

Annexure 1 to Determination Notice

DRAFT

Planning Agreement

Inner West Council

ABN 19 488 017 987

and

Eranna Development Pty Ltd

ABN 44 638 578 588

and

[E&R Property Eranna](#) Pty Ltd

ACN ~~610 778 648~~ [638 515 349](#)

CONTENTS

| CLAUSE | PAGE |
|--|------------------|
| 1. INTERPRETATION | 1 |
| 1.1 Definitions | 1 |
| 1.2 Rules for interpreting this Planning Agreement | 6 |
| 2. APPLICATION OF THE ACT AND THE REGULATION | 7 |
| 2.1 Application of this Planning Agreement | 7 |
| 2.2 Public Benefits to be made by Developer | 7 8 |
| 2.3 Application of sections 7.11, 7.12 and 7.24 of the Act | 8 |
| 2.4 Council rights | 8 |
| 2.5 Explanatory note | 8 |
| 3. OPERATION OF THIS PLANNING AGREEMENT | 8 |
| 3.1 Commencement | 8 |
| 4. WARRANTIES | 8 |
| 4.1 Mutual warranties | 8 |
| 4.2 Developer warranties | 9 |
| 5. PUBLIC BENEFITS | 10 |
| 5.1 Developer to provide Public Benefits | 10 |
| 6. COMPLETION..... | 10 |
| 6.1 Date of Completion | 10 |
| 6.2 Developer completion notice | 10 |
| 6.3 Inspection by Council | 11 10 |
| 6.4 Non-completion of Public Benefits | 11 |
| 7. INDEMNITY | 12 |
| 8. DEFECTS LIABILITY..... | 12 |
| 8.1 Security for Defects Liability Period | 12 |
| 8.2 Defect in the Public Benefits | 12 |
| 9. REGISTRATION AND CAVEAT | 13 |
| 9.1 Registration of this Planning Agreement | 13 |
| 9.2 Release of this Planning Agreement | 13 |
| 10. ENFORCEMENT | 13 |
| 10.1 Developer to provide Guarantee | 13 |
| 10.2 Adjustment of Guarantee Amount..... | 14 13 |
| 10.3 Right of Council to claim on Guarantee | 14 |
| 10.4 Expenditure by Council | 15 |
| 10.5 Top-up and return of Guarantee | 15 |
| 10.6 Compulsory acquisition..... | 16 15 |
| 11. DISPUTE RESOLUTION | 16 |
| 11.1 Application..... | 16 |
| 11.2 Negotiation | 16 |
| 11.3 Not use information | 17 |
| 11.4 Condition precedent to litigation | 17 |
| 11.5 Summary or urgent relief..... | 17 |
| 12. TAXES AND GST | 18 17 |

| | | |
|-------|--|-----------------------------|
| 12.1 | Responsibility for Taxes | 18 ¹⁷ |
| 12.2 | GST free supply | 18 ¹⁷ |
| 12.3 | Supply subject to GST | 18 |
| 13. | DEALINGS..... | 19 ¹⁸ |
| 13.1 | Dealing by Council | 19 ¹⁸ |
| 13.2 | Dealing by the Developer..... | 19 |
| 13.3 | Extinguishment or creation of interests on Transfer Land | 20 ¹⁹ |
| 14. | TERMINATION | 20 ¹⁹ |
| 15. | CONFIDENTIALITY AND DISCLOSURES | 20 |
| 15.1 | Use and disclosure of Confidential Information | 20 |
| 15.2 | Disclosures to personnel and advisers | 21 ²⁰ |
| 15.3 | Disclosures required by law..... | 21 |
| 15.4 | Receiving party's return or destruction of Planning Agreements | 22 ²¹ |
| 15.5 | Security and control | 22 ²¹ |
| 15.6 | Media releases | 22 |
| 16. | NOTICES | 22 |
| 17. | GENERAL | 22 |
| 17.1 | Governing law | 22 |
| 17.2 | Access to information | 23 ²² |
| 17.3 | Liability for expenses..... | 23 ²² |
| 17.4 | Relationship of parties..... | 23 |
| 17.5 | Giving effect to this Planning Agreement..... | 23 |
| 17.6 | Time for doing acts | 23 |
| 17.7 | Severance..... | 24 ²³ |
| 17.8 | Preservation of existing rights | 24 ²³ |
| 17.9 | No merger | 24 ²³ |
| 17.10 | Waiver of rights..... | 24 |
| 17.11 | Operation of this Planning Agreement..... | 24 |
| 17.12 | Operation of indemnities..... | 24 |
| 17.13 | Inconsistency with other Planning Agreements | 25 ²⁴ |
| 17.14 | No fetter..... | 25 ²⁴ |
| 17.15 | Counterparts..... | 25 |
| 1. | PUBLIC BENEFITS - OVERVIEW..... | 30 ²⁹ |
| 2. | TRANSFER LAND | 32 ³⁰ |
| 2.1 | Dedication of land – decision | 32 ³⁰ |
| 2.2 | Obligations on dedication..... | 33 ³⁰ |
| 2.3 | Obligations on transfer | 33 ³⁰ |
| 3. | FINAL DESIGN OF THE DEVELOPER'S WORKS | 33 ³¹ |
| 3.1 | Scope of Developer's Works | 33 ³¹ |
| 3.2 | Final design of Developer's Works | 34 ³¹ |
| 3.3 | Preparation of and changes to construction design drawings | 35 ³² |
| 4. | CONSTRUCTION OF DEVELOPER'S WORKS..... | 36 ³³ |
| 4.1 | Insurance | 36 ³³ |
| 4.2 | Approvals and consents..... | 36 ³⁴ |
| 4.3 | Construction work..... | 37 ³⁴ |
| 4.4 | Inspections by Council..... | 37 ³⁴ |
| 5. | STANDARDS..... | 37 ³⁵ |

Schedules

| | | |
|---|-------------------------|----|
| 1 | Agreement Details | 26 |
|---|-------------------------|----|

| | | |
|---|--|-----------------|
| 2 | Requirements under the Act and Regulation (clause 2) | 2827 |
| 3 | Public Benefits (clause 5) | 3029 |

DRAFT

BETWEEN:

- (1) **Inner West Council** ABN 19 488 017 987 of Leichhardt Service Centre, 7-15 Wetherill Street, Leichhardt NSW 2000 (**Council**); and
- (2) **Eranna Development Pty Ltd** ABN 44 638 578 588 of 447-451 Parramatta Road, Leichhardt NSW 2040 (**Developer**).
- (3) ~~E&R Property~~**Eranna Pty Ltd** ACN ~~610 778 642638~~ 515 349 of 447-451 Parramatta Road, Leichhardt NSW 2040 (**Owner**)

BACKGROUND

- (A) The Developer intends to undertake the Development on the Land.
- (B) The Owner is the registered owner of the Land and has authorised the Developer to undertake the Development on the Land.
- (C) The Developer and the Owner have offered to enter into this Planning Agreement with Council to provide the Public Benefits on the terms of this Planning Agreement.

