

Terms and conditions for website hosting provided by Aubergine 262 Ltd in relation to Council Website Service Contracts:

DATE:

PARTIES:

- (1) Aubergine 262 Ltd, a Limited Company incorporated in England and Wales (registration number 4478628) having its registered office at 12 Church Square, Leighton Buzzard, Bedfordshire LU7 1AE (the "**Company**").
- (2) [*Customer as defined in the invoice provided*] (the "**Customer**").

BACKGROUND:

- (A) The Company has expertise in the provision of website hosting services, and the Customer has appointed the Company to provide website hosting services on the terms of this Agreement. No variation to this agreement will be accepted unless signed in writing by the Company.

AGREEMENT:

1. Definitions and interpretation

1.1 In this Agreement:

"**Affiliate**" means a company, firm or individual that Controls, is Controlled by, or is under common Control with the relevant company, firm or individual;

"**Agreement**" means this agreement (including the Schedule) and any amendments to it from time to time;

"**Business Day**" means Monday to Friday, excluding UK Bank Holidays;

"**Business Hours**" means between 08:30 and 17:30 on a Business Day;

"**Charges**" means the amounts payable by the Customer to the Company under or in relation to this Agreement (as set out in the Schedule);

"**Confidential Information**" means any information supplied (whether supplied in writing, orally or otherwise) by one party to the other party marked as "confidential", described as "confidential" or reasonably understood to be confidential; and

"**Control**" means the legal power to control (directly or indirectly) the management of an entity (and "**Controlled**" will be construed accordingly);

"**Effective Date**" means the implementation date, as specified in the Schedule;

"Force Majeure Event" means any event or sequence of events beyond a parties reasonable control (and that could not have been reasonably anticipated or avoided) and which prevents it from, or delays it in, performing its obligations under this Agreement including but not limited to, (a) an act of God, fire, flood, drought, earthquake, windstorm or other natural disaster; (b) an act of any sovereign including war (or threat of, or preparation for a war), armed conflict (or threat of, or preparation for armed conflict), invasion, act of foreign enemies, hostilities (whether war be declared or not), rebellion, revolution, insurrections, military or usurped power or confiscation; (c) acts of terrorism, civil war, civil commotion or riot (or the threat of or preparation for acts of terrorism, civil war, civil commotion or riot); (d) civil emergency (whether an emergency be declared or not); (e) fire or explosion other than, in each case, one caused by breach of contract by, or with the assistance of, the party seeking to rely on it as a force majeure event or by a member of the same group of such a party; (f) adverse weather conditions; (g) nationalisation, requisition, destruction or damage to property by or under order of any government or public or local authority; (h) embargo, blockade, imposition of sanctions or breaking off of diplomatic relations or similar actions; (i) radioactive, nuclear, chemical or biological contamination or sonic boom, pressure waves caused by aircraft travelling at sonic or supersonic speeds; (j) law, or governmental order, rule, regulation or direction, judgment, order or decree; (k) epidemic or pandemic; (l) labour dispute including but not limited to strikes, industrial action, lock outs or boycott (of a third party workforce only or other than by a member of the same group as the party seeking to rely on it as a force majeure event); (m) interruption or failure of utility service including to electric, power, gas, water, internet or telephone service; (n) loss at sea; (o) collapse of building structures; (p) failure of the transportation of any personnel, equipment, machinery supply or material required by a party for performance of the agreement; (q) failure of plant machinery, machinery, computers or vehicles; (r) non-performance by suppliers or subcontractors; (s) malicious or negligent damage or other act (other than in each case by the party seeking to rely on it as a force majeure event or by a member of the same group as such party; (t) any action taken by a government or public authority, including but not limited to, a failure to grant a necessary licence or consent or the imposition of an export restriction, import restriction, quota or other restriction or prohibition; (u) accidental damage or other act but not including without limitation an inability to pay, a shortage of raw materials, an increase in the price of raw materials, over commitment, market circumstances or other circumstances that may make the terms of this agreement unattractive to a party.

