

**EXPLANATORY NOTE PURSUANT TO REGULATION 25E OF THE
ENVIRONMENTAL PLANNING AND ASSESSMENT REGULATION 2000**

101-103 Lilyfield Road, Lilyfield

Planning proposal: 101-103 Lilyfield Road, Lilyfield

1. Parties

The parties to the Planning Agreement are Inner West Council of 2 Fisher Street, Petersham (Council) and JRNN Pty Limited (ACN 169 950 510) (Developer) and Joe Soglimbene and Connie Soglimbene (Land Owners).

2. Description of Subject Land

The land to which the Planning Agreement applies is located at 101-103 Lilyfield Road, Lilyfield which is legal described as Lot 1 in Deposited Plan 432612. The land is located in the Local Government area of Inner West Council.

**3. Description of Proposed Change to Environmental Planning Instrument /
Development Application**

The proposed change to the Environmental Planning Instrument will permit the additional uses of 'restaurant and café' and 'takeaway food and drink premises' as additional permitted uses (with development consent) and will limit the maximum size of such uses to 50sqm. Further, the maximum floor space ratio will be increased from 0.5:1 to 1:1 to allow for the development of the site for a mixed use building including residential flats.

4. Summary of Objectives, Nature and Effect of the Draft Planning Agreement

The Planning Agreement provides that the Developer will provide a contribution of \$250,000 to Council to be applied toward provision of affordable housing in the Council's area on the terms provided in the Planning Agreement.

The contribution is to be paid prior to the issue of a Construction Certificate for any Development which takes advantage of the increased permissible gross floor area permitted by the Planning Proposal.

5. Assessment of the Merits of the Draft Planning Agreement

The Planning Agreement promotes the public interest by making provision for the Developer to make contributions towards provision of affordable housing.

By requiring the Developer, who will benefit from the development, to make contributions towards local public facilities, the orderly and economic use and development of land is promoted by the Planning Agreement.

The Planning Agreement assists the Council to provide the community with better access to affordable housing within the area.

6. How the Draft Planning Agreement Promotes the Objects of the Environmental Planning and Assessment Act 1979

By providing contributions toward the provision of affordable housing, the Planning Agreement promotes the following objects of the Act:

- To promote the orderly and economic use and development of land
- To promote the delivery and maintenance of affordable housing

The contribution made under the Planning Agreement assists the Council to provide appropriate affordable housing where required.

The Planning Agreement promotes the Public Interest by facilitating access to housing in an affordable manner in the local government area.

The Planning Agreement does not involve any capital works.

The Planning Agreement facilitates the construction of additional affordable housing in order to promote the effective delivery and maintenance of affordable housing. The public will benefit by having better access to affordable housing in the locality.

7. Interpretation of Planning Agreement

This Explanatory Note is not to be used to assist in construing the Planning Agreement.

Planning agreement dated

Parties

Inner West Council ABN 19 488 017 987
of Administrative Centre, 2 Fisher Street, Petersham NSW 2049
(**Council**)

JRNN Pty Limited ACN 169 950 510
of Suite 3430 Darling Street, Balmain NSW 2041
(**Developer**)

Joe Soglimbene and **Connie Soglimbene**
of 53 Kingsford Street, Haberfield NSW 2045
(**Land Owners**)

Introduction

- A. The Land Owners are the registered proprietors of the Land.
- B. The Developer is the developer of the Land.
- C. 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.
- D. On or about 8 December 2016, the Developer requested that Council prepare a Planning Proposal in relation to the Land.
- E. The Developer requested that the Council submit the Planning Proposal to the Minister for the making of the LEP.
- F. The Developer wishes to carry out the Development if the Planning Proposal is effected and the LEP is made.
- G. The Developer has agreed to make Development Contributions in connection with the making of the LEP and the carrying out of the Development in accordance with this Agreement.

