

The Council of the City of Ryde
ABN 81 621 292 610

and

Waterloo Projects Pty Ltd
ACN 609 776 374

**9 to 13 Epping Road, Macquarie Park
Planning Agreement**

George Dedes
GENERAL MANAGER
George Dedes

Carmelina Loughland
CARMELINA LOUGHLAND
WITNESS

Error! Unknown document property name.

Paul Ready
PAUL READY
WITNESS

Ricardo Colosimo
RICARDO COLOSIMO
DIRECTOR

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DETAILS

Date: 12 August 2020

Parties

(1) The Council of the City of Ryde (Council)

ABN 81 621 292 610

Address

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

Attention The General Manager

(2) Waterloo Projects Pty Ltd (Developer)

ACN 609 776 374

Address

17-19 Lexington Drive, Bella Vista NSW 2153

Attention

Ricardo Pietro Colosimo

Recitals

- A. The Developer is the registered owner of the Land.
- B. On 17 April 2019, the Developer authorised PGH Environmental Planning to lodge with the Council, the Development Application to carry out the Development.
- C. The Development will generate the need for an additional thirty six (36) off-street car parking spaces to be provided on the Land.
- D. The required off-street car parking spaces cannot be physically provided on the Land.
- E. In lieu of any contributions being paid for the required off-street car parking spaces pursuant to Council's Section 7.11 Development Contributions Plan, the Developer has agreed to enter into this Agreement to pay a monetary contribution to the Council for it to construct the Council Works.
- F. As a consequence of the matters set out above, the Developer has offered to provide the Monetary Contribution on, and subject to, the terms set out in this Agreement.

Operative Parts

1. Planning Agreement under the Act

- 1.1 The parties agree that this Agreement is a Planning Agreement governed by Part 7 of the Act.

2. Scope and application of this Agreement

- 2.1 This Agreement binds the parties and applies to the Land on which the Development is to be carried out.
- 2.2 This Agreement wholly excludes the application of:
- (a) section 7.11 of the Act; and
 - (b) section 7.12 of the Act,
- but only to the extent of the Development.
- 2.3 This Agreement does not exclude the application of section 7.24 of the Act to the Development on the Land.

3. Operation of this Agreement

- 3.1 This Agreement takes effect on the date of this Agreement after execution by both parties.

4. Defined terms and interpretation

4.1 Defined terms

The following definitions apply unless the context requires otherwise.

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

Bank Guarantee means an irrevocable and unconditional undertaking, with the exception of an expiry date, by one of the following trading banks:

- (a) Australia and New Zealand Banking Group Limited;
- (b) Commonwealth Bank of Australia;
- (c) Macquarie Bank;
- (d) National Australia Bank Limited;
- (e) St George Bank Limited;
- (f) Westpac Banking Corporation; or
- (g) An authorised deposit taking institution listed on the ADI Register maintained by the Australian Prudential Regulatory Authority and approved by Council,

to pay an amount or amounts of money to Council on demand and containing terms and conditions reasonably acceptable to Council.

Business Day means:

- (a) for the purpose of sending or receiving a notice, a day which is not a Saturday, Sunday, a bank holiday or a public holiday in the city where the notice is received; and

- (b) for all other purposes, a day which is not a Saturday, Sunday, a bank holiday or a public holiday in Sydney.

Business Hours means from 9.00am to 5.00pm on a Business Day.

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's Section 7.11 Development Contributions Plan means Council's document entitled '*Section 94 Developer Contributions Plan 2007 (Interim Update 2014)*'.

Council Works means the works 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.

CPI means the Sydney Consumer Price Index (All Groups) published by the Commonwealth Statistician, or if that index no longer exists, any similar index which the Council determines in its sole discretion.

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

Details means, in relation to a party, the details for that party set out in this Agreement.

Development means the development of the Land approved under the Development Application as described in Item 4 of Schedule 1.

Development Application means Development Application LDA2019/0117 as lodged with Council on 17 April 2019.

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

GST has the same meaning as in the GST Law.

GST Amount means, in relation to a Payment, an amount arrived at by multiplying the Payment (or the relevant part of a Payment if only part of a Payment is the consideration for a taxable supply) by the appropriate rate of GST (being 10% when the GST Law commenced).

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.