"Implementation Date" means the date specified as such in the Schedule;

"Intellectual Property Rights" means all intellectual property rights wherever in the world, whether registered or unregistered, including any application or right of application for such rights (and the "intellectual property rights" referred to above include copyright and related rights, moral rights, database rights, confidential information, trade secrets, know-how, business names, trade names, domain names, trade marks, service marks, passing off rights, unfair competition rights, patents, petty patents, utility models, semi-conductor topography rights and rights in designs);

"Minimum Term" means the period of 1 Year starting on the Effective Date;

"Personal Data" has the meaning given to it in the Data Protection Act 1998 and subsequent General Data Protection Regulation;

"Prohibited Content" means:

- (a) material which breaches any applicable laws, regulations or legally binding codes, or infringes any third party Intellectual Property Rights or other third party rights, or may give rise to any form of legal action against the Company or the Customer or any third party;
- (b) pornographic or lewd material;
- (c) messages or communications which are offensive, abusive, indecent or obscene, are likely to cause annoyance, inconvenience or anxiety to another internet user, or constitute spam or bulk unsolicited mail in the reasonable opinion of the Company;

"Resources" means the resources specified in the Schedule;

"Schedule" means the schedule attached to this Agreement;

"Service Level Agreement ("SLA")" means the service level agreed in a separate Contract between the Customer and the Company;

"Services" means the services detailed in Clause 4;

"Term" means the term of this Agreement;

"Website" means the website specified in the Schedule; and

"Year" means a period of 365 days (or 366 days if there is a 29 February during the relevant period) starting on the Implementation Date as specified in the Schedule, or on any anniversary of the Implementation Date.

1.2 In this Agreement, a reference to a statute or statutory provision includes a reference to:

- (a) that statute or statutory provision as modified, consolidated and/or re-enacted from time to time; and
- (b) any subordinate legislation made under that statute or statutory provision.

1.3 The Clause headings do not affect the interpretation of this Agreement.

1.4 The ejusdem generis rule is not intended to be used in the interpretation of this Agreement; it follows that a general concept or category utilised in this Agreement will not be limited by any specific examples or instances utilised in relation to such a concept or category.

2. Term

This Agreement will come into force on the Implementation Date and will continue in force indefinitely, unless and until terminated in accordance with Clause 13, upon which it will terminate automatically, unless terminated earlier in accordance with Clause 13.

3. Transition and implementation

- 3.1 The Company will implement the hosting of the Website on or before the Implementation Date or, where the Company does not hold a copy of the Website at least 5 Business Days before the Implementation Date, within 5 Business Days after the date of receipt of a copy of the Website.
- 3.2 Within 5 Business Days following the Implementation Date (or, if later, the actual date of implementation of the hosting of the Website), the Customer will comprehensively test the hosting of the Website and will inform the Company of the results of those tests.

4. Services

- 4.1 From the date of actual implementation, the Company will host the Website in the manner specified in the Schedule, and will make available the Resources for this purpose.
- 4.2 The Company may suspend some or all of the Services in order to carry out scheduled or emergency maintenance or repairs. Subject to this, the Company will use its best endeavours to maintain the Website availability level specified in the Schedule.
- 4.3 The Company will make available to the Customer the ability to update or amend the Website but the customer irrevocably acknowledges that the Company can accept no liability in respect of any updates or amendments and the limitations to liability contained below are expressly reserved.
- 4.4 The Company will not provide email services.
- 4.5 The Company will make available, on Business Days between the hours of 9 am and 5 pm (local time), a telephone helpdesk facility for the purpose of providing support to the Customer (and the Company's other customers). The Company will use reasonable endeavours to respond to requests for support in within 72 hours, or in accordance with an agreed SLA.
- 4.6 Once every day, the Company will arrange for the on-site storage of a current back-up of the Customer's Website Database & Files (excluding email) (which will be over-written on the following on-site back-up date).

