, FLISP & any other Grant(s) (Estate Agent), Transfer Ownership of Complete Houses to Buyers, Transfer Ownership of Full Title Stands to 80 Free Stands to be purchased by affording purchasers at a market price with conditions for building homes and not for any other Purpose nor Leasing purposes, to Register the Complex SG Diagram with the Surveyor General & the Deeds Office (Conveyancing) and to comply with any Municipal By-Laws, Regulation & Laws of the Republic of South Africa.
- v) The Private Developer will take over the Site, design, Build, Fund, Maintain & Operate for 3 years and to have 144 (min) Town Houses fully Built and sell at Market Value to deserving Buyers funded by Banks and assist in FLISP Applications to those who qualify.
- vi) The Private Developer will take over the Site, design, Build, Fund, Maintain & Operate for 3 years it to have 103 Flats (min) and sell the same at Market Value to deserving Buyers funded by Banks and assist in FLISP Applications to those who qualify
- vii) The Private Developer will transfer Properties to Buyers and assure allocation of all Properties and ensure that all Properties are in good Quality Condition for 3 years
- viii) The Private Developer will accept adjudication of Delivery of Works from the Project Officer for works done and in acceptable condition.
- ix) The Private Developer will accept Alternative Dispute Resolution in the event that a dispute arises as shall be agreed at Financial Close and signing of this Agreement.
- x) The Private Party shall cause that the entire site unoccupied to remain the sole Property owned by Knysna Municipality in 3 years after the completion of the Development and Selling of demarcated Sites.
- xi) The Private Party shall make its income and in full of no Contingent Fees from selling of Properties mentioned herein *supra* with clear no charge to the Municipality at his/her or its risk.
- xii) The Private Developer assures the Municipality that the values of Properties shall be affordable to the Earning group between R3500.01 to R22000.00 Households per month of earnings.
- xiii) The Private Developer assures the Municipality that he/she or it will establish a Construction Company, the Marketing Company and Conveyancing Practitioner to transfer the bought properties at agreed cost.
- xiv) The Private Developer agrees that any defects to the Complex and individual houses that are built by him/her or it will be repaired at no cost to the Municipality during the 3-year latent defect liability period. The liability period is for the Private Party's liability.
- xv) The Private Party agrees that the principle of "*pacta sunt servanda*" shall apply between the Parties and as, when and where the contradiction between the Contract and the Constitution arises, the Constitution shall be supreme.

PART 1: PRELIMINARY

1. DEFINITIONS

In this PPP Agreement, unless the context otherwise requires, the following capitalized terms shall have the meanings assigned to them below and cognate expressions shall have corresponding meanings:

- 1.1 **Access Road** means the Initial Access Road or the Alternative Access Road (as applicable).
- 1.2 **Actual Construction Completion Date** means the date on which the construction and commissioning of all the Works is completed, being the date on which the Final Completion Certificate is issued.
- 1.3 **Adjusted Debt** means ninety percent (90%) of the Debt, **less**, to the extent that it is a positive amount, the aggregate of:
- 1.4 Any Post Termination Service Amounts paid to the Private Party to date.
- 1.4.1 All credit balances on any bank accounts held by or on behalf of the Private Party on the Termination Date and the value of any right of the Private Party or the Lenders to receive insurance proceeds or any proceeds pursuant to letters of credit and of any such proceeds actually received by them (save where such credit balances or proceeds are paid to the Municipality and/or are to be applied in reinstatement) and sums due and payable from the Subcontractors and any other third parties;
- 1.4.2 all amounts payable by the Lenders (or the counterparties to the interest rate or exchange rate hedging arrangements provided for in the Financing Agreements) to the Private Party in connection with the early termination of such hedging arrangements because of prepayment of amounts outstanding under the Financing Agreements.
- 1.4.3 amounts that the Municipality is entitled to set off or deduct under clause 40 (Set-Off),
- plus**
- 1.4.4 the Post Termination Service Amounts (if a negative number), to the extent that it has not been directly considered in that Tender and the Municipality is entitled to such amounts in accordance with this PPP Agreement.
- 1.5 **Adjusted Estimated Project Value** means the Estimated Project Value of the PPP Agreement
- less** the aggregate of:
- 1.5.1 the Post Termination Service Amounts (if a positive number).
- 1.5.2 the Calculation Costs; and
- 1.5.3 amounts that the Municipality is entitled to set off or deduct under clause 40 (Set-Off),
- plus**, the aggregate of:

- 1.5.4 all credit balances on any bank accounts held by or on behalf of the Private Party on the date that the Estimated Project Value of the PPP Agreement is calculated.
- 1.5.5 any insurance proceeds, and other amounts owing to the Private Party (and which the Private Party is entitled to retain), to the extent not included in 1.4.4; and
- 1.5.6 the Post Termination Service Amounts (if a negative number), to the extent that:
- (a) 1.4.4, 1.4.5 and 1.4.6 have not been directly taken into account in calculating the Estimated Project Value; and
 - (b) the Municipality has received such amounts in accordance with this PPP Agreement.
- 1.6 **Adjusted Highest Tender Price** means the Highest Tender Price **less**, to the extent it is a positive amount, the aggregate of:
- 1.6.1 any Post Termination Service Amounts paid to the Private Party to date.
- 1.6.2 the Tender Costs; and
- 1.6.3 amounts that the Municipality is entitled to set off or deduct under clause 40 (Set-Off),
- plus**, the aggregate of:
- 1.6.4 all credit balances on any bank accounts held by or on behalf of the Private Party on the date that the Highest Tender Price is received.
- 1.6.5 any insurance proceeds and other amounts owing to the Private Party (and which the Private Party is entitled to retain), to the extent not included in 1.5.4; and
- 1.6.6 the Post Termination Service Amounts (if a negative number), to the extent that:
- (a) 1.5.4, 1.5.5 and 1.5.6 have not been directly considered in that Tender; and
 - (b) The Municipality is entitled to such amounts in accordance with this PPP Agreement.
- 1.7 **Affiliate** means any person that directly or indirectly through any one or more intermediaries Controls, is Controlled by or is under common Control with any person.
- 1.8 **Agent** means the agent of the Lenders from time to time.
- 1.9 **Agreed Form** means in relation to any document not executed simultaneously with this PPP Agreement, the terms and conditions of that document have been agreed by the Parties and initialed by each of them for identification purposes on or before the Signature Date.
- 1.10 **Alternative Access Road** means a new road which may be constructed by the Private Party from the N2 to the entrance of the Project Site as indicated in Schedule 6: Project Site.
- 1.11 **Annexes** means the documents and agreements annexed to this PPP Agreement marked as annexes, but which do not form part of this PPP Agreement, although they

have been concluded pursuant to this PPP Agreement.

- 1.12 **Available** means that the Services (or a part thereof) have been made available to the Municipality by the Private Party as required under this Agreement and **Availability** shall have a corresponding meaning.
- 1.13 **Availability Certificate** means the certificate to be issued by the Private Party pursuant to clause 23.2 certifying that the Services are Available.
- 1.14 **Availability Deductions** have the meaning set forth in Schedule 1: Payment Mechanism.
- 1.15 **Base Case Equity IRR** means having regard to the base case Financial Model, the real post-tax Equity IRR as at the Signature Date, being fifteen percent (15%);
- 1.16 **Base Case Financial Model** means the financial base case for the Project attached to this PPP Agreement on disk as Schedule 2: Financial Model, which model incorporates the forecasted cash flow statements of the Private Party including all expenditure, revenues, taxation and financing of the Project Deliverables together with the income statements and balance sheets for the Private Party over the Project Term, and details of all assumptions, calculations and methodology used in the compilation thereof, as at the Signature Date;
- 1.17 **Business Day** means any day except a Saturday, Sunday or gazette national public holiday in the Republic of South Africa.
- 1.18 **Calculation Costs** means the total of all reasonable costs incurred by the Municipality as a result of termination, which shall be calculated and discounted, from the date on which they are forecast to be incurred at the Termination Date Discount Rate and deducted from the payment calculated pursuant to sub-clause 1.4.2 in the definition of Adjusted Estimated Project Value above, such costs to include (without double counting):
- 1.18.1 a reasonable risk assessment of any cost overruns that will arise as a result of delivering the Works and/or Services to the standard required under the Output Specifications, whether or not forecast in the relevant base case.
- 1.18.2 the reasonable costs of procuring or performing the Services forecast to be incurred by the Municipality to the standard required; and
- 1.18.3 any rectification costs reasonably required to deliver the Services to the standard required (including any costs forecast to be incurred by the Municipality to complete construction or development work and additional operating costs required to restore operating services standards),
- 1.18.4 in each case such costs to be forecast at a level that will deliver the Services in accordance with the Output Specifications and in case which would not have been incurred had this PPP Agreement been terminated.
- 1.19 **Calendar Day** means a period of twenty-four (24) hours starting at zero hours (00:00) and ending at twenty-four hours (24:00);
- 1.20 **Capital Expenditure** means any expenditure treated as capital expenditure under IFRS.
- 1.21 **Change in Control** means any direct change in Control.
- 1.22 **Change in Law** means the introduction, application coming into effect of and/or change in the application after the Signature Date of this PPP Agreement of a Law or any amendment or variation to any Law other than any Law that on or before the Signature

Date has been published:

- 1.22.1 in a draft bill as part of a government white or green paper which is subsequently enacted in substantially the same form; or
- 1.22.2 in a bill which is subsequently enacted in substantially the same form.
- 1.23 **Compensation Date** means the date being one hundred and eighty (180) days after the Determination Date or such earlier date upon which the Termination Amount is paid.
- 1.24 **Compensation Date Interest Rate** means the interest rate set out in the Financing Agreements to be applied to termination payments to be made in accordance with clause 63 (Compensation on Termination for Municipality Default), clause 67 (Compensation on Termination for Force Majeure) and clause 68 (Compensation on Termination for Corrupt Acts) and payable from the 31st (thirty first) business day after the Determination Date to the Compensation Date (both days inclusive);
- 1.25 **Compensation Events** means any breach by the Municipality including a breach of any of the Municipality's obligations under this Agreement in respect of the Relevant Sites, a PetroSA Event and any failure of the Municipality to procure and renew the Municipal Consents, save for any breach that constitutes a Municipality Default.
- 1.26 **Completion Certificate/s** means the Phase 1 Completion Certificate and the Phase 2 Completion Certificate.
- 1.27 **Confidential Information** means any information or data irrespective of the form or media in which it may be stored, accessible to a Party because of this PPP Agreement or any transaction document, which is protected from disclosures by virtue of:-
- 1.27.1 the Promotion of Access to Information Act, 2000; and/or
- 1.27.2 is agreed by the Parties as at the Signature Date or prior to disclosure to the other party to be confidential in nature on grounds of commercial sensitivity.
- information or data, which one Party provides to another in terms of this PPP Agreement or a transaction document and in which the Party would have a reasonable expectation of confidentiality, but shall not include the disclosure of information:-
- 1.27.3 which would otherwise be Confidential Information if and to the extent that such information is disclosed as part of an attempt to resolve a dispute pursuant to clause 77 (Dispute Resolution) or clause 78 (Fast Track Dispute Resolution) or is made available or published by a Party as required by Law or any regulatory authority including the rules of any recognized stock exchange; or
- 1.27.4 which is revealed to a Party's employees, professional advisers, the Lenders or their professional advisers, subject to the Party's relevant employees, professional advisers, the Lenders or their professional advisers being aware of the content of clause 87 (Confidentiality) and agreeing to abide by the terms thereof; or
- 1.27.5 which is disclosed as part of any attempt to resolve a dispute pursuant to clause 77 (Dispute Resolution) or clause 78 (Fast-Track Dispute Resolution); or

- 1.27.6 which is made available or published by a Party as required by Law or any regulatory authority including the rules of any recognized securities exchange; or
- 1.27.7 which is or becomes public knowledge (otherwise) than by reason of breach of clause 87 (Confidentiality); or
- 1.27.8 which was in the possession of either Party without restriction in respect of its disclosure before receiving it from the other Party; or
- 1.27.9 which is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure; or
- 1.27.10 which is required to be disclosed to National Treasury or Parliament; or
- 1.27.11 which is required to be disclosed to the Auditor-General pursuant to the Public Audit Act; or
- 1.27.12 which is disclosed by the Municipality as reasonably required for the purpose of retendering the PPP Agreement in accordance with clause 65 (Retendering Procedure); or
- 1.27.13 which is disclosed by the Municipality to a Responsible Authority; or
- 1.27.14 which is disclosed to a third party with the prior written consent of the Party to whom such information is confidential to; or
- 1.27.15 which is required to be disclosed pursuant to the Promotion of Access to Information Act, 2000.

and **Confidential** shall have a corresponding meaning.

- 1.28 **Consents** mean all consents, permits, clearances, authorisations, approvals, rulings, exemptions, registrations, filings, decisions and licences required to be issued by or made with any Responsible Authority in connection with the Project.
- 1.29 **Construction Subcontract** means the contract between the Private Party and the Construction Subcontractor in respect of the Works.
- 1.30 **Construction Subcontractor** means being the person/s appointed by the Private Party to undertake the Works.
- 1.31 **Contract Month** means each calendar month occurring during the Project Term.
- 1.32 **Contract Year** means each municipal financial year starting on the 1st of July and ending on the 30th of June during the Service Period, or in respect of the first and last years of the Service Period, the relevant part thereof.
- 1.33 **Control** means in relation to any entity, the ability (directly) to direct or cause the direction of the votes attaching to most of its issued shares or interest carrying voting rights or to appoint or remove or cause the appointment or removal of any directors (or equivalent officials) holding most of the voting rights on its board of directors (or equivalent body);

1.34 **Corrupt Act** means:

1.34.1 Offering, giving or agreeing to give to the Municipality or any other organ of state or to any person employed by or on behalf of the Municipality or any other organ of state any gift or consideration of any kind as an inducement or reward:

- (a) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this PPP Agreement or any other contract with the Municipality or any other organ of state; or
- (b) for showing or not showing favour or disfavour to any person in relation to this PPP Agreement or any other contract with the Municipality or any other organ of state.

1.34.2 entering into this PPP Agreement or any other contract with the Municipality or any other organ of state in connection with which commission has been paid or has been agreed to be paid by the Private Party or on its behalf, or to its knowledge, unless before the relevant contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment of such commission have been disclosed in writing to the Municipality;

1.34.3 committing any offence:

- (a) under any law from time to time dealing with bribery, corruption or extortion.
- (b) under any law creating offences in respect of fraudulent acts; or
- (c) at common law, in respect of fraudulent acts in relation to this PPP Agreement or any other contract with the Municipality or any other public body; or

1.34.4 defrauding or attempting to defraud or conspiring to defraud the Municipality or any other public body.

1.35 **CPI** means the consumer price index excluding interest on mortgage bonds, for metropolitan and other urban areas (Base 2000=100) published from time to time by Statistics SA in Statistical Release PO141.1; provided that if:

1.35.1 such index ceases to be published; or

1.35.2 the Municipality and the Private Party agree (or, failing agreement, if it is determined by the Independent Expert pursuant to clause 78 (Fast-track Dispute Resolution)) that due to a change in circumstances such index is no longer representative, then from the date when the index was last published, the Parties shall use such other index as agreed between them or, failing agreement, as determined by the Independent Expert as being a fair and reasonable replacement index;

1.36 **DBSA** means the Development Bank of Southern Africa Limited, a juristic person incorporated in accordance with section 2 of the Development Bank of Southern Africa Act, 1997.

1.37 **Debt** means at any date, all amounts that are outstanding under the Financing Agreements at that date, but excluding all default interest, breakage premiums as well as all fees, costs and expenses whatsoever in connection with any hedging arrangements entered by the Private Party.

- 1.38 **Deemed New PPP Agreement** means a contract on the same terms and conditions as this PPP Agreement, as at the Termination Date, but with the following amendments:
- 1.38.1 if this PPP Agreement is terminated prior to the Service Commencement Date, then the Service Commencement Date shall be extended by a period to allow a New Private Party to achieve Service Commencement.
- 1.38.2 any accrued Penalty Deductions shall be cancelled; and
- 1.38.3 the term of such contract shall be for a period equal to the term from the Termination Date to the Expiry Date.
- 1.39 **Default Interest Rate** means the interest rate applicable to the Debt, plus 100 bps (one hundred basis points).
- 1.40 **Determination Date** means the date being:
- 1.40.1 if clause 63 (Termination for Municipality Default) applies, the date on which the amount due to the Private Party in terms of clause 63 (Compensation on Termination for Municipality Default) has been agreed or determined.
- 1.40.2 if clause 67 (Termination for Force Majeure) applies, the date upon which the amount due to the Private Party in terms of clause 67 (Compensation on Termination for Force Majeure) has been agreed or determined.
- 1.40.3 if clause 68 (Termination for Corrupt Acts) applies, the date on which the amount due to the Private Party in terms of clause 68 (Compensation on Termination for Corrupt Acts) is agreed or determined.
- 1.40.4 if clause 65 (*Retendering Procedure*) applies, the earlier of:
- (a) the date that the New PPP Agreement is entered into; and
- (b) the date on which the Adjusted Highest Tender Price and the Adjusted Debt is agreed or determined.
- 1.40.5 if clause 66 (*No Retendering Procedure*) applies, the date on which the Adjusted Estimated Project Value and the Adjusted Debt has been agreed or determined,
- provided that if the Parties to this PPP Agreement cannot agree on the amount due by either party on the Determination Date, the procedure to be followed to determine such amount or any other matter which is relevant to the determination of the Determination Date, the dispute shall be determined in accordance with clause 78 (*Fast-Track Dispute Resolution*).
- 1.41 **Direct Financing Agreement** means the agreement so titled between the Lenders (or their nominated agent), the Private Party and the Municipality concluded simultaneously herewith or in the Agreed Form.
- 1.42 **Distributions** shall mean:
- 1.42.1 whether in cash or in kind, any:
- (a) dividend or distribution of share capital.

- (b) reduction of share capital, stated capital, any capital redemption fund or any share premium account.
 - (c) cancellation, conversion, redemption or re-purchase of shares or any other variation whatsoever in share capital.
 - (d) payment in respect of the Shareholder Loans (whether of principal, interest, breakage costs or otherwise); or
 - (e) payment, loan or other financial assistance, transfer of rights or other assets or receipt of any other benefit to the extent put in place after the Signature Date and not in the ordinary course of business, not on an arm's length basis or not otherwise on reasonable commercial terms; or
- 1.42.2 release of any liability of any of the Shareholders or their Affiliates in respect of their financial obligations to the Private Party and/or the Lenders (or any security company or trust holding any security in respect of the Debt for the benefit of the Lenders). Such release shall be deemed to be a cash amount for the purpose of calculating the Refinancing Gain.
- 1.43 **Effective Date** means the first (1st) Business Day following the date on which the Financing Agreements have become unconditional in accordance with their terms or the Signature Date (whichever occurs last);
- 1.44 **Equity** means the entire issued share capital of the Private Party.
- 1.45 **Equity Compensation** means an amount which, if considered together with Distributions paid on or before the Termination Date, gives a real internal rate of return to the Shareholders equal to the Base Case Equity IRR, having regard to the actual timing of all such payments.
- 1.46 **Equity IRR** means the projected blended rate of return to the Shareholders and their Affiliates over the full Project Term, having regard to Distributions made and forecast to be made.
- 1.47 **Estimated Project Value** means the amount determined in accordance with clause 66 (No Retendering Procedure) that a third party would pay to the Municipality as the market value of the Deemed New PPP Agreement.
- 1.48 **Exempt Refinancing** means any Refinancing:
- 1.48.1 that effects a sale or cession of the whole or any part of Equity or the Shareholder Loans or securitisation of the rights attaching to the Equity or the Shareholder Loans, provided that this exemption shall not limit the application of clause 76 (Changes in Control and Black Equity).
 - 1.48.2 that was taken account of fully in the calculation of the Unitary Payment.
 - 1.48.3 that arises solely from a change in taxation or accounting treatment.
 - 1.48.4 that comprises a waiver, approval or any similar action taken in respect of breaches of any provisions or warranties or representations or the late or non- provision of required information, and which occurs in the ordinary day-to-day administration of the Financing Agreements, the Shareholders Agreements or the Subcontracts.

- 1.48.5 that effects any syndication, sell-down, cession or grant of any rights of participation or security by the Lenders (or any agent acting on their behalf, or any security company or trust holding any security in respect of the Debt for the benefit of the Lenders) of or in relation to any of its rights under any of the Financing Agreements in favour of any Qualifying Financial Institution; or
- 1.48.6 that comprises Rescue Refinancing.
- 1.49 **Expiry Date** means the 10th anniversary of the Service Commencement Date.
- 1.50 **Facilities** means the buildings and other facilities together with all supporting infrastructure, plant and equipment as required to enable the Private Party to exercise its rights and perform its obligations included in the Project Deliverables.
- 1.51 **Financial Model** means the Base Case Financial Model as amended from time to time in accordance with the Financing Agreements and other Project requirements.
- 1.52 **Financing Agreements** means the documents listed in Schedule 17: Financing Agreements in their Agreed Form.
- 1.53 **Force Majeure** means any of the following events:
- 1.53.1 war, civil war, armed conflicts or terrorism.
- 1.53.2 nuclear contamination, unless the Private Party and/or any Sub-Contractor is the source or cause of this contamination.
- 1.53.3 any act of God, earthquake, fire, explosion, flood, cyclone, tempest, riot, insurrection or other civil disorder; and/or
- 1.53.4 chemical or biological contamination of the Works and/or Facilities and/or the Project Site from any of the events referred to in this PPP Agreement, which directly causes any party to be unable to comply with all or a material part of its obligations under this PPP Agreement.
- 1.54 **George Site** shall have the meaning ascribed to it in Schedule 15: Relevant Sites.
- 1.55 **Good Industry Practice** means applying, in relation to the manner in which the Works are performed and the Services rendered, the standards, practices, methods and procedures conforming to applicable law, and exercising that degree of skill, care, diligence, prudence and foresight that would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under similar circumstances in the Republic of South Africa;
- 1.56 **Hazardous Waste** means any waste that contains organic or inorganic elements or compounds that may, owing to the inherent physical, chemical or toxicological characteristics of that waste, have a detrimental impact on health and the environment and includes hazardous substances, materials or objects within business waste, residue deposits and residue stockpiles as outlined in Schedule 3 of the National Environmental Management: Waste Act, 2008.
- 1.57 **Hazardous Waste Invoice** means the invoice issued by the Private Party to Hazardous Waste Producers for the services related to the collection, classification, handling and disposal of Hazardous Waste which considers the Hazardous Waste Levy.

- 1.58 **Highest Tender Price** means the price offered by the Tenderer (if any) with the highest tender price and, if no Tenders are received, zero.
- 1.59 **IFRS** means the International Finance Reporting Standards.
- 1.60 **Independent Certifier** means the independent certifier appointed by the Parties pursuant to clause 20 (Independent Certifier) and who is responsible for issuing the Completion Certificates declaring that the relevant Works have been completed.
- 1.61 **Independent Certifier Agreement** means the written agreement, so entitled and attached hereto as Schedule 4: Independent Certifier Agreement, between the Private Party and the Independent Certifier in terms of which the Independent Certifier undertakes to provide the Services under clause 21 (Completion Certificate);
- 1.62 **Independent Expert** means
- 1.62.1 a qualified accountant with no less than ten (10) years professional experience, preferably in Public Private Partnership arrangements or Project Finance, agreed to between the Parties and, failing agreement, nominated (at the request of either Party) by the President for the time being of the South African Institute of Chartered Accountants from the ranks of accountants suitably qualified as set out above, if the matter primarily relates to an accounting matter;
- 1.62.2 a qualified attorney or advocate with no less than ten (10) years professional experience, preferably in Public Private Partnership arrangements or Project Finance, agreed to between the Parties, failing agreement nominated (at the request of either Party) by the President for the time being of the Law Society of the Cape of Good Hope from the ranks of attorneys or advocates suitably qualified as provided above, if the matter primarily relates to a legal matter;
- 1.62.3 a qualified engineer with no less than ten (10) years professional experience, preferably in Public Private Partnership arrangements or Design Build and Operating Projects, agreed to between the Parties, failing agreement nominated (at the request of either Party) by the President for the time being of the Engineering Council of South Africa from the ranks of engineers suitably qualified as provided above, if the matter primarily relates to an engineering matter; and
- 1.62.4 A facilities Manager with no less than ten (10) years professional experience, preferably in Public Private Partnership arrangements or Design Build and Operating Projects, agreed to between the Parties, failing agreement nominated (at the request of either Party) by the President for the time being of the South African Facilities Management Association, if the matter primarily relates to an facilities management matter.
- 1.63 **Insurance Account** shall have the meaning ascribed to it in clause 45.2.
- 1.64 **Intellectual Property** means all intellectual property whatsoever used from time to time in connection with the Works and/or the Services whether capable of registration, registered or not.
- 1.65 **Key Performance Indicator** means the key performance indicators listed in paragraphs 43, 45 and 47 of Schedule 7: Output Specifications of the PPP Agreement.
- 1.66 **Knysna Site** shall have the meaning ascribed to it in Schedule 15: Relevant Sites.

- 1.67 **Law** means the common law, all applicable statutes, statutory instruments, proclamations, by-laws, regulations, orders, rules and other subordinate legislation, treaties, directives and codes of practice having the force of law in the Republic of South Africa; judicial decisions, notifications and all similar directives made pursuant thereto with which the Municipality and/or Private Party is bound to comply.
- 1.68 **Lenders** means any person providing financing to the Private Party under the Financing Agreements.
- 1.69 **Licensed Intellectual Property** means all Intellectual Property to be used under licence from any third party.
- 1.70 **Long Stop Date** means the last Business Day of the thirteenth Contract Month reckoned from the Effective Date as extended in accordance with clause 46 (Consequences of a Relief Event) and 47 (Consequences of a Compensation Event), clause 48 (Consequences of a Force Majeure), or such other date as may be agreed to, in writing, by the Parties, being the date by which the Services must have commenced, failing which the Municipality shall be entitled to terminate this PPP Agreement in accordance with the provisions of clause 59 (Termination for Private Party Default);
- 1.71 **Maximum Unitary Payment** means in respect of a month or part thereof, the Unitary Payment payable during that month before any deductions under clause 32 (Penalty Deductions) but allowing for CPI indexation under this PPP Agreement.
- 1.72 **MFMA** means the Local Government: Municipal Finance Management Act, 2003, as amended.
- 1.73 **MSA** means the Local Government: Municipal Systems Act, 2000, as amended.
- 1.74 **Municipal Consents** means the Consents to be procured and maintained by the Municipality, listed in Schedule 12: Municipal Consents.
- 1.75 **Municipality** means the Knysna Municipality duly established in terms of Section 12 and 14 of the Local Government: Municipal Structures Act, 1998, by Establishment Notice No. PN499/2000, dated 22 September 2000.
- 1.76 **Municipality Default** means any of the following events:
- 1.76.1 An expropriation of a part of the Project Assets and/or shares (or shareholder loans) of the Private Party by the Municipality or other Responsible Authority.
- 1.76.2 A failure by the Municipality to make payment of any amount or amounts that are due and payable by the Municipality under this PPP Agreement (which amounts are not in dispute) which, either singly or in aggregate exceeds the sum of R100 000.00 (one Hundred Thousand Rand) and such failure continues for twenty (20) Business Days from receipt by the Municipality of a notice of non-payment from the Private Party;
- 1.76.3 A breach by the Municipality of its obligations under this PPP Agreement which substantially or materially frustrates or renders it impossible for the Private Party to perform its obligations under this PPP Agreement for a continuous period of three (3) months.
- 1.76.4 A Corrupt Act in relation to the Project committed by an officer or employee of the Municipality; and

- 1.76.5 a breach by the Municipality of its obligations in terms of clause 75 (Assignment).
- 1.77 **Municipality Representative** means the party(s) appointed as such by the Municipality in terms of this PPP Agreement, which appointment shall exclude any person that may have represented a bidder for the Project.
- 1.78 **Net Present Value** or **NPV** means the aggregate of the discounted values, calculated as at the estimated date of the Refinancing, of each of the relevant projected Distributions, in each case discounted using the Base Case Equity IRR.
- 1.79 **New PPP Agreement** means a contract on the same terms and conditions as this PPP Agreement at the Termination Date, but with the following amendments:
- 1.79.1 if this PPP Agreement is terminated prior to the Service Commencement Date, then the Scheduled Service Commencement Date shall be extended by a period to allow the New Private Party to achieve Service Commencement on or before the extended Scheduled Service Commencement Date.
- 1.79.2 any accrued Penalty Deductions and/or warning notices shall be cancelled.
- 1.79.3 the term of such contract shall be a period equal to the period from the Termination Date until the Expiry Date; and
- 1.79.4 any other amendments, which do not adversely affect the Private Party.
- 1.80 **New Private Party** means the person who has entered or who will enter into the New PPP Agreement with the Municipality.
- 1.81 **Once Off Payment** means the payment to be made by the Private Party in terms of clause 29, which shall be the sum of the capital expenditure expended by the Municipality to acquire the Project Site and/or expenditure incurred by the Municipality in relation to the feasibility study, the environmental impact assessment study and consultancy charges incurred in terms of Section 21(b) of the Municipal Public Private Partnership Regulations published under GN R309 in Government Gazette 27431 on the 1st of April 2005.
- 1.82 **Operating Expenditure** means any expenditure treated as operating expenditure under IFRS.
- 1.83 **Operations Subcontract** means the contract between the Private Party and the Operations Subcontractor in respect of the Services.
- 1.84 **Operations Subcontractor** being the person/s appointed by the Private Party to perform the Services.
- 1.85 **Output Specifications** means the specifications set out in Schedule 7: Output Specifications.
- 1.86 **Parties** means the Private Party and the Municipality.
- 1.87 **Payment Period** means the period in respect of which each monthly payment is levied by the Municipality or the Private Party, being each calendar month or part thereof during the Service Period.
- 1.88 **Penalty Deductions** means the deductions as described in Schedule 1: Payment Mechanisms.

