

## Voluntary Planning Agreement

*125-129 Arthur Street, Parramatta*

City of Parramatta Council

ABN 49 907 174 773

S & A Property Holdings Pty Ltd

ACN 140 865 836



AHMAD SAKR



**Newcastle**

Sparke Helmore Building, Level 7, 28 Honeysuckle Dr, Newcastle NSW 2300

PO Box 812, Newcastle NSW 2300

t: +61 2 4924 7200 | f: +61 2 4924 7299 | DX 7829 Newcastle | [www.sparke.com.au](http://www.sparke.com.au)

adelaide | brisbane | canberra | melbourne | newcastle | perth | sydney | upper hunter

NLS\NLS\50372020\1

# Contents

|  |          |
|--|----------|
| <b>Parties</b>   | <b>4</b> |
| <b>Background</b>  | <b>4</b> |
| <b>Operative part</b>  | <b>4</b> |
| 1 <i>Definitions</i>   | 4        |
| 2 <i>Interpretation</i>                                      | 6        |
| 3 <i>Planning Agreement under the Act</i>                    | 7        |
| 4 <i>Application of this Agreement</i>                       | 7        |
| 5 <i>Operation of this Agreement</i>                         | 8        |
| 6 <i>Contributions to be made under this Agreement</i>       | 8        |
| 6.1 <i>Monetary Contribution</i>                             | 8        |
| 7 <i>Application of sections 94, 94A and 94EF of the Act</i> | 8        |
| 8 <i>Dispute Resolution</i>                                  | 8        |
| 8.1 <i>Reference to Dispute</i>                              | 8        |
| 8.2 <i>Notice of Dispute</i>                                 | 8        |
| 8.3 <i>Representatives of Parties to Meet</i>                | 9        |
| 8.4 <i>Further Notice if Not Settled</i>                     | 9        |
| 8.5 <i>Mediation</i>   | 9        |
| 8.6 <i>Litigation</i>  | 10       |
| 8.7 <i>No suspension of contractual obligations</i>          | 10       |
| 9 <i>Security and Enforcement</i>                            | 10       |
| 9.1 <i>Restriction on the issue of Certificates</i>          | 10       |
| 9.2 <i>General Enforcement</i>                               | 10       |
| 10 <i>Review</i>   | 11       |
| 11 <i>Assignment and Transfer</i>                            | 11       |
| 12 <i>No fetter</i>  | 11       |
| 12.1 <i>Discretion</i>                                       | 11       |
| 12.2 <i>No fetter</i>  | 12       |
| 13 <i>Notices</i>  | 12       |
| 13.1 <i>Notices</i>  | 12       |
| 13.2 <i>Notices sent by email</i>                            | 13       |
| 13.3 <i>Receipt of Notices sent by email</i>                 | 13       |

|           |   |           |
|-----------|---|-----------|
| <b>14</b> | <b><i>General</i></b>                       | <b>14</b> |
| 14.1      | Relationship between parties                | 14        |
| 14.2      | Time for doing acts                         | 14        |
| 14.3      | Further assurances                          | 14        |
| 14.4      | Joint and individual liability and benefits | 14        |
| 14.5      | Variation                                   | 14        |
| 14.6      | Counterparts                                | 15        |
| 14.7      | Legal expenses                              | 15        |
| 14.8      | Entire agreement                            | 15        |
| 14.9      | Invalidity                                  | 15        |
| 14.10     | Waiver                                      | 15        |
| 14.11     | Governing law and jurisdiction              | 15        |
| 14.12     | GST   | 16        |
| 14.13     | Representations and warranties              | 16        |

# Agreement

Date

## Parties

### First party

**Name** City of Parramatta Council (**Council**)  
**ABN** 49 907 174 773  
**Contact** The Chief Executive Officer  
**Telephone** (02) 9806 5050

### Second party

**Name** S & A Property Holdings Pty Ltd  
(**Developer**)  
**ACN** 140 865 836  
**Contact** Michael Amarni, Project Director  
**Telephone** 0423 292 228

## Background

- A. As at the date of this agreement, the Developer owns the Land.
- B. The Developer proposes to carry out the Development on the Land.
- C. The Development Consent was granted on 22 June 2015 for the Development. Condition 8 of the Development Consent requires a planning agreement to be entered into under section 93F of the Act in the terms of an offer made in connection with the Development Application.
- D. The parties wish to formalise the terms of the offer by entering into this agreement in accordance with section 93F of the Act.

