

# **Voluntary Planning Agreement**

**Council of the City of Ryde**

and

**Rutledge Street Pty Limited ACN 106 876 279  
and Rutledge Properties Pty Limited ACN 145 467 492**

For property known as

Lot 1, DP 1111051

Lot 24, DP 653568

## PLANNING AGREEMENT

DATED 21<sup>ST</sup>

day of SEPTEMBER 2016

### Parties

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

AND

**Rutledge Street Pty Ltd** (ACN 106 876 279) of Level 2, 486 Pacific Highway, St Leonards, NSW and **Rutledge Properties Pty Ltd** (ACN 145 467 492) of Level 2, 486 Pacific Highway, St Leonards, NSW (collectively known as the '**Developer**')

### Background

- A. The Developer made the Development Application to the Council seeking Development Consent to carry out the Development on the Land.
- B. Development Consent was granted on 19 December 2014 for the Development.
- C. The Development Application was accompanied by an offer by the Developer to enter into this Deed to make the Contribution in respect of the Development Application.
- D. This Deed constitutes the planning agreement contemplated by the Development Application.

### Deed

#### 1. Definitions and interpretation

In this Deed the following definitions apply:

- a. **Act** means the Environmental Planning and Assessment Act 1979 (NSW).
- b. **Contribution** means the sum of Two Hundred and Twenty Five Thousand Dollars (\$225,000).
- c. **Development** means the construction of a mixed use development on the Land as described in the Development Application and approved by the Development

Consent.

- d. **Development Application** means Development Application LDA2011/0612 which was lodged with Council on 28 November 2011.
- e. **Development Consent** means the development consent granted on 19 December 2014 with respect to the Development Application and as modified by the Section 96 Modification as approved on 4 November 2015.
- f. **GST** has the same meaning as the GST Law.
- g. **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 GST.
- h. **Land** means the land on which the Development will be undertaken, being Lot 24 in DP 653568 and Lot 1 in DP 1111051 and as otherwise known as 7-9 Rutledge Street, Eastwood.
- i. **Party** means a party to this Agreement, including their successors and assigns.
- j. **Public Purpose** has same meaning as Section 93F(2) of the Environmental Planning and Assessment Act 1979 (No. 203)
- k. **Regulation** means the Environmental Planning and Assessment Regulation 2000.
- l. **Section 96 Modification** means any modification pursuant to section 96 of the Act to the Development Consent granted in respect of the Development Application.

## 1.1 Interpretations

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 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. If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day.
- d. A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
- e. 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.
- f. A reference in this Deed 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 government 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 refer to this Deed includes the Deed recorded in this Agreement.
- m. 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.
- n. Any schedules and attachments form part of this Agreement.

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

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- 2.1. The Parties agree that this Deed 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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- 3.1. This Deed is made in respect of the Development Application and applies to the Land.

## **4. Commencement**

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- 4.1. This Deed operates from the date on which it is executed by all parties.

## **5. Provision of the Contribution**

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- 5.1. The Developer will pay the Contribution on execution of this Agreement.
- 5.2. The parties agree that Council may, at its sole discretion, use the Contribution for the provision of any material public benefit or public purpose within the Ryde Local Government Area.
- 5.3. Subject to the requirements of clause 5.2, the Developer may not make or bring any claim or action of any nature relating to the expenditure of the Contribution by Council.

## **6. Application of s94 and s94A of the Act to the Development**

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- 6.1. This Deed does not exclude the operation of Section 94 and 94A of the Act to any development consent that is granted in respect of the Land including the Development Consent. For the avoidance of doubt, the Developer is to pay all statutory contributions with respect to any development on the Land.

## **7. Review of this Agreement**

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- 7.1. This Deed may be varied or amended only by the express written approval of both parties and

in compliance of the Act.

## **8. Dispute Resolution**

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### **8.1. Notice of a Dispute**

If a party claims that a dispute has arisen under this Deed (**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 8.

### **8.2. 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.

### **8.3. Negotiation**

The nominated representatives must:

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

### **8.4. 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 8.5 or by expert determination under clause 8.6.

### **8.5. 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 shall 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 agreement 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 8.5 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 shall be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and performance of this 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 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.

#### 8.6. **Expert Determination**

If the dispute is not resolved under 8.3 or 8.5, the dispute may by agreement between the parties, both acting reasonably having regard to the nature of the dispute, be resolved by expert determination, in which event:

- a. the dispute must be determined by an independent expert in the relevant field;
  - (i) agreed upon and appointed jointly by the Council and the Developer; or
  - (ii) in the event that no agreement is reached or appointment made within 30 business days, appointed on application of a party by the then current President of the Law Society of New South Wales;
- b. the expert must be appointed in writing and the terms of appointment must not be inconsistent with this clause;
- c. the determination of the dispute by such expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- d. the expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- e. each party will bear its own costs in connection with the process and the determination by the expert together with an equal proportion of the expert's fees and costs; and
- f. any determination made by an expert pursuant to this clause is final and binding upon the parties except where the determination is in respect of or relates to termination or purported termination, of this Deed by any party, in which event the expert is deemed to be giving a non-binding appraisal and any party may commence litigation in relation to the dispute if it has not been resolved within 20 business days of the expert giving his or her decision.

#### 8.7. **Litigation**

If the dispute is not finally resolved in accordance with this clause 8 either party is at

liberty to litigate the dispute.

