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| Planning Agreement  Inner West Council  (ABN 19 488 017 987)  and  Heworth Grand Development Pty Ltd  (ABN 66 620 430 891)  and  Grand Rozelle Pty Ltd  (ACN 619 872 749) |

CONTENTS

CLAUSE PAGE

[1. INTERPRETATION 1](#_Toc63270308)

[1.1 Definitions 1](#_Toc63270309)

[1.2 Rules for interpreting this Document 6](#_Toc63270310)

[2. APPLICATION OF THE ACT AND THE REGULATION 7](#_Toc63270311)

[2.1 Application of this Document 7](#_Toc63270312)

[2.2 Public Benefits to be made by Developer 8](#_Toc63270313)

[2.3 Public Benefits to be made by Owner 8](#_Toc63270314)

[2.4 Application of sections 7.11, 7.12 and 7.24 of the Act 8](#_Toc63270315)

[2.5 Council rights 8](#_Toc63270316)

[2.6 Explanatory note 8](#_Toc63270317)

[3. OPERATION OF THIS PLANNING AGREEMENT 8](#_Toc63270318)

[3.1 Commencement 8](#_Toc63270319)

[4. TERMINATION AND REVOCATION OF PREVIOUS PLANNING AGREEMENT 9](#_Toc63270320)

[4.1 Termination of Previous Planning Agreement 9](#_Toc63270321)

[4.2 Release of the Previous Planning Agreement 9](#_Toc63270322)

[5. WARRANTIES 9](#_Toc63270323)

[5.1 Mutual warranties 9](#_Toc63270324)

[5.2 Developer warranties 10](#_Toc63270325)

[5.3 Owner’s warranty 10](#_Toc63270326)

[6. Public Benefits 10](#_Toc63270327)

[6.1 Developer to provide Public Benefits 10](#_Toc63270328)

[6.2 Owner to provide Public Benefits 10](#_Toc63270329)

[7. Completion 10](#_Toc63270330)

[7.1 Date of Completion 10](#_Toc63270331)

[7.2 Developer completion notice 11](#_Toc63270332)

[7.3 Inspection by Council 11](#_Toc63270333)

[7.4 Non-completion of Public Benefits 12](#_Toc63270334)

[8. Indemnity 12](#_Toc63270335)

[9. DEFECTS LIABILITY 13](#_Toc63270336)

[9.1 Security for Defects Liability Period 13](#_Toc63270337)

[9.2 Defect in the Public Benefits 13](#_Toc63270338)

[10. REGISTRATION AND CAVEAT 13](#_Toc63270339)

[10.1 Registration of this Document 13](#_Toc63270340)

[10.2 Caveat 14](#_Toc63270341)

[10.3 Release of this Document 14](#_Toc63270342)

[11. ENFORCEMENT 14](#_Toc63270343)

[11.1 Developer to provide Guarantee 14](#_Toc63270344)

[11.2 Adjustment of Guarantee Amount 15](#_Toc63270345)

[11.3 Right of Council to claim on Guarantee 15](#_Toc63270346)

[11.4 Expenditure by Council 16](#_Toc63270347)

[11.5 Top-up and return of Guarantee 16](#_Toc63270348)

[12. DISPUTE RESOLUTION 17](#_Toc63270349)

[12.1 Application 17](#_Toc63270350)

[12.2 Negotiation 17](#_Toc63270351)

[12.3 Mediation 17](#_Toc63270352)

[12.4 Not use information 19](#_Toc63270353)

[12.5 Condition precedent to litigation 19](#_Toc63270354)

[12.6 Summary or urgent relief 19](#_Toc63270355)

[13. taxes and GST 19](#_Toc63270356)

[13.1 Responsibility for Taxes 19](#_Toc63270357)

[13.2 GST free supply 19](#_Toc63270358)

[13.3 Supply subject to GST 19](#_Toc63270359)

[14. DEALINGS 20](#_Toc63270360)

[14.1 Dealing by Council 20](#_Toc63270361)

[14.2 Dealing by the Developer and Owner 20](#_Toc63270362)

[15. TERMINATION 21](#_Toc63270363)

[16. CONFIDENTIALITY AND DISCLOSURES 22](#_Toc63270364)

[16.1 Use and disclosure of Confidential Information 22](#_Toc63270365)

[16.2 Disclosures to personnel and advisers 22](#_Toc63270366)

[16.3 Disclosures required by law 23](#_Toc63270367)

[16.4 Receiving party's return or destruction of documents 23](#_Toc63270368)

[16.5 Security and control 24](#_Toc63270369)

[17. NOTICES 24](#_Toc63270370)

[18. GENERAL 24](#_Toc63270371)

[18.1 Governing law 24](#_Toc63270372)

[18.2 Access to information 24](#_Toc63270373)

[18.3 Liability for expenses 25](#_Toc63270374)

[18.4 Relationship of parties 25](#_Toc63270375)

[18.5 Giving effect to this Document 25](#_Toc63270376)

[18.6 Time for doing acts 25](#_Toc63270377)

[18.7 Severance 25](#_Toc63270378)

[18.8 Preservation of existing rights 26](#_Toc63270379)

[18.9 No merger 26](#_Toc63270380)

[18.10 Waiver of rights 26](#_Toc63270381)

[18.11 Operation of this Document 26](#_Toc63270382)

[18.12 Operation of indemnities 26](#_Toc63270383)

[18.13 Inconsistency with other documents 26](#_Toc63270384)

[18.14 No fetter 27](#_Toc63270385)

[18.15 Counterparts 27](#_Toc63270386)

[1. Public benefits - overview 32](#_Toc63270387)

[2. Payment of monetary contribution 35](#_Toc63270388)

[2.1 Payment 35](#_Toc63270389)

[2.2 Indexation 35](#_Toc63270390)

[2.3 No trust 35](#_Toc63270391)

[3. ChANGES TO the design of the Developer’s Works 36](#_Toc63270392)

[3.1 Scope of Developer’s Works 36](#_Toc63270393)

[3.2 Changing the design of the Developer’s Works 36](#_Toc63270394)

Schedules

1. [Agreement Details 27](#_Toc55317300)
2. [Requirements under the Act and Regulation (clause 2) 29](#_Toc55317301)
3. [Public Benefits (clause 5) 31](#_Toc55317302)
4. [Explanatory Note 36](#_Toc55317303)

**ANNEXURES**

**THIS PLANNING AGREEMENT** is made on the day of 2021

BETWEEN:

1. **Inner West Council** ABN 19 488 017 987 of Leichhardt Service Centre, 7-15 Wetherill Street, LEICHHARDT NSW 2000 (Council);
2. **Heworth Grand Development Pty Ltd** ABN 66 620 430 891of Level 21, The Zenith Tower A, 821 Pacific Highway, Chatswood NSW 2067 (the **Developer**); and
3. **Grand Rozelle Pty Ltd** ACN 619 872 749 of Suite 01 Level 21, The Zenith Tower A, 821 Pacific Highway, Chatswood NSW 2067 (the **Owner**).

BACKGROUND

1. The Developer intends to undertake Development on the Land on behalf of the Owner.
2. The Owner has authorised the Developer to undertake the Development on the Land.
3. The Owner and the Developer have offered to enter into this Document with Council to provide the Public Benefits on the terms of this Document.

THE PARTIES AGREE AS FOLLOWS:

1. INTERPRETATION
   1. Definitions

The following definitions apply in this document.

1. **Act** means the *Environmental Planning and Assessment Act 1979 (NSW)*.
2. **Adverse Affectation** has the same meaning as in Part 3 of Schedule 3 of the *Conveyancing (Sale of Land) Regulation 2010* (NSW).
3. **Attributed Value** means the value Council and the Developer agree is to be attributed to each element of the Public Benefits as at the date of this Document, as set out in clause 1 of Schedule 3 of this Document.
4. **Authorisation** means:
   1. an approval, authorisation, consent, declaration, exemption, permit, licence, notarisation or waiver, however it is described, and including any condition attached to it; and
   2. in relation to anything that could be prohibited or restricted by law if a Government Agency acts in any way within a specified period, the expiry of that period without that action being taken,
5. including any renewal or amendment.
6. **Business Day** means a day (other than a Saturday, Sunday or public holiday) on which banks are open for general banking business in Sydney, Australia.

**Completion** means the point at which the Developer’s Works are complete except for minor defects:

* 1. the existence of which do not prevent the Developer’s Works being reasonably capable of being used for their intended purpose;
  2. which the Developer has grounds for not promptly rectifying; and
  3. rectification of which will not affect the immediate and convenient use of the Developer’s Works for their intended purpose.

1. **Completion Notice** means a notice issued by the Developer in accordance with clause 7.1.
2. **Confidential Information** means:
   1. information of a party (**disclosing party**) that is:
      1. made available by or on behalf of the disclosing party to the other party (**receiving party**), or is otherwise obtained by or on behalf of the receiving party; and
      2. by its nature confidential or the receiving party knows, or ought reasonably to know, is confidential.
3. Confidential Information may be made available or obtained directly or indirectly, and before, on or after the date of this document.
4. Confidential Information does not include information that:
   1. is in or enters the public domain through no fault of the receiving party or any of its officers, employees or agents;
   2. is or was made available to the receiving party by a person (other than the disclosing party) who is not or was not then under an obligation of confidence to the disclosing party in relation to that information; or
   3. is or was developed by the receiving party independently of the disclosing party and any of its officers, employees or agents.
5. **Construction Certificate** has the same meaning as in the Act.
6. **Contamination** has the meaning given to that word in the *Contaminated Land Management Act 1997* (NSW).
7. **Corporations Act** means the *Corporations Act 2001* (Cth).
8. **Council's Personal Information** means Personal Information to which the Owner, the Developer, or any third party engaged by the Developer, has access directly or indirectly in connection with this document, including the Personal Information of any personnel, customer or supplier of Council (other than the Developer).
9. **Council's Policies** means all policies and procedures relevant to the provision of the Public Benefits, as notified by Council in writing to the Developer.
10. **Council’s Representative** means the person named in Item 3 of Schedule 1 or his/her delegate.

**Dealing** means selling, transferring, assigning, novating, mortgaging, charging, or encumbering and, where appearing, **Deal** has the same meaning.

