

Planning Agreement

22-28 Gardeners Road, Kingsford

Randwick City Council (ABN 77 362 844 121) (**Council**)

Gardeners at Kingsford Pty Ltd (ACN 622 880 639) in its own capacity and as trustee for Gardeners at Kingsford Land Unit Trust (ABN 99 655 166 188) (**Developer**)

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Planning Agreement

22-28 Gardeners Road, Kingsford

Parties

Council	Name	Randwick City Council
	Address	30 Frances Street Randwick NSW 2031
	ABN	77 362 844 121
Developer	Name	Gardeners at Kingsford Pty Ltd (ACN 622 880 639) in its own capacity and as trustee for Gardeners at Kingsford Land Unit Trust
	Address	Level 7, 111 Elizabeth Street Sydney NSW 2000
	ABN	99 655 166 188

Background

- A The Developer owns the Land.
- B The Developer wishes to carry out the Development.
- C The Developer has applied for the Development Consent.
- D The Developer has agreed to make the Contributions on and subject to the terms of this document.

Operative Provisions

1 Agreement

The agreement of the parties is set out in the Operative Provisions of this document, in consideration of, among other things, the mutual promises contained in this document.

2 Definitions

2.1 Defined Terms

In this document, words beginning with a capital letter that are defined in Part 1 of **Schedule 2** have the meaning ascribed to them in that schedule.

2.2 Interpretation

The interpretational rules contained in Part 2 of **Schedule 2** apply in the interpretation of this document.

3 Application and operation of document

3.1 Planning Agreement

This document is a planning agreement:

- (1) within the meaning set out in s7.4 of the Act; and
- (2) governed by Subdivision 2 of Part 7 of the Act.

3.2 Application

- (1) This document is made in respect of the Development and applies to both the Land and the Development.
- (2) The Developer acknowledges and agrees that this document applies to the Council Land only to the extent set out in clause 5.8 of this document. Council, as owner of the Council Land, has no obligations imposed on it under this document other than as set out in clause 5.8 of this document.

3.3 Operation

This document operates from the date it is executed by both parties.

4 Application of s7.11 & s7.12

4.1 Application

- (1) This document does not exclude the application of section 7.11 of the Act to the Development.
- (2) The document does not exclude the application of 7.12 of the Act to the Development.

4.2 Section 7.24

This document does not exclude the application of s7.24 to the Development.

5 Provision of Contributions

5.1 Affordable Housing Levy Contribution

- (1) The Developer must pay the Affordable Housing Levy Contribution to Council in accordance with **Schedule 3**.
- (2) The Affordable Housing Levy Contribution is made for the purposes of this document when Council receives:
 - (a) the full amount of the Affordable Housing Levy Contribution payable under this document:
 - (i) in cash;
 - (ii) by unendorsed bank cheque; or
 - (iii) by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by Council.

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- (b) Council acknowledges and agrees that payment of the Affordable Housing Levy Contribution in accordance with this agreement, satisfies condition 50 of the Development Consent and vice versa.

5.2 Community Infrastructure Contribution

- (1) The Developer acknowledges and agrees that:
- (a) the value of the Community Infrastructure Contribution provided by it must be no less than the relevant Contribution Value for that item in **Schedule 3**; and
 - (b) the value of the Works in that regard will be determined in accordance with this clause 5.2.
- (2) The Community Infrastructure Contribution is made for the purposes of this document on either:
- (a) the Works having been:
 - (i) Completed; and
 - (ii) valued at an amount equivalent to, or in addition to, the Contribution Value for the Works in accordance with paragraph (3) below; or
 - (b) if the Works are Completed but paragraph (a)(ii) is not satisfied, the Developer paying to Council the difference between the actual value of the Completed Works and the Contribution Value for the Works, as a Monetary Contribution by the time specified in **Schedule 3**:
 - (i) in cash;
 - (ii) by unendorsed bank cheque; or
 - (iii) by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by Council; or
 - (c) the Community Infrastructure Contribution being paid to Council in accordance with clause 9.
- (3) For the purpose of determining whether the Works are valued at an amount equivalent to, or in addition to, the Contribution Value for the Works, the Developer must (at its own cost), by no later than thirty (30) days after Completion of the Works, submit to Council a report from a suitable Quantity Surveyor (approved by Council acting reasonably) confirming the value of the Completed Works.
- (4) The parties agree that the report provided by the Quantity Surveyor under paragraph (3) is final and binding on the parties, subject to any manifest error.

5.3 Indexation of Amounts payable by Developer

The Contributions will be increased (with the calculation to be made as from the date any such amount is due to be paid under this document) in accordance with the following formula:

$$A = B \times \frac{C}{D}$$

where:

A = the indexed amount;

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- B** = the relevant amount as set out in this document;
- C** = the Index most recently published before the date that the relevant payment or the calculation with respect to the relevant amount is to be made; and
- D** = the Index most recently published before the commencement date of this document.

If **A** is less than **B**, then the amount of the relevant Monetary Contribution will not change.

5.4 Works

The Developer, at its cost, must:

- (1) obtain development consent, and any other form of consent required by a relevant Authority, for the construction and use of the Works;
- (2) carry out and complete the Works to the satisfaction of the Council by the time specified in **Schedule 4**; and
- (3) carry out and complete the Works:
 - (a) in accordance with the specifications referred to in **Schedule 4** for the relevant Works or the design and specifications agreed or determined to apply to the Works under clause 5.5;
 - (b) in accordance with any relevant development consent;
 - (c) in accordance with the requirements of, or consents issued by, any Authority;
 - (d) ensuring that:
 - (i) all necessary measures are taken to protect people, property, and the Environment;
 - (ii) unnecessary interference with the passage of people and vehicles is avoided;
 - (iii) nuisances and unreasonable noise and disturbances are prevented; and
 - (iv) all relevant laws and regulations with respect to water, air, noise and land pollution (including 'pollution incidents') as defined under the *Protection of the Environment Operations Act 1997* (NSW);
 - (e) in accordance with any Australian Standards applicable to works of the same nature as each aspect of the Works; and
 - (f) in a proper and workmanlike manner complying with current industry practice and standards relating to each aspect of the Works.

5.5 Design and specification of Works

- (1) The Developer must consult with Council with respect to the development of the detailed design and specification of the Works.
- (2) Before commencing construction of the Work, the Developer must submit to Council:
 - (a) for its approval, the detailed design and specification for the Works; and

-
- (b) a report from a suitable Quantity Surveyor which estimates the cost to complete the Works in accordance with the detailed design.
 - (3) The design and specification for the Works must be prepared by the Developer having specific regard to:
 - (a) the specification for the Works; and
 - (b) the Contribution Value for the Works.
 - (4) Within thirty (21) days of the date of the first submission referred to in paragraph (3), Council must either:
 - (a) notify the Developer in writing of its approval of the design and specification. The Developer is then to carry out and complete the Works in accordance with that design and specification; or
 - (b) notify the Developer in writing that it does not approve of the design and specification (providing the Developer with reasons).
 - (5) If Council notifies the Developer in writing that it does not approve of the design and specification, the Developer may:
 - (a) elect to amend the design and specification and submit to Council the amended design and specification, in which case the approval process set out in this clause 5.5 applies to that amendment; or
 - (b) if the Developer does not agree with the modifications requested by Council, then it may refer the relevant matter for dispute resolution in accordance with this document.

5.6 Contribution Value

If the Developer's actual cost of carrying out the Works, including any costs incurred pursuant to this document, determined at the date on which the Works are Completed, differs from the Contribution Value, the Developer is not entitled to claim credit or reimbursement, as the case may be, for the difference.

5.7 Access to the Land and location of Works

- (1) The Developer is to permit the Council, its officers, employees, agents and contractors to enter the Land at any time, upon giving reasonable prior notice, in order to inspect, examine or test any of the Works.
- (2) The Developer must enable Council, its officers, employees, agents and contractors access to the location of the Works where this is not the Land, Council land or a public road.

5.8 Access to Council Land

Subject to any statutory approval or consent required, and subject to any applicable Council policy at the relevant time with respect to such access, Council will permit the Developer its officers, employees, agents and contractors to enter the Council Land at any time, upon giving reasonable prior notice, in order to carry out the Works, in which case the Developer must ensure that the Developer its officers, employees, agents and contractors comply with all directions of Council.

6 Completion of Works

6.1 Completion

For the purpose of this document the Works are Completed when:

- (1) the Works have been accepted as, or deemed to have been, Completed in accordance with this clause 6; and
- (2) any other obligation with respect to the Works which must be discharged prior to the Completion of that Work in accordance with this document has been discharged.

6.2 Issue of Completion Notice

If the Developer considers that the Works are complete it must serve a notice on Council which:

- (1) is in writing;
- (2) identifies the Works to which it relates; and
- (3) specifies the date on which the Developer believes the Works were completed,

(Completion Notice).

6.3 Inspection by Council

- (1) Council must inspect the Works set out in a Completion Notice within ten (10) business days of the receipt of that notice.
- (2) If Council fails to carry out an inspection required under paragraph (1) the Works referred to in the relevant Completion Notice will be deemed to be Complete.

6.4 Rectification Notice

- (1) Within twenty (20) business days of inspecting the Works set out in a Completion Notice Council must provide notice in writing (**Rectification Notice**) to the Developer that the Works set out in the Completion Notice:
 - (a) have been Completed; or
 - (b) have not been Completed, in which case the notice must also detail:
 - (i) those aspects of the Works which have not been Completed; and
 - (ii) the work Council requires the Developer to carry out in order to rectify the deficiencies in those Works.
- (2) If Council does not provide the Developer with a Rectification Notice in accordance with paragraph (1), the Works set out in the Completion Notice will be deemed to have been Completed.
- (3) Where Council serves a Rectification Notice on the Developer, the Developer must:
 - (a) rectify the Works in accordance with that notice; or
 - (b) serve a notice on the Council that it disputes the matters set out in the notice.
- (4) Where the Developer:

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- (a) serves notice on Council in accordance with paragraph (3)(b), the dispute resolution provisions of this document apply; or
 - (b) rectifies the Works in accordance with paragraph (3)(a), it must serve upon the Council a new Completion Notice for the Works it has rectified and this 6.4 will apply to new Completion Notice.

6.5 Works-As-Executed-Plan

Prior to Completion of the Works the Developer must provide to Council a full works-as-executed-plan in respect of the Works.

7 Defects Liability

7.1 Defects Notice

- (1) Where any part of the Works has been Completed but those Works contain a material defect which:
 - (a) adversely affects the ordinary use and/or enjoyment of the relevant Works; or
 - (b) will require maintenance or rectification works to be performed on them at some time in the future as a result of the existence of the defect;

(Defect) Council may issue a defects notice (**Defects Notice**) concerning those Works but only within the Defects Liability Period.
- (2) A Defects Notice must contain the following information:
 - (a) the nature and extent of the Defect;
 - (b) the work Council requires the Developer to carry out in order to rectify the Defect; and
 - (c) the time within which the Defect must be rectified (which must be a reasonable time and not less than ten (10) business days).

7.2 Developer to Rectify Defects

- (1) The Developer must rectify the Defects contained within a Defects Notice as soon as practicable after receipt of the Defects Notice.
- (2) The Developer must follow the procedure set out in clause 6 in respect of the satisfaction of the Defects Notice.

7.3 Right of Council to Step-In

Council, at its absolute discretion, may enter upon the Land for the purpose of satisfying the Defects Notice where the Developer has failed to comply with a Defects Notice but only after giving the Developer five (5) business days written notice of its intention to do so.

7.4 Consequence of Step-In

If Council elects to exercise the step-in rights granted to it under clause 7.3 then:

- (1) Council may:
 - (a) enter upon any part of the Land that it requires access to in order to satisfy the obligations of the Developer in accordance with the Defects Notice; and

-
- (b) rectify the relevant Defects in accordance with the Defects Notice; and
 - (2) the Developer must not impede or interfere with Council in undertaking that work.

7.5 Costs of Council

Where Council exercises its step-in rights, it may call upon the Defects Security provided by the Developer pursuant to clause 11 and recover as a debt due in a court of competent jurisdiction any difference between the amount of the Defects Security and the costs incurred by the Council in rectifying the Defects.

8 Variation of scope or timing for provision of Works

8.1 Variation to the scope of Works

- (1) The Developer may request that Council approve in writing a variation to the scope of the Works.
- (2) The scope of an Works is not to be varied unless Council, and the Developer agree in writing to the variation.
- (3) Council may withhold its consent or refuse to agree to a variation of the Works at its absolute discretion.

8.2 Deferral of the timing of Completion of the Works

- (1) Notwithstanding any other provision of this document, if the Developer forms the view at any time, that:
 - (a) it is unable to Complete the Works by the time specified in **Schedule 4**; or
 - (b) it believes that there is a risk of damage to the Works if they are delivered by the time required in **Schedule 4**,

(**Deferred Works**), then the Developer may seek Council's approval to defer the Completion of the Works by providing written notice to the Council:

 - (c) identifying the Works that the Developer proposes to defer;
 - (d) specifying the reason for the request to defer the Completion of the Works; and
 - (e) identifying the anticipated time for Completion of the Works.
- (2) The Council, acting reasonably, must give the Developer a written notice within thirty (21) business days of the date upon which the Developer serves written notice upon Council in accordance with paragraph (1) stating:
 - (a) whether or not it consents to the deferral of the Deferred Works;
 - (b) the revised date for Completion required by Council; and
 - (c) any reasonable conditions Council requires with respect to the deferral.
- (3) The Developer acknowledges and agrees that:
 - (a) for the purpose of paragraph (2)(b), Council may require the Works to be completed before the issue of a Subdivision Certificate or Occupation Certificate with respect to the Development; or

-
- (b) Council may require additional Security on account of that deferral provided that the amount of any such security held by Council as a result does not exceed one hundred and twenty per cent (120%) of the then estimated cost to complete the Works.
 - (4) If the Council consents to the deferral of the Deferred Works, then the following applies:
 - (a) The Developer must comply with any conditions required by Council under paragraph (2)(c) above.
 - (b) Provided the Developer satisfies those conditions, the Developer will not be considered to be in breach of this document as a result of a failure to achieve Completion of the relevant Deferred Works by the time for Completion specified in this document.
 - (c) The time for completion of the Deferred Works under this document is the revised date for Completion approved by Council.

9 Payment of Community Infrastructure Contribution in lieu of carrying out the Works

- (1) The Developer may, at any time before commencement of the Works and at its sole discretion, elect to pay the Community Infrastructure Contribution in lieu of carrying out the Works.
- (2) An election pursuant to clause 9(1) must be advised to Council in writing as soon as practicable.
- (3) If an election is made pursuant to clause 9(1) then the Community Infrastructure Contribution becomes payable as a monetary contribution in accordance with **Schedule 3**.
- (4) If the Community Infrastructure Contribution is paid to Council in lieu of carrying out the Works clauses 5.4, 5.5, 5.6, 5.7, 5.8, 6, 7 and 8 of this agreement do not apply.

10 Developer Warranties and Indemnities

10.1 Warranties

The Developer warrants to Council that it is:

- (1) legally and beneficially entitled to the Land;
- (2) able to fully comply with its obligations under this document;
- (3) it has full capacity to enter into this document; and
- (4) there is no legal impediment to it entering into this document, or performing the obligations imposed under it.

10.2 Indemnity

The Developer indemnifies Council in respect of any Claim that may arise as a result of the conduct of the Works but only to the extent that any such Claim does not arise as a result of the negligent acts or omissions of Council.

11 Security

11.1 Provision of Security

- (1) Subject to paragraph (2), the Developer must deliver to Council separate Bank Guarantees to the satisfaction of the Council:
 - (a) prior to the issue of a Construction Certificate in respect of the Development, for the amount equivalent to one hundred and twenty per cent (120%) of the sum of the Contribution Values (**Primary Security**) for the Works; and
 - (b) as a pre-condition to the Completion of the relevant item of the Works, for an amount equivalent to fifteen per cent (15%) of the relevant Primary Security (**Defects Security**),(collectively referred to as the **Security**).
- (2) The Developer may satisfy its obligations under paragraph (1) (either in whole or in part), by directing Council to retain any Security held by Council which is required to be released by Council under this document.
- (3) If Developer elects to pay the Community Infrastructure contribution under clause 9, then no Security will be payable.

11.2 Replacement of Security

- (1) The Developer may replace any Security provided by it at any time, provided that the amount of that replacement is not less than that which is required to be provided under this document.
- (2) On receipt of a replacement Security, Council must immediately release the Security being replaced and return it to the Developer.

11.3 Council may call on Security

- (1) If the Developer commits an Event of Default Council, without limiting any other remedies available to it, may call on any Security provided by the Developer.
- (2) If Council calls on any Security, it may use the amount so paid to it in satisfaction of any costs incurred by it in remedying the relevant Event of Default.

