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Crows Nest Plaza Planning Agreement

Draft 12/11/2013

North Sydney Council

Coles Group Property Developments Ltd

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Crows Nest Plaza

Planning Agreement

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Date	
Parties	
1.	North Sydney Council of 200 Miller Street, North Sydney, NSW 2060 (Council).
2.	Coles Group Property Developments Ltd (ACN 004 428 326) of L1 M6 / 800 Toorak Road, Hawthorn East, Victoria 3123 (the Owner).
Recitals	
A	The Owner is the registered proprietor of Lot 1 in DP 1265 and Lot 101 in DP 771247 (known as 101-111 Willoughby Road, North Sydney – Crows Nest Plaza).
B	The Land is located in the local government area of North Sydney and is currently zoned mixed use under the North Sydney Local Environmental Plan 2001.
C	The Owner proposes to make a Development Application for redevelopment of the Land. The development is proposed to comprise a 4– 6 storey mixed use building including: • 3 levels of residential and non-residential parking; and • residential and commercial floor space.
D	The Development will be carried out on the Land and on Part Zig Zag Lane adjacent to the Development to the east.
E	LEP 2013 limits the erection of buildings on the Land in excess of the height shown on the map. LEP 2013 also zones Part Zig Zag Lane as Special Uses.
F	The Developer has sought a change to LEP 2013 to increase the height limit that applies to the Land and to re-zone Part Zig Zag Lane.
G	The Owner acknowledges that if the Development is carried out it is likely to increase the demand for the provision of public facilities.
H	This Deed represents an offer by the Owner to Council in accordance with Subdivision 2 of Division 6 of Part 4 of the Act to make Contributions to Council in respect of the Instrument Change and the Development, upon the terms set out in this Deed.

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It is agreed as follows.

1. Definitions and interpretation

1.1 Dictionary

The following words have these meanings in this Deed unless the contrary intention appears:

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

Authority means any Federal, State or local government or semi-governmental, statutory, judicial or public person, instrumentality or department.

Business Day means any day except for Saturday or Sunday or a day which is a public holiday in Sydney.

Completion means the state when the Contribution Works are complete and a certificate of completion has been issued by the Council for those works as required under clause 4 of Schedule 1. **Complete** has a corresponding meaning.

Confidential Information means any information and all other knowledge at any time disclosed (whether in writing or 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 or required to be in the public domain and which:

- (a) is by its nature confidential;
- (b) is designated, or marked, or stipulated by either Party as confidential (whether in writing or otherwise);
- (c) any Party knows or ought to know is confidential; or
- (d) is information which may reasonably be considered to be of a confidential nature.

Contribution Works means the works to be undertaken by the Owner as described in clause 4(a) of Schedule 1.

Contributions means the contributions provided for in Schedule 1, and includes the registration of covenants and easements in gross permitting public access to land in accordance with that Schedule.

Council means North Sydney Council.

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

Development means the proposed redevelopment of the Crows Nest Plaza as described in Recital C.

Development Application has the same meaning as under the Act.

Development Consent means a consent granted under Part 4 of the Act by Council or other consent authority to carry out the Development or any part of the Development.

Discretion has the meaning given in clause 11.6.

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Document includes agreement, deed, instrument, memorandum, note and the like.

Explanatory Note means the explanatory note required by the Regulation.

Force Majeure means a circumstance beyond the reasonable control of a party which results in that party being unable to observe or perform on time an obligation under this Deed including:

- (a) acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires and any natural disaster; and
- (b) civil commotion, national emergency, power shortage, strike or other labour difficulty (whether or not involving employees of a party concerned), action or inaction of a government or other competent authority;

but excludes breakdown of plant, machinery or equipment or shortages of labour, equipment or material.

GST has the same meaning as in the GST Law.

GST Law has the same meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

Instrument Change means the proposed amendment to LEP 2013 to increase the height limit that applies to the land and to re-zone Part Zig Zag Lane.

Land means Lot 1 in DP 1265 and Lot 101 in DP 771247, known as 101-111 Willoughby Road, North Sydney, New South Wales.

Laneway means Part Zig Zag Lane, or the land formerly comprising Part Zig Zag Lane, if that public road is closed in accordance with the provisions of the *Roads Act 1993*.

Law means the relevant requirements of all statutes, rules, ordinances, regulations, proclamations, by-laws or consents issued by an Authority, present or future, including applicable principles of common law.

LEP 2013 means North Sydney Local Environmental Plan 2013.

Non-Residential Car Park has the meaning given in clause 2.1 of Schedule 1.

Occupation Certificate means a certificate referred to in section 109C(1)(c) of the Act, and includes an interim occupation certificate as defined in section 109H(1)(a) of the Act.

Owner means the registered proprietor of the Land, which at the date of this deed is Coles Group Property Developments Ltd.

Part Zig Zag Lane means that part of the public road known as Zig Zag Lane identified in the plan at **Schedule 2**, including the widened area of that public road used as at the date of this Deed for public car parking.

Party means a party to this Deed. **Parties** has a corresponding meaning.

Planning Agreement means the provisions of this Deed as and when it becomes operative as a planning agreement pursuant to clause 2.1(b), under which the Owner is required to make Contributions in connection with the carrying out of the Development, and includes any provisions that are incidental or supplementary to those provisions.

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Plaza Area has the meaning given in clause 3.1 of Schedule 1.

Public Pedestrian Walkway has the meaning given in clause 1.2(a) of Schedule 1.

Put and Call Option Deed means the deed referred to in clause 1.1(a) of Schedule 1.

Real Property Act means the *Real Property Act 1900 (NSW)*.

Register means the Torrens title register maintained under the Real Property Act.

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

Representative means the person designated by each Party in accordance with clause 6.2 to negotiate disputes.

State means the State of New South Wales and, where the context permits, includes a public authority as defined in section 4(1) of the Act.

State Government means the government of the State, including its elected and appointed representatives.

Transfer means a transfer in the approved form under the *Real Property Act 1900 (NSW)* which is duly stamped, signed and otherwise in registrable form.