It is agreed

1 Definitions and interpretation

1.1 Definitions

In this Agreement:

- (1) **Act** means the *Environmental Planning and Assessment Act* 1979 (NSW);
- (2) ;
- (3) **Agreement** means this document, including any schedule or annexure to it, signed by the parties;
- (4) **Building** means one or more mixed use or residential flat buildings to be constructed on the Land;
- (5) **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;
- (6) **Construction Certificate** means a construction certificate within the meaning of section 109C(1)(b) of the Act to the effect that work completed in accordance with specified plans and specifications will comply with the requirements for the Development;

- (7) **Compliance Certificate** means a compliance certificate within the meaning of section 109C(1)(a)(i) of the Act to the effect that work has been completed as specified in the certificate and complies with the plans and specifications for the Development;
- (8) **Confidential Information** means any information and all other knowledge at any time disclosed (whether in writing or orally) by the parties to each other, or acquired by the parties in relation to the other's activities or services which is not already in the public domain and which:
- is by its nature confidential;
 - is designated, or marked, or stipulated by either party as confidential (whether in writing or otherwise);
 - any party knows or ought to know is confidential; or
 - is information which may reasonably be considered to be of a confidential nature;
- (9) **Council's Discretion** means:
- the Council's power to make any law; or
 - the Council's exercise of any statutory power or discretion;
- (10) **Development** means any development of the Land that is consistent with the LEP or any other applicable environmental planning instrument or which has a gross floor area that takes advantage of the amendments to the LEP proposed in the Planning Proposal and includes demolition of the existing structures on the Land of the development, the remediation of the Land for development and the preparation of the Land for development;
- (11) **Development Application** has the same meaning as in the Act;
- (12) **Development Consent** has the same meaning as in the Act;
- (13) **Development Contribution** means a monetary contribution, the dedication of land free of costs or the provision of a material public benefit;
- (14) **Development Contribution Amount** means the amount of the Development Contribution to be made by the Developer under this Agreement, calculated in accordance with Item 2 in Schedule 1;
- (15) **Governmental Agency** means any government and any governmental body whether:
- legislative, judicial or administrative;
 - a department, commission, authority, tribunal, agency or entity;
 - commonwealth, state, territorial or local;
- but does not include a governmental body in respect of any service or trading functions as distinguished from regulatory or fiscal functions;
- (16) **GST** has the same meaning as in the GST Law;
- (17) **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;
- (18) **Land** means the land described in Item 1 in Schedule 1;
- (19) **Legislation** means the Act and the *Local Government Act 1993* (NSW);
- (20) **LEP** means an amendment of the *Leichhardt Local Environmental Plan 2013* in accordance with the Planning Proposal which makes development including residential development of the Land having a floor space ratio of not less than 1:1 (as defined in *Leichhardt Local Environmental Plan 2013*) permissible with consent.
- (21) **LPI NSW** means Land and Property Information, a division of the Department of Finance and Services, or such agency as carries out the same functions;
- (22) **Party** means a party to this agreement, including their successors and assigns;
- (23) **Planning Proposal** means Planning Proposal PP_2016_IWEST_002_00 (as referenced by the Department of Planning), being the planning proposal prepared by Council at the request of the Developer, as may be amended from time to time, but providing inter alia for inclusion of 'restaurant or café' and 'takeaway food and drink premises' as additional permitted uses (with consent) and to limit the maximum size of such uses to 50sqm, and for an increase of the maximum floor space ratio from 0.5:1 to 1:1 to allow for the redevelopment of the site for a mixed use building including residential flats;
- (24) **Regulation** means the *Environmental Planning and Assessment Regulation 2000*.

1.2 Interpretation

- (1) 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. 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;
 - c. a reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars;
 - d. 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;
 - e. a reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced;
 - f. a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement;
 - g. an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or Governmental Agency;
 - h. 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;
 - i. a word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular;
 - j. 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 thing includes the whole and each part of it separately;
 - 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; and
 - n. A reference to an Item is to an item in Schedule 1;
 - o. words or expressions used in clause 29, 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.
- (2) 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.

2 Planning agreement under the Act

- 2.1 The Parties agree that this Agreement is a planning agreement pursuant to section 93F of the Act and governed by Subdivision 2 of Division 6 of Part 4 of the Act.

3 Application of this Agreement

- 3.1 This Agreement applies to the Land and to the Development.
- 3.2 This Agreement constitutes a planning agreement within the meaning of section 7.4 of the Act.

