

# MinterEllisonRuddWatts

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MEMO

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**To** Paul Speedy QLDC

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**From** Andrew Monteith

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**Matter** Queenstown Lakes District Council - Lakeview Development  
201009750

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**Date** 26 May 2023

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**LEGALLY PRIVILEGED AND CONFIDENTIAL**

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**Subject: Proposed Revocation of CEO's delegation in relation to Lakeview Development Agreement**

**1. Background**

1.1 A notice of motion has been submitted proposing that the Council revoke the existing delegations held by the CEO in respect of the Development Agreement – Lakeview Precinct dated 10 October 2019 between QLDC and QT Lakeview Developments Limited as bare trustee of the QT Lakeview Partnership (**Developer**) and Henry Rzechta, Ben Harkham and Augusta Capital Limited as varied by the deed of variation signed by the same parties dated 11 July 2022 (the **Agreement**) to make the following decisions:

- (a) approve any Design Documentation for a Super Lot;
- (b) make any decision regarding proposed Modifications, including whether such Modifications are Material Modifications, and whether any Material Modification is approved or declined.

The Notice of Motion proposes that the decision-making power in respect of these matters be held by the full council of elected members rather than delegated to the CEO.

- 1.2 The Chief Executive has asked for advice on the possible impact of the proposed revocation of the delegations in respect of Modifications in terms of QLDC exposure under the Agreement, whether the change in delegations provides a right for the Developer to renegotiate or otherwise expose QLDC to legal action.
- 1.3 The proposed Notice of Motion appears to traverse similar issues that were considered by QLDC in June/July 2022. We note that the independent report obtained in June 2022 from Bruce Robertson considered this option (to revoke the delegation and reserve the decision-making powers to the Elected Members) and recommended against it. We suggest that QLDC seek the views of Mr Robertson on the new proposed Notice of Motion given his specific knowledge and consideration of these matters.
- 1.4 Capitalised terms used in this document (if not defined in this document) have the meanings given in the Agreement.

**2. Overview of relevant QLDC approval processes in Development Agreement**

2.1 As an overview, the Agreement sets up a design framework whereby the Master Development Plan becomes the baseline/touchstone against which all subsequent Development Documentation (including Design Documentation) is assessed. As the Master Development Plan has been approved by QLDC on the basis that, if developed, will achieve the Project Objectives and Material Outcomes, then all subsequent Development Documentation, if it is consistent with the Master Development Plan, should, as a baseline, do the same.

- 2.2 This cascading hierarchy of Development Documentation is a key contractual protection for QLDC to enshrine the Project Objectives and Material Outcomes into the design of the Development, and also to provide contractual certainty for both parties as to the design development process.

#### *Design Documentation*

- 2.3 Clause 7 of the Agreement sets out the process for the approval of Design Documentation (being the design drawings and specifications relating to a Super Lot) for each Super Lot. In brief, the proposed Design Documentation:

- (a) must be consistent with the Agreed Documents (being the Lakeview Precinct Plan, the Master Development Plan, Design Documentation and Development Documentation (being the Design Documentation and related documents and information relating to a Super Lot);
- (b) the Preliminary Design of the Design Documentation must be consistent with the Concept Design, and the Concept Design must be consistent with the Master Development Plan in all material respects; and
- (c) must have been prepared to the design standards set out in clause 8.

Under clause 7.2, QLDC must approve or otherwise within 20 Business Days of receipt and cannot withhold its approval of Design Documents if they have been prepared in accordance with clause 8 and are consistent with the achievement of Project Objectives and Material Outcomes. If QLDC considers that the Design Documentation does not meet the requirements of clauses 7.1 and 7.2, then it can object and the matter goes to dispute resolution for ultimate determination by the Expert.

#### *Modifications*

- 2.4 Clause 9 of the Agreement sets out the process by which the Developer may propose Modifications to the Agreed Documents relating to the Development. As you know, QLDC has a documented process set out in the Modification Review Plan to deal with Modification requests from the Developer which provide the framework and scope of considerations for assessors and the decision-maker to follow.
- 2.5 The Modification Review Plan is attached at Appendix 1 and sets out the relevant clauses and framework. In brief, each Modification proposal is evaluated by a panel of technical experts (commercial/design/legal) and the Modification is assessed to determine whether there are any Material Modifications, and if so, whether such Material Modifications should be approved or not. The recommendations are collated and provided to the decision-maker (currently the CEO under the delegations) who then makes the decision for QLDC under that delegation and advises the Developer.