Transferee means any person to whom the Owner proposes to sell, transfer or grant any right, title of interest in the Land,

1.2 Interpretation

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

- (a) A reference in this Deed to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (b) A reference in this Deed to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
- (c) An expression importing a natural person includes any company, trust partnership, joint venture, association, body corporate or governmental agency.
- (d) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (e) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular and a reference to any gender denotes other genders.
- (f) References to the word "include" or "including" are to be construed without limitation.
- (g) A reference to this Deed includes the agreement recorded in this Deed.
- (h) A reference to a Party to this Deed includes a reference to the servants, agents and contractors of the Party and the Party's successors and assigns.
- (i) Any Explanatory Note prepared in relation to this Deed is not to be used to assist in construing this Deed.

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1.3 Schedules, headings and textual notes

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- (a) The Schedules form part of this Deed.
 - (b) The headings and any textual notes in this Deed do not form part of the operative provisions of this Deed but are provided merely for the assistance of the reader.

2. Operation, term and amendment of this Deed

2.1 Operation of this Deed

- (a) Until the Planning Agreement operates pursuant to clause 2.1(b), this Deed constitutes an irrevocable offer to Council from the Owner to enter into the Planning Agreement in accordance with the terms of this Deed.
- (b) The Planning Agreement operates if:
 - (i) The Instrument Change is made;
 - (ii) Development Consent is granted;;
 - (iii) the Planning Agreement is entered into as required by section 93F of the Act; and
 - (iv) Council executes this Deed.
- (c) For the avoidance of doubt, nothing in this Deed requires the Owner to commence the Contribution Works in the event that no building, engineering or construction work authorised by the Development Consent is physically commenced within the meaning of section 95(4) of the Act and this Deed is intended to specify the times when Contributions Works must be completed and the Contributions provided.

2.2 Effect of this Deed

- (a) Subject to clause 2.1, the Parties agree that this Deed constitutes a planning agreement within the meaning of section 93F of the Act.
- (b) This Deed applies to the Land and the Development.
- (c) Subject to clause 3.2, this Deed does not exclude the application of sections 94, 94A and 94EF of the Act to the Land and the Development.

2.3 Term of this Deed

This Deed will remain in force until:

- (a) it is terminated by operation of Law;
- (b) all obligations are performed or satisfied; or
- (c) all Development Consents granted to the Development have lapsed under s95 of the Act.

2.4 Amendment of this Deed

The Parties agree that, subject to section 93G of the Act, this Deed can be reviewed and amended at any time by mutual agreement.

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3. Requirement to provide Contributions

3.1 Contributions to be made under this Deed

The Owner undertakes to provide, or procure the provision of, the Contributions in the manner and at the times set out in Schedule 1 and the Parties agree to abide by the procedures and obligations set out in Schedule 1.

3.2 Section 94 Contributions

- (a) The Contributions are to be taken into consideration by Council under s94(6) of the Act in determining development contributions applicable to the Development under section 94 of the Act.
- (b) The Council will assess whether the Contributions provide a material public benefit capable of satisfying, wholly or in part, obligations which may arise upon the development of the Land in accordance with Section 2.5 of the North Sydney Section 94 Contributions Plan 2013.

4. Registration of Deed

4.1 Ownership

The Owner represents and warrants to the Council that as at the date of this Deed it is the legal owner of the Land and holds the Land in its capacity as registered proprietor.

4.2 Obligation to register

- (a) The Owner and Council agree that this Deed will be registered on the title of the Land pursuant to section 93H of the Act.
- (b) The Owner will, at its own expense, do all things necessary to procure the registration of the Deed in the relevant folios of the Register for the Land in accordance with paragraph (a), including:
 - (i) procuring the consent of each person who has an estate or interest in the Land registered under the Real Property Act or is seized or possessed of an estate or interest in the Land;
 - (ii) executing any documents;
 - (iii) producing any relevant certificates of title; and
 - (iv) lodging this Deed in registrable form with the Land and Property Information Office as soon as reasonably practicable after execution of this Deed by both parties, but in any event, no later than 10 Business Days after that date.

4.3 Release and discharge of Deed

Council will, at the Owner's expense, do all things reasonably required by the Owner to provide a release and discharge of this Deed with respect to any part of the Land and

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remove the registration of this Deed against the relevant folios of the Register upon the Owner satisfying all of its obligations under this Deed in respect of that part of the Land.

5. Force Majeure**5.1 Consequences of Force Majeure event**

- (a) If a Party is unable by reason of Force Majeure to carry out wholly or in part its obligations under this Deed, it must:
 - (i) give to the other Party prompt notice of the Force Majeure with reasonably full particulars of the Force Majeure and the probable extent to which that Party will be unable to perform or be delayed in performing its obligations; and
 - (ii) suggest a reasonable alternative method, if any, of satisfying its obligations under this Deed.
- (b) If a Party is unable to satisfy its obligations under this Deed by an alternative method, the obligations of the Parties so far as they are affected by the Force Majeure are then suspended during continuance of the Force Majeure and any further period as may be reasonable in the circumstances.
- (c) The Party giving such notice under this clause must use all reasonable effort and diligence to remove the Force Majeure or ameliorate its effects as quickly as practicable.

5.2 Dispute

If the Parties are unable to agree on the existence of a Force Majeure event or the period during which the obligations of the Parties are suspended during the continuance of the Force Majeure, that dispute must be notified and dealt with in accordance with clause 6.

6. Dispute resolution**6.1 Proceedings not to be commenced**

If a dispute arises out of or in connection with this Deed, a Party must not commence any court proceedings relating to the dispute unless and until that Party has complied with the following clauses.

6.2 Notice of dispute

- (a) If a dispute arises out of or in connection with this Deed, the Party claiming that a dispute has arisen must serve written notice on the other Party specifying the nature of the dispute and designating a person to act as the Representative of that Party in relation to that dispute.
- (b) Upon receiving notice of a dispute in accordance with clause 6.2(a), the other Party must, within 5 Business Days of receiving such notice, provide notice to the first Party designating a person to act as its Representative in relation to that dispute.

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- (c) Notwithstanding clause 6.2(b), if it is necessary for the Council to meet and pass a resolution to appoint a Representative, the Council will not be required to provide the notice under clause 6.2(b) until 5 Business Days after the Council has met and resolved to appoint a person as the Representative, such meeting to be held as soon as reasonably practicable after the receipt by Council of notice in accordance with clause 6.2(a).

6.3 Attempt to resolve

- (a) Any dispute between the Parties arising in connection with this Deed must be referred to the Representatives who must attempt to resolve the dispute within 5 Business Days of notice being provided in accordance with clause 6.2(b).
- (b) If the Representatives have not been able to resolve the dispute within 5 Business Days, then the Parties must endeavour in good faith to resolve the dispute expeditiously using informal dispute resolution techniques such as mediation, expert evaluation or other techniques agreed by the Parties.

6.4 Mediation

- (a) If the Parties do not agree within 20 Business Days of receipt of a notice under clause 6.2 as to:
- (i) the dispute resolution technique and procedures to be adopted;
 - (ii) the timetable for all steps in those procedures; and
 - (iii) the selection and compensation of the independent person required for such technique,

the Parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales and must request the President of the Law Society of New South Wales or the President's nominee to select the mediator and determine the mediator's remuneration.

- (b) The Parties must bear the costs of any mediator appointed in accordance with clause 6.4(a) in equal shares.

6.5 Court proceedings

If the dispute is not resolved within 30 Business Days after notice is given under clause 6.2, then any Party which has complied with the provisions of this clause 6 may, by giving notice in writing to the other Party, terminate any dispute resolution process under this clause 6 and may commence court proceedings in relation to the dispute.

7. Enforcement and Security

- (a) This Agreement may be enforced by any party in any Court of competent jurisdiction.
- (b) The Owner covenants with the Council that the Owner will not rescind or terminate this Deed or make a claim that this Deed is void, voidable, illegal or unenforceable

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because a condition of a Development Consent requires the Owner to enter into a planning agreement on the terms of this Deed.

(c) In accordance with s109H(2) of the Act:

- (i) completion certificates for any Contribution Works as required under Schedule 1 must be issued; and
- (ii) the Owner must take the following steps to enable registration of easements in gross and covenants permitting public access to relevant land as required under Schedule 1:
 - (A) obtain all necessary consents to the registration of the easements;
 - (B) lodge the consents and the Certificates of Title to the Land with the Land and Property Information Office; and
 - (C) lodging an executed instrument in registerable form with the Land and Property Information Office to give effect to the easements and covenants;

prior to the issue of any Occupation Certificate authorising the occupation of any building or any part of any building, forming part of the Development.

- (d) The Owner agrees and acknowledges that the obligations under this Deed to carry out the Contribution Works that are part of the Development are relevant considerations for the Council or any other consent authority when determining any Development Application for the Development and that any inconsistency in the Development Application with the requirements in those clauses may constitute a reason for refusal of any such application.
- (e) Nothing in this clause 7 prevents:
 - (i) A party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Deed or any matter to which this Deed relates; or
 - (ii) The Council from exercising any function under any Law relating to the enforcement of any aspect of this Deed or any matter to which this Deed relates.

8. Assignment and Dealings

The Owner may not sell, transfer or dispose of any right, title or interests in the Land or the Development to another person (*Transferee*), unless before it sells, transfers or disposes of that right, title or interest:

- (a) the Owner procures the execution by that person of a deed of novation in the form in Schedule 6 by which that person agrees to be bound by the Deed as if they were a party to the original Deed; and
- (b) the Owner satisfies the Council that the Owner is not in breach of this Deed; and

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- (c) the Owner and the Transferee agree to pay the Council's reasonable costs in relation to the assignment.

9. Confidentiality

9.1 This Deed not confidential

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

9.2 Other information confidential

- (a) The Parties acknowledge that:
- (i) Confidential Information may have been supplied to some or all of the Parties in the negotiations leading up to the making of this Deed; and
 - (ii) the Parties may disclose to each other further Confidential Information in connection with the subject matter of this Deed.
- (b) Subject to Clauses 9.2(c) and (d), each Party agrees:
- (i) not to disclose any Confidential Information received before or after the making of this Deed to any person without the prior written consent of the Party who supplied the Confidential Information; and
 - (ii) to take all reasonable steps to ensure all Confidential Information received before or after the making of this Deed is kept confidential and protected against unauthorised use and access.
- (c) A Party may disclose Confidential Information in the following circumstances:
- (i) in order to comply with the Law, State Government policy or local government policy or any listing rule; or
 - (ii) to any of their employees, consultants, advisers, financiers, contractors or related bodies corporate to whom it is considered necessary to disclose the information, if the employees, consultants, advisers, financiers, contractors or related bodies corporate undertake to keep the information confidential.
- (d) 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.

10. GST

10.1 Definitions

Words used in this clause which are defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the meaning given in that legislation.

10.2 GST to be added to amounts payable

If GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the

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GST Amount as additional Consideration. This clause does not apply to the extent that the Consideration for the Taxable Supply is expressly agreed to be GST inclusive.

10.3 Consideration GST exclusive

Unless otherwise expressly stated, all prices or other sums payable or Consideration to be provided under or in accordance with this Deed are exclusive of GST.

10.4 Liability net of GST

Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a Party, must exclude the amount of any Input Tax Credit entitlement of that Party in relation to the relevant cost, expense or other liability.

10.5 GST obligations to survive termination

This clause will continue to apply after expiration or termination of this Deed.

11. General provisions**11.1 Entire agreement**

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

11.2 Variation

No variation of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed.

11.3 Waiver

A right created by this Deed cannot be waived except in writing signed by the Party entitled to that right. The fact that a Party fails to exercise, or delays in exercising, a right does not constitute a waiver of that right, nor will a waiver (either wholly or in part) by a Party of a right on a particular occasion operate as a subsequent waiver of the same right or of any other right of that Party.

11.4 Further assurances

Each Party to this Deed must sign and execute all documents and do all things as may be reasonably required to be done by the Party to give effect to this Deed.

11.5 Time for doing acts

- (a) If:
 - (i) the time for doing any act or thing required to be done; or
 - (ii) a notice period specified in this Deed,

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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.

