

# **Planning Agreement**

**The Council of the City of Ryde**

**Kennards Self Storage Pty Limited**

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Ref DTS/CAR/33619178

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## Planning Agreement

Dated 16 TH FEBRUARY 2015

### Parties

1. **The Council of the City of Ryde** of 1 Devlin Street, Ryde NSW 2112 (**Council**).
2. **Kennards Self Storage Pty Limited** of 1 Columbia Lane, Homebush, NSW 2140 (**Developer**).

### Background

- A. The Council has prepared the Draft Planning Controls for Macquarie Park with the aim of achieving a finer grade public road network.
- B. The Draft Planning Controls propose to locate a public road on the Land but do not reserve the Land for acquisition. Rather, incentive floor space will be offered on the future redevelopment of the Land, in exchange for the construction of the public road on, and dedication of, the Road Land.
- C. The Developer is the registered proprietor of the Land and has lodged a Development Application LDA2013/0326, on 4 September 2013, for the Development.
- D. The Developer does not seek to make use of the incentive floor space that would be available under the Draft Planning Controls (which are not yet in force) but has sought a variation to the floor space ratio standard under the Ryde LEP and in doing so offers public benefits in accordance with this Agreement.
- E. The Developer has agreed to not build over the Road Land, and has reconfigured the proposed building as set out in the Amended Development Application.
- F. Having regard to the low intensity nature of the Development, Council proposes to allow an exception to clause 4.4B pursuant to clause 4.6 of the Ryde LEP in exchange for the Developer providing a Public Benefit.
- G. The Amended Development Application was accompanied by an offer by the Developer to enter into this Agreement to provide a Public Benefit.
- H. Development Consent LDA2013/0326 was granted on 4 April 2014.
- I. Condition 1 of Development Consent LDA2013/0326 requires a Voluntary Planning Agreement to be entered into with the Council generally in accordance with the offer made by the Developer.

## **Operative provisions**

### **1. Defined meanings**

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The definitions and interpretation clause at the back of this Agreement sets out and explains the defined terms used in this Agreement and the rules of interpretation that apply.

### **2. Planning agreement under the Act**

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The parties agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

### **3. Application of this Agreement**

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This Agreement applies to:

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

### **4. Operation of this Agreement**

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This Agreement takes effect on the date it is executed by both parties.

### **5. Sections 94, 94A and 94EF of the Act**

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- 5.1 Section 94 and section 94A of the Act are excluded in respect of the Development.
- 5.2 Section 94EF of the Act is not excluded in respect of the Development.

### **6. Contributions**

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#### **Public Benefit**

- 6.1 The Developer agrees that no permanent structures, including any such structures which may be exempt or complying development under the provisions of an Environmental Planning Instrument, will be erected on the Road Land as part of the Development or otherwise.
- 6.2 The parties agree that other structures of a temporary or light weight nature may be erected on the Road Land, such as:
  - (a) hard stand areas;
  - (b) awning or shade cloth structures;
  - (c) temporary storage areas;
  - (d) demountable buildings; and

(e) signs,

subject to any necessary approvals first being obtained.

- 6.3 The parties agree that the arrangement under this Agreement has been made for the purposes of ensuring that the Road Land identified in Schedule 1 is available for public roads and improving the public road network in Macquarie Park.

### **Monetary Contribution**

- 6.4 Prior to the issue of any Construction Certificate for the Development, the Developer will pay to the Council a monetary contribution in the amount of \$60,000.00 plus any GST payable in accordance with clause 27.
- 6.5 At least twenty four (24) hours prior to the payment of the monetary contribution required under clause 6.4, the Developer must notify the Council that it proposes to pay the contribution and provide the Council with reference details for the payment.
- 6.6 The monetary contribution required under clause 6.4 will be made for the purposes of this Agreement when funds are deposited by means of electronic funds transfer into a bank account nominated by the Council.
- 6.7 The parties agree and acknowledge that the monetary contribution payable under this Agreement is to be used towards the provision of public amenities and public services in the Ryde Local Government Area.