Issuing Financial Institution means the trading bank that issued the Bank Guarantee referred to in clause 6.

Land means the land identified in Item 3 of Schedule 1.

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

Notice has the meaning given in clause 9.

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

Payment means:

- (a) the amount of any monetary consideration (other than a GST Amount payable under clause 20); or
- (b) the GST exclusive market value of any non-monetary consideration; and
- (c) which is paid or provided by one party to another for any supply made under or in connection with this Agreement and includes any amount payable by way of indemnity, reimbursement, compensation or damages.

Tax Invoice means tax invoice issued by the Council to the Developer in the amount of the Monetary Contribution (exclusive of GST) in accordance with this Agreement.

4.2 Interpretation

In this Agreement, except where the context otherwise requires:

- (a) the singular includes the plural and vice versa and a gender includes other genders;
- (b) other grammatical forms of a defined word or expression have a corresponding meaning;
- (c) a word defined in the Act has the same meaning in this Agreement, unless specifically defined to the contrary in this Agreement;
- (d) a reference to a clause, paragraph, schedule or annexure is to a clause or paragraph of or schedule or annexure to this Agreement and a reference to this Agreement includes any schedule and annexure;
- (e) a reference to a document or agreement, includes the document or agreement as novated, altered, supplemented or replaced from time to time;
- (f) 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;
- (g) references to the word 'include' or 'including' are to be construed without limitation;
- (g) any schedules and attachments form part of this Agreement;
- (h) a reference to A\$, \$A, dollar or \$ is to Australian currency and all amounts payable under this Agreement are payable in Australian dollars;
- (i) a reference to time is to Sydney time;
- (j) a reference to a year (other than a financial year) or a month means a calendar year or calendar month respectively;
- (k) a reference to a party is to a party to this Agreement, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assigns and substitutes;

- (l) a reference to a person includes a natural person, partnership, firm, body corporate, trust, joint venture, association, governmental or local authority or agency or other entity;
- (m) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (n) any authorities, associations, bodies and entities whether statutory or otherwise will, in the event of such authority, association, body or entity ceasing to exist or being reconstituted, replaced or the powers or functions thereof being transferred to or taken over by any other authority, association, body or entity, be deemed to refer respectively to the authority, association, body or entity established, constituted or substituted in lieu thereof which exercises substantially the same powers or functions;
- (o) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;
- (p) any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- (q) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- (r) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this Agreement or any part of it;
- (s) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day; and
- (t) headings are inserted for convenience only and do not affect the interpretation of this Agreement.

5. Payment of Monetary Contribution

5.1 Payment of the Monetary Contribution

The parties agree that:

- (a) At least ten (10) Business days prior to the Council Works commencing, the Council will provide the Developer with a Tax Invoice for the Monetary Contribution that is payable by the Developer; and
- (b) The Developer agrees to pay the Monetary Contribution (indexed in accordance with CPI from the date of this Agreement to the date of the payment of the Monetary Contribution) by way of bank cheque within ten (10) Business Days from the date of the receipt of the Tax Invoice

5.2 Application

The parties agree that:

- (a) the payment of the Monetary Contribution for the purposes of the Council Works is intended to comprise the public benefit under this Agreement; and
- (b) the Council must commence the Council Works within five (5) years from the date of this Agreement, failing which, the Council must return the Monetary Contribution to the Developer or the Bank Guarantee to the Issuing Financial Institution (as the case may be).

5.3 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.

5.4 Expenditure by the Council

- (a) 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:
 - (i) 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;
 - (ii) the reasonableness of any cost incurred in the performance of the Council Works; or
 - (iii) the Council calling upon the Bank Guarantee to pay for the Council Works.
- (b) The parties agree that should the costs incurred by the Council in undertaking the Council Works exceed the value of the Monetary Contribution, any additional cost will be borne by the Council, and the Council cannot in any circumstances require additional contributions from the Developer.

5.5 Completion of the Council Works

The Council may but is not obliged to notify the Developer in writing of the completion of the Council Works within ten (10) Business Days of completion.

6. Security and Enforcement

- (a) On the execution of this Agreement, the Developer must provide to Council a Bank Guarantee in the amount of \$366,300.
- (b) The Bank Guarantee is to be on unconditional terms with the exception of an expiry date that is not to be less than 5 years from the date of this agreement.
- (c) Council may (at its absolute discretion) call on the Bank Guarantee provided under

this clause if the Developer is in material or substantial breach of the obligation to pay the Contribution Amount under this agreement.