**8.8. Continue to perform obligations**

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

**9. Termination**

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9.1. This Deed terminates on the happening of any of the following events:

- a. the lapsing of the Development Consent; or
- b. a declaration by a Court of competent jurisdiction that the Development Consent is invalid.

**10. Notices**

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10.1. 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 below.
- b. Faxed to that Party at its fax number set out below.
- c. Emailed to that Party at its email address set out below.

**Council**

Attention: General Manager

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

Fax number: 9952 8070

Email: [cityofryde@ryde.nsw.gov.au](mailto:cityofryde@ryde.nsw.gov.au)

## **Developer**

Attention: Mr. Bruce Lyon / Mr. Michael Milliken

Address: Suite 203, Level 2, 486 Pacific Highway  
St Leonards, NSW, 2065

Email: development@lyongroup.com.au

- 10.2. 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.
  - d. if it is sent via email as soon as the sender has sent the email without receipt of a message that the email was undeliverable
- 10.3. If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received or sent via email 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.

## **11. Approvals and consent**

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- 11.1. Except as otherwise set out in this Agreement, and subject to any statutory obligations, 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.

## **12. Assignment and dealings**

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- 12.1. The Developer must not sell, transfer, assign or novate or similarly deal with (**Dealing**) its right, title or interest in the land (if any) or its rights or obligations under this Deed unless, prior to any such sale, transfer, assignment, charge, encumbrance or novation, the Developer:
- a. gives the Council no less than 10 business days notice in writing of the proposed Dealing; and
  - b. procures that the transferee, assignee or novate executes and delivers to the Council prior to any such Dealing taking effect, a deed in favour of the Council in form and substance acceptable to the Council (acting reasonably) whereby:
    - (i) the transferee, assignee or novate becomes contractually bound with the Council to perform all of the Developer's obligations (including obligations which may have arisen before the transfer, assignment or novation takes effect); and



- (ii) the Developer is released from any obligations under or by virtue of this Deed which at the time of any proposed assignment or novation contemplated by this clause are required to be performed or satisfied by the Developer at any time from or after the date on which that assignment or novation takes effect under this Agreement.

### **13. Costs**

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- 13.1. Each party will bear their own costs of negotiating, preparing and executing this Agreement.

### **14. Entire Agreement**

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- 14.1. This Deed 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 Deed was executed, except as permitted by law.

### **15. Further acts**

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- 15.1. 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.

### **16. Governing law and jurisdiction**

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- 16.1. This Deed 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.

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

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- 17.1. Except as otherwise set out in this Agreement, any agreement, covenant, representation or warranty under this Deed by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more person is for the benefit of them jointly and each of them individually.

### **18. No fetter**

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- 18.1. Nothing in this Deed shall 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 shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

### **19. Representations and warranties**

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- 19.1. 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.

## **20. Severability**

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- 20.1. 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.

## **21. Modification**

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- 21.1. No modification of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Agreement and is undertaken in accordance with the relevant provision of the Act.

## **22. Waiver**

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- 22.1. The fact that a Party fails to 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. 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.

## **23. GST**

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- 23.1. If any Party reasonably decides that it is liable to pay GST on a supply made to the other Party under this Deed and the supply was not priced to include GST, the recipient of the supply must pay an additional amount equal to the GST on that supply.
- 23.2. Where as a result of the operation of this clause the Council is required to pay GST to the Developer, the Developer shall not require the council to remit such GST to the Developer until 7 days after receiving an input tax credit for that GST amount. On receipt of a tax invoice from the Developer, the Council must apply for the input tax credit as soon as practicable.

## **24. Compliance with laws**

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- 24.1. If a Law is changed or a new Law comes into force (both referred to as new Law) and the Developer is obliged by the New Law to do something or pay an amount which it is already contractually obliged to do or pay under this Deed then, to the extent only that the relevant obligation is required under both the New Law and this Agreement, compliance with this Deed will constitute compliance with the New Law.

## **25. Confidentiality**

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- 25.1. The parties agree that the terms of this Deed are not confidential and this Deed may be treated as a public document and exhibited or reported without restriction by any party.

## **26. Stamp Duty**

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


**27. Explanatory Note**

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

**Executed as a Deed**

**SIGNED** on behalf of the Council of the City of Ryde  
by Roy Newsome, Acting General Manager,  
under Delegated Authority pursuant to  
Section 377 of the *Local Government Act 1993*  
in the presence of:

  
\_\_\_\_\_  
Signature of witness


PAUL KARRETAS  
\_\_\_\_\_  
Full Name:

  
\_\_\_\_\_  
ACTING GENERAL MANAGER

**Executed** by Rutledge Street Pty Ltd  
(ACN 106 876 279) in accordance  
with section 127 of the *Corporations  
Act 2001* in the presence of:


  
\_\_\_\_\_  
Signature of Director

BRUCE JAMES LYON  
\_\_\_\_\_  
Full Name:

  
\_\_\_\_\_  
Director

MICHAEL CLIVE MILLIKEN  
\_\_\_\_\_  
Full Name:

**Executed** by Rutledge Properties Pty Ltd  
(ACN 145 467 492) In accordance with  
section 127 of the *Corporations Act 2001*  
in the presence of:

  
\_\_\_\_\_  
Sole Director / Secretary

Full Name: Michael Clive Milliken