

## Management report to Council

Agenda item 6.7

### Agreement with Museum Victoria - Water Harvesting Facility Carlton Gardens

Presenter: Rob Adams, Director City Design

26 August 2014

#### Purpose and background

1. The purpose of this report is to seek Council approval to sign an agreement with Museum Victoria for the shared water harvesting facility in Exhibition Reserve.
2. In 2010, the Council contributed \$300,000 plus GST towards the cost of installing a stormwater collection and re-use facility under the Western Forecourt in Exhibition Reserve. Of this, \$185,000 was from the Melbourne International Flower and Garden Show 'sinking fund' that the event organiser, Flower and Garden Show Ltd, is obliged to contribute for works in Carlton Gardens.
3. The Council's total contribution represented 27 per cent of the cost of the facility and was made on condition that the Council would be able to access the reclaimed water in a similar proportion (27 per cent of the harvested volume). The total installed storage capacity of the Museum tanks is 1.35 million litres.
4. Reclaimed water from the facility is used to irrigate the parterre garden beds and to top up the Hochgurtel Fountain and the top lake in Carlton Gardens North.

#### Key issues

5. Formalising an agreement between Council and Museum Victoria was deferred until the extended defects period for the Western Forecourt construction works was complete. The proposed agreement has now been developed which sets out the terms and conditions of the arrangement. It is for an initial term of one year with an option for a further eight year period.
6. Under the proposed agreement, the Museum will operate and maintain the facility and the Council will contribute 27 per cent of the ongoing maintenance costs, which reflects the 27 per cent water allocation. While the maintenance cost will vary from year to year, it has been estimated by the Museum to be in the order of \$3,500 per annum.
7. The Museum has indicated that it is satisfied with the proposed agreement.

#### Recommendation from management

8. That Council:
  - 8.1. approves the Royal Exhibition Building Western forecourt water harvesting facility Carlton Gardens Agreement
  - 8.2. notes the agreement will be entered into under delegations.

#### Attachments:

1. Supporting Attachment
2. Royal Exhibition Building Western Forecourt Water harvesting facility Carlton Gardens agreement

## Supporting Attachment

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### Legal

1. Legal advice has been provided in respect to the agreement. Given that the agreement includes the obligation on the Council to contribute towards the cost of maintenance for a period of up to nine years, the Council's approval is required to enter into the agreement.

### Finance

2. It has been estimated that the Council's contribution to the maintenance costs would be in the order of \$3,500 per annum. This will be funded in 2014–15 from the existing Park Services budget.

### Conflict of interest

3. No member of Council staff, or other person engaged under a contract, involved in advising on or preparing this report has declared a direct or indirect interest in relation to the matter of the report.

### Stakeholder consultation

4. This agreement has been drafted by Museum Victoria in consultation with Council officers.

### Relation to Council policy

5. The recommendation is consistent with the Carlton Gardens Master Plan and Total Watermark – City as a Catchment policy.

### Environmental sustainability

6. Using reclaimed water for garden irrigation reduces the demand for potable water and improves the sustainability of the gardens.

 **NORTON ROSE FULBRIGHT**

*DRAFT COMPLETE: 16 May 2014*

Dated

**Royal Exhibition Building**  
**Western Forecourt**  
**Water Harvesting Facility**  
**Carlton Gardens**  
**Agreement**

Parties

**Museums Board of Victoria**  
ABN 63 640 679 155

**Melbourne City Council**  
ABN 55 370 219 287

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Our ref: 2754812

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**Agreement** dated

**Parties**      **Museums Boards of Victoria** ABN 63 640 679 155  
of Level 3, 11 Nicholson Street, Carlton, Victoria 3053 (trading as Museum  
Victoria)  
(MV)

**Melbourne City Council** ABN 55 370 219 287  
of Town Hall, Swanston Street, Melbourne, Victoria 3000 (trading as City of  
Melbourne)  
(CoM)

## Introduction

- A. MV has engaged a contractor to construct the Facilities at the Site.
- B. CoM has agreed to contribute the Funding Contribution to the cost of the construction of the Facilities.
- C. In exchange for the funding contribution and subject to the payment of the maintenance fee, MV has agreed to meet the Obligations to CoM on the terms and conditions in this Agreement.

