

# Deed of Covenant

in relation to [insert property address]

Owner's Names:

[insert owner's name/s]

TEMPLATE

# Details

Date xx/xx/20xx

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## Background

- A The Owner is or will be the owner of the land and improvements at [insert property address] (the **Property**).
- B The Property was constructed as part of a development under the KiwiBuild Programme.
- C The Owner acquired its interest in the Property by virtue of qualifying for the KiwiBuild Programme as an Eligible Purchaser.
- D The Owner has agreed to covenant in favour of the Crown in relation to the Owner's use of the Property and its rights to transfer the Property during the Minimum Ownership Period.
- E The Owner has agreed to grant a covenant in gross to the Crown to secure performance of the Owner's covenants under this deed.

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# Agreed terms

## 1. Defined terms and interpretation

### 1.1 Defined terms

In this deed:

**Boarder** means any person that occupies the Property under a Boarding Arrangement.

**Boarding Arrangement** means an arrangement whereby the Owner allows a third party to reside in the Property (whether for valuable consideration or not) at the same time that the Owner also resides in the Property.

**Capital Gain** means the difference between:

- (a) the purchase price paid by the Owner to purchase the Property; and
- (b) the total amount received by the Owner from a third party as consideration for the transfer of the Property to that third party,

both amounts being GST inclusive.

**Crown** means the Sovereign in right of New Zealand acting by and through the Chief Executive of the Ministry of Housing and Urban Development.

**Crown Interest** has the meaning given to it in clause 3.2.

**Crown Payment** means:

- (a) where clause 2.6(a) applies, 30% of the gross rental received by the Owner from the relevant third party; and
- (b) where clause 2.6(b) applies, the lesser of:
  - (i) 30% of the Capital Gain; and
  - (ii) the difference between:
    - (A) the total amount received by the Owner from a third party as consideration for the transfer of the Property to that third party (including GST); and
    - (B) the amount required to discharge any mortgage of the Property before transferring the Property to that third party.

**Eligible Purchaser** means a person who meets all of the requirements to purchase a KiwiBuild Dwelling, as determined by the Crown from time to time.

**KiwiBuild Dwelling** means a dwelling that:

- (a) is priced at or below the relevant KiwiBuild price cap for the relevant type of dwelling in the relevant location;
- (b) is offered for sale in the first instance to an Eligible Purchaser; and
- (c) has been approved by the Crown's KiwiBuild unit as forming part of the KiwiBuild Programme.

**KiwiBuild Programme** means the Crown's programme in relation to housing to identify and leverage opportunities to procure KiwiBuild Dwellings, being affordable quality homes for Eligible Purchasers generally known as 'KiwiBuild'.

**Minimum Ownership Period** means:

- (a) where the Property is a studio or one-bedroom dwelling, a one-year period from and including the date on which the Owner is registered as owner of the Property; or

- (b) where the Property comprises a dwelling of two or more bedrooms, a three-year period from and including the date on which the Owner is registered as owner of the Property.

**Property** has the meaning given to it in Background paragraph A to this deed.

**Transfer Request** has the meaning given to it in clause 2.4.

**Working Day** has the meaning given to in the Property Law Act 2007.

## 1.2 References

A reference in this deed to:

- (a) **\$** means the lawful currency of New Zealand;
- (b) an **agreement** includes any legally enforceable arrangement, understanding, undertaking or representation whether or not in writing;
- (c) **at any time** includes from time to time;
- (d) **including** and similar expressions do not limit what else may be included;
- (e) **law** includes any common law, equity and any statute; and
- (f) a **person** includes:
  - (i) an individual, body corporate, association of persons (whether corporate or not), trust, state, agency of state and any other entity (in each case, whether or not having separate legal personality); and
  - (ii) that person's successors, permitted assigns, executors and administrators (as applicable).