- (d) Council may apply the proceeds of the Bank Guarantee provided under this clause in satisfaction of:
 - (i) any obligation of the Developer under this Deed to pay the Contribution Amount, and
 - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by Council because of the failure of the Developer to pay the Contribution Amount.
- (d) Council must return the Bank Guarantee provided under this clause if:
 - (i) the Developer has duly fulfilled the obligation under this agreement to pay the Contribution Amount; and
 - (ii) the Developer has subsequently requested Council in writing to return the Bank Guarantee.
- (e) Nothing in this clause prevents or restricts Council from taking any enforcement action in relation to:
 - (i) any obligation of the Developer under this Deed; or
 - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by Council because of the failure by the Developer to comply with this agreement,

that is not or cannot be satisfied by calling on a Bank Guarantee.

7. Dispute resolution

7.1 Dispute resolution

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 this 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 fourteen (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 Part 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 fourteen (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 Agreement.

8. **Termination of Agreement**

The parties agree that the Developer will be released from its obligations under this Agreement if:

- (a) The Developer has fulfilled its obligations to make the Monetary Contribution in accordance with this Agreement;
- (b) This Agreement is terminated by agreement in writing between the parties; or
- (c) The Council returns the Monetary Contribution to the Developer or the Bank Guarantee to the Issuing Financial Institution (as the case may be) pursuant to the provisions of clause 5.2(b).

9. **Notices**

9.1 **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 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.

9.2 **Change of Address**

If a Party gives the other Party ten (10) Business Days' written notice of a change of its address, any notice, consent, information, application or request is only given or made by that other Party if it is delivered or posted to the latest address.

9.3 **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.

9.4 **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.

10. **Approvals and consent**

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.

11. **Assignment and dealings**

Subject to the provisions of clause 5.2(b), the Developer agrees and acknowledges that Council is not obliged to return the Monetary Contribution to the Developer or the Bank Guarantee to the Issuing Financial Institution (as the case may be) if the Developer transfers, sell or disposes any part of the Land to any legal entity.

12. **Costs**

The Developer must pay all reasonable legal and administrative costs and expenses that the Council incurs 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.

13. **Entire Agreement**

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

14. Further Acts

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

15. Governing Law and Jurisdiction

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

16. No fetter

Nothing in this Agreement will be construed as requiring the 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.

17. Representations and warranties

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

18. Severability

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

19. Waiver

19.1 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.

19.2 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

20.1 Expressions set out in italics in this clause 20 bear the same meaning as those expressions in the GST Law.

20.2 All Payments have been set or determined without regard to the impact of GST.

20.3 If the whole or any part of a Payment by a party (including amounts referred to in clause 5.1) is the consideration for a *taxable supply*, the GST Amount in respect of the Payment must be paid to the supplier of the *taxable supply* as an additional amount, at the same time and in the same manner as the Payment is otherwise payable or as otherwise agreed in writing.

20.4 If a Payment due under this Agreement is a reimbursement or indemnification by one party of an expense, loss or liability incurred or to be incurred by the other party, the Payment will

exclude any GST forming part of the amount to be reimbursed or indemnified to the extent to which the other party can claim an *input tax credit*.

- 20.5 A party's obligation to make payment under clause 20.3 is subject to a valid tax invoice being delivered to the party liable to pay for the *taxable supply*.
- 20.6 Where the supplier has become subject to any penalties or interest because of a late payment by the supplier to the Australian Taxation Office of any GST Amount and that late payment is a result of the failure of the *recipient* to comply with the terms of this clause 19, the *recipient* must pay to the supplier an additional amount on demand equal to the amount of those penalties and interest.
- 20.7 The recipient must indemnify the supplier on demand in respect of all loss or damage arising from a breach by the *recipient* of its obligations under this clause 20.

21. Explanatory Note

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

22. General

22.1 Counterparts

This Agreement may be executed in counterparts. All executed counterparts constitute one document. This Agreement may be executed by either of the parties by duly executing a counterpart and forwarding a copy of the signed counterpart to the other party.

22.2 No merger

Except where this Agreement expressly states otherwise, the rights and obligations of the parties under this Agreement do not merge on completion of any transaction contemplated by this Agreement.

