

## DEED OF AGREEMENT AND LICENCE TO ACCESS PUBLIC ROAD

### PARTIES

Lane Cove Municipal Council trading as Lane Cove Council

(Council)

AND

Tuta Properties Pty Ltd (ABN 30 008 441 709)

(Tuta)

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Ref: JSL:12/0096

1 | Page



## DEED OF AGREEMENT AND LICENCE TO ACCESS PUBLIC ROAD

THIS DEED is made on.....23rd.....day of.....November..... 2012  
(insert day) (insert month)

### BETWEEN

**Lane Cove Municipal Council trading as Lane Cove Council of 48**  
Longueville Road, Lane Cove, New South Wales

(Council)

And

**Tuta Properties Pty Ltd (ABN 30 008 441 709)** of Level 1, 89 Moore Street,  
Leichhardt in the State of New South Wales

(Tuta)

### RECITALS:

- A. Council is the owner of land situated at 304 – 314 Burns Bay Road, Lane Cove (**Bowling Club Land**).
- B. Tuta is the owner of land situated at 318-322 Burns Bay Road, Lane Cove (**Tuta's Land**).
- C. APP Corporation Pty Ltd is the Applicant under a development application numbered DA 12/39 (**Development Application**), pursuant to which it is proposed to develop land situated at 316, 316A and 318-322 Burns Bay Road, Lane Cove.
- D. The Development Application involves the demolition of existing buildings, removal of trees, excavation works and construction of a residential flat development comprising 218 dwellings within 5 building blocks, a substation, landscaping, a neighbourhood shop and basement car parking for 377 cars, relocation of bus stop and construction of slip lane (**Development**).
- E. The Master Plan prepared for the site by the Applicant's former consultants detailed a dedicated access road across the Council's land to serve car parking, recreational open space, community facilities and residential development on the Bowling Club Land as well as a residential development on the Tuta's Land.
- F. The Development Application does not propose the construction of a public road across the Bowling Club Land and the Development Application does not include the Bowling Club Land. The Development Application proposes access to the Development Site by way of construction of a slip lane within Burns Bay Road.
- G. The Development Application makes provision to link the internal access road within the Development Site to the proposed Public Road at the northern boundary of the Development Site.



- H. The Development Application is to be further considered by the Joint Regional Planning Panel (**JRPP**) on the 6 December 2012.
- I. The recommendation of the Council's assessment officers to the JRPP for the Development Application is that development consent be issued subject to a number of conditions including the Deferred Commencement Consent Conditions specified, in part, in the definitions section to this Deed.
- J. Through the operation of this Deed, Tuta intends to satisfy the terms of all five of the Deferred Commencement Consent Conditions presently recommended and thereby avoid the requirement for deferred commencement conditions to be imposed on any development consent issued in connection with the Development Application.
- K. Council intends to build the Public Road on the Bowling Club Land.
- L. Subject to the terms of the Deed set out hereunder, the Council agrees to construct the Public Road across the Bowling Club Land and to grant a licence to Tuta to connect to and access the Public Road from the Development Site in consideration of which Tuta agrees to deliver the Cash Amount to Council.

## OPERATIVE PROVISIONS

### IT IS AGREED

#### 1. DEFINITIONS AND INTERPRETATIONS

##### 1.1. In this Deed unless the contrary intention appears:

- (a) **AUD** means Australian Dollars.
- (b) **Applicant** means Clare Brown APP Corporation Pty Ltd the applicant to the Development Application.
- (c) **Bank Guarantee** means the bank guarantee referred to in clause 6.
- (d) **Bowling Club Land** means the property owned by the Council located at 304-314 Burns Bay Road, Lane Cove, being Lot 101 and 102 in DP 1013285.
- (e) **Cash Amount** means the amount of **AUD 680,000.00** plus GST adjusted by the increase of CPI (All Groups Sydney Consumer Price Index) published by the Australian Bureau of Statistics, calculated from the date of this Deed to the last published index prior to the date of the Contract.
- (f) **Completion Date** means the earlier of the date on which:
  - (i) the construction of the Public Road is completed and the Public Road is open for use; or
  - (ii) a final or interim certificate of occupation is granted in respect of the residential development component of the Development.