1. **Defect** means any error, omission, defect, non-conformity, discrepancy, shrinkage, blemish in appearance or other fault in the Public Benefits or any other matter which prevents the Public Benefits from complying with the terms of this Document.
2. **Defects Liability Period** means in relation to the Public Benefits, the period of 12 months from the date on which the Developer’s Works reach Completion.
3. **Developer’s Representative** means the person named in Item 4 of Schedule 1 or his/her delegate.
4. **Developer’s Works** means those parts of the Public Benefit described as “Developer’s Works” in clause 1 of Schedule 3, to be delivered by the Developer in accordance with this Document.
5. **Development** means the development of the Land by the Developer described at Item 2 of Schedule 1.
6. **Development Application** means the development application identified in Item 6 of Schedule 1 and includes all plans, reports models, photomontages, material boards (as amended supplemented) submitted to the consent authority before the determination of that Development Application.
7. **Development Consent** means the consent granted to the Development Application for the Development and includes all modifications made under section 4.55 of the Act.
8. **Dispute** means any dispute or difference between the parties arising out of, relating to or in connection with this Document, including any dispute or difference as to the formation, validity, existence or termination of this document.
9. **Document** means this planning agreement
10. **Environmental Laws** means all laws and legislation relating to environmental protection, building, planning, health, safety or work health and safety matters and includes the following:
    1. the *Work Health and Safety Act 2011 (NSW)*;
    2. the *Protection of the Environment Operations Act 1997 (NSW)*; and
    3. the *Contaminated Land Management Act 1997 (NSW)*.
11. **Government Agency** means:
    1. a government or government department or other body;
    2. a governmental, semi‑governmental or judicial person; or
    3. a person (whether autonomous or not) who is charged with the administration of a law.
12. **Gross Floor Area** has the meaning given to that term in the *Leichhardt Local Environment Plan* 2013 in effect at the date of this Document.
13. **GST** means the same as in the GST Act.
14. **GST Act** means *A New Tax System (Goods and Services Tax) Act* *1999* (Cth).
15. **Guarantee** means an irrevocable unconditional bank guarantee or documentary performance bond for the Guarantee Amount which must:
    1. be denominated in Australian dollars;
    2. be an unconditional undertaking;
    3. be signed and issued by a bank licensed to carry on business in Australia, an Australian Prudential Regulation Authority (APRA) regulated authorised deposit taking institution or an insurer authorised by APRA to conduct new or renewal insurance business in Australia having at all times an investment grade security rating from an industry recognised rating agency of at least:
       1. BBB + (Standard & Poors and Fitch);
       2. Baa 1 (Moodys); or
       3. Bbb (Bests);
    4. be issued on behalf of the Developer;
    5. have no expiry or end date;
    6. state the beneficiary as Council;
    7. be irrevocable;
    8. state the Guarantee Amount as the minimum amount required by this Document to be lodged as security;
    9. state the purpose of the security as required in accordance with this Document; and
    10. be on such other terms approved by Council.

**Guarantee Amount(s)** means a Guarantee or Guarantees for the total amount listed in Item 7 of Schedule 1 of this Document.

**Guarantee Amount(s) Due Date** means the date or milestone by which the Developer must provide the Guarantee Amount to Council, set out at Item 8 of Schedule 1.

**Index Number** means the Consumer Price Index (Sydney all groups) published by the Australian Bureau of Statistics from time to time.

**Insolvency Event** means:

* 1. having a controller, receiver, manager, administrator, provisional liquidator, liquidator or analogous person appointed;
  2. an application being made to a court for an order to appoint a controller, provisional liquidator, trustee for creditors or in bankruptcy or analogous person to the person or any of the person's property
  3. the person being taken under section 459F(1) of the Corporations Act to have failed to comply with a statutory demand;
  4. an application being made to a court for an order for its winding up;
  5. an order being made, or the person passing a resolution, for its winding up;
  6. the person:
     1. suspending payment of its debts, ceasing (or threatening to cease) to carry on all or a material part of its business, stating that it is unable to pay its debts or being or becoming otherwise insolvent; or
     2. being unable to pay its debts or otherwise insolvent;
  7. the person taking any step toward entering into a compromise or arrangement with, or assignment for the benefit of, any of its members or creditors;
  8. a court or other authority enforcing any judgment or order against the person for the payment of money or the recovery of any property; or
  9. any analogous event under the laws of any applicable jurisdiction,

unless this takes place as part of a solvent reconstruction, amalgamation, merger or consolidation that has been approved by the other party.

1. **Land** means the land described in Item 1 of Schedule 1 of this Document.
2. **Laws** means all applicable laws, regulations, industry codes and standards, including all Environmental Laws.
3. **Monetary Contribution** means that part of the Public Benefits described as “Monetary Contribution” in clause 1 of Schedule 3 to be paid by the Owner to Council in accordance with this Document.
4. **Occupation Certificate** has the same meaning as in the Act.
5. **Owners Representative** means the person named in Item 4A of Schedule 1 or his/her delegate.
6. **Personal Information** has the meaning set out in the *Privacy Act 1988* (Cth).
7. **Personnel** means the Developer’s officers, employees, agents, contractors or subcontractors.
8. **Previous Planning Agreement** means the voluntary planning agreement dated 26 June 2008 and made between Leichhardt Council and Balmain Leagues Club Limited (ACN 000 190 161) in respect of the Land.
9. **Privacy Laws** means the *Privacy Act 1988* (Cth), the *Privacy and Personal Information Protection Act 1998* (NSW), the *Spam Act 2003* (Cth), the *Do Not Call Register Act 2006* (Cth) and any other applicable legislation, principles, industry codes and policies relating to the handling of Personal Information.

**Public Benefits** means the provision of benefits to the community by the Developer and / or Owner in the form and at the times specified in Schedule 3.

**Quantity Surveyor** means a qualified independent and practising quantity surveyor with at least five years’ experience in the assessment of building and construction costs.

**Quantity Surveyor’s Assessment** means the assessment by the Quantity Surveyor of the cost to deliver the Developer’s Works.

**Regulation** means the *Environmental Planning and Assessment Regulation 2000 (NSW)*.

**Subdivision of Land** has the same meaning as in the Act.

**Tax** means a tax, levy, duty, rate, charge, deduction or withholding, however it is described, that is imposed by law or by a Government Agency, together with any related interest, penalty, fine or other charge.

* 1. Rules for interpreting this Document

Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this Document, except where the context makes it clear that a rule is not intended to apply.

* + 1. A reference to:
       1. a legislative provision or legislation (including subordinate legislation) is to that provision or legislation as amended, re‑enacted or replaced, and includes any subordinate legislation issued under it;
       2. a document (including this Document) or agreement, or a provision of a document (including this Document) or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;
       3. a party to this Document or to any other Document or agreement includes a permitted substitute or a permitted assign of that party;
       4. a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person; and
       5. anything (including a right, obligation or concept) includes each part of it.
    2. A singular word includes the plural, and vice versa.
    3. A word which suggests one gender includes the other genders.
    4. If a word or phrase is defined, any other grammatical form of that word or phrase has a corresponding meaning.
    5. If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.
    6. A reference to **including** means “including, without limitation”.
    7. A reference to **dollars** or **$** is to an amount in Australian currency.
    8. A reference to **this Document** includes the agreement recorded by this Document.
    9. Words defined in the GST Act have the same meaning in clauses about GST.
    10. This Document is not to be interpreted against the interests of a party merely because that party proposed this Document or some provision in it or because that party relies on a provision of this Document to protect itself.

1. APPLICATION OF THE ACT AND THE REGULATION
   1. Application of this Document

This Document is a planning agreement within the meaning of section 7.4 of the Act and applies to:

* + 1. the Land; and
    2. the Development.
  1. Public Benefits to be made by Developer

Clause 6and Schedule 3set out the details of the:

* + 1. Public Benefits to be delivered by the Developer;
    2. time or times by which the Developer must deliver the Public Benefits; and
    3. manner in which the Developer must deliver the Public Benefits.
  1. Public Benefits to be made by Owner

Clause 6 and Schedule 3 set out the details of the:

(a) Public Benefits to be delivered by the Owner:

(b) time or times by which the Owner must deliver the Public Benefits; and

(c) manner in which the Owner must deliver the Public Benefits.

* 1. Application of sections 7.11, 7.12 and 7.24 of the Act

The application of sections 7.11, 7.12 and 7.24 of the Act are excluded to the extent set out in Items 5 and 6 of Schedule 2 to this Document.

* 1. Council rights

This Document does not impose an obligation on Council to

* + 1. grant Development Consent for the Development; or
    2. exercise any function under the Act in relation to a change to an environmental planning instrument, including the making or revocation of an environmental planning instrument.
  1. Explanatory note

The explanatory note prepared in accordance with clause 25E of the Regulation must not be used to assist in construing this Document.

1. OPERATION OF THIS PLANNING AGREEMENT
   1. Commencement

This Document will commence on the date of execution of this Document by all parties to this Document.

1. TERMINATION AND REVOCATION OF PREVIOUS PLANNING AGREEMENT
   1. Termination of Previous Planning Agreement

On the date that this Document commences, the Previous Planning Agreement will be terminated so that it no longer has any effect and is revoked in accordance with clause 25C(3) of the Regulation.

* 1. Release of the Previous Planning Agreement

The Owner and Council must promptly do all things reasonably required including signing and lodging documents with Land Registry Services to remove the Previous Planning Agreement from the certificate of title to the Land once this Document has commenced.

1. WARRANTIES
   1. Mutual warranties

Each party represents and warrants that:

* + 1. (**power**) it has full legal capacity and power to enter into this Document and to carry out the transactions that it contemplates;
    2. (**corporate authority**) it has taken all corporate action that is necessary or desirable to authorise its entry into this Document and to carry out the transactions contemplated;
    3. (**Authorisations**) it holds each Authorisation that is necessary or desirable to:
       1. enable it to properly execute this Documentand to carry out the transactions that it contemplates;
       2. ensure that this Document is legal, valid, binding and admissible in evidence; or
       3. enable it to properly carry on its business as it is now being conducted,

and it is complying with any conditions to which any of these Authorisations is subject;

* + 1. (**documents effective**) this Document constitutes its legal, valid and binding obligations, enforceable against it in accordance with its terms (except to the extent limited by equitable principles and laws affecting creditors' rights generally), subject to any necessary stamping or registration;
    2. (**solvency**) there are no reasonable grounds to suspect that it will not be able to pay its debts as and when they become due and payable; and
    3. (**no controller**) no controller is currently appointed in relation to any of its property, or any property of any of its subsidiaries.
  1. Developer warranties
     1. The Developer warrants to Council that, at the date of this Document:
        1. it is legally entitled to obtain all consents and approvals that are required by this Document and do all things necessary to give effect to this Document;
        2. all work performed by the Developer and the Personnel under this Document will be performed with due care and skill and to a standard which is equal to or better than that which a well experienced person in the industry would expect to be provided by an organisation of the Developer’s size and experience; and
        3. it is not aware of any matter which may materially affect the Developer’s ability to perform its obligations under this Document.
     2. The Developer warrants to Council that, prior to commencing delivery of the Public Benefits it will have obtained all Authorisations and insurances required under any Law to carry out its obligations under this Document.
  2. Owner’s warranty
     1. The Owner warrants to Council that, at the date of this Document:
        1. it is the registered proprietor of the Land.