## 1.3 Interpretation

In this deed:

- (a) headings are for reference only and do not affect interpretation;
- (b) references to clauses, schedules and appendices are to those in this deed, and a reference to this deed includes any schedule or appendix;
- (c) reference to a document or agreement includes that document or agreement as extended, novated, altered, amended, supplemented or replaced from time to time;
- (d) reference to any thing includes any part of it and a reference to a group of things or persons includes each thing or person in that group;
- (e) reference to legislation or other law or a provision of them includes regulations and other instruments under them, and any consolidation, amendment, re-enactment or replacement;
- (f) the singular includes the plural and *vice versa*, a gender includes other genders and different grammatical forms of defined expressions have corresponding meanings;
- (g) unless stated otherwise, anything (other than making a payment) required to be done on or by a day which is not a Working Day, will be done on or by the next Working Day;
- (h) reference to time is to New Zealand time unless stated otherwise; and
- (i) no provision or expression is to be construed against a party on the basis that the party (or its advisers) was responsible for its drafting.

## 2. Owner's covenants

### 2.1 Property to be used as residence for Owner

Subject to clauses 2.2 to 2.5, the Owner must live in the Property as their principal place of residence during the Minimum Ownership Period.

### 2.2 Owner may enter into Boarding Arrangement

Subject to clauses 2.4 and 2.5, the Owner may allow a Boarder to reside in the Property under a Boarding Arrangement during the Minimum Ownership Period, but will not otherwise rent all or any part of the Property to any third party.

### 2.3 Owner not to transfer Property during Minimum Ownership Period

Subject to clauses 2.4 and 2.5, the Owner will not transfer the Property to any third party at any time during the Minimum Ownership Period. For the avoidance of doubt, nothing in this clause will prevent the Owner from entering into an agreement to transfer the Property to a third party during the Minimum Ownership Period where settlement is to take place following expiry of the Minimum Ownership Period.

### 2.4 Permitted rentals and transfers

Notwithstanding clauses 2.2 and 2.3, the Owner may give the Crown written notice requesting the Crown to consent to the Owner renting or transferring the Property during the Minimum Ownership Period (a **Rental Request** or **Transfer Request** (as applicable)). If the Owner presents reasonable evidence to the Crown that any mortgagee of the Property is encouraging the Owner to sell the Property voluntarily because the Owner is having difficulty making mortgage payments to that mortgagee, the Crown cannot refuse a Transfer Request without the mortgagee's prior written consent. In all other cases, the Owner acknowledges and agrees that the Crown may act at its discretion in considering any Rental Request or Transfer Request and may impose any conditions it thinks fit in giving its consent, except that the Crown cannot restrict the price at which the Property is rented or sold, nor place any restrictions on the person to whom the Property may be rented or sold. If the Crown consents to a Rental Request or Transfer Request, the Owner:

- (a) may rent or transfer (as applicable) the Property in accordance with the Crown's consent and any conditions imposed by the Crown in giving its consent; and
- (b) will not be required to pay any Crown Payment to the Crown in relation to that rental or transfer (as applicable).

### 2.5 Permitted transfers and dealings

Notwithstanding clause 2.3, the following transfers or dealings with the Property are permitted during the Minimum Ownership Period and will not trigger payment of any Crown Payment:

- (a) the registration of a mortgage to any mortgagee;
- (b) the registration of a variation to a mortgage to any mortgagee;
- (c) transfer by way of power of sale exercised by any registered mortgagee during the Minimum Ownership Period at any price and to any buyer, whether or not they are an Eligible Purchaser;
- (d) the discharge of an existing mortgage and the registration of a replacement mortgage for any reason;
- (e) where there is more than one Owner holding the Property, the transfer of the Property to the same Owner, whether from joint tenants to tenants in common, or vice versa;

- (f) where the Owner wants to transfer the Property to the trustees of a trust under which the Owner is a beneficiary, the transfer of the Property to those trustees;
- (g) where the Owners are the trustees of a trust, the transfer of the Property to any newly appointed and/or remaining trustees of that trust; or
- (h) where the Property is held by more than one Owner as relationship property for the purposes of the Property (Relationships) Act 1976, then provided the Owners notify the Crown: the transfer of the Property to one of those Owners as required to give effect to any:
  - (i) agreement reached between those Owners on the dissolution of their marriage or civil union or ending of their de facto relationship (as applicable); or
  - (ii) order of the Family Court under that Act (or any other court having jurisdiction).

## **2.6 Owner to pay Crown Payment in specified circumstances**

Subject to clauses 2.2 to 2.5, the Owner will pay the Crown Payment to the Crown on demand if the Owner:

- (a) rents all or any part of the Property; and/or
- (b) transfers the Property, to any third party at any time during the Minimum Ownership Period.