11.4 Top up of Security

If Council calls on the Security, Council, by notice in writing to the Developer, may require the Developer to provide a further or replacement Security in an amount that, when added to any unused portion of any Security then held by Council, does not exceed the amount of the Security Council is entitled to hold at that time under this document.

11.5 Release of Primary Security

Unless:

- (1) Council has made or intends to make a demand against any Security provided by the Developer;
- (2) the Development Contributions on account of which that Security was provided have not been made; or
- (3) the Developer is in breach of this document at the relevant time,

Council, upon a written request being made by the Developer, must return the Primary Security within ten (10) business days of such a request being made.

11.6 Release of Defects Security

Unless:

- (1) Council has made or intends to make a demand against any Security provided by the Developer for that Stage;
- (2) the relevant Defects Liability Period has not expired; or
- (3) the Developer is in breach of this document at the relevant time,

Council, upon a written request being made by the Developer, must return the Defects Security within ten (10) business days of such a request being made.

11.7 Council may withhold Occupation Certificate

- (1) The Developer may only make, or cause, suffer or permit the making of, an application for a Occupation Certificate in respect of the Development if, at the date of the application, the Developer is not in breach of its obligation to make any Contribution under this document.
- (2) Council may withhold the issue of a Occupation Certificate if, at the relevant time, the Developer is in breach of any obligation to make any Contribution under this document until such time as:
 - (a) the breach is rectified; or
 - (b) Council calls upon the Security provided by the Developer in respect of the Contribution to which the breach relates.

12 Registration of this document

12.1 Registration of this document

The Developer acknowledges and agrees that:

- (1) this document must be registered on the title to the Land pursuant to section 7.6 of the Act; and
- (2) subject to clause 12.2:
 - (a) the Developer will undertake the registration in paragraph (1); and
 - (b) the Developer will pay or reimburse Council's reasonable costs associated with this clause.

12.2 Obligations of Developer

- (1) The Developer, at its own expense must, promptly after this document comes into operation, and before the issue of any Construction Certificate or Subdivision Certificate for the Development, take all necessary and practical steps, and otherwise do anything that the Council reasonably requires, to procure:
 - (a) the consent of each person who:

-
- (i) has an estate or interest in the Land; or
 - (ii) is seized or possessed of an estate or interest in the Land;
 - (b) the execution of any documents; and
 - (c) the production of the relevant:
 - (i) certificate(s) of title; or
 - (ii) Control of the Right to Deal (CoRD) Holder Consent(s);
- to enable the registration of this document in accordance with clause 12.1.
- (2) The Developer, at its own expense, will take all necessary and practical steps, and otherwise do anything that the Council reasonably requires:
- (a) to allow the lodgement of this document with the Registrar-General as soon as reasonably practicable after this document comes into operation but in any event, no later than thirty (30) business days after that date; and
 - (b) to allow the registration of this document by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this document is lodged for registration.

12.3 Discharge from the Register

The parties must do all things reasonably necessary to remove this document from the title to the Land on the earlier of:

- (1) the Developer's obligations under this document having been performed to Council's satisfaction; or
- (2) if this document is terminated or otherwise comes to an end for any other reason.

13 Assignment

13.1 Application

This clause 13 only applies during any period when this document is not registered on the title of the Land.

13.2 Restriction on Assignment

Other than in accordance with this clause 13 the Developer may not:

- (1) Assign any part of the Land; and/or
- (2) Assign their rights or obligations under this document.

13.3 Procedure for Assignment

- (1) If the Developer:
 - (a) wishes to Assign any part of the Land; and/or
 - (b) wishes to Assign its rights or obligations under this document,
- then the Developer must:

-
- (c) provide a written request to Council for the consent of Council to the relevant Assignment;
 - (d) provide Council with any evidence required by Council, acting reasonably, to satisfy Council that the third party in whose favour the Assignment is to be made (**Assignee**) is reasonably capable of performing the obligations under this document that are to be Assigned to it;
 - (e) obtain written consent of Council to the relevant Assignment which not be unreasonably withheld; and
 - (f) at no cost to Council, procure:
 - (i) the execution by the Assignee of an appropriate deed where the Assignee agrees to be bound by the terms of this document; and
 - (ii) the provision of all Securities to Council by the Assignee that the Developer is required to provide under this document (and any additional securities if required by Council acting reasonably) at the same time as, or prior to, entering into that deed.
- (2) Council is under no obligation to consider granting its consent to any request made by the Developer under paragraph (1)(c) if, at the time the request is made, the Developer is in breach of this document.

14 Dispute Resolution

14.1 Notice of dispute

- (1) If a dispute or lack of certainty between the parties arises in connection with this document or its subject matter (**Dispute**), then either party (**First Party**) must give to the other (**Second Party**) a notice which:
- (a) is in writing;
 - (b) adequately identifies and provides details of the Dispute;
 - (c) stipulates what the First Party believes will resolve the Dispute; and
 - (d) designates its representative (**Representative**) to negotiate the Dispute.
- (2) The Second Party must, within five (5) Business Days of service of the notice of dispute, provide a notice to the First Party designating as its representative a person to negotiate the Dispute (the representatives designated by the parties being together, the **Representatives**).

14.2 Conduct pending resolution

The parties must continue to perform their respective obligations under this document if there is a Dispute but will not be required to complete the matter the subject of the Dispute, unless the appropriate party indemnifies the other parties against costs, damages and all losses suffered in completing the disputed matter if the Dispute is not resolved in favour of the indemnifying party.

14.3 Further steps required before proceedings

The Representatives must endeavour to resolve the dispute within five (5) Business Days of the date a notice under clause 14.1(2) is served.

