

# Planning Agreement

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Marrickville Metro Shopping Centre Pty Limited ACN 111 075 837 as Trustee for the Marrickville Metro Trust (ABN 16 208 028 541)

Inner West Council (ABN 19 488 017 987)

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# Planning Agreement

## Dated

## Parties

1. **Marrickville Metro Shopping Centre Pty Limited ACN 111 075 837 as Trustee for the Marrickville Metro Trust (ABN 16 208 028 541)** of Level 16, 50 Bridge Street, Sydney NSW 2000 (**Developer**).
2. **Inner West Council (ABN 19 488 017 987)** of Petersham Service Centre, 2-14 Fisher Street, Petersham NSW 2049 (**Council**).

## Background

- A. The Developer is the registered proprietor of the Land.
- B. Council is the local authority constituted under the *Local Government Act 1993* in respect of the Land, and is a consent authority constituted under the Act.
- C. On 19 March 2012 the Developer obtained the Concept Approval to carry out the Development on the Land.
- D. The Concept Approval requires the Developer to enter into this Agreement to provide public benefits in the form of Monetary Contributions.

## Operative provisions

### 1. Defined meanings

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The definitions and interpretation clause at the back of this Agreement sets out and explains the defined terms used in this Agreement and the rules of interpretation that apply.

### 2. Planning agreement under the Act

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The Parties agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

### 3. Application of this Agreement

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This Agreement applies to:

- (a) the Land; and
- (b) the Development.

### 4. Operation of this Agreement

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- 4.1 This Agreement takes effect on the date it is executed by both Parties.
- 4.2 Execution must occur prior to the issue of a Construction Certificate for the development consent relating to Stage 1B of the Concept Approval MP 09\_0191.

## 5. Sections 94, 94A and 94EF of the Act

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- 5.1 Section 94 and section 94A of the Act are not excluded in respect of the Development.
- 5.2 Section 94EF of the Act is not excluded in respect of the Development.

## 6. Development Contributions to be made under this Agreement

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- 6.1 The Developer must provide the Monetary Contributions in accordance with Schedule 1 of this document.
- 6.2 The Monetary Contributions set out in Schedule 1 are to be adjusted from the date of the Concept Approval, being 19 March 2012 until the time of payment in line with any change in the Consumer Price Index: All Groups Index Number for Sydney provided by the Bureau of Statistics over that time period.

## 7. Notices

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- 7.1 Any notice, demand, consent, approval or communication under this document (**Notice**) that must or may be given or made to a Party this document must be:
- (a) in writing, in English and signed by a person duly authorised by the sender; and
  - (b) hand delivered or sent by post or electronic notification to that Party at its contact details as set out below:

### **Council**

Attention: General Manager

Address: 2-14 Fisher Street, Petersham NSW 2049

Email: [council@innerwest.nsw.gov.au](mailto:council@innerwest.nsw.gov.au)

### **Developer**

Attention: The Company Secretary

Address: Marrickville Metro Shopping Centre Pty Limited  
33 Alfred Street  
Sydney NSW 2000

Email: [cosec@ampcapital.com](mailto:cosec@ampcapital.com)

With a copy of all notices to be sent to:

Attention: Robert Lewis, Development Manager

Address: AMP Capital Investors Limited  
Level 16, 50 Bridge Street  
Sydney NSW 2000

Email: [robert.lewis@ampcapital.com](mailto:robert.lewis@ampcapital.com)

Phone: 0413 027 689

- 7.2 If a Party gives the other Party 3 business days' notice of a change of its address or email, any notice, consent, information, or request is only given or made by that other Party if it is delivered, posted or emailed to the latest address or email.
- 7.3 Any notice, consent, information, or request is to be treated as given or made at the following time:
- (a) if it is delivered, when it is left at the relevant address;
  - (b) if it is sent by post, 2 business days after it is posted; or
  - (c) if it is sent by email, the next business day unless the sender receives an automated message identifying that the email has not been delivered in which case the notice, consent information or request is not be treated as given or made.
- 7.4 If any notice, consent, information, or request is delivered on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

## **8. Registration**

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- 8.1 The Developer agrees to the registration of this Agreement under section 93H of the Act in relation to the Land.
- 8.2 Within 20 Business Days of this Agreement coming into effect, the Developer, at its own expense, will take all necessary steps to register this Agreement on all titles for the Land.
- 8.3 The Developer must give the Council a copy of the relevant folio of the Register and a copy of the registered dealing within 21 Business Days of registration of this Agreement.