5. Customer Responsibilities

- 5.1 The Customer will provide the Company with all co-operation, information and documentation reasonably required for the implementation and hosting of the Website and the provision of the other Services, and the Customer will be responsible for procuring any third party co-operation reasonably required for the implementation and hosting of the Website and the provision of the other Services.
- 5.2 The Services are provided to the Customer only, and the Customer may not resell the Services to any third party.

- 5.3 The Customer will be responsible for obtaining suitable licences of third party software which are required for the full use of the Services.
- 5.4 It is the Customer's responsibility to keep any passwords relating to the Services confidential, and to change such passwords on a regular basis. The Customer will notify the Company immediately if it becomes aware that a password relating to the Services is or may have been compromised or misused.
- 5.5 The Customer will be responsible for all aspects in relation to compliance with current Data Protection regulation and reporting.
- 5.6 The Customer shall indemnify Aubergine 262 Limited against all damages, losses, expenses and costs (including legal costs and disbursements) on a full indemnity basis arising as a result of any action or claim that materials constitute inappropriate content.

6. Acceptable Use

- 6.1 The Customer must not use the Website or any of the Services:
- (a) to host, store, send, relay or process any Prohibited Content;
 - (b) for any purpose which is unlawful, fraudulent, or infringes any third party rights;
 - (c) in any way which may put the Company in breach of a contractual or other obligation owed by the Company to any internet service provider.
- 6.2 The Company reserves the right to remove content from the Website where it reasonably suspects or has reason to believe that such content is Prohibited Content.
- 6.3 The Website's utilisation of Resources must not exceed the limits set out in the Schedule. If the Website's utilisation of Resources exceeds those limits, the parties will endeavour to agree a variation to this Agreement. If the parties cannot agree such a variation within a reasonable period (being not more than 30 days) following notice from the Company to the Customer requesting such variation, and Resource utilisation continues to exceed those limits, the Customer will be deemed to be in material breach of this Agreement for the purposes of Clause 14.
- 6.4 The Customer acknowledges that the Company does not purport to monitor the content of the Website or the use of the Services and under no circumstances whatsoever will the Company accept liability for any breaches of any nature in respect of any content placed on the website by any Customer or any of its Servants or Agents or Customers or Visitors to their website.
- 6.5 Where the Company reasonably suspects that there has been a breach of the provisions of this Clause 6, the Company may suspend any or all of the Services and/or the Customer's access to any or all Services while it investigates the matter.
- 6.6 Subject to Clause 6.3, any breach by the Customer of this Clause 6 will be deemed to be a material breach of this Agreement for the purposes of Clause 14.

6.7 The Customer will indemnify the Company against all damages, losses and expenses arising as a result of any breach by the Customer of this Clause 6.

7. Charges and payment

7.1 The Company will issue invoices for the Charges to the Customer on or before the relevant dates set out in the Schedule

7.2 The Customer will pay the Charges to the Company within 28 days of the date of issue of an invoice issued in accordance with Clause 7.1

7.3 All Charges stated in or in relation to this Agreement are stated exclusive of VAT, unless the context requires otherwise.

7.4 Charges must be paid by bank transfer or by cheque (using such payment details as are notified by the Company to the Customer from time to time).

7.5 If the Customer does not pay any amount properly due to the Company under or in connection with this Agreement, the Company may:

(a) charge the Customer interest on the overdue amount at the rate of 5% per year above the base rate of HSBC Bank Plc from time to time (which interest will accrue daily until the date of actual payment, be compounded quarterly, and be payable on demand); or

(b) claim interest and statutory compensation from the Customer pursuant to the Late Payment of Commercial Debts (Interest) Act 1998.

