

# Voluntary Planning Agreement

**87 Church Street and 6 Great Western Highway, Parramatta**

City of Parramatta Council

*ABN 49 907 174 773*

Arcadia Land Estate Pty Ltd

*ACN 609 955 704*

WFM Motors Pty Ltd

*ACN 001 632 837*

NGP Investments (No 2) Pty Limited

*ACN 001 495 343*

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# Agreement

## Date

## Parties

### First party

**Name** City of Parramatta Council (**Council**)  
**ACN** 49 907 174 773  
**Contact** Manager, Land Use Planning  
**Telephone** (02) 9806 5050

### Second party

**Name** Arcadia Land Estate Pty Ltd (**Developer**)  
**ACN** 609 955 704  
**Contact** Remon Fayad  
**Telephone** (02) 9893 7607

### Third party

**Name** WFM Motors Pty Ltd (**WFM**)  
**ACN** 001 632 837  
**Contact** Nick Politis  
**Telephone** 0419 328 804

### Fourth party

**Name** NGP Investments (No 2) Pty Limited (**NGP**)  
**ACN** 001 495 343  
**Contact** Nick Politis  
**Telephone** 0419 328 804

## Background

- A. WFM owns part of the Land, being Lot 1 DP 1009227.
- B. NGP owns part of the Land, being Lot 100 DP 632636.
- C. The Developer intends to purchase the Land from the Landowners.
- D. WFM and NGP consent and agree to be bound by the terms of the VPA.
- E. On 29 September 2015, Hamptons Property Services Pty Ltd, acting for and on behalf of the Developer and the Landowners, lodged the Planning Proposal for the Land.
- F. The Developer has made an offer, in connection with the Planning Proposal, to enter into this agreement to make contributions for public purposes associated with the Planning Proposal and the Development.

- G. On 14 July 2016, Council submitted the Planning Proposal with the Department of Planning and Environment.
- H. On 12 September 2016, the Minister issued a conditional gateway determination under section 56 of the Act for the Planning Proposal.

## Operative part

### 1 Definitions

In this agreement, unless the 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;

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

**Claim** means any claim, loss, liability, damage, proceeding, order, judgment or expense arising out of the operation of this agreement;

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

**Contributions** means any monetary contributions, the dedication of land free of cost, the carrying out of work, or the provision of any other material public benefit detailed in clause 6.

**Contributions Plan** has the same meaning as under the Act;

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

**Damages** means all liabilities, losses, damages, costs and expenses, including legal fees and disbursements and costs of investigation, litigation, settlement, judgment, interest and penalties;

**Dealing**, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land;

**Development** means any future mixed use, multi-storey development on the Land;

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

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

**Easement Land** means that part of the Land specified by the RMS as required for the pedestrian bridge referred to in clause 6.2, the indicative location of which is shown on the plan in **Annexure A**;

**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 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 of or administration of the GST;

**Insolvent** means, in relation to a party:

- (a) that party makes an arrangement, compromise or composition with, or assignment for, the benefit of its creditors or a class of them;
- (b) a receiver, receiver and manager, administrator, provisional liquidator, trustee, controller, inspector or analogous person is appointed in relation to, or over, all or any part of that party's business, assets or securities;
- (c) a presumption of insolvency has arisen under legislation because of the party's failure to comply with a statutory demand or analogous process;
- (d) an application for the winding up of, or for the appointment of a receiver to, that party, other than winding up for the purpose of solvent reconstruction or re amalgamation, is presented and not withdrawn or dismissed within [21] days (or such longer period agreed to by the parties), or an order is made or an effective resolution is passed for the winding up of, or for the appointment of a receiver to, that party, or any analogous application is made or proceedings initiated;
- (e) any shareholder or director of that party convenes a meeting for the purpose of considering or passing any resolution for the winding up or administration of that party;
- (f) that is an individual, a creditor's petition or a debtor's petition is presented to the Official Receiver or analogous authority in relation to that party;
- (g) an execution or analogous process is levied or enforced against the property of that party;
- (h) that party ceases or suspends, or threatens to cease or suspend, the conduct of all or a substantial part of its business;
- (i) that party disposes of, or threatens to dispose of, a substantial part of its assets;
- (j) that party stops or suspends, or threatens to stop or suspend, payment of all or a class of its debts; or
- (k) that party is unable to pay the party's debts as and when they become due and payable.

