



Deacons

SPEAR Surveyor Access Agreement

Contact

Robert Bradford
Special Counsel
Deacons

Telephone: (03) 8686 6958
Email: robert.Bradford@deacons.com.au
Website: www.deacons.com.au
Our ref: 2517745

This Agreement is made between the **Department of Sustainability and Environment** (Department) on behalf of the **State of Victoria** of 570 Bourke Street, Melbourne and the **Surveyor** identified in the Reference Schedule.

Introduction

- A.** The Surveyor is granted access to the SPEAR system on the conditions set out below and in the SPEAR Common Rules.
- B.** The Parties agree that in consideration of the access granted to SPEAR by the Department, the Surveyor is bound by the following conditions and the Common Rules.

It is agreed

1. SPEAR Access

The Department grants to the Surveyor a right of access to SPEAR for the purpose of the Surveyor lodging and tracking Relevant Applications and communicating with Customers.

2. Intellectual Property Dispute

The parties acknowledge that there is currently a dispute in relation to ownership of Intellectual Property Rights in survey materials submitted to government for statutory processes, including that submitted to SPEAR, and that nothing in this Agreement or the Common Rules (including clause 12) is to be construed as affecting whatever Intellectual Property Rights (express or implied) that the parties may have in relation to such survey information. Should the matters in dispute be finally determined by a court the parties agree to negotiate in good faith to make such amendments to this Agreement and the Common Rules as are considered appropriate by the parties.

3. Parties Bound

The Surveyor and the Department agree to be bound by these conditions and the Common Rules.

4. **Web Interface**

The Surveyor must only gain access to SPEAR via the SPEAR Internet site using the Web Interface and must not use any program other than an Internet browser to gain such access.

5. **Access to SPEAR**

- 5.1 Subject to availability, the Surveyor may gain access to SPEAR 24 hours a day for every day of the year but the Department does not warrant that SPEAR will always be available when required.
- 5.2 The Department accepts no liability which may arise as a result of any unavailability of, or any interruption of access to, SPEAR and does not guarantee that SPEAR is or will remain error or virus free.

6. **Email Notification**

The Surveyor agrees that email notification of the lodgement of any document or information in SPEAR is sufficient and the Surveyor must check any documents or information notified by SPEAR in a timely and diligent manner.

7. **Surveyor Users**

- 7.1 The Surveyor must appoint Surveyor Users for SPEAR and is fully and solely responsible for validating the identity of Surveyor Users. It is the sole responsibility of the Surveyor (and not of the Department) to monitor the use of any Access Method to access SPEAR and to grant or deny access to SPEAR for Surveyor Users. A Surveyor User who is a Signing User must be a Licensed Surveyor.
- 7.2 The Department is authorised by the Surveyor to act upon all instructions communicated through SPEAR by a Surveyor User. A Surveyor User may be a Signing User or a Standard User.
- 7.3 The Surveyor must identify a Signing User in accordance with the requirements for a Digital Certificate and the Surveyor agrees that the Signing User is duly appointed as a delegate of the Surveyor with the authority to certify or sign documents for and on behalf of the Surveyor. The Department will accept and the Surveyor is bound by all documents certified or signed and submitted using the Digital Certificate.
- 7.4 A Surveyor User who is not authorised as a Signing User is a Standard User. The Standard User shall have authority to enter data and to have access to SPEAR on behalf of the Surveyor and the actions of the Standard User shall be binding actions of the Surveyor.

7.5 The Department will issue each Surveyor User with a username and password which will be unique to that Surveyor User. The Surveyor and Surveyor User must keep all components of the username and password secure and not more than one person must use that username and password. If the security of the username or password is compromised in any way, or is suspected of having been compromised, the Surveyor must immediately stop the use of such username and password and must immediately notify the Department.

7.6 The Department may take any action including cancelling or suspending a username or password at any time without notice if the Department believes, on reasonable grounds, that a username or password is being misused or has been compromised.

8. **Digital Certificate**

8.1 The Surveyor must acquire a Digital Certificate for any Signing User which meets the requirements specified in writing by the Department. The Surveyor must provide the Department with the full name of the user and the relevant Australian Business Number of that user for whom the Digital Certificate has been obtained. The Surveyor agrees that it is fully responsible for ensuring that the usage of the Digital Certificate is in accordance with all terms and conditions applicable to that Digital Certificate.

8.2 The Surveyor is responsible for and indemnifies the Department and the Relevant Council against any and all Loss which results from, and all acts and transactions communicated using a Digital Certificate acquired by the Surveyor, other than during a period that the Digital Certificate has been notified, recorded in any data base checked by the Department, as suspended or revoked by the certificate issuer.