11.6 Deed does not fetter discretion

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- (a) Nothing in this Deed shall be construed as operating to fetter, in any unlawful manner:
 - (i) the power of Council to make any Law; or
 - (ii) the exercise by Council of any statutory power or discretion, (referred to in this Deed as a *Discretion*).
 - (b) If, contrary to the operation of this clause, any provision of this Deed is held by a court of competent jurisdiction to constitute an unlawful fetter on any Discretion, the Parties agree:
 - (i) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause 11.6 is substantially satisfied; and
 - (ii) in the event that clause 11.6(b)(i) cannot be achieved without giving rise to an unlawful fetter on Discretion, the relevant provision is to be severed and the remainder of this Deed has, to the fullest extent possible, full force and effect; and
 - (iii) to endeavour to satisfy the common objectives of the Parties in relation to the provision of this Deed which is held to be an unlawful fetter to the extent that is possible having regard to the relevant court judgment.

11.7 Good faith

Each Party must act in good faith towards the other Party and use its best endeavours to comply with the spirit and intention of this Deed.

11.8 Choice of Law

The Laws of New South Wales as in force from time to time govern this Deed. The Parties submit to the non-exclusive jurisdiction of the court of New South Wales and any courts competent to hear appeal from those courts.

11.9 Severance

If any clause or part of any clause is in any way unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid and legal. If this is not possible, the clause (or where possible, the offending part of the clause) is to be severed from this Deed and the remainder of the Deed is, to the fullest extent possible, to be read and performed as if the clause (or offending part of the clause) does not form part of this Deed.

11.10 Representations and warranties

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

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11.11 Power of attorney

If an attorney executes this Deed on behalf of any party, the attorney declares that it has no notice of the revocation or suspension of the power of attorney.

11.12 Counterparts

This Deed may be executed in counterparts. All counterparts taken together constitute one instrument.

11.13 Notices

Any notice, request, demand, consent or other communication given or made under this Deed:

- (a) must be in writing and signed by the sender or the person duly authorised by the sender;
- (b) must be addressed and delivered to the intended recipient at the address below or the address last notified by the intended recipient to the sender after the date of this Deed:

(i) to Council North Sydney Council
 200 Miller Street
 North Sydney NSW 2060

(ii) to the Owner Coles Group Property Developments Ltd
 Attention: Director of Property
 L3 M6 / 800 Toorak Road
 Hawthorn East Victoria 3123

- (c) will be taken to be duly given or made when delivered, received, or left at the above address. If delivery or receipt occurs on a day that is not a Business Day in the place to which the notice is sent or is later than 4pm (local time) at that place, it will be taken to have been duly given or made at the commencement of business on the next Business Day in that place.

11.14 Costs

The Owner will bear the Council's reasonable costs in relation to the preparation, negotiation and execution of this Deed.

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EXECUTED and delivered as a Deed

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Executed as a deed by **North Sydney Council** by its authorised delegate in accordance with a resolution of the Council made on _____ 2013 in the presence of:

Signature of Witness_____
Authorised Representative_____
Print Name_____
Print Name

Executed as a deed by **Coles Group Property Developments Ltd** by its duly appointed Attorney pursuant to registered Power of Attorney Book 4618 No. 967 in the presence of:

Signature of Witness_____
Attorney Signature_____
Print Name_____
Print Name

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Schedule 1 – Contributions**1. Laneway Redevelopment and Public Pedestrian Walkway****1.1 Purchase of Part Zig Zag Lane**

- (a) Council has agreed to sell and the Owner has agreed to purchase Part Zig Zag Lane in accordance with a Put and Call Option Deed. The Owner has agreed to pay the Council at settlement of the purchase:
- (i) Consideration of \$2,400,000 (plus GST) for the purchase of Part Zig Zag Lane; and
 - (ii) Consideration of \$1,100,000 (plus GST) for the right to manage and control the Non-Residential Car Park and to receive and retain all income derived from the Non-Residential Car Park,
- indexed in accordance with the provisions of the Put and Call Option Deed.
- (b) For the avoidance of doubt:
- (i) Nothing in this Deed requires the Owner to commence the works to redevelop the Laneway and construct the Public Pedestrian Walkway prior to the Owner becoming the registered proprietor of Part Zig Zag Lane or prior to obtaining all approvals necessary to lawfully carry out the works, however this Deed does not prevent the Owner from commencing those works (subject to obtaining necessary approvals) even if it is not the registered proprietor of Part Zig Zag Lane;
 - (ii) This Deed is intended to require the works to redevelop the Laneway and construct the Public Pedestrian Walkway to be completed prior to the issue of an Occupation Certificate for, or occupation of, any building forming part of the Development; and
 - (iii) The parties agree and acknowledge that if the Owner does not become the registered proprietor of Part Zig Zag Lane after the Owner has made all reasonable efforts to do so, then the parties will, in good faith and acting reasonably, negotiate an amendment to this Deed to remove the requirement to carry out the works to redevelop the Laneway and construct the Public Pedestrian Walkway and, if appropriate, replace that requirement with an alternative requirement relating to car parking, pedestrian safety and traffic impacts in the area that must be provided prior to the issue of an Occupation Certificate for, or occupation of, any building forming part of the Development.

1.2 Laneway Redevelopment

- (a) The Owner agrees to carry out or procure the carrying out of the works specified in the plans in Schedule 3 for the redevelopment of the Laneway, including:
- (i) the construction of a public pedestrian walkway along the northern side of the Laneway (*Public Pedestrian Walkway*); and

Crows Nest Plaza

Planning Agreement

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- (ii) the relocation (for the avoidance of doubt at the Owner's expense) of any services currently existing in Zig Zag Lane that will be affected by the Development or the redevelopment of the Laneway or construction of the Public Pedestrian Walkway including but not limited to water, gas, electricity, television, drainage, sewerage, cable TV, data communications, telecommunications and other services..