**Land** has the meaning described in Schedule 1;

**Landowners** means WFM and NGP;

**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);

**LEP** means *Parramatta Local Environmental Plan 2011*;

**Modification Application** means any application to modify the Development Consent under section 96 of the Act;

**Monetary Contribution** means the monetary contribution payable by the Developer under clause 6 of this agreement;

**Occupation Certificate** means an occupation certificate referred to in section 109C(1)(c) of the Act and may be an interim or final occupation certificate or issued for the whole or part of any building as provided for in section 109C(2) of the Act;

**Planning Proposal** has the meaning described in Schedule 1;

**Register** means the Torrens title register maintained under the *Real Property Act 1900* (NSW);

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

**Related Body Corporate** has the meaning given to that term in s 9 of the *Corporations Act 2001* (Cth); and

**RMS** means Roads and Maritime Services.

**Transferee** has the meaning given in clause 12.3

## 2 Interpretation

In this agreement, unless the 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) **(president, CEO, general manager or managing director)** the president, CEO, general manager or managing director of a body or Authority includes any person acting in that capacity;
- (g) **(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;
- (h) **(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;

- (i) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (j) **(singular)** the singular includes the plural and vice-versa;
- (k) **(gender)** words importing one gender include all other genders;
- (l) **(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;
- (m) **(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;
- (n) **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (o) **(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, Australia, even if the obligation is to be performed elsewhere;
- (p) **(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;
- (q) **(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;
- (r) **(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;
- (s) **(Australian currency)** a reference to dollars or \$ is to Australian currency;
- (t) **(month)** a reference to a month is a reference to a calendar month; and
- (u) **(year)** a reference to a year is a reference to twelve consecutive calendar months.

### 3 Planning Agreement under the Act

- (a) The parties agree that this agreement is a planning agreement within the meaning of section 93F of the Act.
- (b) Schedule 2 of this agreement summarises the requirements for planning agreements under s 93F of the Act and the way this agreement addresses those requirements.

### 4 Application of this agreement

This agreement applies to:

- (a) the Planning Proposal , and

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

## 5 Operation of this agreement

### 5.1 Operation

The Parties agree that this agreement operates on and from the date it is executed by the Parties as required by clause 25C(1) of the Regulation, except that clause 6 of this agreement does not operate until the LEP is amended in a manner consistent with the Planning Proposal in accordance with section 59 of the Act.

### 5.2 Termination

- (a) Subject to clause 5.2(b), this agreement will remain in force until:
  - (i) it is terminated by operation of Law; or
  - (ii) all obligations are performed or satisfied.
- (b) Clauses 8.3, 8.4, 10, 11, 16.3, 16.7 and 16.13 will continue to have effect despite any termination of this agreement in accordance with clause 5.2(a).

## 6 Contributions to be made under this agreement

### 6.1 Monetary Contribution

- (a) The Developer and Landowners will pay to Council a monetary contribution of \$3,223,350.00 or an amount calculated in accordance with the following formula, whichever is the greater:

$$\begin{array}{r}
 \$3,223,350.00 \quad \times \quad \frac{\text{The CPI at the time of payment}}{\text{The CPI at the date of this agreement}}
 \end{array}$$

- (b) The Monetary Contribution must be paid to Council prior to the issue of the first Occupation Certificate for the Development, or any part of the Development.
- (c) The Monetary Contribution must be paid by way of bank cheque in favour of Council or by deposit by means of electronic funds transfer into an account specified by 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 or electronic funds have been deposited in the Council's bank account.
- (e) The parties agree and acknowledge that the Monetary Contribution will be used by the Council towards upgrades and delivery of new public domain and open spaces in the Parramatta CBD.