THE PARTIES AGREE AS FOLLOWS:

1. **INTERPRETATION**

1.1 **Definitions**

The following definitions apply in this Planning Agreement.

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

Adverse Affection has the same meaning as in Part 3 of Schedule 3 of the *Conveyancing (Sale of Land) Regulation 2010 (NSW)*.

Attributed Value means the value Council, the Developer and the Owner agree are to be attributed to each element of the Public Benefits as at the date of this Planning Agreement, as set out in clause 1 of Schedule 3 of this Planning Agreement.

Authorisation means:

- (a) an approval, authorisation, consent, declaration, exemption, permit, licence, notarisation or waiver, however it is described, and including any condition attached to it; and
- (b) 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,

including any renewal or amendment.

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:

- (a) the existence of which do not prevent the Developer's Works being reasonably capable of being used for their intended purpose;
- (b) which the Developer has grounds for not promptly rectifying; and
- (c) rectification of which will not affect the immediate and convenient use of the Developer's Works for their intended purpose.

Completion Notice means a notice issued by the Developer in accordance with clause 6.2.

Confidential Information means:

- (a) information of a party (**disclosing party**) that is:
 - (i) 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
 - (ii) by its nature confidential or the receiving party knows, or ought reasonably to know, is confidential.

Confidential Information may be made available or obtained directly or indirectly, and before, on or after the date of this Planning Agreement.

Confidential Information does not include information that:

- (a) is in or enters the public domain through no fault of the receiving party or any of its officers, employees or agents;
- (b) 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
- (c) is or was developed by the receiving party independently of the disclosing party and any of its officers, employees or agents.

Construction Certificate has the same meaning as in the Act.

Contamination has the meaning given to that word in the *Contaminated Land Management Act 1997* (NSW).

Corporations Act means the *Corporations Act 2001* (Cth).

Council's Personal Information means Personal Information to which the Developer, or any third party engaged by the Developer, has access directly or indirectly in connection with this Planning Agreement, including the Personal Information of any personnel, customer or supplier of Council (other than the Developer).

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 and the Owner.

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.

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 Planning Agreement.

Defects Liability Period means:

- (a) in relation to the Public Benefits other than the Essential Infrastructure, the period of 12 months from the date on which the Developer's Works reach Completion; and
- (b) in relation to the Essential Infrastructure, the period of 12 months from the date on which the Essential Infrastructure reaches Completion.

Developer's Representative means the person named in Item 4 of Schedule 1 or his/her delegate.

Developer's Works means those parts of the Public Benefit described as "Developer's Works" and "Essential Infrastructure" in clause 1 of Schedule 3, to be delivered by the Developer in accordance with this Planning Agreement.

Development means the development of the Land by the Developer described at Item 2 of Schedule 1.

Development Application means the development application identified in Item 5 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.

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.

Dispute means any dispute or difference between the parties arising out of, relating to or in connection with this Planning Agreement, including any dispute or difference as to the formation, validity, existence or termination of this Planning Agreement.

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:

- (a) the *Work Health and Safety Act 2011 (NSW)*;
- (b) the *Protection of the Environment Operations Act 1997 (NSW)*; and
- (c) the *Contaminated Land Management Act 1997 (NSW)*.

Essential Infrastructure means that part of the Public Benefit described as "Essential Infrastructure" in clause 1 of Schedule 3, to be delivered by the Developer in accordance with this Planning Agreement.

Government Agency means:

- (a) a government or government department or other body;
- (b) a governmental, semi-governmental or judicial person; or
- (c) a person (whether autonomous or not) who is charged with the administration of a law.

Gross Floor Area has the meaning given to that term in the *Leichhardt Local Environment Plan 2013* in effect at the date of this Planning Agreement.

GST means the same as in the GST Act.

GST Act means *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

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

- (a) be denominated in Australian dollars;
- (b) be an unconditional undertaking;
- (c) be signed and issued by a bank licensed to carry on business in Australia, 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:
 - (i) BBB + (Standard & Poors and Fitch);
 - (ii) Baa 1 (Moody's); or
 - (iii) Bbb (Bests);
- (d) be issued on behalf of the Developer;
- (e) have no expiry or end date;
- (f) state the beneficiary as Council;
- (g) be irrevocable;
- (h) state the Guarantee Amount as the minimum amount required by this Planning Agreement to be lodged as security;
- (i) state the purpose of the security as required in accordance with this Planning Agreement; and
- (j) be on such other terms approved by Council.

Guarantee Amount(s) means a Guarantee or Guarantees for the total amount listed in Item 6 of Schedule 1 of this Planning Agreement.

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 7 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:

- (a) having a controller, receiver, manager, administrator, provisional liquidator, liquidator or analogous person appointed;
- (b) 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
- (c) the person being taken under section 459F(1) of the Corporations Act to have failed to comply with a statutory demand;
- (d) an application being made to a court for an order for its winding up;
- (e) an order being made, or the person passing a resolution, for its winding up;
- (f) the person:
 - (i) 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
 - (ii) being unable to pay its debts or otherwise insolvent;
- (g) 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;
- (h) 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
- (i) 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.

Land means the land described in Item 1 of Schedule 1 of this Planning Agreement.

Laws means all applicable laws, regulations, industry codes and standards, including all Environmental Laws.

Modification Application means the application to modify the Development Consent identified in Item 5A of Schedule 1 and includes all plans, reports models, photomontages, material boards (as amended) submitted to the consent authority before the determination of that application.

Occupation Certificate has the same meaning as in the Act.

Owners Representative means the person named in Item 4A of Schedule 1 or his/her delegate.

Personal Information has the meaning set out in the *Privacy Act 1988* (Cth).

Personnel means the Developer's officers, employees, agents, contractors or subcontractors.

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 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).

Standards means the policies, procedures and standards for carrying out the Developer's Works, listed non-exhaustively at clause 4 of Schedule 3.

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.

Transfer Land means land forming part of the Public Benefit that is to be either dedicated or transferred to Council in accordance with Schedule 3 of this Planning Agreement.

1.2 **Rules for interpreting this Planning Agreement**

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

- (a) A reference to:
 - (i) 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;
 - (ii) a document (including this Planning Agreement) or agreement, or a provision of a document (including this Planning Agreement) or

agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;

- (iii) a party to this Planning Agreement or to any other document or agreement includes a permitted substitute or a permitted assign of that party;
 - (iv) 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
 - (v) anything (including a right, obligation or concept) includes each part of it.
- (b) A singular word includes the plural, and vice versa.
 - (c) A word which suggests one gender includes the other genders.
 - (d) If a word or phrase is defined, any other grammatical form of that word or phrase has a corresponding meaning.
 - (e) 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.
 - (f) A reference to **including** means "including, without limitation".
 - (g) A reference to **dollars** or **\$** is to an amount in Australian currency.
 - (h) A reference to **this Planning Agreement** includes the agreement recorded by this Planning Agreement.
 - (i) Words defined in the GST Act have the same meaning in clauses about GST.
 - (j) This Planning Agreement is not to be interpreted against the interests of a party merely because that party proposed this Planning Agreement or some provision in it or because that party relies on a provision of this Planning Agreement to protect itself.