4 Operation of this Agreement

- 4.1 This Agreement takes effect upon the date that it is signed by all Parties.

5 Confidentiality

- 5.1 The terms of this Agreement are not confidential. This Agreement may be exhibited by either party.
- 5.2 Except as stated in this Agreement, Council must not and must not permit any of its officers, employees, agents, contractors or related companies to use or to disclose any Confidential Information to any person without the prior written consent of the Developer.
- 5.3 If requested by a party, the other party must:

- a. not issue, publish or authorise any media release, advertisement or publicity concerning this Agreement or its subject matter without obtaining the prior written consent of the other party; and
- b. ensure that its officers, employees, agents, contractors and related companies do the same.

5.4 This clause 5 does not apply to any information which:

- a. is generally available to the public (other than as a result of the wrongful disclosure by the Council); or
- b. is required or authorised to be disclosed by any law.

6 Intentionally Deleted.

7 Application of Development Contributions

- 7.1 The Developer is to make the Development Contribution by paying to Council the Development Contribution Amount in accordance with Schedule 1 of, and the other terms of, this Agreement, and otherwise to the satisfaction of the Council.
- 7.2 The Parties agree that the making of the Development Contribution is in addition to any requirements which might otherwise be imposed as a condition of Development Consent.

8 Application of s94 and s94A of the Act to the Development

- 8.1 This Agreement does not exclude the application of sections 7.11 and 7.12 of the Act to the Development the subject of Development Applications lodged by the Developer.
- 8.2 Development Contributions under this Agreement are not to be taken into account in determining amounts payable under s.7.11 and 7.12 of the Act.

9 Registration of this Agreement

- 9.1 The Developer is to register this Agreement on the title to the Land prior to the date of gazettal of the Planning Proposal. The Council and the Land Owners shall do all things necessary to permit the Developer to comply with this clause.
- 9.2 Should the Developer fail to comply with clause 9.1, the Land Owners shall make the Certificates of Title for the Land available to Council so that Council may register this Agreement. The Land Owners shall do all things necessary to permit Council to register the Agreement and grant Council an irrevocable power of attorney for Council to comply with this clause.
- 9.3 Should the Land Owners seek to transfer the Land before the Agreement is registered., the Land Owners agree to procure from any transferee, in a form acceptable to Council, an agreement from the transferee to abide by the terms of this Agreement.
- 9.4 The Council is to promptly agree to a request by the Developer or Land Owners for the lodging of a Request for the registration of this Agreement to be removed from the title of the Land once the Developer has made all of the Development Contributions required of it under this Agreement or should the Agreement be otherwise terminated.
- 9.5 The Land Owners and the Developer are not to object to the Council lodging and maintaining a caveat over the Land until such time as this Agreement is terminated or otherwise ends.

10 Dispute resolution

- 10.1 If a dispute arises in connection with this Agreement, a Party to the dispute must give to the other party or Parties to the dispute notice specifying the dispute and requiring its resolution under this clause 13 (**Notice of Dispute**).
- 10.2 A person from each Party with sufficient authority to resolve the subject matter of a Notice of Dispute must confer within 7 days after the Notice of Dispute is given to try to resolve the dispute.
- 10.3 If the dispute is not resolved within 7 days after the Notice of Dispute is given to the other party or Parties (**First Period**), either Party may by written notice to the other party require the dispute to be submitted to expert determination.
- 10.4 The provisions of the Institute of Arbitrators & Mediators Australia Expert Determination Rules as published by The Institute of Arbitrators and Mediators Australia (to be found on its website www.iama.org.au) apply to the expert determination, except to the extent that there are inconsistent provisions in this Agreement.
- 10.5 Despite anything in this clause 13, a party at any time may commence court proceedings in relation to any dispute or claim arising under or in connection with this Agreement where that party seeks urgent interlocutory relief.
- 10.6 Despite the reference of a dispute to expert determination under this clause 13, the Parties must continue to perform their obligations under this Agreement. In the award, the expert may make any appropriate adjustment for the performance of obligations under this Agreement since the Notice of Dispute was given.
- 10.7 Subject to clause 13.5, a party must not commence or maintain a court action or proceeding upon a dispute in connection with this Agreement until the dispute has been referred to an expert and determined under this clause 13.
- 10.8 This clause 13 continues in force even where the Agreement has been fully performed, terminated or rescinded or where the parties or any of them have been discharged from the obligation to further perform the Agreement for any reason.
- 10.9 This clause 13 applies even where the Agreement is otherwise void or voidable.
- 10.10 The Parties must:
 - (1) keep confidential any information or documents disclosed under this clause; and
 - (2) only use any information or documents disclosed under this clause to attempt to resolve the dispute.

