

Voluntary Planning Agreement

Inner West Council

And

Eye Drive Sydney Pty Ltd

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KEY DETAILS

1	Date	See Execution on page 11
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2	Parties
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Council	
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Name	Inner West Council
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ABN 19 488 017 987

Address	7-15 Wetherill Street, Leichhardt NSW 2040
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Attention	General Counsel
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Email	council@innerwest.nsw.gov.au
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Developer	
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Name	Eye Drive Sydney Pty Ltd
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Address	Level 2, 76 Berry St North Sydney NSW 2060
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Attention	Anita Burgermeister
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Email	Anita.Burgermeister@oohmedia.com.au
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BACKGROUND

- A The Developer is the current holder of the Lease for signage on the Glebe Island Silos, White Bay.
- B The Developer has lodged the Modification Application in relation to the Development Consent with the Minister for Planning.
- C As part of the Modification Application, the Developer made an offer to enter into a voluntary planning agreement with Council under which the Developer would provide a monetary contribution to Council if the Minister for Planning grants consent to the Modification Application.
- D The Developer and the Council have agreed that the Developer will make the Contributions in connection with the Modification Application in accordance with this Deed.

TERMS

Part 1 - Preliminary

1 Interpretation

1.1 Definitions

In this Deed the following definitions apply:

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

Commencement Date means 14 days after the day the Minister for Planning grants Consent to the Modification Application.

Consent means the grant of consent by the Minister for Planning (or his delegate) on terms acceptable to the Developer to the Modification Application under section 4.55 of the Act.

Contribution means an annual payment to Council of \$125,000 plus GST (if applicable) in accordance with clause 5, and as varied under clause 6.

Cost means a cost, charge, expense, outgoing, payment, fee and other expenditure of any nature.

CPI for Sydney Index Number means the Consumer Price Index All Groups Index Number for Sydney published from time to time by the Australian Bureau of Statistics (or its successor) or, if that index number is no longer published, its closest substitute as determined by the Council (acting reasonably).

Deed means this planning agreement and includes any schedules, annexures and appendices to this deed.

Development means the development described in the Modification Application.

Development Consent means DA 04-09-2011 granted by the Minister for Planning in 2012 in respect of advertising signage on the Glebe Island Silos on the Land.

Dispute means a dispute or difference between the Parties under or in relation to this Deed.

GST has the same meaning as in the GST Law.

GST Law has the same meaning as 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.

Key Details means the section of this agreement headed Key Details.

Land means Part Folio Identifiers 12/1170710 and 13/1170710 (formerly comprised in Folio Identifier 10/1065973) being Lease Area 1, Lease Area 2 and Lease Area 3 as defined in the Lease.

Lease means the lease between Eye Drive Sydney Pty Ltd (ABN 98 007 305 179) (as tenant) and Sydney Ports Corporation (ABN 95 784 452 933) (as landlord) dated 1 October 2011, being registered dealing AH185662.

Modification Application means the modification application DA 04-09-2011 MOD 1 lodged by the Developer with the Minister for Planning seeking an amendment to the Development Consent to extend the duration of the Development Consent pursuant to section 4.55 of the Act such that it will terminate on 11 April 2022.

Party means a party to this Deed.

Related Body Corporate has the same meaning as in the *Corporations Act 2001* (Cth).

Review Date means the first, second and third anniversaries of the Commencement Date.

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

- (a) Except as otherwise provided in this Deed, words in this Deed have the same meaning as those words have in the Act;
- (b) Headings are inserted for convenience only and do not affect the interpretation of this Deed.
- (c) A reference in this Deed to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (d) If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day.
- (e) A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.

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- (f) A reference in this Deed to a \$ value relating to a Contribution is a reference to the value exclusive of GST.
 - (g) A reference in this Deed 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.
 - (h) A reference in this Deed to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
 - (i) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
 - (j) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
 - (k) 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.
 - (l) 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.
 - (m) References to the word 'include' or 'including' are to be construed without limitation.
 - (n) A reference to this Deed includes the agreement recorded in this Deed.
 - (o) A reference to a Party to this Deed includes a reference to the servants, agents and contractors of the Party, the Party's successors and assigns.
 - (p) Any schedules, appendices and attachments form part of this Deed.