### **3. Consideration of the queries raised**

- 3.1 We have considered the proposed change to the delegations and having regard to the specific terms of the Agreement and the CEO's queries, we advise as follows.

#### ***The Agreement does not contractually bind QLDC to the current delegations framework***

- 3.2 The contracting entity that is party to, and bound by, the Agreement is the legal entity, Queenstown Lakes District Council (referred to as **QLDC** in the Agreement). As noted in clause 17.5, QLDC has entered the Agreement in its non-regulatory capacity as land-owner of the Precinct land. References to "QLDC" in the Agreement should be read accordingly.
- 3.3 Where the Agreement in clauses 7 and 9 provides QLDC with decision making powers, the Agreement is referencing the entity only. The Agreement does not prescribe the internal process or the delegations' framework, that QLDC may apply/follow in order to make the decision required under the Agreement. Rather the Agreement sets out the parameters/contractual considerations that QLDC must properly consider/have regard to when making a relevant decision.
- 3.4 There is no contractual commitment by QLDC that the decision-making powers held by QLDC under these clauses must be delegated to the Chief Executive. Accordingly it is open to QLDC to

change the delegation framework including, if it so chooses, to have the full Council exercise those powers.

***A decision to change the Delegations does not give the Developer a right to renegotiate the Agreement or take legal action.***

***However a failure by the new decision-maker to comply with the requirements of the Agreement would give rise to legal challenge.***

- 3.5 As noted above, the Agreement does not prescribe the specific internal delegation framework that QLDC must follow to make a relevant decision. Changing the existing framework is not a breach of an express provision of the Agreement and does not trigger any Developer rights to re-negotiate or take legal action.
- 3.6 The decision-making parameters are expressly prescribed in the Agreement. QLDC (and therefore the assessing team and the decision-maker) must act reasonably when undertaking the assessment and consideration of the Modification in the context of the Agreement. All considerations/conclusions and recommendations must be firmly anchored within the parameters of the relevant defined terms, required considerations and the matters contemplated as relevant as set out in the Agreement.
- 3.7 A failure to do comply with the requirements of the Agreement when making a decision (for example, reaching a decision that is based on, or takes into account extraneous matters outside of those prescribed in the Agreement) will expose QLDC to legal challenge pursuant to the dispute resolution process in Agreement. If there is disagreement between QLDC and the Developer as to whether a Modification is a Material Modification, and if the parties are unable to resolve that within 5 Business Days, the matter is referred to the Independent Architect who will act as an expert and their determination will be binding on the parties. Additionally, other disputes are to be resolved by negotiation, or if that fails, arbitration.
- 3.8 As previously advised, requests for a Modification do not present an opportunity for QLDC to try and reopen the commercial terms of the Agreement or other aspects of the Approved Documents outside of those that are specifically affected by the Modification.

#### **4. Additional comments on the Notice of Motion**

- 4.1 Having reviewed the Notice of Motion, there are a number of statements which comment on legal points that should be more fully explained, or circumstances that have arisen that should be clarified.
- 4.2 Para 1 – The resolutions passed providing the CEO with the delegations was at the tail end of a comprehensive procurement process that was undertaken to select the Developer. At that time the Project Objectives and Material Outcomes had been determined, there had been substantive officer and expert advice and workshops provided to the elected members on the methodologies of sale, the financial return that may accrue depending on the sale process followed, and the contractual framework of a development agreement that is now enshrined in the Agreement. We believe officers and councillors received all of the information and explanations necessary to understand the transaction, its structure and the future decisions that would be required of QLDC.
- 4.3 Para 4 – The Council Works under the Agreement, specifically the subdivision and the infrastructure works, has cost QLDC more than anticipated. While unfortunate, this is not related to the delegation framework as it exists, nor can it increase “the likelihood of tradeoffs (with uncertain return) between the financial, amenity and efficiency objectives”. These objectives relate largely to the design and performance of the Developer which are not affected by QLDC’s cost overruns. Of more risk to the net financial return to QLDC is any protracted delay in completing the Council Works by QLDC which in turn delays the completion of the subdivision and the ability to require the Developer to settle and commence construction works.
- 4.4 Para 5 / Recommendation – the recommendation that the decision maker on Modification requests and Design Documentation be the full Council was expressly considered in the Robertson report and rejected as requiring the direct engagement of elected members in the project beyond their current workload and arguably their role (as elected members), might increase their sense of risk and exposure to s46 of the Local Government Act 2002, and could