14.4 Disputes for mediation

- (1) If the Representatives have not been able to resolve the Dispute, then the parties must agree within five (5) Business Days to refer the matter to mediation
- (2) If the parties agree in accordance with paragraph (1) to refer the Dispute to mediation, the mediation must be conducted by a mediator agreed by the parties and, if the parties cannot agree within five (5) Business Days, then by a mediator appointed by the President of the Law Society of New South Wales for the time being.

14.5 Other courses of action

If, in accordance with clause 14.4:

- (1) the parties cannot agree to refer the matter to mediation; or
- (2) the mediation has not resulted in settlement of the dispute and the mediation has been terminated,

then either party may take whatever course of action it deems appropriate for the purpose of resolving the Dispute.

14.6 Confidentiality of information provided in dispute resolution process

- (1) The parties agree, and must procure that the mediator agree as a condition of his or her appointment:
 - (a) subject to paragraph (2), to keep confidential all documents, information and other material disclosed to them during or in relation to the mediation;
 - (b) not to disclose any confidential documents, information and other material except:
 - (i) to a party or adviser or consultant who has signed a confidentiality undertaking; or
 - (ii) if required by Law or any Authority to do so; and
 - (c) not to use confidential documents, information or other material disclosed to them during or in relation to the mediation for a purpose other than the mediation.
- (2) The parties must keep confidential and must not disclose or rely upon or make the subject of a subpoena to give evidence or produce documents in any arbitral, judicial or other proceedings:
 - (a) views expressed or proposals or suggestions made by a party or the mediator during the mediation relating to a possible settlement of the Dispute;
 - (b) admissions or concessions made by a party during the mediation in relation to the Dispute; and
 - (c) information, documents or other material concerning the dispute which are disclosed by a party during the mediation unless such information, documents or facts would be discoverable in judicial or arbitral proceedings.

14.7 Remedies available under the Act

This clause 14 does not operate to limit the availability of any remedies available to Council under the Act.

14.8 Urgent relief

This clause 14 does not prevent a party from seeking urgent injunctive or declaratory relief concerning any matter arising out of this document.

15 Breach of this document

15.1 Breach Notice

If the Developer breaches this document, Council may serve a notice on the Developer (**Breach Notice**) specifying:

- (1) the nature and extent of the alleged breach;
- (2) if:
 - (a) the breach is capable of being rectified other than by the payment of compensation, what Council requires the Developer to do in order to rectify the breach; or
 - (b) the breach is not capable of being rectified other than by payment of compensation, the amount of compensation Council requires the Developer to pay in order to rectify the breach, and
- (3) the time within which Council requires the breach to be rectified, which must be a reasonable time of not less than forty (40) business days.

15.2 Events of Default

The Developer commits an **Event of Default** if it:

- (1) fails to comply with a Breach Notice; or
- (2) becomes subject to an Insolvency Event.

15.3 Consequences of Events of default

Where the Developer commits an Event of Default, Council may, in addition to any rights it has at Law:

- (1) exercise the Step in Rights so as to carry out any work specified in the relevant Breach Notice; or
- (2) call on the Security to the extent of any compensation claimed in a Breach Notice and not paid by the Developer.

16 Termination, Rescission or Determination

16.1 Termination

This document terminates in the following events:

- (1) The parties agree in writing to terminate the operation of this document at any time.
- (2) Council serves notice on the Developer terminating this Planning Agreement where the Developer has failed to comply with a notice issued in accordance with clause 15.1.
- (3) The Development Consent lapses.

16.2 Consequence of termination

Upon termination of this Planning Agreement:

- (1) all future rights and obligations of the parties are discharged; and
- (2) all pre-existing rights and obligations of the parties continue to subsist.

16.3 Determination

This Planning Agreement will determine upon the Developer satisfying all of the obligations imposed on it in full.

17 Position of Council

17.1 Consent authority

The parties acknowledge that Council is a consent authority with statutory rights and obligations pursuant to the terms of the Planning Legislation.

17.2 Document does not fetter discretion

This document is not intended to operate to fetter, in any unlawful manner:

- (1) the power of Council to make any Law; or
- (2) the exercise by Council of any statutory power or discretion,
(Discretion).

17.3 Severance of provisions

- (1) No provision of this document is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this document is held by a court of competent jurisdiction to constitute an unlawful 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 17 is substantially satisfied; and
 - (b) in the event that paragraph (1)(a) cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this document has full force and effect; and
 - (c) to endeavour to satisfy the common objectives of the parties on relation to the provision of this document which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.
- (2) Where the Law permits Council to contract out of a provision of that Law or gives Council power to exercise a Discretion, then if Council has in this document contracted out of a provision or exercised a Discretion under this document, then to the extent of this document is not to be taken to be inconsistent with the Law.

17.4 No Obligations

Nothing in this document will be deemed to impose any obligation on Council to exercise any of its functions under the Act in relation to the Development Consent, the Land or the Development in a certain manner.

18 Confidentiality

18.1 Document not Confidential

The terms of this document are not confidential and this document may be treated as a public document and exhibited or reported without restriction by any party.

18.2 Other Confidential Information

- (1) The parties acknowledge that:
 - (a) Confidential Information may have been supplied to some or all of the parties in the negotiations leading up to the making of this document; and
 - (b) The parties may disclose to each other further Confidential Information in connection with the subject matter of this document.
 - (c) Subject to paragraphs (2) and (3), each party agrees:
 - (i) not to disclose any Confidential document received before or after the making of this document to any person without the prior written consent of the party who supplied the Confidential Information; or
 - (ii) to take all reasonable steps to ensure all Confidential Information received before or after the making of this document is kept confidential and protected against unauthorised use and access.
- (2) A party may disclose Confidential Information in the following circumstances:
 - (a) in order to comply with the Law, or the requirements of any Authority; or
 - (b) to any of their employees, consultants, advisers, financiers or contractors to whom it is considered necessary to disclose the information, if the employees, consultants, advisers, financiers or contractors undertake to keep the information confidential.
- (3) The obligations of confidentiality under this clause do not extend to information which is public knowledge other than as a result of a breach of this clause.