- (g) **Deferred Commencement Consent Conditions** means the Council recommended conditions requiring the Applicant to the Development Application to:
- (i) enter into an appropriate legal arrangement (**Agreement**) with the Council (as landowner of the Bowling Club Land) for the design and construction of an access road through the Bowling Club Land so as to allow for access to and from the Development Site by means thereof; and
  - (ii) where the Agreement provides:
    - a. that the design of the proposed development will permit access to and from the Development Site via the Public Road;
    - b. details as to the monetary contribution to be paid by Tuta to secure access to the Public Road.
    - c. details as to the payment of any security, liabilities, risk and indemnities involved in the proposed works (if any).
- (h) **Contract** means the contract between the Council and the successful tenderer for the construction of the Public Road pursuant to the Resolution.
- (i) **Development** means the works proposed under Development Application DA12/39 including the demolition of existing buildings, removal of trees, excavation works and construction of a residential flat development comprising 218 dwellings within 5 building blocks, a substation, a neighbourhood shop and basement car parking for 377 cars, landscaping, relocation of bus stop and construction of slip lane.
- (j) **Development Application** means the development application numbered DA12/39.
- (k) **Development Site** means the land to be developed pursuant to the Development Application comprising Tuta's Land; Hill's Land and Energy Australia's Land.
- (l) **Due Date** means the date falling 30 days after a notice of determination of the Development Application is issued by the JRPP.
- (m) **Energy Australia's Land** means the land belonging to Ausgrid situated at 316A Burns Bay Road Lane Cove identified as Lot 1 in DP338571.
- (n) **GST** means the Goods and Services Tax described in the GST Law.
- (o) **GST Law** means A New Tax System the (Goods and Services Tax) Act 1999 (C'wealth) and all regulations and rulings thereunder.
- (p) **Hill's Land** means the land belonging to Lancelot Hill situated at 316 Burns Bay Road Lane Cove identified as Lot A in DP342316.
- (q) **JRPP** means the Joint Regional Planning Panel.



- (r) **Plan** means the plan showing the approximate location of the Public Road annexed to this Deed and marked '**Annexure A**'.
- (s) **Public Road** means the public road identified in the Plan and located on the Bowling Club Land comprising such design and manner of construction as determined by the Council at its sole discretion but providing for access to the Development Site across the Bowling Club Land subject to the terms of the licence granted under this Deed.
- (t) **Resolution** means the Council resolution authorising the appointment of a successful tenderer to undertake the construction of the Public Road.
- (u) **RMS** means the Roads and Maritime Service and where relevant its successor.
- (v) **Tuta's Land** means the land situated at 318-322 Burns Bay Road, Lane Cove identified comprising Lot B in DP 342316 and Lots 1, 2 and 3 in DP 204603.

1.2. In this Deed:

- (a) words importing the singular number shall include the plural number and vice versa;
- (b) headings are used for convenience only and shall not affect the interpretation hereof;
- (c) a reference to this Deed or another instrument includes any variation or replacement of them;
- (d) "including" when introducing a list of items does not limit the meaning of the words to which the list relates to those items or to items of a similar kind;
- (e) references to a gender include every gender;
- (f) a reference to a person includes the person's executors, administrators, successors and permitted transferees and assigns;
- (g) reference to a clause or schedule or annexure shall be construed as a reference to a clause of or schedule or annexure to this Deed and references to this Deed shall include its schedules and any annexures;
- (h) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (i) the word person includes a firm, a body corporate, an unincorporated association or an authority;
- (j) a reference to anything (including any amount) is a reference to the whole or any part of it and a reference to a group of persons is a reference to any one or more of them;

- (k) where any of the parties comprise more than one person then each such person shall be jointly and severally bound in respect of the covenants contained herein or on the part of those parties to be performed;
- (l) if a period of time is specified and dates from a given day or the day of an act or event, it is to be calculated exclusive of that day; and
- (m) a reference to a day is to be interpreted as a period of time commencing at midnight and ending 24 hours later.

## 2. **ACKNOWLEDGEMENT**

- 2.1. This Deed witnesses that in consideration of the covenants in this document the parties accept and agree to be bound by this document.

## 3. **CONDITION PRECEDENT**

- 3.1. It is a condition precedent to this Deed that development consent is granted to the Development Application on such terms and conditions as considered appropriate by the JRPP.

## 4. **AGREEMENT TO CONSTRUCT PUBLIC ROAD**

- 4.1. Subject to clauses 5 and 6 Council, in its capacity as landowner, agrees that it will seek to:
  - (a) permit the construction of the Public Road on the Bowling Club Land; and
  - (b) to have the Public Road constructed by contractors appointed by the Council following their selection by tender process in accordance with the requirements of the *Local Government Act 1993* and pursuant to the Contract, subject to any approval process and,

upon construction of the Public Road, will grant a licence to Tuta and the successors in title to the Development Site to gain direct access to the Public Road from the Development Site.

## 5. **AGREEMENT TO PAY CASH AMOUNT**

- 5.1. In consideration of the licence granted pursuant to clause 4.1 Tuta agrees to pay the Cash Amount to the Council no later than 14 days after the Completion Date by Bank Cheque made payable to Lane Cove Council.