- 1.89 **Performance Deductions** has the meaning set forth in Schedule 1: Payment Mechanisms.
- 1.90 **Performance Standard** means the standard required for the provision of the Services as indicated in the Key Performance Indicators.
- 1.91 **Permitted Borrowing** means at any time after the Signature Date; any advance made to the Private Party under the Financing Agreements for the purpose(s) specified therein.
- 1.92 **Phase 1 Completion Certificate** means the certificate to be issued by the Independent Certifier, declaring that the first phase of the Works (as set out in Schedule 7: Output Specifications) have been completed in accordance with clause 21.2 (Completion Certificate).
- 1.93 **Phase 2 Completion Certificate** means the certificate to be issued by the Independent Certifier, declaring that the second phase of the Works (as set out in Schedule 7: Output Specifications) have been completed in accordance with clause 21.5 (Completion Certificate).
- 1.94 **Post Termination Penalty Deduction Amount** means for any month or part of a month, an amount equal to the Penalty Deduction that was made from the Unitary Payment under clause 32 (Penalty Deductions) in the month immediately preceding the Termination Date, less an amount equal to any Penalty Deduction that was made for Available Services which were unavailable at the Termination Date but which have subsequently become Available whether as a result of the Municipality incurring Rectification Costs or otherwise;
- 1.95 **Post Termination Service Amount** means for the purposes of clause 65 (Retendering Procedure), for the whole or any part of a month for the period from the Termination Date to the Compensation Date, an amount equal to the Maximum Unitary Payment which would have been payable in that month under this PPP Agreement had this PPP Agreement not been terminated, less the aggregate of:
- 1.95.1 the Post Termination Penalty Deduction Amount for that month;
- 1.95.2 the Rectification Costs incurred by the Municipality in that month; and
- 1.95.3 (where relevant), the amount by which the Post Termination Service Amount for the previous month was less than zero.
- 1.96 **PPP Agreement** means this public private partnership agreement between the Parties, being a public private partnership agreement as contemplated in Section 120 and the PPP Regulations of the MFMA.
- 1.97 **Private Party** means [Company Name] (Pty) Ltd, a private company, with limited liability, duly registered and incorporated in accordance with the Company Laws of the Republic of South Africa, with registration number 2014/092464/07, a special purpose vehicle incorporated for the purposes of entering into the PPP Agreement with the Municipality and for undertaking of the Project.
- 1.98 **Private Party Consents** means the Consents to be procured and maintained by the Private Party, listed in Schedule 13: Private Party Consents.
- 1.99 **Private Party Default** means any of the following events or circumstances:
- 1.99.1 Any arrangement, composition or compromise with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act, 1936 or the Companies Act, 1973) being entered into by or in relation to the Private Party.

- 1.99.2 A liquidator, business rescue practitioner or the like taking possession of or being appointed over, winding-up, execution or other process being levied or enforced (and not being discharged within twenty (20) Business Days) upon, the whole or any material part of the assets of the Private Party (in any of these cases, where applicable, whether provisional or final, and whether voluntary or compulsory);
- 1.99.3 The Private Party ceases to carry on business.
- 1.99.4 A resolution being passed or an order being made for the administration, Business Rescue, winding-up, liquidation or dissolution of the Private Party (in any of these cases, where applicable, whether provisional or final and whether voluntary or compulsory).
- 1.99.5 The Private Party fails to complete the Works on or before the Long Stop Date.
- 1.99.6 The Private Party commits a breach of any of its material obligations under this PPP Agreement.
- 1.99.7 The Private Party abandons the Works (other than because of a breach by the Municipality of its obligations under this PPP Agreement).
- 1.99.8 The Private Party ceases to provide all or a substantial part of the Services in accordance with this PPP Agreement (other than because of a breach by the Municipality of its obligations under this PPP Agreement).
- 1.99.9 The Private Party fails to comply with any provision of clause 75 (Assignment), clause 5.4 (Appointment of Subcontractors) and clause 76 (Changes in Control and Black Equity).
- 1.99.10 The accumulation of R 2,400 000 (two million four hundred thousand Rand), or more Penalty Deductions in any year.
- 1.99.11 the Private Party fails to pay any sum or sums due to the Municipality under this PPP Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) R100,000 (indexed to CPI) and such failure continues for twenty (20) Business Days from receipt by the Private Party of a notice of non-payment from the Municipality;
- 1.99.12 the Private Party fails to obtain and maintain any Project Insurances as required in terms of clause 42 (Insurance).
- 1.99.13 termination of the Financing Agreements because of any default or acceleration of any amounts under the Financing Agreements.
- 1.99.14 any breach of any provision of this PPP Agreement has occurred more than once within a rolling six month period and:
- (a) the Municipality has given an initial warning notice to the Private Party describing that breach in reasonable detail and stating that if that breach persists or recurs then the Municipality may take further steps to terminate this PPP Agreement; and
 - (b) that breach persists or recurs after the expiry of period of forty five (45) days after the initial warning notice, and the Municipality has upon that breach so recurring or persisting issued a second and final warning notice, stating that if that breach persists or recurs within the period of forty five (45) days after the final warning notice then the Municipality may terminate this PPP

agreement on ten (10) days' notice to the Private Party; and

- 1.99.15 any breach of the refinancing provisions.
- 1.100 **Project** means the provision by the Private Party of the Project Deliverables to the Municipality including *inter alia* the development (Build), design, finance, maintenance and operation of Erf 3339 Fisherhaven, Knysna into a Social Housing Complex.
- 1.101 **Project Assets** means the equipment listed in Schedule 18: Project Assets.
- 1.102 **Project Deliverables** means the project deliverables set out in of Schedule 7: Output Specifications.
- 1.103 **Project Documents** means the Shareholders Agreement, the Subcontracts and all other contracts as listed in Schedule 5: Project Documents, each executed by the parties thereto simultaneously with this PPP Agreement or otherwise in the Agreed Form.
- 1.104 **Project Insurances** has the meaning set forth in clause 42 (Insurance).
- 1.105 **Project Officer** means the official designated by the accounting officer/accounting authority of the Municipality on notice to the Private Party as the project officer for the Project. The Municipality may replace the project officer from time to time on prior written notice to the Private Party.
- 1.106 **Project Site** means the land made available by the Municipality to the Private Party for the conduct of the Project Deliverables as further described in Schedule 6: Project Site;
- 1.107 **Project Term** means the period from the Signature Date to the Expiry Date or the Termination Date, whichever occurs first.
- 1.108 **Qualification Criteria** means:
- 1.108.1 the original tender criteria, subject to such variation as may be reasonable considering market conditions since the original tender, including the New PPP Agreement terms agreed between the Municipality, the Private Party and the Lenders.
- 1.108.2 financial ability to pay the capital sum tendered on the basis that tenderers may only bid based on a single capital payment.
- 1.108.3 any other criteria agreed between the Municipality, the Private Party and the Lenders.
- 1.109 **Qualifying Financial Institution** means a bank as defined in section 1 of the Banks Act, 1990, any pension fund or provident fund registered in terms of the Pension Funds Act, 1956, any unit trust scheme as defined in section 1 of the Unit Trusts Control Act, 1981, any long-term insurer as defined in section 1 of the Long-term Insurance Act, 1998, or any short-term insurer being a person registered or deemed (in terms of the Short-Term Insurance Act, 1998) to be registered as a short-term insurer in that statute.
- 1.110 **Real Base Case Project IRR** means the real pre-tax Project internal rate of return as set out in the Financial Model.
- 1.111 **Rectification Costs** means for the purposes of any Termination Date that occurs during the Service Period, an amount equal to the reasonable and proper costs incurred by the Municipality in ensuring that the Services are Available to the Performance Standards.
- 1.112 **Refinancing** means at any time after the Signature Date:

- 1.112.1 any amendment, assignment, novation, replacement or supplementing of any of the Financing Agreements (or an agreed form thereof, if any such agreement has not been executed by the signature date), whether independently or in combination with any connected arrangements.
- 1.112.2 the exercise of any right or grant of any waiver, indulgence or approval under any of the Financing Agreements (other than permitted borrowing);
- 1.112.3 the disposition or encumbering (by whatever means) of any rights under any of the Financing Agreements or the creation or granting of any other benefit or interest in any of the Financing Agreements or any of the Private Party's other contracts, Project Revenues or Project assets; or
- 1.112.4 any other arrangements having any of the effects in clause 1.124.1 and 1.124.2 of this clause (inclusive);
- 1.113 **Refinancing Gain** means in relation to any Refinancing (other than an Exempt Refinancing), an amount equal to the greater of nil and $[(A - B) - C]$, where:
- 1.113.1 A = the Net Present Value of the Distributions forecast immediately prior to such Refinancing (having regard to the Base Case Financial Model, as updated to that time), considering the effect of the Refinancing, including the costs of the Refinancing, to be made over the remaining Project Term.
- 1.113.2 B = the Net Present Value of the Distributions forecast immediately prior to such Refinancing (having regard to the Base Case Financial Model, as updated to that time), not considering the effect of the Refinancing or the costs of the Refinancing, to be made over the remaining Project Term; and
- 1.113.3 C = any adjustment required to raise the nominal post-tax Equity IRR calculated immediately prior to such Refinancing (having regard to the Base Case Financial Model, as updated to reflect all changes in the operating assumptions for the Project, and considering the actual performance of the Project to that time) to the Base Case Equity IRR.
- 1.114 **Relevant Site** means the Transfer Stations and the Mossel Bay Site.
- 1.115 **Relief Event** means
- 1.115.1 any fire, explosion, tempest, flood, ionising radiation (to the extent it does not constitute an event of Force Majeure), earthquakes, riots, civil commotion and community unrest or pressure waves caused by devices travelling at supersonic speed.
- 1.115.2 (without limiting the obligations of the Private Party regarding the design and construction specifications and the Output Specifications) any failure by the Municipality, any Responsible Authority, utility provider or other like body which affects the ability of the Private Party to carry out the Works or provide Services.
- 1.115.3 any accidental loss or damage to the Works and/or facilities.
- 1.115.4 any off-site failure or shortage of power, water, fuel or transport.
- 1.115.5 any blockade or embargo which does not constitute an event of Force Majeure.
- 1.115.6 the discovery of any heritage objects or resources.

- 1.115.7 any delay in obtaining any consent/Consent or such Consent is renewed on onerous terms; or
- 1.115.8 Any official or unofficial strike, lock-out, go-slow or other such labour disputes generally affecting the Project.
- 1.115.9 adverse weather conditions which fall outside the five-year average for the Project Site; or
- 1.115.10 the outbreak of any plague or epidemic at the Facilities.

unless any of the events listed above arises as a result of any negligence, wilful conduct or default of the Private Party or any subcontractor.

- 1.116 **Rescue Refinancing** means any amendment to the Financing Agreements or any increase in borrowings by the Private Party, whose sole purpose is to avoid or cure a default or permit the repayment of any bridging financing (including bridging finance provided in the form of Equity), whether or not a Refinancing, to the extent in all such instances that there is no gain to the Shareholders by way of a Distribution, failing which the foregoing shall constitute a Refinancing;
- 1.117 **Responsible Authority** means any ministry, any minister, any organ of state, any official in the public administration or any other governmental or regulatory department, commission, municipality, entity, service utility, board, agency, instrumentality or authority (in each case, whether national, provincial or municipal) or any court, each having jurisdiction over the matter in question, but excluding for all purposes the Municipality;
- 1.118 **Scheduled Service Commencement Date** means the date stipulated in the Works programme Commencement Date as the day after the date on which the Availability Certificate is scheduled to be issued and the Services are due to commence.
- 1.119 **Schedules** means the attachments to this PPP Agreement comprising of Project Documents listed as Schedules at the end of the table of contents to this PPP Agreement and forming part thereof.
- 1.120 **Service Commencement** means the actual commencement of the Services, after the issue of the Availability Certificate in accordance with clause 21 (Completion Certificate);
- 1.121 **Service Commencement Date** means the date of Service Commencement as stated in the Availability Certificate issued by the Private Party in accordance with clause 21 (Completion Certificate);
- 1.122 **Service Period** means the period from the Service Commencement Date to the Expiry Date, unless this PPP Agreement is terminated earlier in accordance with its terms.
- 1.123 **Services** mean the operational services (excluding design and construction) to be provided by or on behalf of the Private Party for the Municipality as set forth in Schedule 7: Output Specifications and as may be subsequently amended in accordance with this PPP Agreement.
- 1.124 **Shareholder Loans** at any date, in relation to any financing (other than the Equity and the financing under a Financing Agreement) made available for the Project by the Shareholders, all principal unpaid at that date.
- 1.125 **Shareholders** mean the holders of the Equity.

- 1.126 **Shareholders Agreement** means the agreement(s) between the Shareholders and/or the Private Party which governs the relationship between the Private Party and its Shareholders inter se and in respect of the Equity and/or Shareholder Loans.
- 1.127 **Signature Date** means the date of signature of this PPP Agreement by the last signing Party.
- 1.128 **Small Works** means any change to the Works requested by the Municipality having an individual cost not exceeding R100 000.00 (One Hundred Thousand Rand) (indexed to CPI) or as otherwise agreed from time to time, except for any request which will (if implemented) increase the likelihood of the Services not complying with the performance regime or materially and adversely affect the Private Party's ability to perform its obligations under this PPP Agreement;
- 1.129 **Subcontractor Costs** means all damages, losses, liabilities, costs, and expenses (including legal costs and expenses) (**Losses**) that have been or will be reasonably and properly incurred by the Private Party as a direct result of the termination of this PPP Agreement, but only to the extent that:
- 1.129.1 the Losses are incurred in connection with the provision of Services or the completion of the Works by the Subcontractors, including, without limitation:
- (a) the cost of any materials or goods ordered or Subcontracts placed that cannot be cancelled without such Losses being incurred.
 - (b) Subcontractor losses of profits for a period not exceeding one (1) year.
 - (c) any expenditure incurred in anticipation of the provision of the Services or the completion of Works.
 - (d) the cost of demobilisation including the cost of any relocation of equipment used in connection with the Project; and
 - (e) retrenchment payments; and
- 1.129.2 the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms; and
- 1.129.3 each of the Private Party and the relevant Subcontractor has used reasonable endeavours to mitigate its Losses.
- 1.130 **Subcontractors** mean the counterparties of the Private Party to the Subcontracts including the Construction Subcontractor and the Operations Subcontractor.
- 1.131 **Subcontracts** means the Construction Subcontract and the Operations Subcontract.
- 1.132 **Tender** means any tender submitted by a Tenderer that meets the Qualification Criteria or criteria as notified under clause 65 (Retendering Procedure).
- 1.133 **Tenderer** means a tenderer who is a Suitable Substitute Private Party having submitted a Tender that complies with the requirements of the Request for Proposal issued by the Municipality in relation to the New PPP Agreement.
- 1.134 **Tender Costs** means the reasonable and proper costs of the Municipality incurred in carrying out the Tender Process.

- 1.135 **Tender Process** means the process by which the Municipality requests tenders from any parties interested in entering into a New PPP Agreement, evaluates the responses from those interested parties and negotiates the conclusion of a New PPP Agreement with a New Private Party, in accordance with clause 65 (Retendering Procedure);
- 1.136 **Tender Process Monitor** means a third party appointed by the Private Party under clause 65 (Retendering Procedure).
- 1.137 **Tender Submission Date** means [27 November 2025].
- 1.138 **Termination Amount** means the amount agreed or determined to be due and payable to the Private Party in terms of clause 44 (Economic Test), clause 49 (Unforeseeable Conduct), clause 63 (Compensation on Termination for Municipality Default), clause 64 (Compensation on Termination for Private Party), clause 65 (Retendering Procedure), clause 66 (No Retendering Procedure), clause 67 (Compensation on Termination for Force Majeure) and clause 68 (Compensation on Termination for Corrupt Acts);
- 1.139 **Termination Date** means any date of early termination of this PPP Agreement in accordance with its terms.
- 1.140 **Termination Date Discount Rate** means a discount rate expressed as:
- $$[(1 + \text{Real Base Case Project IRR} + \text{Bond B} - \text{Bond A}) * (1 + i) - 1]$$
- where:
- 1.140.1 "i" is the agreed assumed forecast rate of increase in the South African Reserve Bank's prevailing long-term inflation target.
- 1.140.2 "**Bond A**" is the real yield to maturity on a benchmark government bond instrument of the same or closest possible maturity as the average life of the Debt as at the Signature Date.
- 1.140.3 "**Bond B**" is the real yield to maturity on a benchmark government bond instrument of the same or closest possible maturity as the average life of the Debt as at the Termination Date.
- 1.141 **Unforeseeable Conduct** shall occur if, after the Tender Submission Date, the Municipality or any Responsible Authority takes any action (including any Change in Law) or fails to carry out its obligations as prescribed by law; and
- 1.141.1 the principal effect of which is directly borne by:
- (a) the Project and no other similar PPPs.
 - (b) the Private Party and no other persons; or
 - (c) parties undertaking PPP's or similar PPP's and no other person; and
- 1.141.2 in respect of which the Private Party is not entitled to any other relief pursuant to any other provision of this PPP Agreement.
- 1.141.3 which was not foreseen by the Private Party on or before the Tender Submission Date or if foreseen, its direct consequences on the Project were not foreseen or

the consequences were judged to be so small that they were not taken into consideration; and

- 1.141.4 which could not reasonably be foreseen by any person in the position of the Private Party on or before the Tender Submission Date as being likely to occur, or, if it could reasonably have been foreseen, its direct consequences could not reasonably have been foreseen by any person in the position of the Private Party on or before the Tender Submission Date, provided that the following shall not constitute unforeseeable conduct;
- (a) where any act or omission of the Municipality is in direct response to any act or omission of the Private Party which is illegal, other than an act or omission rendered illegal by virtue of such conduct of the Municipality or in violation of agreements to which the Private Party is a party.
 - (b) an increase in taxes of general application which does not discriminate against the Private Party or against the Private Party and other parties undertaking projects like the Project; and
 - (c) such conduct by the Municipality is required because of an event of Force Majeure and is reasonably proportionate thereto.
- 1.142 **Uninsurable** means in relation to a risk means either that:-
- 1.142.1 insurance is no longer available from reputable insurers in the South African insurance market; or
- 1.142.2 even if insurance is available from reputable insurers in the South African insurance market, the insurance premium payable for ensuring that risk had increased to such a level or the terms on which it is available are so onerous or the scope of the insurance cover is so reduced that the risk is generally no longer being insured against in the South African insurance market.
- 1.143 **Variations** means any variations to the Project Deliverables in accordance with clause 50 (Variations).
- 1.144 **VAT** means any value-added tax or any similar tax which is imposed in place of or in addition to such tax.
- 1.145 **Works** means the design, construction, fitting installation and commissioning works to be undertaken by the Private Party as detailed in Schedule 8: Works Programme.

2. INTERPRETATION

This PPP Agreement shall be interpreted according to the following provisions, unless the context requires otherwise:

- 2.1 References to the provisions of any Law shall include such provisions as amended, re-enacted or consolidated from time to time in so far as such amendment, re-enactment or consolidation applies or can apply to any transaction entered into under this PPP Agreement.
- 2.2 References to **indexed to CPI** in relation to any amount of money shall mean that such amount has been expressed in the month and year in which the Signature Date occurs prices and shall be escalated annually as at the Signature Date and each anniversary thereof with reference to the then most recent publication of the CPI, subject to adjustments for any rebasing or recalculation thereof in accordance with the formula

contained in Schedule 2: Financial Model.

- 2.3 References to **Parties** shall include the Parties' respective successors-in-title and, if permitted in this PPP Agreement, their respective cessionary and assignees.
- 2.4 References to a **person** shall include an individual, firm, company, corporation, juristic person, Responsible Authority, and any trust, organisation, association or partnership, whether having separate legal personality.
- 2.5 References to any **Responsible Authority** or any public or professional organisation shall include a reference to any of its successors or any organisation or entity, which takes over its functions or responsibilities.
- 2.6 References to **clauses, sub-clauses** and **Schedules** are references to the clauses, sub-clauses and schedules of this PPP Agreement.
- 2.7 The headings of clauses, sub-clauses and Schedules are included for convenience only and shall not affect the interpretation of this PPP Agreement.
- 2.8 The Schedules to this PPP Agreement are an integral part of this PPP Agreement and references to this PPP Agreement shall include the Schedules.
- 2.9 The Parties acknowledge that each of them has had the opportunity to take legal advice concerning this PPP Agreement and agree that no provision or word used in this PPP Agreement shall be interpreted to the disadvantage of either Party because that Party was responsible for or participated in the preparation or drafting of this PPP Agreement or any part of it.
- 2.10 Words importing the singular number shall include the plural and vice versa, and words importing either gender or the neuter shall include both genders and the neuter.
- 2.11 References to **this PPP Agreement** shall include this PPP Agreement as amended, varied, novated or substituted in writing from time to time.
- 2.12 References to any other contract or document shall include (subject to all approvals required to be given pursuant to this PPP Agreement for any amendment or variation to or novation or substitution of such contract or document) a reference to that contract or document as amended, varied, novated or substituted from time to time.
- 2.13 General words preceded or followed by words such as **other** or **including** or **particularly** shall not be given a restrictive meaning because they are preceded or followed by examples intended to fall within the meaning of the general words.
- 2.14 When any number of days are prescribed in this PPP Agreement, same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day falls on a day which is not a Business Day, in which case the last day shall be the immediately following Business Day.
- 2.15 Any substantive provision, conferring rights or imposing obligations on a Party and appearing in any of the definitions in clause 1 or elsewhere in the Agreement, shall be given effect to as if it were a substantive provision in the body of the Agreement.

3. DURATION OF PPP AGREEMENT

- 3.1 This PPP Agreement and the rights and obligations of the Parties under this PPP Agreement shall take effect on the Effective Date and terminate on the earlier of the Expiry Date and the Termination Date.

- 3.2 The Service Period will commence on the Service Commencement Date and terminate on the earlier of the Expiry Date and the Termination Date.

PART 2: PROJECT DOCUMENTS AND DELIVERABLES

4. PROJECT DOCUMENTS

- 4.1 The Private Party must manage the Project Documents to ensure that they comply with the provisions of the PPP Agreement and, save as otherwise provided in relation to Exempt Refinancing or Permitted Borrowings, may only:
- 4.1.1 terminate, or make any amendment to (or otherwise agree to do so) any Project Document; or
 - 4.1.2 in any respect, depart from its obligations or waive any rights under any Project Document insofar as such departure or waiver directly or indirectly affects its compliance with the provisions of this PPP Agreement,
- with the prior written agreement of the Municipality which may not be unreasonably withheld.
- 4.2 The Private Party shall procure that any Project Document not executed simultaneously with this PPP Agreement is executed in the Agreed Form annexed to this PPP Agreement.
- 4.3 Without limiting the restrictions on amendments to the Project Documents in clause 4.1 above, the Private Party shall furnish the Municipality with a true and complete copy (including all annexes) of any amendment to any Project Document or of any Project Document not executed by the Signature Date, within ten (10) Business Days of the date of the Private Party's execution of such amendment or Project Document.

5. PROJECT DELIVERABLES

5.1 Private Party

- 5.1.1 Subject to, and in accordance with, the provisions of this PPP Agreement, the Private Party shall exercise its rights and perform its obligations included in the Project Deliverables at its own cost and risk without recourse to the Municipality save as otherwise expressly provided for in this PPP Agreement.
- 5.1.2 Without limiting clause 5.1.1, the Private Party shall at its own cost and risk be solely responsible for procuring that the Project Deliverables are performed:
- (a) in accordance with Good Industry Practice.
 - (b) in a manner that is not likely to cause death, injury to health or damage to property or the environment.
 - (c) in a manner that is consistent with the Municipality discharging its statutory functions and duties.
 - (d) in compliance with all applicable Law and the Consents.
 - (e) to achieve the design and construction specifications in accordance with this PPP Agreement; and
 - (f) to meet the Output Specifications in accordance with this PPP Agreement.

5.2 Cooperation

Each Party shall cooperate with the other in the exercise and performance of their respective rights and obligations under this PPP Agreement.

5.3 Private Party Not Agent

The Private Party agrees that it is an independent contractor performing this PPP Agreement. This PPP Agreement does not create any agency, partnership, joint venture or other joint relationship between the Parties. The Private Party shall not contract with any person or otherwise incur liabilities in the name of the Municipality.

5.4 Appointment of Subcontractors

The Municipality subject to clause 56 (Subcontracting) hereby consents to the Private Party subcontracting the Project Deliverables to the Subcontractors. In the event that the Private Party wishes to appoint additional Subcontractors or replace the Subcontractors, such Subcontractors shall comply with the following criteria:

- 5.4.1 have the appropriate technical and financial ability to perform the obligations of the original Subcontractor under the relevant Subcontract.
- 5.4.2 employ persons having appropriate qualifications, experience and technical competence.
- 5.4.3 have sufficient resources available to them (including committed financial resources and contracts) to perform the obligations of the original Subcontractor under the relevant Subcontract (as applicable); and
- 5.4.4 have the necessary legal power and authority to become a party to the relevant Subcontract, its directors not having any criminal convictions, it not having any outstanding tax liabilities (save for any such liability which is the subject of a *bona fide* dispute),

and the Private Party shall ensure that Municipality provides its prior written consent in terms hereof, provided that such prior written consent shall not be unreasonably withheld or delayed and shall in any event be provided within five (5) Business Days of the request by the Private Party, failing which it shall be deemed to be approved and that the terms and conditions upon which any such Subcontractor is appointed are substantially the same as the Subcontracts and provide the Municipality with a copy of the duly executed agreement with any such proposed Subcontractor.

PART 3: GENERAL OBLIGATIONS

6. GENERAL OBLIGATIONS

- 6.1 The Private Party shall not engage in any business or activity other than the business or activity included in or otherwise required to enable the Private Party to provide, the Project Deliverables.
- 6.2 The Private Party shall not be relieved of any obligation, responsibility or liability under this PPP Agreement by the appointment of any Subcontractor to carry out any part of the Project Deliverables. As between the Private Party and the Municipality, the Private Party shall be responsible for the payment, performance, acts, defaults, omissions, breaches and negligence of all Subcontractors. All references in this PPP Agreement to any performance, payment, act, default, omission, breach or negligence of the Private Party shall be deemed to include any of the same by a Subcontractor.

7. WARRANTIES

7.1 Private Party Warranties

The Private Party warrants as at the Signature Date, that:

- 7.1.1 it has taken all necessary actions to authorise its execution of this PPP Agreement.
- 7.1.2 all the Project Documents have been duly executed on proper authority and are in full force and effect as at the Signature Date, save for those Project Documents that will be executed in the Agreed Form after the Signature Date by the corresponding date in Schedule 5: Project Documents.
- 7.1.3 the execution and performance of any Project Documents do not and will not contravene any provision of the Memorandum of Incorporation of the Private Party as at the Signature Date, or arbitrator that is binding on the Private Party as at the Signature Date.
- 7.1.4 the Private Party Consents are in full force and effect as at the Signature Date, save for any Consents which are not required under applicable law to be obtained by the Signature Date; provided that the Private Party warrants that it knows of no reason (having made all reasonable enquiries in this regard) why any such Consent will not be granted on reasonable terms by the time it is required to obtain such Consent;
- 7.1.5 no litigation, arbitration, investigation or administrative proceeding is in progress as at the Signature Date or, to the best of the knowledge of the Private Party as at the Signature Date having made all reasonable enquiries, threatened against it, which is likely to have a material adverse effect on the ability of the Private Party to conduct the Project Deliverables.
- 7.1.6 the Private Party is not subject to any obligation, non-compliance with which is likely to have a material adverse effect on its ability to conduct the Project Deliverables.
- 7.1.7 no proceedings or any other steps have been taken or, to the best of the knowledge of the Private Party having made all reasonable enquiries, threatened for the winding-up or liquidation (whether voluntary or involuntary, provisional or

final), business rescue or deregistration of the Private Party, or for the appointment of a liquidator, judicial manager, business rescue practitioner or similar officer over it or over any of its assets.

- 7.1.8 all information disclosed by or on behalf of the Private Party to the Municipality at any time up to the Signature Date and, in particular, during the bid process preceding the award of this PPP Agreement to the Private Party, is true, complete and accurate in all material respects and the Private Party is not aware of any material facts or circumstances not disclosed to the Municipality which would, if disclosed, be likely to have an adverse effect on the Municipality's decision (acting reasonably) to award the PPP Agreement to the Private Party;
- 7.1.9 the copies of the executed Project Documents, which have been delivered to the Municipality, are true and complete copies of such Project Documents and there are no other documents replacing or relating to any such Project Documents, which would materially affect the performance of these Project Documents; and
- 7.1.10 as at the Signature Date:
- (a) the Private Party has an authorised and issued share capital as set out in Schedule 9: Private Party Details and all shares in the issued share capital of the Private Party are fully paid up.
 - (b) all shares in the issued share capital of the Private Party are legally and beneficially owned as represented in Schedule 9: Private Party Details.
 - (c) save as provided in the Financing Agreements or the Shareholders Agreement, no person has the right (whether actual or contingent) to call for the issue of any share or loan capital in the Private Party whether pursuant to any option or otherwise including on realisation of security; and
 - (d) save as provided in the Financing Agreements or the Shareholders Agreement, there is no encumbrance over or affecting any of the Equity or the Shareholder Loans and there is no agreement or commitment to grant or create any such encumbrance.

7.2 Municipality Warranties

The Municipality warrants that:

- 7.2.1 it has taken all necessary actions through its Council to authorise the execution of this PPP Agreement.
- 7.2.2 it has not knowingly omitted to disclose any material information in its possession or under its control relating to the Project Assets.
- 7.2.3 all information disclosed by or on behalf of the Municipality to the Private Party at any time up to the Signature Date and, in particular, during the bid process preceding the award of this PPP Agreement to the Private Party, is true, complete and accurate in all material respects and the Municipality is not aware of any material facts or circumstances not disclosed to the Private Party which would, if disclosed, be likely to have an adverse effect on the Private Party's decision (acting reasonably) to enter into this PPP Agreement with the Municipality;

- 7.2.4 it is not a party to any legal proceedings of any nature or the subject of any enquiries or investigations nor are there any material, actual, pending or threatened litigation or review proceedings which will have an adverse effect on the timing or implementation of this PPP Agreement.
- 7.2.5 it has entered the PetroSA Access Arrangements in respect of the use and access to PetroSA facilities; and
- 7.2.6 no restrictive conditions of title exist over the title deed(s) for the Project Site and/or the Relevant Sites that would in any manner prevent or obstruct the Private Party from performing the Project Deliverables.

8. PRIVATE PARTY INDEMNITIES

The Private Party indemnifies and shall keep the Municipality always indemnified against all direct losses sustained by the Municipality in consequence of:

- 8.1 any:
- 8.1.1 loss of or damage to property relating to the Project (including, without limitation, any Project Assets);
 - 8.1.2 breach of a statutory duty arising under applicable Law.
 - 8.1.3 claim for or in respect of the death or personal injury of any individual because of the performance of the Project Deliverables; or
 - 8.1.4 other claim, action, charge, cost, demand or expense by a third party relating to the Private Party's performance of the Project Deliverables,
(including, without limitation, any reasonable legal fees or reasonable costs); or
 - 8.1.5 any breach by the Private Party of any warranties given by it in this PPP Agreement,
 - 8.1.6 save to the extent caused by the negligence or wilful acts or omissions or misconduct of the Municipality or by a breach by the Municipality of an express provision of this PPP Agreement
- 8.2 It is specifically recorded that the incurrence or discharge of any penalty deduction by the Private Party will not discharge or release the Private Party from any third party indemnity as contemplated in this clause.

9. MUNICIPALITY INDEMNITIES

The Municipality indemnifies and shall keep the Private Party always indemnified against all direct losses sustained by the Private Party in consequence of:

- 9.1 negligence or wilful acts or omissions of the Municipality, its employees, its agents or its authorised visitors to the Project Site and the Relevant Sites (provided that, in respect to the Project Site, the Municipality has provided the Private Party with due and reasonable notice that such persons have been authorised by the Municipality and where such notice has not been received by the Private Party, the Private Party may deny access to the Project Site to such persons);

- 9.2 inappropriate use by the Municipality, its employees or its visitors of any Project Assets; and
- 9.3 any breach by the Municipality of any warranties given by it in this PPP Agreement.

10. THIRD PARTY CLAIMS

- 10.1 Nothing in this clause shall prevent or restrict the right of the Municipality or the Private Party to seek any interdict or similar relief, any decree or specific performance or any other discretionary remedies of court.
- 10.2 In the event of either Party incurring a third party claim (**third party claim**) for which the other Party has indemnified it then such Party shall notify the other Party thereof within a period of ten (10) Business Days of that Party becoming aware of such claim.
- 10.3 Either Party will provide the other Party with all reasonable co-operation and assistance in relation to the third party claim.
- 10.4 Subject to the terms of any Project Insurances, the Private Party shall be entitled to dispute any such third party claim, at its own cost and risk, in the name of the Municipality, subject to the Private Party:
- 10.4.1 exercising due care in defending a third party claim so as not to bring the name of the Municipality into disrepute.
 - 10.4.2 keeping the Municipality fully informed of the conduct of such third party claim; and
 - 10.4.3 obtaining the written approval of the Municipality (which shall not be unreasonably withheld or delayed) prior to settling any third party claim.
- 10.5 Should the Private Party fail to exercise its right in terms of this clause 10 to dispute any third party claim in the name of the Municipality, the Private Party shall notify the Municipality within a reasonable period of its decision to pay and/or settle any such third party claim, pursuant to which the Municipality shall have an election, on written notice to the Private Party to take over any third party claim against its release of the Private Party from liability under the indemnity in respect of such claim.
- 10.6 Where the Municipality fails to provide the Private Party with written notice of its decision to take over a third party claim within ten (10) Business Days of the receipt of the notice by the Private Party referred to in clause 10.5, the Municipality shall be deemed to have repudiated any right under clause 10.5 to take over the third party claim and the Private Party shall be required to pay and/or settle such third party claim in a manner that does not result in any breach of its obligations under this PPP Agreement.
- 10.7 In the event that the Municipality has received an indemnifying amount from the Private Party and subsequently recovers (in a separate action) a sum arising from the third party claim to which the indemnifying amount relates, to the extent that the aggregate sum recovered by the Municipality exceeds the indemnified amount of the loss sustained by the Municipality (the **excess**), the Municipality shall make payment to the Private Party of the excess up until an amount equal to the indemnifying amount.
- 10.8 The Private Party's liability under clause 10 in respect of third party claims shall:

in respect of any claim arising during the Service Period out of an event for which the Private Party is insured under the Project Insurances, be limited to the extent that the Private Party is indemnified under the Project Insurances; provided that, where the claim exceeds the maximum amount for which the Private Party is indemnified under the Project Insurances, the liability of the Private Party will be limited to such maximum amount plus R500 000 (five hundred thousand Rand) indexed to CPI, and provided further that where the Private Party has not insured itself against that event under the Project Insurances, then, the Private Party's liability shall be limited to the maximum sum which would have applied under the Project Insurance had the Private Party so insured plus R500 000 (five hundred thousand Rand) (indexed to CPI); and

- 10.8.1 in respect of any claim arising during the Service Period out of an event for which the Private Party is not required in terms of this PPP Agreement to be insured under the Project Insurances, be limited to an amount of R1,000 000 (one million Rand), indexed to CPI.
- 10.9 Any combination of events, circumstances or matters that is, for the purposes of a claim under the Project Insurances, treated as a single claim (or, where there is no Project Insurance in respect of the relevant events, circumstances or matters, would, for the purposes of a claim under the Project Insurances be so treated, if the events, circumstances or matters were insured against under the Project Insurances) shall, for the purposes of clauses 10.8.1 and 10.8.2, be treated as a single claim.

11. LIMITATIONS ON LIABILITY

- 11.1 Save for the Municipality's right at any time to claim the amount of any direct losses incurred by it as a result of rectifying or mitigating the effects of any Private Party Default and any other express right of the Municipality under this PPP Agreement (including any express right to indemnification), the sole remedy available to the Municipality in respect of any failure in the delivery of the Services (but not in respect of the other Project Deliverables) shall be the operation of the Penalty Deductions in accordance with the provisions of this PPP Agreement.
- 11.2 Save as otherwise provided for by the provisions of this PPP Agreement, neither Party shall be liable in delict to the other Party in respect of any act or omission relating to or in connection with this PPP Agreement.
- 11.3 Neither Party shall be liable to the other for any damages or any indemnity to the extent that the damages or the amount claimed under the indemnity is for or arises out of loss of profit, loss of use, loss of production, loss of business or loss of business opportunity or is a claim for special damages or consequential loss suffered or allegedly suffered by any person.
- 11.4 The Municipality agrees that, notwithstanding clauses 11.2 and 11.3, where the calculation or determination of any compensation on termination or compensation or other amount to be paid to the Private Party under clause 47 (*Consequences of a Compensation Event*), clause 63 (*Compensation on Termination for Municipality Default*), clause 64 (*Compensation on Termination for Private Party Default*), clause 67 (*Compensation on Termination for Force Majeure*) and clause 68 (*Compensation on Termination for Corrupt Acts*) includes any amount that the Private Party would otherwise be prevented from claiming by virtue of clauses 11.2 and 11.3 (including, but not limited to, Subcontractor losses of profits), such amounts shall nevertheless be included in such calculation or determination.

12. DOUBLE RECOVERY AND MITIGATION

- 12.1 Neither Party to this PPP Agreement shall be entitled to recover (whether pursuant to an indemnity or otherwise) any loss to the extent that it has already been compensated for that loss, whether by way of insurance payments or otherwise or is entitled to be compensated for that loss by way of Project Insurance.
- 12.2 Each Party shall be under an obligation to mitigate the consequences of any conduct in respect of which it is entitled to compensation under this PPP Agreement (whether by way of indemnity or otherwise).

PART 4: PROJECT SITE

13. PROJECT SITE ACCESS

- 13.1 With effect from the Effective Date, the Municipality shall make the Project Site available to and hereby grants vacant, free and undisturbed possession, use and access to the Private Party and its Subcontractors and any other contractors or agents of the Private Party to the Project Site for the purposes of undertaking the Project Deliverables for the duration of this PPP Agreement.
- 13.2 Furthermore, the Municipality shall procure (i) free and undisturbed access to the Project Site and Relevant Sites from third parties where necessary, and (ii) the use of the facilities and services as may be necessary, for the purposes of, or in relation to, undertaking the Project Deliverables for the duration of this PPP Agreement.
- 13.3 The Municipality undertakes not to grant to any third party any right or interest in the Project Site for the duration of this PPP Agreement.

14. CONDITIONS OF PROJECT SITE

14.1 Project Site Agreement

14.1.1 Project Site

- (a) With effect from the Effective Date, the Municipality undertakes to make the Project Site available to and grant (i) access, (ii) undisturbed possession of, and (iii) an exclusive right of use of the Project Site to the Private Party and its Subcontractors and any other contractors or agents of the Private Party. Accordingly, the Private Party is entitled to enter, occupy, use and possess the Project Site for the purposes of undertaking the Project Deliverables for the duration of this PPP Agreement.
- (b) The Private Party shall, throughout the progress of the Works and the conduct of the other Project Deliverables, as far as reasonably possible, have regard for the safety of all persons at the Project Site (whether lawfully or not) to the extent required by law, and shall keep the Project Site, the Works and the Facilities in an orderly state as appropriate in accordance with Good Industry Practice to avoid danger to such persons.
- (c) The Municipality undertakes that, for the duration of this PPP Agreement and subject to the terms of this PPP Agreement, it shall not:
- (i) prevent the Private Party or its Subcontractors from accessing, occupying, using or possessing the Project Site; or

(ii) grant to a third party or third parties any rights or interests in the Project Site.

(d) With effect from the Expiry Date, the Private Party's unencumbered interest in the Project Site shall automatically be assigned to the Municipality, without the need for any further formality to give effect to such assignment. The Private Party shall not be entitled to any compensation in respect of such assignment. Notwithstanding the aforesaid, the Private Party shall, on demand by the Municipality, duly execute all documents which may be required by the Municipality in connection with such assignment.

14.1.2 Compliance with Title Deeds and Zoning Conditions

the Private Party shall procure that:

- (a) all Project Deliverables carried out at the Project Site by or on behalf of the Private Party whether before, during or after the completion of the Works shall be carried out in a manner that does not breach any conditions of the title deeds of the Project Site; and
- (b) there shall be no conduct which gives rise to a right on the part of any person to obtain title to the Project Site or any part of it save in accordance with the terms of this PPP Agreement; and
- (c) it complies with the zoning conditions imposed by the Mossel Bay Local Authority on the Project Site.

14.2 Relevant Sites

14.2.1 With effect from the Service Commencement Date, the Municipality undertakes to procure (i) access, (ii) undisturbed use of the agreed services (as applicable in the respective Relevant Sites (as set out in Schedule 15: Relevant Sites), and (iii) a right of use of the agreed services in such Relevant Sites (as applicable) from the respective parties for and on behalf of the Private Party and its Subcontractors and any other contractors or agents of the Private Party. Accordingly, the Private Party is entitled to enter and use the agreed services in the Relevant Site for the purposes of undertaking the Project Deliverables for the duration of this PPP Agreement.

14.2.2 The Private Party shall, throughout the conduct of the Project Deliverables as may be required in the Relevant Sites, as far as reasonably possible, have regard for the safety of persons at the Relevant Site.

14.3 Project Site Conditions

The Municipality has conducted studies or caused studies to be conducted on their behalf at the Project Site, the results of which have been made available to the Private Party.

15. CONSENTS

15.1 The Private Party shall be responsible for:

- 15.1.1 obtaining all the Private Party Consents listed in Schedule 13: Private Party Consents which may be required in connection with the performance of the Project Deliverables.
- 15.1.2 maintaining in full force and effect all Private Party Consents; and
- 15.1.3 implementing all Private Party Consents in accordance with their respective terms within the period of their validity.
- 15.2 The Municipality shall provide all such assistance to the Private Party as may be reasonably necessary for the Private Party to obtain all the Project Party Consents referred to in clause 15.1.1, provided, however, that the Municipality shall incur no liability for the costs of obtaining or maintaining, or any delay, failure or inability of the Private Party to obtain or maintain any such Project Party Consents.
- 15.3 The Municipality shall be responsible for obtaining and maintaining in full force and effect all Municipal Consents.
- 15.4 To the extent that there is any environmental contamination at the Project Site caused by activities conducted at the Project Site, Relevant Site and/or the adjacent sites before the Effective Date, then the Municipality indemnifies and shall keep the Private Party always indemnified against all claims, harm, damage or loss:
- 15.4.1 sustained by the Private Party in consequence of the latent pre-transfer environmental contamination; and
- 15.4.2 incurred by the Private Party because of future environmental contamination at the Project Site arising from the ongoing activities at the adjacent sites, except to the extent that the cost of any such claim is covered by the Project Insurances. The provisions of clauses 10.2 to 10.7 shall apply *mutatis mutandis* to any claims under this clause 15.4.

16. HERITAGE OBJECTS AND RESOURCES

16.1 Discovery

Upon the discovery of any heritage object or resource (as defined in the National Heritage Resources Act, 1999 or any corresponding provincial legislation) during the Works, the Private Party shall:

- 16.1.1 promptly notify the Municipality of such discovery.
- 16.1.2 take all necessary steps not to disturb the heritage object or resource, including cease any Works to the extent that the carrying out of such Works might reasonably endanger the heritage object or resource or prevent or impede its excavation or preservation; and
- 16.1.3 take all necessary steps to preserve the heritage object or resource in the same position and condition in which it was discovered.

16.2 Action

- 16.2.1 The Municipality shall promptly and in any event within five (5) Business Days of the notice in section 16.1.1 issue an instruction to the Private Party specifying

what action the Municipality requires the Private Party to take in relation to such discovery.

- 16.2.2 The Private Party shall promptly and diligently comply with any instruction so issued (save to the extent that such instruction constitutes a proposal by the Municipality for a deemed Municipality Variation as provided in clause 16.2.4 below, in which case the variation procedure provided for in clause 50.2 (Municipality Variations) shall apply) at its own cost.
- 16.2.3 If so directed by the Municipality or Responsible Authority, the Private Party shall allow representatives of the Municipality or Responsible Authority to enter onto the Project Site for the purposes of removal or disposal of such discovery; provided that such entry shall be subject to the Municipality or Responsible Authority complying with all relevant safety procedures which shall include any relevant health and safety plans for the construction of the Facilities and any reasonable directions regarding the safety of the Project Site that may be issued by or on behalf of the Private Party.
- 16.2.4 If the discovery constitutes a Relief Event and any instruction from the Municipality in connection with the discovery includes the requirement for the Private Party to carry out works (being any work of alteration, addition, demolition or extension or variation in the Facilities) which are not Works that would be necessary for the purpose of compliance with applicable law or any Consents or to perform the Project Deliverables, then such works shall be deemed to be an Municipality Variation and the provisions of clause 50.2 (Municipality Variation) shall apply.

PART 5: DESIGN AND CONSTRUCTION

17. PRIVATE PARTY RESPONSIBILITY

- 17.1 The Private Party shall carry out the Works in line with its accepted design proposals as set out in Schedule 10: Private Party Proposals to achieve the required Output Specifications as set out in Schedule 7: Output Specifications.
- 17.2 It is expressly agreed between the Parties that the Private Party remains solely responsible for its design and assumes and carries all risk in insuring that it meets the Municipality's Output Specifications as set out in Schedule 7: Output Specifications.
- 17.3 The Private Party shall comply with the Waste Management Licence issued in terms of Section 49(1)(a) of the National Environmental Management: Waste Act, 2008 by the Department of Environmental Affairs and the authority granted by the Western Cape Government as appears in Schedule 6: Project Site and all other legislative, regulatory and authoritative conditions, including but not limited to those listed in Schedule 7: Output Specifications.
- 17.4 The Private Party shall develop and finalise the design and specification of the Facilities by using Good Industry Practice.

18. MUNICIPALITY'S RIGHT TO INSPECT

- 18.1 Subject to complying to all relevant safety procedures, which shall include any relevant health and safety plans for the construction of the Facilities, the Private Party site rules for the Project Site from time to time and any reasonable directions regarding site safety that may be issued by or on behalf of the Private Party, the Municipality

Representative shall have access at all reasonable times to the Project Site to view the carrying out of the Works on reasonable prior notice appropriate to the circumstances.

- 18.2 In addition, the Municipality Representative shall be entitled to visit any site or workshop where materials, plant or equipment are being manufactured, prepared or stored for use in the Works for the purposes of general inspection and of attending any test or investigation being carried out in respect of the Works, provided that the Municipality Representative observes all reasonable security, access, health and safety and environmental policies prescribed by the Private Party. If the Municipality Representative fails to comply with the requirements the Private Party shall be entitled to preclude such Municipality Representative from exercising the rights of access to the Project Site granted to them under this PPP Agreement.

19. WORKS PROGRAMME AND DATES FOR COMPLETION

19.1 Dates of Completion

Subject to the provisions of this PPP Agreement, the Private Party shall ensure the Project is Available by the Scheduled Service Commencement Date and shall complete the Works by the scheduled construction completion date as set out in Schedule 8: Works Programme, unless otherwise extended in accordance with clause 46 (*Consequences of a Relief Event*) and 47 (*Consequences of a Compensation Event*) or such other date as may be agreed to, in writing, by the Parties.

19.2 Works Programme

- 19.2.1 The Works programme submitted has been prepared in accordance with Good Industry Practice and is in sufficient detail to enable the Municipality Representative to monitor the progress of the Works and shall be revised by the Private Party whenever the previous Works Programme is inconsistent with actual progress.

- 19.2.2 For the avoidance of doubt, the risk in completing the Project in terms of the Works programme remains with the exclusively with the Private Party.

19.3 Report on Delay

- 19.3.1 If the Private Party becomes aware of any circumstances which might lead to a significant delay in progress and/or completion of the Works, which delay requires a revision of the Works programme, the Private Party shall forthwith give written notice to the Municipality of the relevant circumstances.

- 19.3.2 Such notice shall:

- (a) identify the cause or causes of the delay.
- (b) indicate whether and to what extent the delay is caused by a Relief Event or Compensation Event.
- (c) provide details of the nature of the event causing or likely to cause a delay and its duration.

- (d) identify clearly, by reference to a revised Works programme, whether the Scheduled Service Commencement Date is to be affected and the extent of such affect.

19.3.3 The Private Party shall afford the Municipality such access to the Project Site and documentation of the Private Party as the Municipality may reasonably consider necessary and appropriate for the purpose of establishing the accuracy of the delay notice.

19.3.4 If it appears to the Municipality Representative at any time that the actual progress of the Works as a whole has significantly fallen behind in terms of the Works programme, then the Municipality Representative shall be entitled to require the Private Party to submit to the Municipality Representative a report identifying the reasons for the delay and at the election of the Municipality to:

- (a) produce and submit to the Municipality Representative a revised Works programme showing the manner and the periods in which the Works will be carried out to ensure completion; and/or
- (b) produce and submit to the Municipality's Representative a revised Works programme showing the steps which are to be taken to eliminate or reduce the delay and the effect of any such delay on the achievement of the scheduled construction completion date.

19.3.5 Should the Service Commencement be delayed beyond the Scheduled Service Commencement Date owing to the Private Party's failure to timeously comply with the time periods agreed upon (dates of completion) the Municipality shall be indemnified by the Private Party for all reasonable costs and expenses which the Municipality may incur as a consequence of such delay, but only to the extent that such costs and expenses exceed the monthly Unitary Payment which the Municipality would have paid to the Private Party had the Scheduled Service Commencement Date not been delayed.

19.3.6 The Private Party shall notify the Municipality Representative if at any time the actual progress of the Works is significantly ahead of the Works programme so that the Private Party anticipates that the Actual Construction Completion Date will be earlier than the scheduled construction completion date.

19.3.7 The Municipality Representative shall be entitled to reasonably require the Private Party to produce and submit a revised Works programme.

20. INDEPENDENT CERTIFIER

20.1 Appointment

20.1.1 The Private Party shall within fourteen (14) days from the Signature Date provide the Municipality with the full name and Curriculum Vitae of an expert to be appointed as Independent Certifier out of the names listed in Schedule 4: Independent Certifiers, who will be responsible for certifying that, in his/her professional opinion, the Works have been satisfactorily completed.

20.1.2 The Private Party will immediately proceed to appoint the Independent Certifier at its own cost.

- 20.1.3 Notwithstanding the fact that the costs of the Independent Certifier is paid by the Private Party, this in no uncertain terms derogates from the Independent Certifier's fiduciary duty towards the Municipality.
- 20.1.4 The Private Party shall provide the Independent Certifier, once appointed, with a copy of the PPP Agreement and all the requisite information and documentation it may require enabling the Independent Certifier to discharge his/her responsibilities and duties.
- 20.1.5 Once appointed, the Independent Certifier will be obligated to enter into an Independent Certifier Agreement with the Parties, a draft of which appears in Schedule 4: Independent Certifier Agreement hereto.

20.2 **Changes to Terms of Appointment**

- 20.2.1 Neither Party shall, without the other Party's prior written approval (not to be unreasonably withheld):
- (a) terminate or repudiate the services of or discharge the Independent Certifier.
 - (b) waive, settle, compromise or otherwise prejudice any rights or claims which the Municipality may from time to time have against the Independent Certifier; and/or
 - (c) vary the terms of the Independent Certifier Agreement or the services performed or to be performed by the Independent Certifier.
- 20.2.2 The Parties specifically agree to comply with and fulfil their duties and obligations arising under or in connection with the Independent Certifier Agreement.

21. **COMPLETION CERTIFICATE**

- 21.1 When the Private Party is satisfied that it has complied with its obligations and that the first phase of the Works are complete, it shall advise the Independent Certifier accordingly and request the Independent Certifier to issue the Phase 1 Completion Certificate within five (5) Business Days of receipt of the Private Party request.
- 21.2 The Independent Certifier shall, upon receipt of the Private Party's request, issue the Phase 1 Completion Certificate only if satisfied that:
- 21.2.1 all of the Works for the first phase have been completed in accordance with the design and construction specifications and that the Private Party has satisfied the Output Specifications of the Municipality except for any minor outstanding work or defects which will not substantially affect the use or safe operation of the first phase of the Works in accordance with their intended purpose; and
 - 21.2.2 in the Independent Certifier's reasonable opinion, the Facilities can support the Services to be provided by the Private Party from the Services Commencement Date;

or give written notice to the Municipality and Private Party specifying all material matters that in the reasonable opinion of the Independent Certifier must be satisfied before a Phase 1 Completion Certificate shall be issued.

- 21.3 Upon receipt of a Phase 1 Completion Certificate from the Independent Certifier, the Private Party shall, in accordance with the further provisions of this PPP Agreement:
- 21.3.1 comply with any conditions stipulated in the Phase 1 Completion Certificate to the extent that it has not already been complied with.
- 21.3.2 deliver to the Municipality all such documentation as may be reasonably required by the Municipality, including the design and construction data for the first phase of the Works within twenty one (21) Business Days of the issue of the Phase 1 Completion Certificate; and
- 21.3.3 issue an Availability Certificate within 5 (five) Business Days thereafter.
- 21.4 When the Private Party is satisfied that it has complied with its obligations and that the second phase of the Works are complete, it shall advise the Independent Certifier accordingly and request the Independent Certifier to issue the Phase 2 Completion Certificate within five (5) Business Days of receipt of the Private Party request.
- 21.5 The Independent Certifier shall, upon receipt of the Private Party's request, issue the Phase 2 Completion Certificate only if satisfied that:
- 21.5.1 all of the Works for the second phase have been completed in accordance with the design and construction specifications and that the Private Party has satisfied the Output Specifications of the Municipality except for any minor outstanding work or defects which will not substantially affect the use or safe operation of the of all the Works in accordance with their intended purpose; and
- 21.5.2 in the Independent Certifier's reasonable opinion, the Facilities can support the Services to be provided by the Private Party.
- or give written notice to the Municipality and Private Party specifying all material matters that in the reasonable opinion of the Independent Certifier must be satisfied before a Phase 2 Completion Certificate shall be issued.
- 21.6 Upon receipt of a Phase 2 Completion Certificate from the Independent Certifier, the Private Party shall, in accordance with the further provisions of this PPP Agreement:
- 21.6.1 comply with any conditions stipulated in both the Phase 1 and the Phase 2 Completion Certificates to the extent that it has not already been complied with; and
- 21.6.2 deliver to the Municipality all such documentation as may be reasonably required by the Municipality, including the design and construction data for the second phase of the Works within twenty one (21) (Business Days of the issue of the Phase 2 Completion Certificate.
- 21.7 For the sake of clarity, it is hereby recorded that the Independent Certifier's appointment is to provide a reasonable and objective measure of ensuring that the Private Party completes the Works in accordance with this PPP Agreement. Performing his/her functions, the Independent Certifier does not in any way acquire any risk in relation to the design, construction, fitting, installation or commissioning of the Works, nor does it imply that the Municipality makes any representation or warranty of whatsoever nature as to the value, design, construction, maintenance, operation or fitness for use of the Facilities or any of the Project Assets. The risk in relation to the above at all times remains with the Private Party.

PART 6: QUALITY ASSESSMENT

22. QUALITY ASSESSMENT PLANS AND SYSTEM

- 22.1 The Private Party shall develop an appropriate quality assessment plan, the standard of which shall be consistent with the principles of ISO 9000 or any equivalent standard which is generally recognised as having replaced it.
- 22.2 There shall be:
- 22.2.1 a design quality plan.
 - 22.2.2 a construction quality plan; and
 - 22.2.3 a service quality plan,
- for each service, which shall be consistent with any standard set in terms of any applicable environmental legislation and any relevant rules, regulations, codes of practice as set out by the South African Bureau of Standards (SABS).
- 22.3 The Private Party shall ensure that the Project Deliverables are carried out in compliance with the quality assessment plans.
- 22.4 The Private Party shall ensure compliance with the quality assessment plan, including compliance by the Construction Subcontractor and Operations Subcontractor.
- 22.5 The Municipality's Representative will be entitled to carry out audits as against the requirements set out in the Output Specifications and the Consents provided that the cost of such audits shall be paid for by the Municipality.
- 22.6 Such audits shall be carried out at appropriate intervals, provided that the Municipality's Representative shall give the Private Party reasonable notice of at least ten (10) Business Days of when he/she proposes to carry out such audits. Such audits shall not in any way delay the Private Party from proceeding with the Works.
- 22.7 The Private Party shall ensure that any Subcontractor cooperates with the Municipality's Representative, including providing him/her with all the information and documentation which he/she may reasonably require in connection with his/her right to audit.

PART 7: OPERATION AND MAINTENANCE

23. SERVICE COMMENCEMENT

- 23.1 The Private Party undertakes to achieve Service Commencement on or before the Scheduled Service Commencement Date.
- 23.2 Subject to the Independent Certifier issuing the Phase 1 Completion Certificate, the Private Party shall be entitled to and in any event, must issue an Availability Certificate on or before the Scheduled Service Commencement Date.
- 23.3 The Private Party shall perform the Services from the Service Commencement Date for the remainder of the Project Term.

24. THE SERVICES

24.1 General Obligations

24.1.1 The Private Party shall with effect from the Service Commencement Date ensure (or procure) that it and/or the Operations Subcontractor and any other person for whom it is responsible, ensures that the Services Are Available and performed:

- (a) in such manner as ensures that the requirements of Schedule 7: Output Specifications are met.
- (b) in accordance with the terms of this PPP Agreement; and
- (c) in such manner as ensures compliance with Schedule 10: Private Party Proposals.

24.1.2 To avoid doubt, the obligations set out above are independent obligations and therefore compliance with the one does not excuse failure to satisfy the other.

24.2 Amendment of Private Party Proposal

The Private Party may at any time submit to the Municipality Representative proposals for the amendment to or substitution of Schedule 10: Private Party Proposals or any part thereof, on the proviso that if there is no express acceptance of such proposed amendment or substitution, then there shall be no deemed amendment or substitution.

25. MONITORING AND INSPECTION

25.1 Monitoring by the Private Party

25.1.1 The Private Party undertakes to monitor its performance of the Services and/or to procure that its performance of the Services is monitored against the Output Specifications in Schedule 7: Output Specifications.

25.1.2 The Private Party shall in respect of each of the component parts of the Services as per Schedule 7: Output Specifications develop and maintain a detailed written performance monitoring mechanism and procedure in a format and with a content acceptable to the Municipality, which performance monitoring mechanism and procedure shall be based on mechanisms and monitoring frequencies to be approved by the Municipality.

25.1.3 The performance monitoring mechanisms and procedures referred to above shall be implemented by the Private Party with effect from the Service Commencement Date.

25.2 Monitoring by the Municipality

25.2.1 The Municipality may, at its own expense, carry out such monitoring and/or auditing of the Services and of the Private Party's performance monitoring mechanisms and procedures and quality assurance procedures as it may from time to time require.

25.2.2 The Municipality may, in its absolute discretion, jointly monitor any of the aspects of the Services with the Private Party.

- 25.2.3 The Municipality shall, in addition, at its own expense, be entitled to undertake an annual review of the Private Party's maintenance, operating and management procedures relating to the Project Deliverables.

26. RESOURCES AND TRAINING

The Private Party shall ensure that:

- 26.1 There shall always be enough staff (including all relevant grades of supervisory staff) engaged in the provision of the Services with the requisite level of skill and experience.
- 26.2 To avoid doubt, this obligation shall include:
- 26.2.1 ensuring that there are sufficient staff to cover periods of holiday, sickness, other absences; and
- 26.2.2 ensuring that all staff receive such training and supervision as is necessary to ensure the proper performance of the Services, maintenance of a quality service in accordance with the quality assessment plans and systems established and compliance with all applicable health and safety rules, procedures and requirements.

PART 8: PROJECT ASSETS

27. EQUIPMENT STANDARDS

- 27.1 The Private Party shall ensure that the goods, equipment, consumables and materials used by it or any Subcontractor in connection with the provision of any of the Services (each as a distinct and separate obligation) are:
- 27.1.1 maintained in a safe, serviceable and clean condition in accordance with Good Industry Practice.
- 27.1.2 of the type specified in the service level specifications and/or the method statements (where appropriate).
- 27.1.3 in compliance with any relevant rules, regulations, codes of practice and/or South African standards.
- and shall, as soon as practical after receiving a reasonable request, in writing, from the Municipality, supply to the Municipality evidence within a reasonable period to demonstrate its compliance with this clause.

28. PROJECT ASSETS – GENERAL OBLIGATIONS

- 28.1 Save as otherwise stated in this PPP Agreement, the Private Party shall be liable for all loss and damage to the Project Assets (in whole or in part) howsoever caused.
- 28.2 The Private Party shall at its own cost and risk, provide, deliver, install, commission, manage, maintain, repair, renew and replace (as the case may be) the Project Assets (or part thereof) at such times and in such manner:
- 28.2.1 as to enable it to meet the Output Specifications for the Project set forth in Schedule 7: Output Specifications.

- 28.2.2 as to ensure that the Private Party is, always, able to provide the Services.
- 28.2.3 without limiting clause 28.2 above, as would be required having regard to Good Industry Practice; and
- 28.2.4 as required by Law.
- 28.3 The Private Party shall, upon receipt of a request from the Municipality, supply to the Municipality evidence, as reasonably practicable, to demonstrate its compliance with this clause 28.

PART 9: PAYMENT AND FINANCIAL MATTERS

29. ONCE OFF PAYMENT BY A PRIVATE PARTY

- 29.1 The Private Party shall within thirty (30) days from the Effective Date make the Once Off Payment into a bank account nominated by the Municipality for the benefit of the Municipality.
- 29.2 The Parties agree that, once the Once Off Payment is paid by the Private Party to the Municipality, the Municipality shall make payment to the DBSA of any monies due to the DBSA in terms of an agreement between the Municipality and DBSA in respect of the Project (if any) and the balance of the Once Off Payment shall be ring-fenced and held in the capital reserve replacement fund account of the Municipality until the Termination Date (unless otherwise agreed to between the Parties in writing) and such balance may be used in the sole discretion of the Municipality for the payment of any monies due and owed to the Private Party by the Municipality under this PPP Agreement.

30. REVENUE FUND

The Municipality must:

- 30.1 ensure that its expenditure commitment under this PPP Agreement is appropriated in its annual budget for each financial year for the duration of the Project; and
- 30.2 ensure that, in doing so, it complies with all relevant legislation, including the Municipal Finance Management Act and the Regulations thereto, the Municipal Systems Act, and the relevant by-laws established in terms thereof and any other relevant Law.

31. MONTHLY UNITARY PAYMENT (where applicable)

- 31.1 It is specifically agreed that the Private Party shall not be entitled to receive any monthly Unitary Payment until the Service Commencement Date.
- 31.2 The monthly Unitary Payment shall be paid to the extent that the Services are Available from the Service Commencement Date and will be made in accordance with this clause and the provisions of Schedule 1: Payment Mechanism or where such Services are not Available due to a breach by the Municipality of its obligations to provide access to the Project Site or the Relevant Sites.

32. HAZARDOUS WASTE PAYMENT

- 32.1 It is specifically agreed between the Parties that the classification, handling and disposal of Hazardous Waste by the Private Party will not form part of the Unitary

Payment for bulk transport services and management and operation of the Project Site as set out in Schedule 1: Payment Mechanism.

- 32.2 The Private Party will invoice the Hazardous Waste Producer directly in accordance with its classification and agreed tariff as set out in Schedule 7: Output Specification.
- 32.3 The Hazardous Waste Levy for the first Contract Year will be equal to a ten percent (10%) mark-up of the Hazardous Waste Invoice. The Parties agree that thirty (30) days prior to the anniversary of each Contract Year, the Parties shall agree the revised percentage of the Hazardous Waste Levy, failing which the Private Party will utilise the percentage of the Hazardous Waste Levy provided in the preceding Contract Year.
- 32.4 The Private Party shall include in each Hazardous Waste Invoice the Hazardous Waste Levy.
- 32.5 On the fifth (5th) Business Day of each Contract Month the Private Party shall deliver to the Municipality in a form acceptable to the Municipality a report (the **Hazardous Waste Payment Report**) which shall set out the total of the payments actually received by the Private Party in respect of the Hazardous Waste Invoices for the relevant Contract Month and the Hazardous Waste Levy due to the Municipality.
- 32.6 Where the Hazardous Waste Payment Report is undisputed, the Municipality shall invoice the Private Party an amount equal to the Hazardous Waste Levy reflected therein.
- 32.7 Subject to clause 32.9, the monthly payment for the Hazardous Waste Levy shall accrue in arrears in respect of each Payment Period during the Service Period and shall become due once invoiced by the Municipality.
- 32.8 The Private Party shall pay the Hazardous Waste Payment to the Municipality on or before the payment date stipulated in clause 32.9.
- 32.9 The Private Party shall pay the Hazardous Waste Levy to the Municipality within thirty (30) days of receipt of the Hazardous Waste Payment.
- 32.10 The Private Party accepts all risk in the collection of payments due to it in respect of the Hazardous Waste Invoice.
- 32.11 To the extent that the Private Party, using reasonable efforts, is unable to collect the payments referred to in clause 32.10 above within each financial year, the Municipality and the Private Party shall write off the receivables associated with such Hazardous Waste Invoice in accordance with good accounting practices.

33. PENALTY DEDUCTIONS

- 33.1 Undisputed Penalty Deductions from the monthly Unitary Payment and the Hazardous Waste Payment shall be made as required in terms of Schedule 1: Payment Mechanism.
- 33.2 In addition to the Penalty Deductions referred to in clause 33.1 above, whenever any sum of money is agreed or determined in terms of this PPP Agreement to be due and payable by the Private Party to the Municipality, such sum may, at the reasonable discretion of the Municipality, be deducted from or applied to reduce the amount then due or which at any time afterwards may become due by the Municipality to the Private Party, provided that:

- 33.2.1 the Municipality has given the Private Party five (5) Business Days' notice of its intention to apply such a deduction; and
- 33.2.2 upon the termination of this PPP Agreement, any deductions then deductible shall be made from any termination payment due to the Private Party under clause 63 (Compensation on Termination for Municipality Default), clause 64 (Compensation on Termination for Private Party Default) and clause 67 (Compensation on Termination for Force Majeure), provided that such deductions under the relevant clauses have not already been made.

34. INVOICING AND PAYMENT ARRANGEMENTS

Reference to Unitary Payments in this clause shall be a reference to all Unitary Payments as set out in Schedule 1: Payment Mechanism.

- 34.1 The invoicing arrangements with respect to Unitary Payments and other payments shall be as follows:
- 34.1.1 The monthly Unitary Payment shall accrue in arrears in respect of each Payment Period during the Service Period and shall be invoiced and paid on or before the payment date stipulated in clause 34.4.
- 34.1.2 On the fifth (5th) Business Day of each Contract Month the Private Party shall deliver to the Municipality in a form acceptable to the Municipality a report (the **Unitary Payment Invoice Report**) which shall set out:
- (a) the Unitary Payment (if any) due in respect of the previous Payment Period.
 - (b) the aggregate Penalty Deductions (if any) due in respect of the previous Payment Period.
 - (c) any VAT due and payable in respect of any of the above amounts.
 - (d) the calculation of the applicable CPI factor (if any) and
 - (e) the aggregate Penalty Deduction (if any) due in respect of the previous payment period relating to the Hazardous Waste Payment.
- 34.2 The monthly Unitary Payment Invoice Report delivered pursuant to clause 34.1.2 above shall be accompanied by a performance report in a format reasonably acceptable to the Municipality, as agreed to by the Parties prior to the Service Commencement Date, for the relevant Payment Period, which will be prepared by the Private Party and which will clearly show the basis of calculation of each of the amounts referred to in the monthly Unitary Payment Invoice Report.
- 34.3 The monthly Unitary Payment Invoice Report shall be accompanied by invoices from the Private Party to the Municipality in respect of any amounts that are due and payable.
- 34.4 If the monthly Unitary Payment Invoice Report shows a net amount owing by the Private Party to the Municipality, then the Municipality shall issue a legally compliant invoice to the Private Party in respect of such amount promptly following its receipt of such monthly Unitary Payment Invoice Report and the Private Party shall pay to the Municipality the amount reflected on such invoice no later than the twentieth (20th)

Business Day after the Private Party has received such invoice, if such amount is undisputed.

- 34.5 Payment of the undisputed portion of the monthly Unitary Payment invoice shall be made by the Municipality on or before the Payment Date (as defined below), provided that the Private Party submits to the Municipality a revised invoice in respect of such undisputed portion (and a credit note in respect of the disputed portion) within three (3) Business Days of notification by the Municipality to the Private Party of the dispute in regard to the remaining portion, such notification of a dispute being in accordance with clause 36 (Disputes).
- 34.6 The **Payment Date** for any undisputed invoiced amount in a monthly Unitary Payment Invoice shall be the thirtieth (30th) day after the date on which the relevant report and invoice/statement are presented to the Municipality.

35. MANNER OF PAYMENT

All payments under this PPP Agreement shall be made in RSA Rands, quoting the invoice/statement number against which payment is made. Payment will be made by electronic funds transfer into the bank account designated in writing for this purpose by the Private Party.

36. DISPUTES

- 36.1 If the Municipality disputes all or any part of the monthly Unitary Payment invoice, this clause will apply in respect of the disputed portion. The Municipality shall give written notification to the Private Party within five (5) Business Days from the date of receipt of the reports and invoices referred to in clause 34 above of any disputes regarding the monthly Unitary Payment invoice, which notification shall state the amount of the disputed portion and its reason for disputing such portion.
- 36.2 The Parties shall use all reasonable endeavours to resolve the dispute in question within five (5) Business Days of the date of notification by the Municipality to the Private Party.
- 36.3 If they fail to resolve the dispute, either Party may refer the dispute for resolution in accordance with the dispute resolution procedure in clause 77 (Dispute Resolution).
- 36.4 Following resolution of the dispute, the Private Party shall, to the extent necessary, issue a replacement invoice to the Municipality reflecting the agreed or determined amount due by the Municipality, but excluding any amount already paid. Such amount, if any, shall be paid by the Municipality to the Private Party together with interest on such amount calculated in accordance with clause 37 (Late Payments) forthwith after receipt by it of the replacement invoice.
- 36.5 The provisions of this clause 36 shall apply *mutatis mutandis* to any disputed amounts claimed by the Municipality from the Private Party.

37. LATE PAYMENTS

Each Party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not duly made pursuant to the terms of this PPP Agreement on the due date, calculated from day to day at a rate per annum equal to the Default Interest Rate from the day after the date on which payment was due up to and including the date of payment.

38. VAT

Any invoice/statement or request for payment of monies due to the Private Party under this PPP Agreement shall comply with the requirements of the Value-Added Tax Act, 1991.

39. PERFORMANCE REPORT

A performance report is to be compiled monthly and delivered by the Private Party to the Municipality Representative, which shall be prepared in good faith and in accordance with Good Industry Practice and shall contain at least the following:

- 39.1 a summary of the overall performance of the Services.
- 39.2 a monthly assessment of the Private Party's performance of each material component of the Services as against its Availability, standard and performance standards.
- 39.3 details of all relevant monitoring measures undertaken by or on behalf of the Private Party and/or the Operations Subcontractor in relation to performance of the Services, including the dates when such measures were undertaken, by whom they were undertaken and the results.
- 39.4 where there have been material deficiencies in the performance of the Services and, if so, details of the corrected actions taken or to be taken by the Private Party and/or the Operations Subcontractor to remedy same.
- 39.5 details of any training undertaken by the Private Party or Subcontractors' personnel in respect of the Project Deliverables and a summary of any employment related issues as relevant to the Project Deliverables.
- 39.6 a full record of all incidents relating to health, safety and security relating to the Project Deliverables which occurred during the applicable Payment Period.
- 39.7 a summary of any material changes in the manner of provision of the Services agreed to between the Parties pursuant to the PPP Agreement or lawful instructions given by a legislator in respect of the provision of the Services which do not result in or require amendment of the PPP Agreement itself; and
- 39.8 such other information as may be required in terms of Schedule 7: Output Specifications or any other additional information the Municipality may reasonably require from time to time.

40. SETOFF

In addition to undisputed Penalty Deductions, the Municipality may, at its discretion, retain or setoff any undisputed amount owed to it by the Private Party under this PPP Agreement (other than the Hazardous Waste Levy) which has, by agreement or determination under this PPP Agreement, become due and payable to the Municipality against any amount due to the Private Party under this PPP Agreement, including any termination payment due to the Private Party under this PPP Agreement.

41. REPORTING REQUIREMENTS

- 41.1 The Private Party shall for the duration of the Project:
 - 41.1.1 maintain a full record of particulars of the cost of providing the Project Deliverables.

- 41.1.2 when reasonably requested by the Municipality, furnish, within a reasonable period, a summary of any of the costs in such format and detail as the Municipality may reasonably require.
- 41.1.3 deliver to the Municipality, as soon as they become available:
- (a) copies of its financial statements for its latest financial year which shall include an income statement, balance sheet and cash flow statement audited and certified by a firm of independent auditors; and
 - (b) copies of its unaudited financial statements for that half year or year (as the case may be) which shall include an income statement, balance sheet and cash flow statement.
- 41.2 The Private Party shall prepare the financial statements in accordance with IFRS and these financial statements will reflect a true and fair view of the results of its operations for the period in question and the state of its affairs as at the date at which the financial statements are compiled and shall disclose or reserve against all the liabilities, actual or contingent of the Private Party.
- 41.3 The Private Party shall keep books of accounts in accordance with IFRS and have same available for inspection by the Municipality upon reasonable notice and shall allow the Municipality to arrange for an audit to be conducted from time to time as may be required by the Municipality in its discretion and as may be required under the Public Audit Act, 2004.
- 41.4 The Private Party shall maintain or produce the following records or reports in respect of the Project Site and all the Project Deliverables:
- 41.4.1 a full record of all incidents relating to health, safety and security which occur during the term of the PPP Agreement.
 - 41.4.2 full records of all material maintenance procedures carried out during the terms of the PPP Agreement.
 - 41.4.3 full records of all relevant training and instruction by Subcontractors of their personnel, together the certificates and record of qualifications pertaining thereto.
 - 41.4.4 a schedule of any changes in the monthly Unitary Payment during the Project Term, whether because of a contract price adjustment in terms of Schedule 1: Payment Mechanism or by means of a Variation, or as agreed between the Parties, or for any other reason whatsoever; and
 - 41.4.5 organisation charts for the Private Party and Subcontractors' personnel.
- 41.5 The abovementioned reports shall be available for inspection by the Municipality upon reasonable notice.
- 41.6 The Private Party shall maintain such records for a period of at least five (5) years after the Expiry Date and make same available to the Municipality as the Municipality may reasonably require.

PART 10: INSURANCE

42. INSURANCE

- 42.1 The Private Party shall take out and shall thereafter maintain the insurances listed in Schedule 11: Project Insurances and any other insurances in respect of the Project as may be required by law for the periods set out in the schedule (the **Project Insurances**). Each of the Project Insurances listed in Schedule 11: Project Insurances must be taken out and become fully effective by no later than the Effective Date. Each of the Project Insurances (if any) not listed in Schedule 11: Project Insurances but required by law must be taken out and become fully effective not later than the earliest date as required by the applicable law.
- 42.2 The payment of the insurance premiums due and payable under the policy applying to any Project Insurance shall be the responsibility of the Private Party.
- 42.3 No Party to this PPP Agreement shall take any action or fail to take any action, or (in so far as is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under the policy applying to any Project Insurance.
- 42.4 The Private Party undertakes that each Project Insurance shall:
- 42.4.1 without limiting the provisions of clause 42.4.6 below, name the Private Party as the insured.
 - 42.4.2 provide for non-vitiation protection in respect of any claim made by the Municipality as co-insured insofar as and to the extent available. If non-vitiation protection is unavailable when any such insurance policy is first placed, then the Private Party shall procure that the insurance broker investigates whether any non-vitiation protection subsequently becomes available prior to each renewal of the policy and provides written confirmation promptly upon the renewal thereof as to the unavailability thereof to the Municipality. If any non-vitiation protection subsequently becomes available, then the Municipality shall be entitled to require the Private Party to procure such protection, and the costs thereof shall be borne by the Private Party.
 - 42.4.3 contain a clause waiving the insurers' subrogation rights against the Municipality, its employees and agents, save if the claim arises out of a negligent act or omission on the part of the Municipality, its employees and agents.
 - 42.4.4 provide for thirty (30) days' prior written notice of its cancellation, non-renewal or amendment to be given to the Municipality.
 - 42.4.5 contain a clause recording that such Project Insurance is a primary insurance and shall not be brought into contribution by any other insurances; and
 - 42.4.6 provide for payment of any proceeds under any of the material damage insurances included in the Project Insurances to be made by the insurers in accordance with clause 45 (Reinstatement).
- 42.5 The Private Party shall procure that each of the Project Insurances shall note the Municipality's interest.

- 42.6 The Municipality undertakes to comply with the terms of the Project Insurances, as applicable.
- 42.7 The Municipality shall indemnify and hold harmless the Private Party from and against any and all suits, actions, administrative proceedings, claims, fines, losses, demands, costs, charges and expenses of whatsoever nature to the extent arising out of or resulting from any vitiating acts in respect of the Project Insurances.
- 42.8 Any liability for uninsured loss or damage (including any deductibles), shall be borne by the Party responsible for such loss and damage.
- 42.9 The Private Party shall furnish the Municipality, on request, with:
- 42.9.1 true and complete copies of the policies of all the Project Insurances (together with any other information reasonably requested by the Municipality relating to such policies) and the Municipality shall be entitled to inspect them during ordinary business hours; and
- 42.9.2 satisfactory evidence that the premiums due and payable under any such policies have been paid and that the Project Insurances are in full force and effect in accordance with the requirements of this clause.
- 42.10 The Private Party shall, as and when required pursuant to the terms of the relevant policy, renew each Project Insurance for so long as any risk covered thereby exists and shall furnish the Municipality with true and complete copies of each certificate of renewal for such Project Insurance as soon as possible but in any event no less than at least ten (10) days before the relevant renewal date.
- 42.11 If the Private Party breaches clause 42.1 or 42.2 above in relation to any Project Insurance, the Municipality may pay any premiums required to keep such Project Insurance in force and effect, or itself procure such Project Insurance and may recover all premiums or other costs incurred by it in doing so from the Private Party on written demand.
- 42.12 The Private Party shall notify the Municipality within five (5) working days after submitting any claim in excess of R75 000.00 (Seventy-Five Thousand Rand) (indexed to CPI) under any of the insurance policies referred to in this clause, accompanied by full details of the event giving rise to the claim.
- 42.13 Neither the failure to comply, nor full compliance with the insurance provisions of this PPP Agreement shall limit or relieve the Private Party of its liabilities and obligations under this PPP Agreement.
- 42.14 Subject clause 45 (Reinstatement), the Private Party shall apply any proceeds of any policy of the Project Insurance:
- 42.14.1 in the case of third party legal liability or employers' liability insurance, in satisfaction of the claim, demand, proceeding or liability in respect of which the proceeds are payable; and
- 42.14.2 in the case of any other Project Insurance, to ensure the performance by the Private Party of its obligations under this PPP Agreement.
- 42.15 The Private Party shall bear the risk of any shortfall in the proceeds of any Project Insurance.

42.16 To the extent that the Municipality receives any proceeds of any Project Insurance, then the Municipality shall pay such proceeds to the Private Party and shall not be entitled to deduct such proceeds from any Termination Amount.

42.17 Insofar as any proceeds of any Project Insurance are paid to the Municipality, as co-insured, the Municipality shall pay such proceeds to the Private Party which shall utilise such proceeds to reinstate, repair or replace the Facilities or any Project Asset, the benefit received under such Project Insurance shall not be deducted from a Termination Amount.

43. UNINSURABLE RISK

43.1 Insurance is no longer available from a reputable insurer if a risk usually covered by the Project Insurances in Schedule 11: Project Insurances, becomes Uninsurable. The Private Party shall notify the Municipality within thirty (30) days of the risk becoming Uninsurable.

43.2 If both Parties agree, or it is determined in accordance with clause 78 (Fast-track Dispute Resolution), that:

43.2.1 the risk is Uninsurable.

43.2.2 the risk being Uninsurable is not caused by the actions or omissions of the Private Party or a Subcontractor.

then the Parties shall meet to discuss how the risk should be managed.

43.3 The Private Party shall bear the onus of proving the circumstances in clause 43.1 and its sub-clauses.

43.4 If the requirements of clauses 43.1 and 43.2 are met:

43.4.1 this PPP Agreement shall continue in force and effect.

43.4.2 the Unitary Payment shall be reduced by an amount equal to the premium previously payable in respect of the Uninsurable risk in accordance with the Base Case Financial Model; and

43.4.3 on the occurrence of the risk (but only if that risk has continued to be Uninsurable) the Municipality shall, at the Municipality's option, either pay:

(a) to the Private Party an amount equal to the insurance proceeds that would have been payable had the risk continued to be insurable, in which event this PPP Agreement will continue; or

(b) an amount equal to the amount set out in clause 67 (Compensation on Termination for Force Majeure) and this PPP Agreement will terminate as if for Force Majeure.

43.5 Where a risk which was previously Uninsurable ceases to be Uninsurable, the Private Party shall procure and maintain insurance in respect of that risk and the Unitary Payment shall be increased by an amount equal to the premium payable in respect of the previously Uninsurable risk.

43.6 If the risk that would usually be covered by the Project Insurances becomes Uninsurable and is also a Relief Event, then the provisions of this clause 43

(Uninsurable Risks) together with the provisions of clause 46 (Consequences of a Relief Event) shall apply if such risk occurs.

44. ECONOMIC TEST

- 44.1 If all or substantially all of the Project Assets are destroyed or substantially destroyed in a single event or a series of related events and the insurance proceeds (when taken together with any other funds available to the Private Party) in respect of that event or series of events (the **Reinstatement Proceeds**) are equal to or greater than the amount required to repair, reinstate or replace the Project Assets, then the Private Party shall calculate the loan life cover ratio in accordance with the Financing Agreements (on the assumption that the Project Assets are repaired or reinstated in accordance with this PPP Agreement).
- 44.2 Subject to the Direct Agreement and/or the Financing Agreements, if the calculation referred to in clause 44.1 above shows that the loan life cover ratio is greater than or equal to the event of default level then the Private Party shall apply the insurance proceeds in accordance with the Reinstatement Plan set out in clause 45 (Reinstatement).
- 44.3 Subject to the Direct Agreement and/or the Financing Agreements, if the calculation referred to in clause 44.1 above shows that the loan life cover ratio is less than the event of default level, then an amount equal to the lesser of:
- 44.3.1 the amount of the Reinstatement Proceeds; and
- 44.3.2 the amount of the Debt less, to the extent that it is a positive amount, the aggregate, as at the date of calculation, of:
- (a) all credit balances on any bank accounts held by or on behalf of the Private Party and the value of any right of the Private Party or the Lenders to receive insurance proceeds or any proceeds pursuant to letters of credit and of any such proceeds actually received by them (save where such credit balances or proceeds are paid to the Municipality and/or are to be applied in reinstatement) and sums due and payable from the Subcontractors and any other third parties;
 - (b) all amounts payable by the Lenders (or the counterparties to the interest rate or exchange rate hedging arrangements provided for in the Financing Agreements) to the Private Party in connection with the early termination of such hedging arrangements because of prepayment of amounts outstanding under the Financing Agreements; and
 - (c) the market value of any other assets and rights of the Private Party or the Lenders (other than those that are transferable to the Municipality pursuant to this PPP Agreement) less liabilities of the Private Party or the Lenders properly incurred in connection with this PPP Agreement, provided that no account shall be taken of any liabilities and obligations of the Private Party arising out of:
 - (i) agreements or arrangements entered into by the Private Party to the extent that such agreements or arrangements were not entered into in connection with the Private Party's obligations in relation to the Project; and

- (ii) agreements or arrangements entered into by the Private Party to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms,

shall be released from the Insurance Account to the Private Party and shall be applied by the Private Party towards the prepayment of the Debt; provided, however, that such release shall not discharge the Private Party from performing the Project Deliverables in accordance with this PPP Agreement.

45. REINSTATEMENT

45.1 Subject to clause 44 all insurance proceeds received under any policy referred to in Schedule 11: Project Insurances shall be applied to repair, reinstate or replace each part or parts of the Project Assets in respect of which the proceeds were received.

45.2 All insurance proceeds paid under any Material Damage Policy in respect of a single event, or a series of related events shall be paid into a bank account to be opened in the name of the Private Party and shall note the Municipality's interests (the **Insurance Account**).

45.3 Subject to clause 44 where a claim is made or proceeds of insurance are received or are receivable under any Material Damage Policy in respect of a single event or a series or related events:

45.3.1 The Private Party shall deliver as soon as practicable and in any event within ten (10) Business Days after the making of the claim, a plan (the **Reinstatement Plan**) prepared by the Private Party for the carrying out of the works necessary (the **Reinstatement Works**) to repair, reinstate, or replace the Project Assets which are the subject of the relevant claim or claims in accordance with clause 45.4 below. The Reinstatement Plan shall set out:

- (a) If not the Construction Subcontractor, then the identity of the person proposed to affect the Reinstatement Works, which shall be subject to the prior written agreement of the Municipality which agreement may not be unreasonably withheld; and
- (b) the proposed terms and timetable upon which the Reinstatement Works are to be affected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written agreement of the Municipality which agreement may not be unreasonably withheld,

provided that if the Parties fail to reach any such agreement, then the dispute shall be referred for resolution by the Independent Expert in accordance with clause 78 (Fast-track Dispute Resolution); and

45.3.2 if the Reinstatement Plan (as amended by agreement with the Municipality or in accordance with the decision of the Independent Expert) will enable the Private Party to comply with clause 45.4 below within a reasonable timescale, then:

- (a) the Reinstatement Plan shall be adopted.

- (b) the Private Party shall enter contractual arrangements to affect the Reinstatement Works with the person agreed to by the Municipality.
- (c) prior to the earlier of the Termination Date and the Expiry Date, any amount standing to the credit of the Insurance Account, together with any interest accrued (the **Relevant Proceeds**) may be withdrawn by the Private Party to the extent required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in clause (b) above and to meet any other reasonable costs and expenses of the Private Party for the sole purposes of funding the Reinstatement Works. Following the earlier of the Termination Date and the Expiry Date, the Municipality may withdraw the Relevant Proceeds for the purposes of funding any Reinstatement Works.
- (d) The Municipality agrees and undertakes that, subject to compliance by the Private Party with its obligations under this clause, and provided that the Private Party procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in clause (b) above, it shall not exercise any right which it might otherwise have had to terminate this PPP Agreement by virtue of the event which gave rise to the claim for the Relevant Proceeds; and
- (e) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Municipality and in accordance with clause 45.4 below, the Municipality shall permit the withdrawal by the Private Party of any Relevant Proceeds that have not been paid under clause (c) above.

45.4 Where insurance proceeds are to be used in accordance with this PPP Agreement to repair, reinstate or replace any Project Asset forming part of the Works, the Private Party shall carry out the Reinstatement Works or procure that such works are carried out in accordance with the (construction specification) so that on completion of the Reinstatement Works, the provisions of this PPP Agreement are complied with.

PART 11: RELIEF EVENTS, COMPENSATION EVENTS & FORCE MAJEURE

46. CONSEQUENCES OF A RELIEF EVENT

46.1 If and to the extent that a Relief Event:

46.1.1 directly causes a delay in Service Commencement; and/ or

46.1.2 materially adversely affects the ability of the Private Party to perform any of its obligations under this PPP Agreement,

then the Private Party shall be entitled to apply for relief from any rights of the Municipality arising under clause 59 (Termination for Private Party Default) or in respect of Deductions and shall, in the case of clause 46.1.2, continue to receive the Unitary Payment.

46.2 To obtain relief, the Private Party must:

46.2.1 as soon as practicable, and in any event within ten (10) Business Days after it became aware that the Relief Event has caused or is likely to cause delay and/or materially adversely affect the ability of the Private Party to perform its other obligations, give to the Municipality a notice of its claim for relief from its

obligations under this PPP Agreement, including full details of the nature of the Relief Event, the date of occurrence and its likely duration.

- 46.2.2 within twenty (20) Business Days of receipt by the Municipality of the notice referred to in clause 46.2.1 above, give full details of the relief claimed; and
- 46.2.3 demonstrate to the reasonable satisfaction of the Municipality that:
- (a) the Private Party and its Subcontractors could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure.
 - (b) the Relief Event was the primary cause of the delay to the Scheduled Service Commencement Date or the need for relief from other obligations under this PPP Agreement.
 - (c) the time lost and/or relief from the obligations under this PPP Agreement claimed could not reasonably be expected to be mitigated or recovered by the Private Party acting in accordance with Good Industry Practice, without incurring material expenditure; and
 - (d) the Private Party is using reasonable endeavours to perform its obligations under this PPP Agreement.
- 46.3 If the Private Party has complied with its obligations under clause 46.2 above, then:
- 46.3.1 the Scheduled Service Commencement Date shall be postponed by such time as shall be reasonable for such a Relief Event, considering the likely effect of delay; and/or
- 46.3.2 the Municipality shall not be entitled to exercise its rights to terminate this PPP Agreement under clause 59 (Termination for Private Party Default) and, subject to clause 46.4 below, shall give such other relief as has been requested by the Private Party and agreed between the Parties or decided pursuant to clause 78 (Fast-track Dispute Resolution).
- 46.4 Nothing in clause 46.3 above shall affect any entitlement to make Penalty Deductions or any deductions made in accordance with PART 9: PAYMENT AND FINANCIAL MATTERS during the period in which the Relief Event is subsisting where the right to make deductions arose prior to the happening of the Relief Event.
- 46.5 If information required by clause 46.2 above is provided after the dates referred to in that clause, then the Private Party shall not be entitled to any relief during the period for which the information is delayed.
- 46.6 The Private Party shall notify the Municipality if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.
- 46.7 In the event of a Relief Event as defined in clause 1.127 that continues for a period more than one hundred and eighty (180) days, the Parties shall meet to find a mutually satisfactory solution for dealing with such prolonged Relief Event.

- 46.8 If the Parties cannot agree on the extent of the relief required, or the Municipality disagrees that a Relief Event has occurred or that the Private Party is entitled to any extension of the Scheduled Service Commencement Date and/or relief from other obligations under this PPP Agreement, the Parties shall resolve the matter in accordance with clause 78 (Fast-track Dispute Resolution).

47. CONSEQUENCES OF A COMPENSATION EVENT

- 47.1 If, as a direct result of the occurrence of a Compensation Event:

- 47.1.1 the Private Party is unable to achieve Service Commencement on or before the Scheduled Service Commencement Date.
- 47.1.2 the Private Party is unable to comply with its obligations under this PPP Agreement; and/or
- 47.1.3 the Private Party incurs costs or loses revenue,

then the Private Party is entitled to apply for relief from its obligations and/or claim compensation under this PPP Agreement.

- 47.2 To obtain relief and/or claim compensation the Private Party must:

- 47.2.1 as soon as practicable, and in any event within ten (10) Business Days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this PPP Agreement and/or the Private Party to incur costs or lose revenue, give to the Municipality a notice of its claim for an extension of time for Service Commencement, payment of compensation and/or relief from its obligations under this PPP Agreement;
- 47.2.2 within twenty (20) Business Days of receipt by the Municipality of the notice referred to in clause 47.2.1 above, give full details of the Compensation Event and the extension of time and/or any estimated change in project costs claimed; and
- 47.2.3 demonstrate to the reasonable satisfaction of the Municipality that:
 - (a) the Compensation Event was the primary cause of the estimated change in project costs and/or any delay in the achievement of the Scheduled Service Commencement Date; and
 - (b) the estimated change in Project costs, time or revenue lost, and/or relief from the obligations under the PPP Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Private Party acting in accordance with Good Industry Practice.

- 47.3 If the Private Party has complied with its obligations under clause 47.2 above, then:

- 47.3.1 the Scheduled Service Commencement Date shall be postponed by such time as shall be reasonable for such a Compensation Event, considering the likely effect of delay; and
- 47.3.2 in the case of an additional cost being incurred by the Private Party or the Private Party losing any revenue:

- (a) on or before the Service Commencement Date; or
- (b) because of Capital Expenditure being incurred by the Private Party at any time,

the Municipality shall compensate the Private Party for the actual change in Project costs, loss of revenue, Capital Expenditure incurred, within thirty (30) Business Days of its receipt of a written demand by the Private Party supported by all relevant information.

- 47.3.3 in the case of a payment of compensation for the estimated change in Project costs that does not result in Capital Expenditure being incurred by the Private Party but which reflects a change in the costs being incurred by the Private Party after the Service Commencement Date, the Municipality shall compensate the Private Party in accordance with clause 47.6 below by an adjustment to the Unitary Payment; and /or
- 47.3.4 the Municipality shall give the Private Party such relief from its obligations under this PPP Agreement, as is reasonable for such a Compensation Event.
- 47.4 If information is provided after the dates referred to in clause 47.2 above, then the Private Party shall not be entitled to any extension of time, compensation, or relief from its obligations under this PPP Agreement in respect of the period for which the information is delayed.
- 47.5 If the Parties cannot agree on the extent of any compensation, delay incurred, or relief from the Private Party's obligations under this PPP Agreement, or the Municipality disagrees that a Compensation Event has occurred (or as to its consequences), or that the Private Party is entitled to any relief under this clause, the Parties shall resolve the matter in accordance with clause 78 (Fast-track Dispute Resolution).
- 47.6 Any payment of compensation referred to in Section 47.3.3 above shall be calculated so as to ensure that the Private Party is not placed in a better or worse position following the occurrence of a Compensation Event).

PART 12: FORCE MAJEURE

48. FORCE MAJEURE

- 48.1 Subject to clauses 48.2.1 and 48.2.2 the Party claiming relief shall be relieved from liability under this PPP Agreement to the extent that by reason of the Force Majeure event it is not able to perform all or a material part of its obligations under this PPP Agreement.
- 48.2 Where a Party is (or claims to be) affected by an event of Force Majeure:
 - 48.2.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this PPP Agreement, resume performance of its obligations affected by the event of Force Majeure as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
 - 48.2.2 it shall not be relieved from liability under this PPP Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this PPP

Agreement due to its failure to comply with its obligations under sub-clause 48.2.1.

- 48.3 The Party claiming relief shall serve written notice on the other Party within ten (10) Business Days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the event claimed to be an event of Force Majeure.
- 48.4 A subsequent written notice shall be served by the Party claiming relief on the other Party within a further twenty (20) Business Days which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the Party to perform, the action being taken in accordance with clause 48.2.1, the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects) including taking into account any customary builder holidays occurring during such period (if applicable).
- 48.5 The Party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and when performance of its affected obligations can be resumed.
- 48.6 If, following the issue of any notice referred to in clause 48.4, the Party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other Party as soon as reasonably possible.
- 48.7 During the continuance of any event of Force Majeure which occurs on or after the Service Commencement Date the Unitary Payment payable in respect of such period shall be reduced to an amount equivalent to (a) the Unitary Payments payable in respect of those Services that are Available to the Municipality during such period after taking account of the effects of such event of Force Majeure and no Deduction shall be effected to the extent any rights to make such Deductions arises from facts or circumstances covered by an event of Force Majeure plus (b) so much of the Unitary Payment as is required to be paid so as to prevent the Default Cover Ratios (as defined in the Financing Agreement) from being breached.
- 48.8 If an event of Force Majeure occurs before the Service Commencement Date and as a result thereof the Private Party is unable to achieve Service Commencement on or before the Scheduled Service Commencement Date and the Private Party has complied with its obligation under this clause, then subject to clause 67 (Compensation on Termination for Force Majeure):
- 48.8.1 the relevant Scheduled Service Commencement Date shall be postponed by such time as shall be reasonable for such event of Force Majeure, considering the likely effect of delay; and
- 48.8.2 the Private Party shall not be entitled to receive any payment in respect of the Unitary Payment in respect of the Services not being performed during the occurrence of the event of Force Majeure.
- 48.9 Subject to clause 67 (Compensation on Termination for Force Majeure) the Private Party's sole right to payment or otherwise in relation to the occurrence of an event of Force Majeure shall be as provided in this clause.

- 48.10 The Parties shall endeavour to agree any modifications to this PPP Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Clause 78 (Fast-track Dispute Resolution) shall not apply to a failure of the Municipality and the Private Party to reach agreement pursuant to this sub-clause.

PART 13: UNFORESEEABLE DISCRIMINATORY GOVERNMENT CONDUCT AND VARIATIONS

49. UNFORESEEABLE CONDUCT

- 49.1 Should any Unforeseeable Conduct occur which materially and adversely affects the general financial and economic position of the Private Party, the Private Party shall be entitled to such compensation and/or relief from the Municipality as shall place the Private Party in the same overall financial and economic position as the Private Party would have been in but for such Unforeseeable Conduct.
- 49.2 Should any Unforeseeable Conduct occur which materially beneficially affects the general economic position of the Private Party, the Private Party shall pay the value of such benefit, upon that benefit becoming available to the Private Party in the form of cash revenues, to the Municipality so that the Private Party remains in the same overall economic position it would have been in had the materially beneficial Unforeseeable Conduct not occurred.
- 49.3 The Party claiming the occurrence of the Unforeseeable Conduct (**Claiming Party**) shall give written notice to the other Party (**Receiving Party**) containing reasonable particulars of such conduct and its likely economic consequences to the Private Party.
- 49.4 The Receiving Party shall have sixty (60) days from the date of receipt of such notice to affect a remedy for the Unforeseeable Conduct which restores the general economic position of the Private Party to that which it would have been in if such Unforeseeable Conduct had not occurred. If the Receiving Party does not affect such a remedy within such period, the Parties shall consult within ten (10) Business Days after the expiration of such period with a view to reaching a mutually satisfactory resolution of the situation. In the event that a mutually satisfactory resolution has not been reached within such ten (10) Business Day consultation period, the matter shall be dealt with in accordance with clause 77 (Dispute Resolution) for a determination to be made in respect of:
- 49.4.1 an appropriate extension of time as may be fair and reasonable under the circumstances and/or
 - 49.4.2 any monetary relief as may be fair and reasonable under the circumstances; and/or
 - 49.4.3 termination of the PPP Agreement where any other remedy under this clause shall not be sufficient to place the Private Party in the same position as it would have been, had the Unforeseeable Conduct not taken place in which event the Termination Date shall be the date specified in the determination in terms of clause 78 (*Fast Track Dispute Resolution*), or failing such specification, the earliest date specified by either Party on written notice to the other Party, and the compensation payable to the Private Party for termination in such circumstances shall be equal to the amount the Private Party would have received had the PPP Agreement been terminated for a Force Majeure as calculated under clause 67 (*Compensation on Termination for Force Majeure*).

- 49.5 In so far as the Private Party is the Claiming Party, it shall use all reasonable endeavours to minimise and mitigate the effects of any Unforeseeable Conduct.

50. VARIATIONS

50.1 Small Works Variations

- 50.1.1 At least twenty (20) days prior to the Scheduled Service Commencement Date and the commencement of each subsequent PPP Agreement year, the Private Party shall propose a schedule of rates to be agreed with the Municipality (the **Small Works Rates**), such agreed rates to be applied in respect of any request from the Municipality for Small Works to be completed during that PPP Agreement year. The value of any Small Works shall be calculated on the basis that:

- (a) the labour element shall be calculated in accordance with rates which are fair and reasonable; and
- (b) the materials element shall be charged at the cost of the materials to the Private Party or to the party carrying out the work (net of all discounts) plus ten percent (10%).

- 50.1.2 The Private Party and the Municipality shall agree the timing of any Small Works, to minimise any inconvenience to the Municipality. The Private Party shall take all reasonable steps to minimise the duration of any Small Works.

- 50.1.3 Any dispute between the Parties relating to Small Works shall be determined by Independent Expert in accordance with clause 78 (Fast-track Dispute Resolution).

50.2 Municipality Variations

- 50.2.1 The Municipality has the right to propose Variations to the Project Deliverables such as the Transfer Stations and disposal of waste of any other local authority within the Knysna and/or the management of Transfer Stations, in accordance with this clause. The Municipality shall not propose a Variation which:

- (a) requires the Works or Services (as the case may be) to be performed in a way that infringes any Law or is inconsistent with Good Industry Practice.
- (b) would cause any Consent to be revoked (or be unobtainable).
- (c) would, if implemented, result in a change in the nature of the Project.
- (d) would materially and adversely affect the Works or Services in a way that is not compensated for.

and any dispute or uncertainty as to whether any proposed Variation will have any such effect may be referred by Party for resolution by the independent expert in accordance with clause 78 (*Fast Track Dispute Resolution*).

- 50.2.2 If the Municipality requires a Variation to the Project Deliverables, it must serve a notice on the Private Party detailing the requested Variation (a **Municipality Variation Proposal**).

- 50.2.3 The Municipality Variation Proposal shall set out the Variation required in sufficient detail as to enable the Private Party to calculate and provide the estimated revised Project costs, Unitary Payment and where necessary a revised Service Commencement Date and any other relevant dates that may require revision as a result of such Variation, in accordance with clause 50.2.4 below (the **Estimate**).
- 50.2.4 As soon as practicable and in any event within thirty (30) Business Days after having received the Municipality Variation Proposal, the Private Party shall, subject to clause 50.2.9 deliver the Estimate to the Municipality. The Estimate shall include the opinion of the Private Party on:
- (a) whether relief from compliance with its obligations is required, including the obligations of the Private Party to achieve the Scheduled Service Commencement Date and meet the performance regime during the implementation of the Variation.
 - (b) any impact on the Scheduled Service Commencement Date.
 - (c) any impact on the provision of the Services.
 - (d) any amendment required to this PPP Agreement and/or any Project Document because of the Variation.
 - (e) any estimated revised Project costs and Unitary Payment that result directly from the Variation.
 - (f) any loss of revenue that will result directly from the Variation.
 - (g) any Capital Expenditure or Operating Expenditure that is required or no longer required because of the Variation.
 - (h) any regulatory approvals or Consents which are required.
 - (i) the proposed method of certification of any Works or operational aspects of the Variations required by the Municipality Variation Proposal; and
 - (j) any required change in the Unitary Payment (whether being an increase or decrease) so as to ensure that the Base Case Equity IRR is achieved; provided that should the Private Party believe its risk profile has been substantially altered by virtue of the Municipality Variation Proposal, it may put forward a proposal for an increased or decreased Base Case Equity IRR in respect of such Variation. Should the Parties fail to reach agreement on any proposed increase or decrease Base Case Equity IRR in respect of such Variation, either Party may refer the matter for determination pursuant to clause 78 (*Fast Track Dispute Resolution*).
- 50.2.5 Subject to clause 50.3.9, as soon as practicable after the Municipality receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. The Private Party shall:
- (a) provide evidence that it has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its Subcontractors to minimise any increase in costs and maximise any reduction in costs.

- (b) demonstrate how any Capital Expenditure to be incurred or avoided is being measured in a cost-effective manner; and
- (c) demonstrate that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Municipality Variation concerned, has been considered in the amount which in its opinion has resulted or is required under Clauses 50.2.4(d) and/or 50.2.4(e) above.

In such discussions the Municipality may modify the Municipality Variation Proposal and (if the estimated increase in Capital Expenditure in respect of the Variation is expected to exceed R1 000 000.00 (one million Rand) (indexed to CPI) and it is practicable for the Private Party to do so), the Municipality may require the Private Party to seek and evaluate competitive tenders for the relevant capital works. In each case the Private Party shall, as soon as practicable, and in any event not more than ten (10) Business Days after receipt of such modification, notify the Municipality of any consequential changes to the Estimate.

- 50.2.6 The Private Party shall comply with Good Industry Practice with the objective of ensuring that it obtains best value for money (taking into account all relevant circumstances including, in particular, the requirement that the Private Party should not be worse off as a result of the implementation of the Variation) when procuring any work, supplies, materials or equipment required in relation to the Variation.
- 50.2.7 If the Parties cannot agree on the contents of the Estimate, then the dispute will be determined in accordance with clause 78 (Fast-track Dispute Resolution) provided that any matter referred for resolution to fast track dispute resolution shall be referred on the basis that the Independent Expert in making its determination shall not place the Private Party in a better or worse position than prior to such Municipality Variation.
- 50.2.8 As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to clause 78 (Fast-track Dispute Resolution), the Municipality shall:
- (a) confirm the Estimate (as modified) in writing; or
 - (b) withdraw the Municipality Variation Proposal.
- 50.2.9 Notwithstanding the other provisions of this clause 50.2:
- (a) if, on receipt of the Municipality Variation Proposal pursuant to clause 50.2.1, the Private Party is of the opinion that such Variation is likely to result in an increase in the Project risk or its financial risk or to generally adversely affect the risk profile of the Private Party, it shall, as soon as practical and in any event within ten (10) Business Days after having received the Municipality Variation Proposal, serve a notice on the Municipality stating its opinion and the reasons therefor; and
 - (b) the Parties shall meet as soon as practical and in any event within ten (10) Business Days of receipt of such notice. If the Parties agree that such Variation is likely to increase the Project risk or the Private Party's financial risk or to generally adversely affect the risk profile of the Private Party, the Municipality Variation Proposal shall be withdrawn. If the Parties are unable

to agree on the likely effects of the Municipality Variation Proposal, either Party may refer the matter to an Independent Expert pursuant to clause 78 (Fast-track Dispute Resolution). If it is determined by the Independent Expert that the Municipality Variation Proposal will increase the Project risk, financial risk or generally adversely affect the risk profile of the Private Party, the Municipality Variation Proposal shall be deemed to have been withdrawn.

- 50.2.10 If the Municipality does not confirm the Estimate (as modified) in writing within twenty (20) Business Days of the contents of the Estimate having been agreed in accordance with clause 50.2.5 or determined pursuant to clause 50.2.7, then the Municipality Variation Proposal shall be deemed to have been withdrawn.
- 50.2.11 In the event that the Estimate (as modified) involves estimated Capital Expenditure then the Private Party shall use its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure, on terms reasonably satisfactory to it and the Municipality.
- 50.2.12 If the Private Party has used its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure, but has been unable to obtain an offer of funding within twenty (20) Business Days of the date that the Municipality confirmed the Estimate, then the Private Party shall have no obligation to carry out the Variation, unless the Municipality agrees to pay the costs involved.
- 50.2.13 The Municipality may, at any time following the date on which the Estimate is confirmed, agree to meet all or, to the extent the Private Party has obtained funding for only part of the Capital Expenditure, the remaining part of the Capital Expenditure.
- 50.2.14 If the Estimate has been confirmed by the Municipality, then the Unitary Payment shall be adjusted in accordance with the Estimate.
- 50.2.15 While the Private Party gives the Estimate, it shall also provide the Municipality with a proposal as to whether the Financial Model should change, and if so, how. If the Municipality accepts the proposal, the Financial Model shall be adjusted as proposed and concomitantly therewith the Unitary Payment shall be adjusted as contemplated in the revised Financial Model. If the Municipality rejects such proposal and the Parties are unable to agree the required changes to the Financial Model within 20 (twenty) Business Days of the Municipality's rejection of the Private Party's proposal, the Municipality Variation Proposal shall be withdrawn.
- 50.2.16 Where the Municipality agrees to pay the costs for which funding is not available pursuant to clause 50.2.12 above:
- (a) the Municipality and Private Party shall agree:
 - (i) a payment schedule in respect of the payment of such sum reflecting the amount and timing of the costs to be incurred by the Private Party in carrying out the Variation to the extent borne by the Municipality; and
 - (ii) where payment for part of the Variation reflects the carrying out of, or specific progress towards, an element within the Variation, an objective means of providing evidence confirming that the part of the

Variation corresponding to each occasion when payment is due under the payment schedule appears to have been duly carried out,

(such payment schedule and evidence to be determined by an Independent Expert in accordance with clause 78 (Fast-track Dispute Resolution) in the event of the Municipality and Private Party failing to agree as to its terms);

- (b) the Municipality shall make payment to the Private Party within thirty (30) days of receipt by the Municipality of invoices/statements presented in accordance with the agreed payment schedule (as the case may be, varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the Variation has been carried out; and
- (c) if payment is not made in accordance with sub-clause (b), the Municipality shall pay interest to the Private Party on the amount unpaid from the date thirty (30) days after receipt of the relevant invoice/statement until paid, at the Default Interest Rate.

50.2.17 Notwithstanding any provision to the contrary, it is recorded that any Municipality Variation Proposal or Estimate resulting in a material increase to the monthly Unitary Payment will require authorisation by the Council of the Municipality in compliance with the provisions of the MFMA and MSA. The Private Party shall not carry out the Municipality Variation until such authorisation is granted.

50.3 Private Party Variations

50.3.1 If the Private Party wishes to introduce a Variation, it must serve a notice on the Municipality providing details of such Variation (a **Private Party Variation Proposal**).

50.3.2 The Private Party Variation Proposal must:

- (a) set out the proposed Variation in sufficient detail to enable the Municipality to evaluate it in full;
- (b) specify the Private Party's reasons for the Private Party Variation Proposal.
- (c) request the Municipality to consult with the Private Party with a view to deciding whether to agree to the Private Party Variation Proposal and, if so, what consequential changes the Municipality requires as a result.
- (d) specify all implications of the Private Party Variation Proposal on this PPP Agreement and any of its terms.
- (e) indicate whether a Variation to the Unitary Payments is proposed (and, if so, give a detailed cost estimate of such proposed Variation); and
- (f) indicate if there are any dates by which a decision by the Municipality is critical.

50.3.3 The Municipality shall evaluate the Private Party's Variation Proposal taking into account all relevant issues, including whether:

- (a) a change in the Unitary Payments will occur.
- (b) the Variation will affect the quality or successful delivery of the Services.
- (c) the Variation will interfere with the relationship of the Municipality with third parties.
- (d) the financial strength of the Private Party is sufficient to perform the Variation.
- (e) the residual value of the Project Assets is reduced; and
- (f) the Variation materially affects the risks or costs to which the Municipality is exposed.
- (g) if an amendment to this PPP Agreement and any Project Document is required as a result thereof.

50.3.4 As soon as practicable after receiving the Private Party Variation Proposal, the Parties shall meet and discuss the matters referred to in it. During their discussions the Municipality may propose modifications or accept or reject the Private Party Variation Proposal.

50.3.5 Subject to clause 50.3.9, if the Municipality accepts the Private Party Variation Proposal (with or without modification), the Private Party shall begin to implement the relevant changes arising from the Variation within twenty (20) Business Days (or such longer period as the Parties agree) of the Municipality's acceptance. Within this period, the Parties shall consult and agree the remaining details as soon as practicable and shall enter any documents to amend this PPP Agreement or any relevant Project Document, which are necessary to give effect to the Variation.

50.3.6 If the Municipality rejects the Private Party Variation Proposal, it shall not be obliged to give its reasons for such a rejection.

50.3.7 Unless the Municipality's acceptance specifically agrees to an increase in the Unitary Payments, the Private Party shall be deemed to have withdrawn the Private Party Variation Proposal and the Private Party shall be under no obligation to proceed with the Variation, unless the Private Party indicates, within 20 (twenty) Business Days of it being notified by the Municipality that the Private Party is prepared to carry out the Variation without an increase in the Unitary Payments.

50.3.8 If the Private Party Variation Proposal causes or will cause the Private Party's costs or those of a Subcontractor to decrease, there shall be a decrease in the Unitary Payments in a manner that ensures an equitable sharing in any cost saving by the Private Party and/or the Subcontractors.

50.3.9 Notwithstanding any provision to the contrary, it is recorded that any Private Party Variation Proposal or Estimate resulting in a material increase to the monthly Unitary Payment will require authorisation by the Council of the Municipality in compliance with the provisions of the MFMA and MSA. The Private Party will not commence with the Private Party Variation until such authorisation has been granted.

PART 14: EMPLOYMENT

51. OCCUPATIONAL HEALTH AND SAFETY

- 51.1 During the Project Term, the Private Party shall be responsible for the observance by itself and the Subcontractors of all applicable health and safety precautions necessary, whether required by Law or Good Industry Practice, for the protection of itself, the Municipality's employees, the Subcontractors involved in providing the Project Deliverables and any third parties within the Project Site. In particular (and without limiting the generality of the foregoing), the Private Party shall ensure that such persons are aware of, and always comply with, any Municipal health and safety policy and reasonable requirements notified to the Private Party from time to time.
- 51.2 The Private Party shall maintain proof of compliance with the Occupational Health and Safety Act, 1993 and produce the same to the Municipality within twenty four (24) hours of request for same.
- 51.3 The Municipality shall not be liable in respect of a breach of any of the provisions under the Occupational Health and Safety Act, 1993 in relation to the performance of the Project Deliverables by the Private Party and its Subcontractors and to this extent the Private Party indemnifies the Municipality against any claim which may arise against the Municipality as a result of the Private Party's failure to comply therewith.

52. KEY PERSONNEL AND REMOVAL OF PERSONNEL

- 52.1 The Private Party shall always ensure that sufficient suitable and appropriately qualified and experienced personnel will be employed (whether by the Private Party or its Subcontractors) to undertake the Project Deliverables and that such personnel shall be in and be citizens of the Republic of South Africa. Without limiting the generality of the foregoing, the Private Party shall ensure that all key personnel positions are always filled as soon as reasonably possible.
- 52.2 The Municipality may require the Private Party to remove any employee or other personnel of the Private Party or any Subcontractor from the Project Site and the Private Party shall do so (provided such removal is permitted under applicable law) if in the reasonable opinion of the Municipality such employee or personnel engages in any conduct which might reasonably result in a breach of any provision of this PPP Agreement or threaten public health, safety or security, and the Private Party shall as soon as reasonably possible replace such employee or personnel with suitable appropriately qualified and experienced replacement (provided such replacement is permitted under applicable law).

PART 15: BLACK ECONOMIC EMPOWERMENT

53. BEE DEFINITIONS

The following definitions are applicable to this part of this PPP Agreement:

- 53.1 **Annual BEE Report** has the meaning set forth in clause 54 (Black Equity in the Private Party).
- 53.2 **Annual Skills Development Commitment** has the meaning set forth in clause 55 (Private Party Management and Employment Equity).

- 53.3 **Black Enterprise** means an enterprise that is at least 50.1% beneficially owned by Black People and in which Black People have substantial Management Control. Such beneficial ownership may be held directly or through other Black Enterprises.
- 53.4 **Black Equity** means the voting Equity held by Black Shareholders from time to time.
- 53.5 **Black People** mean African, Coloured and Indian South African citizens as defined in the Broad Based Black Economic Empowerment Amendment Act, 2013 and **Black Person** means any such citizen.
- 53.6 **Black Shareholder** means any Shareholder that is a Black Person or a Black Enterprise.
- 53.7 **Black Women** means female African, Coloured and Indian South African citizens.
- 53.8 **Management Control** means, in relation to any enterprise, the ability to direct or cause the direction of the business and management policies or practices of that enterprise.
- 53.9 **Minimum Black Equity** has the meaning set forth in clause 54 (Black Equity in the Private Party; and
- 53.10 **SMME** means an exempted micro enterprise or a qualifying small enterprise as defined in the Codes of Good Practice on Broad-Based Black Economic Empowerment issued in terms of the Broad-Based Black Economic Empowerment Act, 2013.

54. **BLACK EQUITY IN THE PRIVATE PARTY**

The Private Party shall ensure that:

- 54.1 for the duration of this PPP Agreement, no less than 25% of the voting Equity from time to time shall be directly and beneficially owned by Black People and/or Black Enterprises (the **Minimum Black Equity**) and such Equity shall rank *pari passu* with the voting Equity held by the Shareholders who are not Black People or Black Enterprises.
- 54.2 the Black Shareholders shall be entitled to earn a return on their investment in the Project consistent with the returns forecast in the Financial Model, through their participation in:
- 54.2.1 the dividends and other distributions declared by the Private Party from time to time in respect of the Equity; and
- 54.2.2 the payments made to the Shareholders in respect of the Shareholder Loans.
- 54.3 The Private Party shall furnish the Municipality annually within seven (7) Business Days after the end of each financial year of the Private Party a report certified by the Private Party's auditors (**Annual BEE Report**) setting forth, in relation to each Shareholder:
- 54.3.1 the Equity ownership of that Shareholder and details of all changes whatsoever in such ownership in that financial year (including, without limitation, changes effected through any acquisition or disposal of issued shares, or through any subscription for new shares).
- 54.3.2 the Shareholder Loans of that Shareholder and details of all changes in the amount of such Shareholder Loans in that financial year (including, without limitation, changes effected through repayments).

- 54.3.3 the voting rights attaching to all classes of Equity owned by that Shareholder in that financial year; and
- 54.3.4 details of all dividends and other distributions declared to and received by that Shareholder in respect of its Equity, as well as all payments made to that Shareholder in respect of any Shareholder Loans, in that financial year.

55. PRIVATE PARTY MANAGEMENT AND EMPLOYMENT EQUITY

55.1 The Private Party shall ensure that:

- 55.1.1 by no later than Scheduled Service Commencement Date, no less than 25% of the Private Party's senior management and executive appointments shall be filled by Black People; and
- 55.1.2 no less than 50% of the minimum number of appointments in clause 55.1.1 is filled by Black Women.

55.2 The Private Party shall comply with the Employment Equity Act, 1998 and implement its current employment equity plan, as substituted from time to time in accordance with that Act. The Private Party shall furnish the Municipality with:

- 55.2.1 each successive employment equity plan submitted by the Private Party in accordance with that Act within ten (10) Business Days following the date of submission of that plan; and
- 55.2.2 a copy of each report submitted by the Private Party to the Department of Labour (or its successor) pursuant to section 21 of that Act within ten (10) days following the date of submission of that report.

55.3 The Private Party shall implement a skills development plan and shall apply no less than an amount (the **Annual Skills Development Commitment**) equal to 6% of its annual payroll expenditure in any financial year towards the costs of implementing its skills development targets for that financial year.

55.4 The Private Party shall include in its Annual BEE Report for each financial year:

- 55.4.1 a complete statement of all targets set forth in the skills development plan for that financial year that have been achieved by the Private Party in that financial year, together with details of the costs incurred by the Private Party in that financial year in respect of such targets.
- 55.4.2 a complete statement of all targets (if any) set forth in the skills development plan for that financial year that have not been achieved by the Private Party in that financial year, together with the Private Party's reasons for not achieving these targets; and
- 55.4.3 details of the portion (if any) of its Annual Skills Development Commitment for that financial year not applied by the Private Party towards the implementation of any of its skills development targets for that financial year, together with the Private Party's reasons for not applying the full Annual Skills Development Commitment in that financial year.

56. SUBCONTRACTING

The Private Party shall procure that:

- 56.1 the Construction Subcontractor ensures that no less than 30% of its total expenditure forecast to be incurred shall be expended under further subcontracts in which Black People and/or Black Enterprises will participate; and
- 56.2 the Operation Subcontractor ensure that no less than 30% of its total expenditure forecast to be incurred shall be expended under further subcontracts in which Black People and/or Black Enterprises will participate.
- 56.3 no less than:
 - 56.3.1 30% of each of the said Subcontractor's senior management and executive appointments shall be filled by Black Persons; and
 - 56.3.2 50% of the minimum number of appointments specified in clause 56.3.1 are filled by Black Women.
- 56.4 each Subcontractor implements that Subcontractor's current employment equity plan, as substituted from time to time in accordance with the Employment Equity Act, 1998. The Private Party shall furnish the Municipality with or cause the Municipality to be furnished with:
 - 56.4.1 each successive employment equity plan submitted by that Subcontractor in terms of that Act within seven (7) Business Days following the date of submission of that plan; and
 - 56.4.2 a copy of each report submitted by that Subcontractor to the Department of Labour (or its successor) pursuant to Section 21 of that act within seven (7) Business Days following the date of submission of that report.
- 56.5 each Subcontractor shall apply no less than an amount equal to 6% of that Subcontractor's annual payroll expenditure in any financial year towards the costs of implementing its skills development targets for that financial year; and
- 56.6 each Subcontractor shall expend no less than 1% of the total procurement budget of that Subcontractor in respect of the Project under procurement contracts with SMMEs.