## It is agreed

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### 1. Definitions and interpretation

#### 1.1 Definitions

In this Agreement:

- (1) **Agreement** means this document, including any schedule or annexure to it;
- (2) **Business Day** means a day that is not a Saturday, Sunday or any other day which is a public holiday or a bank holiday in the place where an act is to be performed or a payment is to be made;
- (3) **Commencement Date** means the date described in Item 1 of Schedule 1;
- (4) **Confidential Information** means all information or data which has been or may be disclosed by a party (**Disclosing Party**) or any of its representatives to the other party (**Receiving Party**) or any of its representatives (whether orally, in writing or otherwise) from time to time, including all information or data to be processed, formatted, generated, compiled, tabulated, transformed, arranged, manipulated or otherwise operated on in the course of the supply of the Obligations under this Agreement;
- (5) **Dispute** has the meaning given in clause 9.1(1);
- (6) **Facilities** means the rain water harvesting system at the Site, including the concrete tank, pump, filters, pump controller, inlet and outlet distribution pipes, gross pollutant traps and transducers as constructed pursuant to the construction contract between MV and 2Construct dated 27 April 2010 and as described in Schedule 4- Facility As built drawing prepared by 2Construct.

- (7) **Funding Contribution** means the contribution described in 1 of Schedule 3;
- (8) **Initial Term** means the period specified in Item 2 of Schedule 1;
- (9) **Irrigation Schedule** means the plan for the irrigation of the land surrounding the Site, known as the Carlton Gardens, including a schedule of the planned irrigation, detailed in Schedule 2;
- (10) **Maintenance** means servicing, repairs and reasonable replacement of operating parts, but not new equipment or capital costs associated with the operation of the Facility;
- (11) **Maintenance Fee** means fees incurred for Maintenance in accordance with clause 7.1 and described in Item 2 of Schedule 3;
- (12) **Notification** has the meaning given in clause 9.2(1);
- (13) **Obligations** mean the commitments of the parties set out in clause 3.1(1) to supply water, provide the Water reports and contribute to the cost of Maintenance through payment of the Maintenance Fees
- (14) **Renewal Term** means the period specified in Item 3 of Schedule 1;
- (15) **Site** means Royal Exhibition Building and Carlton Gardens World Heritage Site;
- (16) **Term** means the Initial Term and any Renewal Term of this Agreement, granted in accordance with clause 2;
- (17) **Water** means the water that enters the tank of the Facilities from the rain water harvesting system during the Term; and
- (18) **Water Report** means the report detailing the levels of Water as provided in accordance with clause 4.2.

## 1.2 Interpretation

- (1) Reference to:
  - (a) one gender includes the others;
  - (b) the singular includes the plural and the plural includes the singular;
  - (c) a person includes a body corporate;
  - (d) a party includes the party's executors, administrators, successors and permitted assigns;
  - (e) a thing includes the whole and each part of it separately;
  - (f) a statute, regulation, code or other law or a provision of any of them includes:
    - (i) any amendment or replacement of it; and
    - (ii) another regulation or other statutory instrument made under it, or made under it as amended or replaced; and
  - (g) dollars means Australian dollars unless otherwise stated.

- (2) "Including" and similar expressions are not words of limitation.
- (3) Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
- (4) Headings and any table of contents or index are for convenience only and do not form part of this Agreement or affect its interpretation.
- (5) A provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the Agreement or the inclusion of the provision in the Agreement.
- (6) If an act must be done on a specified day which is not a Business Day, it must be done instead on the next Business Day.

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## **2. Term**

- 2.1 This Agreement commences on the Commencement Date and continues for the Initial Term, unless terminated earlier in accordance with this Agreement.
- 2.2 Subject to clause 2.1, CoM may renew the term of this Agreement for a further period equal to the Renewal Term by giving MV not less than 30 days written notice before the end of the Initial Term.