2. **APPLICATION OF THE ACT AND THE REGULATION**

2.1 **Application of this Planning Agreement**

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

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

2.2 **Public Benefits to be made by Developer**

Clause 5 and Schedule 3 set out the details of the:

- (a) Public Benefits to be delivered by the Developer;
- (b) time or times by which the Developer must deliver the Public Benefits; and

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

2.3 **Application of sections 7.11, 7.12 and 7.24 of the Act**

- (a) The application of sections 7.11, 7.12 and 7.24 of the Act are set out in Items 5 and 6 of Schedule 2 to this Planning Agreement.
- (b) For the avoidance of doubt, a condition of consent imposed on the Development Consent for the Development requiring payment of contributions under section 7.11 or 7.12 of the Act remains in force and is not impacted by this Agreement.

2.4 **Council rights**

This Planning Agreement does not impose an obligation on Council to:

- (a) grant approval to the Modification Application; or
- (b) 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.

2.5 **Explanatory note**

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

3. **OPERATION OF THIS PLANNING AGREEMENT**

3.1 **Commencement**

- (a) This Planning Agreement will commence on the date of:
 - (i) execution of this Planning Agreement by all parties to this Planning Agreement which must be completed within 2 months after the resolution of Council to enter into the Planning Agreement.
- (b) Clauses 5, 6, 8, 9.2, 10, 13.1 and Schedule 3 commence 1 month prior to the application for a Construction Certificate for any construction works located above the basement levels or for any public domain works (whichever is earlier) in relation to the Development Consent.

4. **WARRANTIES**

4.1 **Mutual warranties**

Each party represents and warrants that:

- (a) **(power)** it has full legal capacity and power to enter into this Planning Agreement and to carry out the transactions that it contemplates;
- (b) **(corporate authority)** it has taken all corporate action that is necessary or desirable to authorise its entry into this Planning Agreement and to carry out the transactions contemplated;

- (c) (**Authorisations**) it holds each Authorisation that is necessary or desirable to:
 - (i) enable it to properly execute this Planning Agreement and to carry out the transactions that it contemplates;
 - (ii) ensure that this Planning Agreement is legal, valid, binding and admissible in evidence; or
 - (iii) 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;
- (d) (**Planning Agreements effective**) this Planning Agreement 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;
- (e) (**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
- (f) (**no controller**) no controller is currently appointed in relation to any of its property, or any property of any of its subsidiaries.

4.2 **Owner's warranties**

- (a) The Owner warrants to Council that, at the date of this Planning Agreement:
 - (i) it is the registered proprietor of the Land.

4.3 **Developer's warranties**

- (a) The Developer warrants to Council that, at the date of this Planning Agreement:
 - (i) it is legally entitled to obtain all consents and approvals that are required by this Planning Agreement and do all things necessary to give effect to this Planning Agreement;
 - (ii) all work performed by the Developer and the Personnel under this Planning Agreement 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
 - (iii) it is not aware of any matter which may materially affect the Developer's ability to perform its obligations under this Planning Agreement.
- (b) 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 Planning Agreement.

5. **PUBLIC BENEFITS**

5.1 **Developer to provide Public Benefits**

Subject to clauses 3.1 and 14, the Developer must, at its cost and risk, provide the Public Benefits to Council in accordance with this Planning Agreement.

5.2 **Owner to provide Public Benefits**

Subject to clauses 3.1 and 14, the Owner must, at its cost and risk, transfer the Public Benefits to Council in accordance with this Planning Agreement.

5.3 For the avoidance of doubt, nothing in this Planning Agreement requires the Developer or Owner to provide any Public Benefits prior to the Developer obtaining a Construction Certificate for any construction works located above the basement levels or for any public domain works (whichever is earlier) in relation to the Development Consent ~~and physically commencing the Development~~ in accordance with Section 4.53(4) of the Act.

6. **COMPLETION**

6.1 **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 Planning Agreement.

6.2 **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:

- (a) a statement from the person with direct responsibility and supervision of that work that in their opinion the Developer's Works have reached Completion;
- (b) copies of any warranties, guarantees, maintenance information or other material reasonably required for Council to assume responsibility for the Developer's Works; and
- (c) 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.

6.3 **Inspection by Council**

- (a) 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 6.2. Within 10 Business Days of the date of the inspection by Council's Representative, Council must by written notice to the Developer:
 - (i) state that Completion has been achieved;
 - (ii) 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
 - (iii) issue a notice under clause 6.4(a).
- (b) Nothing in this clause 6.3, or any notice issued under this clause 6.3, will:
 - (i) reduce or waive in any manner the Developer's responsibility to:
 - (A) deliver the Developer's Works in accordance with this Planning Agreement; or
 - (B) the Developer's responsibility to correct Defects, errors or omissions, whether or not these are identified by Council; or
 - (ii) create any liability for Council in relation to any defective aspect of the Developer's Works.

6.4 **Non-completion of Public Benefits**

- (a) If the Developer makes a request by notice in writing not to complete the Public Benefits (or any part of the Public Benefits):
 - (i) Council may permit the Developer not to complete 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 Planning Agreement; and
 - (ii) 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.
- (b) 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 Planning Agreement then Council may either:
 - (i) complete the Public Benefits itself; or
 - (ii) modify the Public Benefits to reasonably achieve the objectives identified in the Development Consent and this Planning Agreement,

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 10 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.

- (c) If Council exercises its rights under this clause 6.4 to complete the Public Benefits, the Developer grants Council a licence for the period necessary for Council to access the Land to carry out, or procure the carrying out, of the Public Benefits.

7. 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 and / or the Owner (or any Personnel) in connection with the performance of the Developer's and / or the Owner's obligations under this Planning Agreement, 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).

8. DEFECTS LIABILITY

8.1 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 8. The Developer must make any necessary arrangements to allow the provision of the Guarantee for the Defects Liability Period in accordance with this clause.

8.2 Defect in the Public Benefits

- (a) If:
 - (i) the Developer is in breach of clause 4.3 of this Planning Agreement; or
 - (ii) 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.
- (b) If the Developer is unable or unwilling to comply with clause 8.2(a), or fails to rectify the Defect within three months of receiving notice from Council under clause 8.2(a), Council may:
 - (i) rectify the Defect itself;
 - (ii) make a claim on the Guarantee in accordance with clause 10 for the reasonable costs of Council in rectifying the Defect; and

- (iii) 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.
- (c) 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.