- (b) The works to redevelop the Laneway and construct the Public Pedestrian Walkway required by clause 1.2(a) of this Schedule 1 will be carried out in accordance with relevant standards and design specifications to be approved by the Council prior to commencement of works.
- (c) The Owner will obtain the relevant standards and design specifications for the works from the Council if the Council fails to deliver them to the Owner.
- (d) If the Owner proposes to carry out the works for the redevelopment of the Laneway, prior to Part Zig Zag Lane being closed in accordance with clause 1.1 of this Schedule 1:
 - (i) the Owner must seek and obtain all necessary approvals under the *Roads Act 1993* before carrying out any works on public roads; and
 - (ii) this Deed does not fetter the Council's discretion as roads authority in relation to approvals necessary for works to be carried out on public roads.

1.3 Easements

- (a) On Completion of the works to redevelop the Laneway and construct the Public Pedestrian Walkway, the Owner will register easements in gross in favour of the Council in accordance with the provisions of the *Conveyancing Act 1919*, permitting public access to the Laneway and the Public Pedestrian Walkway.
- (b) The easements in gross referred to in clause 1.3(a) of this Schedule 1 will include:
 - (i) a right of footway granting full and free right to the Council and every person authorised by it including any member of the public, to go, pass and repass on foot at all times and for all purposes without animals or vehicles over the Public Pedestrian Walkway and the Laneway;
 - (ii) a right of carriageway granting full and free right to the Council and every person authorised by it including any member of the public to go, pass and repass at all times and for all purposes with or without animals or vehicles or both over the Laneway.
- (c) The easements in gross referred to in clause 1.3(a) of this Schedule 1 will require the owner of the Laneway and the Public Pedestrian Walkway to:
 - (i) maintain and repair the Laneway and the Public Pedestrian Walkway to the satisfaction of the Council; and
 - (ii) maintain sufficient public liability insurance covering the use of the Laneway and the Public Pedestrian Walkway as required by the Council.

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2. Non-Residential Car Park**2.1 Construction of a public car park**

The Owner agrees that the Development will include the construction of a minimum of 140 car parking spaces on the Land and under Part Zig Zag Lane to be used as retail and public car parking in accordance with the plans in Schedule 4 (**Non-Residential Car Park**).

2.2 Car Park Management

- (a) The Parties agree that the Owner will own the Non-Residential Car Park and the Owner, or a legal entity appointed by the Owner, will manage and operate the Non-Residential Car Park.
- (b) The Owner acknowledges and agrees:
 - (i) the Non-Residential Car Park will be available for use as a public car park in perpetuity in accordance with this clause 2.2 of Schedule 1 of this Deed;
 - (ii) the Non-Residential Car Park will be accessible by the general public during the trading hours of the retail stores located on the Land; and
 - (iii) a minimum of two hours of free parking will be provided for the whole of the Non-Residential Car Park at all times during retail trading hours.
- (c) Prior to occupation of the Development, the Owner will, at no cost to Council do all things reasonably necessary to register against the title to the Land a covenant or covenants prohibiting the use of the Non-Residential Car Park for any purpose other than a public car park.
- (d) The Owner acknowledges and agrees that the covenant or covenants referred to in paragraph 2.2(c) will require the Owner to:
 - (i) maintain and repair the Non-Residential Car Park;
 - (ii) maintain sufficient public liability insurance relating to the Non-Residential Car Park as required by the Council; and
 - (iii) ensure that any rules relating to the use of the Non-Residential Car Park are approved by the Council.

3. Open Space Plaza Area**3.1 Construction of an open space plaza area**

- (a) The Owner agrees that the Development will include construction of a plaza with an area of approximately 415 square metres for use as public open space in accordance with the plans in Schedule 5 (**Plaza Area**).

3.2 Use of the Plaza Area

- (a) The Owner acknowledges and agrees that the Plaza Area will be accessible by the general public and will be available for use as public open space.
- (b) Prior to occupation of the Development, the Owner will, at no cost to Council register against the title to the Land:

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- (i) an easement in gross in favour of the Council permitting public access to the Plaza Area; and
- (ii) a covenant prohibiting the use of the Plaza Area for any purpose other than public open space and prohibiting any building or development (other than general open space embellishment) on the Plaza Area.
- (c) The Owner acknowledges and agrees that the easement in gross referred to in paragraph 3.2(b) will require the Owner to:
 - (i) maintain and repair the Plaza Area to the satisfaction of the Council;
 - (ii) maintain sufficient public liability insurance relating to the Plaza Area as required by the Council; and
 - (iii) ensure that any rules relating to the use of the Plaza Area are approved by the Council.

4. Completion of Works to be Accessed by the Public

- (a) This clause 4 of Schedule 1 applies to all works required under this Schedule 1 that will, when completed, be accessed by the public (*the Contribution Works*) including:
 - (i) The works required to redevelop the Laneway;
 - (ii) The works required to construct the Public Pedestrian Walkway;
 - (iii) The works to construct the Non-Residential Car Park; and
 - (iv) The works to construct the Plaza Area.
- (b) The Contribution Works must be designed and constructed to the Australian standards applicable to the construction of the relevant works.
- (c) When the Owner considers that the Contribution Works have been completed, it must send a notice to the Council accompanied by complete works as executed plans and a request for written certification from the Council that the Contribution Works are Complete.
- (d) Within 30 days of receipt of the notice under clause 4(c) of this Schedule 1, the Council will carry out an inspection of the Contribution Works and will either:
 - (i) provide written certification to the Owner that the Contribution Works have been completed; or
 - (ii) notify the Owner of any additional information required or matters which must be addressed by the Owner prior to the certification being issued.
- (e) Subject to clause 4(f), if the Owner is required to provide additional information or address any matters under clause 4(d) of this Schedule 1, the Owner will provide that information to the Council or address those matters within 7 days of receiving the notice and make a further request under clause 4(c) of this Schedule 1 for written certification that the Contribution Works have been completed.
- (f) If the Owner disagrees that additional information is required or additional matters are required to be addressed, as identified by Council in a notice under

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clause 4(d)(ii), before the Contribution Works are Complete, the Owner will serve written notice of a dispute in accordance with clause 6.2(a) and the Parties will comply with the dispute resolution procedure in clause 6 of this Deed.