## **9. Termination of Document**

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Either Party may terminate this Agreement if the Agreement takes effect in accordance with clause 4:

- (a) and the Concept Approval issued for the Development lapses (in accordance with section 95 of the Act); or
- (b) the Concept Approval issued for the Development is declared by a Court of competent jurisdiction to be void or invalid; or
- (c) the Concept Approval is surrendered in accordance with section 104A of the Act.

## **10. Release and discharge**

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The Developer is released and discharged from its obligations under this Agreement upon:

- (a) meeting its obligations set out in Schedule 1; and/or
- (b) termination under clause 9.

## **11. Dispute Resolution**

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- 11.1 If any dispute arises out of or in connection with this Agreement, the following procedure must be followed in order to resolve it:
- (a) any Party may give written notice of the dispute to the other Party with such notice to include sufficient detail for the other Party to understand the nature of the dispute;
  - (b) representatives of each Party with sufficient authority to resolve the dispute must meet within 10 Business Days of receipt of the notice and attempt in good faith to resolve the dispute; and
  - (c) for the purposes of this clause, a meeting may take place by telephone or any other agreeable means of communication.
- 11.2 If the Parties fail to resolve the dispute after following the procedures set out in clause 11.1, the dispute must be referred to expert determination within 10 Business Days of the date of the final meeting held in accordance with clause 11.1, such expert determination to be run with as little formality as possible and otherwise at the direction of the appointed expert.
- 11.3 The expert appointed to determine the dispute must act as an expert and not an arbitrator their determination will be binding upon the Parties unless otherwise agreed and their costs must be shared equally between the Parties.
- 11.4 If the Parties fail to agree on the identity of an expert within the timeframe for referral identified in clause 11.2, the identity of the expert is to be determined by the Chairperson of the Australian Commercial Disputes Centre in Sydney (ACDC), or, if ACDC no longer exists, the chairperson of a reputable commercial dispute resolution body as agreed between the Parties, or failing agreement, as nominated by the Council.

## **12. Enforcement**

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- 12.1 In accordance with section 109H(2) of the Act, the obligation to provide the Monetary Contributions to Council must be satisfied as set out in Schedule 1.
- 12.2 The Developer has agreed to provide security to Council in the form of Bank Guarantees for the performance of the Developer's obligations under this Agreement as set out in Schedule 1.
- 12.3 These Bank Guarantees will be procured by the Developer in favour of Council and returned to the Developer by Council upon the Developer satisfying all of its obligations under this Agreement.
- 12.4 This Agreement may be enforced by either Party in any court of competent jurisdiction in the State of New South Wales.

## **13. Approvals and consent**

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The Parties acknowledge that:

- (a) except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party must act reasonably in giving or withholding an approval or consent to be given under this Agreement;
- (b) this Agreement does not impose any obligation on the Council to grant an approval under the Act.

#### **14. Costs**

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The Parties will each bear their own costs of negotiating, preparing and executing this Agreement.

#### **15. Limitation of Liability**

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The Developer's liability is limited in accordance with Annexure A.

#### **16. Entire Agreement**

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This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.

#### **17. Further acts**

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Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.

#### **18. Governing law and jurisdiction**

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This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

#### **19. Joint and individual liability and benefits**

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Except as otherwise set out in this Agreement, any document, covenant, representation or warranty under this Agreement by two or more persons binds them jointly and each of them individually, and any benefit in favour of two or more persons is for the benefit of them jointly and each of them individually.

#### **20. No fetter**

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Nothing in this Agreement will be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing will be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

#### **21. Representations and warranties**

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The Parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under the document and that entry into this Agreement will not result in the breach of any law.

#### **22. Severability**

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If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

## 23. Modification

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No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

## 24. Waiver

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The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party. A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

## 25. GST

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If any Party reasonably decides that it is liable to pay GST on a supply made to the other Party under this Agreement and the supply was not priced to include GST, the recipient of the supply must pay an additional amount equal to the GST on that supply.

## 26. Definitions and interpretations

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26.1 In this Agreement the following definitions apply:

**Act** means the *Environmental Planning and Assessment Act 1979* (NSW).

**Bank Guarantee** means an irrevocable unconditional bank guarantee or documentary performance bond for the guarantee amount which must:

- (a) be denominated in Australian dollars;
- (b) be an unconditional undertaking;
- (c) be signed and issued by a bank licensed to carry on business in Australia or an Australian Prudential Regulation Authority (APRA) regulated authorised deposit taking institution;
- (d) be issued on behalf of the Developer;
- (e) have no expiry or end date;
- (f) state the beneficiary as the Council;
- (g) be irrevocable;
- (h) state the guarantee amount as the minimum amount required by this document to be lodged as security; and
- (i) state the purpose of the security as required in accordance with this document.