## **7. Breach and rectification**

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- 7.1 If Council forms the view that the Developer has erected structures contrary to clause 6.1, Council may issue the Developer with a notice specifying the alleged non-compliance and requiring rectification of the non-compliances within 20 business days or such further time as may be reasonable in the circumstances.
- 7.2 If the Developer disputes whether a breach of clause 6.1 has occurred, it must give Council written notice of the dispute in accordance with Clause 13, within 10 business days of receiving the notice from Council under clause 7.1.
- 7.3 If the removal of any structure is required to rectify a breach, the Developer will bear all costs associated with the rectification and will make no claim against the Council in relation to such costs.

## **8. Registration of this Agreement**

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- 8.1 The Developer represents and warrants to the Council that it is the registered proprietor of the Land.
- 8.2 The Developer agrees to the registration of this Agreement, under the *Real Property Act 1900*, in the relevant folios of the Register for the Land in accordance with section 93H of the Act.
- 8.3 The parties agree to promptly do all things that are necessary to procure the registration of this Agreement in the relevant folio of the Register for the Land in accordance with clause 8.2.

- 8.4 The Developer, at its own expense will, promptly after this Agreement is executed, take all practical steps, and otherwise do anything that the Council reasonably requires, to procure:
- (a) the consent of each person who has an estate or interest in the Land or is seized or possessed of an estate or interest in the Land; and
  - (b) the execution of any documents; and
  - (c) the production of the relevant certificates of title,
- to enable the registration of this Agreement in accordance with clause 8.2.
- 8.5 The Developer, will provide all necessary documentation to the Council together with the relevant fees for registration of this Agreement on the title of the Land prior to the issue of any Construction Certificate for the Development.
- 8.6 Subject to clause 8.5, the Council will lodge all necessary documentation for registration of this Agreement and upon receipt of confirmation of registration will inform the Developer that registration has occurred and return any certificate of title.

## **9. Release and discharge of Document by Council**

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The Council must promptly do all things reasonably required by the Developer to release and discharge this Agreement with respect to any part of the Land (such that this Agreement is no longer registered by the Registrar-General under section 93H of the Act in relation to that part of the Land) upon the earlier of:

- (a) termination of the document under clause 10,
- (b) the occurrence of any of the release and discharge events in clause 11.

## **10. Termination of Document**

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Either party may terminate this Agreement if:

- (a) the document commences, but the Development Consent issued for the Development lapses or is declared void or invalid;
- (b) building, engineering or construction work relating to the Development is not physically commenced (in accordance with section 95 of the Act) and the Development Consent issued for the Development is surrendered;
- (c) as a result of a review of this Agreement under clause 12, it is agreed that this Agreement should be terminated; or
- (d) this Agreement is superseded by a future document relating to the Road Land.

## **11. Release and discharge**

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The Developer is released and discharged from its obligations under this Agreement upon:

- (a) termination under clause 10; or

- (b) the Road Land being dedicated to Council (provided that the monetary contribution has been paid).

## **12. Review of this Agreement**

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12.1 The parties agree that this Agreement will be reviewed if:

- (a) the location of the Proposed Road changes; or
- (b) a public road is located on other land that achieves the same purpose as the Proposed Road;

so that the Road Land or any part of the Road Land is no longer required by the Council for the Proposed Road, or

- (c) the relevant authorities refuse to make the Draft Planning Controls, or those Draft Planning Controls are made and do not provide any incentive floor space ratio bonus for dedication of the Road Land, or those Draft Planning Controls are made and any incentive floor space ratio bonus available for dedication of the Road Land is later removed from the Planning Controls.