5. Timing

- (a) The Owner agrees to Complete or procure the Completion of the Contribution Works prior to the issue of an Occupation Certificate for any building that forms part of the Development or if an Occupation Certificate is not required or obtained, prior to occupation of any building that forms part of the Development.
- (b) The Owner agrees to take all steps necessary to enable the registration of any easements or covenants required under this Schedule 1 prior to the issue of an Occupation Certificate for any building that forms part of the Development or if an Occupation Certificate is not required or obtained, prior to occupation of any building that forms part of the Development.

6. Manner of Delivery

A Contribution will be made for the purposes of this Deed when:

- (a) the Council provides a certificate of completion for any works required for that Contribution under this Schedule 1; and
- (b) any easements or covenants enabling public access to the relevant land required under this Deed have been registered against the title to that land.

7. Public Purposes

The Parties agree and acknowledge that the Contributions are intended to be used for public purposes including:

- (a) Open space and recreation;
- (b) Public roads; and
- (c) Public car parking.

8. Other Traffic and Road Works

- (a) The Owner acknowledges that any Development Consent granted for the Development may require traffic, road and footpath works to be carried out to minimise traffic impacts of the Development and accepts that such conditions of Development Consent are requirements related to the Development additional to the obligations set out under this Deed.

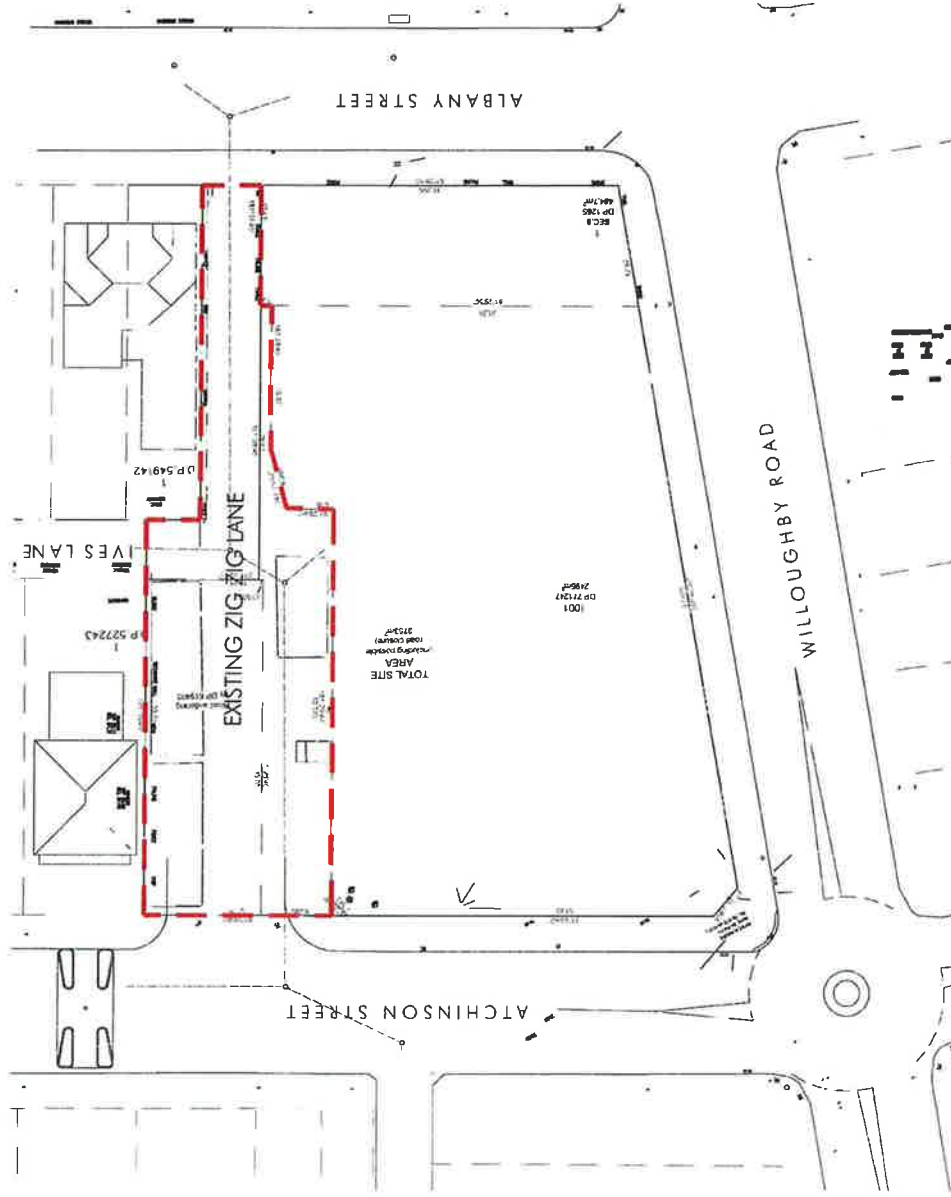
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Schedule 2 – Part Zig Zag Lane