22.3 Variations

This Agreement shall not be changed or modified in any way subsequent to its execution except by writing duly executed by all relevant parties.

Schedule 1 – Reference Schedule

Item	Name	Description
1	Developer's Name	Waterloo Projects Pty Ltd
	Developer's ABN	94 609 776 374
	Developer's Address	17-19 Lexington Drive Bella Vista NSW 2153
2	Council's Representative	<i>The General Manager</i>
3	Land	Lot 4 in DP844951 (9-13 Waterloo Road, Macquarie Park)
4	Development	<i>Alterations and additions to the existing hotel, use of first and second floors as meeting rooms and function rooms respectively, increase in patron numbers from 550 to 700 and increase in patron numbers to the rooftop level from 150 to 300 on the Land</i>
5	Monetary Contribution	\$ 366,300 (excluding GST – see clause 20)
6	Notices	
	<p>Council Attention Address</p> <p>Developer Attention Address</p>	<p>The General Manager North Ryde Office Level 1, Building O, Binary Centre, 3 Richardson Place, North Ryde NSW 2113</p> <p>Ricardo Pietro Colosimo 17-19 Lexington Drive Bella Vista NSW 2153</p>

Schedule 2 - Council Works and Specifications

Area of the Council's Works

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

Nature of Works

Construction of footpath as generally shown on the attached plan identified in this Schedule 2.

Specifications

The Council Works are to comply with the following specifications:

FACILITY	SPECIFICATIONS
Footpath	
Elements	
Paved Footpath	2.4 metre (W) x 138.7 metres (L)
Materials	Granite paving equal to black - flame exfoliated 600 mm x 300 mm x 60 mm - (Refer to Fig. 3.2.1 Macquarie Park Corridor Paving Plan – City of Ryde Public Domain Manual)
Kerb	Integral cast-in-situ concrete kerb and gutter; kerb ramp to be designed in accordance with desire lines, safety, and conflict zones

Schedule 3

Requirements under Section 7.4 of the Act

REQUIREMENT UNDER THE ACT	THIS PLANNING AGREEMENT
Planning instrument and/or development application – (Section 7.4 (1)) The Developer has: (a) sought a change to an environmental planning instrument; (b) made, or proposes to make, a Development Application; or (c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.	(a) No (b) No (c) Yes
Description of land to which this Planning Agreement applies – (Section 7.4(3)(a))	The Land as outlined in Schedule 1 Item 3.
Description of change to the environmental planning instrument to which Planning Agreement applies – (Section 7.4(3)(b))	Not Applicable
Application of section 7.11 of the Act – (Section 7.4(3)(d))	Section 7.11 is excluded from the Development as set out in clause 2.
Applicability of section 7.12 of the Act – (Section 7.4(3)(d))	Section 7.12 is excluded from the Development as set out in clause 2.
Applicability of section 7.24 of the Act – (Section	Section 7.24 is not excluded from the

7.4(3)(d)	Development as set out in clause 2.
Mechanism for Dispute resolution – (Section 7.4(3)(f))	See clause 7 Dispute Resolution
Enforcement of this Planning Agreement (Section 7.4(3)(g))	See clause 6 Security and Enforcement

Indicative location of proposed works



Length of proposed footpath upgrade is 138.7m
Width of proposed footpath upgrade is 2.4m

Created by:	Land Information
Date:	01/05/2020
Scale:	1:1000 @ A4

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Executed as an agreement

Executed for and on behalf of **The Council of the City of Ryde ABN 81 621 292 610** under delegated authority by George Dedes as General Manager pursuant to Section 377 of the Local Government Act 1993, in the presence of:



Signature of Witness

CARMELINA LOUGHLAND

Name of Witness Building 0, Level 1
3 Richardson Place, North Ryde 2113

Address of Witness



Signature of General Manager

GENERAL MANAGER

Name of General Manager

Executed by **Waterloo Projects Pty Ltd ACN 609 776 374** pursuant to Section 127 of the Corporations Act 2001, in the presence of:



Signature of Witness

PAUL READY

Name of Witness

17-19 LEXINGTON DRIVE, BELLA VISTA 2153

Address of Witness



Signature of Director

Riccardo Colosimo

Name of Director