### 6.2 Pedestrian Bridge

- (a) The Developer and Landowners acknowledge that:
  - (i) Development Consent DA/706/2014 applying to land on the southern side of the Great Western Highway requires the developer of that land to enter into a Deed with Roads and Maritime Services NSW, to construct a

- pedestrian overbridge at the intersection of the Great Western Highway and Church Street; and
- (ii) if that pedestrian bridge is constructed, the Easement Land, on the northern side of the Great Western Highway, will be required to accommodate the pedestrian bridge.
- (b) The Developer will, at no cost to Council, seek confirmation from the RMS as to the exact location of the Easement Land and register against the title to the Land:
    - (i) a covenant in favour of RMS prohibiting any building or structures other than structures for the purposes of the pedestrian bridge or purposes that will not be inconsistent with the proposed pedestrian bridge, to be constructed on the Easement Land; and
    - (ii) an easement in gross burdening the Easement Land in favour of RMS permitting public access to the Easement Land and authorising the continued use of the Easement Land for a pedestrian bridge.
  - (c) For the avoidance of doubt, the RMS will be the body whose authority is required to vary or release the covenant and easement in gross referred to in clause 6.2(b)6.2(b).
  - (d) Any requirement to register an easement, covenant or other instrument against the title to the Land will be satisfied when the Developer provides to the Council a copy of the relevant title search showing the registration of the instrument.
  - (e) The covenant and easement required under clause 6.2(b) must be registered prior to the issue of the first Occupation Certificate for the Development or any part of the Development.
  - (f) The parties agree that the proposed covenant and easement under this clause will serve the public purpose of improving pedestrian circulation and the amenity of the public domain in the vicinity of the Land.
  - (g) The Developer agrees and acknowledges that the obligations under this clause 6.2 are relevant considerations for the Council or any other consent authority when determining a Development Application or Modification Application relating to the Land and that a failure to comply with those obligations or any inconsistency with the requirements in those clauses may constitute a reason for refusal of such a Development Application or Modification Application.
  - (h) Notwithstanding any other provision of this deed, if prior to the registration of the easement and covenant in this section, Council receives notice in writing from the RMS that the Easement Land is no longer required for the pedestrian bridge, this clause 6.2 will cease to have any effect and the Developer and Landowners will be released from the obligation to register the covenant and the easement under clause 6.2(b).

## 7 Application of s 94, s 94A and s 94EF of the Act to the Development

- (a) This agreement does not exclude the application of section 94 of the Act to the Development.
- (b) This agreement does not exclude the application of section 94A of the Act to the Development.

- (c) This agreement does not exclude the application of section 93EF of the Act to the Development.
- (d) The benefits under this agreement are not to be taken into consideration in determining a development contribution under section 94 of the Act.

## 8 Registration of this agreement

### 8.1 Developer Interest

- (a) WFM represents and warrants to the Council that on the date of this agreement it is the registered proprietor of Lot 1 DP 1009227.
- (b) NGP represents and warrants to the Council that on the date of this agreement it is the registered proprietor of Lot 100 DP 632638.

