

**DRAFT PLANNING AGREEMENT**

**(ADDRESS)**

**THE COUNCIL OF THE CITY OF RYDE**

**AND**

**(INSERT NAME)**

**The Council of the City of Ryde**

General Counsel

1 Devlin Street

**RYDE NSW 2112**

Ref:

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## CONTENTS

Clause		Page No
1	<b>PLANNING AGREEMENT UNDER THE ACT</b>	2
2	<b>SCOPE AND APPLICATION OF THIS AGREEMENT</b>	2
3	<b>OPERATION OF THIS AGREEMENT</b>	2
4	<b>DEFINITIONS AND INTERPRETATION</b>	3
	4.1 Definitions	3
	4.2 Interpretation	4
5	<b>PAYMENT OF MONETARY CONTRIBUTION</b>	4
	5.1 Payment of Monetary Contribution	4
	5.2 Indexation	5
	5.3 Application	5
	5.4 No Trust	5
	5.5 Expenditure by the Council	5
6	<b>REGISTRATION OF AGREEMENT</b>	6
7	<b>DISPUTE RESOLUTION</b>	7
	7.1 Reference to Dispute	7
	7.2 Notice of Dispute	7
	7.3 Principals of Parties to Meet	8
	7.4 Neither Party May Constrain	8
8	<b>NOTICES</b>	8
	8.1 Service of Notice	8
	8.2 Change of Address	8
	8.3 Time of Service of Notice	9
	8.4 Service After Hours, on Weekends and Holidays	9
9	<b>APPROVALS AND CONSENT</b>	9
10	<b>ASSIGNMENT AND DEALINGS</b>	9
	10.1 Dealings with Land	9
11	<b>COSTS</b>	10
	11.1 Legal and Administrative Costs	10
	11.2 Stamp Duty	10
12	<b>ENTIRE AGREEMENT</b>	10
13	<b>FURTHER ACTS</b>	10
14	<b>GOVERNING LAW AND JURISDICTION</b>	10
15	<b>NO FETTER</b>	10
16	<b>REPRESENTATIONS AND WARRANTIES</b>	10
17	<b>SEVERABILITY</b>	10
18	<b>MODIFICATION</b>	11
19	<b>WAIVER</b>	11
20	<b>GST</b>	11
21	<b>EXPLANATORY NOTE</b>	11
	<b>SCHEDULE 1</b>	12
	<b>SCHEDULE 2</b>	13
	<b>SCHEDULE 3</b>	14
	<b>EXECUTION</b>	15

## PLANNING AGREEMENT

**DATED** \_\_\_\_\_ **day of** \_\_\_\_\_ **20** \_\_\_\_\_

### **PARTIES**

1. **COUNCIL OF THE CITY OF RYDE (ABN 81 621 292 610)** of 1 Devlin Street, Ryde, New South Wales (**Council**); and
2. (*identify name*) of (**Developer**).

### **BACKGROUND**

- A. The Developer is the owner of the Land.
- B. On (*identify date*) the Developer lodged (or authorised to be lodged, as the case may be) the Development Application with the Council to carry out the Development on the Land.
- C. On (*identify date*), the Council granted the Development Consent.

### **OPERATIVE PROVISIONS**

#### **1 PLANNING AGREEMENT UNDER THE ACT**

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The parties agree that this Agreement is a Planning Agreement governed by Part 4 of the Act.

#### **2 SCOPE AND APPLICATION OF THIS AGREEMENT**

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- (a) This Agreement binds the parties and applies to the Land on which the Development is to be carried out. This Agreement does not include and does **not** in any way reduce or satisfy the Developer's obligations to pay monies under:
  - (i) section 94 of the Act; or
  - (ii) any other statute or instrument that may apply to the land or to the development application.
- (b) For the purposes of section 93F(3)(d) of the Act, the parties expressly agree that this Planning Agreement does not exclude the operation of section 94 of the Act, and conditions may be imposed in respect of the contributions identified in (a) to (b) inclusive.
- (c) For the purposes of section 93F(3)(e) of the Act, the parties expressly agree that the Developer's Contributions to be provided under this Planning Agreement are not to be taken into consideration when determining the Developer's obligations to pay monies under section 94 of the Act.

#### **3 OPERATION OF THIS AGREEMENT**

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This Agreement takes effect on the date of this Agreement after execution by both parties,

## 4 DEFINITIONS AND INTERPRETATION

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### 4.1 Definitions

In this Agreement, the following definitions apply:

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

**Construction Certificate** has the same meaning as set out in the Act.

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

**Council Works** means the works of the general nature described in Schedule 2 to be completed by the Council and includes any application fees, advertising fees, design development costs, tendering costs, tender assessment costs, public consultation costs, and any other consultancy costs (such as architectural, heritage, planning, traffic, engineering, drafting or any other advice), land acquisition costs, survey costs, construction costs, relating to the design and implementation of the Council Works.