19 GST

19.1 Defined GST Terms

Defined terms used in this clause 19 have the meaning ascribed to them in the GST Law.

19.2 GST to be Added to Amounts Payable

- (1) If GST is payable on a Taxable Supply made under, by reference to or in connection with this document, the party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- (2) This clause does not apply to the extent that the Consideration for the Taxable Supply is expressly agreed to be GST inclusive.
- (3) Unless otherwise expressly stated, prices or other sums payable or Consideration to be provided under or in accordance with this document are exclusive of GST.

19.3 GST Obligations to Survive Termination

This clause 19 will continue to apply after expiration of termination of this document.

20 Miscellaneous

20.1 Obligation to act in good faith

The parties must at all times:

- (1) cooperate and use their best endeavours to profitably and professionally give effect to their rights and obligations set out in this document;
- (2) not unreasonably delay any action, approval, direction, determination or decision which is required of them;
- (3) make approvals or decisions that are required of them in good faith and in a manner consistent with the completion of the transactions set out in this document; and
- (4) be just and faithful in their activities and dealings with the other parties.

20.2 Legal costs

The Developer agrees to:

- (1) pay or reimburse the reasonable legal costs and disbursements of Council of the negotiation, preparation, execution, and stamping of this document up to an amount of \$5,000 plus GST;
- (2) pay the reasonable legal costs and disbursements referred to in paragraph (1) within ten (10) business days of receipt of a Tax Invoice from Council.

21 Administrative Provisions

21.1 Notices

- (1) Any notice, consent or other communication under this document must be in writing and signed by or on behalf of the person giving it, addressed to the person to whom it is to be given and:
 - (a) delivered to that person's address;
 - (b) sent by pre-paid mail to that person's address; or
 - (c) transmitted by facsimile to that person's address.
- (2) A notice given to a person in accordance with this clause is treated as having been given and received:
 - (a) if delivered to a person's address, on the day of delivery if a Business Day, otherwise on the next Business Day;
 - (b) if sent by pre-paid mail, on the third Business Day after posting; and
 - (c) if transmitted by facsimile to a person's address and a correct and complete transmission report is received, on the day of transmission if a Business Day, otherwise on the next Business Day.

-
- (3) For the purpose of this clause the address of a person is the address set out in this document or another address of which that person may from time to time give notice to each other person.

21.2 Entire Document

This document is the entire agreement of the parties on the subject matter. All representations, communications and prior agreements in relation to the subject matter are merged in and superseded by this document.

21.3 Waiver

The non-exercise of or delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the parties to be bound by the waiver.

21.4 Cooperation

Each party must sign, execute and deliver all agreements, documents, instruments and act reasonably and effectively to carry out and give full effect to this document and the rights and obligations of the parties under it.

21.5 Counterparts

This document may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

21.6 Amendment

This document may only be amended or supplemented in writing signed by the parties.

21.7 Unenforceability

Any provision of this document which is invalid or unenforceable in any jurisdiction is to be read down for the purposes of that jurisdiction, if possible, so as to be valid or enforceable, and is otherwise capable of being severed to the extent of the invalidity or enforceability, without affecting the remaining provisions of this document or affecting the validity or enforceability of that provision in any other jurisdiction.

21.8 Power of Attorney

Each attorney who executes this document on behalf of a party declares that the attorney has no notice of:

- (1) the revocation or suspension of the power of attorney by the grantor; or
- (2) the death of the grantor.

21.9 Governing law

The law in force in the State of New South Wales governs this document. The parties:

- (1) submit to the exclusive jurisdiction of the courts of New South Wales and any courts that may hear appeal from those courts in respect of any proceedings in connection with this document; and
- (2) may not seek to have any proceedings removed from the jurisdiction of New South Wales on the grounds of *forum non conveniens*.

Schedule 1– Requirements under s7.4

REQUIREMENT UNDER THE ACT	THIS PLANNING AGREEMENT
Planning instrument and/or development application – (Section 7.4(1)) The Developer has: (c) sought a change to an environmental planning instrument. (d) made, or proposes to make, a Development Application. (e) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.	(a) No (b) Yes (c) N/A
Description of land to which this agreement applies – (Section 7.4(3)(a))	(1) Lots 1-3 in DP210743 and known as 22-28 Gardeners Road, Kingsford NSW 2038 and owned by the Developer (Land). (2) That part of the public road reserve known as ANZAC Parade which is comprised of the footpath directly adjacent to the entire ANZAC Parade frontage of the Land (Council Land).
Description of change to the environmental planning instrument to which this agreement applies – (Section 7.4(3)(b))	N/A
Application of section 7.11 of the Act – (Section 7.4(3)(d))	Applies
Applicability of section 7.12 of the Act – (Section 7.4(3)(d))	Applies
Consideration of benefits under this agreement if section 7.11 applies – (Section 7.4(3)(e))	Applies
Mechanism for Dispute resolution – (Section 7.4(3)(f))	See clause 14.
Enforcement of this agreement (Section 7.4(3)(g))	See clause 11.
No obligation to grant consent or exercise functions – (Section 7.4(3)(9))	See clause 16.