12.2 The objective of the review will be to ensure that:

- (a) if, as referred to in clause 12.1(a) or clause 12.1(b), the Proposed Road is no longer required on the Road Land, any part of the Road Land, or any part of the Land, the Developer will be released and discharged from the obligation to limit development on the Road Land as set out in clauses 6.1 and 6.2 of this Agreement;
- (b) if the Proposed Road is to be relocated so that it affects only part of the Road Land or any other part of the Land, this Agreement and the identification of the Road Land under this Agreement will be amended accordingly; and
- (c) if the relevant authorities refuse to make the Draft Planning Controls, or those Draft Planning Controls are made and do not provide any incentive floor space ratio bonus for dedication of the Road Land, or those Draft Planning Controls are made and any incentive floor space ratio bonus available for dedication of the Road Land is later removed from the Planning Controls, the Developer will be released and discharged from the obligation to limit development on the Road Land as set out in clauses 6.1 and 6.2 of this Agreement.

12.3 If either party forms the view that a cause for review under clause 12.1 has occurred, they may issue a written request to the other party that this Agreement be subject to review, in which case the parties must meet promptly, and no later than 15 business days after the request is given, for the purpose of reviewing this Agreement.

12.4 A failure by a party to agree to participate in a review under this clause 12 is taken to be a dispute for the purposes of clause 13.

12.5 If the parties cannot agree to the terms of any amendment following a review, either party may invoke the provisions of clause 13.



## **13. Dispute Resolution**

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### **13.1 Notice of Dispute**

If a party claims that a dispute has arisen under this Agreement (**Claimant**), it must give written notice to the other party (**Respondent**) stating the matters in dispute and designating as its representative a person to negotiate the dispute (**Claim Notice**). No party may start court proceedings (except for proceedings seeking interlocutory relief) in respect of a dispute unless it has first complied with this clause 13.1.

### **13.2 Response to Notice**

Within 10 business days of receiving the Claim Notice, the Respondent must notify the Claimant of its representative to negotiate the dispute, except that if it is necessary for the Council to meet and pass a resolution to appoint a representative, the Council will not be required to provide notice of its representative until 5 business days after the Council has met and resolved to appoint a person as the representative, such meeting to be held as soon as reasonably practicable after the receipt by Council of notice in accordance with clause 13.1.

### **13.3 Negotiation**

The nominated representative must:

- (a) meet to discuss the matter in good faith within 5 business days after service by the Respondent of notice of its representative;
- (b) use reasonable endeavours to settle or resolve the dispute within 15 business days after they have met.

### **13.4 Further Notice if Not Settled**

If the dispute is not resolved within 15 business days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (**Dispute Notice**) by mediation under clause 13.5.

### **13.5 Mediation**

If a party gives a Dispute Notice calling for the dispute to be mediated:

- (a) the parties must agree to the terms of reference of the mediation within 5 business days of the receipt of the Dispute Notice (the terms will include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);
- (b) the Mediator will be agreed between the parties, or failing document within 5 business days of receipt of the Dispute Notice, either party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (c) the Mediator appointed pursuant to this clause 13.5 must:
  - (i) have reasonable qualifications and practical experience in the area of the dispute; and

- (ii) have no interest or duty which conflicts or may conflict with his function as mediator, he being required to fully disclose any such interest or duty before his appointment;
- (d) the Mediator will be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and performance of his duties;
- (e) the parties must within 5 business days of receipt of the Dispute Notice notify each other of their representatives who will be involved in the mediation;
- (f) the parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement;
- (g) in relation to a dispute arising under clause 12, if the parties are unable to reach an agreement following mediation under this clause 13, the Mediator will determine the reasonable amendments required to be made to this Agreement to achieve the objectives of clause 12.2;
- (h) in relation to costs and expenses:
  - (i) each party will bear their own professional and expert costs incurred in connection with the mediation; and
  - (ii) the costs of the Mediator will be shared equally by the parties unless the Mediator determines a party has engaged in vexatious or unconscionable behaviour in which case the Mediator may require the full costs of the mediation to be borne by that party.

### 13.6 Litigation

If the dispute is not finally resolved in accordance with this clause 13, either party is at liberty to litigate the dispute.

### 13.7 Continue to perform obligations

Each party must continue to perform its obligations under this Agreement, despite the existence of a dispute.