9. REGISTRATION

9.1 Registration of this Planning Agreement

- (a) The Owner:
 - (i) consents to the registration of this Planning Agreement at the NSW Land Registry Services on the certificate of title/s to the Land;
 - (ii) warrants that it has obtained all consents to the registration of this Planning Agreement on the certificate of title/s to the Land; and
 - (iii) must within 10 Business Days of a written request from Council do all things necessary to allow Council to register this Planning Agreement on the certificate of title/s to the Land, including but not limited to:
 - (A) producing any documents or letters of consent required by the Registrar-General of the NSW Land Registry Services;
 - (B) providing the production slip number when the Owner produces the certificate of title/s to the Land at the NSW Land Registry Services; and
 - (C) providing Council with a cheque for registration fees payable in relation to registration of this Planning Agreement at NSW Land Registry Services.
 - (iv) 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 Planning Agreement.

9.2 Release of this Planning Agreement

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

10. ENFORCEMENT

10.1 Developer to provide Guarantee

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

10.2 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:

$$\mathbf{RGA} = \mathbf{GA} \times (\mathbf{A/B})$$

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:

- (i) before the date of the Guarantee for the first Adjustment Date; and
- (ii) 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.

10.3 Right of Council to claim on Guarantee

- (a) The Developer agrees that Council may make an appropriation from the Guarantee in such amount as Council, acting reasonably, thinks appropriate if:
 - (i) the Developer fails to comply with clause 2.2 of Schedule 3 of this Planning Agreement (provision of detailed design drawings and detailed costs estimate);
 - (ii) Council allows the Developer not to complete the Public Benefits, or any part of them, in accordance with clause 6.4(a)(ii);
 - (iii) an Insolvency Event occurs in respect of the Developer;
 - (iv) the Developer fails to deliver the Public Benefits in accordance with clause 6.4(b);
 - (v) the Developer fails to rectify a Defect in accordance with clause 8.2 of this Planning Agreement;
 - (vi) the detailed designs for the Developer's Works are not finalised between Council and the Developer within 12 months of the date of issue of a Construction Certificate that approves the construction of any structures above the ground floor of the Development;
 - (vii) 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

- (viii) Council incurs any other expense or liability in exercising its rights and powers under this Planning Agreement.
- (b) Any amount of the Guarantee appropriated by Council in accordance with clause 10.2 must be applied only towards:
 - (i) the costs and expenses incurred by Council rectifying any default by the Developer under this Planning Agreement; and
 - (ii) carrying out any works required to achieve the Public Benefits.

10.4 **Expenditure by Council**

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

- (a) 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
- (b) may 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.

10.5 **Top-up and return of Guarantee**

- (a) If Council calls upon the Guarantee in accordance with this clause 10 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.
- (b) If:
 - (i) the monies secured by the Guarantee have not been expended;
 - (ii) Council has concurred with Completion in accordance with clause 6.3(a)(i) of this Planning Agreement, taking into account any approved non-completion of Public Benefits approved by clause 6.4(a) of this Planning Agreement; and
 - (iii) Council has been provided with the security for the Defects Liability Period in accordance with clause 8.1,

then Council will promptly return the Guarantee to the Developer following the issue of a notice pursuant to clause 6.3(a)(i) of this Planning Agreement.

- (c) If, following expiry of the Defects Liability Period, Council is satisfied that all defects have been rectified in accordance with clause 8 then Council must promptly return to the Developer the portion of the Guarantee retained by Council as security for the Defects Liability Period.

10.6 Compulsory acquisition

10.6.1 Subject to clauses 3.1 and 14, if the Owner fails to transfer or dedicate the Transfer Land or any land forming part of the Essential Infrastructure to Council in accordance with Schedule 3 of this Planning Agreement then Council may compulsorily acquire that land for the amount of \$1.00 in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)*. Council and the Owner agree that:

- (a) this clause 10.6.1 is an agreement between the Owner and Council for the purposes of section 30 of the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)*;
- (b) subject to clause 10.6.2, in this clause 10.6.1 the Owner and Council have agreed on all relevant matters concerning the compulsory acquisition and the compensation to be paid for the acquisition; and
- (c) the Owner must pay Council, promptly on demand, an amount equivalent to all costs incurred by Council in acquiring the whole or any part of the Transfer Land or land forming part of the Essential Infrastructure as contemplated by this clause 10.6.

10.6.2 Clause 10.6.1 is subject to:

- (a) the Developer or Owner activating the Development Consent by obtaining a Construction Certificate for any construction works located above the basement levels or for any public domain works (whichever is earlier) in relation to the Development Consent and physically commencing the Development in accordance with Section 4.53 (4) of the Act;
- (b) the Developer or Owner not surrendering the Development Consent;
- (c) the acquisition of the dedicated land being subject to a plan of subdivision; and
- (d) the Developer and the Owner being granted a licence for exclusive possession over the acquired land until such time as an Occupation Certificate is issued, subject to the ability for Council to enter the land if Public Benefits are not completed by the Developer within an agreed timeframe.

11. DISPUTE RESOLUTION

11.1 Application

Any Dispute must be determined in accordance with the procedure in this clause 11.

11.2 Negotiation

- (a) 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, the Owner's Representative and Council's Representative for resolution. The Dispute Notice must:
 - (i) be in writing;
 - (ii) state that it is given pursuant to this clause 11; and

- (iii) include or be accompanied by reasonable particulars of the Dispute including:
 - (A) a brief description of the circumstances in which the Dispute arose;
 - (B) references to any:
 - (aa) provisions of this Planning Agreement; and
 - (bb) acts or omissions of any person, relevant to the Dispute; and
 - (C) where applicable, the amount in dispute (whether monetary or any other commodity) and if not precisely known, the best estimate available.
- (b) Within 10 Business Days of the Referring Party issuing the Dispute Notice (**Resolution Period**), the Developer's Representative, the Owner's Representative and Council's Representative must meet at least once to attempt to resolve the Dispute.
- (c) The Developer's Representative, the Owner's Representative and Council's Representative may meet more than once to resolve a Dispute. The Developer's Representative, 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.

11.3 **Not use information**

The purpose of any exchange of information or documents or the making of any offer of settlement under this clause 11 is to attempt to settle the Dispute. None of the parties to this Planning Agreement may use any information or documents obtained through any dispute resolution process undertaken under this clause 11 for any purpose other than in an attempt to settle the Dispute.

11.4 **Condition precedent to litigation**

Subject to clause 11.5, a party must not commence legal proceedings in respect of a Dispute unless:

- (a) a Dispute Notice has been given; and
- (b) the Resolution Period has expired.

11.5 **Summary or urgent relief**

Nothing in this clause 11 will prevent a party from instituting proceedings to seek urgent injunctive, interlocutory or declaratory relief in respect of a Dispute.

12. TAXES AND GST

12.1 Responsibility for Taxes

- (a) 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 Planning Agreement or the Public Benefits.
- (b) 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 or the Owner is responsible for under clause 12.1(a).

12.2 GST free supply

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

- (a) no additional amount will be payable by a party on account of GST; and
- (b) no tax invoices will be exchanged between the parties.

12.3 Supply subject to GST

To the extent that clause 12.2 does not apply to a supply made under this Planning Agreement, this clause 12.3 will apply.