2 Commencement and termination

- 2.1 This Deed takes effect on the date that the Minister for Planning grants the Consent provided each Party has executed one counterpart of this Deed.
- 2.2 The Party who executes this Deed last is to insert on the front page the date they did so and provide a copy of the fully executed and dated Deed to any other person who is a Party.
- 2.3 If any of the following events occur:
 - (a) the Developer withdraws the Modification Application; or
 - (b) the Minister for Planning does not grant the Consent; or
 - (c) on appeal, the Land and Environment Court of NSW does not grant the Consent, or

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- (d) the Lease expires by effluxion of time or is otherwise terminated and no further lease of the Land is granted by Sydney Ports Corporation (or the registered proprietor from time to time of the Land) to the Developer, or
 - (e) the Developer, or a Related Body Corporate of the Developer, ceases to enjoy the benefit of the Development Consent as modified by the granting of Consent, including as a result of:
 - (i) the Developer or its Related Body Corporate ceasing to be the lessee of the Land; or
 - (ii) the expiration of the Development Consent as modified by the granting of Consent,

this deed will terminate on the date that the relevant event occurs and no Contributions will be payable by the Developer to the Council from that date of termination.

3 Application of this Deed

This Deed applies to the Land and to the Development.

4 Warranties

- 4.1 The Parties warrant to each other that they:
- (a) have full capacity to enter into this Deed, and
 - (b) are able to fully comply with their obligations under this Deed.

5 Payment of Contributions

- 5.1 The Developer must pay the Contribution to the Council on the Commencement Date and on each Review Date.
- 5.2 The Council must apply the Contributions made by the Developer under this Deed towards heritage conservation in the Inner West Council local government area.
- 5.3 The Developer will be deemed to have satisfied its obligations under this Deed on the date that the final Contribution is paid to the Council.
- 5.4 On the payment of the fourth and final Contribution, this Deed will terminate and no party will have any liability to the other in relation to the subject matter of this Deed.

6 Indexation of Contributions

On each Review Date, the Contribution will be varied in accordance with the following formula:

$$P = \frac{A \times B}{C}$$

Where:

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- (a) "P" is the Contributions payable on the relevant Review Date;
 - (b) "A" is the Contributions payable before the relevant Review Date;
 - (c) "B" is the CPI for Sydney Index Number last published before the relevant Review Date; and
 - (d) "C" is the CPI for Sydney Index Number last published before the Commencement Date or the last Review Date, whichever is the later.

7 Application of sections 7.11, 7.12 and 7.17 of the Act to the Development

This Deed excludes the application of sections 7.11, 7.12 and 7.17 of the Act to the Development.

8 Security

To secure the performance of this deed, the Developer must comply with the restrictions on dealings as provided by clause 10 and, in the event of a breach by the Developer of the terms of this deed, the Developer acknowledges and agrees that the Council may enforce the terms of this Deed in a court of competent jurisdiction.

9 Dispute Resolution - Mediation

- 9.1 This clause applies to any Dispute arising in connection with this Deed.
- 9.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 9.3 If a notice is given under clause 9.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 9.4 If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.
- 9.5 If the Dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the Dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.
- 9.6 Each Party is to bear its own Costs arising from or in connection with the appointment of a mediator and the mediation.
- 9.7 The Parties are to share equally the Costs of the President, the mediator, and the mediation.

10 Restriction on dealings

- 10.1 The Developer may assign the Developer's rights or obligations under this Deed, or novate this Deed, to a Related Body Corporate of the Developer, at any time and

without the consent of Council. The Developer must promptly notify Council of any assignment or novation of this Deed, including the details of the relevant Related Body Corporate, under this clause 10.1.

10.2 Except as provided for in clause 10.1, the Developer must not:

- (a) assign or transfer the Lease; or
- (b) assign the Developer's rights or obligations under this Deed, or novate this Deed,

to any person unless:

- (c) the Developer has, at no cost to the Council, first procured the execution by the person to whom the Developer's rights or obligations under this Deed are to be assigned or novated, of a deed in favour of the Council on terms reasonably satisfactory to the Council; and
- (d) the Council has given written notice to the Developer stating that it reasonably considers that the transferee, assignee or novatee, is reasonably capable of performing its obligations under this Deed, and
- (e) the Developer is not in material breach of this Deed.