(c) costs of recovery

i we shall be entitled to recover on a full indemnity basis (irrespective of Court track) for all works in accordance with these terms and conditions, all costs incurred by us in collecting overdue payments whether or not proceedings are issued.

ii should any assessment by the Court be required such assessment is to be on an indemnity basis which, for the avoidance of doubt, will include all works undertaken that are irrecoverable on an inter partes basis irrespective as to any track to which recovery proceedings may be allocated.

iii the hourly rates payable will be at the level of the fee earner at any firm of solicitors instructed by us to conduct the matter and will not be by virtue of any guideline rates that may be applicable to summary assessment procedures.

iv a copy of these terms will be produced to the Court should the need arise to assist with the determination of recoverable costs, any assessment of those costs and proof that a contract between us subsists to cover these issues.

8. Warranties

8.1 The Customer warrants to the Company that it has the legal right and authority to enter into and perform its obligations under this Agreement.

8.2 The Company warrants to the Customer:

- (a) that it has the legal right and authority to enter into and perform its obligations under this Agreement; and
 - (b) that it will perform its obligations under this Agreement with reasonable care and skill.
- 8.3 All of the parties' liabilities and obligations in respect of the subject matter of this Agreement are expressly set out in the terms of this Agreement. To the maximum extent permitted by applicable law, no other terms concerning the subject matter of this Agreement will be implied into this Agreement or any related contract.

9. Limitations and exclusions of liability

9.1 Nothing in the Agreement will:

- (a) limit or exclude the liability of a party for death or personal injury resulting from negligence;
- (b) limit or exclude the liability of a party for fraud or fraudulent misrepresentation by that party;
- (c) limit any liability of a party in any way that is not permitted under applicable law; or
- (d) exclude any liability of a party that may not be excluded under applicable law.

9.2 The limitations and exclusions of liability set out in this Clause 9 and elsewhere in the Agreement:

- (a) are subject to Clause 9.1;
- (b) govern all liabilities arising under the Agreement or any collateral contract or in relation to the subject matter of the Agreement or any collateral contract, including liabilities arising in contract, in tort (including negligence) and for breach of statutory duty; and
- (c) will not limit or exclude / limit and exclude the liability of the parties under the express indemnities set out the Agreement.

9.3 Neither party will be liable in respect of any loss of profits, income, revenue, use, production or anticipated savings.

9.4 Neither will be liable for any loss of business, contracts or commercial opportunities.

9.5 Neither party will be liable for any loss of or damage to goodwill or reputation.

9.6 Neither party will be liable in respect of any loss or corruption of any data, database or software.

9.7 Neither party will be liable in respect of any special, indirect or consequential loss or damage.

- 9.8 Neither party will be liable for any losses arising out of a Force Majeure Event. The Customer and the Company irrevocably acknowledge that the Company's liability is limited to resolving any technical non-compliant issues that it has been made aware of. It is the responsibility of the Customer (and not the Company) to make the Company aware of any such non-compliant issues. Under no circumstances whatsoever will the Company accept any liability should the Client be taken to Court or otherwise fined or litigated against or referred to a Regulator for displaying non-compliant matters on the website it has developed or hosts.
- 9.9 The Client irrevocably acknowledges the Company's limitations and warranties are to seek to resolve reasonably any technical or non-compliant issues within such agreed time frame as may be set out from time to time in the Service Level Agreement. The Customer irrevocably acknowledges that software changes and evolves constantly such that a system is guaranteed to be compliant on the day it goes live but no warranty can be made as to any further changes at any time thereafter as these factors are acknowledged irrevocably by the Customer to be beyond the control and knowledge of the Company. The Customer acknowledges that all issues arising as a result of content on any page being non-compliant are the responsibility of the individual council to resolve although the Company will render assistance if requested to do so notwithstanding that they accept no liability for any problems thereby arising.