## Operative part

### 1 Definitions

In this agreement, unless context indicates a contrary intention:

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

**Address** means a party's address set out in the Notices clause of this agreement;

**Approval** means any certificate, licence, consent, permit, approval or other requirement of any Authority having jurisdiction in connection with the activities contemplated by this agreement;

**Authority** means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person;

**Bank Guarantee** means an irrevocable and unconditional undertaking, not limited in time, 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) Other financial institution approved by the Council,

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

**Business Day** means a day on which banks are open for general banking business in Sydney, excluding Saturdays and Sundays;

**Construction Certificate** means a construction certificate as defined under section 109C of the Act;

**CPI** means the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics;

**Development** means the development proposed for the Land including demolition of existing buildings, tree removal and construction of a part 4, 6 and 7 storey residential flat building comprising 64 dwellings and basement car parking as approved under the Development Consent;

**Development Application** means Development Application DA776/2014 lodged with the Council in November 2014;

**Development Consent** means the development consent granted to the Development Application, approving the Development;

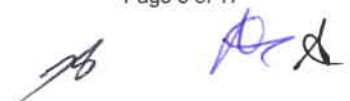
**Fax Number** means a party's facsimile number set out in the Notices clause of this agreement;

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

**GST Law** has the same 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 Lots 5, 6 and 7 DP 27997, known as 125-129 Arthur Street, Parramatta;

**Law** means:



- (a) any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation;
- (b) any Approval, including any condition or requirement under it; and
- (c) any fees and charges payable in connection with the things referred to in paragraphs (a) and (b);

**Monetary Contribution** means the monetary contribution to be paid by the Developer to the Council in accordance with clause 6.1(a) of this Agreement;

**Register** means the Torrens Title register maintained under the *Real Property Act 1900* (NSW).

## 2 Interpretation

In this agreement, unless context indicates a contrary intention:

- (a) **(documents)** a reference to this agreement or another document includes any document which varies, supplements, replaces, assigns or novates this agreement or that other document;
- (b) **(references)** a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this agreement;
- (c) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this agreement;
- (d) **(person)** a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns;
- (e) **(party)** a reference to a party to a document includes that party's personal representatives, executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) **(requirements)** a requirement to do any thing includes a requirement to cause that thing to be done, and a requirement not to do any thing includes a requirement to prevent that thing being done;
- (g) **(including)** including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind;
- (h) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (i) **(singular)** the singular includes the plural and vice-versa;
- (j) **(gender)** words importing one gender include all other genders;
- (k) **(parts)** a reference to one or more things includes each part and all parts of that thing or group of things but nothing in this clause implies



that part performance of an obligation constitutes performance of that obligation;

- (l) **(rules of construction)** neither this agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting;
- (m) **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (n) **(time and date)** a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in Sydney, Australia, even if the obligation is to be performed elsewhere;
- (o) **(joint and several)** an agreement, representation, covenant, right or obligation:
  - (i) in favour of two or more persons is for the benefit of them jointly and severally; and
  - (ii) on the part of two or more persons binds them jointly and severally;
- (p) **(writing)** a reference to a notice, consent, request, approval or other communication under this agreement or an agreement between the parties means a written notice, request, consent, approval or agreement;
- (q) **(replacement bodies)** a reference to a body (including an institute, association or Authority) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions;
- (r) **(Australian currency)** a reference to dollars or \$ is to Australian currency;
- (s) **(month)** a reference to a month is a reference to a calendar month.
- (t) **(year)** a reference to a year is a reference to twelve consecutive calendar months;

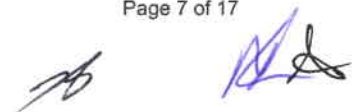
### 3 Planning Agreement under the Act

The parties agree that this agreement is a planning agreement within the meaning of section 93F of the Act.