1. Public Benefits
   1. Developer to provide Public Benefits

The Developer must, at its cost, provide the Public Benefits to Council in accordance with this Document.

* 1. Owner to provide Public Benefits

The Owner must, at its cost and risk, provide the Public Benefits to Council in accordance with this Document.

1. Completion
   1. Date of Completion

The Developer must ensure that the Developer’s Works reach Completion on or before the date or milestone referred to in clause 1 of Schedule 3 of this Document.

* 1. Developer completion notice

When, in the reasonable opinion of the Developer, the Developer’s Works have reached Completion, the Developer must notify Council’s Representative in writing and must include in that notice:

* + 1. a statement from the person with direct responsibility and supervision of that work that in their opinion the Developer’s Works have reached Completion;
    2. copies of any warranties, guarantees, maintenance information or other material reasonably required for Council to assume responsibility for the Developer’s Works; and
    3. at least three sets of the “as built” drawings of the Developer’s Works, including one set in electronic format,

(**Completion Notice**). For the avoidance of doubt, the Developer can issue separate Completion Notices at separate times for different elements of the Developer’s Works, however the Developer must ensure that Completion is achieved for the Developer’s Works before the due date specified in Item 1 of Schedule 3.

* 1. Inspection by Council
     1. Council’s Representative must inspect the Developer’s Works within 5 Business Days of the date that the Completion Notice is received by Council. Council’s Representative may refuse to complete the inspection until the Completion Notice has been issued with all required Documentation attached in accordance with clause 7.2. Within 10 Business Days of the date of the inspection by Council’s Representative, Council must by written notice to the Developer:
        1. state that Completion has been achieved;
        2. state that Completion has not been achieved and, if so, identify the Defects, errors or omissions which, in the opinion of Council’s Representative, prevent Completion; or
        3. issue a notice under clause 7.4(a).
     2. Nothing in this clause 7.3, or any notice issued under this clause 7.3, will:
        1. reduce or waive in any manner the Developer’s responsibility to:
           1. deliver the Developer’s Works in accordance with this Document; or
           2. the Developer’s responsibility to correct Defects, errors or omissions, whether or not these are identified by Council; or
        2. create any liability for Council in relation to any defective aspect of the Developer’s Works.
  2. Non-completion of Public Benefits
     1. If the Developer makes a request by notice in writing not to complete the Public Benefits, or to delay completion or delivery of the Public Benefits (or any part of the Public Benefits):
        1. Council may permit the Developer not to complete or to delay delivery of the Public Benefits (or any part of the Public Benefits) by issuing a notice in writing to the Developer stating that completion of the items identified in that notice is not required to fulfil the Developer’s obligations under this Document, or is required by such further later date as is specified in the notice; and
        2. In the case of non-completion, Council may make a claim on the Guarantee in such amount as Council considers necessary to complete the portion of Public Benefit not being delivered by the Developer.
     2. If the Developer fails to complete the whole of the Public Benefits in the form and to the standards required under the Development Consent or this Document (as modified by any agreement made pursuant to this Document) then Council may either:
        1. complete the Public Benefits itself; or
        2. modify the Public Benefits to reasonably achieve the objectives identified in the Development Consent and this Document,

and may recover all costs of and reasonably incidental to that work from the Developer. Council can claim on the Guarantee in order to exercise this right, in which case the provisions of clause 11 will apply. To the extent that Council’s costs exceed the amount of the Guarantee, Council can recover this amount from the Developer as a debt due and owing to Council.

* + 1. If Council exercises its rights under this clause 7.4 to complete the Public Benefits, the Developer grants Council a licence for the period reasonably necessary for Council to access the Land to carry out, or procure the carrying out, of the Public Benefits.

1. Indemnity

The Developer and the Owner indemnify Council against all damage, expense, loss or liability of any nature suffered or incurred by Council arising from any act or omission by the Developer (or any Personnel) and / or the Owner in connection with the performance of the Developer’s and Owner’s obligations under this Document, except where the damage, expense, loss or liability suffered or incurred is caused by, or contributed to by, any wilful or negligent act or omission of Council (or any person engaged by Council).

1. DEFECTS LIABILITY
   1. Security for Defects Liability Period

Until the expiry of the relevant Defects Liability Period, Council may retain from the Guarantee an amount equal to 10% of the Attributed Value of the Developer’s Works as security for the Developer’s performance of its obligations under this clause 9. The Developer must make any necessary arrangements to allow the provision of the Guarantee for the Defects Liability Period in accordance with this clause.

* 1. Defect in the Public Benefits
     1. If:
        1. the Developer is in breach of clause 5.2 of this Document; or
        2. Council notifies the Developer of a Defect in the Public Benefits within the Defects Liability Period,

then, following written notice from Council, the Developer must promptly correct or replace (at the Developer’s expense) the defective elements of the Public Benefits.

* + 1. If the Developer is unable or unwilling to comply with clause 9.2(a), or fails to rectify the Defect within three months of receiving notice from Council under clause 9.2(a), Council may:
       1. rectify the Defect itself;
       2. make a claim on the Guarantee in accordance with clause 11for the reasonable costs of Council in rectifying the Defect; and
       3. to the extent the costs incurred to rectify the Defect exceeds the Guarantee, recover the reasonable costs from the Developer as a debt due and owing to Council.
    2. If Council requires access to the Land to rectify any Defect, the Developer grants Council and its contractors a licence for such period as is necessary for Council and its contractors to access the Land to carry out, or procure the carrying out, of the rectification works.

1. REGISTRATION AND CAVEAT
   1. Registration of this Document
      1. The Owner:
         1. consents to the registration of this Document at the NSW Land Registry Services on the certificate of title to the Land;
         2. warrants that it has obtained all consents to the registration of this Document on the certificate of title to the Land; and
         3. must within 10 Business Days of a written request from Council do all things necessary to allow Council to register this Document on the certificate of title to the Land, including but not limited to:
            1. producing any Documents or letters of consent required by the Registrar-General of the NSW Land Registry Services;
            2. providing the production slip number when the Developer produces the certificate of title to the Land at the NSW Land Registry Services; and
            3. providing Council with a cheque for registration fees payable in relation to registration of this Document at NSW Land Registry Services.
         4. The Owner must act promptly in complying with and assisting to respond to any requisitions raised by the NSW Land Registry Services that relate to registration of this Document.
   2. Caveat
      1. Council may, at any time after the date of this Document, register a caveat over the Land preventing any dealing with the Land that is inconsistent with this Document. Provided that Council complies with this clause 10.2, the Owner must not object to the registration of this caveat and may not attempt to have the caveat removed from the certificate of title to the Land.
      2. In exercising its rights under this clause 10.2 Council must do all things reasonably required to:
         1. remove the caveat from the Land once this Document has been registered on the certificate of title to the Land; and
         2. consent to the registration of:
            1. this Document; and
            2. any plan of consolidation, plan of subdivision or other dealing required by this Document or the Development Consent.
   3. Release of this Document

If Council is satisfied that the Developer and the Owner have provided all Public Benefits and otherwise complied with this Document then Council must promptly do all things reasonably required to remove this Document from the certificate of title to the Land.

1. ENFORCEMENT
   1. Developer to provide Guarantee

The Developer must deliver the Guarantee for the Guarantee Amount to Council by the Guarantee Amount Due Date.

* 1. Adjustment of Guarantee Amount

On each anniversary of the date of the Guarantee (the “Adjustment Date”), the Guarantee Amounts are to be adjusted to a revised amount by applying the following formula:

**RGA** **= GA x (A/B)**

where:

**RGA** is the revised guarantee amount applicable from the relevant Adjustment Date  
**GA** is the Guarantee Amount that is current on the relevant Adjustment Date  
**A** is the Index Number most recently published before the relevant Adjustment Date  
**B** is the Index Number most recently published:

* + - 1. before the date of the Guarantee for the first Adjustment Date; and
      2. before the preceding Adjustment Date for every subsequent Adjustment Date

If after the formula is applied the revised Guarantee Amount will be less than the amount held at the preceding Adjustment Date, the Guarantee Amount will not be adjusted.

* 1. Right of Council to claim on Guarantee
     1. The Developer agrees that Council may make an appropriation from the Guarantee in such amount as Council, acting reasonably, thinks appropriate if:
        1. the Developer fails to comply with clause 2 of Schedule 3 (payment of Monetary Contribution);
        2. Council allows the Developer not to complete the Public Benefits, or any part of them, in accordance with clause 7.4(a)(ii);
        3. an Insolvency Event occurs in respect of the Developer;
        4. the Developer fails to deliver the Public Benefits in accordance with clause 7.4(b);
        5. the Developer fails to rectify a Defect in accordance with clause 9.2 of this Document;
        6. the Developer’s Works do not reach Completion within 36 months of the date of issue of the first Construction Certificate in respect of the Development (or such later time as agreed by Council in writing); or
        7. Council incurs any other expense or liability in exercising its rights and powers under this Document.
     2. Any amount of the Guarantee appropriated by Council in accordance with clause 11.2 must be applied only towards:
        1. the costs and expenses incurred by Council rectifying any default by the Developer under this Document; and
        2. carrying out any works required to achieve the Public Benefits.
  2. Expenditure by Council

If Council claims on the Guarantee to Complete the Developer’s Works, then Council:

* + 1. is not required to expend more money than the Guarantee Amount and may elect not to carry out items of the Developer’s Works to ensure that those works can be carried out for an amount equal to or less than the Guarantee Amount; or
    2. may, acting reasonably, expend more than the Guarantee Amount. If Council expends more money than the Guarantee Amount then the amount in excess of the Guarantee Amount will be deemed to be a debt due and owing to Council by the Developer.
  1. Top-up and return of Guarantee
     1. If Council calls upon the Guarantee in accordance with this clause 11 then the Developer must immediately provide to Council a replacement Guarantee to ensure that, at all times until the Guarantee is released in accordance with paragraph (b), Council is in possession of a Guarantee for a face value equivalent to the Guarantee Amount.
     2. If:
        1. the monies secured by the Guarantee have not been expended;
        2. Council has concurred with Completion in accordance with clause 7.3(a)(i) of this Document, taking into account any approved non-completion of Public Benefits approved by clause 7.4(a) of this Document; and
        3. Council has been provided with the security for the Defects Liability Period in accordance with clause 9.1,

then Council will promptly return the Guarantee to the Developer following the issue of a notice pursuant to clause 7.3(a)(i) of this Document.

