

PLANNING AGREEMENT

Parties

Inner West Council

of 260 Liverpool Road, Ashfield, New South Wales **(Council)**

and

Moweno Pty Ltd

(ACN XXXXXXXXXXXX)

of 776 Parramatta Road, Lewisham **(Developer)**.

Background

- A. On 4 June 2018, the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.
- B. On 10 January 2019, the Developer lodged a class 1 appeal to the Land and Environment Court against Council's deemed refusal of the development application.
- C. Prior to the determination of the development application by the Court, a letter of offer dated 3 September 2019 was provided to the council by the Developer to enter into this Agreement to provide for a monetary contribution of \$10,000 to be applied by Council to the provision of parking in the locality of the land.

Operative provisions

1 Planning agreement under the Act

This deed constitutes a planning agreement within the meaning of section 7.4 of the Act.

2 Application of this Agreement

This agreement applies to DA201800240 for premise known as 776 Parramatta Road,

Lewisham, being Lot 16 in DP 2357 and arises out of the Land and Environment Court proceeding 2019/9578.

3 Operation of this Agreement

This deed commences on the date that the deed is signed by the parties.

4 Definitions and interpretation

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

Dealing, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.

Development means the Development Consent granted by the Land and Environment Court of NSW with regard to Development Application DA201800240.

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land or the provision of a material public benefit.

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 Lots 16 DP 2357 known as 776 Parramatta Road, Lewisham.

Letter of Offer means the Letter dated 3 September 2019 from Conomos Legal to Inner West Council.

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

Regulation means the Environmental Planning and Assessment Regulation 2000.

4.2 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.

5 Development Contributions to be made under this Agreement

The Developer is to provide a monetary contribution of \$10,000 to Inner West Council to be applied by Inner West Council toward the provision of parking in the Local Council Area.

6 Application of the Development Contributions

The monetary contribution referred to at 5 above is to be applied by Inner West Council towards the provision of parking in the Local Council Area.

7 Application of s7.11 and s7.12 of the Act to the Development

The application of s7.11 and s7.12 are not excluded as a consequence of this Voluntary Planning Agreement.

8 Registration of this Agreement

The parties agree that this Voluntary Planning Agreement does not need to be registered for the purpose of s7.6 of the Act.

9 Review of this Agreement

This agreement can be reviewed if agreed to by both parties.

10 Dispute Resolution

10.1 Notice of dispute

- (1) If a dispute or lack of certainty between the parties arises in connection with this document or its subject matter (**Dispute**), then either party (**First Party**) must give to the other (**Second Party**) a notice which:
 - (a) is in writing;
 - (b) adequately identifies and provides details of the Dispute;
 - (c) stipulates what the First Party believes will resolve the Dispute; and

- (d) designates its representative (**Representative**) to negotiate the Dispute.
- (2) The Second Party must, within five (5) Business Days of service of the notice of dispute, provide a notice to the First Party designating as its representative a person to negotiate the Dispute (the representatives designated by the parties being together, the **Representatives**).

10.2 Conduct pending resolution

The parties must continue to perform their respective obligations under this document if there is a Dispute but will not be required to complete the matter the subject of the Dispute, unless the appropriate party indemnifies the other parties against costs, damages and all losses suffered in completing the disputed matter if the Dispute is not resolved in favour of the indemnifying party.

10.3 Further steps required before proceedings

Subject to clauses 10.14 and 10.15 and except as otherwise expressly provided in his document, any Dispute must, as a condition precedent to the commencement of litigation, mediation under clause 10.5 or determination by an expert under clause 10.6, first be referred to the Representatives. The Representatives must endeavour to resolve the dispute within five (5) Business Days of the date a notice under clause (2) is served.

10.4 Disputes for mediation or expert determination

If the Representatives have not been able to resolve the Dispute, then the parties must agree within five (5) Business Days to either refer the matter to mediation under clause 10.5 or expert resolution under clause 10.6.