9. **Common Rules**

9.1 The Surveyor agrees that the Common Rules apply to the Surveyor's use of SPEAR and shall bind the Surveyor for all dealings between that Surveyor and any other Customer or user. The Surveyor agrees that the terms and conditions contained in the Common Rules are for the benefit of and may be enforced by, or relied upon by, any other Customer against the Surveyor. To the extent that there is any inconsistency between the provisions of this Agreement and the Common Rules, this Agreement shall prevail.

9.2 The Department may amend the Common Rules by not less than 60 days notice via email to the Surveyor. The Surveyor is deemed to accept the amended Common Rules if it continues to use SPEAR after the expiration of the period of notice.

10. **Term**

- 10.1 The term of this Agreement shall be from the Commencement Date until termination. The Department can immediately suspend the Surveyor's access to SPEAR and provide notice of termination in the event of:
- Any misuse of SPEAR or any fraud by the Surveyor or a Surveyor User.
 - Any significant adverse effect on SPEAR or its operation which is, in the reasonable opinion of the Department, due to access to SPEAR by the Surveyor or any Surveyor User.
- 10.2 Either party may terminate this Agreement by giving the other party not less than 6 calendar months notice of such termination. The Department may terminate this Agreement if it has suspended the Surveyor's use of SPEAR under Clause 10.1 and the Surveyor has failed to rectify the cause of suspension within 28 days of such suspension.

11. **Privacy**

- 11.1 In providing information to the SPEAR system the Surveyor acknowledges that the information may be used for the Authorised Purposes. The Surveyor is bound by the information privacy principles and any applicable code of practice under the *Information Privacy Act 2000 (Vic)* for the purposes of information provided to it or generated by it as a result of the performance or use of the SPEAR system as if it were the Department.

12. **SPEAR Intellectual Property**

The Surveyor agrees that the Department owns all of the Intellectual Property rights in SPEAR and nothing in this Agreement shall be read so as to transfer any rights, title or interest in SPEAR to the Surveyor.

13. **Department and Council Liability**

- 13.1 To the extent permitted by law the Department provides no warranties with respect to SPEAR or any support information or materials. Subject to the following all statutory or implied conditions and warranties are excluded to the extent permitted by law. The liability of the Department and the Relevant Council under any condition or warranty which cannot be legally excluded is limited to:

In the case of goods;

- (1) The replacement of the goods or the supply of equivalent goods;
- (2) The repair of the goods;

(3) The payment of the cost of replacing the goods or of acquiring equivalent goods; or

(4) The payment of the cost of having the goods repaired; and

In the case of services;

(5) Supplying the services again; or

(6) Paying the cost of having the services supplied again.

13.2 To the extent permitted by law, the Department and each Relevant Council exclude liability for any loss or damage arising from or in connection with:

- Any inaccuracy or incompleteness of the information or document contained in or obtained through the use of SPEAR; or
- Use by the Surveyor or any person of SPEAR and the information that may be derived from the system.

14. **Release**

The Surveyor hereby releases the Department and any relevant Responsible Authority, their employees and agents from any Loss suffered or incurred by the Surveyor including but not limited to indirect, special, or consequential damages (including loss of anticipated revenue, business interruption and loss of business) in connection with or arising out of access to SPEAR, the use of SPEAR or the access to or use of information derived from SPEAR (including any lack of access or loss of data) except to the extent that any Loss arises from any wilful or negligent act or omission of the Department or the relevant Responsible Authority, their employees or agents.

15. **Statutory Obligations**

For the avoidance of doubt the parties agree that nothing in this Agreement is to be construed as changing the duties or functions of any party under the *Planning Environment Act 1987* or the *Subdivision Act 1988* or any other Statutory Provision. The Surveyor and the Department must comply with all Statutory Provisions in all matters relating to this Agreement and to any dealing with or use of SPEAR or information derived from it.

16. **Notices**

16.1 Notice or any other Communication connected with this Agreement may be given in writing by prepaid ordinary post or by electronic mail to the addresses of the party as set out in the Reference Schedule.

16.2 A notice sent by post is deemed to have been received on the 2nd Business Day (at the address to which it is posted) after posting. A notice sent by electronic mail before 5pm on a Business Day at the place of receipt, is deemed to have been received on the day it is sent and otherwise on the next Business Day at the place of receipt. An electronic mail message is not treated as given or received if the sender's computer reports that the message has not been delivered.

17. Definitions

The following definitions shall apply in these conditions.