* + 1. If, following expiry of the Defects Liability Period, Council is satisfied that all defects have been rectified in accordance with clause 9 then Council must promptly return to the Developer the portion of the Guarantee retained by Council as security for the Defects Liability Period.

1. DISPUTE RESOLUTION
   1. Application

Any Dispute must be determined in accordance with the procedure in this clause 12.

* 1. Negotiation
     1. If any Dispute arises, a party to the Dispute (**Referring Party**) may by giving notice to the other party or parties to the Dispute (**Dispute Notice**) refer the Dispute to the Developer’s Representative, and / or the Owner’s Representative and Council’s Representative for resolution. The Dispute Notice must:
        1. be in writing;
        2. state that it is given pursuant to this clause 12; and
        3. include or be accompanied by reasonable particulars of the Dispute including:
           1. a brief description of the circumstances in which the Dispute arose;
           2. references to any:

provisions of this Document; and

acts or omissions of any person,

relevant to the Dispute; and

* + - * 1. where applicable, the amount in dispute (whether monetary or any other commodity) and if not precisely known, the best estimate available.
    1. Within 10 Business Days of the Referring Party issuing the Dispute Notice (**Resolution Period**), the Developer’s Representative, and / or the Owner’s Representative and Council’s Representative must meet at least once to attempt to resolve the Dispute.
    2. The Developer’s Representative, and / or the Owner’s Representative and Council’s Representative may meet more than once to resolve a Dispute. The Developer’s Representative, and / or the Owner’s Representative and Council’s Representative may meet in person, via telephone, videoconference, internet-based instant messaging or any other agreed means of instantaneous communication to effect the meeting.
  1. Mediation
     1. If a Dispute is not resolved within 15 business days after the expiry of the Resolution Period, either party or other parties may give to each other a written notice calling for determination of the dispute by mediation under this clause 12.3.
     2. If a party gives a Dispute Notice calling for the dispute to be mediated:
        1. the parties must agree to the terms of reference of the mediation within 3 business days of the receipt of the Dispute Notice calling for the dispute to be mediated (the terms will include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);
        2. the Mediator will be agreed between the parties, or failing agreement within 3 business days of receipt of the Dispute Notice, a party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
        3. the Mediator appointed pursuant to this clause 12.3 must:
           1. have reasonable qualifications and practical experience in the area of the dispute; and
           2. have no interest or duty which conflicts or may conflict with his function as mediator, he being required to fully disclose any such interest or duty before his appointment;
        4. the Mediator will be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and performance of his duties;
        5. the parties must within 5 business days of receipt of the Dispute Notice calling for the dispute to be mediated notify each other of their representatives who will be involved in the mediation;
        6. the parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement;
        7. the parties must convene and attend the mediation within 21 days of the date of the Dispute Notice calling for the dispute to be mediated;
        8. in relation to costs and expenses:
           1. each party will bear their own professional and expert costs incurred in connection with the mediation; and
           2. the costs of the Mediator will be shared equally by the parties unless the Mediator determines a party has engaged in vexatious or unconscionable behaviour in which case the Mediator may require the full costs of the mediation to be borne by that party.
  2. Not use information

The purpose of any exchange of information or Documents or the making of any offer of settlement under this clause 12 is to attempt to settle the Dispute. Neither party may use any information or Documents obtained through any dispute resolution process undertaken under this clause 12 for any purpose other than in an attempt to settle the Dispute.

* 1. Condition precedent to litigation

Subject to clause 12.6, a party must not commence legal proceedings in respect of a Dispute unless:

* + 1. a Dispute Notice has been given; and
    2. the Resolution Period has expired.
  1. Summary or urgent relief

Nothing in this clause 12 will prevent a party from instituting proceedings to seek urgent injunctive, interlocutory or declaratory relief in respect of a Dispute.

1. taxes and GST
   1. Responsibility for Taxes
      1. The Developer and the Owner are responsible for any and all Taxes and other like liabilities which may arise under any Commonwealth, State or Territory legislation (as amended from time to time) as a result of or in connection with this Document or the Public Benefits.
      2. The Developer and the Owner must indemnify Council in relation to any claims, liabilities and costs (including penalties and interest) arising as a result of any Tax or other like liability for which the Developer is responsible under clause 13.1(a).
   2. GST free supply

To the extent that Divisions 81 and 82 of the GST Law apply to a supply made under this Document:

* + 1. no additional amount will be payable by a party on account of GST; and
    2. no tax invoices will be exchanged between the parties.
  1. Supply subject to GST

To the extent that clause 13.2 does not apply to a supply made under this Document, this clause 13.3 will apply.

* + 1. If one party (**Supplying Party**) makes a taxable supply and the consideration for that supply does not expressly include GST, the party that is liable to provide the consideration (**Receiving Party**) must also pay an amount (**GST Amount**) equal to the GST payable in respect of that supply.
    2. Subject to first receiving a tax invoice or adjustment note as appropriate, the receiving party must pay the GST amount when it is liable to provide the consideration.
    3. If one party must indemnify or reimburse another party (**Payee**) for any loss or expense incurred by the Payee, the required payment does not include any amount which the Payee (or an entity that is in the same GST group as the Payee) is entitled to claim as an input tax credit, but will be increased under clause 13.3(a) if the payment is consideration for a taxable supply.
    4. If an adjustment event arises in respect of a taxable supply made by a Supplying Party, the GST Amount payable by the Receiving Party under clause 13.3(a) will be recalculated to reflect the adjustment event and a payment will be made by the Receiving Party to the Supplying Party, or by the Supplying Party to the Receiving Party, as the case requires.
    5. The Developer will assume Council is not entitled to any input tax credit when calculating any amounts payable under this clause 13.3.
    6. In this Document:
       1. consideration includes non-monetary consideration, in respect of which the parties must agree on a market value, acting reasonably; and
       2. in addition to the meaning given in the GST Act, the term "GST" includes a notional liability for GST.

1. DEALINGS
   1. Dealing by Council
      1. Council may Deal with its interest in this Document without the consent of the Developer or the Owner if the Dealing is with a Government Agency. Council must give the Developer and the Owner notice of the Dealing within five Business Days of the date of the Dealing.
      2. Council may not otherwise Deal with its interest in this Document without the consent of the Developer and Owner, such consent not to be unreasonably withheld or delayed.
   2. Dealing by the Developer and Owner
      1. Prior to registration of this Document in accordance with clause 10, the Developer and the Owner must not Deal with this Document or the Land without:
         1. the prior written consent of Council; and
         2. Council, the Developer, the Owner and the third party the subject of the Dealing entering into a deed of consent to the Dealing on terms acceptable to Council,

provided that in relation to the Land this does not apply to entering into a contract to sell an off the plan lot in a strata plan or stratum plan, or to a mortgage or charge of the Land.

* + 1. On and from registration of this Document in accordance with clause 10:
       1. the Owner may Deal with this Document without the consent of Council only as a result of the sale of the whole of the Land (without subdivision) to a purchaser of the Land;
       2. the Owner may register a plan of strata subdivision or stratum subdivision, and Council consents to this Document remaining registered only on the certificate of title to the common property of the strata plan upon registration of the strata plan; and
       3. the Developer and the Owner must not otherwise Deal with this Document to a third party that is not a purchaser of the whole or any part of the Land without:
          1. the prior written consent of Council; and
          2. Council, the Developer, the Owner and the third party the subject of the Dealing entering into a deed of consent to the Dealing on terms acceptable to Council.
    2. The Developer and / or the Owner must pay Council’s costs and expenses relating to any consent or documentation required due to the operation of this clause 14.2.

1. TERMINATION
   * 1. Council may terminate this Document by notice in writing to the Developer if the Development Consent lapses or is surrendered by the Developer or is invalidated by a Court in any final hearing that is not the subject of a further appeal.
     2. If Council terminates this Document then:
        1. the rights of each party that arose before the termination or which may arise at any future time for any breach or non-observance of obligations occurring prior to the termination are not affected;
        2. the Developer and the Owner must take all steps reasonably necessary to minimise any loss each party may suffer as a result of the termination of this Document;
        3. Council will return the Guarantee to the Developer after first deducting any amounts owing to Council or costs incurred by Council by operation of this Document. If in exercising its rights under this Document Council expends more money than the Guarantee Amount then the amount in excess of the Guarantee Amount will be deemed to be a debt due and owing to Council by the Developer; and
        4. Council will, at the Owner’s cost, do all things reasonably required to remove this Document from the certificate of title to the Land.
     3. For the avoidance of doubt, this Document automatically terminates if the Development Consent lapses or is surrendered or is invalidated by a Court in any final hearing that is not the subject of a further appeal.
2. CONFIDENTIALITY AND DISCLOSURES
   1. Use and disclosure of Confidential Information

A party (**receiving party**) which acquires Confidential Information of another party (**disclosing party**) must not:

* + 1. use any of the Confidential Information except to the extent necessary to exercise its rights and perform its obligations under this Document; or
    2. disclose any of the Confidential Information except in accordance with clauses 16.2 or 16.3.
  1. Disclosures to personnel and advisers
     1. The receiving party may disclose Confidential Information to an officer, employee, agent, contractor, or legal, financial or other professional adviser if:
        1. the disclosure is necessary to enable the receiving party to perform its obligations or to exercise its rights under this Document; and
        2. prior to disclosure, the receiving party informs the person of the receiving party's obligations in relation to the Confidential Information under this Document and obtains an undertaking from the person to comply with those obligations.
     2. The receiving party:
        1. must ensure that any person to whom Confidential Information is disclosed under clause 16.2(a) keeps the Confidential Information confidential and does not use it for any purpose other than as permitted under clause 16.2(a); and
        2. is liable for the actions of any officer, employee, agent, contractor or legal, financial or other professional adviser that causes a breach of the obligations set out in clause 16.2(b)(i).
  2. Disclosures required by law
     1. Subject to clause 16.3(b), the receiving party may disclose Confidential Information that the receiving party is required to disclose:
        1. by law or by order of any court or tribunal of competent jurisdiction; or
        2. by any Government Agency, stock exchange or other regulatory body.
     2. If the receiving party is required to make a disclosure under clause 16.3(a), the receiving party must:
        1. to the extent possible, notify the disclosing party immediately it anticipates that it may be required to disclose any of the Confidential Information;
        2. consult with and follow any reasonable directions from the disclosing party to minimise disclosure; and
        3. if disclosure cannot be avoided:
           1. only disclose Confidential Information to the extent necessary to comply; and
           2. use reasonable efforts to ensure that any Confidential Information disclosed is kept confidential.
  3. Receiving party's return or destruction of documents

On termination of this Document the receiving party must immediately:

* + 1. deliver to the disclosing party all Documents and other materials containing, recording or referring to Confidential Information; and
    2. erase or destroy in another way all electronic and other intangible records containing, recording or referring to Confidential Information,

which are in the possession, power or control of the receiving party or of any person to whom the receiving party has given access.

* 1. Security and control

The receiving party must:

* + 1. keep effective control of the Confidential Information; and
    2. ensure that the Confidential Information is kept secure from theft, loss, damage or unauthorised access or alteration.

1. NOTICES
   * 1. A notice, consent or other communication under this Document is only effective if it is in writing, signed and either left at the addressee's address or sent to the addressee by mail or fax. If it is sent by mail, it is taken to have been received 5 Business Days after it is posted. If it is sent by fax, it is taken to have been received when the addressee actually receives it in full and in legible form.
     2. A person's address and fax number are those set out in Schedule 1 for Council’s Representative and the Developer’s Representative and the Owner’s Representative, or as the person notifies the sender in writing from time to time.
2. GENERAL
   1. Governing law
      1. This Document is governed by the laws of New South Wales.
      2. Each party submits to the exclusive jurisdiction of the courts exercising jurisdiction in New South Wales, and any court that may hear appeals from any of those courts, for any proceedings in connection with this Document, and waives any right it might have to claim that those courts are an inconvenient forum.
   2. Access to information

In accordance with section 121 of the *Government Information (Public Access) Act 2009 (NSW)*, the Developer and the Owner agree to allow Council immediate access to the following information contained in records held by the Developer and the Owner:

* + 1. information that relates directly to the delivery of the Public Benefits by the Developer and Owner;
    2. information collected by the Developer and / or Owner from members of the public to whom the Developer and / or Owner provides, or offers to provide, services on behalf of Council; and
    3. information received by the Developer and / or Owner from Council to enable the Developer to deliver the Public Benefits.
  1. Liability for expenses
     1. The Developer and / or the owner must pay their own and Council’s expenses incurred in negotiating, executing, registering, releasing, administering and enforcing this Document.
     2. The Developer and / or the Owner must pay for all reasonable costs and expenses associated with the preparation and giving of public notice of this Document and the explanatory note prepared in accordance with the Regulations and for any consent Council is required to provide under this Document.
  2. Relationship of parties
     1. Nothing in this Document creates a joint venture, partnership, or the relationship of principal and agent, or employee and employer between the parties; and
     2. No party has the authority to bind any other party by any representation, declaration or admission, or to make any contract or commitment on behalf of any other party or to pledge any other party’s credit.
  3. Giving effect to this Document

Each party must do anything (including execute any document), and must ensure that its employees and agents do anything (including execute any document), that the other party may reasonably require to give full effect to this Document.

* 1. Time for doing acts
     1. If:
        1. the time for doing any act or thing required to be done; or
        2. a notice period specified in this Document,

expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.

* + 1. If any act or thing required to be done is done after 5pm on the specified day, it is taken to have been done on the following Business Day.
  1. Severance

If any clause or part of any clause is in any way unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid and legal. If this is not possible, the clause (or where possible, the offending part) is to be severed from this Document without affecting the enforceability, validity or legality of the remaining clauses (or parts of those clauses) which will continue in full force and effect.

* 1. Preservation of existing rights

The expiration or termination of this Document does not affect any right that has accrued to a party before the expiration or termination date.

* 1. No merger

Any right or obligation of any party that is expressed to operate or have effect on or after the completion, expiration or termination of this Document for any reason, will not merge on the occurrence of that event but will remain in full force and effect.

* 1. Waiver of rights

A right may only be waived in writing, signed by the party giving the waiver, and:

* + 1. no other conduct of a party (including a failure to exercise, or delay in exercising, the right) operates as a waiver of the right or otherwise prevents the exercise of the right;
    2. a waiver of a right on one or more occasions does not operate as a waiver of that right if it arises again; and
    3. the exercise of a right does not prevent any further exercise of that right or of any other right.
  1. Operation of this Document
     1. This Document contains the entire agreement between the parties about its subject matter. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by this Document and has no further effect.
     2. Any right that a person may have under this Document is in addition to, and does not replace or limit, any other right that the person may have.
     3. Any provision of this Document which is unenforceable or partly unenforceable is, where possible, to be severed to the extent necessary to make this Document enforceable, unless this would materially change the intended effect of this Document.
  2. Operation of indemnities
     1. Each indemnity in this Document survives the expiry or termination of this Document.
     2. A party may recover a payment under an indemnity in this Document before it makes the payment in respect of which the indemnity is given.
  3. Inconsistency with other documents

Unless the contrary intention is expressed, if there is an inconsistency between any of one or more of:

* + 1. this Document;
    2. any Schedule to this Document; and
    3. the provisions of any other Document of the Developer,

the order of precedence between them will be the order listed above, this Document having the highest level of precedence.

* 1. No fetter

Nothing in this Document in any way restricts or otherwise affects Council’s unfettered discretion to exercise its statutory powers as a public authority.

* 1. Counterparts

This Document may be executed in counterparts.



Agreement Details

|  |  |  |
| --- | --- | --- |
| ITEM | TERM | DESCRIPTION |
| 1. | **Land** | 138-152 Victoria Road, ROZELLE NSW 2039 (Lot 1 DP 528045);  154-156 Victoria Road, ROZELLE NSW 2039 (Lot 1 DP 109047);  697 Darling Street, ROZELLE NSW 2039 (Lot 104 DP 733658); and 1-7 Waterloo Street ROZELLE NSW 2039 (Lot 101 DP 629133, Lot 102 DP 629133, Lot 37 DP 421, Lot 38 DP 421, Lot 36 DP 190866) |
| 2. | **Development** | Demolition of all existing improvements, site remediation, and construction of a mixed-use development comprising three basement levels for residential and commercial parking with three 11 to 12 storey buildings connected above a shared retail and commercial podium with 164 residential units above, a new leagues club in the commercial area, and development fronting Waterloo Street comprised of two to three storey buildings for three live/work units resulting in a total of 167 residential units on the Land.  The total Gross Floor Area of the Development on the Land is 28,414 square metres. |
| 3. | **Council’s Representative** | Name: Brian Barrett Acting General Manager,  Address: 7-15 Wetherill Street, Leichhardt NSW 2040  Email: council@innerwest.nsw.gov.au |
| 4. | **Developer’s Representative** | Name: Chris Walsh  Address: Level 21, The Zenith Tower A, 821 Pacific Highway, Chatswood NSW 2067  Email: reception@heworth.com.au |
| 5. | **Owner’s Representative** | Name: Yuhui He  Address: Level 21, The Zenith Tower A, 821 Pacific Highway, Chatswood NSW 2067  Email: reception@heworth.com.au |
| 6. | **Development Application** | Development Application No. D/2018/219 lodged with Council on 1 May 2018 and approved on 10 September 2020 and amended in December 2020 |
| 7. | **Guarantee Amount** | A total amount of $2,000,000. |
| 8. | **Guarantee Amount Due Date** | Prior to the issue of a construction certificate. |



Requirements under the Act and Regulation (clause 2)

The below table summarises how this Document complies with the Act and Regulation.

| **ITEM** | **SECTION OF ACT OR REGULATION** | **PROVISION/CLAUSE OF THIS DOCUMENT** |
| --- | --- | --- |
|  | **Planning instrument and/or development application** (section 7.4(1) of the Act)  The Developer has:   * + 1. sought a change to an environmental planning instrument;     2. made, or proposes to make, a Development Application; or     3. entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies. | * + 1. No.     2. Yes – Item 6 of Schedule 1.     3. Not applicable. |
|  | **Description of land to which this Document applies** (section 7.4(3)(a) of the Act) | Item 1 of Schedule 1. |
|  | **Description of change to the environmental planning instrument to which this Document applies and/or the development to which this Document applies** (section 7.4(3)(b) of the Act) | The Development as described in clause 2.1. |
|  | **The nature and extent of the provision to be made by the developer under this Document, the time or times by which the provision is to be made and the manner in which the provision is to be made** (section 7.4(3)(c) of the Act) | Schedule 3 and Annexures A and B. |
|  | **Whether this Document excludes (wholly or in part) or does not exclude the application of section 7.11, 7.12 or 7.24 to the development** (section 7.4(3)(d) of the Act) | Section 7.11 excluded  Section 7.12 not excluded  Section 7.24 not excluded |
|  | **Applicability of section 7.11 of the Act** (section 7.4(3)(e) of the Act) | The application of section 7.11 of the Act is excluded in respect of the Development and contributions (if any) under section 7.11 willnot be required to be paid. |
|  | **Consideration of benefits under this Document if section 7.11 applies** (section 7.4(3)(e) of the Act) | Not applicable because this Document excludes section 7.11 of the Act. |
|  | **Mechanism for Dispute Resolution** (section 7.4(3)(f) of the Act) | Clause 12 |
|  | **Enforcement of this Document** (section 7.4(3)(g) of the Act) | Clause 11 |
|  | **No obligation to grant consent or exercise functions** (section 7.4(9) of the Act) | Clause 2.5 |
|  | **Registration of this Document** (section 7.6 of the Act) | Clause 10 |
|  | **Whether certain requirements of this Document must be complied with before a construction certificate is issued** (clause 25E(2)(g) of the Regulation) | Yes, refer to the explanatory note |
|  | **Whether certain requirements of this Document must be complied with before a subdivision certificate is issued** (clause 25E(2)(g) of the Regulation) | No, refer to the explanatory note |
|  | **Whether certain requirements of this Document must be complied with before an occupation certificate is issued** (clause 25E(2)(g) of the Regulation) | Yes, refer to the explanatory note |
|  | **Whether the explanatory note that accompanied exhibition of this Document may be used to assist in construing this Document** (clause 25E(7) of the Regulation) | Clause 2.6 |



Public Benefits (clause 5)

1. Public benefits - overview

The Developer and / or the Owner (as determined by the Developer and Owner) must provide the Public Benefits in accordance with Schedule 3 and this Document. The Attributed Value, timing of delivery and additional specifications relating to the Public Benefits is set out in the table below