### 4 Application of this Agreement

This agreement applies to:

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



## 5 Operation of this Agreement

The parties agree that this agreement operates on and from the date it is executed by the parties.

## 6 Contributions to be made under this Agreement

### 6.1 Monetary Contribution

- (a) The Developer will pay to Council a monetary contribution of \$100,000.00 or an amount calculated in accordance with the following formula, whichever is the greater:

$$\begin{array}{r} \$100,000.00 \quad \times \quad \frac{\text{The CPI at the time of payment}}{\text{The CPI at the date of this agreement}} \end{array}$$

- (b) The Monetary Contribution must be paid on execution of this agreement.
- (c) The Monetary Contribution must be paid by way of bank cheque in favour of City of Parramatta Council.
- (d) The Monetary Contribution will be taken to have been made when the Council notifies the Developer in writing that the bank cheque has been received and cleared funds have been deposited in the Council's bank account.
- (e) The parties acknowledge and agree that the Monetary Contribution will be used by Council towards the proposed pedestrian bridge connecting Morton Street and Alfred Street, Parramatta.

## 7 Application of sections 94, 94A and 94EF of the Act

- (a) This agreement does not exclude the application of section 94, section 94A and section 94EF of the Act to the Development or any other development on the Land.
- (b) Benefits under this agreement must not be taken into consideration under section 94(6) of the Act for the purposes of determining any contributions payable under the Act for the Development or any other development on the Land.

## 8 Dispute Resolution

### 8.1 Reference to Dispute

If a dispute arises between the parties in relation to this agreement, the parties must not commence any court proceedings relating to the dispute unless the parties have complied with this clause, except where a party seeks urgent interlocutory relief.

### 8.2 Notice of Dispute

The party wishing to commence the dispute resolution processes must give written notice (**Notice of Dispute**) to the other party of:

- (a) The nature of the dispute;



- (b) The alleged basis of the dispute; and
- (c) The position which the party issuing the Notice of Dispute believes is correct.

**8.3 Representatives of Parties to Meet**

- (a) The representatives of the parties must promptly (and in any event within 14 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.
- (b) The parties may, without limitation:
  - (i) Resolve the dispute during the course of that meeting;
  - (ii) Agree that further material about a particular issue or consideration is needed to effectively resolve the dispute (in which event, the parties will, in good faith, agree to a timetable for resolution); or
  - (iii) Agree that the parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

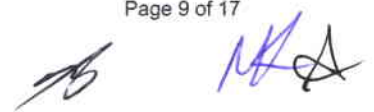
**8.4 Further Notice if Not Settled**

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 (**Determination Notice**) by mediation under clause 8.5.

**8.5 Mediation**

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

- (a) The parties must agree to the terms of reference of the mediation within five Business Days of the receipt of the Determination 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 five Business Days of receipt of the Determination 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 or her function as a mediator, he or she being required to fully disclose any such interest or duty before his or her appointment.



- (d) The mediator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties;
- (e) The parties must within five Business Days of receipt of the Determination Notice notify each other of their representatives that will be involved in the mediation (except if a resolution of the Council is required to appoint a representative, the Council must advise of the representative within five Business Days of the resolution);
- (f) The parties agree to be bound by a mediation settlement and unless waived by the parties, 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; and
- (g) In relation to costs and expenses:
  - (i) Each party will bear its 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 that a party has engaged in unreasonable behaviour in which case the mediator may require the full costs of the mediation to be borne by that party.

#### 8.6 *Litigation*

If the dispute is not finally resolved in accordance with this clause 8, then either party is at liberty to litigate the dispute.

#### 8.7 *No suspension of contractual obligations*

Subject to any interlocutory order obtained under clause 8.1, the referral to or undertaking of a dispute resolution process under this clause 8 does not suspend the parties' obligations under this agreement.

### 9 Security and Enforcement

#### 9.1 *Restriction on the issue of Certificates*

For the purposes of section 109F(1) of the Act and clause 146A of the Regulation, a Construction Certificate must not be issued for the Development or any part of the Development if the Developer has failed to pay the Monetary Contribution under this agreement.