Schedule 2 – Defined Terms and Interpretation

Part 1 – Definitions

Act	means the <i>Environmental Planning and Assessment Act 1979</i> (NSW).
Affordable Housing Levy Contribution	has the meaning ascribed to it in clause 5.1.
Assign	as the context requires refers to any assignment, sale, transfer, disposition, declaration of trust over or other assignment of a legal and/or beneficial interest.
Authority	means (as appropriate) any: (1) federal, state or local government; (2) department of any federal, state or local government; (3) any court or administrative tribunal; or (4) statutory corporation or regulatory body.
Bank Guarantee	means an irrevocable and unconditional undertaking without any expiry or end date by one of the following trading banks: (1) Australia and New Zealand Banking Group Limited. (2) Commonwealth Bank of Australia. (3) Macquarie Bank. (4) National Australia Bank Limited. (5) St George Bank Limited. (6) Westpac Banking Corporation. (7) Any other financial institution approved by the Council, in its absolute discretion, in response to a request from the Developer.
Claim	against any person any allegation, action, demand, cause of action, suit, proceeding, judgement, debt, damage, loss, cost, expense or liability howsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at law, in equity, under statute or otherwise.
Community Infrastructure	has the meaning ascribed to it under the LEP.
Community Infrastructure Contribution	has the meaning ascribed to it in clause 5.2.
Completed	means completed in accordance with the requirements of this document.
Completion Notice	has the meaning ascribed to it in clause 6.1.
Confidential Information	means any information and all other knowledge at any time disclosed (whether in writing and orally) by the parties to each

other, or acquired by the parties in relation to the other's activities or services which is not already in the public domain and which:

- (1) is by its nature confidential;
- (2) is designated, or marked, or stipulated by either party as confidential (whether in writing or otherwise);
- (3) any party knows or ought to know is confidential;
- (4) is information which may be reasonably considered to be of a confidential nature.

Construction Certificate

has the same meaning as in section 6.4(d) of the Act.

Contributions

means the Affordable Housing Levy Contribution and Community Infrastructure Contribution.

Contribution Value

means the amount specified in **Schedules 3 and 4** in the column headed "contribution value" for each item of the Contributions.

Council Land

means the "Council Land" set out in **Schedule 1**.

Defect

has the meaning ascribed to it in clause 7.1.

Defects Notice

has the meaning ascribed to it in clause 7.1.

Defects Liability Period

means with respect to the Works, a period of twelve (12) months commencing on the date of Completion of the Works.

Defects Security

has the meaning ascribed to it in clause 11.

Development

means the development permitted to be undertaken in accordance with development consent DA/915/2015 as amended by development application DA/216/2021.

Development Consent

means the consent issued under the Act for the Development.

Dispute

has the meaning ascribed to it in clause 14.1.

Encumbrance

means an interest or power:

- (1) reserved in or over an interest in any asset;
- (2) arising under, or with respect to, a Bio-Banking Agreement;
- (3) created or otherwise arising in or over any interest in any asset under any mortgage, charge (whether fixed or floating), pledge, lien, hypothecation, title retention, conditional sale agreement, hire or hire purchase agreement, option, restriction as to transfer, use or possession, easement, covenant, lease, subordination to any right of any other person and any other encumbrance or security interest, trust or bill of sale; or
- (4) by way of security for the payment of a debt or other monetary obligation or the performance of any obligation.

Encumber means to grant an Encumbrance.

Event of Default	has the meaning ascribed to it in clause 15.2.
GST Law	means <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth) and any other Act or regulation relating to the imposition or administration of the GST.
Index	means the Consumer Price Index (All Groups - Sydney) as provided by the Australian Bureau of Statistics.
Insolvency Event	means the happening of any of the following events: (1) Application which is not withdrawn or dismissed within fourteen (14) days is made to a court for an order or an order is made that a body corporate be wound up. (2) An application which is not withdrawn or dismissed within fourteen (14) days is made to a court for an order appointing a liquidator or provisional liquidator in respect of a body corporate or one of them is appointed, whether or not under an order. (3) Except to reconstruct or amalgamate while solvent, a body corporate enters into, or resolves to enter into, a scheme of arrangement, agreement of company arrangement or composition with, or assignment for the benefit of, all or any class of its creditors, or it proposes a reorganisation, moratorium or other administration involving any of them. (4) A body corporate resolves to wind itself up, or otherwise dissolve itself, or gives notice of intention to do so, except to reconstruct or amalgamate while solvent or is otherwise wound up or dissolved. (5) A body corporate is or states that it is insolvent. (6) As a result of the operation of section 459F(1) of the <i>Corporations Act 2001</i> (Cth) (Corporations Act), a body corporate is taken to have failed to comply with a statutory demand; (7) A body corporate is or makes a statement from which it may be reasonably deduced that the body corporate is, the subject of an event described in section 459C(2)(b) or section 585 of the <i>Corporations Act</i>. (8) A body corporate takes any step to obtain protection or is granted protection from its creditors, under any applicable legislation or an administrator is appointed to a body corporate. (9) A person becomes an insolvent under administration as defined in section 9 of the <i>Corporations Act</i> or action is taken which could result in that event. (10) A receiver, manager or receiver and manager is appointed to the Company. (11) A claim is filed in a court against a person that is not defended, released or otherwise settled within twenty eight (28) days of the date of its filing at the court. (12) Anything analogous or having a substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction.

Land	means the "Land" set out in Schedule 1 .
Law	means all legislation, regulations, by-laws, common law and other binding order made by any Authority.
LEP	means the <i>Randwick Local Environmental Plan 2012</i> .
Occupation Certificate	has the same meaning as in section 6.4(c) of the Act.
Planning Legislation	means the Act, the <i>Local Government Act 1993</i> (NSW) and the <i>Roads Act 1993</i> (NSW).
Primary Security	has the meaning ascribed to it in clause 11.
Rectification Notice	has the meaning ascribed to it in clause 6.4.
Quantity Surveyor	means a person who: (1) is a member of their respective professional organisation and has been for at least five (5) years; (2) practises as a quantity surveyor for works of the same nature as the relevant Works; (3) is active as a quantity surveyor at the time of his appointment; (4) has at least three (3) years experience in valuing works of the same nature as the relevant Works; and (5) undertakes to act fairly and promptly in accordance with the requirements of this document.
Rectification Notice	has the meaning ascribed to it in clause 6.4.
Security	means collectively the Primary Security and the Defects Security.
Subdivision Certificate	has the same meaning as in section 6.4(d) of the Act.
Works	means the works specified or described in Schedule 4 .