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Public Benefit** | **Attributed Value** | **Due date** | **Additional specifications** |
| 1. | **OWNER**  Monetary Contribution | $300,000 | Prior to the issue of an occupation certificate | For community grants (no GST) |
| $1,000,000 | Prior to the issue of an occupation certificate | For affordable housing fund (no GST) |
| $4,000,000 | Prior to the issue of an occupation certificate | In lieu of s7.11 contributions |
|  | Over 25 years. | Income from public parking.  An Easement in Gross and Public Positive Covenant will be granted to Council for 25 years for 130 publicly accessible car parking spaces in the retail and club car park. The Owner will install a car park management system to charge vehicles for use of the car park after 2 hours free parking with income paid directly to Council. This amount is the estimated total net revenue Council will receive by the end of the lease period. |
| 2. | **OWNER**  An Easement in Gross and Public Positive Covenant |  | After Completion but before the issue of the first Occupation Certificate for the Development | An Easement in Gross and Public Positive Covenant will be granted to Council for 25 years for 130 publicly accessible car parking spaces in the retail and club car park. The Easement in Gross will not require outgoings to be paid by Council other than any utilities charges. As the Easement in Gross value includes $30,000/annum over 25 years - items include but not limited to any strata levies, cleaning, general R&M, insurance, land tax etc. This term of the Easement in Gross and Positive Covenant are provided at Annexure C. |
|  | Prior to the issue of the first Occupation Certificate for the Development | Darling Lane, (privately owned) made available to Council via a right of way easement, in order to provide access for Darling Street properties and to pedestrianize the through site link.  See Public Open Space Plan Prepared by Scott Carver dated 10.03.19 at Annexure B. |
|  | After Completion but before the issue of the first Occupation Certificate for the Development | 25 year lease of 200m2 commercial space to Council for $1/year for 25 years. Gross lease inclusive of outgoings and any strata levies but excluding utilities charges.  The Owner will also make a contribution of a maximum of $100,000 for the fit out of this space.  The terms of the lease are provided at Annexure D.  See Scott Carver Floor Plan AD-DA105 Upper Ground Mez at Annexure A. |
| 3. | **OWNER**  Permit use of Land |  | N/A | Town Square space made available for Council to hold events at no charge to Council for a maximum of 4 single day events per calendar month and the maximum of one per calender week, provided that only 2 single day events are permitted on a Saturday and Sunday (that is, on a weekend) in a calendar month. A management agreement between Inner West Council and the Owner of the Retail Stratum will be prepared in respect of this use, which can be novated with ownership of the Town Square |
|  |  |  | Prior to the issue of the first Occupation Certificate for the Development | Tigers Lane, (privately owned) made available to enable Council to hold events in the Town Square. See Public Open Space Plan Prepared by Scott Carver dated 10.03.19 at Annexure B. |
| 4. | Developer’s Works |  | Prior to the issue of the first Occupation Certificate for the Development | Additional footpath widening to both the Victoria Road and Waterloo Street frontages (in stratum).  See Public Open Space Plan Prepared by Scott Carver dated 10.03.19 at Annexure B. |
|  | Prior to the issue of the first Occupation Certificate for the Development | Construction of a pedestrian link (i.e. the proposed retail arcade) from the proposed development to the Darling Street shop frontage as shown in the Public Open Space Plan prepared by Scott Carver dated 10.03.19 at Annexure B. |
|  | Prior to the issue of the first Occupation Certificate for the Development | Bicycle Parking facilities provided for shoppers, employees and residents.  See Scott Carver Drawing AD-DA101 & AD-DA102 at Annexure A. |
|  | Prior to the issue of the first Occupation Certificate for the Development | Community car share scheme with a minimum of 2 car share spaces provided.  See Scott Carver Drawing AD-DA101 & AD-DA102 at Annexure A. |
|  | Prior to the issue of the first Occupation Certificate for the Development | Designated accessible area provided for taxis to pick up and drop off.  See Scott Carver Drawing AD-DA101 & AD-DA102 at Annexure A. |

1. Payment of monetary contribution
   1. Payment

The Owner must pay the Monetary Contribution (excluding the income from public parking) to Council prior to the issue of the first Occupation Certificate for the Development in cash or by unendorsed bank cheque.

* 1. Indexation

If the Monetary Contribution is not paid to Council on the date of this Document then at the date of payment the Monetary Contribution must be indexed as follows:

**Monetary Contribution (to be provided) =**

**Monetary Contribution (as per item 1 of clause 1 above) x (A/B)**

where:

**A** is the Index Number most recently published before the date the Monetary Contribution is to be paid

**B** is the Index Number most recently published before the date this agreement commenced in accordance with clause 3.1 of this Document.

If after the formula is applied the Monetary Contribution will be less than the amount stated in item 1 of clause 1 above, the Monetary Contribution will not be adjusted.

* 1. No trust

Nothing in this Document creates any form of trust arrangement or fiduciary duty between Council and the Owner. Following receipt of the Monetary Contribution, Council is not required to separately account for the Monetary Contribution, report to the Owner regarding expenditure of the Monetary Contribution or comply with any request by the Owner to trace the Monetary Contribution.

1. ChANGES TO the design of the Developer’s Works
   1. Scope of Developer’s Works

The parties agree that refinement or amendment of the Developer’s Works as set out in this document may be necessary, having regard to:

* + 1. the extent to which the design of the Developer’s Works has been approved by Council;
    2. conditions affecting the Developer’s Works that were not reasonably capable of identification prior to the date of this Document;
    3. the extent of any refinement of the design of the Developer’s Works permitted by this clause 3 of Schedule 3;
    4. construction certificate plans for the development;
    5. any modification to the Development Consent made and approved under section 4.55 of the Act or any other development consent granted that relates to the Developer’s Works.
  1. Changing the design of the Developer’s Works
     1. If at any time during the course of the development it becomes necessary to refine or amend the parts of the Developer’s Works being the 200m2 of commercial space to be leased to Council under this document and/or the 130 publicly accessible parking spaces which council has the benefit of under this document, to the extent that would require a section 4.55 of the Act modification and/or any other development application to be lodged or construction certificate plans then:
        1. As soon as practicable the Developer must submit to Council’s Representative detailed design drawings of the proposed refinements or amendments; and
        2. Within 28 days after Council’s Representative has received the detailed design drawings that detail the proposed refinements and/or amendments, Council must inform the Developer in writing as to whether it agrees to the proposed refinements or amendments. Agreement to the proposed refinements or amendments may not be unreasonably withheld and may only be withheld where the proposed refinements or amendments impact on Council’s use of the parts of the Developer’s Works being the 200m2 of commercial space to be leased to Council under this document and the 130 publicly accessible parking spaces which council has the benefit of under this document. If Council does not agree to the proposed refinements and/or amendments, then it must also advise the Developer of its reasons for disagreeing to the proposed refinements and/or amendments.
        3. If Council does not provide any response during the 28 days after receiving the detailed design drawings of the proposed refinements or amendments as required under clause 3.2(a)(ii), it is deemed that Council agrees to the proposed refinements and/or amendments.
        4. If the Developer determines that any disagreement by Council to the refinements and/or amendments proposed under this clause 3 is unreasonable for any reason (including that the proposed refinements and/or amendments will not impact Council’s use of the parts of the Developer’s Works being the 200m2 of commercial space to be leased to Council under this document and the 130 publicly accessible parking spaces which council has the benefit of under this document) then the developer may notify a dispute in accordance with clause 12 of this Document.
        5. Nothing in this clause 3 prevents refinements and/or amendments to the Developer’s works being proposed to Council on more than one occasion.

Explanatory Note

Schedule 4 – Explanatory Note

The purpose of this Explanatory Note is to provide a plain English summary to support the exhibition of a draft Planning Agreement which has been prepared under section 7.4 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

The Planning Agreement will require the provision of public benefits, monetary contributions, and works relating to local infrastructure items in relation to approved development on the land known as 138-152, 154-156 Victoria Road, Rozelle, 697 Darling Street, Rozelle and 1-7 Waterloo Street Rozelle (**the Subject Land**).

This explanatory note has been prepared jointly between the parties as required by clause 25E of the *Environmental Planning and Assessment Regulations* 2000 (**EP&A Regulation**)to summarise the objectives, nature, and effect of the proposed Planning Agreement, and to assess its merits.

**1. Parties**

The parties to the Planning Agreement are:

(1) Inner West Council (**Council**);

(2) Heworth Holdings Group Pty Ltd (**Developer**); and

(3) Grand Rozelle Pty Ltd (**Owner**).

**2. Description of Subject Land**

The land to which the original Planning Agreement relates is as follows:

* 138-152 Victoria Road, Rozelle NSW 2039 (Lot 1 DP 528045);
* 154-156 Victoria Road, Rozelle NSW 2039 (Lot 1 DP 109047);
* 697 Darling Street, Rozelle NSW 2039 (Lot 104 DP 733658); and
* 1-7 Waterloo Street Rozelle NSW 2039 (Lot 101 DP 629133, Lot 102 DP 629133, Lot 37 DP 421, Lot 38 DP 421, Lot 36 DP 190866)

**3. Description of Proposed Development to which the Planning Agreement applies**

On 28 June 2008, the previous developer of the Subject Land entered into a Planning Agreement with Leichhardt Council (since amalgamated to become part of the Council) (**the Previous Planning Agreement**). The Previous Planning Agreement was entered into in connection with the making of a new Local Environmental Plan and Development Control Plan that would allow for an increased maximum floor space ratio control and a greater range of permissible uses on the Subject Land, so that a development application could be lodged for redevelopment of the Subject Land including for demolition and construction of a mixed retail, commercial and residential development including a leagues club and associated works.

The Previous Planning Agreement has never been acted upon, and the carrying out of public benefits including payment of the contributions under it was never enlivened.

On 1 May 2018, Development Application No D/2018/219 was lodged by the Developer with Council for:

1. the demolition of all existing improvements;
2. site remediation and excavation works; and
3. construction of a mixed-use development comprising:  
   1. three basement levels for residential and commercial parking;
   2. three 11 to 12 story buildings connected above a shared retail and commercial podium with 164 residential units above;
   3. a new leagues Club provided in the commercial area; and
   4. development fronting Waterloo Street comprising of two to three story buildings for three live/work units, resulting in 167 total residential units overall,

on the Subject Land (**the Development Application**).

On 31 March 2020, the Developer formally offered to replace the Previous Planning Agreement as some aspects of that agreement were not applicable to the Development Application, including the construction of a pedestrian bridge across Victoria Road. The amended offer also significantly increased the value of the public benefits that would be provided under a new voluntary planning agreement.

On 8 September 2020, the Council considered the offer to amend the Previous Planning Agreement in a closed meeting session. On 9 September 2020, the Council wrote to the Sydney Eastern City Planning Panel (**the Panel**) recommending that a deferred commencement condition be imposed if the Development Application were to be approved by the Panel requiring the Previous Planning Agreement be terminated and a new planning agreement be entered into in accordance with the terms of offer as set out in the letter from the Developer dated 31 March 2020.