- (a) 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.
- (b) 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.
- (c) 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 12.3(a) if the payment is consideration for a taxable supply.
- (d) 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 12.3(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.
- (e) The Developer will assume Council is not entitled to any input tax credit when calculating any amounts payable under this clause 12.3.

- (f) In this Planning Agreement:
 - (i) consideration includes non-monetary consideration, in respect of which the parties must agree on a market value, acting reasonably; and
 - (ii) in addition to the meaning given in the GST Act, the term "GST" includes a notional liability for GST.

13. **DEALINGS**

13.1 **Dealing by Council**

- (a) Council may Deal with its interest in this Planning Agreement without the consent of the Developer and 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.
- (b) Council may not otherwise Deal with its interest in this Planning Agreement without the consent of the Developer and the Owner, such consent not to be unreasonably withheld or delayed.

13.2 **Dealing by the Developer**

- (a) Prior to registration of this Planning Agreement in accordance with clause 9, the Developer and the Owner must not Deal with this Planning Agreement or the Land without:
 - (i) the prior written consent of Council; and
 - (ii) Council, the Developer, the Owner and the third party the subject of the Dealing entering into a deed of consent in the form of a deed of novation to the Dealing on terms acceptable to Council.
- (b) On and from registration of this Planning Agreement in accordance with clause 9:
 - (i) the Developer may register a plan of strata subdivision, and Council consents to this Planning Agreement remaining registered only on the certificate of title to the common property of the strata plan upon registration of the strata plan; and
 - (ii) the Developer and the Owner must not otherwise Deal with this Planning Agreement to a third party without:
 - (A) the prior written consent of Council; and
 - (B) Council, the Developer, the Owner and the third party the subject of the Dealing entering into a deed of consent in the form of a deed of novation to the Dealing on terms acceptable to Council.
- (c) The Developer must pay Council's costs and expenses relating to any consent or Planning Agreement required due to the operation of this clause 13.2.

13.3 **Extinguishment or creation of interests on Transfer Land**

- (a) Prior to the dedication or transfer of the Transfer Land to Council, the Owner or Developer must:
 - (i) extinguish all leases and licences over the Transfer Land; and
 - (ii) use their best endeavours to extinguish all redundant encumbrances and those that, in Council's opinion, would unreasonably impede the intended use of all or any part of the Transfer Land.
- (b) The Owner must comply with any directions by Council relating to the Transfer Land, including but not limited to the creation of any encumbrances over the Transfer Land.

14. **TERMINATION**

- (a) Any of the parties to this Planning Agreement may terminate this Planning Agreement by notice in writing if the Modification Application is refused, the Development Consent lapses or the Development Consent ceases to have effect (for example, if the Development Consent is surrendered, provided Council has consented to the surrender).
- (b) If this Planning Agreement is terminated under clause 14(a) then:
 - (i) 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;
 - (ii) the Developer and the Owner must take all steps reasonably necessary to minimise any loss that each party may suffer as a result of the termination of this Planning Agreement;
 - (iii) 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 Planning Agreement. If in exercising its rights under this Planning Agreement 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
 - (iv) Council will, at the Council's cost, do all things reasonably required to remove this Planning Agreement from the certificate of title /s to the Land.

15. **CONFIDENTIALITY AND DISCLOSURES**

15.1 **Use and disclosure of Confidential Information**

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

- (a) use any of the Confidential Information except to the extent necessary to exercise its rights and perform its obligations under this Planning Agreement; or

- (b) disclose any of the Confidential Information except in accordance with clauses 15.2 or 15.3.

15.2 Disclosures to personnel and advisers

- (a) The receiving party may disclose Confidential Information to an officer, employee, agent, contractor, or legal, financial or other professional adviser if:
 - (i) the disclosure is necessary to enable the receiving party to perform its obligations or to exercise its rights under this Planning Agreement; and
 - (ii) prior to disclosure, the receiving party informs the person of the receiving party's obligations in relation to the Confidential Information under this Planning Agreement and obtains an undertaking from the person to comply with those obligations.
- (b) The receiving party:
 - (i) must ensure that any person to whom Confidential Information is disclosed under clause 15.2(a) keeps the Confidential Information confidential and does not use it for any purpose other than as permitted under clause 15.2(a); and
 - (ii) 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 15.2(b)(i).

15.3 Disclosures required by law

- (a) Subject to clause 15.3(b), the receiving party may disclose Confidential Information that the receiving party is required to disclose:
 - (i) by law or by order of any court or tribunal of competent jurisdiction; or
 - (ii) by any Government Agency, stock exchange or other regulatory body.
- (b) If the receiving party is required to make a disclosure under clause 15.3(a), the receiving party must:
 - (i) to the extent possible, notify the disclosing party immediately it anticipates that it may be required to disclose any of the Confidential Information;
 - (ii) consult with and follow any reasonable directions from the disclosing party to minimise disclosure; and
 - (iii) if disclosure cannot be avoided:
 - (A) only disclose Confidential Information to the extent necessary to comply; and
 - (B) use reasonable efforts to ensure that any Confidential Information disclosed is kept confidential.

15.4 Receiving party's return or destruction of documents

On termination of this Planning Agreement the receiving party must immediately:

- (a) deliver to the disclosing party all documents and other materials containing, recording or referring to Confidential Information; and
- (b) 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.

15.5 Security and control

The receiving party must:

- (a) keep effective control of the Confidential Information; and
- (b) ensure that the Confidential Information is kept secure from theft, loss, damage or unauthorised access or alteration.

15.6 Media releases

The Developer and / or the Owner must not issue any information, publication, document or article for publication in any media concerning this Planning Agreement or the Public Benefits without Council's prior written consent.

16. NOTICES

- (a) A notice, consent or other communication under this Planning Agreement 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 email. 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 email, it is taken to have been received when the addressee actually receives it in full and in legible form.
- (b) A person's mail and email address are those set out in Schedule 1 for Council's Representative, the Developer's Representative and the Owner's Representative, or as the person notifies the sender in writing from time to time.

17. GENERAL

17.1 Governing law

- (a) This Planning Agreement is governed by the laws of New South Wales.
- (b) 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 Planning Agreement, and waives any right it might have to claim that those courts are an inconvenient forum.

17.2 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:

- (a) information that relates directly to the delivery of the Public Benefits by the Developer and the Owner;
- (b) information collected by the Developer and / or the Owner from members of the public to whom the Developer and the Owner provides, or offers to provide, services on behalf of Council; and
- (c) information received by the Developer and the Owner from Council to enable the Developer and the Owner to deliver the Public Benefits.

17.3 Liability for expenses

- (a) Other than as set out in this Planning Agreement, each party to this Planning Agreement must pay their own expenses incurred in negotiating, executing, registering, releasing, administering and enforcing this Planning Agreement.

17.4 Relationship of parties

- (a) Nothing in this Planning Agreement creates a joint venture, partnership, or the relationship of principal and agent, or employee and employer between the parties; and
- (b) 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.

17.5 Giving effect to this Planning Agreement

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 Planning Agreement.

