

PLANNING AGREEMENT

17 -23 Talavera Road, Macquarie Park
NSW

THE COUNCIL OF THE CITY OF RYDE

AND

MACQUARIE TELECOM PTY LIMITED

The Council of the City of Ryde

Level 1, Building 0, Binary Centre, 3
Richardson Place, North Ryde NSW 2113

Ref:17-226

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PLANNING AGREEMENT

DATED _____ **day of** _____ **20** _____

PARTIES

1. **COUNCIL OF THE CITY OF RYDE (ABN 81 621 292 610)** of Level 1, Building 0, Binary Centre, 3 Richardson Place, North Ryde NSW 2113 (**Council**); and
2. **MACQUARIE TELECOM PTY LIMITED (ACN 082 930 916)** of Level 15, 2 Market Street, Sydney, New South Wales 2000 (**Developer**).

BACKGROUND

- A. The Land is within the Macquarie Park Corridor and clause 6.9 of *Ryde Local Environmental Plan 2014* applies to the Development.
- B. The Developer is the occupier of the Land under registered lease AJ737090 and is the proponent of the Development Application.
- C. On 7 August 2018 the Developer authorised the lodgment of the Development Application with Council to carry out the Development on the Land.
- D. On 8 October 2018 the Developer made an offer to Council to enter into a planning agreement under section 7.4 of the Act in respect of the Development and on 27 November 2018, Council resolved to accept the Developer's offer.

OPERATIVE PROVISIONS

1 PLANNING AGREEMENT UNDER THE ACT

The parties agree that this Deed is a Planning Agreement within the meaning of section 7.4(1) of the Act.

2 SCOPE AND APPLICATION OF THIS DEED

- (a) This Deed binds the parties and applies to the Development and the Land on which the Development is to be carried out.
- (b) This Deed does not exclude the application of sections 7.11 and 7.12 of the Act to the Development.
- (c) This Deed does not exclude the application of section 7.24 of the Act to the Development.

3 OPERATION OF THIS DEED

- (a) This Deed commences and has force and effect on and from the date when the Parties have each executed separate counterparts of this Deed and exchanged the counterparts.
- (b) The Parties are to insert the date when this Deed commences on the front page and on the execution page.
- (c) The Developer agrees that this Deed operates as a deed poll in favour

of the Council on and from the date of execution of this Deed by the Developer until the date on which this Deed commences.

4 DEFINITIONS AND INTERPRETATION

4.1 Definitions

In this Deed, the following definitions apply:

Act means the *Environmental Planning and Assessment Act 1979* (NSW) (as amended) and includes any regulations made under that Act.

Council's Representative means the person specified in Item 2 of Schedule 1 who is duly authorised to give approval under this Deed or such other person as may be nominated by the person occupying the role of General Manager of the Council from time to time.

Development means the development specified in Item 4 of Schedule 1.

Development Application means the development application LDA2018/322 and includes all plans, reports models, photomontages, material boards (as amended supplemented) submitted to the Council prior to the determination of that Development Application for the Development.

Development Consent means the consent granted by the Council to the Development Application for the Development and includes all modifications made under section 4.55 of the Act.

GST has the same meaning as in the GST Act.

GST Act has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

Macquarie Park Corridor means the area identified as "Precinct 01—Macquarie Park" on the Macquarie Park Corridor Precinct Map *under Ryde Local Environmental Plan 2014*.

Land means the land comprising the land the subject of the Development Application and identified in Item 3 of Schedule 1.

Legal Costs means reasonable legal costs and expenses on a full indemnity basis.

Monetary Development Contribution means the amount set out in Item 5 of Schedule 1 to be used for, or applied towards a public purpose and includes any increase to that amount pursuant to clauses 5.2 and 5.3.

Party means a party to this Deed, and includes their successors and assigns.

4.2 Interpretation

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

- (a) headings are inserted for convenience only and do not affect the

interpretation of this Deed.

- (b) a reference in this Deed to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (c) a reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
- (d) a reference in this Deed to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (e) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
- (f) a word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular.
- (g) references to the word 'include' or 'including are to be construed without limitation.
- (h) a reference to a party to this Deed includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- (i) any schedules and attachments form part of this Deed.
- (j) a word defined in the Act has the same meaning in this Deed.