## 14. Enforcement

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- 14.1 In accordance with section 109F of the Act and clause 146A of the Regulation, the obligations to pay the monetary contribution under clause 6.4 and the requirement to provide this Agreement and all other documentation and fees to the Council for registration under clause 8.5 must be satisfied prior to the issue of any Construction Certificate that applies to the Development.
- 14.2 This Agreement may be enforced by either party in any court of competent jurisdiction in the State of New South Wales.
- 14.3 Council may enforce the Developer's obligation to provide the Public Benefit in accordance with clause 7.

## 15. Notices

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15.1 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 below;
- (b) faxed to that party at its fax number set out below;

### **Council**

Attention: General Manager  
Address: 1 Devlin Street, Ryde  
Fax Number: +61 2 9952 8070

### **Developer**

#### *Prior to 30 May 2014:*

Attention: Sam Kennard  
Address: 1 Columbia Lane, Homebush, NSW 2140  
Fax Number: +61 2 9764 3444

#### *After 30 May 2014*

Attention: Sam Kennard  
Address: 7 Khartoum Road, Macquarie Park 2113  
Fax Number: +61 2 9764 3444

15.2 If a party gives the other party 3 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.

15.3 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.

15.4 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 5.00pm 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.

## **16. Approvals and consent**

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Except as otherwise set out in this Agreement, and subject to any statutory obligations, a party must act promptly and reasonably in giving or withholding an approval or consent to be given under this Agreement.

## **17. Costs**

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The parties will each bear their own costs of negotiating, preparing and execution of this Agreement. The Developer will bear any costs associated with its stamping and registration.

## **18. Entire Agreement**

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This Agreement contains everything to which the parties have agreed in relation to the matters it deals with. No party can rely on an earlier document, or anything said or done by another party, or by a director, officer, agent or employee of that party, before this Agreement was executed, except as permitted by law.

## **19. 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.

## **20. Governing law and jurisdiction**

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This Agreement is governed by the law of New South Wales. The parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The parties will not object to the exercise of jurisdiction by those courts on any basis.

## **21. Joint and individual liability and benefits**

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Except as otherwise set out in this Agreement, any document, covenant, representation or warranty under this Agreement by two or more persons binds them jointly and each of them individually, and any benefit in favour of two or more persons is for the benefit of them jointly and each of them individually.

## **22. 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, and without limitation, nothing will be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

## **23. 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 document and that entry into this Agreement will not result in the breach of any law.

## 24. 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.

## 25. 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.

## 26. Waiver

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The fact that a party fails to 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.

## 27. GST

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If any party reasonably decides that it is liable to pay GST on a supply made to the other party under this Agreement and the supply was not priced to include GST, then recipient of the supply must pay an additional amount equal to the GST on that supply.

## 28. Definitions and interpretations

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### 28.1 Definitions

In this Agreement the following definitions apply:

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

**Amended Development Application** means the revised plans and accompanying documents submitted to Council on 25 February 2014 in connection with LDA2013/0326.

**Construction Certificate** means a certificate referred to in section 109C(1)(b) of the EPA Act.

**Development** means the construction of a new multi-storey building on the Land for use as a self storage facility in accordance with Development Consent LDA2013/0326 granted by the Council.

**Development Application** has the same meaning as in the Act.

**Development Consent** has the same meaning as in the Act.

**Draft Planning Controls** means Ryde Local Environmental Plan 2013 Draft (Amendment 1) Macquarie Park Corridor which received gateway determination on 21 December 2011, and the City of Ryde Development Control Plan 2010 Part: 4.5 Macquarie Park Corridor.

**Environmental Planning Instrument** means an environmental planning instrument (including a SEPP or LEP but not including a DCP) made, or taken to have been made, under Part 3 of the Act and in force.

**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 Lot B in DP 364963 known as 7-9 Khartoum Road, Macquarie Park.

**Planning Controls** means any Environmental Planning Instrument, Development Control Plan (as defined by the Act), or similar document, that regulates the development of the Land.

**Proposed Road** means the road envisaged in the Council's Draft Planning Controls for Macquarie Park for the purpose of achieving a finer grade public road network. The Draft Planning Controls propose to locate a public road on the Road Land.