10.5 Disputes for mediation

- 10.5.1 If the parties agree in accordance with clause 10.4 to refer the Dispute to mediation, the mediation must be conducted by a mediator agreed by the parties and, if the parties cannot agree within five (5) Business Days, then by a mediator appointed by the President of the Law Society of New South Wales for the time being.
- 10.5.2 If the mediation referred to in paragraph 10.5.1 has not resulted in settlement of the Dispute and has been terminated, the parties may agree to have the matter determined by expert determination under clause 10.6.

10.6 Choice of expert

- 10.6.1 If the Dispute is to be determined by expert determination, this clause 10.6 applies.
- 10.6.2 The Dispute must be determined by an independent expert in the relevant field:
 - 10.6.2.1 agreed between and appointed jointly by the parties; or
 - 10.6.2.2 in the absence of document within five (5) Business Days after the date that the matter is required to be determined by expert determination, appointed by the President of the Law Society of New South Wales for the time being.
- 10.6.3 If the parties fail to agree as to the relevant field within five (5) Business Days after the date that the matter is required to be determined by expert determination, either party may refer the matter to the President of the Law Society of New South Wales

for the time being whose decision as to the relevant field is final and binding on the parties.

10.6.4 The expert appointed to determine a Dispute:

10.6.4.1 must have a technical understanding of the issues in dispute;

10.6.4.2 must not have a significantly greater understanding of one party's business, functions or operations which might allow the other side to construe this greater understanding as a bias; and

10.6.4.3 must inform the parties before being appointed of the extent of the expert's understanding of each party's business or operations and, if that information indicates a possible bias, then that expert must not be appointed except with the written approval of the parties.

10.6.5 The parties must promptly enter into a document with the expert appointed under this clause 10.6 setting out the terms of the expert's determination and the fees payable to the expert.

10.7 Directions to expert

10.7.1 In reaching a determination in respect of a dispute under clause 10.6, the independent expert must give effect to the intent of the parties entering into this document and the purposes of this document.

10.7.2 The expert must:

10.7.2.1 act as an expert and not as an arbitrator;

10.7.2.2 proceed in any manner as the expert thinks fit without being bound to observe the rules of natural justice or the rules of evidence;

10.7.2.3 not accept verbal submissions unless both parties are present;

10.7.2.4 on receipt of a written submission from one party, ensure that a copy of that submission is given promptly to the other party;

10.7.2.5 take into consideration all documents, information and other material which the parties give the expert which the expert in its absolute discretion considers relevant to the determination of the Dispute;

10.7.2.6 not be expected or required to obtain or refer to any other documents, information or material (but may do so if the expert so wishes);

10.7.2.7 issue a draft certificate stating the expert's intended determination (together with written reasons), giving each party ten (10) Business Days to make further submissions;

10.7.2.8 issue a final certificate stating the expert's determination (together with written reasons); and

10.7.2.9 act with expedition with a view to issuing the final certificate as soon as practicable.

10.7.3 The parties must comply with all directions given by the expert in relation to the resolution of the Dispute and must within the time period specified by the expert, give the expert:

10.7.3.1 a short statement of facts;

10.7.3.2 a description of the Dispute; and

10.7.3.3 any other documents, records or information which the expert requests.

10.8 Expert may commission reports

10.8.1 Subject to paragraph 10.8.2:

10.8.1.1 the expert may commission the expert's own advisers or consultants (including lawyers, accountants, bankers, engineers, surveyors or other technical consultants) to provide information to assist the expert in making a determination; and

10.8.1.2 the parties must indemnify the expert for the cost of those advisers or consultants in accordance with clause 10.6.5 of this deed.

10.8.2 The parties must approve the costs of those advisers or consultants in writing prior to the expert engaging those advisers or consultants.

10.9 Expert may convene meetings

10.9.1 The expert must hold a meeting with all of the parties present to discuss the Dispute. The meeting must be conducted in a manner which the expert considers appropriate. The meeting may be adjourned to, and resumed at, a later time in the expert's discretion.

10.9.2 The parties agree that a meeting under paragraph 10.9.1 is not a hearing and is not an arbitration.

10.10 Other courses of action

If:

10.10.1 the parties cannot agree in accordance with clause 10.4 to refer the matter to mediation or determination by an expert; or

10.10.2 the mediation referred to in clause 10.5 has not resulted in settlement of the dispute, the mediation has been terminated and the parties have not agreed to refer the matter to expert determination within five (5) Business Days after termination of the mediation,

then either party may take whatever course of action it deems appropriate for the purpose of resolving the Dispute.