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## **3. Obligations**

### **3.1 MV's obligations**

- (1) Subject to clause 3.2(2), MV must supply 27% of the annual total amount of Water, to CoM, as determined in accordance with the Irrigation Schedule. Weekly amounts may vary according to the season.
- (2) MV will provide CoM with the Water at the times, in accordance with the irrigation cycles for the current month of the Term, detailed in the Irrigation Schedule, subject to clause 3.2, to be used for irrigation and general tasks associated with Garden maintenance.
- (3) In accordance with clause 3.1(2), MV shall supply the available quantity of Water in accordance with clause 3.1(1).

### **3.2 Supply of Water**

- (1) Subject to clause 3.3(1):
  - (a) CoM will not be allocated any Water from the Facility beyond 27% of the weekly transducer level read; and
  - (b) MV will not be allocated any Water from the Facility beyond 73% of the weekly transducer level read.
- (2) The parties acknowledge that the quantity of Water will vary from time to time and that, on occasion, there may be no Water.
- (3) The parties acknowledge that the quality of water will be variable but is intended to be fit-for-irrigation use and as outlined in Schedule 2-Item 2.

- (4) When MV becomes aware of a significant decline in or of an incident that may compromise the water quality, MV will notify CoM as soon as practical before the next watering cycle.

### 3.3 Removal of Water for maintenance

- (1) Despite clause 3.2(1), MV may remove Water from the Facility at any time in order to conduct maintenance or repairs to the water harvesting infrastructure in accordance with clause 5.
- (2) Before removing any Water from the Facility pursuant to clause 3.3(1), MV, where reasonably practical, provide prior written notice to CoM, outlining why the Water must be removed.

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## 4. Water Reports

- 4.1 MV must, during the Term, monitor the amount of Water.
- 4.2 On a weekly basis, MV shall provide the Water Report to CoM. The Water Report is to be in an electronic form unless otherwise notified, and set out in reasonable detail:
  - (1) the Water level at the beginning of the week;
  - (2) the agreed Water allocation to the three control zones; and
  - (3) such other items as agreed between the parties from time to time.

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## 5. Operation and maintenance

- 5.1 MV will operate and maintain the Facilities.

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## 6. Warranties

### 6.1 General warranties

Each party warrants that:

- (1) it has the capacity and authority to enter into this Agreement; and
- (2) it is not in a position where, directly or indirectly, duties or interests are or might be created in conflict with or might appear to be created in conflict with its duties and interests under this Agreement.

### 6.2 Excluded warranty

MV does not represent or warrant that the quantity of Water provided by the Facilities will be sufficient to meet the total requirements CoM's Irrigation Schedule.

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## 7. Fees and payment

### 7.1 Operation and Maintenance Fees

- (1) Both parties shall share, in amounts proportionate to the water allocation, the cost of any expenses incurred in respect of the operation and maintenance performed



in accordance with clause 5, upon renewal of this Agreement and after expiry of the 12 month defects liability period.

- (2) MV must provide CoM with notice of any costs incurred in performing the operation and maintenance of the Facilities and upon request provide documentary evidence of such costs for which CoM are obligated to contribute towards.
- (3) CoM must pay to MV the Maintenance Fees in consideration of the performance of operation and Maintenance activities provided under clause 5.

## 7.2 Invoicing

- (1) MV must submit invoices to CoM for the Maintenance Fees in accordance with Schedule 3.
- (2) All invoices submitted by MV must be valid tax invoices and have had a previously issued CoM purchase order associated with it. Where deemed urgent works by MV, MV will carry out the works and notify CoM accordingly upon which time a purchase order will be issued by CoM accordingly.

## 7.3 Payment of invoices

- (1) Where there is no dispute between the parties in relation to an invoice, CoM must pay the invoiced amount to MV in accordance with Schedule 3.
- (2) Where there is a dispute between the parties in relation to an invoice CoM must pay the non-disputed component (if any) of the invoiced amount to MV in accordance with Schedule 3 and may withhold the disputed component of the invoice until the dispute is resolved in accordance with clause 9.