11 Notices

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

- (a) delivered or posted to that Party at its address set out in the Key Details;
- (b) faxed to that Party at its fax number set out in the Key Details; or
- (c) emailed to that Party at its email address set out in the Key Details.

11.2 If a Party gives the other Party 3 business days' notice of a change of its address, fax number or email, 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.

11.3 Any notice, consent, information, application or request is to be treated as given or made if it is:

- (a) delivered, when it is left at the relevant address,
- (b) sent by post, 2 business days after it is posted, or
- (c) sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.

11.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, 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.

12 Costs

Each party is to pay their own Costs of preparing, negotiating, executing this Deed.

13 Entire Deed

13.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with.

13.2 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 Deed was executed, except as permitted by law.

14 Further Acts

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

15 Governing Law and Jurisdiction

This Deed is governed by the law of New South Wales and the Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.

16 No Fetter

Nothing in this Deed shall 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 shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

17 Illegality

If this Deed or any part of it becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties are to co-operate and do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.

18 Severability

18.1 If a clause or part of a clause of this Deed 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.

18.2 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 Deed, but the rest of this Deed is not affected.

19 Amendment

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

20 Waiver

- 20.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- 20.2 A waiver by a Party is only effective if it is in writing.
- 20.3 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.

21 GST

- 21.1 In this clause:

Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice have the same meaning given by the GST Law.

GST Amount means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.

GST Law has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Input Tax Credit has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.

Taxable Supply has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.

- 21.2 Subject to clause 21.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- 21.3 Clause 21.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.
- 21.4 No additional amount shall be payable by the Council under clause 21.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.

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- 21.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the GST Law, the Parties agree:
- (a) to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies; and
 - (b) that any amounts payable by the Parties in accordance with clause 21.2 (as limited by clause 21.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 21.6 No payment of any amount pursuant to this clause 21, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 21.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- 21.8 This clause continues to apply after expiration or termination of this Deed.

EXECUTION

Executed as a deed on


2018

Signed sealed and delivered for and on behalf
of **Inner West Council ABN 19 488 017 987**
by its General Manager pursuant to
Section 683 of the *Local Government Act 1993*

.....
General Manager

.....
Witness


Signed, sealed and delivered by Eye
Drive Sydney Pty Ltd ABN 98 007 305
179 by:



Signature of director/~~company secretary~~

Chris Robert

Print name



Signature of ~~director~~ *company secretary*

SHEILA A. LINES

Print name

Explanatory Note

Environmental Planning and Assessment Regulation 2000 (Clause 25E)

[Note: to be completed upon finalisation of Planning Agreement]

Draft Planning Agreement

Under section 7.4 of the *Environmental Planning and Assessment Act 1979*

Parties

Inner West Council

Eye Drive Sydney Pty Ltd

Description of Subject Land

The general advertising signage at the top of Glebe Island Silos comprised within part Folio Identifiers 12/1170710 and 13/1170710 (formerly comprised in Folio Identifier 10/1065973) being Lease Area 1, Lease Area 2 and Lease Area 3 as defined in the Lease.

Description of Proposed Change to Environmental Planning Instrument/Development Application

Modification No DA 04-09-2011 MOD 1 seeks to modify the development consent for the existing general advertising signage such that the consent expires on 11 April 2022.

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

The planning agreement provides for a monetary contribution by the Developer to the Council in the amount of \$125,000 per year (indexed to CPI) for Council to spend on heritage conservation matters throughout the local government area.

The monetary contribution offered by the Developer to the Council was accepted by the Council on 28 August 2018 and this agreement reflects the terms of the accepted offer.

Assessment of the Merits of the Planning Agreement

The planning agreement serves the public purpose and promotes the objects of the *Environmental Planning and Assessment Act 1979* by providing a pool of funds for Council to spend on various heritage conservation matters within the local government area of the Inner West.

This funding supplements Council's existing funding sources and allows the Council to improve and maintain heritage works. To protect the value of the funds, the amounts are indexed to CPI. The funding will therefore be a minimum of \$500,000 over the funding period.

Council may allocate the funding to any heritage matter it considers relevant and appropriate.