

Date:	25 November 2005
To:	Community Housing Council of SA Inc.
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From:	Franco Camatta
Re:	MEMORANDUM OF ADVICE
Our Reference:	300496/FC
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Dear Sirs

We refer to your instructions to review the proposed South Australian Community Housing Authority Funding Agreement.

This Agreement is meant to relate to funding provided by organisations within your umbrella group, being Community Housing organisations.

The Agreement proposes pursuant to Section 64.1 of the *South Australian Co-operative and Community Housing Act 1979*.

We have been forwarded a copy of the draft Agreement and enclose herewith our general comments in relation to it.

Of course, it is imperative that each paragraph of each clause be read very carefully and we hereby advise of some peculiarities which may be the subject of discussion between you and the South Australian Community Housing Authority ("SACHA"):-

- The Agreement commits any organisation executing the document to the current SACHA policies and guidelines. It also provides that SACHA may vary these guidelines from time to time and such variations will result in the Community Housing said to being advised and consulted of the change prior to the change, but once made Community Housing will then be required to implement the changes albeit with the assistance of SACHA.
- The process may also be initiated by the organisations by request in writing, but it is recommended that rather than approaching SACHA they approach a peak body being the Community Housing Council of South Australia Inc ("CHCSA").

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- Whilst the policies and guidelines are attached as schedules to the document, clause 1.2.1 provides that SACHA may at its discretion at any time during the term of the agreement vary or replacing of the schedules provide that SACHA must notify the organisation and provide the organisation with a copy of the varied conditions. It is expected that this would be subsequent to the consultation and advice provided in clauses 1.1.4.
- In clause 1.3, please note that this Funding Agreement will apply to all premises which have been acquired, leased or developed or improved using wholly or partly any funds provided by SACHA and to monies delivered derived from those premises. It replaces any prior agreement. The effect of this is that where there have been any premises acquired from any funding source through SACHA or its predecessors, then this Agreement would apply to it.
- In clause 1.4, SACHA will impose a charge to secure the enforcement of this Agreement over all real property in connection with SACHA has provided assistance. In other words, the charge will relate to all property whether it is held freehold by an organisation or not if funding was obtained through SACHA. This may not be its intended scope.
- In clause 1.5, all property must be held by the organisation in its names and pursuant to its rules. Housing is only to be provided for eligible applicants.
- In clause 1.6, the organisation must comply with all laws and carry out its obligations as land owner under all relevant legislation.

## 2. FINANCE

- The rental calculated for any residential premises held by the organisation shall be in accordance with SACHA's rent policy in accordance with the schedules. The organisation must abide by SACHA's rent policies.
- In clause 2.2.1, the organisation must pay all outgoings for the premises acquired under the Agreement and this responsibility will be funded from the operational costs by retention of rent monies, for the purposes of property allowances, administration allowances and maintenance allowances. These amounts are set out in schedule C.
- Clause 2.2 further provides for all funds to be banked in the general operating account and special maintenance fund bank accounts are to be established. Should the funding arrangements must be in excess of the rentals payable in any given month, the organisation is entitled to invoice SACHA for the shortfall.
- In clause 2.2.7, again a blanket prohibition is placed on using any income derived from any premises purchased with funding through SACHA for any purchases other than those set out in this Agreement. SACHA is in a position to make advances to the organisations in relation to shortfalls and outgoings.
- In clause 2.3, any property subject to a charge under the Agreement and the Act will require any capital contribution be paid by the organisation to SACHA on a monthly basis, in accordance with Schedule D on a monthly basis. This capital contribution is basically as defined the residual amount from rent receivable once the organisation has abductured the funding components in clause 2.2.2. This is payable monthly and is due on the 1<sup>st</sup> day of the month following the date on which the premises were first available for letting.
- Clause 2.3.4 provides that if there is a failure to payment, SACHA has powers set out within the clause.

- Clause 2.3.5 provides that in the event the premises are vacant, then the capital contribution requirement does not apply.
- In clause 2.4, if the organisation is in default SACHA can recover those sums as a debt from the organisation and charge interest on it at its discretion. If the discretion is balanced issues of extenuating circumstances affecting the organisation's ability to pay, interest would otherwise be 1% per month for the first 3, and 2% per month thereafter. SACHA is also entitled to charge a recovery fee.

## **INSURANCE**

- Insurance will be arranged on behalf of all Community Housing organisations through SACHA and the organisation will be required to pay premiums in brokerage and prescribed fees in accordance with SACHA's terms for the provision of that insurance. If unpaid, this is also a debt due to SACHA and can be recovered. Insurance arrangements can be varied by SACHA and notify the organisation in writing. Some further notification in this regard of any proposed changes should be notified in our view.
- Clause 2.6 provides the organisation must invest all surplus funds deviced form allowances under this Agreement and not immediately required by any investments ascertained in clause 2.6.1.
- In clause 2.7 – Financial Management, the requirements for audited balance sheets and statements as set out in clause 2.7. These need to be referred to your accountant and are detailed and clear.