Part 2 - Interpretational Rules

clauses, annexures and schedules	a clause, annexure or schedule is a reference to a clause in or annexure or schedule to this document.
reference to statutes	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.
singular includes plural	the singular includes the plural and vice versa.
person	the word "person" includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association or any government agency.

executors, administrators, successors

a particular person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns.

dollars

Australian dollars, dollars, \$ or A\$ is a reference to the lawful currency of Australia.

calculation of time

if a period of time dates from a given day or the day of an act or event, it is to be calculated exclusive of that day.

reference to a day

a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later.

accounting terms

an accounting term is a reference to that term as it is used in accounting standards under the Corporations Act or, if not inconsistent with those standards, in accounting principles and practices generally accepted in Australia.

reference to a group of persons

a group of persons or things is a reference to any two or more of them jointly and to each of them individually.

meaning not limited

the words "include", "including", "for example" or "such as" are not used as, nor are they to be interpreted as, words of limitation, and, when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind.

next day

if an act under this document to be done by a party on or by a given day is done after 4.30pm on that day, it is taken to be done on the next day.

next Business Day

if an event must occur on a stipulated day which is not a Business Day then the stipulated day will be taken to be the next Business Day.

time of day

time is a reference to Sydney time.

headings

headings (including those in brackets at the beginning of paragraphs) are for convenience only and do not affect the interpretation of this document.

agreement

a reference to any agreement, document or instrument includes the same as varied, supplemented, novated or replaced from time to time.

Gender

a reference to one gender extends and applies to the other and neuter gender.

Schedule 3 – Monetary Contributions

Item	Time for Completion	Contribution Value
Affordable Housing Levy Contribution	Prior to the issue of the first Occupation Certificate in respect of the Development.	The amount of the contribution is calculated in accordance with Clause 6.18 of the <i>Randwick Local Environmental Plan 2012</i>, the <i>Kensington and Kingsford Town Centres - Affordable Housing Plan</i> adopted by the Council on 10 December 2019 and is based on the relevant indexed Affordable Housing Contribution Rate (being an amount of \$373.13 per square metre as at the date of this document) for a total floor area of 4,023.36 square metres. The Affordable Housing Contribution Rate is indexed twice a year, being the first day of January and July, with reference to the most recently published median strata dwelling price in Randwick City Local Government Area. As at the date of this document, the Contribution Value is estimated to be \$1492103.29 (being 4,023.36 square metres of floor space payable at a rate of \$370.86/sqm)
Community Contribution	Infrastructure	Subject to clauses 5.2, the earlier of twenty four (24) months after the issue of a Construction Certificate for the Development, or the issue of the first Occupation Certificate in respect of the Development. The amount of the contribution is calculated in accordance with Clause 6.17 of the <i>Randwick Local Environmental Plan 2012</i>, the <i>Kensington and Kingsford Town Centres – Community Infrastructure Contributions Plan</i> adopted by the Council on 10 December 2019 and is based on a Community Infrastructure Contribution Rate of \$475 per square metre for a total floor area of 307.26 square metres, and in accordance with the conditions of the Development Consent As at the date of this document, the Contribution Value is estimated to be \$157,296.25 (being 333.15 square metres of floor space payable at a rate of \$475/sqm) .

Schedule 4 – Works-in-Kind

Works	Specifications	Time for Completion	Contribution Value
Local road improvements and upgrades including but not limited to Gardeners Road frontage	240m² of pavement removal and replacement to the Gardeners Rd footpath outside 14-20, 22-28 & 30-34 Gardeners Rd, Kingsford. Pavement to be replaced with similar materials/colours as approved in accordance with clause 5.6 of this agreement. Any Council fees or charges associated with carrying out the Works are to form part of the Contribution Value. The works exclude realignment off pits/lids and removal/replacement of kerb and gutter.	Within twenty four (24) months after the issue of a construction certificate for the Development and prior to the issue of an Occupation Certificate for the Development.	The Contribution Value ascribed to the Community Infrastructure Contribution in Schedule 3 which, for the purpose of clause 11 is \$157,296.25.

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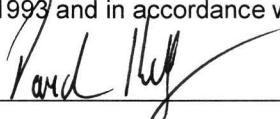
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Execution page

Executed as a deed

Dated: 4/11/21

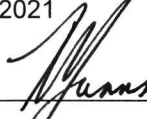
Executed by **Randwick City Council** pursuant to delegation under s377 of the Local Government Act 1993 and in accordance with resolution dated 26 October 2021



Witness (Signature)

DAVID KELLY

Name of Witness (Print Name)

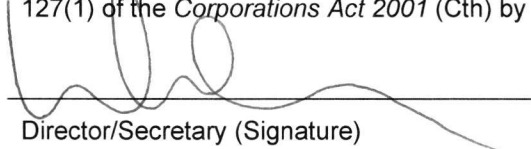


General Manager (Signature)

Therese Manns

Name of General Manager (Print Name)

Signed, sealed and delivered by **Gardeners at Kingsford Pty Ltd (ACN 622 880 639)** in its own capacity and as trustee for **Gardeners at Kingsford Land Unit Trust** in accordance with section 127(1) of the *Corporations Act 2001* (Cth) by authority of its directors.



Director/Secretary (Signature)

MARCO SANTUCCI

Name of Director/ Secretary (Print Name)

Director (Signature)

Name of Director (Print Name)