#### 9.2 *General Enforcement*

- (a) Without limiting any other remedies available to the parties, this agreement may be enforced by any party in any court of competent jurisdiction.
- (b) Nothing in this agreement prevents:
  - (i) a party from bringing proceedings in the Land and Environment Court to enforce any aspect of this agreement or any matter to which this agreement relates; and



- (ii) the Council from exercising any function under the Act or any other Act or Law relating to the enforcement of any aspect of this agreement or any matter to which this agreement relates.

## 10 Review

- (a) This agreement may be reviewed or modified and any review or modification of this agreement will be conducted in the circumstances and in the manner determined by the parties.
- (b) No modification or review of this agreement will be of any force or effect unless it is in writing and signed by the parties to this agreement.
- (c) A party is not in breach of this agreement if it does not agree to an amendment to this agreement requested by a party in or as a consequence of a review.

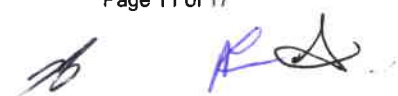
## 11 Assignment and Transfer

- (a) The parties must not assign or otherwise transfer their rights under this agreement without the prior written consent of the other party.
- (b) The Developer must not assign, transfer or dispose of any right, title or interest in the Land to another person or entity (**Transferee**) unless:
  - (i) the Developer satisfies Council that the proposed Transferee is financially capable of complying with the Developer's obligations under this agreement;
  - (ii) the Developer satisfies Council that the rights of the Council will not be diminished or fettered in any way;
  - (iii) the Transferee delivers to the Council a novation deed signed by the Transferee in a form and of such substance as is acceptable to the Council containing provisions under which the Transferee agrees to comply with all the outstanding obligations of the Developer under this agreement and does not release the Developer from prior breaches under this agreement;
  - (iv) any default by the Developer under any provisions of this agreement have been remedied by the Developer or waived by the Council on such conditions as the Council may determine; and
  - (v) the Developer and the Transferee pay the Council's reasonable costs in relation to the novation deed and the assignment.

## 12 No fetter

### 12.1 Discretion

This agreement is not intended to operate to fetter, in any manner, the exercise of any statutory power or discretion of the Council, including but not limited to any statutory power or discretion of the Council relating to the Development Consent for the Development (referred to in this agreement as a "**Discretion**").



## 12.2 *No fetter*

No provision of this agreement is intended to constitute any fetter on the exercise of any Discretion. If, contrary to the operation of this clause, any provision of this agreement is held by a court of competent jurisdiction to constitute a fetter on any Discretion, the parties agree:

- (a) they will take all practical steps, including the execution of any further documents to ensure the objective of this clause is substantially satisfied;
- (b) in the event that (a) cannot be achieved without giving rise to a fetter on the exercise of a Discretion, the relevant provision is to be severed and the remainder of this agreement has full force and effect; and
- (c) to endeavour to satisfy the common objectives of the parties in relation to the provision of this agreement which is to be held to be a fetter to the extent that is possible having regard to the relevant court judgment.

## 13 Notices

### 13.1 *Notices*

Subject to clause 13.2, any notice given under or in connection with this agreement (**Notice**):

- (a) must be in writing and signed by a person duly authorised by the sender;
- (b) must be addressed as follows and delivered to the intended recipient by hand, by prepaid post or by fax at the Address or Fax Number below, or at the Address or Fax Number last notified by the intended recipient to the sender after the date of this agreement:
  - (i) to City of Parramatta Council: PO Box 32, Parramatta NSW 2124  
Fax: 02 9806 5917  
Attention: The Chief Executive Officer;
  - (ii) to the Developer: 22 Holmes Road, Moonee Ponds Vic 3039  
Fax: N/A  
Attention: Mr Michael Amarni, Project Director
- (c) is taken to be given and made:
  - (i) in the case of hand delivery, when delivered;
  - (ii) in the case of delivery by post, three Business Days after the date of posting (if posted to an Address in the same country) or seven Business Days after the date of posting (if posted to an Address in another country); and





whichever occurs first.

- (b) If under clause (a) a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4 pm (local time), it will be taken to have been given or made at the start of business on the next Business Day in that place.