17.6 Time for doing acts

- (a) If:
 - (i) the time for doing any act or thing required to be done; or
 - (ii) a notice period specified in this Planning Agreement,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.
- (b) 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.

17.7 **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 Planning Agreement without affecting the enforceability, validity or legality of the remaining clauses (or parts of those clauses) which will continue in full force and effect.

17.8 **Preservation of existing rights**

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

17.9 **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 Planning Agreement for any reason, will not merge on the occurrence of that event but will remain in full force and effect.

17.10 **Waiver of rights**

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

- (a) 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;
- (b) a waiver of a right on one or more occasions does not operate as a waiver of that right if it arises again; and
- (c) the exercise of a right does not prevent any further exercise of that right or of any other right.

17.11 **Operation of this Planning Agreement**

- (a) This Planning Agreement 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 Planning Agreement and has no further effect.
- (b) Any right that a person may have under this Planning Agreement is in addition to, and does not replace or limit, any other right that the person may have.
- (c) Any provision of this Planning Agreement which is unenforceable or partly unenforceable is, where possible, to be severed to the extent necessary to make this Planning Agreement enforceable, unless this would materially change the intended effect of this Planning Agreement.

17.12 **Operation of indemnities**

- (a) Each indemnity in this Planning Agreement survives the expiry or termination of this Planning Agreement.

- (b) A party may recover a payment under an indemnity in this Planning Agreement before it makes the payment in respect of which the indemnity is given.

17.13 Inconsistency with other documents

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

- (a) this Planning Agreement;
- (b) any Schedule to this Planning Agreement; and
- (c) the provisions of any other document of the Developer,

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

17.14 No fetter

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

17.15 Counterparts

This Planning Agreement may be executed in counterparts.

SCHEDULE 1

Agreement Details

| ITEM | TERM | DESCRIPTION |
|------|-----------------------------------|---|
| 1. | Land | Lot 50 in Deposited Plan 456784, Lot 52 in Deposited Plan 1248353 and Lot 53 in Deposited Plan 1248353, being 1-13 Parramatta Road Annandale NSW 2038 |
| 2. | Development | Mixed use development comprising 2-ground floor retail shops and 42 residential units at 1-13 Parramatta Road, Annandale NSW 2038 The total Gross Floor Area of the Development on the Land is approximately 4313 square metres. |
| 3. | Council's Representative | Name: David Paton – Engineering Services Manager Address: 7-15 Wetherill Street, Leichhardt NSW 2040 Email: council@innerwest.nsw.gov.au |
| 4. | Developer's Representative | Name: Mitchell Favaloro Address: 447-451 Parramatta Road Leichhardt NSW 2040 Email: Mitchell.favaloro@ceerose.com.au |
| 4A. | Owner's Representative | Name: Mitchell Favaloro Address : 447-451 Parramatta Road, Leichhardt NSW 2040 Email: Mitchell.favaloro@ceerose.com.au |
| 5. | Development Application | D/2017/161 |
| 5A | Modification Application | M/2019/53 MOD/2022/0143 |
| 6.. | Guarantee Amount | A total amount of \$270,000.00 plus GST. |
| 7. | Guarantee Amount Due Date | On issue of a Construction Certificate for any construction works located above the basement levels or for any public domain works (whichever is earlier) in relation to the Development Consent. |

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SCHEDULE 2

Requirements under the Act and Regulation (clause 2)

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

| ITEM | SECTION OF ACT OR REGULATION | PROVISION/CLAUSE OF THIS PLANNING AGREEMENT |
|------|--|--|
| 1. | <p>Planning instrument and/or development application (section 7.4(1) of the Act)</p> <p>The Developer has:</p> <p>(a) sought a change to an environmental planning instrument;</p> <p>(b) made, or proposes to make, a Development Application; or</p> <p>(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.</p> | <p>(a) No</p> <p>(b) Yes</p> <p>(c) No</p> |
| 2. | <p>Description of land to which this Planning Agreement applies (section 7.4(3)(a) of the Act)</p> | Item 1 of Schedule 1. |
| 3. | <p>Description of change to the environmental planning instrument to which this Planning Agreement applies and/or the development to which this Planning Agreement applies (section 7.4(3)(b) of the Act)</p> | The Development as described in item 2 of Schedule 1. |
| 4. | <p>The nature and extent of the provision to be made by the developer under this Planning Agreement, 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)</p> | Schedule 3 and Annexure A. |
| 5. | <p>Whether this Planning Agreement 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)</p> | <p>Section 7.11 not excluded</p> <p>Section 7.12 not excluded</p> <p>Section 7.24 not excluded</p> |

| ITEM | SECTION OF ACT OR REGULATION | PROVISION/CLAUSE OF THIS PLANNING AGREEMENT |
|------|--|--|
| 6. | Applicability of section 7.11 or 7.12 of the Act (section 7.4(3)(e) of the Act) | The application of section 7.11 and s7.12 of the Act is not excluded in respect of the Development and contributions (if any) under section 7.11 be required to be paid. |
| 7. | Consideration of benefits under this Planning Agreement if section 7.11 or 7.12 applies (section 7.4(3)(e) of the Act) | Planning Agreement benefits are not to be taken into consideration in determining any contribution under section 7.11 or 7.12 of the Act. |
| 8. | Mechanism for Dispute Resolution (section 7.4(3)(f) of the Act) | Clause 11 |
| 9. | Enforcement of this Planning Agreement (section 7.4(3)(g) of the Act) | Clause 10 |
| 10. | No obligation to grant consent or exercise functions (section 7.4(9) of the Act) | Clause 2.4 |
| 11. | Registration of this Planning Agreement (section 7.6 of the Act) | Clause 9 |
| 12. | Whether certain requirements of this Planning Agreement must be complied with before a construction certificate is issued (clause 25E(2)(g) of the Regulation) | Clauses 2.1, 2.2 and 2.3 of Schedule 3 |
| 13. | Whether certain requirements of this Planning Agreement must be complied with before a subdivision certificate is issued (clause 25E(2)(g) of the Regulation) | Clauses 6.1, 6.2 and 6.3 |
| 14. | Whether certain requirements of this Planning Agreement must be complied with before an occupation certificate is issued (clause 25E(2)(g) of the Regulation) | Clauses 1.1, 1.2 and 1.3 of Schedule 3 |
| 15. | Whether the explanatory note that accompanied exhibition of this Planning Agreement may be used to assist in construing this Planning Agreement (clause 25E(7) of the Regulation) | Clause 2.5 |

SCHEDULE 3

Public Benefits (clause 5)