57. LOCAL EMPLOYMENT

- 57.1 The Private Party shall utilise its existing labour for the purposes of carrying out the Services and the Works.
- 57.2 To the extent that the Private Party wishes to employ additional labour, the Private Party undertakes to employ labour within the municipal boundaries of Knysna Municipality unless a special skill or experience is required which is not readily available within the municipal boundaries of Knysna Municipality or South Africa.

PART 16: TERMINATION

58. TERMINATION FOR MUNICIPALITY DEFAULT

- 58.1 On the occurrence of a Municipality Default, or within ten (10) Business Days after the Private Party becomes aware of same, the Private Party may serve notice on the Municipality of the occurrence (and specifying details) of such Municipality Default. If the relevant Municipality Default has not been remedied or rectified within twenty (20) Business Days of such notice, the Private Party may serve a further notice on the Municipality terminating this PPP Agreement with immediate effect.
- 58.2 The Private Party shall not exercise or purport to exercise any rights to terminate this PPP Agreement (or accept any repudiation of this PPP Agreement) except as expressly provided for herein.

59. TERMINATION FOR PRIVATE PARTY DEFAULT

59.1 Notification

The Private Party shall notify the Municipality of the occurrence, and details, of any Private Party Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to a Private Party Default, in either case promptly on the Private Party becoming aware of its occurrence.

59.2 Municipality's Options

- 59.2.1 On the occurrence of a Private Party Default, or within a reasonable time after the Municipality becomes aware of the same, the Municipality may:
- (a) in the case of the Private Party Default referred to in clauses 1.111.1, 1.111.2, 1.111.3, 1.111.4, 1.111.5 and 1.111.10 terminate this PPP Agreement in its entirety by notice in writing having immediate effect.
 - (b) and while the same is subsisting, in the case of any other Private Party Default referred in sub-clauses 1.111.6, 1.111.7, 1.111.8, 1.111.9, 1.111.11, 1.111.12, 1.111.13, 1.111.14 and 1.111.15 serve notice of default on the Private Party requiring the Private Party at the Private Party's option either:
 - (i) to remedy the Private Party Default referred to in such notice of default (if the same is continuing) within twenty (20) Business Days of such notice of default; or
 - (ii) to put forward within twenty (20) Business Days of such notice of default a reasonable programme for remedying the Private Party Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Private Party Default is proposed to be remedied. The Private Party shall only have the option of putting forward a programme in accordance with this clause if it first notifies the Municipality within five (5) Business Days of such notice of default that it proposes to do so.

59.3 Remedy Provisions

- 59.3.1 Where the Private Party puts forward a programme in accordance with clause 59.2, the Municipality shall have ten (10) Business Days from receipt of the same

within which to notify the Private Party that it does not accept the programme, failing which the Municipality shall be deemed to have accepted the programme. The Municipality shall act reasonably in rejecting the programme. Where the Municipality notifies the Private Party that it does not accept the programme, the Parties shall endeavour within the following five (5) Business Days to agree any necessary amendments to the programme put forward. In the absence of agreement within five (5) Business Days, the question of whether the programme (as the same may have been amended by agreement) will remedy the Private Party Default in a reasonable manner and within a reasonable time period (and, if not, what would be a reasonable programme) may be referred by either Party for resolution in accordance with clause 78 (Fast-track Dispute Resolution).

59.3.2

If:

- (a) the Private Party Default notified in a notice of default is not remedied before the expiry of the period referred to in the notice; or
- (b) where the Private Party puts forward a programme which has been accepted by the Municipality or has been determined to be reasonable, the Private Party fails to achieve any element of the programme or to complete the programme by the specified end date for the programme (as the case may be); or
- (c) any programme put forward by the Private Party is rejected by the Municipality as not being reasonable, and the dispute resolution procedure does not find against that rejection,

then the Municipality may, subject to the Lenders' rights under the Direct Financing Agreement, terminate this PPP Agreement in its entirety by written notice to the Private Party with immediate effect, provided that for the purposes of clause 59.4.2 if the Private Party's execution of the programme is adversely affected by the occurrence of an event of Force Majeure or a Relief Event then, subject to the Private Party complying with the mitigation and other requirements in this PPP Agreement concerning Force Majeure or Relief Events (as the case may be), the time for execution of the programme or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by the Force Majeure event or Relief Event (as the case may be) which is agreed by the Parties or determined in accordance with clause 78 (Fast-track Dispute Resolution).

59.4 **Municipality's Costs**

59.4.1 The Private Party shall reimburse the Municipality with all costs incurred by the Municipality in exercising any of its rights in terms of this clause. The Municipality should take reasonable steps to mitigate such costs.

59.4.2 The Municipality shall not exercise, or purport to exercise, any right to terminate this PPP Agreement except as expressly set out in this PPP Agreement. The rights of the Municipality (to terminate or otherwise) under this clause are in addition (and without prejudice) to any other right which the Municipality may have in law to claim the amount of any direct loss or damages suffered by the Municipality on account of the acts or omissions of the Private Party (or to take any action other than termination of this PPP Agreement).

60. TERMINATION FOR FORCE MAJEURE

If, in the circumstances referred to in clause 1.55 (Force Majeure) the Parties have failed to reach agreement on any modification to this PPP Agreement pursuant to that clause within one hundred and eighty days (180) days of the date on which the Party affected serves notice on the other Party in accordance with that clause, either Party may at any time afterwards terminate this PPP Agreement by written notice to the other Party having immediate effect, provided always that the effects of the relevant events of Force Majeure continue to prevent either Party from performing any material obligation under this PPP Agreement. In such an event the Termination Date shall be the date upon which the earliest of the notices terminating the PPP Agreement is received by the other Party.

61. TERMINATION FOR CORRUPT ACTS

61.1 The Private Party warrants that in entering into this PPP Agreement it has not committed any Corrupt Act.

61.2 If the Private Party, any Shareholder, Subcontractor or any Affiliate or agent commits any Corrupt Act, then the Municipality shall be entitled to act in accordance with clauses 61.2.1 to 61.2.7 below:

61.2.1 if the Corrupt Act is committed by the Private Party, any Shareholder, any director of the Private Party or any employee of the Private Party or of any Shareholder acting under the authority of or with the knowledge of a director of the Private Party or such Shareholder, as the case may be, then in any such case, the Municipality may terminate this PPP Agreement with immediate effect by giving written notice to the Private Party;

61.2.2 if the Corrupt Act is committed by an employee of the Private Party or of any Shareholder acting of his or her own accord, then in any such case, the Municipality may give written notice to the Private Party of termination and this PPP Agreement will terminate, unless within ten (10) Business Days of the Private Party's receipt of such notice that employee's involvement in the Project is terminated and (if necessary) the performance of any part of the Project Deliverables previously performed by him or her is performed by another person;

61.2.3 if the Corrupt Act is committed by a Subcontractor, director of a Subcontractor or an employee of a Subcontractor acting under the authority or with the knowledge of a director of that Subcontractor, then in any such case, the Municipality may give written notice to the Private Party of termination and this PPP Agreement will terminate, unless within eighty (80) Business Days of its receipt of such notice the Private Party terminates the relevant Subcontract and procures the performance of the relevant part of the Project Deliverables by another person, where relevant, in accordance with clause 75 (Assignment);

61.2.4 if the Corrupt Act is committed by an employee of a Subcontractor acting of his or her own accord, then the Municipality may give notice to the Private Party of termination and this PPP Agreement will terminate, unless within ten (10) Business Days of its receipt of such notice the Private Party procures the termination of that employee's involvement in the Project and (if necessary) procures the performance of that part of the Project Deliverables previously performed by that employee to be performed by another person;

61.2.5 if the Corrupt Act is committed by a Lender, a director of a Lender or any employee of a Lender acting under the authority or with the knowledge of a

director of that Lender, then in any such case the Municipality may give written notice to the Private Party of termination and this PPP Agreement will terminate, unless within fifty (50) Business Days of its receipt of such notice the Private Party procures the termination of such Lender's involvement in the Project (in any capacity whatsoever including, without limitation, as Lender under the Financing Agreements) and provides the Municipality with satisfactory proof that such Lender's entire participations in the Debt and in any undrawn financial commitments under the Financing Agreements have been assumed by any Qualifying Financial Institution(s) (including any one or more of the remaining Lenders);

- 61.2.6 if the Corrupt Act is committed by any employee of a Lender acting of his or her own accord, then the Municipality may give written notice to the Private Party of termination and this PPP Agreement will terminate, unless within ten (10) Business Days of the Private Party's receipt of such notice, that employee's involvement in the Project is terminated; and
- 61.2.7 any notice of termination under this clause shall specify:
- (a) the nature of the Corrupt Act;
 - (b) the identity of the party or parties who has committed the Corrupt Act; and
 - (c) the date on which this PPP Agreement will terminate in accordance with the applicable provisions of this clause.
- 61.3 Without prejudice to its other rights or remedies under this clause, the Municipality shall be entitled to recover from the Private Party, the greater of:
- 61.3.1 the amount or value of the gift, consideration or commission which is the subject of the Corrupt Act, provided that the Private Party, directly or indirectly, is the beneficiary of such gift, consideration or commission; and
- 61.3.2 any direct losses sustained by the Municipality in consequence of any breach of this clause by the Private Party.
- 61.4 Nothing contained in this clause shall prevent the Private Party from paying any proper commission or bonus to its employees within the agreed terms of their employment.
- 61.5 The Private Party shall notify the Municipality of the occurrence (and details) of any Corrupt Act promptly on the Private Party becoming aware of its occurrence.
- 61.6 Where the Private Party is required to replace any Subcontractor pursuant to this clause, the provisions of clause 67 (Appointment of Subcontractors) shall apply and be construed accordingly.

62. EFFECTS OF TERMINATION

62.1 Termination

Notwithstanding any provision of this PPP Agreement, on service of a notice of termination, this PPP Agreement shall only terminate in accordance with the provisions of this clause.

62.2 **Continued Effect – No Waiver**

Notwithstanding any breach of this PPP Agreement by either Party, and without prejudice to any other rights which the other Party may have in relation to it, the other Party may elect to continue to treat this PPP Agreement as being in full force and effect and to enforce its rights under this PPP Agreement. The failure of either Party to exercise any right under this PPP Agreement, including any right to terminate this PPP Agreement and any right to claim damages, shall not be deemed a waiver of such right for any continuing or subsequent breach.

62.3 **Continued Performance**

Subject to any exercise by the Municipality of its rights to perform, or to procure a third party to perform, the obligations of the Private Party, the Parties shall continue to perform their obligations under this PPP Agreement, notwithstanding the giving of any notice of default or notice of termination, until the termination of the PPP Agreement becomes effective in accordance with the provisions of this clause.

62.4 **Transfers to Municipality of Assets, Contracts, etc. on Termination Only**

On termination of this PPP Agreement in accordance with its terms for any reason:

62.4.1 if that occurs prior to the Service Commencement Date, in so far as any transfer of the Project Assets to the Municipality shall be necessary, the Private Party shall transfer such part of the Works and/or the Facilities as shall have been constructed, and/or Project Assets, to, and there shall vest in, the Municipality. If the Municipality so elects:

- (a) the Facilities shall remain available to the Municipality for the purposes of completing the Works; and
- (b) the construction plant purchased for the Project shall remain available to the Municipality for the purposes of completing the Works, subject to payment of the Private Party's reasonable costs,

provided that all the Facilities forms part of the Project Assets and /or the Private Party shall have been paid for such Facilities if it does not form part of the Project Assets.

62.4.2 if the Municipality so elects, the Private Party shall procure that any of the Subcontracts specified by the Municipality are assigned to the Municipality or any third party nominated by it; provided that where termination occurs under clause 58 (Termination for Municipality Default), the consent of the relevant Subcontractor(s) shall be required. Where the Municipality does not so elect, or any Subcontractor whose consent is required refuses that consent, the Private Party shall procure that all relevant Subcontracts automatically terminate when this PPP Agreement terminates.

62.5 **Transfers to Municipality on Termination or Expiry**

On termination of this PPP Agreement for any reason in accordance with its terms or within ten (10) Business Days prior to the Expiry Date, the Private Party shall:

62.5.1 hand over to, and there shall vest in, the Municipality, free from all encumbrances, the Project Assets, which in the case of expiry or termination of this PPP

Agreement at the Expiry Date shall be in the state as agreed to by the Parties in the Schedule 16: Handback Schedule, however if the PPP Agreement is terminated prior to the Expiry Date, the Project Assets will be handed over to the Municipality in the condition that they are in at that point in time; or

- 62.5.2 procure that any Subcontractor shall (as the case may be), transfer to the Municipality, free from any security interest full and unencumbered title in and to all or any part of the Project Assets required by the Municipality in connection with the Project Deliverables.
- 62.5.3 procure that any Licensed Intellectual Property shall be provided to the Municipality and the Municipality shall, to the extent possible, be granted a perpetual non-exclusive, royalty-free licence to use such Licenced Intellectual Property.
- 62.5.4 deliver to the Municipality (as far as not already delivered to the Municipality) one complete set of:
- (a) **as built drawings** upon completion of construction of the Facilities which need to reflect all changes made to the working drawings during the construction process; and
 - (b) maintenance, operation and training manuals for the Facilities to the extent that they exist or the Private Party has an obligation in terms of this PPP Agreement to acquire or prepare them.
- 62.5.5 use all reasonable endeavours to procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical plant and equipment used or made available by the Private Party under this PPP Agreement and included in the Project Assets are assigned, or otherwise transferred, to the Municipality.
- 62.5.6 ensure that provision is made in all relevant contracts of any description whatsoever to which the Private Party or any Subcontractor is a party to ensure that the Municipality will be able to exercise its rights, and the Private Party will be able to comply with its obligations, under this clause 62.5.
- 62.5.7 remove from the Project Site all property not forming part of the Facilities and Project Assets as required by the Municipality pursuant to clause 62.4 (Transfer to Municipality of Assets, Contracts, etc.) and if it has not done so within ten (10) Business Days or such reasonable period taking into consideration the nature of property to be removed after any notice from the Municipality requiring it to do so the Municipality may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property not forming part of the Facilities and Project Assets and shall hold any proceeds less all costs incurred for the credit of the Private Party and/or its Subcontractors provided that where this PPP Agreement is terminated without any period of notice to the Private Party, the Private Party shall have a period of 10 (ten) Business Days or such additional reasonable period after the Termination Date to remove such property;
- 62.5.8 deliver to the Municipality:
- (a) any keys, remote access apparatus and computer access cards to the Facilities; and

- (b) without prejudice to clause 73 (Intellectual Property of the Municipality) and 74 (Intellectual Property of the Private Party), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facilities (but excluding computer programmes which have been developed or acquired by the Private Party for its own use and not solely for the purposes of provision of any of the Services at the Facilities or the assignment or transfer of which is otherwise restricted); and

62.5.9 vacate, within reasonable time, the Project Site and shall leave the Project Site and the Facilities in a safe, clean and orderly condition

it being agreed that fair consideration has been paid for such assets, rights and obligations by virtue of the Unitary Payment and, to the extent termination occurs prior to the Expiry Date, the termination payments made under clause 63 (Compensation on Termination for Municipality Default) to clause 68 (Compensation on Termination for Corrupt Acts) (inclusive).

62.6 Transitional Arrangements

For a period of twelve (12) months (or longer as may be agreed to, in writing, by the Parties) both before and after the Expiry Date or in the case of any earlier termination for the period from the service of notice of termination to twelve (12) months after the termination date (or a period of one (1) month in the event that the Private Party is required to hand over the Facilities to a third party), the Private Party shall have the following obligations, on substantially similar terms and conditions as set out in this PPP Agreement:

62.6.1 the Private Party shall co-operate fully with the Municipality and any successor providing services to the Municipality in the nature of any of the Services or any part of the Services in order to achieve a smooth transfer of the manner in which the Municipality obtains services in the nature of the Services and to avoid or mitigate in so far as reasonably practicable any inconvenience or any risk to the health and safety of the employees of the Municipality and members of the public, provided the Municipality pays for the reasonable costs and expenses incurred by the Private Party for the delivery of the transitional services should such transitional services be required after the Expiry Date. The Private Party however shall not provide transitional services if such are required by a third party for a period greater than the period referred to in clause 62.6 above;

62.6.2 if the Municipality wishes to conduct a tender process with a view to entering into a contract for the provision of services (which may or may not be the same as, or similar to, the Services or any of them) following the expiry or earlier termination of this PPP Agreement, the Private Party shall co-operate with the Municipality fully in such tender process including (without limitation) by:

- (a) providing any information which the Municipality may reasonably require to conduct such tender excluding any information which is commercially sensitive to the Private Party (and, for the purposes of this sub-clause, commercially sensitive shall mean information which would if disclosed to a competitor of the Private Party or Subcontractor give that competitor a competitive advantage over the Private Party or Subcontractor and thereby prejudice the business of the Private Party or Subcontractor but shall exclude any information referred to in the clause dealing with employment matters; and

- (b) assisting the Municipality by providing all (or any) participants in such tender process with access on reasonable notice and at reasonable times to the Project Site and the Project Assets subject to the Private Party's safety rules and regulations.

62.7 Continuing Obligations

Save as otherwise expressly provided in this PPP Agreement:

- 62.7.1 termination of this PPP Agreement shall be without prejudice to any accrued rights and obligations under this PPP Agreement as at the date of termination; and
- 62.7.2 termination of this PPP Agreement shall not affect the continuing rights and obligations of the Private Party and the Municipality under this clause or any other provision of this PPP Agreement which is expressed to survive termination, or which is required to give effect to such termination or the consequences of such termination.

63. COMPENSATION ON TERMINATION FOR MUNICIPALITY DEFAULT

On termination of this PPP Agreement because of a Municipality Default, the Municipality shall pay the Private Party an amount equal to the aggregate of:

- 63.1 an amount equal to the Debt and all fees, costs, expenses, breakage costs and breakage premiums in connection with any Financing Agreement.
- 63.2 Subcontractor Costs; and
- 63.3 Equity Compensation; and
- 63.4 retrenchment costs payments for employees of the Private Party that have been or will reasonably be incurred by the Private Party as a direct result of the termination of this PPP Agreement,
- 63.5 ~~less~~, to the extent it is a positive amount, the aggregate, as at the Termination Date, of:
 - 63.5.1 all credit balances on any bank accounts, held by or on behalf of the Private Party on the Termination Date and the value of any right of the Private Party or the Lenders to receive insurance proceeds or any proceeds pursuant to letters of credit and of any such proceeds actually received by them (save where such credit balances or proceeds are paid to the Municipality and/or are to be applied in reinstatement) and sums due and payable from the Subcontractors and any other third parties; and
 - 63.5.2 all amounts payable by the Lenders (or the counterparties to the interest rate or exchange rate hedging arrangements provided for in the Financing Agreements) to the Private Party in connection with the early termination of such hedging arrangements because of prepayment of amounts outstanding under the Financing Agreements.

if there should be no double deductions of any amount in terms of the clauses above.

64. COMPENSATION ON TERMINATION FOR PRIVATE PARTY DEFAULT

Retendering Election

- 64.1 Subject to clause 64.3, the Municipality shall be entitled either to:
- 64.1.1 retender the provision of the Services in accordance with clause 65 (Retendering Procedure); or
 - 64.1.2 require an expert determination in accordance with clause 66 (No Retendering Procedure).
- 64.2 Subject to clause 64.3, the Municipality shall notify the Private Party of its election on or before the date falling sixty (60) days after the Termination Date.
- 64.3 The Municipality shall not be entitled to elect to retender the provision of the Services for the unexpired portion of the Project Term if the Lenders have stepped-in, and the Agent has demonstrated to the Municipality that there are less than 3 (three) parties (each meeting the criteria in paragraph (a), (b) and (c) of the definition of **Substitute Private Party** in the Direct Financing Agreement) who have pre-qualified pursuant to an RFQ issued by the Lenders for the provision of the Services for the unexpired portion of the Project Term, in accordance with the Direct Financing Agreement.

65. RETENDERING PROCEDURE

If the Municipality elects to retender the provision of the Services under clause 64.1.1 (retendering election), then the following provisions shall apply:

- 65.1 The objective of the retendering procedure shall be to establish and pay to the Private Party the Highest Tender Price, because of the Tender Process. If less than 2 (two) Tenderers who pre-qualified in terms of the request for pre-qualification submit compliant Tenders, the Municipality shall not be entitled to proceed under this clause 65 and shall proceed under clause 66 (*No Retendering Procedure*).
- 65.2 The Municipality shall (subject to any legal requirements preventing it from doing so) use its reasonable endeavours to complete the Tender Process as soon as practicable.
- 65.3 The Municipality shall notify the Private Party of the qualification criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process, and shall act reasonably in setting such requirements and terms.
- 65.4 The Private Party authorises the release of any information that is reasonably required as part of the Tender Process by the Municipality, which the Municipality would otherwise be prevented from releasing under clause 87 (Confidentiality), other than such information which would constitute a contravention of Law or the rules of any stock exchange
- 65.5 The Private Party may, at its own cost, appoint a Tender Process Monitor for the purposes of monitoring and reporting to the Private Party and the Lenders on the Municipality's compliance with the Tender Process and making representations to the Municipality. The Tender Process Monitor will not disclose any confidential information to the Private Party, the Lenders or any other person (and shall provide an undertaking to the Municipality to such effect as a condition of its appointment) but shall be entitled to advise the Private Party as to whether it considers that the Municipality has acted in

accordance with the Tender Process and correctly determined the Adjusted Highest Tender Price.

- 65.6 The Tender Process Monitor shall be required to enter into a confidentiality agreement with the Municipality in a form acceptable to the Municipality and shall be entitled to attend all meetings relating to the Tender Process, and inspect copies of the tender documentation and bids, and shall make written representations to the Municipality regarding compliance with the Tender Process. The Tender Process Monitor shall be required to make all representations in a timely manner as the Tender Process proceeds. The Municipality shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by the Private Party if the Private Party refers a dispute relating to the Adjusted Highest Tender Price to dispute resolution in accordance with clause 77 (Dispute Resolution).
- 65.7 For all or any part of a month, falling within the period from the Termination Date to the Compensation Date, the Municipality shall pay to the Private Party:
- 65.7.1 the Post Termination Service Amount for that month, on or before thirty (30) days after the end of that month; and
- 65.7.2 the Post Termination Service Amount for the period ending on the Compensation Date, on or before the date falling thirty (30) days after the Compensation Date.
- 65.8 If any Post Termination Service Amount is less than zero, then it shall be carried forward and shall be set off against any future positive Post Termination Service Amounts. If any such Post Termination Service Amount has not been set off on or before the Compensation Date, then it shall be considered in the calculation of the Adjusted Highest Compliant Tender Price.
- 65.9 The Municipality shall require the Private Party to bid on the basis that they will receive the benefit of any insurance proceeds or any outstanding claims under material damage insurance policies on the date that the New PPP Agreement is entered into.
- 65.10 As soon as practicable after tenders have been received, the Municipality shall (acting reasonably) evaluate the Tenders and shall notify the Private Party of the Adjusted Highest Tender Price.
- 65.11 If the Private Party refers a dispute relating to the Adjusted Highest Tender Price to dispute resolution in accordance with clause 77 (Dispute Resolution), the Municipality shall nevertheless be entitled to enter into a New PPP Agreement.
- 65.12 Within ninety (90) Business Days after the Adjusted Highest Tender Price has been determined, the Municipality shall pay to the Private Party, the greater of:
- 65.12.1 the Adjusted Debt; and
- 65.12.2 the Adjusted Highest Tender Price.
- 65.13 The discharge by the Municipality of its payment obligation in clause 65.12 above shall be in full and final settlement of all the Private Party's claims and rights against the Municipality for breaches and/or termination of this PPP Agreement and the Project Documents whether under contract, delict or otherwise, save for any liability of the Municipality which arose prior to the Termination Date that has not already been taken

into account in determining the Adjusted Highest Tender Price or the Adjusted Debt (as the case may be).

- 65.14 Subject to clauses 65.15 and 65.16 below, if the Municipality has not paid an amount equal to the Adjusted Highest Tender Price or the Adjusted Debt in terms of clause 65.12 to the Private Party on or before the date falling two (2) years after the Termination Date then the provisions of this clause shall not apply to that termination and the provisions of clause 66 (No Retendering Procedure) shall apply instead.
- 65.15 If each of the Adjusted Debt and the Adjusted Highest Tender Price is zero or a negative number then the Municipality shall have no obligation to make any payment to the Private Party and with effect from the time that the Municipality gives notice of such determination to the Private Party, the Municipality shall be released from all liability to the Private Party for breaches and/or termination of this PPP Agreement and any other Project Document whether under contract, delict or otherwise save for any liability of the Municipality which arose prior to the Termination Date that has not already been taken into account in determining the Adjusted Highest Tender Price or Adjusted Debt.
- 65.16 The Municipality may elect at any time prior to the receipt of a Tender to follow the no retendering procedure under clause 66 (No Retendering Procedure) by notifying the Private Party that this election has been made.
- 65.17 If the Municipality receives a Tender but decides not to complete the Tender Process, it shall notify the Private Party of this decision and pay to the Private Party an amount equal to the greater of the Adjusted Highest Tender Price and the Adjusted Debt within ninety (90) Business Days of such notification.

66. NO RETENDERING PROCEDURE

If either the Municipality is not entitled to retender pursuant to clause 59 (Termination on Private Party Default) or the Municipality elects to require an expert determination by the Termination Calculation Expert in accordance with this clause 66 (No Retendering Procedure) then the following procedure shall apply:

- 66.1 In determining the Adjusted Estimated Project Value, the Parties shall procure that the Termination Calculation Expert will be obliged to follow the principles set out below:
- 66.1.1 all forecast amounts should be calculated in nominal terms at current prices, recognising the adjustment for CPI in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in this PPP Agreement; and
- 66.1.2 the total of all future payments of the full Unitary Payments (without Penalty Deductions) forecast to be made shall be calculated and discounted to the Termination Date at the Termination Date Discount Rate.
- 66.2 If the Parties cannot agree on the Adjusted Estimated Project Value on or before the date falling thirty (30) days after the date on which the Termination Calculation Expert has determined such value, in accordance with this clause 66 (No Retendering Procedure), then the Estimated Project Value shall be determined in accordance with clause 77 (Dispute Resolution).
- 66.3 The Municipality shall pay to the Private Party an amount equal to the greater of the Adjusted Debt and the Adjusted Estimated Project Value on the date falling thirty (30)

days after the date on which the Adjusted Estimated Project Value has been agreed or determined in accordance with this clause 66 (No Retendering Procedure).

- 66.4 The discharge by the Municipality of its obligation in clause (e) shall be in full and final settlement of all the Private Party's claims and rights against the Municipality for breaches and/or termination of this PPP Agreement or any Project Documents whether in contract, delict, restitution or otherwise save for any liability that arose prior to the Termination Date (but not from the termination itself) that has not been taken into account in determining the Adjusted Estimated Project Value.

67. COMPENSATION ON TERMINATION FOR FORCE MAJEURE

On termination of this PPP Agreement under clause 60 (Termination for Force Majeure), the Municipality shall pay to the Private Party the aggregate of:

- 67.1 an amount equal to the Debt and all fees, costs, expenses, breakage costs and breakage premiums in connection with any Financing Agreement.
- 67.2 the Subcontractor Costs.
- 67.3 an amount equal to the Shareholder Loans (indexed to CPI) less any interest on the Shareholder Loans already paid to the Shareholders which, if a negative amount, shall be deemed to be zero for purposes of calculating the Termination amount.
- 67.4 an amount equal to all amounts paid to the Private Party in respect of Equity (indexed to CPI) less dividends and other distributions already paid to the Shareholders which, if a negative amount, shall be deemed to be zero for purposes of calculating the Termination amount; and
- 67.5 retrenchment costs for employees of the Private Party that have been or will be reasonably incurred by the Private Party as a direct result of the termination of this PPP Agreement.
- 67.6 **less**, to the extent it is a positive amount, the aggregate, as at the Termination Date, of:
- 67.6.1 all credit balances on any bank accounts held by or on behalf of the Private Party on the Termination Date and the value of any right of the Private Party or the Lenders to receive insurance proceeds or any proceeds pursuant to letters of credit and of any such proceeds actually received by them (save where such credit balances or proceeds are paid to the Municipality and/or are to be applied in reinstatement) and sums due and payable from the Subcontractors and any other third parties;
- 67.6.2 sums due and payable from the Subcontractor and any other third parties to the Private Party; and
- 67.6.3 all amounts payable by the Lenders (or the counterparties to the interest rate or exchange rate hedging arrangements provided for in the Financing Agreements) to the Private Party in connection with the early termination of such hedging arrangements because of prepayment of amounts outstanding under the Financing Agreements.
- 67.7 Interest at the rate of the Compensation Date Interest Rate shall be payable on the amount so determined with effect from the Termination Date to the Compensation Date.

67.8 If the aggregate of the amounts referred to above is less than zero, then, for the purposes of the calculation in this clause the aggregate shall be deemed to be zero.

68. COMPENSATION ON TERMINATION FOR CORRUPT ACTS

On termination of this PPP Agreement in accordance with clause 61 (Termination for Corrupt Acts), the Municipality shall, subject to clause 68.5, pay the Private Party an amount equal to:

68.1 the Debt as at the Termination Date.

68.2 **less**, to the extent it is a positive amount, the aggregate, as at the Termination Date, of:

68.2.1 all credit balances on any bank accounts held by or on behalf of the Private Party on the Termination Date and the value of any right of the Private Party or its Lenders to receive insurance proceeds and of any such proceeds actually received by them to the extent arising from insurances concluded for the purposes of the Project (save where such credit balances or insurance proceeds are paid to the Municipality and/or are to be applied in reinstatement) and sums due and payable from Subcontractors and any other third parties;

68.2.2 all amounts payable by the Lenders (or the counterparties to the interest rate or exchange rate hedging arrangements provided for in the Financing Agreements) to the Private Party in connection with the early termination of such hedging arrangements because of prepayment of amounts outstanding under the Financing Agreements; and

68.2.3 any sums due and payable from any Subcontractor and any other third parties to the Private Party.

68.3 Interest at the rate of the Compensation Date Interest Rate shall be payable on the amount so determined with effect from the Termination Date to the Compensation Date.