## 14 General

### 14.1 *Relationship between parties*

- (a) Nothing in this agreement:
  - (i) constitutes a partnership between the parties; or
  - (ii) except as expressly provided, makes a party an agent of another party for any purpose.
- (b) A party cannot in any way or for any purpose:
  - (i) bind another party; or
  - (ii) contract in the name of another party.
- (c) If a party must fulfil an obligation and that party is dependent on another party, then that other party must do each thing reasonably within its power to assist the other in the performance of that obligation.

### 14.2 *Time for doing acts*

- (a) If the time for doing any act or thing required to be done or a notice period specified in this agreement expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.
- (b) If any act or thing required to be done is done after 5pm on the specified day, it is taken to have been done on the following Business Day.

### 14.3 *Further assurances*

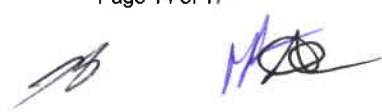
Each party must promptly execute all documents and do all other things reasonably necessary or desirable to give effect to the arrangements recorded in this agreement.

### 14.4 *Joint and individual liability and benefits*

Except as otherwise set out in this agreement, any agreement, 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.

### 14.5 *Variation*

A provision of this agreement can only be varied by a later written document executed by or on behalf of all parties.



**14.6 Counterparts**

This agreement may be executed in any number of counterparts. All counterparts taken together constitute one instrument.

**14.7 Legal expenses**

The Developer must pay the Council's legal costs and disbursements in connection with the negotiation, preparation, execution, carrying into effect and release and discharge of this agreement.

**14.8 Entire agreement**

The contents of this agreement constitute the entire agreement between the parties and supersede any prior negotiations, representations, understandings or arrangements made between the parties regarding the subject matter of this agreement, whether orally or in writing.

**14.9 Invalidity**

- (a) A word or provision must be read down if:
  - (i) this agreement is void, voidable, or unenforceable if it is not read down;
  - (ii) this agreement will not be void, voidable or unenforceable if it is read down; and
  - (iii) the provision is capable of being read down.
- (b) A word or provision must be severed if:
  - (i) despite the operation of clause (a), the provision is void, voidable or unenforceable if it is not severed; and
  - (ii) this agreement will be void, voidable or unenforceable if it is not severed.
- (c) The remainder of this agreement has full effect even if clause 14.9(b)(i) or (ii) applies.

**14.10 Waiver**

A right or remedy created by this agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.

**14.11 Governing law and jurisdiction**

- (a) The Laws applicable in New South Wales govern this agreement.
- (b) The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.



**14.12 GST**

- (a) Words and expressions which are not defined in this agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this agreement are exclusive of GST.
- (c) If GST is imposed on any supply made under or in accordance with this agreement, the Developer must pay the GST or pay to the Council an amount equal to the GST payable on or for the taxable supply, whichever is appropriate in the circumstances.

**14.13 Representations and warranties**

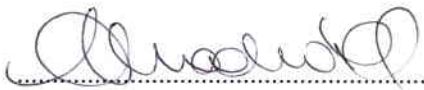
The parties represent and warrant that they have the power to enter into this agreement and comply with their obligations under this agreement and that entry into this agreement will not result in the breach of any law.





Executed as an agreement

Signed for and on behalf of **City of Parramatta Council** in accordance with a resolution of the Council dated ~~27 July 2015~~ 14 June 2016 )  
)  
)

  
.....

Signature of ~~Mayor~~ Administrator

  
.....

Signature of ~~Chief Executive Officer~~ Interim General Manager

AMANDA CHADWICK  
.....

Print name of ~~Mayor~~ Administrator

GREGORY DYER  
.....

Print name of ~~Chief Executive Officer~~ Interim General Manager

Executed by **S & A Holdings Pty Ltd** )  
ACN 140 865 836 in accordance with )  
section 127 of the *Corporations Act 2001* )  
(Cth) by: )  
)  
)

  
.....

Signature of Director

.....

Signature of Director / Secretary

AHMAD SAKR  
.....

Print name of Director

.....

Print name of Director / Secretary