restrict the flexibility in decision-making needed with a commercial agreement. We agree with his recommendations. In addition, the other recommended changes to the decision-making framework, specifically the increased reporting framework with the Audit and Risk Committee have been implemented. As noted above, it would be valuable to obtain Mr Robertson's input on the current Notice of Motion given it is recommending a position that was previously rejected and accepted by Council.

4.5 Para 12 – Reference is made to the liability of councillors, specifically the personal financial liability for losses under section 46 of the Local Government Act. The context of Section 46 needs to be clarified. The liability of councillors only exists (potentially) where the Auditor General has made a report on a loss to a local authority under section 44. Section 44 defines a loss to a local authority very narrowly – specially where the local authority has incurred a loss as a result of any of the following specific acts or omissions:

- (a) money belonging to, or administrable by, a local authority has been unlawfully expended;
- (b) an asset has been unlawfully sold or otherwise disposed of by the local authority; or
- (c) a liability has been unlawfully incurred by the local authority; or
- (d) a local authority has intentionally or negligently failed to enforce the collection of money it is lawfully entitled to receive; and

the local authority has not been fully compensated for the action or omission concerned.

4.6 To our knowledge, none of these circumstances apply in respect of the Agreement, the sale of the Lakeview land or, any other aspect related to the Agreement. Nor would the exercise of the Agreement decision-making powers in question by the CEO fall within the scope of section 44.

4.7 Even in the event the Auditor General did report a loss, section 46 provides a complete defense to Councillors where they can show the act or failure to act resulting in the loss occurred:

- (a) without their knowledge; or
- (b) with their knowledge but against their protest made at or before the time when the loss occurred; or
- (c) contrary to the manner in which the Councillors voted on the issue at a meeting of the local authority; or
- (d) in circumstances where, although being a party to the act or failure to act, the Councillors acted in good faith and in reliance on reports, statements, financial data, or other information prepared or supplied, or on professional or expert advice given, by
  - (i) an employee of the local authority whom the Councillors believed on reasonable grounds to be reliable and competent in relation to the matters concerned:
  - (ii) a professional adviser or expert in relation to matters that the defendant believed on reasonable grounds to be within the person's professional or expert competence.

The current delegation's framework, where the decisions are made by the CEO under delegated authority, would potentially allow Councillors to avail themselves of any of the four of these statutory defences. However, where Councillors exercise the decision-making power themselves (as is proposed in the Notice of Motion), the number of possible defenses may be reduced depending on the circumstances. Mr Robertson flagged this risk in his report and was one of the reasons given to reject the proposed change.

4.8 Para 21/22 – That there have been multiple requests for Modifications is common in the context of development agreement of a long term staged multi-use development. Design development, and consenting processes will always necessitate changes to the original master plan, and in the case of the current request for Modifications, has been required directly because of the resource consent decisions. Additionally, the CEO seeking input from elected members on occasion to get their comments and feedback is evidence of him as the delegation holder exercising proper prudential engagement with elected members prior to the exercise of the delegation.

5. We are happy to discuss this further.

**MinterEllisonRuddWatts**

## Appendix 1 – Modification Review Plan

### ▪ **Purpose**

- a. *The purpose of this document is to set out an evaluation process that QLDC can use as and when the Developer proposes a Modification under the Development Agreement – Lakeview Precinct dated 10 October 2019 between QLDC and QT Lakeview Developments Limited as bare trustee of the QT Lakeview Partnership (**Developer**) and Henry Rzechta, Ben Harkham and Augusta Capital Limited, as varied by the deed of variation signed by the same parties dated 11 July 2022 (the **Agreement**).*
- b. *Capitalised terms used in this document have the meanings given in the Agreement. Appendix 1 of this document sets out key definitions from the Agreement for reference.*