**Public Benefit** means the Developer's agreement to ensure that the Road Land is available in the future for the Proposed Road.

**Regulation** means the *Environmental Planning and Assessment Regulation 2000*

**Road Land** means that part of the Land that has been identified as the future location of the Proposed Road as shown in the plan at Schedule 1.

**Ryde LEP** means *Ryde Local Environmental Plan 2010*.

## 28.2 Interpretation

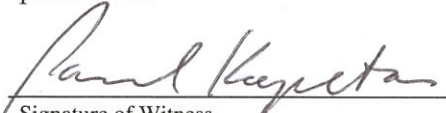
In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:


- (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) if the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day;
- (d) a reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars;
- (e) 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;

- (f) a reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced;
- (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement;
- (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (j) a word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders;
- (k) references to the word 'include' or 'including' are to be construed without limitation;
- (l) a reference to this Agreement includes the agreement recorded in this Agreement;
- (m) 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;
- (n) any schedules and attachments form part of this Agreement.

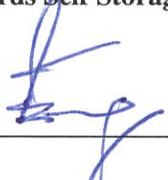
**Executed** as an agreement

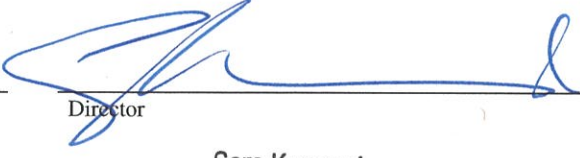
**Signed for and on behalf of The Council of the City of Ryde** in accordance with a resolution passed by Council on 13 May 2014, in the presence of:

  
\_\_\_\_\_  
Signature of Witness  
**PAUL KAYETAN**  
\_\_\_\_\_  
Name of Witness

  
\_\_\_\_\_  
Signature of Authorised Delegate  
**GAIL CONNOLLY**  
\_\_\_\_\_  
**GENERAL MANAGER**