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Existing Zig Zag Lane

1:500 @ A3

14.11.13

3844-Schedule 2

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Title
Scale
Date
Number

Willoughby Road
Crows Nest

coles



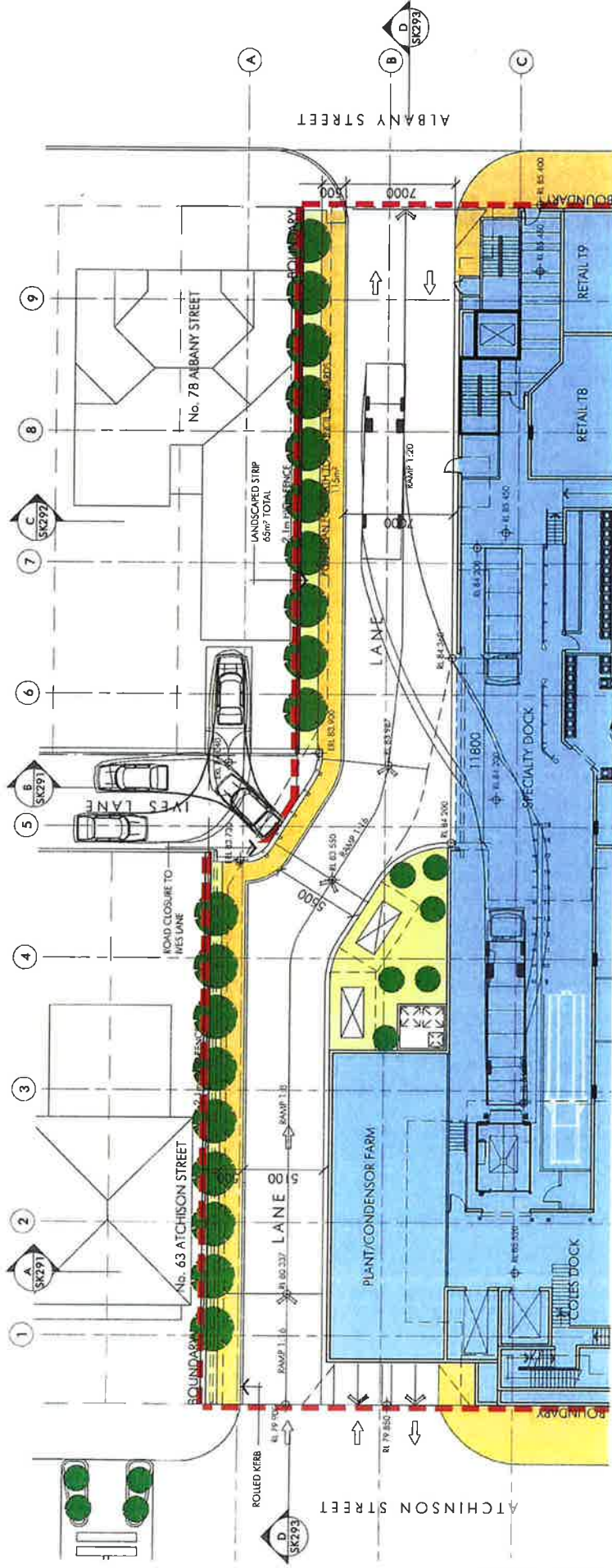
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Schedule 3 – Laneway and Public Pedestrian Walkway

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01 LANE PLAN



coles
Willoughby Road
Crows Nest

Name	Description	Date	Title
			Scale
			Date
			Number

Proposed Zig Zag Lane
1:250 @ A3

14.11.13

3844 Schedule 3
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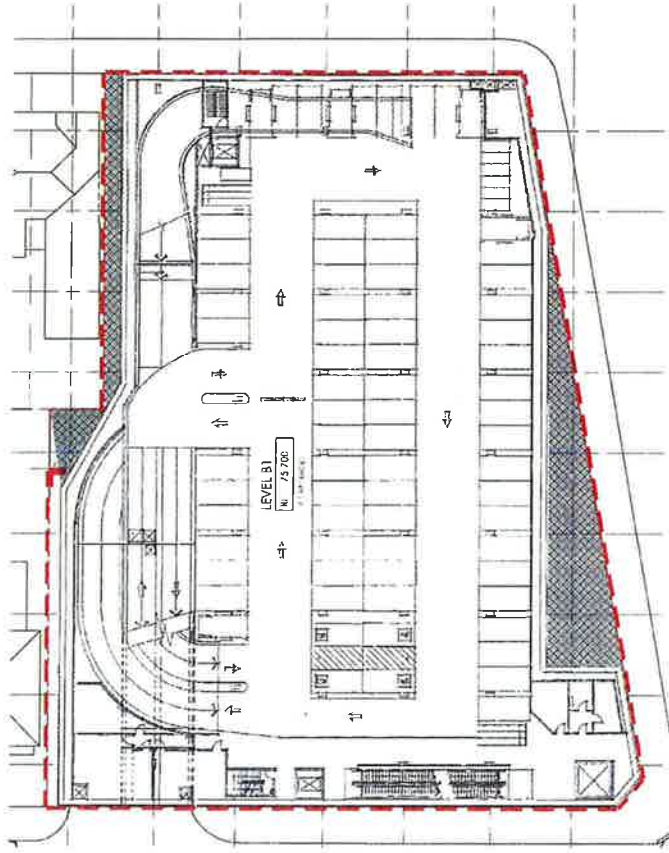
Crows Nest Plaza

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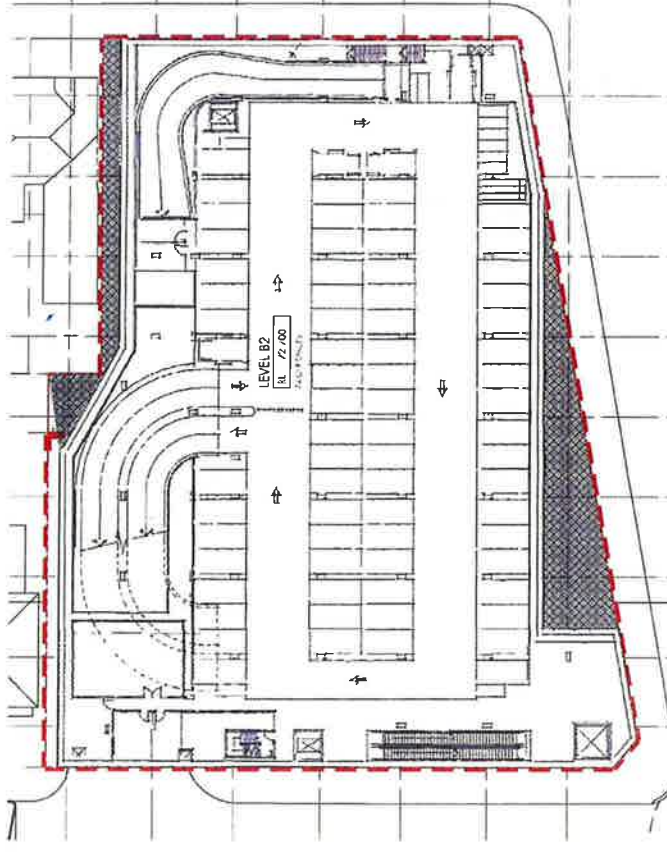
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Schedule 4 – Non-Residential Car Park