### 8.2 Registration of this agreement

- (a) The Developer agrees to procure the registration of this agreement under the *Real Property Act 1900 (NSW)* in the relevant folios of the Register of the Land in accordance with section 93H of the Act.
- (b) The Developer, at its own expense, must:
  - (i) procure the lodgement of this agreement with the Registrar-General as soon as reasonably practicable after this agreement comes into operation, but in any event, no later than 20 Business Days after that date;
  - (ii) procure the registration of this agreement by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this agreement is lodged for registration; and
  - (iii) provide documentary evidence that the registration of this agreement has been completed to Council within 5 Business Days of receiving confirmation that the registration has occurred.
- (c) The Developer at its own expense will take all practical steps, and otherwise do anything that the Council reasonably requires to procure:
  - (i) The consent of each person who:
    - (A) has an estate or interest in the Land registered under the *Real Property Act 1900 (NSW)*; or
    - (B) is seized or possessed of an estate or interest in the Land,
  - (ii) An acceptance of the terms of this agreement and an acknowledgement in writing from any existing mortgagee in relation to the Land that the mortgagee will adhere to the provisions of this agreement if it takes possession of the Land as mortgagee in possession,
  - (iii) The execution of any documents; and
  - (iv) The production of the relevant duplicate certificates of title,
 to enable the registration of this agreement in accordance with this clause 8.2.
- (d) The Landowners consent to the registration of the agreement in accordance with this clause 8.2.

### 8.3 Release

The Council agrees to promptly provide a release and discharge of this Agreement with respect to any part of the Land if the Developer requests a release and discharge of this Agreement (whether in full or part) and:

- (a) In the case of a request for a full release and discharge, the Developer has complied with all its obligations under this Agreement to the Council's satisfaction which should not be unreasonably withheld; or
- (b) In the case of a request for partial release and discharge:
  - (i) the Developer has, at the time of the request complied with its obligations under this Agreement to the Council's satisfaction, which should not be unreasonably withheld, to the extent that they affect that part of the Land to which the partial release relates;
  - (ii) this Agreement has been and will remain registered against the title of any land to be the subject of an easement or covenant under this agreement (unless the registration of the easement or covenant will occur at the same time as the partial release and discharge); and
  - (iii) this Agreement has been and will remain registered against the common property of the Development.

### 8.4 Removal from Register

Within 10 Business Days of the council confirming any release and discharge under clause 8.3, the Council will, at the Developer's cost, do all things necessary to enable the extinguishment or cancellation of this agreement from the Register pertaining to the Land or the relevant part of the Land affected by the obligations under this agreement that have been satisfied to allow the release and discharge.

### 8.5 Caveat

- (a) The Landowners acknowledge and agree that:
  - (i) when this agreement is executed, the Council is deemed to have acquired and the Landowners are deemed to have granted, an equitable estate and interest in the Land for the purposes of section 74F(1) of the *Real Property Act 1900* (NSW) and consequently the Council will have a sufficient interest in the Land in respect of which to lodge a caveat over the Land notifying that interest;
  - (ii) they will not object to the Council lodging a caveat in the relevant folios of the Register for the Land nor will they seek to remove any caveat lodged by the Council provided the caveat does not prevent registration of any dealing or plan other than a transfer.
- (b) The Council must, at the Developer's cost, register a withdrawal of any caveat in respect of the Land within five Business Days after the Developer complies with clause 8.2 and must not lodge any other caveats on the titles to any of the Land.

## 9 Review of this agreement

- (a) This agreement may be reviewed or modified. 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.

## 10 Dispute Resolution

### 10.1 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.

### 10.2 Notice of Dispute

The party wishing to commence the dispute resolution process must give written notice (**Notice of Dispute**) to the other parties 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.

### 10.3 Representatives of Parties to Meet

- (a) The representatives of the parties must promptly (and in any event within 20 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 or expert determination in accordance with clause 10.6 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 expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

### 10.4 Further Notice if Not Settled

If the dispute is not resolved within 10 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 10.5 or by expert determination under clause 10.6.

### 10.5 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 15 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 15 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 10.5 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 15 Business Days of receipt of the Determination Notice notify each other of their representatives who 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 5 Business Days of the resolution);
- (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; 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 vexatious or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that party.