10. Force Majeure

- 10.1 Where a force majeure occurs, or is reasonably likely to occur, a party shall not be liable to the extent that it is delayed in or prevented from performing its obligations under this agreement due to force majeure and the obligations of the parties affected by the force majeure shall be suspended for the duration of the force majeure event provided that the affected party:
- 10.1.1 Promptly notifies the other party of the force majeure event and its expected duration;
 - 10.1.2 Uses reasonable endeavours to minimise the effects of the event of the force majeure; and
 - 10.1.3 Keeps the other party informed of the status of the event and its impact on the performance of the Agreement.
- 10.2 If, due to the force majeure, a party:
- 10.2.1 Is or is likely to be unable to perform a material obligation or any of its obligations; or
 - 10.2.2 Is or is likely to be delayed in or prevented from performing its obligations for a continuous period of 30 days of operations of the agreement or more than business days, the other party or either party may terminate this agreement on written notice or the parties will renegotiate the agreement in good faith for continuation as nearly as possible to its original commercial intent.
- 10.3 No fee shall be due to the affected party for any period during which a party is prevented from performing its obligations in connection with this agreement due to a force majeure event.

11. Data protection

- 11.1 The Customer warrants that it has the legal right to disclose all Personal Data that it does in fact disclose to the Company under this Agreement, and that the processing

of that Personal Data by the Company for the purposes of and in accordance with the terms of this Agreement will not breach any applicable laws (including the Data Protection Act 1998 and subsequent General Data Protection Regulation).

11.2 The Company warrants that:

- (a) it will act only on instructions from the Customer in relation to the processing of any Personal Data performed by the Company on behalf of the Customer; and
- (b) it has in place reasonable security measures (both technical and organisational) against unlawful or unauthorised processing of Personal Data and against loss or corruption of Personal Data processed by the Company on behalf of the Customer.

11.3 The Company will not be responsible or liable for any loss as a result of a data breach.

12. Confidentiality

12.1 Each party will keep confidential the Confidential Information of the other party, and will not disclose that Confidential Information except as expressly permitted by this Clause 12.

12.2 Each party will protect the confidentiality of the Confidential Information of the other party using at least reasonable security measures.

12.3 The Confidential Information of a party may be disclosed by the other party to its employees and professional advisers, provided that each recipient is legally bound to protect the confidentiality of the Confidential Information.

12.4 These obligations of confidentiality will not apply to Confidential Information that:

- (a) has been published or is known to the public (other than as a result of a breach of this Agreement);
- (b) is known to the receiving party, and can be shown by the receiving party to have been known to it, before disclosure by the other party; or
- (c) is required to be disclosed by law, or by an order (binding upon the relevant party) of a competent governmental authority, regulatory body or stock exchange.

13. Publicity

Neither party will make any public disclosure relating to this Agreement (including press releases, public announcements and marketing materials) without the prior written consent of the other party, not to be unreasonably withheld or delayed.

14. Termination

14.1 Either party may terminate this Agreement at any time by giving at least 30 days' written notice to the other party, expiring at any time after the end of the Minimum Term.

14.2 Either party may terminate this Agreement immediately by giving written notice to the other party if the other party:

- (a) commits any material breach of any term of this Agreement, and:
 - (i) the breach is not remediable; or
 - (ii) the breach is remediable, but the other party fails to remedy the breach within 30 days of receipt of a written notice requiring it to do so; or
- (b) persistently breaches the terms of this Agreement.

14.3 Either party may terminate this Agreement immediately by giving written notice to the other party if:

- (a) the other party:
 - (i) is dissolved;
 - (ii) ceases to conduct all (or substantially all) of its business;
 - (iii) is or becomes unable to pay its debts as they fall due;
 - (iv) is or becomes insolvent or is declared insolvent; or
 - (v) convenes a meeting or makes or proposes to make any arrangement or composition with its creditors;
- (b) an administrator, administrative receiver, liquidator, receiver, trustee, manager or similar is appointed over any of the assets of the other party;
- (c) an order is made for the winding up of the other party, or the other party passes a resolution for its winding up (other than for the purpose of a solvent company reorganisation where the resulting entity will assume all the obligations of the other party under this Agreement);
- (d) (where that other party is an individual) that other party dies, or as a result of illness or incapacity becomes incapable of managing his or her own affairs, or is the subject of a bankruptcy petition or order.