## 7.4 GST

- (1) In this clause 7.4:
  - (a) **GST** means GST as defined in *A New Tax System (Goods and Services Tax) Act 1999* as amended (**GST Act**) or any replacement or other relevant legislation and regulations;
  - (b) words or expressions used in this clause which have a particular meaning in the **GST law** (as defined in the GST Act, and also including any applicable legislative determinations and Australian Taxation Office public rulings) have the same meaning, unless the context otherwise requires;
  - (c) any reference to GST payable by a party includes any corresponding GST payable by the representative member of any GST group of which that party is a member;
  - (d) any reference to an input tax credit entitlement by a party includes any corresponding input tax credit entitlement by the representative member of any GST group of which that party is a member; and
  - (e) if the GST law treats part of a supply as a separate supply for the purpose of determining whether GST is payable on that part of the supply or for the purpose of determining the tax period to which that part of the supply is attributable, such part of the supply is to be treated as a separate supply.

- (2) Unless GST is expressly included, the consideration to be paid or provided under any other clause of this Agreement for any supply made under or in connection with this Agreement does not include GST.
- (3) To the extent that any supply made under or in connection with this Agreement is a taxable supply, the GST exclusive consideration otherwise to be paid or provided for that taxable supply is increased by the amount of any GST payable in respect of that taxable supply and that amount must be paid at the same time and in the same manner as the GST exclusive consideration is otherwise to be paid or provided. A party's right to payment under this clause is subject to a valid tax invoice being delivered to the recipient of the taxable supply.
- (4) To the extent that 1 party is required to reimburse or indemnify another party for a loss, cost or expense incurred by that other party, that loss, cost or expense does not include any amount in respect of GST for which that other party is entitled to claim an input tax credit.

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## 8. Indemnity

### 8.1 Indemnity

Each party (**Indemnifying Party**) indemnifies the other party, its employees and agents (**Indemnified Party**) against all damages, costs, expenses, loss or damage which it or any of them may incur or sustain and all actions, proceedings, claims and demands whatsoever which may be brought or made against it or any of them by any person in respect of or by reason of or arising out of:

- (1) any negligence or other wrongful act or omission of the Indemnifying Party, its employees, agents or subcontractors or of any other persons for whose acts or omissions the Indemnifying Party is liable; or
- (2) any death, personal injury or damage to property to the extent caused or contributed by the Indemnifying Party, its employees, agents or subcontractors or of any other persons for whose acts or omissions the Indemnifying Party is liable.

### 8.2 Reduction of liability

The Indemnifying Party's liability under clause 8.1 is reduced to the extent that any action, proceeding, claim or demand arises out of any negligence or other wrongful act or omission of the Indemnified Party or its employees or agents.

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## 9. Disputes

### 9.1 Dispute

- (1) If a dispute arises between the parties in relation to any matter the subject of this Agreement (**Dispute**), any party seeking to resolve the Dispute must do so in accordance with this clause 9.
- (2) Nothing in this clause prejudices the right of either party to seek urgent injunctive or declaratory relief from a court in connection with a Dispute.

### 9.2 Notification

- (1) A party seeking to resolve a Dispute must notify the existence and nature of the Dispute to the other party (**Notification**).

- (2) Within 7 days of receipt of the Notification, representatives of the parties must meet to negotiate with a view to resolving the Dispute.
- (3) If the Dispute is not resolved within a further 14 days, either party may take such action as it sees fit to have the Dispute dealt with by a court or tribunal of competent jurisdiction as appropriate.

### 9.3 Existing obligations unaffected

Except as set out in clause 7.3, despite the existence of a Dispute, each party must continue to perform its obligations under this Agreement without prejudice to their respective rights and remedies.

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## 10. Confidentiality

### 10.1 Confidentiality of Confidential Information

The Receiving Party must not, without the prior written approval of the Disclosing Party, disclose any Confidential Information of the Disclosing Party. The Receiving Party may disclose the Confidential Information to its employees, agents and subcontractors but only to the extent required to perform its obligations under this Agreement.