#### 10.6 *Expert determination*

If the dispute is not resolved under clause 10.3 or clause 10.5, or the parties otherwise agree that the dispute may be resolved by expert determination, the parties may refer the dispute to an expert, 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 parties; and
  - (ii) In the event that no agreement is reached or no appointment is made within 20 Business Days of the agreement to refer the dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales;
- (b) The expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) The determination of the dispute by such an 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 and will share equally 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 unless:
  - (i) Within 20 Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and commences litigation; or
  - (ii) The determination is in respect of, or relates to, termination or purported termination of this agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal.

### 10.7 *Litigation*

If the dispute is not *finally* resolved in accordance with this clause 10, then either party is at liberty to litigate the dispute.

### 10.8 *No suspension of contractual obligations*

Subject to any interlocutory order obtained under clause 10.1, the referral to or undertaking of a dispute resolution process under this clause 10 does not suspend the parties' obligations under this agreement.

## 11 Security and Enforcement

### 11.1 *Default*

- (a) In the event a party considers another party has failed to perform and fulfil an obligation under this agreement, it may give notice in writing to the other party (**Default Notice**) giving all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than 21 days.
- (b) In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (c) If a party disputes the Default Notice it may refer the dispute to dispute resolution under clause 10 of this agreement.

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

In accordance with section 109H of the Act, the following obligations must be satisfied prior to the issue of the first Occupation Certificate for the Development, or any part of the Development:

- (a) Payment of the Monetary Contribution under clause 6.1; and
- (b) Registration of the covenant and easement, unless the Developer has been released from that obligation in accordance with clause 6.2(h).

### 11.3 *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.

## 12 *Assignment and Dealings*

### 12.1 *Assignment*

- (a) A party must not assign or deal with any right under this agreement without the prior written consent of the other parties and such consent must not be unreasonably withheld.
- (b) Any change of ownership or control (as defined in section 50AA of the *Commonwealth Corporations Act 2001*) of a party (excluding the Council) shall be deemed to be an assignment of this agreement for the purposes of this clause.
- (c) Any purported dealing in breach of this clause is of no effect.

### 12.2 *Arrangements with Mortgagee*

- (a) The Landowners agree with the Council that if either Landowner mortgages any part of the Land after this agreement is entered into that Landowner must use all reasonable efforts at that time to arrange a multiple party deed of agreement between the Council, the Landowner, and the mortgagee, so that the mortgagee accepts that the responsibilities set out in this agreement are binding upon the mortgagee in the event that the Landowner defaults on the mortgage and the mortgagee takes possession of the Land.
- (b) The terms of the adoption of the obligations of Landowner by the mortgagee shall be as reasonably required by the Council. The agreement shall be prepared at the cost of the relevant Landowner.

### 12.3 *Transfer of Land*

- (a) The Landowners may not transfer, assign or dispose of the whole or any part of its right, title or interest in the Land (present or future) or in the Development to another person (**Transferee**) unless before each sells, transfers or disposes of that right, title or interest:
  - (i) The relevant Landowner satisfies the Council that the proposed Transferee is financially capable of complying with the Developer obligations under this agreement;
  - (ii) The relevant Landowner satisfies the 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;

- (iv) The Transferee delivers to the Council any Bond or Bank Guarantee to secure the performance of this agreement, as required by Council, acting reasonably, at the time of transfer;
- (v) Any default under any provisions of this agreement has been remedied or waived by the Council, on such conditions as the Council may determine, and
- (vi) The Transferee pays the Council's reasonable costs in relation to the assignment.

## 13 Approvals and consents

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 agreement in that party's absolute discretion and subject to any conditions determined by the party. A party is not obligated by this agreement to give its reasons for giving or withholding consent or for giving consent subject to conditions.

## 14 No fetter

### 14.1 *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 Planning Proposal, or any Development Application applying to the Land (all referred to in this agreement as a "**Discretion**").

### 14.2 *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 on the extent that is possible having regard to the relevant court judgment.