### ▪ **Overview of Modification process in Development Agreement**

- c. *Clause 9 of the Agreement sets out the process by which the Developer may propose Modifications to the Approved Documents relating to the Development.*
- d. *Under clause 9.1 of the Agreement, the Developer may propose Modifications which aren't Minor Modifications by giving written notice to QLDC. Any such proposal must set out specific information in sufficient detail to enable QLDC to properly comprehend and assess the Modification requested*
- i. *the scope and reason for the Modification;*
- ii. *the time within, and the manner in which, the Developer proposes to implement the Modification;*
- iii. *the impact (if any) of the Modification on:*
1. *the relevant Agreed Documents;*
  2. *the Material Outcomes;*
  3. *the ability to achieve Project Objectives and/or Material Outcomes; and*
  4. *the relevant Stage Programme and the ability to achieve the Milestone Dates.*
- iv. *whether the Developer considers the Modification is a Material Modification.*
- e. *QLDC then has 15 Working Days to assess the proposed Modification and advise the Developer whether*
- i. *it considers (acting reasonably) that the proposed Modification is a Material Modification; and*
- ii. *if it is a Material Modification, if QLDC approves that Modification.*
- If the Modification is a Material Modification, the Developer cannot proceed with that Modification without QLDC's approval.*
- f. *The Developer may proceed with any Modification that is not a Material Modification.*
- g. *If QLDC fails to give notice within the 15 Business Day time period, then the relevant Modification is deemed approved by QLDC.*

### ▪ **Assessment Process**

- h. *A baseline approach and methodology that QLDC may apply to assess a Modification request is set out below.*

*Evaluation Panel*

- i. *Given the nature of Modifications, QLDC should assemble a team of subject matter experts relevant to the nature of the specific Modification request, but which will usually include as a baseline:*
  - i. *the Lakeview Project Manager;*
  - ii. *QLDC Commercial Advisor;*
  - iii. *QLDC Architectural/Design Advisor;*

*with support as required from legal. Other specific advice may be needed (e.g. planning/environmental) depending on the specific Modification requested. Where possible, utilizing the relevant members of the original evaluation panel that evaluated the Developer's bid and Master Plan will enable consistency of approach.*

*Preliminary Assessment –required evaluation expertise, level of information provided and indicative timeline*

- j. *Upon receipt of a request for a Modification, QLDC should undertake a preliminary assessment of the following:*
  - i. *establish the assessment team of subject matter experts;*
  - ii. *whether sufficient information has been provided by the Developer (as outlined in clause 2.2 above) to enable QLDC to properly comprehend the request and undertake the assessment as to whether the Modification is a Material Modification. If there are information gaps or additional information required, then that should be requested from the Developer, noting that the assessment period will not commence until the information has been provided; and*
  - iii. *confirm the 15 Business Day timeframe within which the assessment must be completed and advised to the Developer (noting that information requests should extend the timeframe until QLDC has the required information.*

*Assessment of whether the Modification is a Material Modification*

- k. *Once sufficient information is held, then that information needs to be assessed to determine whether QLDC considers (acting reasonably) the proposed Modification amounts to a Material Modification (refer Appendix 1 for definition). Key considerations are:*
  - i. *Does it require an extension to a Progress Sunset Date or a Fixed Settlement Date?*
  - ii. *If implemented, would the Modification materially affect the ability to achieve any of the Project Objectives or Material Outcomes?*
  - iii. *Does it trigger one of the prescribed Material Modifications (more than 25% change in the footprint or gross floor area of any building in the relevant Stage / increase or decrease of more than one floor in any building in the Stage / change or primary or predominant use of a Super Lot / reduction in active frontages within the Super Lot of more than 10%)?*
  - iv. *When considered in aggregate with the cumulative effects of previous Modifications, does this Modification plus the cumulative effects amount to a Material Modification? (Note: QLDC should maintain a register of all requests).*

*If the answer to any of the above considerations is "yes" (e.g the Modification would the ability to achieve any of the Project Objectives or Material Outcomes) then the Modification will be Material Modification.*