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01 LEVEL B1



01 LEVEL B2



coles
Willoughby Road
Crows Nest

Public Car Parking
1:500 @ A3

14.11.13

3844 Schedule 4
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Title	Scale	Date	Number
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Schedule 5 – Open Space Plaza Area

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Schedule 6 – Novation Deed

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Crows Nest Plaza – Planning Agreement

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Novation Deed

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Novation Deed

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This Deed is made on [Insert Date]

Parties

- 1 **North Sydney Council** of 200 Miller Street, North Sydney, NSW 2060 (**Council**).
- 2 **Coles Group Property Developments Ltd** (ACN 004 428 326) of L1 M6/800 Toorak Road, Hawthorn East, Victoria 3123 (the **Transferor**).
- 3 [Insert name of Transferee, ABN/ACN and address] (the **Transferee**).

Recitals

- A Council and the Transferor are parties to a Planning Agreement dated [insert date].
- B This Deed satisfies the obligation of the Transferor under the Planning Agreement to procure the execution of a deed of novation by the Transferee prior to the Transferor selling, transferring or disposing of an interest in the Land or the Development to the Transferee.
- C The parties have entered into this Deed so that :
 - (a) the Transferee will be entitled to the rights and will perform the obligations of the Transferor under the Planning Agreement; and
 - (b) the Transferor will be released and discharged from its obligations under the Planning Agreement.

It is agreed as follows.

1 Definitions and Interpretation**1.2 Dictionary**

The following definitions apply unless the context requires otherwise.

Claim means any claim, notice, demand, suit, account, action, proceeding, arbitration, litigation (including reasonable legal costs), investigation or judgment of any nature, absolute or contingent, liquidated or unliquidated, whether known or unknown, whether directly or indirectly, or whether in law, contract, tort, negligence, statute (including strict liability) or in equity, arising from or out of or in connection with the Planning Agreement, including any claim for any liability, damages, losses, costs, expenses, expenditure, charge, compensation, payment, remedy, debt, lien or relief.

Development means the proposed redevelopment of the Crows Nest Plaza as described in Recital C of the Planning Agreement.

Effective Date means the date of this Deed.

Planning Agreement means the Deed dated [insert date] which constitutes a planning agreement between Council and the Transferor within the meaning of section 93F of the *Environmental Planning and Assessment Act 1979* (NSW).

1.3 Interpretation

Headings are for convenience only and do not affect interpretation. The following rules apply unless the context requires otherwise.

- (a) The singular includes the plural, and the converse also applies.

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- (b) If a word or phrase is defined, its other grammatical forms have a corresponding meaning.
- (c) A reference to a person includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity.
- (d) A reference to a clause is a reference to a clause of this Deed.
- (e) A reference to an agreement or document (including a reference to this Deed) is to the agreement or document as amended, supplemented, novated or replaced, except to the extent prohibited by this Deed or that other agreement or document, and includes the recitals and schedules to that agreement or document.
- (f) A reference to a party to this Deed or another agreement or document includes the party's successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives).

2 Novation of Planning Agreement

2.1 Novation

The parties agree that with effect on and from the Effective Date:

- (a) the Transferee is substituted for the Transferor under the Planning Agreement as if the Transferee had originally been a party to the Planning Agreement instead of the Transferor; and
- (b) each reference in the Planning Agreement to the Transferor must be read and construed as a reference to the Transferee.

2.2 Assumption of benefits and obligations

With effect on and from the Effective Date, the Transferee will:

- (a) be bound by and must comply with all the provisions of the Planning Agreement;
- (b) assume the full obligations and liabilities of the Transferor under the Planning Agreement; and
- (c) enjoy all the rights, benefits and entitlements of the Transferor under the Planning Agreement, including all rights, benefits and entitlements of the Transferor arising prior to the Effective Date.

2.3 Release

With effect on and from the Effective Date, Council absolutely and unconditionally releases the Transferor from:

- (a) the Transferor's obligations under the Planning Agreement arising on and from the Effective Date; and
- (b) any Claims which it has or may have against the Transferor arising on and from the Effective Date.

3 Further Assurances

Each party must do anything reasonably necessary (including executing agreements and documents) to give full effect to this Deed and the transactions contemplated by it.

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4 Costs and Stamp Duty

- (a) The Transferor and Transferee must bear the costs arising out of the negotiation, preparation and execution of this Deed.
- (b) All stamp duty (including fines, penalties and interest) payable on or in connection with this Deed, and any instrument executed under or any transaction evidenced by this Deed, must be borne by Transferee.

5 Governing Law and Jurisdiction

- (a) This Deed is governed by and construed in accordance with the laws of New South Wales.
- (b) Each party submits to the exclusive jurisdiction of the courts of New South Wales and any courts which may hear appeals from any of those courts, except for a right to enforce a judgment from any of those courts in any other jurisdiction.

6 Counterparts

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

7 Corporate Power and Authority

Each party represents and warrants to the others that:

- (a) it is validly incorporated and has the power to carry on its business as it is now being conducted;
- (b) it has full power to enter into and perform its obligations under this Deed;
- (c) it has taken all action which is necessary to authorise the entry into and performance of its obligations under this Deed; and
- (d) this Deed constitutes legal, valid and binding obligations, enforceable in accordance with its terms.

Novation Deed

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Executed and delivered as a Deed

Each attorney executing this Deed states that he or she has no notice of revocation or suspension of his or her power of attorney.

Executed as a deed by North Sydney Council by its authorised delegate in accordance with a resolution of the Council made on 2013 in the presence of:

Signature of Witness

Authorised Representative Signature

Print Name

Print Name

Executed as a deed by Coles Group Property Developments Ltd by its duly appointed Attorney pursuant to registered Power of Attorney Book 4618 No. 967 in the presence of:

Signature of Witness

Attorney Signature

Print Name

Print Name

Executed as a deed by [the Transferee] by its [capacity] in the presence of:

Signature of Witness

[Capacity] Signature

Print Name

Print Name