**Signed on behalf of Kennards Self Storage Pty Limited** by:

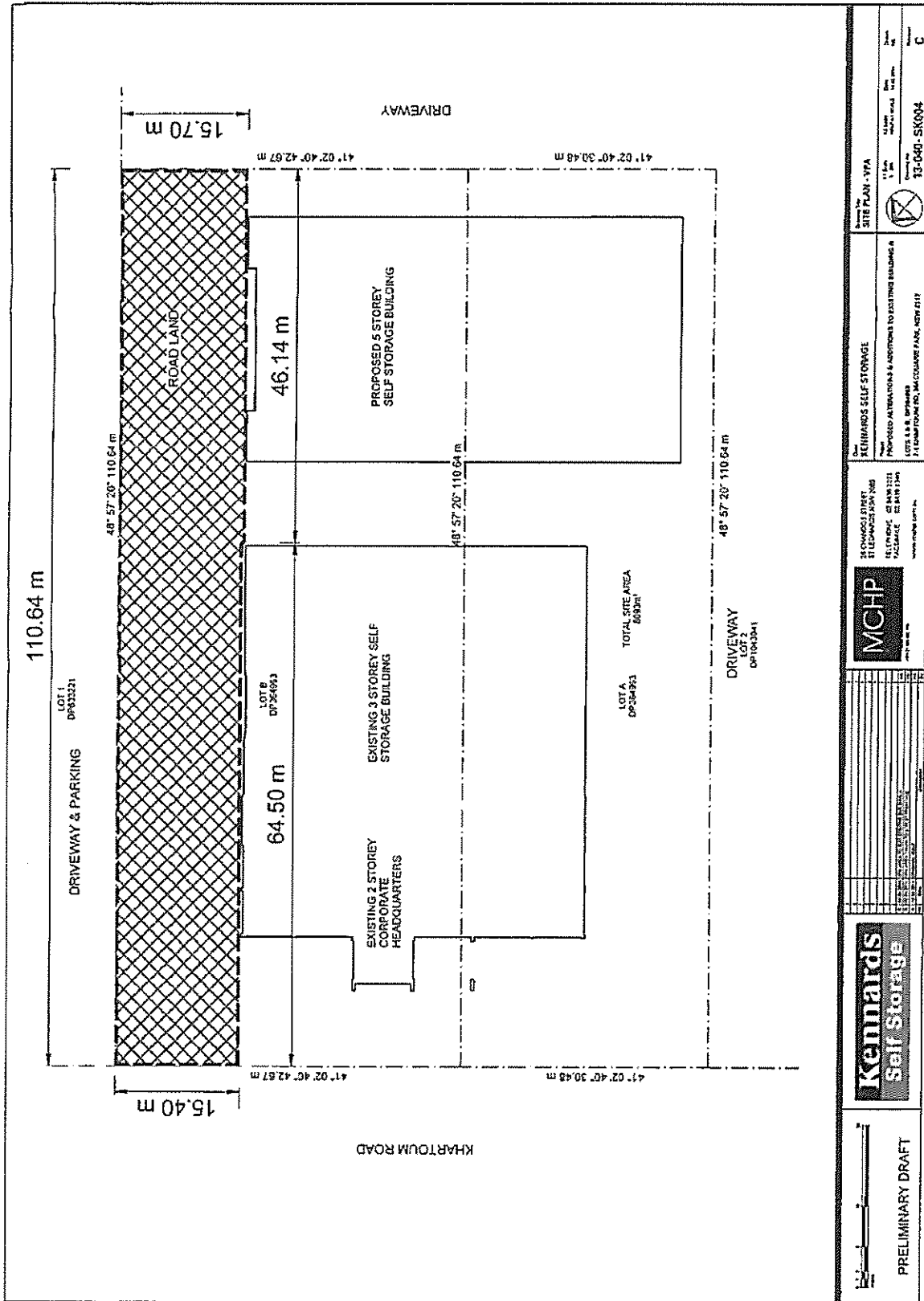
  
\_\_\_\_\_  
Secretary/Director  
**HOK KWAN TUNG**  
\_\_\_\_\_  
Print name

  
\_\_\_\_\_  
Director  
**Sam Kennard**  
\_\_\_\_\_  
Print name



### Schedule 1 – Map showing Road Land

Road Land as identified on this map is not to be used for any purposes other than those listed in Clause 6.2 of this Agreement.



## Schedule 2 – Requirements under section 93F of the Act

The parties acknowledge and agree that the table set out below provides for certain terms, conditions and procedures for the purpose of the document complying with the Act.

Requirement under the Act	This Agreement
<p><b>Planning instrument and/or development application – (section 93F(2))</b></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;</p> <p>(c) entered into an agreement with, or is otherwise associated with, a person, to who paragraph (a) or (b) applies.</p>	<p>(a) No.</p> <p>(b) Yes.</p> <p>(c) No.</p>
<p><b>Description of land to which this Agreement applies – (section 93F(3)(a))</b></p>	The Land as defined in clause 28.1.
<p><b>Description of change to the environmental planning instrument to which this Agreement applies and/or the development to which this Agreement applies – (section 93F(3)(b))</b></p>	The Development as defined in clause 28.1.
<p><b>The scope, timing and manner of delivery of contribution required by this Agreement – (section 93F(3)(c))</b></p>	See clause 6.
<p><b>Applicability of sections 94 and 94A of the Act – (section 93F(3)(d))</b></p>	The application of sections 94 and 94A of the Act is excluded in respect of the Development. See clause 5.
<p><b>Applicability of section 94EF of the Act – (section 93F(3)(d))</b></p>	The application of section 94EF of the Act is not excluded in respect of the Development. See clause 5.
<p><b>Consideration of benefits under this Agreement if section 94 applies – (section 93F(5))</b></p>	Sections 94 and 94A will not apply in respect of the Development. See clause 5.
<p><b>Mechanism for Dispute Resolution – (section 93F(3)(f))</b></p>	See clause 13.
<p><b>Enforcement of this Agreement – (section 93F(3)(g))</b></p>	See clauses 7, 8 and 14.
<p><b>No obligation to grant consent or exercise functions – (section 93F(10))</b></p>	See clause 21.