## **3. Protection of Crown Interest**

### **3.1 Agreement to grant covenant in gross**

The Owner agrees to grant a covenant in gross over the Property to secure performance by the Owner of its covenants in clause 2.

### **3.2 Interest in land**

For the avoidance of doubt, the Owner's agreement to grant a covenant in gross over the Property in clause 3.1 is intended to confer on the Crown an interest in land (the **Crown Interest**).

### **3.3 Registration**

The Owner acknowledges and agrees that to protect the Crown Interest, the Crown may elect (at its discretion) to either:

- (a) register a caveat against the record of title for the Property in respect of the Crown Interest in the form detailed in clause 3.4; or
- (b) require the Owner to register a covenant in gross against the record of title for the Property in respect of the Crown Interest in the form detailed in clause 3.5

### **3.4 Caveat**

If the Crown registers a caveat against the record of title for the Property to protect the Crown's Interest under clause 3.3(a), then:

- (a) the caveat will be in the form attached as Schedule 1; and
- (b) the Owner may require the Crown to withdraw the caveat:
  - (i) in the same e-dealing as any transfer of the Property during the Minimum Ownership Period effected in accordance with clause 2.4; or
  - (ii) on expiry of the Minimum Ownership Period; and

- (c) the Owner or any registered mortgagee of the Property may require the Crown to withdraw the caveat in the same e-dealing as any transfer of the Property during the Minimum Ownership Period by way of power of sale exercised by that registered mortgagee.

### **3.5 Covenant in gross**

If the Crown requires the Owner to register a covenant in gross against the record of title for the Property to protect the Crown's Interest under clause 3.3(b), then:

- (a) the covenant in gross will be in the form and on the terms required by the Crown provided that the covenant in gross will be expressed to be for a term expiring on the earlier of:
  - (i) expiry of the Minimum Ownership Period; and
  - (ii) registration of any transfer of the Property during the Minimum Ownership Period effected in accordance with clause 2.4;
- (b) the Owner will do all other things and sign all documents necessary to enable registration of the covenant in gross; and
- (c) the Owner may require the Crown to surrender the covenant in gross:
  - (i) in the same e-dealing as any transfer of the Property during the Minimum Ownership Period effected in accordance with clause 2.4; or
  - (ii) on expiry of the Minimum Ownership Period; and
- (d) the Owner or any registered mortgagee of the Property may require the Crown to surrender the covenant in gross in the same e-dealing any transfer of the Property during the Minimum Ownership Period by way of power of sale exercised by that registered mortgagee.

### **3.6 Power of attorney**

The Owner irrevocably appoints the Crown as the Owner's attorney to do anything and sign all documents necessary to enable registration of any covenant in gross required by the Crown under clause 3.3(b).

### **3.7 Monitoring**

The Owner acknowledges and consents to the Crown carrying out all reasonable and necessary monitoring of the Owner's obligations under this deed.

## **4. Miscellaneous**

### **4.1 Joint and several liability**

Where there is more than one Owner, the obligations of the Owner under this deed are joint and several.

### **4.2 Privity**

The Owner acknowledges and agrees that, for the purposes of Subpart 1 of Part 2 of the Contract and Commercial Law Act 2017, the Owner's promises in clauses 2 and 3 of this deed confer a benefit on and are enforceable by the Crown.

### **4.3 Severability**

A provision of this deed that is illegal, invalid or unenforceable is ineffective to the extent of the illegality, invalidity or unenforceability. This does not affect the validity or enforceability of the remainder of the deed.

#### **4.4 Variation**

A variation of this deed must be in writing and signed by or on behalf of the Owner and the Crown.

#### **4.5 Further assurances**

The Owner will do all acts and things, including the execution of all relevant documents, as may be reasonable to implement and carry out its obligations under, and contemplated by, this deed.

#### **4.6 Governing law**

This deed is governed by the laws of New Zealand.

#### **4.7 Counterparts**

This deed may be executed in any number of counterparts. Each counterpart constitutes an original of this deed, all of which together constitute one instrument which the parties and Crown may rely on. A party who has executed a counterpart of this deed may exchange it with another party by sending it to the other party including the Crown, including by facsimile or email. If requested by the other party or the Crown, the sending party will promptly deliver the original by hand or post (but failure to make that delivery will not affect the validity of this deed).