5 PAYMENT OF MONETARY DEVELOPMENT CONTRIBUTION

5.1 Payment of the Monetary Development Contribution

- (a) The Developer agrees to make the Monetary Development Contribution before the release of any construction certificate for any part of the Development.
- (b) The Monetary Development Contribution is made for the purposes of this Deed when the Council receives the full amount of the contribution payable under this Deed in cash or by unendorsed bank cheque or by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by the Council.

5.2 Indexation

- a) On the date of payment, the Monetary Development Contribution will be adjusted to a revised amount derived by applying the following formula:

$$\text{Monetary Contribution at Time of Payment} = C \times \frac{\text{CPI2}}{\text{CPI1}}$$

where:

C is the original Monetary Development Contribution (as identified in Item 5 of Schedule 1 of this Deed and any additional amount payable under clause 5.3);

CPI2 is the index number for the Consumer Price Index: All Groups Index for Sydney available from the Australian Bureau of Statistics at the time of payment; and

CPI1 is the index number for the Consumer Price Index: All Groups Index for Sydney available from the Australian Bureau of Statistics and applicable for the quarter at the date of grant of Development Consent.

5.3 Increase to Monetary Development Contribution

- (a) If the Developer amends the application for Development Consent or obtains a modification of the Development Consent under s4.55 of the Act which has the effect of increasing the gross floor area located above the base height specified under *Ryde Local Environmental Plan 2014* to more than 3,000m², the Monetary Development Contribution will be increased by an amount equivalent to \$265 for each additional square metre above 3,000m².
- (b) Any increase of the Monetary Development Contribution shall be adjusted to a revised amount derived by applying the formula in clause 5.2.
- (c) If clause 5.3 applies then any Monetary Development Contribution due pursuant to this clause must be paid prior to the release of any certificate of occupation for the Development.

5.4 Application

The Council will, at its sole discretion apply the Monetary Development Contribution towards any public purpose it considers would be best served by the application of the Monetary Development Contribution. This may include without limitation expending the Monetary Development Contribution on open space and/or the Macquarie Park Corridor access network and otherwise in accordance with this Deed.

5.5 No Trust

- (a) Subject to clause 5.1, the parties expressly acknowledge and agree that nothing in this Deed will be read or construed as creating any form of trust arrangement, or fiduciary duty as and between the Developer and the Council.
- (b) Subject to clause 5.1, the Council is not obliged or required to separately account for, or in any manner trace, the Monetary Development Contribution at the request of or for the benefit of the Developer.

5.6 Expenditure by the Council

- (a) The Parties agree that:
 - i. Council may pool the Monetary Development Contribution with monetary development contributions paid by other developers under other planning agreements under s7.4 of the Act; and
 - ii. the expenditure by Council of an amount equal to or greater than the Monetary Development Contribution will be full and conclusive proof of the proper application of the Monetary Development Contribution; and
 - iii. the Developer may not make or bring any claim or action of any nature relating to the pooling or expenditure of the Monetary

Development Contribution for any public purpose.

5.7 Security

No construction certificate may be issued in respect of the Development if the Developer is in breach of its obligation to pay the Monetary Development Contribution in accordance with this Deed.

6 REGISTRATION OF DEED

6.1 Application of this Clause

- (a) This clause only applies if the Monetary Development Contribution is not received by Council by way of clear funds upon execution of the Deed by the Developer.

6.2 Registration of Deed

- (a) The Developer warrants that it has obtained all consents to the registration of this Deed on the title to the land as are necessary and in particular the consent of the owner of the Land, any mortgagee or Lessee registered on the Certificate of Title to the land.
- (b) The Developer must on execution of this Deed produce to the Council together with this Deed for execution by the Council:
 - (i) the written consent of all persons who have an interest in the Land, including, the owner, any mortgagee and Lessee, confirming their consent to the registration of this Deed on the title of the Land;
 - (ii) A copy of the Production Ticket as evidence that the mortgagee / owner of the Land/ or Developer (as the case may be) has produced the Certificate(s) of Title to New South Wales Land Registry Services for the purpose of Council registering the Deed on the title of the Land; and
 - (iii) A bank cheque for the relevant registration fees made payable to LPI.
- (c) The Developer must promptly comply with any requisitions that may be raised with regard to registration of the Deed from New South Wales Land Registry Services.
- (d) Subject to clause 6.1(a) and 6.2(a), the Council will lodge this Deed for its registration on the title of the Land.
- (e) The Council will notify the Developer following registration of the Deed on the title of the Land and forward a copy of the Deed to the Developer.