**Business Day** means a day other than a Saturday, Sunday or public holiday in the state of New South Wales.

**Development** means the development the subject of the Concept Approval.

**Concept Approval** means the approval granted to Concept Application No MP09\_0191 by the Planning Assessment Commission of New South Wales on 19 March 2012, as modified or amended by the Modification of Minister's Approval 'MP09\_0191 MOD 1' dated 16 April 2013,



Modification of Minister's Approval 'MP09\_0191 MOD 2' dated 23 April 2015, Modification of Minister's Approval 'MP09\_0191 MOD 3' dated 11 February 2016 and Modification of Minister's Approval 'MP09\_0191 MOD 5' dated 27 July 2016 for the use of the existing building for retail premises and business premises, and expansion of the Marrickville Metro Shopping Centre including a first floor addition to the existing building on the Land.

**Construction Certificate** has the same meaning as in the Act.

**GST** has the same meaning as in the GST Law.

**GST Law** has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

**Land** means Lot 100 in DP 715231 and Lot 1 in DP 612551, also known as 34 Victoria Road and 13-55 Edinburgh Road, Marrickville, New South Wales.

**Monetary Contributions** has the meaning identified in Schedule 1.

**Party** means a party to this Agreement, including their successors and assigns.

**Stage(s)** means the various intervals at which various components of the Development are to be carried out as set out in the Concept Approval MP 09\_0191.

## 26.2 Interpretation

In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

- (a) headings are inserted for convenience only and do not affect the interpretation of this Agreement;
- (b) a reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney;
- (c) if the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day;
- (d) a reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars;
- (e) a reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (f) a reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced;
- (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement;
- (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (j) a word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders;

- (k) references to the word 'include' or 'including' are to be construed without limitation;
- (l) a reference to this Agreement includes the agreement recorded in this Agreement;
- (m) a reference to a Party to this Agreement includes a reference to the servants, agents and contractors of the Party, and the Party's successors and assigns;
- (n) any schedules and attachments form part of this Agreement.

**Executed** as an agreement

**Signed** on behalf of **Marrickville Metro Shopping Centre Pty Limited ACN 111 075 837 as Trustee for the Marrickville Metro Trust (ABN 16 208 028 541)** by its attorney under power of attorney registered book        no        in the presence of:

\_\_\_\_\_  
Signature of Witness

\_\_\_\_\_  
Attorney

\_\_\_\_\_  
Name of Witness

\_\_\_\_\_  
Print name

\_\_\_\_\_  
Address of Witness

\_\_\_\_\_  
Signature of Witness

\_\_\_\_\_  
Attorney

\_\_\_\_\_  
Name of Witness

\_\_\_\_\_  
Print name

\_\_\_\_\_  
Address of Witness

**Signed for and on behalf** of **Inner West Council (ABN 19 488 017 987)** by its authorised officer in the presence of:

\_\_\_\_\_  
Signature of Witness

\_\_\_\_\_  
Signature of Deputy General Manager – Assets and Environment

\_\_\_\_\_  
Name of Witness

\_\_\_\_\_  
Print name

\_\_\_\_\_  
Address of Witness

## Schedule 1 – Monetary Contributions

### Part A – Upgrade local shopping strips

Item 1: Public purpose	Item 2: Contribution	Item 3: By whom	Item 4: Timing
Upgrading local shopping strips within the Inner West Council Local Government Area in accordance with the Council's Urban Centres Program	Monetary Contribution of \$600,000 to be provided as follows:		
	\$300,000	The Developer	Prior to the issue of any Construction Certificate for the development consent relating to Stage 1B of the Concept Approval MP 09_0191.
	\$300,000 to be paid in three (3) equal instalments	The Developer	
	<ul style="list-style-type: none"> <li>First Instalment (\$100,000) and provision of 2 Bank Guarantees, each in the amount of \$100,000 to secure the Second Instalment and Third Instalment:</li> </ul>		The date of issue of a Construction Certificate for the development consent relating to Stage 2 of the Concept Approval MP 09_0191.
	<ul style="list-style-type: none"> <li>Second Instalment (\$100,000):</li> </ul>		<p>To be paid on or before the first anniversary of the issue of a Construction Certificate for any development consent relating to Stage 2 of the Concept Approval.</p> <p>If the Developer elects to pay the Contribution by drawing down on one of the two Bank Guarantees held by Council, Council is to retain one of the Bank Guarantee to secure the payment of the Third Instalment.</p> <p>Otherwise, if the Developer pays the Second Instalment by way of cash, bank cheque or some other means acceptable to Council, Council will return to the Developers one of the Bank Guarantees.</p>
	<ul style="list-style-type: none"> <li>Third Instalment (\$100,000):</li> </ul>		<p>To be paid by the Developer by cash, bank cheque, drawing down on the Bank Guarantee held by Council upon the second anniversary of the issue of a Construction Certificate for any development consent relating to Stage 2 of the Concept Approval.</p> <p>The Developer may elect to pay the Contribution by requesting the Council to draw down the final Bank Guarantee held by Council,</p> <p>If the Developer otherwise elects to pay the Third Instalment by way of cash, bank cheque or some other means acceptable to Council, Council will return the Bank Guarantee to the Developer.</p>