### 10.2 Use

The Receiving Party must not, and must ensure its employees, agents and subcontractors do not, use the Disclosing Party's Confidential Information for any purpose other than to perform the Receiving Party's obligations under this Agreement.

### 10.3 Exceptions

The Receiving Party is not in breach of clause 10.1 if:

- (1) it is required by law to disclose the Confidential Information;
- (2) the information disclosed is generally available to the public (other than as a result of the wrongful disclosure by the Receiving Party); or
- (3) such party obtained the Confidential Information from a third party on a non-confidential basis without breach by that third party of any obligation of confidence concerning the Confidential Information.

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## 11. Termination

### 11.1 Termination for breach

Either party may terminate this Agreement immediately by written notice to the other party (**Defaulting Party**) if:

- (1) the Defaulting Party breaches a material term of this Agreement, which is not capable of remedy;
- (2) the Defaulting Party commits a breach of this Agreement and fails to remedy such breach within 20 Business Days after written notice requiring it to do so; or

**11.2 Effect of termination**

- (1) If this Agreement is terminated by either party then COM will no longer be entitled access to the Water.
- (2) Termination of this Agreement for any reason does not prejudice the existing rights and remedies of either party.

**11.3 Survival**

Clauses 1, 6, 7, 8, 9, 10, 11.2, 11.3 and 12 survive expiry or termination of this Agreement.

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**12. General**

**12.1 Assignment**

Neither party may not assign or otherwise deal with this Agreement except with the prior written consent of the other party.

**12.2 Relationship**

This Agreement does not create or evidence a partnership, joint venture, or the relationship of employer and employee between MV and CoM.

**12.3 Further assurance**

Each party must promptly at its own cost do all things (including executing and if necessary delivering all documents) necessary or desirable to give full effect to this Agreement.

**12.4 Severability**

If any provision in this Agreement is unenforceable, illegal or void or makes this Agreement or any part of it unenforceable, illegal or void, then that provision is severed and the rest of this Agreement remains in force.

**12.5 Entire understanding**

This Agreement is the entire agreement and understanding between the parties on everything connected with the subject matter of this Agreement and supersedes any prior agreement or understanding on anything connected with that subject matter.

**12.6 Variation**

An amendment or variation to this Agreement is not effective unless it is in writing and signed by the parties.

**12.7 Waiver**

The failure or delay to exercise a power or right does not operate as a waiver of that power or right. The exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right. A waiver is not effective unless it is in writing. Waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

## 12.8 **Costs and outlays**

Each party must pay its own costs and outlays connected with the negotiation, preparation and execution of this Agreement.

## 12.9 **Notices**

- (1) A notice or other communication connected with this Agreement (**Notice**) has no legal effect unless it is in writing, and in addition to any other method of service provided by law, the Notice may be:
  - (a) sent by prepaid post to the address of the addressee set out in this Agreement or subsequently notified; or
  - (b) sent by facsimile to the facsimile number of the addressee.
- (2) If the Notice is sent or delivered in a manner provided by clause 12.9(1), it must be treated as given to and received by the party to which it is addressed:
  - (a) if sent by post, on the second Business Day (at the address to which it is posted) after posting;
  - (b) if sent by facsimile before 5.00pm on a Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of receipt; or
  - (c) if otherwise delivered before 5.00pm on a Business Day at the place of delivery, upon delivery, and otherwise on the next Business Day at the place of delivery.
- (3) Despite clause 12.9(2)(b) a facsimile is not treated as given or received unless at the end of the transmission the sender's facsimile machine issues a report confirming the transmission and the addressee has not notified the sender that the facsimile was not received in full or in legible form.
- (4) The address for service and facsimile number of each party are set out in Schedule 1.

## 12.10 **Governing law and jurisdiction**

The law of Victoria governs this Agreement. The parties submit to the non-exclusive jurisdiction of the courts of Victoria and of the Commonwealth of Australia.