1. PUBLIC BENEFITS - OVERVIEW

The Developer must provide the Public Benefits in accordance with Schedule 3 and this Planning Agreement. 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 | Transfer Land | \$ 1,000,000 | After Completion but before the issue of the first Occupation Certificate for the Development. | <p>a. An area of approximately 22.8<u>34</u> square metres at McCarthy Lane Annandale being a pedestrian footpath 760mm wide by 45.3<u>0</u> metres long; and</p> <p><u>b.</u> a pedestrian / cycle pathway corridor through the site adjacent to Johnston's Creek 3500mm wide and 45m (length), incorporating 2 metre wide stairs, 1.5 metre wide access ramp to the public lift and the public lift approximately 157.5<u>187.3</u> square metres. <u>A portion of the aforementioned land will be limited in height as detailed below (c), (d) and (e).</u></p> |

| | | | | |
|----|---|-----------|---|--|
| | | | | <p>c. <u>On the northern portion of the pedestrian / cycle pathway approximately 11.13 square metres will be limited to between RL7.6 and RL10.88.</u></p> <p>d. <u>On the middle portion of the pedestrian/cycle pathway approximately 4.6 square metres will be limited to a depth of RL7.6.</u></p> <p>b.e. <u>On the southern portion of the pedestrian / cycle pathway approximately 10 square meters will be limited to RL15.60</u></p> <p>Plans showing the location of the Transfer Land are contained in Annexure A to this Planning Agreement.</p> |
| 2. | <p>Developer's Works</p> <p>Being a pedestrian / cycle path 3500mm wide and 45 metres long adjacent to Johnsons Creek and lighting.</p> <p>Being the construction of a pedestrian</p> | \$135,000 | Before the issue of the first Occupation Certificate for the Development. | Plans and specifications showing the nature and extent of the required Developer's Works as at the date of this Planning Agreement are contained in Annexure A to this Planning Agreement. |

| | | | | |
|----|--|-----------|---|---|
| | <p>footpath 30 metres long McCarthy, Lane, Annandale.</p> <p>Being the construction of a shared pedestrian space and vehicular turning bay at the eastern end of McCarthy Lane Annandale</p> | | | |
| 3. | <p>Essential Infrastructure</p> <p>Being the construction of public stairs 2 metres wide, an access ramp 1.5 metres wide providing access to the public lift and public lift adjacent to Parramatta Road, Annandale.</p> | \$135,000 | Before the issue of the first Occupation Certificate for the Development. | Plans and specifications showing the nature and extent of the required Essential Infrastructure as at the date of this Planning Agreement are contained in Annexure A to this Planning Agreement. |

1. TRANSFER LAND

1.1 Dedication of land – decision

The Owner must, at its cost, take all steps required to transfer the Transfer Land to Council by the due date specified in clause 1 of Schedule 3. As part of this obligation, the Owner must confirm with Council whether the Transfer Land is to be:

- (a) dedicated to Council on registration of a plan of subdivision; or
- (b) transferred to Council on registration of a transfer instrument arising from the plan of subdivision.

1.2 **Obligations on dedication**

The requirement for the Owner to dedicate the Transfer Land to Council is satisfied where a deposited plan is registered in the register of plans held with the Registrar-General that dedicates land as a public road (including a temporary public road) under the *Roads Act 1993* (NSW) or creates a public reserve or drainage reserve under the *Local Government Act 1993* (NSW).

1.3 **Obligations on transfer**

- (a) The requirement for the Owner to transfer the Transfer Land to Council is satisfied where:
 - (i) Council is given:
 - (A) an instrument in registrable form under the *Real Property Act 1900* (NSW) duly executed by the Owner as transferor that is effective to transfer the title to the Transfer Land to Council when executed by Council as transferee and registered;
 - (B) the written consent to the registration of the transfer of any person whose consent is required to that registration; and
 - (C) a written undertaking from any person holding the certificate of title/s to the production of the certificate of title for the purposes of registration of the transfer.
- (b) The Owner is to do all things reasonably necessary to enable registration of the instrument of transfer to occur.
- (c) The Owner must ensure that the Transfer Land is free of all encumbrances and affectations (whether registered or unregistered and including without limitation any charge or liability for rates, taxes and charges) except for any encumbrances agreed in writing by Council in its absolute discretion.
- (d) The Owner must indemnify and agree to keep indemnified Council against all claims made against Council as a result of any Contamination in, over, under or migrating from the whole or any part of the Transfer Land but only in relation to Contamination that existed on or before the date that the Transfer Land is dedicated to Council in accordance with the requirements of this clause.
- (e) The Owner warrants that as at the date of this deed the Transfer Land is not subject to any Adverse Affectation and warrants as to those matters in Schedule 3 of the *Conveyancing (Sale of Land) Regulation 2010* (NSW), unless otherwise notified to and agreed by Council in writing in its absolute discretion.

2. **FINAL DESIGN OF THE DEVELOPER'S WORKS**

2.1 **Scope of Developer's Works**

As at the date of this Planning Agreement, the nature and extent of the required Developer's Works is set out in Annexure A to this Planning Agreement. The parties agree that further design refinement of the Developer's Works may be necessary, having regard to:

- (a) the extent to which the design of the Developer's Works has been approved by Council;
- (b) conditions affecting the Developer's Works that were not reasonably capable of identification prior to the date of this Planning Agreement;
- (c) the extent of any refinement of the design of the Developer's Works permitted by this clause 2 of Schedule 3;
- (d) 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; and
- (e) the reasonable requirements of Council, including in regard to the Standards.

2.2 **Final design of Developer's Works**

- (a) At least 1 month prior to the application for the first a Construction Certificate for any construction works located above the basement levels or for any public domain works (whichever is earlier) in relation to the Development Consent for the Development, the Developer must submit to Council's Representative for approval:
 - (i) detailed design drawings of the Developer's Works that reflect the plans and specifications set out in Annexure A; and
 - (ii) a detailed costs estimate (certified by a Quantity Surveyor) setting out the estimated cost of the Developer's Works.
- (b) Within 30 Business Days after Council's Representative has received the detailed design drawings and detailed costs estimate, Council will inform the Developer in writing as to whether the detailed design drawings and costs estimate are approved. If the detailed design drawings or costs estimate are not approved, Council will inform the Developer in writing of what further information or modifications are required and the Developer will have a further 15 Business Days to re-submit the required information, following which the process outlined in this paragraph (b) will apply again.
- (c) Regarding the costs estimate, the Developer agrees that Council may:
 - (i) reject items included within the Quantity Surveyor's Assessment which are not directly related to the Developer's Works;
 - (ii) require substantiation for the costs of items where the amount estimated is considered by Council to be excessive;
 - (iii) require an adjustment to the costs estimate to reflect a variation to the design required under this clause 2.2 of Schedule 3.
- (d) If the Developer:
 - (i) fails to prepare the detailed design drawings or detailed costs estimate; or

- (ii) does not provide further information or modify the detailed design drawings or detailed costs estimate,

in accordance with this clause ~~2.22.2~~ of Schedule 3, then Council may exercise its rights under clause 10 of this Planning Agreement in order to carry out the Developer's Works itself at the cost of the Developer.

- (e) The Developer agrees that the value of the Developer's Works may be adjusted following completion of the process set out in this clause ~~2.22.2~~ of Schedule 3. The Developer acknowledges that the scope of the Developer's Works will not change or reduce if the costs required to complete those works is greater than the amount estimated at the date of this Planning Agreement.