11 Enforcement

- 14.1 The Land Owners and Developer acknowledge that any Development Consent may include a condition that the Construction Certificate must not issue until payment of the Developer Contribution under this Agreement as specified in Schedule 1.
- 14.2 Without limiting any other provision of this Agreement, the Parties may enforce this Agreement in any court of competent jurisdiction.
- 14.3 For the avoidance of doubt, nothing in this Agreement prevents:
 - a) a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates,

- b) the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

12 Notices

- 12.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

- (1) delivered or posted to that Party at its address set out below; or
(2) emailed to that Party at its email address set out below.

(a) Council

Attention: The General Manager

Address: Administrative Centre, 2 Fisher Street, Petersham NSW 2049

Email: council@innerwest.nsw.gov.au

(b) Developer

Attention: Remolo Nigro

Address: Suite 3, 430 Darling Street, Balmain NSW 2041

Email: remolo6@bigpond.com

(c) Land Owners

Attention: Mr Joe Soglimbene and Mrs Connie Soglimbene

53 Kingsford Street, Haberfield NSW 2045

- 12.2 If a Party gives the other Party 3 Business Days' notice of a change of its address, fax number or email address, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted, faxed or emailed to the latest address or fax number.
- 12.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:
- (1) if it is sent by post, 2 Business Days after it is posted;
(2) if sent by facsimile or email before 5pm on a Business Day at the place of receipt, on the day and at the time it is sent (as recorded on the sender's equipment) and otherwise at 9am on the next Business Day at the place of receipt; or
(3) if otherwise delivered before 5pm on a Business Day at the place of delivery, upon delivery, and otherwise on the next Business Day at the place of delivery.
- 12.4 Despite clause 12.3:
- (1) 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 of the number of pages in the Notice;
(2) an email message is not treated as given or received if within 2 hours after the time sent the sender receives an automated message that the email has not been delivered; and
(3) a facsimile or email message is not treated as given or received if it is not received in full and in legible form and the addressee notifies the sender of that fact within 2 hours after the transmission ends or by 11am on the Business Day on which it would otherwise be treated as given and received, whichever is later.
- 12.5 Any Notice by a party may be given and may be signed by its solicitor.

13 Approvals and consent

Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in that Party's absolute discretion and subject to any conditions determined by the Party. A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

14 Land Owners

- 17.1 Council is not a party to the agreement between the Land Owners and the Developer for the development of the Land.
- 17.2 The Land Owners agree and covenant with Council that if the Developer fails to comply with any of its obligations under this Agreement for any reason (whether or not arising from a breach or termination of the development agreement between the Land Owners and the Developer), the Land Owners will perform those Obligations including but not limited to payment of the monetary Development Contribution specified in Schedule 1 prior to the issue of a Construction Certificate for the Development.

15 Assignment and dealings

- 15.1 The Developer may assign or otherwise deal with this Agreement with the prior written consent of every other party (Consenting Party), which consent must not be unreasonably withheld.
- 15.2 A Consenting Party is required to give its consent under clause 18.1 if:
- (1) the Developer gives the Consenting Party at least 10 Business Days' notice of the proposed assignment;
 - (2) the proposed assignee executes a deed with the parties under which:
 - (a) the proposed assignee agrees to perform all of the obligations of the Developer under this Agreement which have not already been performed by the Developer;
 - (b) the proposed assignee is bound by this Agreement as if the proposed assignee were named in this Agreement in place of the Developer; and
 - (c) the Developer is released from its obligations under this Agreement;
 - (3) the Developer pays all expenses (including legal costs on a solicitor and own client or full indemnity basis, whichever is greater) incurred by the Consenting Party in investigating the proposed assignee or in connection with the proposed assignment.
- 18.3 On receipt on the deed referred to in clause 18.2(2) the Council must execute the deed so that the Developer is released from its obligations under this Agreement.
- 18.4 The Land Owners must not sell or transfer the Land or any part of the Land or any interest in the Land prior to registration of this Agreement on the title to the Land as required by clause 9, except with the Council's prior consent which will not be unreasonably withheld if the proposed purchaser or transferee executes a deed in the form required by Council under which the proposed purchaser or transferee undertake to comply with the Land Owners' obligations under this Agreement.