15. Effects of termination

15.1 Upon termination all the provisions of this Agreement will cease to have effect, save that the following provisions of this Agreement will survive and continue to have effect (in accordance with their terms or otherwise indefinitely): Clauses 1, 6.7, 7.5, 8, 9, 11, 12, 15 and 16.3 to 16.12.

15.2 Termination of this Agreement will not affect either party's accrued rights (including accrued rights to be paid) as at the date of termination.

15.3 If this Agreement is terminated under Clause 14.1, or by the Customer under Clause 14.2 or 14.3 (but not in any other case):

- (a) the Company will promptly provide to the Customer a backup of the site's uploaded images and documents.
- (b) The Company will not share any proprietary code, platform or system that forms part of the Company's intellectual property which includes the website framework, theme and installed plugins and software.
- (c) The Company will provide support to transfer the domain name of the website to another provider as required.

15.4 The Customer will not be entitled to any refund of Charges on termination, and will not be released from any obligation to pay Charges to the Company.

16. General

16.1 Any notice given under this Agreement must be in writing (whether or not described as "written notice" in this Agreement) and must be delivered personally, sent by pre-paid first class post, or sent by email, for the attention of the relevant person, and to the relevant address or email address given below (or as notified by one party to the other in accordance with this Clause).

The Company
Mark Tomkins or Matthew Willson, Aubergine 262 Ltd 10-12 Church Square,
Leighton Buzzard, Bedfordshire LU7 1AE support@aubergine262.com

The Customer [*as defined in the invoice provided*]

16.2 A notice will be deemed to have been received at the relevant time set out below (or where such time is not within Business Hours, when Business Hours next begin after the relevant time set out below):

- (a) where the notice is delivered personally, at the time of delivery;
- (b) where the notice is sent by first class post, 48 hours after posting; and
- (c) where the notice is sent by email at the time of the transmission (providing the sending party retains written evidence of the transmission).

16.3 No breach of any provision of this Agreement will be waived except with the express written consent of the party not in breach.

16.4 If a Clause of this Agreement is determined by any court or other competent authority to be unlawful and/or unenforceable, the other Clauses of this Agreement will continue in effect. If any unlawful and/or unenforceable Clause would be lawful or enforceable if part of it were deleted, that part will be deemed to be deleted, and the rest of the Clause will continue in effect (unless that would contradict the clear intention of the parties, in which case the entirety of the relevant Clause will be deemed to be deleted).

- 16.5 Nothing in this Agreement will constitute a partnership, agency relationship or contract of employment between the parties.
- 16.6 This Agreement may not be varied except by a written document signed by or on behalf of each of the parties.
- 16.7 Either party may freely assign their rights and obligations under this Agreement without the other party's consent to any Affiliate of the assigning party or any successor to all or substantial part of the business of the assigning party from time to time. Save as expressly provided in this Clause or elsewhere in this Agreement, neither party may without the prior written consent of the other party assign, transfer, charge, license or otherwise dispose of or deal in this Agreement or any rights or obligations under this Agreement.
- 16.8 The Company may not subcontract any of its obligations under this Agreement to any third party.
- 16.9 Each party agrees to execute (and arrange for the execution of) any documents and do (and arrange for the doing of) any things reasonably within that party's power, which are necessary to enable the parties to exercise their rights and fulfil their obligations under this Agreement.
- 16.10 This Agreement is made for the benefit of the parties, and is not intended to benefit any third party or be enforceable by any third party. The rights of the parties to terminate, rescind, or agree any amendment, waiver, variation or settlement under or relating to this Agreement are not subject to the consent of any third party.
- 16.11 This Agreement constitutes the entire agreement and understanding of the parties in relation to the subject matter of this Agreement, and supersedes all previous agreements, arrangements and understandings between the parties relating to the subject matter of this Agreement. Subject to Clause 9.1, each party acknowledges that no representations or promises not expressly contained in this Agreement have been made by or on behalf of the other party.
- 16.12 This Agreement will be governed by and construed in accordance with the laws of England; and the courts of England will have exclusive jurisdiction to adjudicate any dispute arising under or in connection with this Agreement.