68.4 If the aggregate of the amounts referred to above is less than zero, then, for the purposes of the calculation in this clause the aggregate shall be deemed to be zero.

68.5 If the termination is because of a Corrupt Act on the part of any of the Lenders, then the amount payable by the Municipality shall be zero in respect of that portion of the Debt owing to the Lender who committed the Corrupt Act.

PART 17: STEP-IN

69. MUNICIPALITY STEP-IN

69.1 If the Municipality reasonably believes that it needs to take any action in connection with the Project Deliverables because a serious and urgent risk arises to the health or safety of persons or property, or to the environment, or to national security and/or to discharge a statutory duty, then the Municipality shall be entitled to take action in accordance with the following provisions provided that the Municipality must cease to exercise its rights in terms of this clause when the reasons for the exercise of the rights in the first instance no longer apply. The Municipality indemnifies the Private Party against all direct losses, costs or expenses sustained by the Private Party in respect of physical loss or damage to the facility because of any act or omission of the Municipality whilst it is exercising its step-in rights under this clause. If the Private Party is able to remedy the risk, the Private Party shall take the necessary action to remedy such risk, at the cost of the Municipality.

- 69.2 If pursuant to clause 69.1 the Municipality wishes to act, it shall as soon as possible after reaching its determination to do so notify the Private Party in writing of:
- 69.2.1 the action it wishes to take.
- 69.2.2 its reasons for taking such action.
- 69.2.3 the date when it wishes to commence such action.
- 69.2.4 the period (the **Step-in Period**) which it reasonably believes will be necessary for such action and which must be a fixed period; and
- 69.2.5 to the extent practicable, the effect of such action on the Private Party and its obligations to perform the Project Deliverables during the Step-in Period.
- 69.3 Following the service of such notice, the Municipality shall take such action as notified under clause 69.2 and any ancillary action as it reasonably believes is necessary (the **Necessary Action**) and the Private Party shall give all reasonable assistance to the Municipality in the conduct of such Necessary Action.
- 69.4 If the Private Party is not in breach of any of its obligations under this PPP Agreement in respect of which the Necessary Action is proposed to be taken, then for so long as and to the extent that the Necessary Action is taken, and this prevents the Private Party from providing any part of the Project Deliverables:
- 69.4.1 the Private Party shall be relieved from such obligations; and
- 69.4.2 in respect of the time period over which such Necessary Action is conducted and provided that the Private Party provides the Municipality with such reasonable assistance as the Municipality may need in the conduct of such Necessary Action (such assistance, however, to be at the expense of the Municipality to the extent of any incremental costs), the Unitary Payments due from the Municipality to the Private Party shall equal the amount the Private Party would have received if it was satisfying all its obligations affected by the Necessary Action in full over such period.
- 69.5 Upon the Necessary Action ceasing, the Private Party shall undertake an audit of the Facilities to determine what remedial maintenance or work is required to be undertaken because of any act or omission by the Municipality whilst it stepped-in under this clause. The Private Party shall provide the Municipality with the detailed audit report with forty (40) Business Days of the Necessary Action.
- 69.6 Within twenty (20) Business Days of the Private Party's audit report, as contemplated above being presented to the Municipality, the Private Party shall undertake a reconciliation of all Incremental Costs and/or Incremental Savings, and the Private Party shall provide the Municipality with the reconciliation and all substantiating documentation with such twenty (20) Business Days. Upon the reconciliation being agreed or determined pursuant to clause 78 (*Fast Track Dispute Resolution*):
- 69.6.1 the Municipality shall pay the Private Party such monies owing to the Private Party as are agreed and upon presentation of a valid tax invoice; or
- 69.6.2 the Municipality shall set-off such monies owed by the Private Party.

69.7 For the purposes of this clause:

69.7.1 **Incremental Cost** shall mean a reasonable cost incurred by the Private Party in meeting the Output Specification after the Necessary Action has ceased, where such cost is incurred by the Private Party as a result of any act or omission by the Municipality it is stepped-in under this clause; provided that no Incremental Cost shall be payable in respect of costs incurred after the Necessary Action where the Private Party failed to meet the Output Specifications prior to the Step-In Period commencing in respect of such item or where a negligent act or omission by the Private Party in performing the Services caused the urgent risk that led to the Municipality to exercise the step-in rights under this clause 69;

69.7.2 **Incremental Saving** shall mean a saving achieved by the Private Party as a result of costs not incurred by the Private Party during the Necessary Action, less the reasonable costs incurred by the Private Party in meeting the Output Specifications after the Necessary Action; where such cost is incurred as a result of the Municipality failing to undertake programmed preventative maintenance or otherwise failing to maintain the Facilities in accordance with the Output Specifications. However, where a negligent act or omission by the Private Party in performing the Services caused the urgent risk that led to the Municipality to exercise the step-in rights under this clause 69, the costs incurred by the Private Party in meeting the Output Specifications after the Necessary Action will not be deducted.

69.8 In claiming any Incremental Costs, the Private Party shall provide the Municipality with detailed substantiating documentation detailing all fixed costs, variable costs and other costs incurred. The Private Party shall mitigate the costs of any Incremental Costs incurred.

69.9 If the Necessary Action is taken as a result of a breach by the Private Party of any of its obligations under this PPP Agreement or where a negligent act or omission by the Private Party in performing the Services caused the urgent risk that led to the Municipality to exercise the step-in rights, then for so long as and to the extent that such Necessary Action is taken and this prevents the Private Party from performing any of its obligations:

69.9.1 the Private Party shall be relieved from such obligations; and

69.9.2 in respect of the period in which the Municipality is taking such Necessary Action, the Unitary Payments due from the Municipality to the Private Party shall equal the amount the Private Party would have received if it were performing the obligations affected by the Necessary Action in full over such period, less any Penalty Deductions in respect of that breach as calculated in accordance with the payment mechanism in this PPP Agreement, and less an amount equal to the Municipality's costs of taking such Necessary Action (for the avoidance of doubt, deductions shall not apply in respect of Availability Deductions arising out of the obligations in respect of which the Private Party is relieved);

69.9.3 provided that, if by the expiry of the Step-in Period, the breach still subsists and if it constitutes a Private Party Default, then the Municipality must serve a notice in terms of clause 59.2 (Municipality's Options) requiring the Private Party to remedy the Private Party Default or to put forward a remediation programme.

70. LENDER'S STEP-IN

The key issues of when Lenders should be permitted to step-in, the extent to which the Lenders should be obliged to assume liabilities of the Private Party and the extent to which the Lenders will be given the opportunity to rectify Private Party Default will be given effect to in accordance with the Direct Financing Agreement as it appears in hereto.

PART 18: INFORMATION AND AUDIT ACCESS

71. INFORMATION AND AUDIT ACCESS

- 71.1 The Private Party shall provide to the Municipality all information, documents, records and the like in the possession of, or available to, the Private Party as may reasonably be requested by the Municipality for the purpose of complying with any of its statutory reporting obligations including its reporting obligations under the MFMA and the Auditor-General Act, 1995.
- 71.2 To this end the Private Party shall use all reasonable endeavours to ensure that all such information in the possession of any counterparty to any Project Document shall be available to the Municipality and the Private Party has included, or shall include, appropriate provisions to this effect in all Project Documents.
- 71.3 Without limiting the generality of the foregoing, the Private Party shall:
- 71.3.1 provide and shall procure that its Subcontractors shall provide all such information as the Municipality may reasonably require from time to time to enable the Municipality to provide reports and returns as required by any Responsible Authority, including reports and returns regarding the physical condition of any building occupied by the Private Party or its Subcontractors in terms of this PPP Agreement, health and safety, national security, and environmental safety; and
- 71.3.2 note and facilitate the Municipality's compliance with the Promotion of Access to Information Act, 2000 if the Municipality is required to provide information to any person pursuant to that Act.

72. REFINANCING

- 72.1 The Private Party shall promptly notify the Municipality in writing prior to taking any steps to implement any proposed Refinancing (including any Exempt Refinancing, save for an Exempt Refinancing as described in 1.50.4 of the definition thereof). Such notice shall include:
- 72.1.1 full details of any proposed amendments to be made to or waivers granted under any of the Project Documents to give effect to such Refinancing.
- 72.1.2 a copy of the proposed financial model relating to such Refinancing (if any) and the basis for the assumptions used in that financial model.
- 72.1.3 the reasons for such Refinancing; and
- 72.1.4 any other information that may be reasonably necessary to enable the Municipality to assess such Refinancing having regard to the following provisions.

- 72.2 The Private Party shall procure that no Refinancing (other than an Exempt Refinancing) is implemented without the prior written approval of the Municipality (which approval shall not be unreasonably withheld or delayed).
- 72.3 Subject to clause 72.1, the Private Party may implement any Exempt Refinancing without the prior approval of the Municipality.
- 72.4 The Municipality shall be entitled to receive a 50% share of the Refinancing Gain arising from any Refinancing (other than an Exempt Refinancing).
- 72.5 The Municipality shall be entitled on prior written notice to the Private Party (at any time before, during and/or after any Refinancing) to audit any financial model and documentation relating to any Refinancing (including any aspect of the calculation of the Refinancing Gain).
- 72.6 The Municipality shall have the right to elect to receive its share of any Refinancing Gain:
- 72.6.1 as a single cash payment in an amount equal to the lesser of:
- (a) 50% of any Distribution made on or about the date of the Refinancing; and
 - (b) the Municipality's 50% share of the Refinancing Gain, and the balance (if any) of its 50% share of the Refinancing Gain as a reduction in the Unitary Payment over the remaining Project Term; or
- 72.6.2 as a reduction in the Unitary Payment over the remaining Project Term.
- 72.7 The Municipality and the Private Party will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain and payment of the Municipality's share of the Refinancing Gain (considering how the Municipality has elected to receive its share of the Refinancing Gain under clause 72.6). If the Parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of the Municipality's share, then the dispute shall be determined in accordance with clause 78 (Fast-track Dispute Resolution).
- 72.8 The Refinancing Gain shall be calculated after considering:
- 72.8.1 the reasonable and proper professional costs that each Party incurs directly in relation to such Refinancing, and
- 72.8.2 if the Municipality's share of the Refinancing Gain is deductible in the hands of the Private Party for income tax purposes, the resulting tax benefits to the Private Party.
- 72.9 The Private Party shall pay to the Municipality all such costs incurred by the Municipality within twenty (20) Business Days of any such Refinancing.
- 72.10 For the avoidance of any doubt, the notification and approval requirements set forth in this clause 72 (Refinancing) do not apply to any Permitted Borrowing.

73. INTELLECTUAL PROPERTY OF THE MUNICIPALITY

- 73.1 All intellectual property rights whatsoever (whether capable of registration or not) regarding the Municipality's name, trademarks, logos, image and all other intellectual

property matters relating to the Municipality, including its name, trademarks, logos and/or image shall remain the sole property of the Municipality.

- 73.2 Subject to existing rights and obligations and clause 73.3, the Municipality shall, on prior written application by the Private Party, grant a non-exclusive revocable right and licence to the Private Party to use the Municipality's trademarks and logos for a period not to exceed the remainder of the Project Term.
- 73.3 To establish and maintain standards of quality and propriety acceptable to the Municipality, if the Private Party desires to use the Municipality's trademarks or logos in any way, the Private Party shall first submit the concept or a sample of the proposed use to the Municipality for approval, which shall be in its sole and absolute discretion. The Municipality shall use reasonable endeavours to advise the Private Party of its approval or disapproval of the concept or sample within twenty (20) Business Days of its receipt of the concept or sample. If the Municipality approves the concept or sample, the Private Party shall not depart therefrom in any respect without the Municipality's further prior written approval.
- 73.4 If at any time the Municipality revokes its approval for the specified use of any trademark or logo, the Private Party shall forthwith discontinue all use of such trademark or logo and shall remove from public sale or distribution any previously approved product in respect of which the Municipality has revoked its approval. The costs incurred by the Private Party because of such revocation shall be borne by the Private Party if the grounds for the revocation include any ground described in clause 73.5.
- 73.5 The Municipality may revoke its approval immediately upon ten (10) Business Days written notice to the Private Party if the Private Party, any Subcontractor or any of its or its Subcontractors' officers, directors or employees commits any crime or otherwise engages in conduct which violates any law, or engages in any conduct that offends against public morals and decency and, in the Municipality's reasonable opinion, materially prejudices the reputation and public goodwill of the Municipality.
- 73.6 The Private Party acknowledges that the name(s) of the Municipality (the **Protected Names**) are associated with and peculiar to the Municipality and are the intellectual property of the Municipality. Consequently, the Private Party agrees that the sole and exclusive ownership of the Protected Names shall vest in the Municipality.
- 73.7 In circumstances where the Private Party utilises any of the Protected Names, either on its own or in combination or association with any other name, it does so only in terms of this PPP Agreement and with the prior approval of the Municipality. On termination or expiry of this PPP Agreement, the Private Party shall not be entitled to operate or conduct any business using any of the Protected Names either on its own or in combination or association with any other name.
- 73.8 Within sixty (60) Business Days after the end of the Project Term and where the Private Party has operated a company utilising any of the Protected Names with the permission of the Municipality, the Private Party shall either:
- 73.8.1 de-register the company bearing any of the Protected Names; or
- 73.8.2 change the name to a name not substantially like any of the Protected Names.

- 73.9 The Municipality hereby acknowledges that the Private Party shall use the name "Eden Waste Management" for its Party's business operation in respect of the Project.

74. INTELLECTUAL PROPERTY OF THE PRIVATE PARTY

- 74.1 The Private Party shall, in respect of all Intellectual Property that is owned by it, upon Termination of this PPP Agreement in accordance with its terms, grant to the Municipality a non-exclusive, royalty free licence to use the Private Party's Intellectual Property for the Project, the Services or any operational and maintenance services to be provided in the future by or on behalf of the Municipality in relation to the Facilities, or any facilities that succeed them (the **Permitted Purposes**).
- 74.2 Those licences shall be capable of being freely transferred by the Municipality to third parties at no cost for the Permitted Purposes, but to no other parties without the prior written consent of the Private Party.
- 74.3 In the event that the Private Party uses any Intellectual Property owned by any third party, the Private Party shall, prior to using any such Intellectual Property, use its reasonable endeavours to the extent practicable to procure the consent of the relevant owner such that the Private Party is at all times entitled to grant the Municipality a non-exclusive licence on terms no less favourable than those applicable to the Private Party to use the Intellectual Property for the Permitted Purposes, which licences shall be capable of being further transferred by the Municipality to third parties at no cost for the Permitted Purposes.
- 74.4 The Private Party indemnifies the Municipality against any liability for costs which the Municipality suffers or incurs as a result of the infringement of any third party rights arising from the use by the Municipality, any responsible authority or any third party whose licence to use any Intellectual Property for the Permitted Purposes, or to whom any rights in respect of the Intellectual Property are assigned for the Permitted Purposes, in accordance with the provisions of that licence or assignment, save to the extent that such liability or costs was occasioned by an intentional act or omission by an indemnified party in question or by its gross negligence.

PART 19: ASSIGNMENT, SUBCONTRACTING & CHANGES IN CONTROL

75. ASSIGNMENT

- 75.1 This PPP Agreement and any Project Document to which both the Municipality and the Private Party are parties shall be binding on and shall ensure to the benefit of them and their respective successors-in-title and permitted transferees and assigns.
- 75.2 Save as expressly permitted hereunder and under the Direct Financing Agreement, the Private Party shall not, without the prior written approval of the Municipality, assign, cede, delegate, transfer or otherwise dispose of any right or obligation under this PPP Agreement or any Project Document to which it is a party to any other person.
- 75.3 The Municipality shall not assign, cede, delegate, transfer or otherwise dispose of any right or obligation under this PPP Agreement or Project Document to which it and the Private Party are parties to any other person, save with the prior written approval of the Private Party (such approval not to be unreasonably withheld or delayed) or to give effect to any mandatory requirement of any applicable law.

76. CHANGES IN CONTROL AND BLACK EQUITY

- 76.1 For the duration of the Project Term (save as otherwise provided in clause 76.2), the Private Party shall procure that there is no Change in Control in the Private Party (in excess of 20% in aggregate) without the prior written approval of the Municipality (such approval not to be unreasonably withheld or delayed).
- 76.2 Notwithstanding the provisions of clause 76.1 above, prior to the expiry of a period of two (2) years commencing on the Service Commencement Date, the Private Party shall procure that there is no sale, assignment, cession, transfer, exchange, renunciation or other disposal of the whole or any part of the Equity and/or the Shareholder Loans, nor any dilution of the Equity, of the Private Party without the prior written approval of the Municipality (such approval not to be unreasonably withheld or delayed).
- 76.3 The Private Party shall procure that for the duration of the Project:
- 76.3.1 subject to the Lenders' rights in respect of any security held by them (or any agent acting on their behalf, or any security company, trust or other entity holding any security in respect of the Debt for the benefit of the Lenders) there is no sale, assignment, cession, transfer, exchange, renunciation or other disposal (at any time) of the whole or any part of the Equity and/or the Shareholder Loans of any Black Shareholder other than to another Black Shareholder, Black Person or Black Enterprise;
- 76.3.2 there is no dilution in the aggregate Equity holdings of the Black Shareholders below the Minimum Black Equity; and
- 76.3.3 there is no Change in Control (at any time) in any Shareholder that is a Black Enterprise, which will result in that Shareholder no longer being a Black Enterprise.
- 76.4 For the purpose of this clause 76 (Changes in Control and Black Equity), the term **subsidiary** shall have the meaning as defined in the Companies Act, 2008.
- 76.5 Where a failure by the Private Party to comply with its obligations under this clause is not within its own control the Private Party shall be entitled to rectify the failure within a period of 6 (six) months from the date on which the failure to comply with the provisions of this clause came to its attention (the **Rectification Period**). A continued failure by the Private Party to comply with its obligations in terms of this clause after the rectification period shall constitute an event of failure for that particular financial year for the purposes of clause 76.7 hereunder.
- 76.6 Any dispute between the Parties regarding the provisions of this clause shall be determined in accordance with the provisions of clause 78 (Fast Track Dispute Resolution).
- 76.7 Failure by the Private Party to comply with its obligations under this clause for 3 consecutive financial years shall result in a Private Party Default.

77. DISPUTE RESOLUTION

77.1 Referable Disputes

The provisions of this clause 77 (Dispute Resolution) shall, save where expressly provided otherwise, apply to any dispute arising in relation to or in connection with any aspect of this PPP Agreement between the Parties.

77.2 Internal Referral

77.2.1 If a dispute arises in relation to any aspect of this PPP Agreement, the Parties shall attempt in good faith to come to an agreement in relation to the disputed matter, in accordance with the following informal process:

- (a) all disputes shall first be referred to a meeting of the Private Party's representative and the Municipality's Representative who have sufficient authority for resolution; and
- (b) if the Parties have been unable to resolve the dispute within five (5) days of referral to the Parties' representatives, either Party may refer the dispute for a decision by the Municipal Manager of the Municipality and the Chief Executive Officer or equivalent officer of the Private Party.
- (c) In the event that the Dispute remains unresolved, either Party may within five (5) days of failure to resolve internally refer the dispute to the [Arbitration Foundation of Southern Africa](#) (AFSA) and every party shall be liable of its own cost of Alternative Resolution regardless of the outcome of such an action or application.

77.2.2 In attempting to resolve the dispute in accordance with the provisions of this clause 77.2, the Parties shall (and shall procure that their employees and representatives shall) use reasonable endeavours to resolve such dispute without delay by negotiations or any other informal procedure which the relevant representatives may adopt. Those attempts shall be conducted in good faith to resolve the dispute without necessity for formal proceedings.

77.2.3 Any dispute which has not been resolved by the representatives contemplated in clause 77.2.1(b) within five (5) Business Days of the dispute being referred to them (or any longer period agreed between the Parties) shall be treated as a dispute in respect of which informal resolution has failed.

77.3 Performance to Continue

No reference of any dispute to any resolution process in terms of this clause shall relieve either Party from any liability for the due and punctual performance of its obligations under this PPP Agreement.

77.4 Litigation

77.4.1 Save where any dispute has been expressly referred for determination in terms of clause 78 (Fast-track Dispute Resolution), if informal resolution of any dispute has failed, then the dispute may be referred to litigation in terms of Clause 77.2.1(C) by either Party.

77.4.2 Neither Party is limited in any proceedings before the Adjudication/ Court to the information, evidence or arguments used in the informal attempts to resolve the dispute.

77.5 Suspension of Prescription

The Parties agree that, for the purposes of the Prescription Act, 1969 as amended from time to time, time shall cease to run in respect of any dispute on the date of service of the relevant notice referring that dispute for fast track dispute resolution in terms of clause 78 (Fast-track Dispute Resolution) or arbitration and if any other subsequent proceedings are instituted in respect of that dispute, from the date of service of the relevant summons or notice of motion.

78. FAST-TRACK DISPUTE RESOLUTION

- 78.1 Disputes expressly referred for determination pursuant to this clause 78 (*Fast-track Dispute Resolution*) shall be determined by the relevant Independent Expert as defined.
- 78.2 Within fifteen (15) Business Days after a dispute has been referred by Party to the appropriate Independent Expert, the Independent Expert shall require the Parties to submit in writing their respective arguments. The Independent Expert shall, in his/her absolute discretion, consider whether a hearing is necessary to resolve the dispute.
- 78.3 It shall be entirely within the power and competence of the Independent Expert to decide upon any matters related to the proper preparation of the dispute for hearing and in that regard the Independent Expert shall direct the Parties accordingly.
- 78.4 The Independent Expert shall set the date for the hearing, choose the venue (which must be a venue in South Africa) for the hearing and determine all matters regarding any aspect of the hearing. Moreover, the Independent Expert can decide whether at the hearing the Parties are to give oral evidence or confine themselves to presenting their cases in writing or by some other appropriate procedure. In this regard, the Independent Expert must be guided by considerations of fairness, the cost-effective resolution of the dispute, and the need to resolve the dispute quickly.
- 78.5 The Independent Expert shall provide both Parties with his/her written decision on the dispute, within twenty (20) Business Days of the referral (or such other period as the Parties may agree after the referral). The Independent Expert shall give his/her reasons for the award, if so requested by either Party.
- 78.6 The Independent Expert's costs of any referral shall be borne as the Independent Expert shall specify or, if not specified, equally by the Parties. Each Party shall bear its own costs arising out of the referral, including its legal costs and the costs and expenses of any witnesses.
- 78.7 The Independent Expert shall act impartially and may take the initiative in ascertaining the facts and the law.
- 78.8 Should the need arise for either Party to seek interim or temporary relief before the adjudication is finalised, that Party may apply to the Independent Expert to grant such interlocutory order or give the required temporary relief and the Independent Expert shall have the same power to do so as if the matter were one heard by a Judge in the High Court of South Africa, save that if by law such power or order cannot be exercised or given by an Independent Expert then, and then only, should the Parties refer such matter to such High Court.
- 78.9 The proceedings shall be confidential, and all information, data or documentation disclosed or delivered by either Party to the Independent Expert in consequence of or in connection with his/her appointment as Independent Expert shall be treated as confidential. Neither the Parties nor the Independent Expert shall, save as permitted by

clause 87 (Confidentiality) of this PPP Agreement, disclose to any person any such information, data or documentation unless the Parties otherwise agree in writing, and all such information, data or documentation shall remain the property of the Party disclosing or delivering the same and all copies shall be returned to such Party on completion of the Independent Expert's work.

- 78.10 The Independent Expert is not liable for anything done or omitted in the discharge or purported discharge of his/her functions as Independent Expert, unless the act or omission is grossly negligent or in bad faith. Any employee or agent of the Independent Expert is similarly protected from liability.
- 78.11 Should any Party fail to co-operate with the Independent Expert with the result that in the view of the Independent Expert such default or omission prejudices the adjudication process, then the Independent Expert can either:
- 78.11.1 give that Party written notice that unless it remedies the default or omission within a given time, it will forfeit the right to continue to participate in the adjudication; or
- 78.11.2 warn the Party in writing that its default or omission may make it liable to a punitive order of costs irrespective of whether it succeeds in the adjudication or not and such punitive award of costs may include an order of attorney and client costs or attorney and own client costs as those expressions are understood in the Uniform Rules of Court.
- 78.12 The Independent Expert shall be deemed not to be an arbitrator but shall render his/her decision as an expert and the provisions of the Arbitration Act, 1965 and any other law relating to arbitration shall not apply to the Independent Expert or his/her determination or the procedure by which he/she reaches his/her determination. The Independent Expert's decision shall be final and binding on the Parties.

PART 20: MISCELLANEOUS

79. GOVERNING LAW AND JURISDICTION

- 79.1 This PPP Agreement shall be governed by and construed in accordance with the laws of the Republic of South Africa.
- 79.2 Subject to the provisions of clause 78 (Fast-track Dispute Resolution), each Party agrees that the High Court of South Africa shall have exclusive jurisdiction to hear and decide any application, action, suit, proceeding or dispute in connection with this PPP Agreement, and irrevocably submits to the jurisdiction of the High Court of South Africa.

80. AMENDMENTS

No provision of this PPP Agreement (including, without limitation, the provisions of this clause) may be amended, substituted or otherwise varied, and no provision may be added to or incorporated in this PPP Agreement, except (in any such case) by an agreement in writing signed by the duly authorised representatives of the Parties.

81. WAIVER

- 81.1 Any relaxation, indulgence or delay (together **Indulgence**) by either Party in exercising, or any failure by either Party to exercise, any right under this PPP Agreement shall not be construed as a waiver of that right and shall not affect the ability of that Party subsequently to exercise that right or to pursue any remedy, nor shall any Indulgence constitute a waiver of any other right (whether against that Party or any other person).

- 81.2 The waiver of any right under this PPP Agreement shall be binding on the waiving Party only to the extent that the waiver has been reduced to writing and signed by the duly authorized representative(s) of the waiving Party.

82. ENTIRE PPP AGREEMENT

- 82.1 Except where expressly provided otherwise in this PPP Agreement, this PPP Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this PPP Agreement.

- 82.2 Each of the Parties acknowledges that:

- 82.2.1 it does not enter into this PPP Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a Party to this PPP Agreement or not) except those expressly contained in or referred to in this PPP Agreement, and the only remedy available in respect of any misrepresentation or untrue statement made to it shall be a remedy available under this PPP Agreement; and

- 82.2.2 this clause shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this PPP Agreement, which was induced by fraud, for which the remedies available shall be all those available under the law governing this PPP Agreement.

83. CONFLICTS WITH OTHER CONTRACTS

In the event of any conflict between this PPP Agreement and any of the Subcontracts and constitutional documents of the Private Party, save the Financing Agreements and Direct Agreement, the provisions of this PPP Agreement will prevail as between the Parties. In the event of any conflict between any of the Schedules, the following order of precedence will apply, with schedules listed earlier in this list prevailing over those listed later:

- 83.1 Schedule 7: Output Specifications.
- 83.2 Schedule 1: Payment Mechanism.
- 83.3 Schedule 4: Independent Certifier Agreement; and
- 83.4 the remaining Schedules to this PPP Agreement.

84. COUNTERPARTS

This PPP Agreement may be executed in any number of identical counterparts, all of which when taken together shall constitute one agreement. Any single counterpart or a set of counterparts taken together which, in either case, are executed by the Parties shall constitute a full original of this PPP Agreement for all purposes.

85. SEVERABILITY

Whenever possible, each provision of this PPP Agreement shall be interpreted in a manner which makes it effective and valid under applicable law, but if any provision of this PPP Agreement is held to be illegal, invalid or unenforceable under applicable law, the illegality,

invalidity or unenforceability shall not affect the other provisions of this PPP Agreement, all of which shall remain in full force.

86. NOTICES AND LEGAL SERVICE

86.1 All notices and any other communications whatsoever (including, without limitation, any approval, consent, demand, query or request) by either Party in terms of this PPP Agreement or relating to it shall be given in writing and sent by registered post, or delivered by hand, or transmitted by facsimile or electronic mail to the recipient Party at its relevant address set out below:

86.1.1 if to the Municipality, at:

- (a) Address: 54 York Street, George
- (b) Postal address: PO Box 12, George, 6530
- (c) Facsimile number: 044 693 3159
- (d) Electronic mail address: morton@gardenroute.gov.za
- (e) marked for the attention of Manager: Waste Management

86.1.2 if to the Private Party, at:

- (a) Address: 2 Brammer Road, Germiston South, Gauteng
- (b) Postal address: PO Box 382, Germiston, 1400
- (c) Facsimile number: N/A
- (d) Electronic mail address: leong@interwaste.co.za
- (e) marked for the attention the Landfills Director

86.2 Either Party may, by written notice to the other Party, change any of the addresses at which or the designated person for whose attention those notices, or other communications are to be given.

86.3 Any notice or other communication given by any Party to the other Party which:

86.3.1 is sent by registered post to the addressee at its specified address shall be rebuttably presumed to have been received by the addressee on the seventh (7th) day after the date of posting; or

86.3.2 is delivered by hand to the addressee during the normal business hours of the addressee at its specified address shall be rebuttably presumed to have been received by the addressee at the time of delivery; or

86.3.3 is transmitted by facsimile to the addressee during the normal business hours of the addressee at its specified facsimile number shall be rebuttably presumed to have been received by the addressee on the date of transmission as indicated on the sender's facsimile transmission report; or

86.3.4 is transmitted by electronic mail to the addressee during the normal business hours of the addressee at its specified electronic mail address shall be rebuttably

presumed to have been received by the addressee on the date of transmission as reflected on the sender's electronic mail records.

- 86.4 The previous provisions of this clause shall not invalidate any notice or other communication actually given and received otherwise than as described in those provisions.
- 86.5 The Parties choose their respective physical addresses in clause 86.1 as their respective *domicilia citandi et executandi* at which all documents relating to any legal proceedings to which they are a party may be served. If that address is changed to another address which is not a physical address in the Republic of South Africa, then the original address shall remain the *domicilium citandi et executandi* of the relevant Party until it nominates a new physical address within the Republic of South Africa in writing to be its new *domicilium citandi et executandi*.
- 86.6 Where any request for consent or approval by the Private Party is given to the Municipality in terms of this clause 86, the Municipality shall not unreasonably withhold or delay such consent or approval and shall be deemed to have consented to any requested action or condition unless the Municipality shall have responded within the period specified in the relevant clause in this Agreement or, if such period is not provided, within seven (7) days (prior to the Service Commencement Date) or twenty one (21) days (following the Service Commencement Date) of the date on which the Municipality received such request.