On 10 September 2020, the Development Application was approved by the Panel subject to conditions (**the Development Consent**), relevantly including the following deferred commencement condition:

1. *Voluntary Planning Agreement*

*Prior to the issue of an Operational Consent, evidence is to be supplied to the consent*

*authority demonstrating that:*

*a) The voluntary planning agreement dated 26th June 2008 between Council and*

*Balmain Leagues Club Limited has been terminated so that it no longer has any*

*effect;*

*b) A voluntary planning agreement has been entered into generally in accordance*

*with the terms of the offer from Heworth Holdings Pty Ltd dated 31st March*

*2020.*

The Development Consent also included the following general condition of consent:

*54. Voluntary Planning Agreement*

*Prior to the issue of a Construction Certificate the applicant/developer shall:*

*a) enter into a Voluntary Planning Agreement (VPA) with Council in accordance*

*with the terms of the offer made by the applicant and as accepted by Council*

*at its meeting on 8 September 2020; and*

*b) register the VPA on the title of the land to which the VPA applies.*

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

[Section 25E(1)(a) of the EP&A Regulation]

The intent of the Planning Agreement is:

1. to terminate and revoke the Previous Planning Agreement;
2. to give effect to the terms offered in the letter from the Developer to Council dated 31 March 2020;
3. to ensure that the above conditions to the Development Consent are appropriately fulfilled so that the Development Consent may become operational;
4. to make provision for monetary contributions in lieu of payment of any development contributions that would otherwise have been payable under a development consent;
5. to make provision for an easement in gross and public positive covenant (for 25 years) of car parking spaces available to the public, with 2 hours free parking, to be constructed on the Subject Land by the Owner to the Council, which will be used to generate income from public parking payable to the Council for the 25 year term;
6. to make provision for a lease (at a nominal rental amount over 25 years) of a 200m2 commercial space to be constructed on the Subject Land by the Owner to the Council, and to enable the developer to make a cash contribution towards the anticipated fitout costs for that future commercial space within the development;
7. to make provision for the use of part of the Subject Land by the Council for events at no charge subject to a management agreement to be prepared at a later date; and
8. to make provision for various works for local infrastructure to be carried out by the Developer at the Developer’s cost including in relation to footpath widening to Victoria Road and Waterloo Street frontages, construction of a pedestrian link, and provision of bicycle parking, car share and taxi pick-up/drop-off facilities.

**5. Assessment of the Merits of the Planning Agreement**

[Section 25E(1)(b) of the EP&A Regulation]

**5.1 The planning purposes served by the Planning Agreement**

[Section 25E(2)(e) of the EP&A Regulation]

This Planning Agreement serves the following planning purposes:

1. The Planning agreement permits Council to use part of the Subject Land for public events and purposes. The lease for Council to use part of the Subject Land for commercial space, and an easement in gross and public positive covenant for public parking, under the Planning Agreement is also for a public purpose.
2. The provision of a monetary payment by the Developer under this Planning Agreement will also be used by Council for public purposes, including for community grants and an affordable housing fund.
3. The Planning agreement provides the opportunity to facilitate improvements and additions to the public domain in and around the Subject Site.

The Planning Agreement provides for a reasonable means of achieving these purposes because there are limits on what the Developer can be required to do as a condition of a development consent.  By entering into the Agreement, the Council is able to secure benefits for the community that would not otherwise be available.  The Agreement achieves these benefits for the community without the need for public funds to be expended.

**5.2 How the Planning Agreement Promotes the Objects of the EP&A Act**

[Section 25E(2)(c) of the EP&A Regulation]

The Planning Agreement promotes the following objects of the EP&A Act:

### the promotion and co-ordination of the orderly and economic use and development of land

### the provision of land for public purposes, and

### the provision and co-ordination of community services and facilities

## This Planning Agreement provides for a reasonable means of achieving those objects.

**5.3 Promotion of the public interest**

[Section 25E(2)(a) of the EP&A Regulation]

This Planning Agreement promotes the public interest by ensuring:

1. that Council receives the benefit of the use of land to be used for a public purpose; and
2. that an appropriate contribution is made towards the provision of infrastructure, facilities and services to satisfy needs that arise from development of the Subject Land.

The Planning Agreement, and the revocation of the Previous Planning Agreement, will provide certainty for the developer and the Council as to the amount to be paid by way of contribution and the works to be carried out for local infrastructure, and will eventually directly contribute towards an improved safety and public amenity outcome in and around the Subject Land.

**5.4 Promotion of the Council’s charter**

[Section 25E(2)(d) of the EP&A Regulation]

This Planning Agreement promotes the following objectives of Council’s charter under Section 8 of the *Local Government Act 1993* (NSW) as follows [italicised sections come directly from the Charter]:

1. Council undertakes to *facilitate flexible and innovative delivery of public infrastructure, facilities, works services and social amenities*. This Planning Agreement makes provision for various works relating to improved local infrastructure to be carried out by the Developer at the Developer’s cost.
2. Council undertakes to *ensure that development delivers a net public benefit to the wider community that is of greatest demand in the development area or precinct*. This Planning Agreement makes provision for the lease of land, and an easement in gross and a public positive covenant, to Council which will assist in the provision of additional public services and benefits where needed.
3. Council undertakes to *include affordable housing as a constituent part of benefits from potential Planning Agreement contributions*. This planning agreement makes provision for monetary contributions to be applied directly to an affordable housing fund.
4. Council undertakes to *establish a transparent, consistent and accountable system that governs the use of Planning Agreements*. The process involved in the Planning Agreement will provide an opportunity for the community and stakeholders to be involved and interested people will be invited to make comment during the exhibition period. The public exhibition and the consideration of this matter at Council meetings is intended to keep the local community informed and the relevant parties accountable.

**5.5 Capital Works Program**

[Section 25E(2)(f) of the EP&A Regulation]

The Planning Agreement conforms with Council's Capital Works Program to the extent that it will supplement the Program by providing works and infrastructure.

**5.6 Matters to be complied with before issue of construction and occupation certificates**

[Section 25E(2)(g) of the EP&A Regulation]

The Planning Agreement requires the following be complied with before the first occupation certificate is issued:

1. The Developer’s Works are to be completed before the issue of the first occupation certificate. Any proposed refinements and/or amendments, in construction certificate plans for the development that may have an impact on Council’s use of the spaces or that would require a section 4.55 of the Act modification and/or any other development application to be lodged, to the parts of the of the Developer’s Works being the 200m2 of commercial space to be leased to Council under Planning Agreement and/or the 130 publicly accessible parking spaces which council has the benefit of under the Planning Agreement must be submitted to Council for agreement. Council can only withhold agreement on reasonable grounds and only if the proposed refinements or amendments impact on Council’s use of the:
   1. 200m2 of commercial space to be leased to Council under the Planning Agreement ;
   2. or the 130 publicly accessible parking spaces which council has the benefit of under the Planning Agreement.

The Planning Agreement requires the following be complied with before an occupation certificate is issued:

1. The Owner must pay all relevant monetary contributions under the Planning Agreement;
2. The easement in gross and public positive covenant for the car park and the lease of the commercial space from the Owner to the Council must be executed by the parties;
3. The various works for local infrastructure listed under Item 3 of Schedule 3 of the Planning Agreement must be carried out.

There are no matters which must be complied with prior to the issue of a subdivision certificate because the Development does not involve any subdivision works.

**EXECUTED** as a deed.

|  |  |  |
| --- | --- | --- |
| Signed, sealed and delivered for **INNER WEST COUNCIL** (ABN 19 488 017 987) by its duly authorised officer, in the presence of: |  |  |
|  |  | Signature of officer |
|  |  |  |
| Signature of witness |  | Name of officer:  Authorised delegate pursuant to section 377 of the Local Government Act 1993 |
|  |  |  |
| Name of witness  7-15 Wetherill Street, Leichhardt NSW 2040 |  | Position of officer: General Manager |
| Address of witness |  |  |

|  |  |  |
| --- | --- | --- |
| EXECUTED by Heworth Grand Development Pty Ltd (ABN 66 620 430 891) in accordance with s127(1) of the Corporations Act 2001 (Cth): |  |  |
|  |  |  |
| Signature of director |  | Signature of director/secretary |
|  |  |  |
| Name: |  | Name: Yuhui He |

|  |  |  |
| --- | --- | --- |
| EXECUTED by Grand Rozelle Pty Ltd (ACN 619 872 749) in accordance with s127(1) of the Corporations Act 2001 (Cth): |  |  |
|  |  |  |
| Signature of director |  |  |
|  |  |  |
| Name: Yuhui He |  |  |

Annexures

A Architectural Drawings prepared by Scott Carver approved under Development Consent

* AD-DA100 Basement Level 2 v9
* AD-DA101 Basement Level 1 v9
* AD-DA104 Floor Plan – Upper Ground Level v6
* AD-DA106 Floor Plan – Level 01 Commercial v4

B Public Open Space Plan prepared by Scott Carver

C Easement in Gross and Public Positive Covenant to Council for car park

Easement in Gross and Public Positive Covenant to Council for car park

Part 1 Parties’ obligations to create an Easement in Gross and Public Positive Covenant

1. The parts of the Land intended at the date of this Document to be the location of the Public Parking Area of 130 car spaces and the means of access to and from it are the parts of the land denoted on the plans which are Attachment A.
2. As soon as is practicable during the course of redevelopment of the Site, the Registered Proprietor must:
   1. at its cost procure the preparation of a plan of survey suitable for registration either as:
      1. a deposited plan, or
      2. a plan to be annexed to a dealing,

identifying the location of the Public Parking Area, and the means of access to and from it, in the new building on the Land;

* 1. at its cost procure the preparation of:
     1. an instrument under section 88B of the Conveyancing Act 1919, for registration with the deposited plan referred to in clause 2(a)(i) to:
        1. create the Easement in the terms set out in Part 2 of this Annexure C, and
        2. create a Public Positive Covenant for the management of the Public Parking Area and payment to Council of the profit from revenue received for the Public Parking Area in the terms set out in Part 3 of this Annexure C, or
     2. a transfer granting easement, with the plan referred to in clause 2(a)(ii) annexed, to create the Easement and the Public Positive Covenant on the terms set out in Part 2 and Part 3 of this Annexure C; and
  2. submit the relevant instrument and plan, or instruments and plan, referred to in clause 2(b), (the Easement Documents) to Council for approval and execution.