10.11 Confidentiality of information provided in dispute resolution process

10.11.1 The parties agree, and must procure that the mediator and the expert agree as a condition of his or her appointment:

10.11.1.1 subject to paragraph 10.11.2, to keep confidential all documents, information and other material disclosed to them during or in relation to the mediation or expert determination;

10.11.1.2 not to disclose any confidential documents, information and other material except:

10.11.1.2.1 to a party or adviser or consultant who has signed a confidentiality undertaking; or

10.11.1.2.2 if required by Law or any Authority to do so; and

10.11.1.3 not to use confidential documents, information or other material disclosed to them during or in relation to the mediation or expert determination for a purpose other than the mediation or expert determination.

10.11.2 The parties must keep confidential and must not disclose or rely upon or make the subject of a subpoena to give evidence or produce documents in any arbitral, judicial or other proceedings:

10.11.2.1 views expressed or proposals or suggestions made by a party or the mediator or the expert during the expert determination or mediation relating to a possible settlement of the Dispute;

10.11.2.2 admissions or concessions made by a party during the mediation or expert determination in relation to the Dispute; and

10.11.2.3 information, documents or other material concerning the dispute which are disclosed by a party during the mediation or expert determination unless such information, documents or facts would be discoverable in judicial or arbitral proceedings.

10.12 Final determination of expert

The parties agree that the final determination by an expert will be final and binding upon them except in the case of fraud or misfeasance by the expert.

10.13 Costs

If any independent expert does not award costs, each party must contribute equally to the expert's costs in making the determination.

10.14 Remedies available under the Act

This clause does not operate to limit the availability of any remedies available to Council under the Act.

10.15 Urgent relief

This clause 10 does not prevent a party from seeking urgent injunctive or declaratory relief concerning any matter arising out of this document.

11 Enforcement

Any provision of this document which is invalid or unenforceable in any jurisdiction is to be read down for the purposes of that jurisdiction, if possible, so as to be valid or enforceable, and is otherwise capable of being severed to the extent of the invalidity or enforceability, without affecting the remaining provisions of this document or affecting the validity or enforceability of that provision in any other jurisdiction.

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:

- (a) Delivered or posted to that Party at its address set out below.
- (b) Faxed to that Party at its fax number set out below.
- (c) Emailed to that Party at its email address set out below.

Council: Inner West Council

Attention: Mr Mark Bonanno

Address: 260 Liverpool Road, Ashfield, NSW 2131

Email: mark.bonanno@innerwest.nsw.gov.au

Developer: Moweno Pty Ltd

Attention: Mr Nick Vranas and Ms Fay Vranas

Address: 776 Parramatta Road, Lewisham

Email: fayv@napf.com.au

12.2 If a Party gives the other Party 3 business days notice of a change of its address, any notice, consent, information, application or request is only given or made by that other Party if it is delivered or posted to the latest address.

12.3 Any notice, consent, information, application 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.

12.4 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.

13 Costs

Each party is to pay its own costs of the negotiating, preparing and executing of the Agreement.

14 Entire agreement

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.

15 Further Acts

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.

16 Governing law and jurisdiction

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.

17 Joint and individual liability and benefits

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.

18 No fetter

Nothing in this Agreement 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.

19 Representations and warranties

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.

20 Severability

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.

21 Modification

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.

22 Waiver

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.

23 GST

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, then recipient of the supply must pay an additional amount equal to the GST on that supply.

Executed by the parties as a Deed

SIGNED AND DELIVERED BY INNER WEST COUNCIL
by its Mayor and General Manager pursuant to a
resolution of the Council dated _____ 2019

Mayor

General Manager

EXECUTED BY MOWENO PTY LTD
(ACN XXXXXXXXX) by its sole Director
and Secretary pursuant to section
127 of the Corporations Act 2001

Signature of Sole Director and Secretary

Full Name (print)