- l. *Each member of the assessment team should set out details of their analysis against the key considerations (where relevant) and clearly state their view as to whether the Modification is a Material Modification, and if so, whether they consider that Material Modification should or should not be approved. Specific reasons should be given to support their findings.*
- m. *Depending on the collective views, a moderation workshop may be needed for the team to work through and agree their collective determinations.*
- n. *If the assessment team decides that the Modification:*
  - i. *is not a Material Modification, then the Developer should be advised and it can then proceed to implement that Modification.*
  - ii. *is a Material Modification, then the assessment undertaken needs to consider the extent of its effect on the ability to achieve each of the Project Objectives or Material Outcomes. In this regard it may*

*be necessary for the team to assess and balance specific negative effects against positive, and take a wider wholistic view of these effects on the Project Objectives or Material Outcomes.*

*Act reasonably and within scope of consideration*

- o. QLDC (and therefore the assessing team) must act reasonably when undertaking the assessment and considering the Modification in the context of the matters outlined above and all considerations/conclusions and recommendations must be firmly anchored within the parameters of the relevant defined terms in the Agreement, and the matters contemplated as relevant as set out in the Agreement.*
- p. It is not, and should not be used as, an opportunity to try and reopen the commercial terms of the Agreement or other aspects of the Approved Documents outside of those that are specifically affected by the Modification.*
- q. It is important to note that the Agreement provides for dispute resolution of any disagreement between QLDC and the Developer as to whether a Modification is a Material Modification, and if the parties are unable to resolve that within 5 Business Days, the matter is referred to the Independent Architect who will act as an expert and their determination will be binding on the parties.*
- r. Once the assessment has been determined, then this should be communicated in writing to the Developer. Currently this type of communication under the Agreement would sit within the delegated authority of QLDC's Chief Executive.*

## 1. **Appendix 1 – Definitions**

### **Modification**

*A Modification means any change to an Agreed Document, or any change to a Progress Sunset Date or Fixed Settlement Sunset Date which is not otherwise permitted under the Agreement.*

### **Agreed Documents**

*Agreed Documents comprise the Lakeview Precinct Plan, the Master Development Plan, Design Documentation (being the design drawings and specifications relating to a Super Lot) and Development Documentation (being the Design Documentation and related documents and information relating to a Super Lot, being:*

- *the indicative location and size of any proposed subdivided lots;*
- *the proposed location and envelope of all buildings in each Super Lot;*
- *the proposed outline design and specification of the buildings;*
- *the proposed uses of the buildings;*
- *any proposed open spaces and amenities;*
- *the proposed carpark strategy;*
- *an indicative street cross-section;*
- *proposed landscaping;*
- *the proposed staging of Super Lot development (including proposed Sub-Stages);*
- *Public/Community communication and public relations/promotions plan; and*
- *an assessment of the information against the Project Objectives and Material Outcomes.*

### **Minor Modification**

*Minor Modification means a Modification that meets the following criteria:*

- (a) *it is not a Material Modification;*
- (b) *will not result in a change of use of a building in the relevant Stage;*
- (c) *will not have any impact on the value, external appearance, size, height or quality of the Developer's Works; and*
- (d) *is otherwise minor and inconsequential in nature.*

### **Material Modification**

*Material Modification means any proposal to extend a Progress Sunset Date (otherwise than pursuant to clause 14) or a Fixed Settlement Sunset Date (otherwise than pursuant to clause 14), or any Modification which the Council considers (acting reasonably) would, if implemented materially affect the ability to achieve any of the Project Objectives or Material Outcomes. The following Modifications will be Material Modifications:*

- (a) *an increase or decrease in the footprint or gross floor area of one or more buildings within a Stage of more than 25%;*
- (b) *an increase of more than one floor in the number of floors (above ground) in one or more buildings or a decrease of more than one floor in one or more buildings;*
- (c) *a change of the primary use of a Super Lot (for example from predominantly hotel use to predominantly residential use)*
- (d) *a reduction of the active frontages within a Super Lot of more than 10% (active frontages being F&B, retail, hotel lobbies and community spaces);*
- (e) *any change to the Co-Living Requirements in relation to any Co-Living Accommodation.*

### **Project Objectives**

*The Project Objectives are:*

- *Maximise financial return for QLDC in a manner that minimises risk to ratepayers;*
- *Establish a thriving residential focused, mixed use precinct, which is stitched into the Queenstown town centre context and:*
  - *Exhibits best practice urban design principles, is walkable, activated, liveable and authentic;*
  - *Exhibits a consistent design language and high-quality built form outcomes that complement the natural environment, fit into the Queenstown context and are of human scale;*



- Provides a diverse retail mix which complements and provides for the natural expansion of the existing town centre core and will appeal to locals and visitors;
- Provides for the intensification sought via Plan Change 50 and delivers for a variety of housing outcomes and/or a diverse residential community; and
- Considers opportunities for visitor accommodation and / or visitor facilities where these are economically viable.
- Ensure the Precinct's development potential is unlocked in a timely and efficient manner.