6.3 Caveat

The Developer acknowledges and agrees that:

- (a) When this Deed is executed by the owner of the Land, the Council is

deemed to have acquired and the owner has deemed to have granted an equitable estate an interest in the Land for the purpose of section 74F(1) of the Real Property Act 1900 and consequently the Council has a sufficient interest in the Land in respect of which to lodge a caveat over the Land to register that interest; and

- (b) It will not object to the Council lodging a caveat on the relevant folio of the register for the Land nor will it seek to remove any caveat registered by the Council.

6.4 Consent of Mortgagee

The Developer warrants to the Council that it has obtained and is in possession of a written consent from the mortgagee in which the mortgagee consents to:

- (a) the Developer entering into and performing its obligations under this Deed and the lodgment of a caveat by the Council notifying its interest in the relevant folio of the register for the Land under the Real Property Act 1900 and agrees that;
- (b) it will only exercise its rights under any mortgage, charge, lien, trust, power or retention of deposit arrangement in relation to the Land subject to the rights of Council and promptly upon request lodge at New South Wales Land Registry Services the relevant Certificate(s) of Title to enable registration of this Deed under the Real Property Act in the relevant folios of the register of the Land.

6.5 Removal of Registration of the Deed and Caveat

Upon the issue of a certificate of occupancy permitting occupancy for the whole of the Development and provided the whole of the Monetary Development Contribution has been received by Council in accordance with clause 5.1(b), the Council will execute any form and supply such other information reasonably required to remove the Deed and the caveat from the title to the Land.

7 DISPUTE RESOLUTION

7.1 Reference to Dispute

If a dispute arises between the parties in relation to this Deed, then either party may seek to resolve in accordance with this clause 7.

7.2 Notice of Dispute

The party wishing to commence dispute resolution processes must notify the other in writing of:

- (a) the nature, or subject matter, of the dispute, including a summary of any efforts made to resolve latter than by way of this clause 7;
- (b) the intent to involve this clause 7;
- (c) (if practicable) the outcomes which the notifying party wishes to achieve;
- (d) any material impact which the dispute has upon the completion of the

Developer's Works.

The contents of a notice issued under the clause 7.2 are deemed to be confidential. The party issuing the notice may (but is not obliged) to assert legal professional privilege in respect of the contents.

7.3 Principals of Parties to Meet

The principals of the parties (and in the case of the Council, the principal may include the person acting the role of General Manager as defined in the *Local Government Act 1993*, or such other person as is nominated by the person holding the role of General Manager in writing) must promptly (and in any event within 14 days of written notice) meet in good faith to attempt to resolve the notified dispute. The parties may, without limitation:

- (a) resolve the dispute during the course of that meeting;
- (b) agree that further material, expert opinion, or consideration is needed to effectively resolve the dispute (in which event the parties will in good faith agree to a timetable for resolution);
- (c) agree that the parties are unlikely to resolve the dispute and in good faith agree to a form of alternative dispute resolution (including expert determination, arbitration, or mediation) which is appropriate for the resolution of the relevant dispute.

7.4 Neither Party May Constrain

If:

- (a) at least one meeting has been held in accordance with clause 7.3; and
- (b) the parties have been unable to reach an outcome identified in 7.3(a) to (c); and
- (c) either of the parties (acting in good faith) forms the view that the dispute is reasonably unlikely to be resolved in accordance with a process agreed under clause 7.3;

then that party may, by 14 days' notice in writing to the other, terminate the dispute resolution process in respect of that dispute. The termination of the process set out in this clause 7 does not of itself amount to a breach of the Deed.

8 NOTICES

8.1 Service of Notice

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

- (a) delivered or posted to that Party at its address set out in Item 6 of Schedule 1 or (if such delivery is not accepted) then to the registered office or principal place of business of the Party; or
- (b) sent by email to that Party at its email address set out in Item 6 of

Schedule 1.

8.2 Change of Address

If a Party gives the other Party 10 business days' notice of a change of its address or email address, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or emailed to the latest delivery, postal or email address.

8.3 Time of Service of Notice

Any notice, consent, information, application or request is to be treated as given or made at the following time:

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

8.4 Service after hours, on Weekends and Holidays

If any notice, consent, information, application or request is delivered, posted or no delivery failure message in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

9 APPROVALS AND CONSENT

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

10 COSTS

10.1 Legal and Administrative Costs

- (a) The Developer must pay all Council's legal and administrative costs and expenses in relation to the negotiation, preparation and execution of this Deed upon receipt of an invoice from the Council for those costs.
- (b) The Developer must pay all reasonable legal and administrative costs and expenses incurred by Council relation to any enforcement of the Council's rights under this Deed. Council may claim monies in payment of the legal and administrative costs from the Developer as a debt due and owing.

10.2 Stamp Duty

The Developer is liable for and must pay all stamp duty (including any fine or penalty) payable on or relating to this Deed.

11 ENTIRE DEED

This Deed sets out the whole agreement of the Parties in respect of the subject matter. There are no other agreements, warranties or undertakings.

12 FURTHER ACTS

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

13 GOVERNING LAW AND JURISDICTION

This Deed is governed by the law of New South Wales. The Parties submit to the jurisdiction of the courts of that state.

14 NO FETTER

Nothing in this Deed will be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, or fettering in any way the exercise of any statutory discretion or duty.

15 REPRESENTATIONS AND WARRANTIES

- (a) The Parties represent and warrant that they have power to enter into this Deed and comply with their obligations under the Deed and that entry into this Deed will not result in the breach of any law.
- (b) The Developer warrants that it occupies the Land under a registered lease.
- (c) The Developer warrants that it has obtained the written consent of the owner of the Land authorising entry into this Deed.

16 SEVERABILITY

If a clause or part of a clause of this Deed can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Deed, but the rest of this Deed is not affected.

17 MODIFICATION

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

18 WAIVER

- (a) The fact that a Party does not do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- (b) A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

19 GST

- (a) In this clause terms used have the meaning given to them by the GST Act as defined in Section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (the "GST Act").
- (b) Except where the context suggests otherwise, terms used in this clause 19 have the meanings given to those terms by the GST Act.
- (c) Any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 19.
- (d) A reference to something done (including a supply made) by a party includes a reference to something done by any entity through which that party acts.
- (e) Unless otherwise expressly stated, all sums payable or consideration to be provided under this Deed are exclusive of GST.
- (f) The Parties agree, in accordance with Class Ruling CR2013/13 published by the Commissioner, that Contributions required to be made under this Deed are exempt from GST.
- (g) If GST is imposed on any supply made under or in accordance with this Deed, the Developer must pay the GST or pay to Council an additional amount equal to the GST payable on or for the taxable supply, whichever is appropriate in the circumstances.
- (h) If this Deed requires a party to pay for, or reimburse any expense, loss or outgoing ("reimbursable expense") suffered or incurred by another party, the amount required to be paid, or reimbursed by the first party is the amount of the reimbursable expense net of any input tax credit or reduced input tax credit to which the other party is entitled in respect of the reimbursable expense.
- (i) Each party agrees to do all things, including providing tax invoices and other documentation that may be necessary or desirable to enable or assist the other party to claim any input tax credit, set-off, rebate or refund in relation to any amount of GST paid or payable in respect of any supply under this Deed.
- (j) This clause will not merge on completion or termination of this Deed.

20 EXPLANATORY NOTE

- (a) The Appendix contains the Explanatory Note relating to this Deed required by clause 25E of the *Environmental Planning and Assessment Regulation 2000*.
- (b) Pursuant to clause 25E(7) of the *Environmental Planning and Assessment Regulation 2000*, the Parties agree that the Explanatory Note is not to be used to assist in construing this Planning Deed.

**SCHEDULE 1
REFERENCE SCHEDULE**

Item	Name	Description
1	Developer's Name Developer's ACN Developer's Address	Macquarie Telecom Pty Limited ACN 082 930 916 Level 15, 2 Market Street Sydney, New South Wales 2000
2	Council's Representative	The General Manager
3	Land	Lot 527, DP 752035 <i>17-23 Talavera Road Macquarie Park NSW 2113</i>
4	Development (Development Application No.)	Alterations and additions to existing data centre increasing the gross floor area from 4,778 square metres to 19,414 square metres. LDA 2018/0322
5	Monetary Contribution	\$795,000.00 (GST exclusive)
6	Notices Council Attention Postal Address: Email: Developer Attention: Address: Email:	General Manager Locked Bag 2069 North Ryde NSW 1670 cityofryde@ryde.nsw.gov.au General Counsel Level 15 2 Market St Sydney, New South Wales 2000 mgold@macquarietelecom.com

EXECUTED as a Deed by:

COUNCIL OF THE CITY OF RYDE)
(ABN: 22 636 550 790) by the General)
Manager under delegated authority)
pursuant to Section 377 of the Local)
Government Act 1993, in the presence)
of:

Witness (signature):

(identify name)

Full Name (printed):

EXECUTED as a Deed by:

MACQUARIE TELECOM PTY LIMITED)
(ACN 082 930 916) in accordance with)
section 127 of Corporations Law:)
)
)

Signature:

Signature:

Full Name (printed):

Full Name (printed):

Position:

Position:

Appendix
(Clause 20)
Environmental Planning and Assessment Regulation 2000
(Clause 25E)

Explanatory Note

Draft Planning Agreement

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Parties

City of Ryde Council ABN 81 621 292 610 of Level 1, Building 0, Binary Centre, 3 Richardson Place, North Ryde NSW 2113 (**Council**)

Macquarie Telecom Pty Limited (ACN 082 930 916) of Level 15, 2 Market St, Sydney, New South Wales 2000 (**Developer**)

Description of the Land to which the Draft Planning Agreement Applies

Lot 527 in DP 752035 at 17-23 Talavera Road Macquarie Park NSW 2113

Description of Proposed Development

Alterations and additions to the existing data centre including increasing the gross floor area from 4778 square metres to 19,414 square metres in accordance with the Development Consent.

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

Objectives of Draft Planning Agreement

The objective of the Draft Planning Agreement is to secure the payment by the Developer of monetary contributions for public purposes including additional open space or network access facilities to enable the Developer to utilise the incentive building height provisions under clause 6.9 of *Ryde Local Environmental Plan 2014* to provide a more slender structure for the Development.

Nature of Draft Planning Agreement

The draft planning agreement is a planning agreement within the meaning of section 7.4(1) of the *Environmental Planning and Assessment Act 1979* (NSW).

Effect of the Draft Planning Agreement

The Draft Planning Agreement requires the Developer to make a monetary development contribution in the amount of \$795,000.00 for public purposes including without limitation additional open space and the Macquarie Park Corridor access network.

Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

The Draft Planning Agreement promotes the orderly and economic use and development of the Land, good design and amenity of the built environment and provides increased opportunity for community participation in environmental planning and assessment.

How the Draft Planning Agreement Promotes the Public Interest

The draft Planning Agreement promotes the public interest by promoting the objects of the Act as set out in s1.3(c), (g) and (j) of the Act.

For Planning Authorities:

Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities

N/A

Other Public Authorities – How the Draft Planning Agreement Promotes the Objects (if any) of the Act under which it is Constituted

N/A

Councils – How the Draft Planning Agreement Promotes the Elements of the Guiding Principles for Local Government (formerly known as the Charter)

The Draft Planning Agreement promotes the elements of the Guiding Principles for Local Government by enabling the Council to:

- obtain monetary contributions to be applied towards managing assets so that current and future local community needs can be met in an affordable way,
- work with others to secure appropriate services for local community needs, and
- actively engage with their local community, through the use of the public notification of this Draft Planning Agreement

All Planning Authorities – Whether the Draft Planning Agreement Conforms with the Council's Delivery and Operational Plan

The Draft Planning Agreement generally conforms with Council's 2018 -2022 Delivery and Operational Plan programs for Macquarie Park.

All Planning Authorities – Whether the Draft Planning Agreement specifies that certain requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued

The Draft Planning Agreement specifies that the Developer must pay the monetary development prior to the release of a construction certificate for the development.