## Part B – Upgrade local shopping strips – Community facilities

Public purpose	Contribution	By whom	Timing
Upgrade of local shopping strips – Community facilities – to be directed to a Council capital works fund or program to be used for the development of new community facilities or extensions to existing facilities within the Inner West Council Local Government	Monetary Contribution of \$600,000 to be provided as follows:		
	\$300,000	The Developer	Prior to the issue of the Construction Certificate for the development consent relating to Stage 1B of the Concept Approval MP09_0191.
	\$300,000	The Developer	Prior to the issue of the Construction Certificate for the development consent relating to Stage 2 of the Concept Approval MP 09_0191.

## Schedule 2 – Requirements under section 93F of the Act

The Parties acknowledge and agree that the table set out below provides for certain terms, conditions and procedures for the purpose of the document complying with the Act.

Requirement under the Act	This Agreement
<b>Planning instrument and/or development application – (section 93F(2))</b>  The Developer has: <ul style="list-style-type: none"> <li>(a) sought a change to an environmental planning instrument;</li> <li>(b) made, or proposes to make, a Development Application;</li> <li>(c) entered into an agreement with, or is otherwise associated with, a person, to who paragraph (a) or (b) applies.</li> </ul>	<ul style="list-style-type: none"> <li>(a) No.</li> <li>(b) Yes.</li> <li>(c) No.</li> </ul>
<b>Description of land to which this Agreement applies – (section 93F(3)(a))</b>	The Land as defined in clause 26.
<b>Description of change to the environmental planning instrument to which this Agreement applies and/or the development to which this Agreement applies – (section 93F(3)(b))</b>	The Development as defined in clause 26.
<b>The scope, timing and manner of delivery of contribution required by this Agreement – (section 93F(3)(c))</b>	See clause 6, and Schedule 1.
<b>Applicability of sections 94 and 94A of the Act – (section 93F(3)(d))</b>	The application of sections 94 and 94A of the Act are not excluded in respect of the Development. See clause 5.
<b>Applicability of section 94EF of the Act – (section 93F(3)(d))</b>	The application of section 94EF of the Act is not excluded in respect of the Development. See clause 5.
<b>Consideration of benefits under this Agreement if section 94 applies – (section 93F(3)(e))</b>	The benefits under this Agreement are not to be taken into consideration in determining the contribution under section 94.
<b>Mechanism for Dispute Resolution – (section 93F(3)(f))</b>	See clause 11.
<b>Enforcement of this Agreement – (section 93F(3)(g))</b>	See clause 12.
<b>No obligation to grant consent or exercise functions – (section 93F(9))</b>	See clause 20.

## **Annexure A - Limitation of Liability**

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For the purpose of this Annexure A, "Trust" means the Marrickville Metro Trust.

- (a) The Developer enters into this Agreement in its capacity as trustee of the assets of the Trust and not in any other capacity. Any liability of the Developer arising under or in connection with this Agreement is limited to, and can be enforced against the Developer only to the extent to which it can be satisfied out of the assets of the Trust out of which the Developer is actually indemnified for the liability. This limitation of the Developer's liability applies despite any other provision of this Agreement and extends to all liabilities and obligations of the relevant Party in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this Agreement.
- (b) No Party may sue the Developer in any capacity other than trustee of the Trust, including to seek the appointment of a receiver (except in relation to property of the Trust), a liquidator, an administrator, or any similar person to the Developer or prove in any liquidation, administration or arrangement of or affecting the Developer (except in relation to property of the Trust).
- (c) The provisions of this Part K do not apply to any obligation or liability of the Developer to the extent that it is not satisfied because under the agreement governing the Trust or by operation of law there is a reduction in the extent of the Developer's indemnification out of the assets of the Trust, as a result of the Developer's fraud, negligence or breach of trust.
- (d) No attorney, agent, receiver or receiver and manager appointed in accordance with this Agreement has authority to act on behalf of the Developer in a way which exposes the trustee to any personal liability, and no act or omission of any such person will be considered fraud, negligence or breach of trust of the relevant Party for the purpose of paragraph (c).