## 6. **BANK GUARANTEE**

- 6.1. Tuta must, on or before the Due Date provide the Council a bank guarantee (**Bank Guarantee**) issued by an Australian Retail Bank in a form acceptable to the Council for the Cash Amount.
- 6.2. The Council is entitled to call on part or all of the Bank Guarantee to cover any amount that may be payable by Tuta to the Council, as a result of any breach by



Tuta of any of the terms and conditions of this Deed, including the requirement to pay the Cash Amount on the Completion Date.

- 6.3. In the event that the Deed is terminated pursuant to clause 14.1, the Bank Guarantee will be returned to Tuta.
- 6.4. The Bank Guarantee will be surrendered on payment of the Cash Amount.

## 7. OTHER PAYMENTS

- 7.1. Tuta must also pay to the Council:
  - (a) Its share of any stamp duty that may be payable on this Deed pursuant to clause 7.2;
  - (b) the registration fee for the registration of this Deed at Land and Property Information New South Wales (if the Deed is to be registered);
  - (c) interest on any money payable by Tuta to the Council if more than fourteen (14) days overdue at the rate prescribed from time to time under Section 101 of the *Civil Procedure Act, 2005* (as amended) or any succeeding legislation, at the date of demand, from the due date to the date of payment;
  - (d) the Council's reasonable costs and disbursements in connection with a default by Tuta under this Deed including, but not limited to, enforcement costs.
- 7.2. The parties agree to share equally the cost of any stamp duty payable on this Deed.

## 8. WARRANTY

- 8.1. Each party warrants that:
  - (a) it has taken independent legal advice as to the nature, effect and extent of this document.
  - (b) it has not been made any promise, representation or inducement or been party to any conduct material to the entry into of this document other than as set out in this document.
  - (c) it is aware that each of the other parties is relying on these warranties in executing this document.

## 9. COUNCIL OBLIGATIONS

- 9.1. The Council will:
  - (a) seek any necessary approvals to construct the Public Road;
  - (b) seek the agreement of RMS to the design of the Public Road; and



- (c) notify Tuta of the Resolution prior to entering into the Contract.

## 10. TUTA'S WARRANTY

### 10.1. Tuta warrants that :

- (a) it will provide the Bank Guarantee on the Due Date;
- (b) it will pay the Cash Amount no later than 14 days after the Completion Date;
- (c) it will not seek to assign its obligations under this Deed; and
- (d) it will not part with the ownership of Tuta's Land prior to paying the Cash Amount.

## 11. DEALINGS WITH THE INTEREST OF PARTIES UNDER THIS DEED

- 11.1. The Council may assign or transfer its interest under this Deed to any third party, at any time, at which time the Council will be released from any obligation to Tuta under this Deed.
- 11.2. Tuta may transfer or assign its interest or obligations under this Deed or dispose of its interest in Tuta's Land, with the written consent of the Council which consent shall not be unreasonably withheld provided that the assignee or transferee first enters into a Deed of Accession in relation to the obligations of Tuta under this Deed.
- 11.3. For the purposes of this clause, Tuta, if a company, is deemed to have transferred or assigned its interest where there has been an effective change in the ownership and/or control of Tuta.

## 12. DEFAULT

### 12.1. The Council may terminate this Deed if:

- (a) Tuta repudiates this Deed;
- (b) Tuta breaches an Essential Term of this Deed as defined under sub-clause 12.2;

### 12.2. "Essential Term" includes:

- (a) **Clause 5** – the payment of the Cash Amount
- (b) **Clause 6** – the obligation to provide the Bank Guarantee; and
- (c) **Clause 10** – Tuta's Warranties;

- 12.3. If Tuta is in default under this Deed including the breach of an Essential Term, then any demand of or acceptance from Tuta by the Council of any late payment of monies due by Tuta to the Council under this Deed does not:





- (a) constitute a waiver of Tuta's obligations to make any future payments; or
- (b) prevent the Council from exercising its rights under this Deed including enforcement and termination.

12.4. If Tuta is in default of its obligations under clause 5 or 6 of this Deed, the Council may take all such actions as it deems necessary to recoup the Cash Amount or Bank Guarantee from Tuta and is entitled to treat the Cash Amount or Bank Guarantee as a liquidated debt recoverable in a court of competent jurisdiction.

13. **NON FETTER**

13.1. Nothing contained in this Deed shall operate so as to unlawfully restrict or otherwise affect the unfettered discretion of the Council to exercise any of its functions or powers, whether pursuant to the *Local Government Act 1993*, the *Environmental Planning and Assessment Act 1979* or any other applicable law.