87. CONFIDENTIALITY

- 87.1 For purposes of this clause, **Confidential Information** means any information exchanged between the Parties with effect from the Tender Submission Date.
- 87.2 Each Party shall keep all Confidential Information of the other Party confidential while this PPP Agreement remains in force and for a period of seven (7) years after it terminates for any reason. Each Party shall also use reasonable endeavours to prevent its employees, agents and Subcontractors from making any disclosure to any person of any Confidential Information of the other Party while this PPP Agreement remains in force and for a period of seven (7) years after it terminates for any reason.
- 87.3 clause 87.2 shall not apply to:
- 87.3.1 any disclosure of information that is reasonably required by shareholders, officers, directors, employees, consultants and professional advisers who have a need to know (and then only to the extent that each such person has a need to know);
- 87.3.2 any matter which a Party can reasonably demonstrate is already generally available and in the public domain otherwise than because of a breach of this clause.
- 87.3.3 any disclosure which is required by any applicable law (including any order of a Court of competent jurisdiction), or the rules of any stock exchange or governmental or regulatory authority having the force of law, in arbitration and the Party required to make the disclosure has taken all reasonable steps to oppose or prevent the disclosure and has consulted with the other Party prior to making such disclosure;
- 87.3.4 any disclosure of information that is already lawfully in the possession of the receiving Party prior its disclosure by the disclosing Party.

- 87.3.5 any provision of information to the advisors of the receiving Party, or to any funders or potential funders, but in the latter case, only to the extent reasonably necessary to enable a decision to be taken on whether that potential funder will become a funder; or
- 87.3.6 any disclosure by the Municipality of information relating to the design, construction, operation and maintenance of the Project and any other information that may be reasonably required for the purpose of retendering of this PPP Agreement in accordance with clause 65 (Retendering Procedure), save for the Intellectual Property owned by the Private Party.
- 87.4 The disclosures permitted under clauses 87.3.5 or 87.3.6 may only be made subject to obtaining appropriate confidentiality restrictions consistent with the provisions of this clause from the intended recipients.

88. COST AND EXPENSES

Each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this PPP Agreement.

SIGNED by the Parties and witnessed on the following dates and at the following places respectively:

DRAFT

SIGNATURE PAGE

Municipal Manager for Knysna Municipality

Name: _____

Office: _____

(who warrants his authority)

The Private Party

Name: _____

Office: _____

(who warrants his authority)

PAYMENT MECHANISM

The Parties agree that there shall be no payments from the Municipality to the Private Party. This constitute full payments and Income to be received from the Buyers of complete Properties

The Special Purpose Vehicle (SPV) is to sustain itself from the Open Market and make no claim(s) to the Municipality.

Any default by the SPV will be to its account.

1. Penalty for Delay of Completion

In the event that the Private Party fails to complete the Project Site before the Long Stop Date, the Private Party shall pay R10 000.00 (ten thousand rand) per day for each day the construction of the Project Site is delayed.

INDEPENDENT CERTIFIER AGREEMENT

INDEPENDENT CERTIFIER AGREEMENT

entered into by and between

THE KNYSNA MUNICIPALITY

and

(INSERT NAME OF PRIVATE PARTY)

and

(INSERT NAME OF INDEPENDENT CERTIFIER)

DRAFT

1. THE PARTIES

The parties to this agreement are as follows:

- 1.1 The Knysna Municipality, as defined in clause 1.83 of the PPP Agreement (hereinafter referred to as **the Municipality**);
- 1.2 *(Insert name of Private Party), a (insert legal description of Private Party), Registration Number (insert registration number of Private Party) with its principal place of business situated at (insert physical address of Private Party) (hereinafter referred to as **the Private Party**);*
- 1.3 *(Insert name of Independent Certifier, a (insert description of Independent Certifier) whose registered office as at (insert physical address of Independent Certifier) (hereinafter referred to as **the Independent Certifier**).*
- 1.4 Reference to the parties or any one of them shall include such party's respective successors-in-title and, if permitted in the PPP Agreement, their respective cessionaries and assignees.

2. BACKGROUND

- 2.1 The Municipality and the Private Party have entered into a Public Private Partnership Agreement (hereinafter referred to as **the PPP Agreement**) for the development, design, finance, maintenance and operation of ERF 3339 Knysna
- 2.2 In terms of Clause 20.1 of the PPP Agreement the Private Party is required to appoint an Independent Certifier to carry out the functions and duties assigned to the Independent Certifier upon the terms of the PPP Agreement.
- 2.3 The Municipality, the Private Party and the Independent Certifier have agreed to the terms and conditions contained herein, being the terms and conditions upon which the Independent Certifier is appointed.

3. INTERPRETATIONS

- 3.1 Unless the context denotes otherwise, words, expressions and interpretations as defined in the PPP Agreement shall have the same meaning in this agreement.
- 3.2 The index and headings of clauses of this agreement are for ease of reference only and shall not affect its interpretation.
- 3.3 Unless the context denotes otherwise, all references to clauses and schedules are references to clauses and schedules to this agreement.

4. APPOINTMENT

- 4.1 Subject to clause 20.1 of the PPP Agreement, the Municipality and the Private Party hereby appoint the Independent Certifier to perform the duties and obligations which are ascribed to the Independent Certifier under the PPP Agreement, which include:
 - 4.1.1 the issuing of Completion Certificates as contemplated in clause 21.2; and
 - 4.1.2 the scope of services more fully detailed in hereto (Scope of Independent Certifier Services)

(hereinafter referred to as the **Independent Certifier Services**)

- 4.2 The Independent Certifier hereby agrees that the Independent Certifier Services will be rendered subject to the terms and conditions of this agreement. In the event of any conflict between the duties ascribed to the Independent Certifier under the PPP Agreement and the duties, obligations and services ascribed under this agreement, the provisions of the PPP Agreement shall prevail.
- 4.3 The Independent Certifier warrants that he shall:
- 4.3.1 provide the Independent Certifier services independently, fairly and impartially to the Municipality and the Private Party at such times and at such locations as the Parties shall agree to from time to time; and
- 4.3.2 at all times act with due care, diligence and skill.
- 4.4 Whilst the Independent Certifier may take account of any representations made by the Municipality and the Private Party, the Independent Certifier shall not be bound to comply with any representations made by either of them in connection with any matter on which the Independent Certifier is required to exercise his professional judgment.
- 4.5 The Municipality and the Private Party shall act in good faith towards the Independent Certifier at all times.
- 4.6 The Independent Certifier warrants that he is familiar with and shall understand all relevant South African standards, including, but not limited to the South African Bureau of Standards and the National Norms and Standards for the Disposal of Waste for Landfill published under section 7(1)(c) of the National Environmental Management: Waste Act, 2008.
- 4.7 The Independent Certifier shall comply with all reasonable instructions given to it by the Municipality and the Private Party, except and to the extent that the Independent Certifier reasonably considers that any such instructions vary or might vary the Independent Certifier Services or its authority or responsibilities under this agreement or prejudice or might prejudice the exercise by the Independent Certifier of its professional, fair and impartial judgement in accordance with this agreement or are inconsistent with the provisions of the PPP Agreement. All instructions to the Independent Certifier shall be given in writing by the Municipality or¹ the Private Party with a copy thereof being simultaneously forwarded to the other Party.
- 4.8 The Private Party and the Municipality agree to cooperate with and provide reasonable assistance to the Independent Certifier to familiarise himself with all necessary aspects of the Project and to enable the Independent Certifier to carry out his obligations in terms of this agreement.
- 4.9 Subject to the Municipality and the Private Party complying with their obligations under Clause 4.8, the Independent Certifier shall be deemed to have full knowledge of the provisions of the PPP Agreement and the Construction Subcontract (if any) and shall be deemed to be aware of and to have taken full account of all the undertakings and warranties, both expressed and implied, on the part of the Municipality, the Private Party and the Construction Subcontractor (if any) which are set out in the PPP Agreement and the Construction Subcontract (if any) and the Lenders' Direct Agreement (if any) and to this end, the Private Party shall provide the Independent

¹ Requiring the instruction to be from both Parties is impractical, especially where the sentence provides that a copy must be simultaneously forwarded to the other Party

Certifier with up to date copies or relevant extracts of the PPP Agreement, the Construction Subcontract (if any) and the Lenders' Direct Agreement (if any).

- 4.10 Subject to the above, the Independent Certifier shall promptly and efficiently perform the Independent Certifier Services in accordance with this Agreement and, for the avoidance of doubt, shall perform the Independent Certifier Services in such a manner and at such times that no act, omission or default of the Independent Certifier in relation thereto shall constitute a breach by the Municipality and/or the Private Party of any of the PPP Agreement, the Construction Subcontract (if any) or the Lenders' Direct Agreement (if any).
- 4.11 Without prejudice to Clause 4.9, the Independent Certifier shall, in performing the Independent Certifier Services:
- 4.11.1 liaise and cooperate with the Municipality and the Private Party and provide each of them with such information relating to the Project as they may from time to time reasonably require promptly and in good time so as not to delay or disrupt the progress of the Works;
- 4.11.2 in monitoring compliance with any Project quality plan, regularly audit its implementation both by reference to such recorded documentation as the Independent Certifier shall reasonably require to review by Site visits;
- 4.11.3 in particular, but not limited to, in determining whether to issue any Certificate, take account and be satisfied of the following:
- (a) that the design of the Works has been done in accordance with the Private Party's Proposals as set out in Schedule 10: Private Party Proposals, of the PPP Agreement and the Output Specifications of the Municipality as set out in Schedule 7: Output Specifications, of the PPP Agreement;
 - (b) that the Works are being or have been designed and built in accordance with Good Industry Practice;
 - (c) that the Works comply with all Consents and Laws;²
- 4.11.4 attend any progress and site meetings the Municipality's representative may reasonably consider appropriate for purposes of carrying out the Independent Certifier Services and prepare monthly and quarterly reports regarding its activities in terms of this agreement for submission to the Municipality and the Private Party;
- 4.11.5 give the Municipality and the Private Party no less than two (2) Business Days written notice of its intention to issue any Certificate and provide the Municipality and the Private Party with copies of all such Certificates upon their issue;
- 4.11.6 use all reasonable care, skill and diligence to be expected of a properly qualified and competent professional Independent Certifier who has presented himself to be competent and experienced in rendering such services for projects of a similar size, nature, scope and complexity to the Project;
- 4.11.7 ensure that adequate resources are directed towards the provision of the Independent Certifier Services, including appointing personnel that are sufficiently

² Correction of typographical error

experienced and qualified to be appropriate to provide the Independent Certifier Services all in accordance with Good Industry Practice. Such personnel shall be available full time, if required, for so long as may be necessary to ensure the proper performance by the Independent Certifier of the Independent Certifier Services;

4.11.8 have full approval and authority to act for all purposes in connection with this agreement;

4.11.9 not be removed or replaced, except at the joint written direction of the Municipality and the Private Party unless he ceases to work as a partner in or director or employee of the Independent Certifier or he is unable to work because of death or ill health. The Independent Certifier shall notify the Municipality and the Private Party of any such circumstances and shall be responsible for finding a replacement which shall previously have been approved in writing by the Municipality and³ the Private Party.

4.12 The Independent Certifier warrants to the Municipality and the Private Party that in the provision of the Independent Certifier Services or any additional services and the performance of his obligation and duties in terms of this agreement, he will comply with all applicable Laws, including but not limited to:

4.12.1 the Occupational Health and Safety Act, 1989; and

4.12.2 the Construction Industry Development Board Act, 2000;

and shall comply with directions, instructions or requests relating to the Site or in pursuance of same given or made by the person responsible from time to time for security and/or safety of the Site in the presence of the Independent Certifier

5. DURATION

The Independent Certifier Services shall commence on the date of the appointment of the Independent Certifier and continue for so long as the Independent Certifier Services are required to be provided in terms of the PPP Agreement.

6. REMUNERATION

The Private Party shall be liable to pay to the Independent Certifier a fee of.....⁴ South African Rand, which shall be exclusive of VAT. Such fee shall be payable within sixty (60) days from date of the Independent Certifier's VAT invoice. The Independent Certifier shall issue an invoice to the Private Party on a monthly basis.

7. ADDITIONAL SERVICES AND VARIATIONS TO THE INDEPENDENT CERTIFIER SERVICES

7.1 Any of the Municipality or the Private Party may appoint the Independent Certifier to carry out work in relation to the Project which is additional to the Independent Certifier Services provided that:

7.1.1 there is no conflict of interest between the provisions of such additional services and the performance of the Independent Certifier Services;

³ Correction of typographical error

⁴ Fee to be agreed with the Independent Certifier

- 7.1.2 the Party appointing the Independent Certifier for such additional services shall be solely responsible for such additional services, including the cost thereof.
- 7.2 Should the scope of the Independent Certifier Services to be provided by the Independent Certifier be changed, such change shall be effected by ⁵ a written variation order issued by the Municipality and the Private Party to the Independent Certifier.

8. LIMITATIONS ON AUTHORITY

- 8.1 The Independent Certifier shall not:
- 8.1.1 make or purport to make any alteration or addition to or omission from the design of the Facilities or issue any instruction or direction to any contractor or professional consultant employed or engaged in connection with the Project Deliverables; or
- 8.1.2 consent or agree to any waiver or release of any obligation of the Private Party, the Municipality or the Constructions Subcontractor (if any) under the PPP Agreement or under the Constructions Subcontract (if any) or of any contractor or professional consultant employed or engaged in connection with the Project Deliverables.
- 8.2 For the avoidance of doubt, the Independent Certifier shall not express an opinion on, interfere with give any advice, opinion or representation in relation to any matters which are beyond its role and responsibilities in terms of this agreement.

9. MONITORING AND INSPECTION

9.1 Inspection

- 9.1.1 The Independent Certifier shall attend to any inspections as contemplated in the PPP Agreement.
- 9.1.2 In respect of the Works, the Independent Certifier is entitled and/or required to examine, inspect, measure and/or test any aspect of the Works. The Private Party shall give notice to the Independent Certifier whenever any such work is ready and before it is covered up. The Independent Certifier shall then either carry out the examination, measurement or testing without unreasonable delay and within twenty four (24) hours of delivery of such notice or within such longer period of time as it is reasonably required having regard to the nature of the inspection required to be made or promptly having sought agreement from the Municipality, give notice to the Private Party that the Independent Certifier is not required⁶ to do so. If the Private Party fails to give notice as set out herein before, it shall, if and when required by the Independent Certifier, uncover the work and thereafter reinstate and make good all at the Private Party's expense.
- 9.1.3 The Private Party shall give the Independent Certifier full opportunity to carry out the activities referred to above, including providing access, facilities, permissions and safety equipment. No such activity shall relieve the Private Party from any obligations or responsibility.

⁵ Correction of typographical error

⁶ Revised wording to aid interpretation and reading

- 9.1.4 Notwithstanding any other provision of this Agreement, the inspection or certifications performed by the Independent Certifier shall not be deemed by the Independent Certifier's actions, inactions or otherwise at any time to confirm or agree that the design, construction and operation of the Facilities or any part thereof complies with the Output Specifications, the PPP Agreement and/or the standards of the Services and such compliance shall at all times be the sole responsibility of the Private Party.

9.2 **Rejection**

- 9.2.1 If, as a result of an examination, inspection, measurement or testing, any plant, materials, design or workmanship or Works are found to be defective or otherwise not in accordance with the PPP Agreement, the Independent Certifier may reject the plant, materials, design or workmanship by giving notice to the Private Party within five (5) Business Days of such examination, inspection, measurement or testing or within such period of time as is reasonably required having regard to the nature of the inspection, with the reasons for such rejection. The Private Party shall then make good the defect and ensure that the rejected item complies with the PPP Agreement by the time it is re-examined, re-inspected or re-measured by the Independent Certifier for purposes of carrying out his obligations in terms of this agreement.
- 9.2.2 If the Independent Certifier requires plant, materials, design or workmanship to be retested, the tests shall be repeated under the same terms and conditions. If the rejection and retesting causes the Municipality to incur additional costs, the Private Party shall be liable for payment of these costs to the Municipality.

10. **COMPLETION SERVICES**

10.1 **Snag List Works and Retention Items**

Where there are matters still to be attended to by the Private Party or the Construction Subcontractor (if any) which are to be completed before the Independent Certifier will consider the issuing of a Completion Certificate (hereinafter referred to as **Snagging Matters**), the Independent Certifier shall not issue a Completion Certificate, but instead issue a notice to the Private Party setting out the Snagging Matters that are to be attended to prior to a Completion Certificate being issued by the Independent Certifier (hereinafter referred to as **the Snagging Notice**) and an estimate of the cost of rectifying such Snagging Matters and the Private Party shall be obligated to give effect thereto and resubmit the relevant Works for final approval by the Independent Certifier.

10.2 **Completion Certificate**

- 10.2.1 The Independent Certifier shall determine, in accordance with the terms of this agreement if the conditions for the issue of a Completion Certificate in respect of the Facilities have been met.
- 10.2.2 If following the final inspection by the Independent Certifier the relevant facilities are not in a condition so as to achieve the issue of a Completion Certificate by the Independent Certifier, then it shall promptly inform the Private Party in writing of any outstanding matters which are to be attended to.
- 10.2.3 The Independent Certifier shall, when he is satisfied that the Private Party has complied with all of its relevant obligations as contemplated in clause 21

(Completion Certificate) of the PPP Agreement, notify the Municipality and the Private Party and issue the relevant Completion Certificate.

10.2.4 By issuing the Completion Certificate, the Independent Certifier will have satisfied himself that:

- (a) all of the relevant Works have been completed in accordance with the design and construction specifications and that it has satisfied the Output Specifications of the Municipality; and
- (b) in the Independent Certifier's reasonable opinion, the relevant Facilities are able to support the Services to be provided by the Private Party.

11. TERMINATION

11.1 If there is:

- 11.1.1 a material breach by the Independent Certifier of this agreement; or
- 11.1.2 any other breach that is repeated more than once in three (3) calendar months by the Independent Certifier of this agreement

which the Independent Certifier fails to remedy after receiving twenty (20) Business Day's written notice from either the Municipality or the Private Party specifying the breach and requiring its remedy, the Private Party, having first obtained the written consent of the Municipality, may terminate the Independent Certifier's engagement under this agreement.

11.2 Alternatively, the Private Party, with the written consent of the Municipality, may terminate the performance of any divisible part of the Independent Certifier Services.

11.3 Following any termination of the Independent Certifier's appointment, the Independent Certifier shall be entitled to be paid any fees due in respect of the Independent Certifier Services carried out in accordance with this agreement prior to the date of termination, less:

- 11.3.1 any set-off or deductions which the Private Party may be entitled to as a result of any breach of this agreement by the Independent Certifier; and
- 11.3.2 any costs, losses and expenses incurred or suffered by the Municipality and/or the Private Party as a result of and to the extent that such termination was caused or contributed to by a negligent act or omission or breach of this agreement by the Independent Certifier or as a result of any insolvency, bankruptcy or receivership of the Independent Certifier

and the balance shall be payable by the Private Party, or where the balance results in a negative amount, it shall be payable by the Independent Certifier to the Private Party.

11.4 Termination of the Independent Certifier's appointment in terms of this agreement shall be without prejudice to any accrued rights and obligations in terms of this agreement as at the date of termination.

11.5 Termination of this agreement shall not affect the continuing rights and obligations of the parties in terms of clause 12 (Confidential Information), 13 (Professional Indemnity Insurance), 14 (Disputes) and this clause or under any other clause which is expressed

to survive termination or which is required to give effect to such termination or the consequences of such termination.

12. CONFIDENTIAL INFORMATION

- 12.1 The Independent Certifier shall treat as secret and confidential and shall not at any time for any reason disclose or permit to be disclosed to any person or otherwise make use of or permit to be made use of any unpublished information relating to the Municipality and the Private Party's technology or other know-how, business plans or finances or any information relating to a subsidiary, supplier, customer, or client of the Municipality and the Private Party where the information was received during the period of his appointment in terms of this agreement.
- 12.2 Upon termination of this agreement for any reason whatsoever, the Independent Certifier shall deliver to the Private Party or the Municipality (as the case may be) all working papers, computer disks and tapes or other material and copies provided to or prepared by him pursuant either to this agreement or to any previous obligation or duty owed to the Private Party or the Municipality.

13. PROFESSIONAL INDEMNITY INSURANCE

- 13.1 Without prejudice to its obligations in terms of this agreement, or otherwise in law, the Independent Certifier shall maintain professional indemnity insurance with a limit of indemnity not less than R 20,000 000 (twenty million Rand) for any one claim in respect of any neglect, error or omission on the Independent Certifier's part in the performance of its obligations under this agreement for the period commencing on the date of his appointment in terms of this agreement and expiring ten (10) years after:
- 13.1.1 the date of completion of the Independent Certifier Services; or
- 13.1.2 the termination of this agreement,
- whichever is the earlier.
- 13.2 The Independent Certifier shall maintain such insurance with reputable insurers carrying on business in the Republic of South Africa who are acceptable to the Municipality and the Private Party, such acceptance not to be unreasonably withheld or delayed.
- 13.3 The Independent Certifier shall, prior to the commencement of the provision of the Independent Certifier Services and no less than thirty (30) days prior to renewal dates, produce for inspection by the Municipality and the Private Party documentary evidence that such insurance is being properly maintained.

14. DISPUTES

14.1 Referable Disputes

The provisions of this clause 14 (Disputes) shall, save where expressly provided otherwise, apply to any dispute arising in relation to or in connection with any aspect of this agreement between the Parties.

14.2 Internal Referral

14.2.1 If a dispute arises in relation to any aspect of this agreement, the Parties shall attempt in good faith to come to an agreement in relation to the disputed matter, in accordance with the following informal process all disputes shall first be referred to a meeting of the Independent Certifier and the representatives of the Private Party and the Municipality who have sufficient authority for resolution.

14.2.2 In attempting to resolve the dispute in accordance with the provisions of this clause 14.2, the Parties shall (and shall procure that their employees and representatives shall) use reasonable endeavours to resolve such dispute without delay by negotiations or any other informal procedure which the relevant representatives may adopt. Those attempts shall be conducted in good faith in an effort to resolve the dispute without necessity for formal proceedings.

14.2.3 If the Parties are unable to settle the dispute within five (5) Business Days of the dispute being referred to them, the Parties will endeavour to settle the dispute in accordance with clause 14.4.

14.3 Performance to Continue

No reference of any dispute to any resolution process in terms of this clause shall relieve a Party from any liability for the due and punctual performance of its obligations under this agreement.

14.4 Fast Track Dispute Resolution

If an informal resolution of any dispute has failed, then any Party may refer the dispute to fast track dispute resolution in accordance with the procedure set out in Clause 78 Fast Track Dispute Resolution of the PPP Agreement which shall form an integral part of this appointment except that any reference to "Parties" shall be construed as a reference to the Parties to this Agreement.

14.5 Suspension of Prescription

The Parties agree that, for the purposes of the Prescription Act, 1969 as amended from time to time, time shall cease to run in respect of any dispute on the date of service of the relevant notice referring that dispute for arbitration and if any other subsequent proceedings are instituted in respect of that dispute, from the date of service of the relevant summons or notice of motion.

15. NOTICE

All notices required to be served on the Independent Certifier in connection with this agreement shall be in writing and sent by hand or by facsimile transmission to the address and/or facsimile number set out below:

Attention Of: _____

Physical Address: _____

Facsimile Number: _____

15.1.1 All notices required to be served on the Municipality and the Private Party shall be served in writing and sent by hand or by facsimile transmission to the addresses as set out in clause 86 (Notices and Legal Service) of the PPP Agreement which is deemed and integral part of this agreement.

15.2 The provisions as set out in clauses 86.3 to 86.5 of the PPP Agreement pertaining to the receipt of notices shall also apply *mutatis mutandis* to this agreement.

16. RECORDS AND REPORTS

16.1 The Independent Certifier shall maintain and update records relating to its activities pertaining to the Project including records required to be produced by the Independent Certifier in terms of this Agreement (hereinafter referred to as **Records**).

16.2 The Records shall be kept in good order and in such form as to be capable of review by the Municipality and the Private Party and their advisors. The Independent Certifier shall make such Records available for inspection by or on behalf of the Municipality and the Private Party or their advisors at all reasonable times.

16.3 Each of the Municipality and the Private Party or their advisors shall be entitled at the time of such inspection to take one (1) copy of any Record at no cost to them and for that purpose to use such copying facilities as are maintained at the place where the Records are kept.

16.4 The Independent Certifier shall procure that copies of all Records shall be retained for no less than a period of seven (7) years after the end of the year to which such Records relate or such longer period as required by law except where such documents are or continue to be relevant or required for a dispute between the Parties, in which case they shall be kept for the duration of the dispute, beyond the period of seven (7) years or such longer period as required by law.

16.5 Where the period for the retention of any copies of the Records has expired, the Independent Certifier shall notify the Municipality and the Private Party as to what it intends to do with such copies of Records. If it intends to dispose of them or subsequently decides to dispose of them, the Independent Certifier shall notify the Municipality and the Private Party and if either of them, within thirty (30) days of such notice, elect to receive those copies of the Records or any part of them, the Independent Certifier shall without cost to the relevant Party requesting the copies of the Records deliver up such copies of the Records to the requesting Party in the manner and at the location as the relevant requesting Party shall reasonably specify.

16.6 Upon termination of the Independent Certifier's appointment in terms of this agreement for any reason whatsoever, the Independent Certifier shall deliver to either of the Municipality or the Private Party, as the case may be, in such manner and at such location as the Municipality and the Private Party, as the case may be, shall reasonably specify, the original of all Records which are in existence at the date of termination and still remain in the possession of the Independent Certifier or such part of such Records as either of the Appointers, as the case may be, may by notice to the Independent Certifier specify.

16.7 To the extent that the Records are to be created or maintained on a computer or other electronic storage device, the Independent Certifier shall comply with any reasonable request of either of the Municipality or the Private Party, as the case may be, from time to time relating to procedures for the back-up and off-site storage for copies of such Records.

17. ASSIGNMENT

- 17.1 The Independent Certifier shall not assign or transfer any of its rights or obligations under this agreement or sub-contract the whole or any part of the Independent Certifier Services.
- 17.2 The Private Party shall not be entitled to assign or transfer any of its respective rights or obligations under this agreement, save that the parties hereby consent to any such assignment or transfer occurring simultaneously with the assignment or transfer of the PPP Agreement and is made to the same assignee or transferee. In the event that the PPP Agreement is novated to a third party, the term **PPP Agreement** shall include any replacement contract arising from such novation.

18. CUMULATIVE RIGHTS AND ENFORCEMENT

For the benefit of the Municipality, the Private Party undertakes that it shall not waive any rights, remedies or entitlements or take any other action in terms of this agreement which would or might reasonably be expected to adversely affect the rights, remedies or entitlements of the Municipality without its' prior written consent, such consent not to be unreasonably withheld or delayed.

19. WAIVER

The failure of any party at any one time to enforce any provision of this agreement shall not in any way affect its right thereafter to require complete performance by any other party, nor shall the waiver of any breach or any provision be taken or held to be a waiver of any subsequent breach of any provision or be a waiver of the provision itself.

20. SEVERABILITY

In the event that any term, condition or provision entered in this agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, clause or provision shall, to that extent, be omitted from this Appointment and the rest of this Appointment shall stand, without affecting the remaining clauses.

21. COUNTERPARTS

This Appointment may be executed in any number of counterparts, all of which when taken together shall constitute one and the same instrument.

22. VARIATION

A variation of this agreement, including a variation to this clause 22⁷, is valid only if the prior written consent of the Municipality to such variation has been given and it is in writing signed by or on behalf of each party.

23. GOVERNING LAW AND JURISDICTION

- 23.1 This Appointment shall be governed by and construed in accordance with the laws of South Africa, and the parties hereby submit to the non-exclusive jurisdiction of the courts of South Africa.

⁷ Specific reference to the applicable clause ensure that the non-variation clause itself may not be varied without the applicable procedure being followed

- 23.2 No action or proceedings may be commenced against the Independent Certifier for any breach of this Appointment after the expiry of ten (10) years following the date of completion of the Independent Certifier Services.

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SIGNATURE PAGE

Municipal Manager for Knysna Municipality

Name: _____

Office: _____
(who warrants his authority)

Director Integrated Human Settlements

Name: _____

Office: _____
(who warrants his authority)

[Independent Certifier]

Name: _____

Office: _____
(who warrants his authority)

THE SCOPE OF THE INDEPENDENT CERTIFIER SERVICES

1. Familiarise itself with the Project Documents (including the Design Data, any Variations issued from time to time and any other relevant documentation or information referred to in the Project Documents) and the Construction Subcontract (if any) to the extent necessary to be in a position to carry out the Independent Certifier Services in accordance with the terms of the PPP Agreement, the Construction Subcontract (if any) and this agreement.
2. Familiarise itself with and understand the Quality Assessment Plans and Systems as contemplated in PART 6: QUALITY ASSESSMENT of the PPP Agreement.
3. Following notification by the Private Party pursuant to Clause 19 and 20 of the PPP Agreement, liaise with the Municipality and the Private Party in anticipation of carrying out such activities as are necessary for it to determine whether or not the Works in relation to the Project Site have been completed in accordance with the PPP Agreement, including inspection of the relevant Works and notifying the Municipality and the Private Party of any outstanding matters to be attended to before the Works can be considered to be complete.
4. Issue Completion Certificates upon completion of the relevant Facilities in accordance with the PPP Agreement.
5. Issue a Snagging Notice to notify Snagging Matters in relation to the Works within five (5) Business Days of its final inspection in contemplation of issuing the relevant Completion Certificate in accordance with the PPP Agreement.

PROJECT DOCUMENTS

1. Shareholder agreements of the Private Party;
2. Subcontracts for:
 - 2.1 construction; and
 - 2.2 operations.

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PROJECT SITE

1. The Project Site is situated at Erf 3339 Knysna