### Material Outcomes

Issue	Material Outcome
<b>Retail &amp; Hospitality Strategy</b>	The progressive implementation of a retail and hospitality strategy that provides for long-term management and proactive curation by Britomart (or a related party of the Consortium) of the retail and food & beverage offerings within the non-Hotel parts of the Precinct
<b>Arts Precinct Strategy</b>	<p>Development of an integrated arts precinct through the implementation of an arts precinct strategy consistent with the proposed activities and strategies set out in the below extract from the Consortium's Proposal:</p> <p>Our Art Precinct has been developed in close collaboration with Christchurch-based SCAPE Public Art Trust who has experience in funding models for art precincts. If preferred developer, we will work with SCAPE for the appropriate funding model and would welcome dialogue with QLDC to deliver our art vision for Queenstown.</p> <p>Funding mechanisms that are widely practiced nationally and internationally will be explored with SCAPE including 'Percent for Art' public/private sector collaborations and general funds for art in public places.</p> <p><b>City Revenue and Tax-Based Incentives</b> There are city revenue and tax art funded programmes in several USA cities, each utilising their own unique funding model. In Houston, Texas, The Cultural Arts Council receive a percentage of hotel/motel tax for art. The public art programme in Phoenix, Arizona is funded through various avenues including the city's state lottery revenue.</p> <p><b>Public Private Sector Collaborations</b> A 1:1 dollar public/private matched funding partnership has worked very well for the past 10 years in Christchurch where SCAPE Public Art have partnered with Christchurch City Council to commission and install 14 ambitious public artworks through closely working with business, industry and philanthropic funders.</p> <p><b>Percent for Art</b> Many international, government and development agencies (in USA and Australia) actively encourage the creation of public art through 'Percent for Art', a funding mechanism whereby a percentage of the project cost from large scale developments is used to fund and install public art. Some government organisations (i.e. the city of Los Angeles) draw administration and maintenance costs before the funds are distributed to commission public art.</p>
<b>Active connections</b>	A Precinct actively connected to both the existing Town Centre and the Ben Lomond reserve through the integration of built form with public space, multi-modal access along Isle Street linking to Hay and Thompson Streets and pedestrian laneways (noting that the Developer is only responsible for this outcome to the extent that it is within its control).
<b>Proportionate Mix</b>	<p>The Project maintains a proportionate Project wide mix of residential, short stay accommodation, long-stay accommodation, office and retail typologies:</p> <ul style="list-style-type: none"> <li>• A change of more than 25% in the number of apartments within the Project would be</li> </ul>

	<p>regarded as a material change to the proportionate mix of uses.</p> <ul style="list-style-type: none"> <li>• A change of more than 25% in the number of short stay accommodation rooms within the Project would be regarded as a material change to the proportionate mix of uses.</li> <li>• A change of more than 25% in the combined number of long stay accommodation units (including as Co-Living Accommodation or seasonal/transient worker accommodation) (as distinct from short stay accommodation rooms) within the Project would be regarded as a material change to the proportionate mix of uses.</li> <li>• A change of more than 25% in the gross floor area dedicated to retail and food and beverage, office (co-working) or gallery space respectively within the Project would be regarded as a material change to the proportionate mix of uses.</li> </ul>
<b>Built Form</b>	<p>The built form within the Precinct reflects the Developer's Architectural Principles [refer 2.7 of Proposal], in particular the:</p> <ul style="list-style-type: none"> <li>• integration of landscape thorough architectural platforms such as landscaped terraced roofs and a complex variation of spaces between buildings;</li> <li>• use of quality façade materials, including natural timber and stone</li> </ul>
<b>Sustainability principles</b>	<p>The Developer's sustainability principles (refer 2.3F of the Proposal) are taken into account as reasonably appropriate during the course of design and delivery of the Project.</p>