### 14.3 *Planning Certificates*

The Landowners acknowledge that Council may, at its discretion, include advice on any planning certificate issued under section 149(5) of the Act that this agreement affects the Land.

## 15 Notices

### 15.1 Notices

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 email or 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  
 Email: [Council email]  
 Attention: Manager, Land Use Planning
  - (ii) to Arcadia Land Estate Pty Ltd: Dyldam Developments  
 Level 1, 74 Macquarie Street  
 Parramatta NSW 2150  
 Email: info@dyldam.com.au  
 Attention: Remon Fayad
  - (iii) to WFM Motors Pty Ltd: Level 2, 10 Neild Avenue  
 Darlinghurst NSW 2010  
 Email: [npolitis@wfmmotors.com.au](mailto:npolitis@wfmmotors.com.au)  
 Attention: Nick Politis
  - (iv) to NGP Investments (No 2) Pty Limited: Level 1, 225 George Street  
 Sydney NSW 2000  
 Email: [npolitis@wfmmotors.com.au](mailto:npolitis@wfmmotors.com.au)  
 Attention: Nick Politis
- (c) is taken to be given or 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
  - (iii) in the case of a fax, on production of a transmission report by the machine from which the fax was sent that indicates the fax was sent in its entirety to the recipient's fax number; and
- (d) if under clause (c) 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 4.00 pm (local time), it is taken to have been given or made at the start of business on the next Business Day in that place.

## 15.2 *Notices sent by email:*

- (a) A party may serve a Notice by email if the Notice:
  - (i) includes a signature block specifying:
    - (A) the name of the person sending the Notice; and
    - (B) the sender's position within the relevant party;
  - (ii) states in the body of the message or the subject field that it is sent as a Notice under this agreement;
  - (iii) contains an express statement that the person sending the Notice has the authority to serve a Notice under this agreement;
  - (iv) is sent to the email address in clause 15.1 or the email address last notified by the intended recipient to the sender
- (b) The recipient of a Notice served under this clause 15.2 must:
  - (i) promptly acknowledge receipt of the Notice; and
  - (ii) keep an electronic copy of the Notice,
- (c) Failure to comply with clause 15.2 does not invalidate service of a Notice under this clause.

## 15.3 *Receipt of Notices sent by email*

- (a) A Notice sent under clause 15.2 is taken to be given or made:
  - (i) when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above;
  - (ii) when the Notice enters an information system controlled by the recipient;  
or
  - (iii) when the Notice is first opened or read by the recipient,  
whichever occurs first.
- (b) If under clause 15.3 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 4.00 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.

## 16 General

### 16.1 *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.

#### **16.2 *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 5.00 pm on the specified day, it is taken to have been done on the following Business Day.

#### **16.3 *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.

#### **16.4 *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.

#### **16.5 *Variations and Amendments***

Subject to the provisions of the Act, this agreement may only be varied or amended by written agreement between all parties.

#### **16.6 *Counterparts***

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

#### **16.7 *Legal expenses and stamp duty***

- (a) The Developer and Landowners must pay the Council's reasonable legal costs and disbursements in connection with the negotiation, preparation, execution, carrying into effect, enforcement and release and discharge of this agreement, including the reasonable costs of obtaining any legal advice in connection with this agreement, no later than 10 Business Days after receiving a demand from the Council to pay such costs.
- (b) The Developer and Landowners agree to pay or reimburse the reasonable costs and expenses incurred by Council in connection with the advertising and exhibition of this agreement in accordance with the Act.
- (c) The Developer and Landowners agree to pay Council any reasonable administrative fees as required by Council, acting reasonably, in connection with the administration of this agreement.

#### **16.8 *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.

### 16.9 *Representations and warranties*

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

### 16.10 *Severability*

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

### 16.11 *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 16.11(b) applies.

### 16.12 *Waiver*

- (a) 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.
- (b) The fact that a party fails to do, or delays in doing, something the party is entitled to do under this agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another party. A waiver by a party is only effective if it is in writing. A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

### 16.13 *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 and Landowners 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.