TEMPLATE



# Signing page

EXECUTED as a deed

SIGNED by [insert owner's name]

\_\_\_\_\_  
Signature of [insert owner's name]

in the presence of:

\_\_\_\_\_  
Name of witness

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Occupation of witness

\_\_\_\_\_  
City/Town of residence

SIGNED by [insert owner's name]

\_\_\_\_\_  
Signature of [insert owner's name]

in the presence of:

\_\_\_\_\_  
Name of witness

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Occupation of witness

\_\_\_\_\_  
City/Town of residence

# Schedule 1 – Form of caveat

Approved for ADLS by Registrar-General of Land under No. 2018/6256

## CAVEAT AGAINST DEALINGS WITH LAND

Section 138, Land Transfer Act 2017

Land registration district

Refer annexure schedule



BARCODE

Record of Title (unique identifier) All/part Area/description of part

Refer annexure schedule

Caveator

Surname(s) must be underlined or in CAPITALS.

Her Majesty the Queen

Estate or interest claimed, grounds on which claim founded, and derivation from Registered Owner

Refer annexure schedule

Notice

Take notice that the Caveator forbids the registration of any instrument, having the effect of charging or transferring, or prejudicially affecting, the estate or interest protected by this caveat, **except as provided by sections 140(2) and 141 of the Land Transfer Act 2017**, until this caveat is withdrawn by the Caveator, removed by order of the High Court, or until the same has lapsed under the provisions of section 143 of the Land Transfer Act 2017. The exceptions are:

Refer annexure schedule

Address for service of Caveator

Kāinga Ora - Homes and Communities, Level 5, 7 Waterloo Quay, National Office, PO Box 2628, Wellington 6140  
(Attention: Manager, KiwiBuild)

Address for service of Registered Owner

Refer annexure schedule

Dated this                      day of    20

Attestation

Delete inapplicable descriptions in [ ].

	Signed in my presence by the [Caveator] [Attorney] [Agent]
	_____ <i>Signature of witness</i> <i>Witness to complete in BLOCK letters (unless legibly printed)</i>
	Witness name
	Occupation
	Address
Signature(s) [common seal] of [Caveator] [Attorney] [Agent]	

Note:

1. You should seek independent legal advice before signing this caveat instrument.
2. The witness cannot also be a party to the caveat instrument and must be able to confirm the identity of the person signing.
3. When entered on the register this caveat instrument will become part of the public record under the Land Transfer Act 2017.

**Caveat****Continuation of "Land registration district":**

*[Land registry to be inserted]*

**Continuation of "Unique identifier or C/T(s)":**

Unique identifier or C/T(s)	All / Part	Area/description of part or stratum
<i>[Unique identifier to be inserted]</i>	All	<i>[Description of stratum for unit title development to be inserted]</i>

**Continuation of "Estate or interest claimed":**

An interest in the land under a Deed of Covenant dated *[date to be inserted]* entered into by the registered owner in favour of the caveator and granting the caveator the right to register a covenant in gross against the record of title for the land.

**Continuation of "Notice":**

The exceptions are registration of any of the following instruments against the record of title for the land:

- (a) a mortgage to any mortgagee;
- (b) a variation of any mortgage to any mortgagee;
- (b) a transfer by way of power of sale exercised by any registered mortgagee at any price and to any buyer;
- (c) the discharge of an existing mortgage and the registration of a replacement mortgage for any reason;
- (d) where there is more than one registered owner holding the land, a transfer of the land to the same registered owners, whether from joint tenants to tenants in common, or vice versa;
- (e) where the registered owner wants to transfer the land to the trustees of a trust under which the registered owner is a beneficiary, a transfer of the land to those trustees;
- (f) where the registered owners are the trustees of a trust, the transfer of the land to any newly appointed and/or remaining trustees of that trust; or
- (g) where the land is held by more than one registered owner as relationship property for the purposes of the Property (Relationships) Act 1976, the transfer of the land to one of those registered owners as required to give effect to any:
  - (i) agreement reached between those registered owners on the dissolution of their marriage or civil union or ending of their de facto relationship (as applicable); or
  - (ii) order of the Family Court under that Act (or any other court having jurisdiction). For the avoidance of doubt, caveator consent will not be required to effect registration of any of the above instruments.

**Continuation of address for service of Registered Owner:**

*[Postal address of registered owner to be inserted]*