## **3. TENANCY MANAGEMENT**

- It is intended that the organisation will only accept any person for tenancy who fits in within the tenancy eligibility criteria, as set out in Schedule A. This policy may change from time to time and this is maybe varied through the Government Gazette. The organisation is entitled to be notified in this regard. Should the organisation develop its own specific tenancy eligibility criteria, it must notify SACHA in that regard.
- The organisation must establish appropriate written tenant selection procedures to be submitted for approval by SACHA. These procedures must be transparent and be provided to the public in accordance with clause 3.4.1.

#### 4. COMMUNITY HOUSING ORGANISATION MANAGEMENT

- The organisation must pass and retain a suitable by-law setting out processes to be used when a tenant falls into arrears of rent. This must be approved by SACAH. Similarly, the organisation must ensure its office bearers maintain certain levels of skills to ensure sufficient operation and SACHA proposes to develop an education training strategy to facilitate in accordance with the sector's demand. The organisation is responsible for the development of agreements with suppliers of services.

#### 5. PROPERTY MANAGEMENT

- Any purchase or lease of construction of the premises will be subject to SACHA approval in accordance with clause 5.1. This needs to be carefully followed through.
- In clause 5.2, SACHA may provide funding to the organisation for the purpose of acquisition of premises in accordance with 5.1, on terms to be agreed between the parties and in the absence of agreement at the discretion of SACHA. SACHA may also require the organisation to issue a debenture, or series of debentures, incorporating the terms of any specific funding.
- In clause 5.2.3 the organisation indemnifies SACHA against any liability for loss arising or incurred in connection with any funding on the amount payable under a debenture issued by the organisation to SACHA not being paid on the due date, any guarantee, indemnity given or assumed by SACHA to a third party in relation to the grant of debentures and to be absolutely clear, any liability of SACHA secured by this indemnity will be secured by the charge.
- In other words, the charge will cover any obligations the organisation has to SACHA of any nature under this agreement.
- In clause 5.3, where Input Tax Credit is due to the organisation for GST purposes, it must be paid to SACHA within 7 days of it being refunded.
- Clause 5.4 relates to discharging the charge. This clause is important as it describes the circumstances when the charge to SACHA will be released. It will only be released in the following circumstances:-
  - Where the current market value of the premises established by a licensed valuer is paid;
  - together with any other amount required to discharge any debenture is paid; and
  - peculiarly, in clause (c), *"any other amounts which are due to SACHA determined at its discretion"*;
  - less any amounts already paid on account of investment shares for the premises.
- The determination at SACHA's discretion is a concern. The current market value is to be determined by SACHA but SACHA has the possibility in its absolute discretion to release a charge for less than the payment required under section 5.4.1.
- Clause 5.4.5 relates to the capital component. It appears that this should in fact be the capital contribution in accordance with the definition.

- In clause 5.4.6, a system of appeal has been established in relation to determining current market value but it would require that the organisation meet its own valuation expenses. This appeal is set out in the legislation and would relate to the determination of current market value.
- Clause 5.5 relates to the sale of the premises. The organisation cannot sell premises (which are the subject of a charge), transfer them or assign them without the consent of SACHA. SACHA would not unreasonably withhold consent but one would expect that it would expect to be repaid, unless some premises are identified as set out in clause 5.5.2. In that case, any funds will be paid into the fund which may be used to acquire the next premises agreed with SACHA.
- If payments are made to the fund then SACHA would arrange a discharge of the charge on the premises. The fund is in fact the Community Housing Development Fund established under the *South Australian Co-operative and Community Housing Act 1991*.
- In clause 5.6, the organisation is responsible for all maintenance of the premises and to keep them in good condition. Accordingly it will abide by SACHA's maintenance policy and the costs of that maintenance are to be borne from the maintenance fund. The organisation must make payments into the maintenance fund bank account as identified previously, and all interest earned on that account will be deemed to form part of that account. These funds are to be invested as set out in clauses 2.2.4 and 2.6.1.
- The organisation must also develop a maintenance plan consistent with SACHA's maintenance policy and approved by SACHA. Similarly whether SACHA's Vacant Properties Policy must also be implemented.
- To be noted, where there is a short-term vacancy the organisation must advise SACHA and report in that regard but if the vacancy is long term, the organisation will require SACHA's approval and without approval SACHA may require the return of the property to SACHA.

## 6. REPORTS

- Please refer the reporting mechanism to adhere that your accounts are audited.
- Reports that have been made in relation to data and audited financial statements are to be provided.

## 7. GENERAL

- The provisions include a provision in relation to undue hardship included in clause 7.2.1, where in SACHA's opinion (their opinion only) the organisation suffers undue hardship due to excessive costs which have been incurred beyond its control it may adjust the capital contribution.
- It is intended that this Agreement be reviewed at least once every 10 years and can be varied following negotiation between the parties, however the schedules can be varied by SACHA unilaterally after notification and consultation.
- The Agreement can also be terminated usually or when all charges have been repaid.

## SCHEDULES

- The Schedules are relatively straight forward and outline the policy arrangements. I expect that you have no great difficulty in that regard.
- Please note Schedule E which requires that mandatory by-laws which are to be developed and approved by SACHA in relation to each organisation.

I trust this advice is of assistance.

Please do not hesitate to contact the writer should you wish to discuss any aspect of it.

Yours faithfully

**CAMATTA LEMPENS PTY LTD**

Per:

**FRANCO CAMATTA**

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