- (d) If the Council is obliged to pay any GST on any supply made under or in accordance with this agreement, the Developer indemnifies the Council for the amount of any such payment is required to make.

**16.14 *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.

## Schedule 1            Land and Planning Proposal

<b>Term</b>	<b>Definition</b>
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<b>Land</b>	Means the following: <ul style="list-style-type: none"><li>(a) Lot 1 DP 1009227, known as 87 Church Street, Parramatta; and</li><li>(b) Lot 100 DP 632636, known as 6 Great Western Highway, Parramatta, as shown on the Location Plan in Annexure A.</li></ul>
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<b>Planning Proposal</b>	Means a proposal to amend the LEP to: <ul style="list-style-type: none"><li>(a) increase the floor space ratio control applying to the Land from 3.5:1 to 10:1 (excluding any bonus floor space available for design excellence under the LEP);</li><li>(b) increase the maximum height limit applying to the Land from 28m to 180m; and</li><li>(c) require a minimum of 20% of gross floor area in any development on the Land to be used for non-residential purposes.</li></ul>
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## Schedule 2 Summary of requirements (section 93F)

Subject and subsection of the Act	Planning Agreement
<b>Planning instrument and/or Development Application – Section 93F(1)</b>	
The Developer and Landowners have:	
(a) Sought a change to an environmental planning instrument	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
(b) Made, or propose to make a Development Application	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
(c) Entered into an agreement with, or are otherwise associated with, a person to whom paragraph (a) or (b) applies	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No The Developer and Landowners have entered into an agreement with Hamptons Property Services Pty Ltd, which has sought a change to the LEP for the purposes of making a development application.
<b>Description of the application</b>	The Planning Proposal involves an increase in maximum building height limits and floor space ratio controls applying to the Land. See the definition of Planning Proposal in Schedule 1.
<b>Description of the land to which the planning Agreement applies – Section 93F(3)(a)</b>	See the definition of Land in Schedule 1.
<b>The scope, timing and manner of delivery of contribution required by the Planning Agreement – Section 93F(3)(b)</b>	See clause 6.
<b>Applicability of section 94 of the Act – Section 93F(3)(d)</b>	Not excluded. See clause 7.
<b>Applicability of section 94A of the Act – Section 93F(3)(d)</b>	Not excluded. See clause 7.
<b>Applicability of section 94EF of the Act – Section 93F(3)(d)</b>	Not excluded. See clause 7.
<b>Mechanism for dispute resolution – Section 93F(3)(f)</b>	See clause 10.
<b>Enforcement of the Planning Agreement – Section 93F(3)(g)</b>	See clause 11.
<b>Registration of the Planning Agreement – Section 93F(3)(g)</b>	Yes. See clause 8.

**No obligation to grant consent or exercise functions** – Section 93F(9) See clause 14 (no fetter)

Executed as an agreement

Executed by City of Parramatta City Council under seal in accordance with a resolution of the Council on [insert date]:

Signature of [insert position]

Signature of [insert position]

Print name

Print name

Executed by Arcadia Land Estate Pty Ltd (ACN 609 955 704) in accordance with s127 of the Corporations Act 2001 (Cth):

Signature of Director

Signature of Director/ Secretary

Print name

Print name

Executed by **WFM Motors Pty Ltd (ACN 001 632 837)** in accordance with s127 of the *Corporations Act 2001* (Cth): )  
)  
)

.....  
Signature of Director

.....  
Signature of Director/ Secretary

.....  
Print name

.....  
Print name

Executed by **NGP Investments (No 2) Pty Limited (ACN 001 495 343)** in accordance with s127 of the *Corporations Act 2001* (Cth): )  
)  
)

.....  
Signature of Director

.....  
Signature of Director/ Secretary

.....  
Print name

.....  
Print name