1. Council must cause the Easement Documents to be executed and returned to the Registered Proprietor as soon as is reasonably practicable after they are submitted to Council to be held in escrow until the Easement Documents are lodged with Land Registry Services NSW .
2. Within two months after completion of the construction works required to create the Public Parking Area, the Registered Proprietor must at its cost:
   1. cause the Easement Documents executed by Council to be executed;
   2. procure the consent of any registered mortgagee to the registration of the Easement Documents; and
   3. cause the Easement Documents to be registered at Land Registry Services NSW.

Part 2 – Terms of the Easement in Gross

1. The Registered Proprietor grants to the Council the right for the Council and for members of the public to:
   1. pass and repass (with or without Motor Cars) along and over that part of the servient tenement shown as "Right of Way" on the Plan (**Right of Way**); and
   2. stand or park not more than 130 Motor Cars on that part of the servient tenement shown as "Carparking" on the Plan (**Car Parking Spaces**),

on a temporary basis during the Trading Hours.

1. The Registered Proprietor will make reasonable rules about the use of the Car Parking Spaces by the public which will include:
   1. rules regarding the use of the Right of Way, for example speed limits that apply to the Right of Way; and
   2. a minimum of two (2) hours of free parking for the Car Parking Spaces,

provided any other rules are not otherwise materially inconsistent with the use of the Right of Way

1. The Registered Proprietor may vary, change, delete or revoke the rules for the use of the Car Parking Spaces from time to time.
2. The Registered Proprietor must at its cost:
   1. keep and maintain the Right of Way and Car Parking Spaces in good order and condition and carry out any required works properly, professionally and promptly with the least amount of disruption to the public as possible and this requirement will be complied with if the Registered Proprietor carries out works in the manner, and at times, that would be considered appropriate for a public car park for a retail and club premises located in Sydney in an area not in the central business district,;
   2. effect and maintain public liability insurance for an amount of not less than $20,000,000 including for public use of the Car Parking Spaces and the Right of Way.
   3. The Easement will be extinguished and released on the date which is 25 years after registration of the Plan and Council must, after receiving a request from the Registered Proprietor:
3. deliver to the Registered Proprietor a transfer releasing easement in respect of the Easement;
4. do all other things as are reasonably required as the statutory authority benefited by the Easement to enable the cancellation of the recording of the Easement on the folio of the register for the servient tenement.

(e) In this instrument:

(i) Council means Inner West Council or its successor, the authority having the benefit of the Easement.

1. Easement means the easement in gross created in accordance with clauses 2(b)(i)(A) and (c)
2. Motor Car means a motor vehicle:
   1. defined in AS2890.1-2004, and
   2. having a tare weight not exceeding 2.75 tonnes (with a variance of 10%).
3. Registered Proprietor means registered proprietor of the servient tenement, being Grand Rozelle Pty Ltd and its successors in title.
4. Trading Hours means the operating hours of car park that the Car Parking Spaces form part of as approved by the relevant authority.

Part 3 – Terms of the Public Positive Covenant

* 1. Terms
     1. The Registered Proprietor covenants with Council that it will manage, control and operate the Right of Way and Car Parking Spaces referred to in the Easement:
        1. with due diligence and efficiency and in a professional manner;
        2. in accordance with the standards required for a commercial car park for a retail and club premises located in Sydney in an area not in the central business district,
        3. in accordance with rules as determined by the Registered Proprietor, acting reasonably, and

provided they are not inconsistent with the terms of the Easement;

* + - 1. so they will be available for use by the public in accordance with the terms of the Easement and this Public Positive Covenant;
      2. with a view to providing an optimum service to the publicand must take all reasonable steps to maximise Gross Revenue as determined by the Registered Proprietor (acting reasonably).
    1. Nothing will require the Registered Proprietor to operate or manage the Car Parking Spaces in any manner which is prohibited by law.
  1. Contracting
     1. The Registered Proprietor **may** subcontract any part of its obligations under this Public Positive Covenant in the usual course of business.
  2. Collection and accounting of Gross Revenue
     1. The Registered Proprietor is responsible for invoicing and collecting all revenue and income derived from the operation of the Car Park Spaces.
     2. Within 15 days after the end of each month, the Registered Proprietor must:
        1. provide a monthly report with the final Gross Revenue for the preceding month; and
        2. account and pay (subject to receipt of a valid tax invoice if Council is making a taxable supply for GST purposes) to Council, by direct credit to Council’s nominated bank account or such other method as reasonably nominated in writing by Council from time to time, the Gross Revenue received for that preceding month.
  3. Car Park Expenses
     1. The Registered Proprietor must pay all Car Park Expenses as and when they fall due for payment.
     2. For the avoidance of doubt, the Registered Proprietor is solely liable for the costs of all Car Park Expenses.

1.5Books and records

* + 1. The Registered Proprietor must keep full and adequate books and records (including but not limited to audit tapes, credit card and debit card transactions and merchant records) reflecting the financial results of operating the Car Park and to allow the Gross Revenue and Car Parking Expenses to be calculated and verified.
    2. The books and records must be kept in accordance with Australian standard accounting practice for an annual audit.
    3. The Registered Proprietor must, on being given reasonable notice, provide Council or its nominated representative with an electronic copy of the records. Council may have the records for particular months audited by an independent and registered company auditor.
    4. Where the Gross Revenue for a month period is incorrect, including as determined by an audit, the Gross Revenue will be adjusted if necessary within 1 month of Council giving the Registered Proprietor notice of the error.
    5. If an audit determines that the actual Gross Revenue for a particular month is higher than the reported Gross Revenue for that month, the Registered Proprietor must pay the difference to Council and if the actual Gross Revenue for a particular month is more than 3% higher than the reported Gross Revenue for that month the Registered Proprietor must pay to Council the cost of audit, each by no later than 5 business days from the date of demand.
    6. The Registered proprietor must provide Council each 30 September a copy of the audited financial records for the previous financial year.
  1. 25 year term
     1. This Public Positive Covenant will be extinguished and released on the date which is 25 years after registration of the Plan and Council must after receiving a request from the Registered Proprietor:
        1. deliver to the Registered Proprietor a request releasing the Public Positive Covenant; and
        2. do all other things as are reasonably required as the statutory authority benefited by this Public Positive Covenant to enable the cancellation of the recording of this Public Positive Covenant on the folio of the register for the servient tenement.
  2. Public Positive Covenant to run with land
     1. This Public Positive Covenant is binding on the Registered Proprietor its successors in title and every person who is entitled to an interest in possession and all persons who claim under the Registered Proprietor.
     2. The Council may use the powers granted under statute, including under s88F, s88G and s88H of the Conveyancing Act 1919 in respect to the Public Positive Covenant.
  3. Indemnity

The Registered Proprietor is liable for and indemnifies the Council against any loss, liability, legal claim or action and/or costs and expenses associated with it arising from or incurred in connection with the failure by the Registered Proprietor to observe or perform any of the Registered Proprietor's covenants or agreements contained in this instrument.

* 1. Definitions

In this instrument:

* + 1. All Car Park Spaces means the Car Parking Spaces (being 130) and all other car parking spaces within the building that are not residential car parking spaces or are not allocated to a lot in a strata plan.
    2. Car Park Expenses means all expenses reasonably and properly incurred by the Manager in the management and operation of the All Car Park Spaces including but not limited to:
       - * labour and staff salaries, wages, and on-costs;
         * management, administration and supervision charges and overheads;
         * payroll expenses;
         * accounting and audit fees;
         * bank charges, credit card fees and merchant fees;
         * cash counting and handling charges;
         * scheduled cleaning for All Car Park Spaces (excluding ad hoc and any additional cleaning outside scope);
         * repair and maintenance of parking and office equipment owned or installed by the Manager or Registered Proprietor;
         * public liability insurance premiums (including any public liability excess payments, costs of managing any claims and the cost of any uninsured claims to the extent of the uninsured part);
         * All costs associated with marketing All Car Park Spaces (whether individually or in conjunction with other car parks managed by the Manager) as determined by the Manager or Registered Proprietor;
         * payments under equipment leases;
         * depreciation or amortisation costs;
         * all remote monitoring and control costs;
         * the costs of maintaining and renewing any licences or permits which the Manager is required to hold; and
         * any other costs and expenses of or incidental to the occupation or operation of the All Car Park Spaces.

( c) Car Parking Levy means any levy, charge, assessment, duty or fee charged or assessed by any authority in respect of car parks, congestion, or car parking spaces imposed on the All Car Park Spaces under the Parking Space Levy Act 2009 (NSW) (including any regulations or amendments pursuant to that Act) or any other law.

(d)Car Parking Spaces has the meaning in the Easement;

1. Council means Inner West Council or its successor, the authority having the benefit of the Easement in gross;

(f) Easement means the easement in gross numbered # for the Car Parking Spaces;

1. Gross Revenue means the Percentage of all moneys receivable by to the Registered Proprietor or Manager arising from the operation of All Car Park Spaces, whether or not collected by the Registered Proprietor, the Manager or their agents in connection with the operation of All Car Park Spaces, the registered proprietor from All Car Park Space users, including:
   * + - 1. charges made by the Registered Proprietor over and above the cash price, such as interest and accommodation charges;
         2. the charges for all services performed or hirings made by the Manager or Registered Proprietor in, at or from All Car Park Spaces, whether made for cash, on credit or otherwise, and whether paid or payable, due or owing, in kind or money;
         3. any premiums and other moneys receivable from rights to use the All Car Park Spaces.

but excluding:

* + - * 1. the amount of all discounts or concessions reasonably and properly allowed by the Manager or Registered Proprietor to users customers of the All Car Park Spaces in the usual course of business;
        2. all amounts written off by the Manager or Registered Proprietor in its books as bad debts, in accordance with normal accounting principles;

* + - * 1. all cash or credit refunds allowed by the Manager or Registered Proprietor on receipts that have previously been included in Gross Revenue;
        2. the amount of all charges, impositions or taxes (including GST), included in the price or supply or costs of goods or services provided by the Manager or Registered Proprietor at the car park;
        3. the amount of all discounts, commissions or fees deducted from payments to the Manager or Registered Proprietor under any form of debit or credit card; and

for the avoidance of doubt, any proceeds from the recovery of any Car Parking Levy from the Car Park Space users must be included in Gross Revenue.

1. Land means #
2. Manager means the entity or person engaged by the registered proprietor of the servient tenement acting reasonably to manage All Car Parking Spaces.
3. Percentage means the percentage calculated by the following formula:

130 (being the Number of Car Parking Spaces) divided by

the number of All Car Parking Spaces x100  
(which at the granting of this covenant is 170)

1. Registered Proprietor means the registered proprietor of the servient tenement being Grand Rozelle Pty Ltd or its successors.
2. The word “**includes**” in any form is not a word of limitation.

**Annexure D – Lease**