16 Costs

- 16.1 The Developer must pay its own costs and outlays connected with the negotiation, preparation and execution of this Agreement.
- 16.2 The Developer will pay Council's reasonable costs, other costs and outlays incurred to an amount not exceeding \$20,000.00 connected with the negotiation, preparation and execution of this Agreement including monitoring and enforcing the Agreement. For avoidance of doubt, the costs and outlays payable by the Developer to Council do not extend to the costs (if any) Council is required to expend in enforcing this Agreement and the Developer will not contribute to those costs.

- 16.3 Council must pay all stamp duty (including all fines and penalties except those arising from the default of the Developer) on this document and any document executed under it.

17 Entire agreement

- 17.1 Subject to clause 20.2, this Agreement:

(1) is the entire agreement and understanding between the Parties on everything connected with the subject matter of this Agreement; and
(2) supersedes any prior agreement or understanding on anything connected with that subject matter.

- 17.2 The explanatory note prepared in relation to this Agreement under clause 25E(1) of the *Environmental Planning and Assessment Regulation 2000* (NSW) must not be used to assist in construing this Agreement.

18 Further acts

- 18.1 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.

19 Governing law and jurisdiction

- 19.1 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.

20 Joint and individual liability and benefits

- 20.1 Except as otherwise set out in this Agreement, any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

21 No fetter

- 24.1 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.

22 Representations and warranties

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

23 Severability

- 23.1 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.
23.2 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.

24 Modification

- 24.1 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.

25 Waiver

- 25.1 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.
- 25.2 A waiver by a Party is only effective if it is in writing.
- 25.3 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.

26 Goods and services tax

- 26.1 The parties believe that there is no GST liability in respect of the grant of the Development Consent by Council or the payment or provision of the Development Contribution because the Development Consent is a non-monetary contribution and:
- (a) it is not consideration for the grant of the Development Consent by Council in accordance with section 82-10(1) of the GST Act; and
 - (b) the grant of the Development is not consideration for the supply of the nonmonetary Development Contribution under section 82-5 of the GST Act.
- 26.2 Despite clause 29.1, to the extent that the Commissioner of Taxation, a court or tribunal determines 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.

Schedule 1

Item 1 Land

The land contained in certificate of title: 1/432612 and known as 101 – 103 Lilyfield Road, Lilyfield NSW.

Item 2 Development Contribution

Nature	Public Purpose	Extent and Manner	Timing
Monetary Contribution	Affordable housing in the Council's area	<p>Monetary payment of \$250,000.00 x Current CPI - Base CPI / Base CPI</p> <p>Where: Current CPI means the Consumer Price Index number for the quarter ending immediately before the date of payment of the monetary Development Contribution Amount; Base CPI means the Consumer Price Index number for the quarter ending immediately before 31 August 2017; and Consumer Price Index means the Consumer Price Index - All Groups for Sydney published by the Australian Bureau of Statistics or the index officially substituted for it.</p> <p>Payment is to be by unendorsed bank cheque which is honoured on presentation or by electronic funds transfer of cleared funds to Council's bank account, and is only made when cleared funds are held by Council in its account.</p>	The amount is to be paid prior to the issue of a Construction Certificate for the Development

Executed as an agreement.

Signed for and on behalf of **Inner West Council** by its authorised representative in the presence of:

Signature of witness

Signature of authorised representative

Name of witness

(BLOCK LETTERS)

Name of authorised representative

(BLOCK LETTERS)

Address of witness

DRAFT