**Dealing** means selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.

**Development** means the proposal of the general nature set out in Item 4 of Schedule 1 to be completed by the Developer in accordance with the Development Consent.

**Development Application** means the development application identified in Item 4 of Schedule 1 and includes all plans, reports models, photomontages, material boards (as amended supplemented) submitted to the consent authority prior to the determination of that Development Application.

**Development Consent** means the consent granted by the Council to the Development Application for the Development identified in Item 4 of Schedule 1 and includes all modifications made under section 96 of the Act.

**Developer's Contribution** means the Monetary Contribution.

**Developer's Works** means the work identified in Schedule 3, as refined and developed in accordance with this Agreement.

**GST** has the same meaning as in the GST Law.

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

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

**Monetary Contribution** means the amount set out in Item 5 of Schedule 1 (indexed in accordance with clause 5.2) to be paid by the Developer to the Council in accordance with this Agreement.

**Occupation Certificate** has the same meaning as in the Act.

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

#### 4.2 Interpretation

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

- (a) headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) a reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (c) a reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (d) a reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (e) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (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 Agreement 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 Agreement.
- (j) a word defined in the Act has the same meaning in this Agreement.

## 5 PAYMENT OF MONETARY CONTRIBUTION

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### 5.1 Payment of the Monetary Contribution

The Developer agrees:

- (a) to pay the Monetary Contribution, indexed in accordance with clause 5.2 before the release of any Construction Certificate for any part of the Development; and

- (b) to provide a Bank Guarantee for the amount of the Monetary Contribution on or before execution of this Agreement which will be exchanged for the Monetary Contribution before issue of the Construction Certificate.

The Monetary Contribution shall be paid in cash or by unendorsed Bank Cheque.

## 5.2 Indexation

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

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

where:

- C** is the original amount Monetary Contribution (as identified in Item 5 of Schedule 1 of this Voluntary Planning Agreement);
- 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 Application

The parties agree that the payment of the Monetary Contribution for the purposes of the Council Works is intended to comprise the public benefit under this Agreement. The Council will, in its sole discretion, expend an amount equivalent to the Monetary Contribution on the Council Works.

## 5.4 No Trust

The parties expressly acknowledge and agree that nothing in this Agreement will be read or construed as creating any form of trust arrangement, or fiduciary duty as and between the Developer and the Council. Without limiting any other part of this Agreement, the Council is not obliged or required to separately account for, or in any manner trace, the Monetary Contribution at the request of or for the benefit of the Developer.

## 5.5 Expenditure by the Council

The parties expressly agree that the expenditure of an amount equal to or greater than the Monetary Contribution upon the Council Works will be full and conclusive proof of the proper application of the Monetary Contribution. Without limiting clause 5.4, the Developer may not make or bring any claim or action of any nature relating to:

- (a) the design, sequencing, or final form of the Council Works, including any areas or elements (as the case may be) deleted from the scope of the Council Works; or
- (b) the reasonableness of any cost incurred in the performance of the Council Works.

## **6 REGISTRATION OF AGREEMENT**

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### **6.1 Registration of Agreement**

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

### **6.2 Caveat**

The Developer acknowledges and agrees that:

- (a) When this Agreement 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.

### **6.3 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 Agreement and the lodgement 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 Land & Property information the relevant Certificate(s) of Title to enable registration of this Agreement under the Real Property Act in the relevant folios of the register of the Land.

### **6.4 Removal of Registration of the Agreement and Caveat**

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After the whole of the Developers contribution has been completed or supplied (as the case may be) the Council will execute any form and supply such other information reasonably required to remove the Agreement and the caveat from the title to the land.

## **7 DISPUTE RESOLUTION**

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### **7.1 Reference to Dispute**

If a dispute arises between the parties in relation to this Agreement, 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 that role 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 day's 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 Agreement.

## 8 NOTICES

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### 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 Agreement is only given or made if it is in writing and sent in one of the following ways:

- (a) delivered or posted to that Party at its address set out 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.
- (b) faxed to that Party at its fax number 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 fax number, any notice, consent, information, application or

request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.