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**Schedule 1**  
**Agreement Details**

Item 1            **Commencement Date**

1 June 2014

Item 2            **Initial Term**

1 year

Item 3            **Renewal Term**

8 years

Item 4            **MV's notice details**

Name            :     Museum Victoria  
Attention       :     Senior Facility Manager Carlton Gardens  
Address         :     GPO Box 666, Melbourne, VIC 3001  
Facsimile no   :     03 8341 7778

Item 5            **CoM's notice details**

Name            :     City of Melbourne  
Attention       :     Manager, Park Services  
Address         :     GPO Box 1603, Melbourne, VIC 3001  
Facsimile no   :     03 9658 9620

**Schedule 2****Water requirements – calculation of Water****Item 1 Water access schedule****SCHEDULE 2 WATER SHARING AGREEMENT**

<b>USE TIME</b>	<b>Mon</b>	<b>Tues</b>	<b>Wed</b>	<b>Thurs</b>	<b>Fri</b>	<b>Sat</b>	<b>Sunday</b>
<b>City of Melbourne (irrigation)</b>	12am to 4am	12am to 4am	12am to 4am	12am to 4am	12am to 4am	12am to 4am	12am to 4am
<b>Melbourne Museum (Irrigation)</b>	4am to 9am  4pm to 11pm	4am to 9am  4pm to 11pm	4am to 9am  4pm to 11pm	4am to 9am  4pm to 11pm	4am to 9am  4pm to 11pm	4am to 9am  4pm to 11pm	4am to 9am  4pm to 11pm
<b>Shared time-nil irrigation- incidental uses (Fountain Top Up etc)</b>	9am to 4pm	9am to 4pm	9am to 4pm	9am to 4pm	9am to 4pm	9am to 4pm	9am to 4pm

**Item 2 Grant of Special Access**

Museum Victoria will grant CoM reasonable access to irrigation water for the purposes of cleaning the Hochgurtel fountain during the time of MV's water allocation upon receipt of a written notice with a minimum of 2 working days notice, at MV's absolute discretion and subject to clause 3.2 (i) (a).

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**Schedule 3**  
**Fees**

Item 1            **Funding Contribution**

- (a)        \$300,000 plus GST acknowledged by both parties as having been paid on 24 June 2010

Item 2            **Maintenance Fees**

- (a)        Maintenance Fees must be paid by CoM upon receipt of Invoice in accordance with clause 7.
- (b)        Invoices will be provided by MV for the proceeding yearly quarter.
- (c)        Invoices must be paid by CoM or written notice of its dispute received by MV within 14 days of receipt of the Invoice, in accordance with clause 7.



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**Schedule 4**  
**Facility As built drawing**

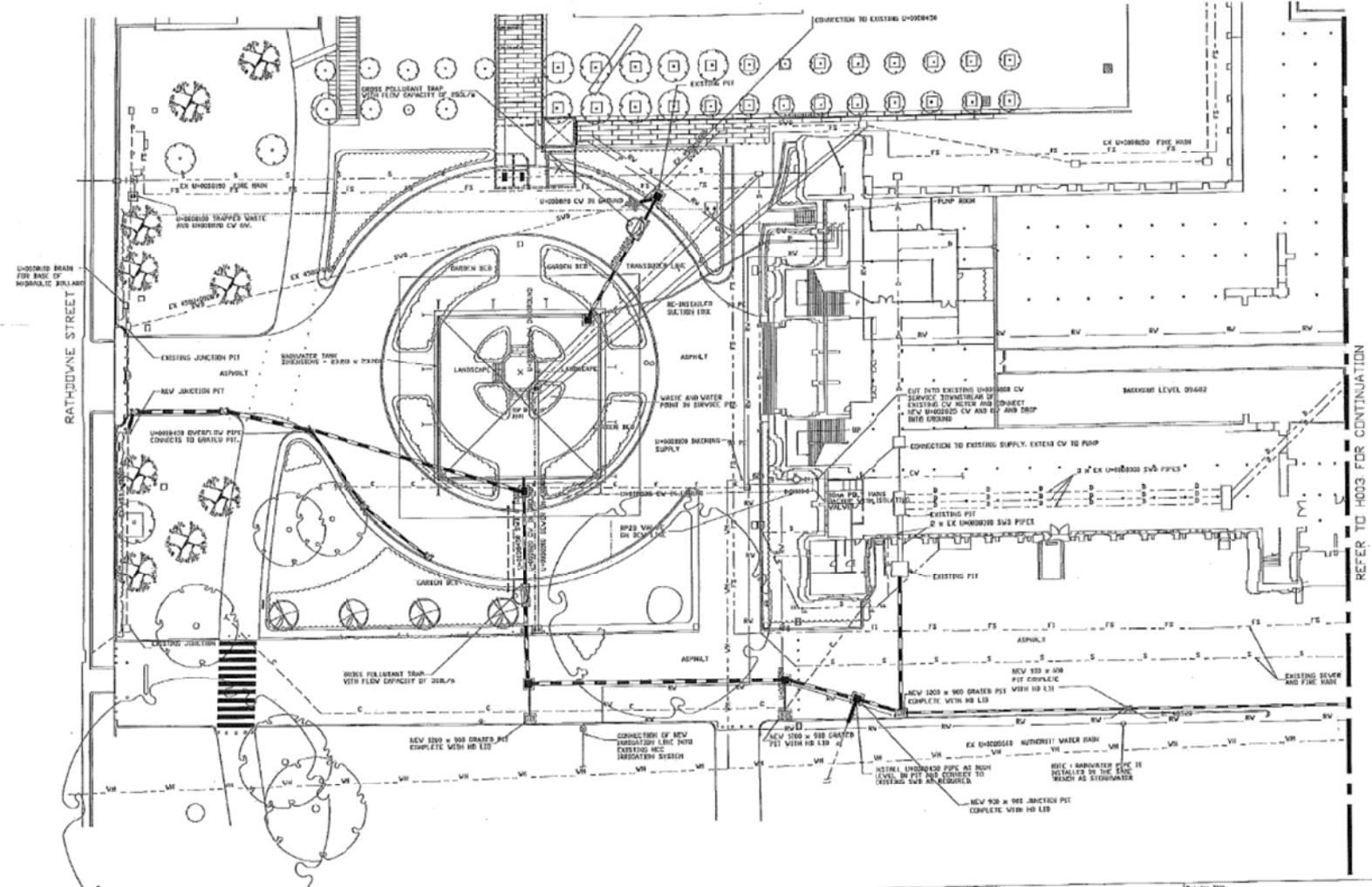
Facility As-built drawing

- (a) Facility As-Built drawing as prepared by 2Construct dated 8/11/11  
Job No.15168 Sheet No.15168-01 Rev 00

Drawing follows this page

Royal Exhibition Building  
Western Forecourt Water Harvesting Facility Carlton Gardens Agreement

Schedule 4- Facility As Built Drawing



SE	AS BUILT FOR APPROVAL	By	SR/11
Rev	Description	By	Date

Status

**AS BUILT**

A Level 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

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Project

ROYAL EXHIBITION BUILDING  
WESTERN FORECOURT PROJECT

Drawing Title

WESTERN FORECOURT RAINWATER TANK LOCATION  
SHEET 1 OF 2

Date	Drawn	Checked	Approved
25/08	SR/11	SR/11	SR/11
Drawn By	Checked By	Drawn No.	Rev.
SR/11	SR/11	13068-01	00

**Executed** as an agreement.

**Signed** for and on behalf of **Museums Board of Victoria** ABN 63 640 679 155 by its authorised signatory in the presence of:

.....  
Witness

.....  
Authorised Signatory

.....  
Name of Witness  
(BLOCK LETTERS)

.....  
Name of Authorised Signatory  
(BLOCK LETTERS)

Signed by Director City Design  
**Melbourne City Council**  
pursuant to a resolution of the Council.

.....  
Director City Design

.....  
Name of Witness  
(BLOCK LETTERS)

.....  
Signature