2.3 Preparation of and changes to construction design drawings

- (a) Following approval of the detailed design drawings by Council in accordance with clause ~~2.22.2~~ of Schedule 3, the Developer must promptly:
 - (i) prepare construction design drawings that comply with the detailed design drawings; and
 - (ii) provide Council with a copy of the construction design drawings.
- (b) Council, acting reasonably, may by written notice to the Developer at any time, approve, vary or direct the Developer to vary the construction design drawings so that the Developer's Works reflect:
 - (i) the Standards;
 - (ii) a departure or discrepancy from the plans approved under clause ~~2.22.2~~ of Schedule 3; or
 - (iii) any other standard or specification for materials or methodology for carrying out works that is adopted by Council from time to time, provided that any direction given under this clause ~~2.3(b)(iii)2.3(b)(iii)~~ of Schedule 3 does not significantly increase:
 - (A) the cost of that element of the Developer's Works; or
 - (B) the complexity of implementation of the Developer's Works that may lead to a significant delay in the completion of the Developer's Works.
- (c) Within 20 Business Days of receiving a notice from Council under clause 2.3(b) of Schedule 3, the Developer must:
 - (i) to the extent practicable, use reasonable endeavours to comply with the notice given by Council; or
 - (ii) if the Developer determines that the notice given by Council is unreasonable or impracticable, notify a dispute in accordance with clause 11 of this Planning Agreement.

If the Developer does not provide any response during the 20 Business Days after receiving a notice from Council under clause 2.3(b) of Schedule 3, it is

deemed that the Developer accepts the notice given by Council and will take all steps required to comply with the notice.

- (d) Council does not assume or owe any duty of care to the Developer in reviewing any design drawings submitted to it under this clause 2f Schedule 3 or for any errors, omissions or non-compliance with this Planning Agreement.
- (e) No participation by Council in the development of, the review of, or comments on any design drawings submitted by the Developer will lessen or otherwise affect the Developer's obligations under this Planning Agreement or constitute an acknowledgement by Council that the Developer has complied with its obligations under this Planning Agreement.

3. CONSTRUCTION OF DEVELOPER'S WORKS

3.1 Insurance

- (a) From commencement of the Developer's Works until expiration of the Defects Liability Period, the Developer must effect and maintain (or cause to be effected and maintained under one or more policies of insurance and without requiring any risk to be double insured) the following insurances held with an insurer licensed by the Australian Prudential Regulation Authority or holding an investment grade rating from Standard & Poors, Moody's or Fitch:
 - (i) worker's compensation insurance or registrations as required by Laws;
 - (ii) public liability insurance written on an occurrence basis with a limit of indemnity of not less than \$20,000,000 covering all aspects of the Developer's Works;
 - (iii) construction works insurance in relation to the Developer's Works; and
 - (iv) motor vehicle third party cover with a limit of indemnity of not less than \$20 million for each and every occurrence.
- (b) The Developer must submit a copy of all certificates of insurance to Council:
 - (i) prior to commencing construction of the Developer's Works; and
 - (ii) promptly following a written request by Council, provided that such a request is not made more than twice in any 12 month period.

3.2 Approvals and consents

The Developer must, at its cost, obtain all relevant approvals and consents for the Developer's Works, whether from Council or from any other relevant Government Agency, including any necessary road opening permits. Before commencing the Developer's Works, the Developer must give to Council copies of all approvals and consents for the Developer's Works, other than the Development Consent.

3.3 **Construction work**

The Developer must, at its cost:

- (a) carry out and complete the Developer's Works in accordance with all approvals and consents relating to the Developer's Works, including any approval given by Council under this Planning Agreement;
- (b) ensure that all Developer's Works are constructed in a good and workmanlike manner, in accordance with the plans approved under this Planning Agreement so that the Developer's Works are structurally sound, fit for purpose and suitable for their intended use;
- (c) ensure that the Developer's Works are Complete by the due date specified in Item 1 of Schedule 3 and promptly after becoming aware advise Council's Representative of any significant delays in completing the Developer's Works or delays that may impact the delivery of the Public Benefits by the due date specified in Item 1 of Schedule 3; and
- (d) comply with all reasonable directions of Council in respect to construction of the Developer's Works.

3.4 **Inspections by Council**

Council, as a party to this Planning Agreement and not in its role as a Government Agency, may:

- (a) inspect the Developer's Works during the course of construction at reasonable times and on reasonable notice; and
- (b) notify the Developer's Representative of any material or significant defect, error or omission relating to the construction or installation of the Developer's Works identified during or as the result of an inspection.

Any failure by Council to identify a Defect, error or omission will not be construed as amounting to an acceptance by Council of the Defect, error or omission.

4. **AUSTRALIAN STANDARDS**

The following list of Australian Standards are included for information purposes only, and as a guide to the relevant standards for the general nature of the work identified as Developer's Works in this Planning Agreement. Council makes no representation or warranty as to the currency of the standards identified, or their application on the final design of the Developer's Works. The Developer must make its own enquiries regarding whether any standard has been replaced or supplemented.

Relevant Australian Standards – Verge Works, Through site links

- AS 1725 Geotechnical Site investigations
- AS 4455 Masonry Units and segmental pavers
- AS 4678 Earth Retaining Structures
- AS 3600 Concrete Structures

- AS 2876 Concrete kerbs and channels
- AS 1158 Road Lighting
- AS 1743 Road signs
- AS 4282 Control of the Obtrusive Effects of Outdoor lighting
- AS 3500.3 Plumbing and Drainage
- AS 3700 Masonry Structures
- AS 2890 Parking Facilities
- AS 1428 Design for Access and Mobility
- AS 4454 Composts, soil conditioners and mulches
- WSA 05-2013

Relevant Australian Standards – Roads (including pedestrian areas)

- AS 1725 Geotechnical Site investigations
- AS 4455 Masonry Units and segmental pavers
- AS 4678 Earth Retaining Structures
- AS 3600 Concrete Structures
- AS 2876 Concrete kerbs and channels
- AS 1158 Road Lighting
- AS 4282 Control of the Obtrusive Effects of Outdoor lighting
- AS 1428 Design for Access and Mobility
- AS 3500.3 Plumbing and Drainage
- AS 3700 Masonry Structures
- AS 2890 Parking Facilities
- AS 1742 Manual of uniform traffic control devices
- AS 1743 Road Signs

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

Position of officer

7-15 Wetherill Street, Leichhardt NSW
2040

Address of witness

EXECUTED by **Eranna Development
Pty Ltd** ABN 44 638 578 588 in
accordance with s127(1) of the
Corporations Act 2001 (Cth):

Signature of director

Signature of director/secretary

Name

Name

EXECUTED by ~~E&R Property~~**Eranna**
Pty Ltd ACN ~~610 778 648~~**638 515 349**
in accordance with s127(1) of the
Corporations Act 2001 (Cth):

Signature of director

Name

Signature of director/secretary

Name

DRAFT

ANNEXURE A

Public Benefits – additional plans and specifications

DRAFT