14. **TERMINATION**

14.1. This Deed will terminate if the construction of the Public Road is not substantially completed and vehicular access cannot be gained from the Development Site to the Public Road and then to Burns Bay Road within 5 years of the date of this Deed.

14.2. In circumstances where the Cash Amount has been paid prior to the termination of this Deed pursuant to clause 14.1, the Cash Amount will be returned to the party who paid the Cash Amount.

15. **MISCELLANEOUS**

15.1. **GST**

If GST or similar value added tax is imposed on any supply made under or in accordance with this Deed, the amount payable for that supply is increased by the amount of that GST. The party seeking payment must provide a GST tax invoice (or any other thing required under any legislation) in the form required, and in the time provided for, by the relevant legislation.

15.2. **Notices**

A communication required by this Deed, by a party to another, must be in writing and may be given to them by being:

- (a) Delivered personally; or
- (b) Posted to their address specified in this agreement, or as later notified by them, in which case it will be treated as having been received on the second business day after posting; or
- (c) Faxed to the facsimile number of the party with acknowledgment of receipt received electronically by the sender, when it will be treated as received on the day of sending; or



- (d) Sent by email to their email address, when it will be treated as received on that day.

**15.3. Governing Law**

In the interpretation of this Deed, the rights and obligations of the parties hereto and all questions relating to the execution, validity and performance hereof shall be governed by and be interpreted under the laws of the State of New South Wales.

**15.4. Counterparts**

This Deed may be executed in any number of counterparts and all such counterparts taken together shall be deemed to constitute one and the same instrument.

**15.5. Variations**

This Deed shall not be changed or modified in any way subsequent to its execution except by writing duly executed by all relevant parties.

**15.6. Representations**

The parties each represent and warrant to and covenant with each other that each has full power to enter into and perform its obligations under this Deed and this Deed constitutes valid and binding obligations of that party enforceable in accordance with its terms.

**15.7. Invalidity**

All provisions in this Deed shall be construed so as not to be invalid, illegal or unenforceable in any respect but if any such provision on its true interpretation is illegal, invalid or unenforceable that provision may at the option of the party be read down to such extent as may be necessary to ensure that it is not illegal, invalid or unenforceable and as may be reasonable in all the circumstances so as to give it a valid operation of a partial character. In the event that any such provision or part thereof cannot be so read down such provision shall be deemed to be void and severable and the remaining provisions hereof shall not in any way be affected or impaired thereby.

**15.8. Non-merger**

Each representation covenant and obligation under this Deed shall continue in full force and effect until such representation obligation or covenant is satisfied or completed.

**15.9. Contra proferentem**

In the interpretation of this Deed no rules of constitution shall apply to the disadvantage of one party on the basis that that party put forward the agreement or any part thereof.



**15.10. Costs**

- (a) Each party will pay their own costs in relation to the preparation and execution of this Deed.

*[A large diagonal line is drawn across the page, likely indicating a signature or a placeholder for a signature.]*

*[Handwritten signature]*



**Executed as Deed**

This 23 day of November 2012

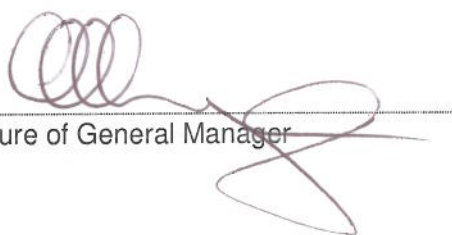
The **COMMON SEAL** of Lane Cove Council was hereunto affixed on the 23 day of November 2012 in pursuance of a resolution of the Council passed on the 19<sup>th</sup> day of **November 2012** and affixed in the presence of:



Signature of Mayor

**SCOTT BENNISON**

Name of Mayor



Signature of General Manager

**CRAIG WRIGHTSON**

Name of General Manager

Signed by **Tuta Properties Pty Ltd** (ACN 008 441 709) in accordance with Section 127 of the Corporations Act 2001 and in the presence of:

Signature of Director/Secretary

**DAVID HERLIHY**

Name Director/Secretary

Signature of Director/Secretary

**FELICE MONTRONE**

Name Director/Secretary



**THIS IS THE ANNEXURE A REFERRED TO IN DEED OF AGREEMENT AND LICENCE TO ACCESS PUBLIC ROAD BETWEEN Lane Cove Municipal Council trading as Lane Cove Council** of 48 Longueville Road, Lane Cove, New South Wales (**Council**) and **Tuta Properties Pty Ltd (ABN 30 008 441 709)** of Level 1, 89 Moore Street, Leichhardt in the State of New South Wales (**Tuta**)

Dated the 23 day of November 2012

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### Plan of Public Road



53.1 metres  
To be used in assessing  
road construction and associated  
costs