Definitions

Access Method means either a Digital Certificate or username and password or such other method of access to SPEAR as may be approved by the Department from time to time.

Authorised Purpose means the recording and the processing of applications under the *Planning and Environment Act 1987* for the development of land, applications for the subdivision or consolidation of land under the *Subdivision Act 1988*, applications for permits under the *Building Act 1993* and all documentation and associated purposes (including recording for public access) and includes use in records of Responsible Authorities or Referral Authorities, the Land Registry, Crown land records and the digital map base as used and distributed by or on behalf of the State.

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.

Common Rules means the terms and conditions so identified and set out on the SPEAR web site at www.landexchange.vic.gov.au/spear which bind all Customers of SPEAR.

Communication includes any instruction, request, approval, certification, acceptance, confirmation, information, or document.

Council means a Council as defined in the Local Government Act 1989.

Customer means any person or body who enters into an agreement with the Department for access to and use of SPEAR and specifically includes the Surveyor and the Relevant Council.

Digital Certificate means a token based certificate which meets the requirements of the Department as specified in writing by the Department from time to time.

Intellectual Property Rights means any patents, trade marks or service marks, rights in designs, trade or business names, copyrights, domain names and data base rights (whether or not any of these is registered and including applications for registration of any such thing) and all rights or forms of protection of a similar nature having equivalent or similar effect to any of these in any part of the world.

Licensed Surveyor has the same meaning as it is given in the *Surveying Act 2004* (Vic).

Loss means any loss, damage, cost, interest, expense, fee, penalty, fine, forfeiture, assessment, demand, action, suit, claim, proceeding, cause of action, liability or damages incurred by a person and includes:

- (1) the cost of any action taken by any person to protect itself from any loss or to preserve any right it has under this Deed;
- (2) any taxes or duties payable by the person in connection with this Deed (excluding any tax on assessable income); and
- (3) where applicable, all costs actually paid by the person to their own legal representative (whether or not under a costs agreement) and other expenses incurred by the person in connection with a demand, action, arbitration or other proceeding (including mediation, compromise, out of court settlement or appeal).

Personal Information has the same meaning as that provided in Section 3 of the *Information Privacy Act 2000* (Vic).

Referral Authority has the same meaning as that in the *Subdivision Act 1988* (Vic).

Relevant Application means an application made to a Responsible Authority and relating to:

- (1) subdivision or consolidation of any land under the *Subdivision Act 1988* (Vic);
- (2) approval of the development of any land under the *Planning and Environment Act 1987* (Vic)) to the extent that it requires subdivision or consolidation as referred to in (a) above; and
- (3) any other activity through which an application may be received through SPEAR, as the Responsible Authorities and the Department may agree from time to time.

Relevant Council means the Council responsible for processing the Relevant Application.

Responsible Authority has the same meaning as in the *Planning and Environment Act 1987* (Vic).

Signing User means an appointed user who has been issued with a Digital Certificate by the Surveyor and who has been delegated the authority by the Surveyor to certify or to sign documents related to Relevant Applications.

SPEAR means the computerised system for Streamlined Planning through Electronic Applications and Referrals developed by the Department as Modified from time to time.

SPEAR Application means a Relevant Application lodged in SPEAR.

SPEAR Internet Site means the URL specified by the Department from time to time as the location for accessing SPEAR through the Web Interface, which URL at the Commencement Date is specified in the Reference Schedule.

Standard User means an appointed Surveyor User other than a Signing User.

State means the Crown in right of the State of Victoria.

Statutory Provision means a statute, regulation or provision of a statute or regulation.

Surveyor means the party so identified in the Reference Schedule.

Surveyor User means any User appointed to act on behalf of the Surveyor.

User means any person authorised to access and use SPEAR.

Web Interface means the interface to SPEAR which is intended to be accessed by Customers of SPEAR using an internet browser and internet based communications.

Reference Schedule

18. **Surveyor** [Surveying Firm]
Company name:
ABN:
19. **Surveying Firm Address:** [Address of Company Head Office]
Postal address:
Email:
20. **Department's Address:** Dept Sustainability & Environment
Postal address: 570 Bourke Street, Melbourne, 3000 VIC
Email: customer.service@dse.vic.gov.au
21. **Commencement Date** [if different from signing date]
22. **SPEAR Internet Site** www.landexchange.vic.gov.au/spear
23. **Surveyor User(s) nominated** [Names of Licensed Surveyors currently using SPEAR]

Executed for and on behalf of the Surveyor [Director of the Firm]

[]

Print Name

Date

Executed for and on behalf of the Department

[]

Print Name

Date