

16 September 2021

Mills Oakley
ABN: 51 493 069 734

Confidential

Your ref:
Our ref: AXGS/KEDS/3502385

Mr Kenneth Gouldthorp
General Manager
North Sydney Council
PO Box 12
NORTH SYDNEY NSW 2059

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Attention: Mr Marcelo Occhiuzzi

Dear Mr Gouldthorp

Letter of offer: Proposed planning agreement in relation to 270-272 Pacific Highway Crows Nest, SP49574

We act for Silvernight (Landowner) Crows Nest Pty Ltd and The Owners – Strata Plan No 49574 (**our clients**).

Our clients are (respectively) the owners of all of the lots within SP49574 and the common property of that scheme. This accounts for the totality of the land within the parcel known as 270-272 Pacific Highway Crows Nest (**the site**).

This is an offer to enter into a planning agreement.

The offer relates to a planning proposal seeking a change to planning controls for the site.

Detail

1. Mandatory matters — section 7.4(3) of the EP&A Act

- 1.1 The *Planning agreements: Practice Note — February 2021*, published by the Department of Planning, Industry and Environment (**the practice note**), requires (in section 4.2) that this offer:

Outline in sufficient detail the matters required to be included in a planning agreement as specified in s7.4(3) of the ... [*Environmental Planning and Assessment Act 1979* (**the EP&A Act**)] to allow proper consideration of the offer by the planning authority.

A description of the land to which the agreement would apply — section 7.4(3)(a)

- 1.2 The site (that is, all of the land held within SP49574).

A description of the change to the environmental planning instrument to which the agreement would apply— section 7.4(3)(b)

- 1.3 Any change to an environmental planning instrument (insofar as it applies to the site) such that:
- (a) the maximum height of buildings for the site is 59 metres (and, in any event, sufficient to permit 13 commercial storeys, including plant) — up from the current 16 metres;

- (b) the maximum floor space ratio for the site is 6.02:1, but only if the floor space ratio of the part of the building that is above the ground level of the building at the Pacific Highway frontage:
 - (i) does not exceed 5.6:1; and
 - (ii) any additional gross floor area above 5.6:1 is used for non-residential purposes,
 (there is no current maximum floor space ratio);
- (c) the minimum non-residential floor space ratio for the site is 5.6:1 (currently 0.5:1)
- (d) no change to the current 'B4 Mixed Use' zoning; and
- (e) there are no other new or amended provisions of the local environmental plan (when compared with what was in place on the date of this letter) that would have the practical effect of preventing the realisation of a commercial premises (within the meaning of the *North Sydney Local Environmental Plan 2013 (the LEP)*) of the height, bulk and scale anticipated by the above numerical constraints on the site.

A description of the development to which the agreement applies — section 7.4(3)(b)

- 1.4 The development of commercial premises (within the meaning of the LEP) of the height, bulk and scale anticipated by the above numerical constraints on the site.

The nature and extent of the provision to be made by the developer under the agreement, the time or times by which the provision is to be made and the manner by which the provision is to be made — section 7.4(3)(c)

- 1.5 The development contribution would be monetary contribution of \$3 million (approximately \$1,900 per square metre of gross floor area actually realised). The contribution would be payable prior to the issue of an occupation certificate.
- 1.6 The key preconditions **before** there is any requirement to provide the contribution would be **all** of the following:
- (a) The making and commencement of the change to an environmental planning instrument referred to in paragraph 1.3 above.
 - (b) The grant of development consent for the development referred to in paragraph 1.4.
 - (c) The issue of a construction certificate under that development consent.

Whether the agreement would exclude (wholly or in part) or would not exclude the application of section 7.11, 7.12 or 7.24 of the PE&A Act to the development — section 7.4(3)(d)

- 1.7 The agreement would not exclude:
- (a) local infrastructure contributions that are set under a contributions plan (section 7.11);
 - (b) fixed infrastructure contributions that are set outside of a contributions plan (section 7.12); and
 - (c) special infrastructure contributions (section 7.24).

Whether benefits under the agreement would or would not to be taken into consideration in determining a development contribution under section 7.11 of the EP&A Act — section 7.4(3)(e)

- 1.8 The benefits under the agreement are not to be taken into consideration in determining a development contribution under section 7.11 of the EP&A Act.

A mechanism for the resolution of disputes under the agreement— section 7.4(3)(f)

- 1.9 Disputes would not affect or be the subject of a mediation process, before the commencement of any Court proceedings. This would not affect the right of our clients to commence a merit ('class 1') appeal in the Land and Environment Court.

The enforcement of the agreement by a suitable means— section 7.4(3)(g)

- 1.10 The agreement will provide for the enforcement of the agreement by a suitable means as follows:
- (a) the agreement would be registered on the title of the site; and
 - (b) no occupation certificate could be issued prior to the making of a development contribution.
- 1.11 The practice note (which is a mandatory consideration for the Council) says that tying the performance of the developer's obligations to the issuing of construction, subdivision or occupation certificates may provide a suitable means of enforcing the planning agreement (page 14).
- 1.12 The practice note does not anticipate that security will need to be provided unless (in cases such as this one) the developer seeks the release of the occupation certificate before the payment of the contribution. Accordingly, there is no need in this instance for the provision of any other security (and none is offered).

2. Council's planning agreements policy

- 2.1 The practice note also requires that this offer:
- Address in sufficient detail any relevant matters required to be included in an offer as specified in any applicable planning agreements policy published by the planning authority to allow proper consideration by the planning authority.
- 2.2 There are no such matters, beyond those outlined above.

3. Other key terms and conditions

- 3.1 A party would be able to terminate the agreement by giving 42 days written notice to the other party if either:
- (a) the change to an environmental planning instrument referred to in paragraph 1.3 has not been commenced within 12 months of the date of the agreement; or
 - (b) after the change to an environmental planning instrument, it is (or becomes) unlawful for a development consent to be granted for the development set out in paragraph 1.4.
- 3.2 The agreement would have other terms of a not unusual nature that are intended to provide reasonable protection for the legitimate interests of all parties.

4. Acceptance of an offer

- 4.1 This offer may only be accepted:
- (a) after the full text of a planning agreement and explanatory note have been negotiated and agreed;

- (b) after 28 days following the giving of public notice under section 7.5(1) of the EP&A Act; and
- (c) by means of the formal execution of the formal agreement by all parties.

4.2 No legal or equitable rights or obligations arise (for either party) in connection with this offer or the proposed agreement prior to such acceptance being completed.

If you or any Council staff (other than your legal staff) wish to discuss this offer, please contact Padraig Scollard (padraig@keylan.com.au) on 8459 7508 or Dan Keary (dan@keylan.com.au) on 8459 7511.

If your legal representatives have any queries regarding this offer they may contact either Kalinda Doyle on (02) 8035 7918 or me on (02) 8035 7858.

Yours sincerely



Aaron Gadiel
Partner

Accredited Specialist—Planning and Environment Law