### 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 fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.

### 8.4 Service after hours, on Weekends and Holidays

If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

## 9 APPROVALS AND CONSENT

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Except as otherwise set out in this Agreement, a party may give or withhold an approval or consent to be given under this Agreement 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 ASSIGNMENT AND DEALINGS

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### 10.1 Dealings with Land

- (a) Subject to clause 10.1(b), the Developer must not have any Dealings with the Land unless the Developer first informs the proposed assignee, purchaser or other party (the **"Incoming Party"**) of this Agreement and provides the Incoming Party with a copy of this Agreement and transfers the obligations of this Agreement to that party.
- (b) If the Incoming Party is acquiring:
  - (i) an interest in the Land as a purchaser of one or more lots in a strata scheme, (whether or not the plan has, at the date of exchange, been registered at Land and Property Information NSW), or
  - (ii) is acquiring a lease on or more parts of the building upon the Land that does not form part of the Development;

then the Developer may create that interest without providing that party with a copy of this Agreement or requiring that party to enter into

a Agreement with the Council and the interest so created will not be in breach of this Agreement.

## **11 COSTS**

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### **11.1 Legal and Administrative Costs**

The Developer must pay all reasonable legal and administrative costs and expenses in relation to:

- (a) the negotiation, preparation and execution of this Agreement; and
- (b) any enforcement of the rights under this Agreement;

and the Council may claim monies in payment of the legal and administrative costs from the Developer as a debt due and owing.

### **11.2 Stamp Duty**

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

## **12 ENTIRE AGREEMENT**

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

## **13 FURTHER ACTS**

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

## **14 GOVERNING LAW AND JURISDICTION**

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

## **15 NO FETTER**

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Nothing in this Agreement 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.

## **16 REPRESENTATIONS AND WARRANTIES**

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The Parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under the Agreement and that entry into this Agreement will not result in the breach of any law.

## **17 SEVERABILITY**

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If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or

part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

## **18 MODIFICATION**

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

## **19 WAIVER**

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The fact that a Party does not do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.

A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

## **20 GST**

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- 20.1 In this clause terms used have the meaning given to them by the GST Law as defined in Section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (the "GST Act").
- 20.2 If a party to this Agreement (the "Supplier") makes a supply under or in connection with this Agreement and is liable by law to pay GST on that supply, then the consideration otherwise payable by the recipient of the supply will be increased by an amount equal to the GST paid or payable by the Supplier.
- 20.3 If this Agreement 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.
- 20.4 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 Agreement.
- 20.5 Subject to the operation of this clause, and unless otherwise expressly stated amounts in this Agreement are GST exclusive.

## **21 EXPLANATORY NOTE**

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The Explanatory Note must not be used to assist in construing this deed.

**SCHEDULE 1  
REFERENCE SCHEDULE**

<b>Item</b>	<b>Name</b>	<b>Description</b>
1	Developer's Name  Developer's ACN  Developer's Address	<i>(identify name)</i>  <i>(identify ACN (if applicable))</i>  <i>(identify address)</i>
2	Council's Representative	<i>(identify name)</i>
3	Land	<i>(identify Land)</i>
4	Development  (Development Application No.)	<i>(insert brief description)</i>  <i>(insert Development Application number)</i>
5	Monetary Contribution	\$ <i>(insert amount)</i>
6	Notices  <b>Council</b> Attention Address Fax Number  <b>Developer</b> Attention Address Fax Number	General Manager 1 Devlin Street, Ryde NSW 2112 9265 9505  <i>(identify name)</i> <i>(identify address)</i> <i>(identify number)</i>

**SCHEDULE 2  
COUNCIL'S WORKS**

**Area of Council's Works**

Council is to perform public domain works of the nature set out in this Schedule

**Nature of Works**

*(Insert description of proposed works)*

EXAMPLE ONLY

**SCHEDULE 3  
DEVELOPER'S WORKS**

**SECTION 1 – Developer's Works**

The parties acknowledge and agree the Developer is **not** required to perform works to the public domain in satisfaction of this Agreement.

Nothing in this Agreement will be read or construed as in any way reducing, or derogating from, the obligations to perform works in accordance with the Development Consent

EXAMPLE ONLY

**EXECUTED** as an Agreement 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 1003, in the presence )  
of:

\_\_\_\_\_  
Witness (signature):

\_\_\_\_\_  
(identify name)

\_\_\_\_\_  
Full Name (printed):

(insert name and ACN) in accordance )  
with section 127 of Corporations Law: )  
)  
)  
)

\_\_\_\_\_  
Signature:

\_\_\_\_\_  
Signature:

\_\_\_\_\_  
Full Name (printed):

\_\_\_\_\_  
Full Name (printed):

\_\_\_\_\_  
Position:

\_\_\_\_\_  
Position: