

# Voluntary Planning Agreement

## Draft for Exhibition

North Sydney Council

*ABN 32 353 260 317*

Stockland Development Pty Limited

*ACN 000 064 835*

Stockland Trust Management Limited as trustee for the 601  
Pacific Highway Trust

*ACN 001 900 741*

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# Agreement

## Date

## Parties

### First party

<b>Name</b>	North Sydney Council ( <b>Council</b> )
<b>ABN</b>	32 353 260 317
<b>Contact</b>	General Manager

### Second party

<b>Name</b>	Stockland Development Pty Limited ( <b>Developer</b> )
<b>ACN</b>	000 064 835
<b>Contact</b>	Chief Legal and Risk Officer

### Third party

<b>Name</b>	Stockland Trust Management Limited as trustee for the 601 Pacific Highway Trust ( <b>Landowner</b> )
<b>ACN</b>	001 900 741
<b>Contact</b>	Chief Legal and Risk Officer

## Background

- A. The Landowner owns the Land.
- B. The Developer proposes to carry out the Development on the Land.
- C. On 19 January 2023, the Developer submitted a planning proposal seeking to amend NSLEP 2013 to increase the maximum building height control for the Land from 49m to RL276.5 (equivalent to 189m) and establish a maximum floor space ratio control of 20:1.
- D. On 2 April 2024, the Minister issued a gateway determination requiring the planning proposal to be amended to apply a maximum building height control of RL259 (equivalent to 171m).
- E. The Developer has made an offer to enter into this agreement to make a contribution towards community infrastructure in connection with the Planning Proposal (as amended) and the Development.
- F. Council has accepted the offer to enter into this agreement. The parties wish to formalise that offer by entering into this agreement in accordance with section 7.4 of the Act.

## Operative part

### 1 Definitions

In this agreement, unless the context indicates a contrary intention:

**Act** means the *Environmental Planning and Assessment Act 1979* (NSW);

**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, agency or entity and includes a certifier accredited under the *Building Professionals Act 2005* (NSW);

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

**Certification Regulation** means the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021*;

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

**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 development of the Land that has a greater height than the maximum building height applying to the Land prior to the Instrument Change and relies on the Instrument Change;

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

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

**Environmental Planning Instrument** has the same meaning as in the Act;

**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;

**Instrument Change** means an amendment to the NSLEP 2013 substantially consistent with the Planning Proposal, or the coming into effect of any Environmental Planning Instrument or amendment to an Environmental Planning Instrument that has the effect of increasing the maximum building height and maximum floor space ratio controls that apply to the Land substantially consistent with what is proposed in the Planning Proposal;

**Land** means Lot 71 DP 749690, known as 601 Pacific Highway, St Leonards;

**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);

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

**NSLEP 2013** means the *North Sydney Local Environmental Plan 2013*;

**Occupation Certificate** means an occupation certificate as defined under section 6.4 of the Act;

**Planning Proposal** means planning proposal PP-2023-92, as amended, seeking to amend NSLEP 2013 as it relates to the Land as follows:

- (a) Amend the maximum building height from 49 metres to RL259 (equivalent to 171 metres).
- (b) Introduce a maximum floor space ratio of 20:1.

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

**Regulation** means the *Environmental Planning and Assessment Regulation 2021*; and

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

## 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 or managing director)** the president, CEO or managing director of a body or Authority means 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 7.4 of the Act.
- (b) Schedule 1 of this agreement summarises the requirements for planning agreements under section 7.4 of the Act and the way this agreement addresses those requirements.

### 4 Application of this agreement

This agreement applies to:

- (a) the Instrument Change,

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

## 5 Operation of this agreement

- (a) This agreement commences on and from the date it is executed by all parties.
- (b) Despite any other provision of this agreement the Developer is under no obligation to make any monetary contribution in accordance with this agreement unless the Instrument Change has been made.

## 6 Contributions to be made under this agreement

### 6.1 Monetary Contribution

- (a) The Developer must pay to Council a monetary contribution of \$172,000.00 or an amount calculated in accordance with the following formula, whichever is the greater:

$$\begin{array}{rcl} \$172,000.00 & \times & \text{The CPI at the time of payment} \\ & & \hline & & \text{The CPI at the date of this agreement} \end{array}$$

- (b) The Monetary Contribution must be paid to Council prior to the issue of an Occupation Certificate for the Development or any part of the Development.
- (c) Nothing in this agreement precludes the payment of the Monetary Contribution earlier than it is required.
- (d) 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.
- (e) 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.
- (f) The parties agree and acknowledge that the Monetary Contribution will be used by the Council towards community infrastructure to be delivered by Council.

## 7 Application of s 7.11, s 7.12 and Division 7.1, Subdivision 4 of the Act

- (a) This agreement does not exclude the application of section 7.11 of the Act to the Development.
- (b) This agreement does not exclude the application of section 7.12 of the Act to the Development.
- (c) This agreement does not exclude the application of Division 7.1, Subdivision 4 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 7.11 of the Act.



## 8 Registration of this agreement

### 8.1 Landowner Interest

The Landowner represents and warrants to the Council that on the date of this agreement it is the registered proprietor of the Land.

### 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 7.6 of the Act.
- (b) The Developer at its own expense will, promptly after the execution of this agreement, 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 certificate of title or electronic equivalent,

to enable the registration of this agreement in accordance with clause 8.2.
- (c) The Landowner consents to the registration of this agreement in accordance with this clause 8.2.
- (d) The Developer, at its own expense, will take all practical steps, and otherwise do anything that the Council reasonably requires:
  - (i) to 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 45 Business Days after that date; and
  - (ii) to 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.

### 8.3 Removal from Register

The Council will promptly after receipt of a request from the Landowner provide a release and discharge of this agreement so that it may be removed from the folios of the Register for the Land (or any part of it) provided the Developer has paid the monetary contribution under this agreement and is not otherwise in default of any of the obligations under this agreement.

## 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 10 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 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 20 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.

### 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 10 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 10 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, her or their function as a mediator he, she or they being required to fully disclose any such interest or duty before his, her or their appointment;
- (d) the mediator shall be required to undertake to keep confidential all matters coming to his, her or their knowledge by reason of his, her or their appointment and performance of his, her or their duties;
- (e) the parties must within 10 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 *Litigation*

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

## 10.7 *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 **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 6.10(2) of the Act and section 48 of the Certification Regulation the obligation to pay the Monetary Contribution in accordance with clause 6 must be satisfied prior to the issue of an Occupation Certificate for the Development or any part of the Development.

### 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) Subject to clause 12.3, a party must not assign or deal with any right under this agreement without the prior written consent of the other parties. Council will act reasonably in the grant of consent and may require a novation deed similar to that at Annexure B.
- (b) Any purported Dealing in breach of this clause is of no effect.

### 12.2 *Transfer of Land*

- (a) Subject to clause 12.3, the Landowner may not transfer, assign or dispose of the whole or any part of its right, title or interest in the Land (present or future) to another person (**Transferee**) unless before it sells, transfers or disposes of that right, title or interest:
  - (i) the Transferee delivers to the Council a novation deed signed by the Transferee in the form at Annexure B;
  - (ii) 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
  - (iii) the Landowner and the Transferee pay the Council's reasonable costs in relation to the assignment.

### 12.3 *Exception*

- (a) Clauses 12.1 and 12.2(a) do not apply where:
  - (i) the Monetary Contribution has been made under this agreement; or
  - (ii) the agreement is registered on the title of the Land; or
  - (iii) if the Council has released or discharged the Developer from any obligations under this agreement in connection with the part of the Land to be transferred.

## 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 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 Instrument Change, any Development Application or any other application for Approval (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.

## 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 at the address, or at the address last notified by the intended recipient to the sender after the date of this agreement:
  - (i) to North Sydney Council: 200 Miller Street, Sydney NSW 2060  
Email: [council@northsydney.nsw.gov.au](mailto:council@northsydney.nsw.gov.au)  
Attention: General Manager
  - (ii) to Stockland Development Pty Limited and Stockland Trust Management Limited: 133 Castlereagh Street, Sydney NSW 200  
Email: [legal4@stockland.com.au](mailto:legal4@stockland.com.au)  
Attention: Chief Legal and Risk Officer
- (c) is taken to be given or made:
  - (i) in the case of hand delivery, when delivered;
  - (ii) in the case of email, if an "undelivered receipt" is not received; and
  - (iii) in the case of delivery by post, five 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).
- (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 5:00 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.

## 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 *Variation*

A provision of this agreement can only be varied by a later written document executed by or on behalf of all parties and in accordance with the provisions of the Act.

### 16.5 *Counterparts*

This agreement may be executed in any number of counterparts, each of which:

- (a) may be executed electronically or in handwriting; and
  - (b) will be deemed an original whether kept in electronic or paper form,
- and all of which taken together will constitute one instrument.

### 16.6 *Legal expenses and stamp duty*

The Developer must pay the Council's reasonable legal costs and disbursements in connection with the negotiation, preparation, execution, and release and discharge of this agreement.

### 16.7 *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.

### 16.8 *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.

### 16.9 *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.

### 16.10 *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 16.10(b) applies.

#### **16.11 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.

#### **16.12 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 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.

#### **16.13 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.

#### **16.14 Explanatory Note**

The Explanatory Note at Annexure A prepared in connection with this agreement pursuant to the Regulation is not to be used to interpret this agreement.

#### **16.15 Capacity and liability**

- (a) Interpretation
  - (i) All provisions of this agreement will have effect and be applied subject to this clause.
  - (ii) For the purpose of this clause:

"Assets" includes all assets, property and rights of personal or any nature whatsoever.

"Obligations" means all obligations and liabilities of whatsoever kind, undertaken or incurred by, or devolving upon the Trustee as Landowner under or in respect of this agreement or other instrument collateral to this



agreement whether express or implied by statute or other legal requirements or arising otherwise howsoever.

"Trust" means the trust set out in 601 Pacific Highway Trust ABN 35 126 065 644.

"Trustee" means Stockland Trust Management Limited ACN 001 900 741 or such other party as is the trustee for the time being of the Trust.

(b) Trustee's limitation of liability

- (i) Any liability of the Trustee arising in connection with this agreement is limited to the extent that the Trustee is able to be indemnified for that liability pursuant to the Trust.
- (ii) The Council acknowledges and agrees that it may enforce its rights against the Trustee with respect to the non-observance of the Trustee's obligations under this agreement only to the extent necessary to enforce the Council's rights, powers and remedies pursuant to the Trust by subrogation or otherwise.
- (iii) However, despite anything in this clause, the Trustee is liable to the extent that a liability under this agreement arises out of the Trustee's own fraud, gross negligence, wilful default, breach of trust or breach of duty which disentitles it from an indemnity pursuant to the Trust in relation to the relevant liability.

(c) Change in trustee, responsible entity or custodian

- (i) If:
  - (A) the Landowner is (or becomes) a trustee, a responsible entity or custodian; or
  - (B) any person who becomes landlord under this lease is (or becomes) a trustee, responsible entity or custodian; or
  - (C) there is a change to the party that is the Trustee or a change to the Trust,

then, if requested, the Council must sign a variation of this agreement under which the limitation of liability clause of the trustee, responsible entity or custodian is included in this lease, or under which the new Trustee or Trust is referred to in the agreement, as the case may be.

(d) The Trustee warrants that:

- (i) it holds the Land on trust for the Trust;
  - (ii) it has the power to:
    - (A) enter and deliver its obligations under the agreement;
    - (B) perform its obligations under the agreement;
  - (iii) all action to authorise:
    - (A) its execution and delivery of this agreement; and
    - (B) the performance of its obligations under this agreement,
- has been taken;

- (iv) the execution by it of this agreement and the performance by it of its obligations or the exercise of its rights under this agreement does not contravene the Trust deed;
  - (v) it is the sole trustee and no action is currently taking place or pending to remove it as trustee of the Trust, or appoint a new or additional trustee to the Trust;
  - (vi) it has a right to be fully indemnified out of the assets of the Trust in respect of the obligations incurred by it under this agreement and it has not released, disposed of or restricted its equitable lien over the Trust which secures that indemnity;
    - (i) it is not aware of any reason why the assets of the Trust might be insufficient to satisfy or discharge the obligations and liabilities incurred by it under this Deed;
    - (ii) it is not and has never been in breach of the Trust;
    - (iii) it has complied with its obligations in connection with the Trust;
    - (iv) the Trust has not been terminated and no action is pending to terminate the Trust; and
    - (v) no vesting date for the Trust has been determined.
- (e) The Trustee indemnifies the Council, and agrees to keep the Council indemnified, in respect of any loss or liability in any way connected with a breach of a warranty in clause 16.15(d). The indemnity in this clause is capped to the extent of the Monetary Contribution, costs payable under clause 16.6 and any reasonable costs incurred by Council in enforcing this agreement.

## Schedule 1                      Summary of requirements (section 7.4)

Subject and subsection of the Act	Planning Agreement
<p><b>Planning instrument and/or Development Application</b> – Section 7.4(1)</p> <p>The Developer has:</p> <p>(a)      Sought a change to an environmental planning instrument</p> <p>(b)      Made, or propose to make a Development Application</p> <p>(c)      Entered into an agreement with, or are otherwise associated with, a person to whom paragraph (a) or (b) applies</p>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>
<p><b>Description of the land to which the Planning Agreement applies</b> – Section 7.4(3)(a)</p>	<p>See the definition of Land in clause 1.</p>
<p><b>Description of the change to the environmental planning instrument to which the Planning Agreement applies</b> – Section 7.4(3)(b)</p>	<p>See the definition of “Instrument Change” in clause 1.</p>
<p><b>The scope, timing and manner of delivery of contribution required by the Planning Agreement</b> – Section 7.4(3)(c)</p>	<p>The Developer is required to pay a monetary contribution. See clause 6.</p>
<p><b>Applicability of section 7.11 of the Act</b> – Section 7.4(3)(d)</p>	<p>Not excluded. See clause 7.</p>
<p><b>Applicability of section 7.12 of the Act</b> – Section 7.4(3)(d)</p>	<p>Not excluded. See clause 7.</p>
<p><b>Applicability of Division 7.1, Subdivision 4 of the Act</b> – Section 7.4(3)(d)</p>	<p>Not excluded. See clause 7.</p>
<p><b>Whether benefits are to be taken into consideration under section 7.11</b> – Section 7.4(3)(e)</p>	<p>Not taken into account. See clause 7.</p>
<p><b>Mechanism for dispute resolution</b> – Section 7.4(3)(f)</p>	<p>See clause 10.</p>
<p><b>Enforcement of the Planning Agreement</b> – Section 7.4(3)(g)</p>	<p>See clause 11.</p>
<p><b>Registration of the Planning Agreement</b> – Section 7.4(3)(g)</p>	<p>See clause 8.</p>
<p><b>No obligation to grant consent or exercise functions</b> – Section 7.4(9)</p>	<p>See clause 14 (no fetter).</p>

Executed as an agreement

**Executed** for and on behalf of **North** )  
**Sydney Council** ABN 32 353 260 317 by )  
its authorised delegate in accordance with )  
a resolution of the Council dated [...] )  
 )  
 )

.....  
Signature of witness

.....  
Signature of Authorised Delegate

.....  
Print name of witness

.....  
Print name and position of Authorised  
Delegate

**Executed** by **Stockland Development** )  
**Pty Limited** ACN 000 064 835 by its )  
Attorney pursuant to Power of Attorney )  
Book 4814 No. 13 and the Attorney )  
declares that the Attorney has not )  
received any notice of the revocation of )  
such Power of Attorney, in the presence )  
of:

.....  
Signature of Witness

.....  
Signature of Attorney

.....  
Print name of Witness

.....  
Print name of Attorney

**Executed by Stockland Trust** )  
**Management Limited** ACN 001 900 741 )  
by its Attorney pursuant to Power of )  
Attorney Book 4814 No. 13 and the )  
Attorney declares that the Attorney has )  
not received any notice of the revocation )  
of such Power of Attorney, in the presence )  
of

.....

Signature of Witness

.....

Signature of Attorney

.....

Print name of Witness

.....

Print name of Attorney

## Annexure A Draft Explanatory note

**Explanatory Note****Exhibition of draft Voluntary Planning Agreement****Lot 71 DP 749690, known as 601 Pacific Highway, St Leonards***Environmental Planning and Assessment Regulation 2021 (section 205)***Planning Agreement**

The purpose of this Explanatory Note is to provide a plain English summary to support the notification of a draft voluntary Planning Agreement (**the Planning Agreement**) under Section 7.4 of the *Environmental Planning and Assessment Act 1979* (**the Act**).

The Explanatory Note must address the requirements of section 205(1)(a)-(b) of the EPA Regulation. This Explanatory Note has been prepared to address these requirements.

Additionally, in preparing the Explanatory Note, the planning authority must consider any relevant practice note prepared by the Planning Secretary under clause 203(6). The relevant practice note is *Planning agreements: Practice note – February 2021* published by the former NSW Department of Planning, Industry and Environment (now the Department of Planning and Environment).

This practice note has been considered by the parties in the course of preparing this Explanatory Note.

The Planning Agreement will require the provision of monetary contributions in relation to [a](#) proposed change to provisions of the North Sydney Local Environmental Plan 2013 (**LEP**) that affect land at Lot 71 DP 749690, known as 601 Pacific Highway, St Leonards.

**Parties**

Stockland Development Pty Limited (**the Developer**) made an offer to North Sydney Council (**the Council**) to enter into a voluntary Planning Agreement, in connection with a Planning Proposal relating to the subject land. The **Landowner**, Stockland Trust Management Limited is also a party to the agreement.

**Description of subject land**

The land to which the Planning Agreement applies is described as Lot 71 DP 749690, known as 601 Pacific Highway, St Leonards (**the Land**).

**Description of the Planning Proposal to which the Planning Agreement applies**

The Developer has lodged a Planning Proposal. The Planning Proposal (PP2/23; PP-2023-92) seeks to amend the LEP to:

- (a) increase the maximum building height for the Land from 49 metres to RL259 (equivalent to 171 metres); and
- (b) impose a maximum floor space ratio (FSR) of 20:1.

The Planning Agreement will apply to any amendment to the LEP that is substantially consistent with the Planning Proposal, or to any environmental planning instrument or amendment to any environmental planning instrument that has the effect of increasing the maximum building height

and floor space ratio controls that apply to the Land substantially consistent with what is proposed in the Planning Proposal (**Instrument Change**).

The Planning Agreement will apply to any future development of the land that relies on the Instrument Change.

## **Summary of Objectives, Nature and Effect of the Planning Agreement**

### **Objectives**

The objective of the Planning Agreement is to provide a mechanism by which contributions towards public purposes can be made in connection with the proposed amendment to the LEP and the future development of the Land relying on the amendment, to benefit the community.

### **Nature**

The nature of the Planning Agreement is an agreement between Council, the Developer and the Landowner that has the effect of binding the Developer and the Landowner and is also enforceable by Council including under the Act.

A Planning Agreement of this kind may require a developer to dedicate land free of costs, pay a monetary contribution, or provide any other material public benefit to be used for or applied towards a public purpose.

In this case, the Planning Agreement will require the payment of a monetary contribution in the sum of \$172,000.00 indexed in accordance with increases in the Consumer Price Index from the date of the agreement to the date of payment.

The monetary contribution will be payable in addition to monetary contributions payable under section 7.11, section 7.12 and Division 4 of Part 7 of the Act.

### **Effect**

The monetary contribution will be used by Council to deliver community infrastructure that meets the needs of the local community.

The Planning Agreement provides for the enforcement of the Planning Agreement by a suitable means if there is a breach by the Developer. The contributions are to be delivered prior to the issue of an occupation certificate for the future development of the Land. An occupation certificate cannot be lawfully issued if the required contributions have not been made.

The Planning Agreement is to be registered on the title to the Land.

## **Assessment of the Merits of the Planning Agreement**

### **How the Planning Agreement Promotes the Objects of the Act and the public interest**

The draft Planning Agreement promotes the following objectives of the Act:

- a. Promotes the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources (section 1.3(a)).*
- b. Promotes the orderly and economic use and development of land (section 1.3 (c)).*
- c. Promotes good design and amenity of the built environment (section 1.3(g)).*

The Planning Agreement will enhance the development potential of the Land, while requiring the Developer to make provision for public purposes. The Planning Agreement promotes the public interest because it will facilitate the provision of community infrastructure that will benefit existing and future residents and workers in the area. These contributions will have a positive impact on the public and will provide for the social welfare of the community.

The contribution required under the Planning Agreement is additional to any normal contribution that will ordinarily need to be made in relation to the development.

The proposed contribution under the Planning Agreement is consistent with the Council's strategic plans and policy documents.

**The Planning Purposes served by the Planning Agreement**

The Planning Agreement facilitates the implementation of Council's strategic plans and, through the development contributions, will provide existing and future residents in the area with improved facilities.

**Whether the Planning Agreement conforms with the Council's Capital Works Program**

The Planning Agreement will contribute towards meeting the demand for community infrastructure in the local government area. The Planning Agreement will assist the Council to meet the current and future needs of the local community.

The contribution proposed under the Planning Agreement does not conform with the Council's capital works program. This is because the opportunity to obtain the contributions has arisen outside of the Council's capital works program.

The Planning Agreement will not have an adverse effect on this capital works program. Overall, the Planning Agreement is likely to result in more capital works (to the benefit of the community) than would be the case without the Planning Agreement.

**Whether the Planning Agreement specifies that certain requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued**

The Planning Agreement requires the payment of the monetary contribution prior to the issue of an occupation certificate for the future development of the Land relying on the Instrument Change.

**Status of the Explanatory Note**

This Explanatory Note has been prepared jointly between the parties.

The parties have agreed that this Explanatory Note is not to be used to assist in construing the Planning Agreement.



Annexure B      Novation Deed

# Novation Deed

## **Draft**

**[Date]**

[Party Name]  
*ABN* [No.]

[Party Name]  
*ACN* [No.]

[Party Name]  
*ACN* [No.]

[Party Name]  
*ACN* [No.]

# Deed

## Date

## Parties

### First party

<b>Name</b>	[Name] ( <b>Council</b> )
<b>ABN</b>	[No]
<b>Address</b>	[Address]

### Second party

<b>Name</b>	[Name] ( <b>Developer</b> )
<b>AN</b>	[No]
<b>Address</b>	[Address]

### Third party

<b>Name</b>	[Name] ( <b>Landowner</b> )
<b>ACN</b>	[No]
<b>Address</b>	[Address]

### Fourth party

<b>Name</b>	[Name] ( <b>Transferee</b> )
<b>ACN</b>	[No]
<b>Address</b>	[Address]

## Recitals

- A. The Council, the Developer and the Landowner are parties to the Original Agreement.
- B. The Original Agreement relates to the whole of the Land.
- C. The parties to this deed have agreed to the novation of the obligations under the Original Agreement to the Transferee.

## This deed provides

### 1 Definitions and interpretation

#### 1.1 Definitions

**Act** means the *Environmental Planning and Assessment Act 1979*.

**Effective Date** means the date the Land is transferred to the Transferee [or in case of an assignment, the date of the assignment from the Developer].

**Land** has the meaning given to that term in the Original Agreement.

**Original Agreement** means the voluntary planning agreement made under section 7.4 of the Act.

**Required Obligations** means the obligations of the [Developer and/or Landowner – insert as applicable] under the terms of the Original Agreement, either individually or jointly and severally.

## 1.2 *References to certain general terms*

In this deed unless the contrary intention appears:

- (a) a reference to this deed or another instrument includes any variation or replacement of them;
- (b) 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;
- (c) the singular includes the plural and vice versa;
- (d) the word person includes a firm, body corporate, an unincorporated association or an authority;
- (e) a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including, without limitation, persons taking by novation) and assigns;
- (f) an agreement, representation or warranty on the part of or in favour of two or more persons binds or is for the benefit of them jointly and severally;
- (g) a reference to anything (including, without limitation, 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 anyone or more of them;
- (h) "include" in any form 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 nature; and
- (i) capitalised terms which are used in this deed but are not otherwise defined have the meaning given to them in the Original Agreement.

## 1.3 *Headings*

Headings are inserted for convenience and do not affect the interpretation of this deed.

# 2 **Novation**

## 2.1 *Original Agreement*

Subject to clause 2.4 and with effect from the Effective Date:

- (a) the Transferee is substituted for the [Developer and/or Landowner] as a party to the Original Agreement, and agrees to perform the Required Obligations of the [Developer and/or Landowner];

- (b) the Transferee will be bound by the Original Agreement, and will be entitled to the benefit of the Original Agreement, as if the Transferee was a party to the Original Agreement instead of the [Developer and/or Landowner];
- (c) all references to the [Developer and/or Landowner] in the Original Agreement shall be taken to be a reference to the Transferee; and
- (d) the [Developer and/or Landowner] is released and discharged from all obligations and liabilities, and from all claims (whether for Costs, Legal Costs, damages, fees or otherwise), arising under the Original Agreement insofar as the Original Agreement relates to the Required Obligations.

## 2.2 *Performance by Transferee*

The Transferee must perform all the obligations of, the [Developer and/or Landowner, or both jointly and severally], under the Original Agreement, whether or not the relevant obligations relate to works performed prior to the date of this deed, including, but not limited to:

- (a) the delivery of all public benefits to Council (including the Contribution Items).

## 2.3 *Release of Securities [Not Used]*

## 2.4 *Liability before Effective Date*

- (a) The [Developer and/or Landowner] warrant to the Council and the Transferee that, up to and including the Effective Date, they have complied with all their obligations under the Original Agreement due as at the Effective Date.
- (b) Notwithstanding any other provision of this deed, the [Developer and/or Landowner] are not released, relieved or discharged from liability under the Original Agreement before the Effective Date, or in relation to any breach of any provision of the Original Agreement occurring before the Effective Date (to the extent that it is not remedied by the Effective Date) in so far as the Original Agreement relates to the Required Obligations.

# 3 *Affirmation of the Original Agreement*

The Original Agreement will be read and construed subject to this deed, and in all other respects the provisions of the Original Agreement are ratified and confirmed, and, subject to the variation and novation contained in this deed, the Original Agreement will continue in full force and effect.

# 4 *GST*

Where a supply made under this deed gives rise to a liability for GST, the consideration to be provided for that supply (other than under this clause) shall be increased by an additional amount equal to the GST payable on the supply. The additional amount must be paid, and the supplier must provide a tax invoice, at the same time as the other consideration for that supply is to be provided under this deed. Terms used in this clause have the meanings in the *A New Tax System (Goods and Services Tax) Act 1999*.

# 5 *Stamp duty and costs*

- (a) The [Developer and/or Landowner] and the Transferee are jointly and severally liable for the Council's legal costs of and incidental to the negotiation, preparation

and execution of this deed, and must reimburse the Council for such legal costs promptly on demand.

- (b) The Transferee will pay any stamp duty arising directly or indirectly from this deed.

## 6 General

### 6.1 *Further Acts*

- (a) Each party will take all steps, execute all deeds and do everything reasonably required by any other party to give effect to any of the actions contemplated by this deed.
- (b) This deed binds each party which signs it even if other parties do not, or if the execution by other parties is defective, void or voidable.

### 6.2 *Authority and power*

- (a) Each party represents and warrants that:
  - (i) it has the full power and authority to enter into and to perform its obligations under this deed;
  - (ii) the execution, delivery and performance by it of this deed does not and will not contravene any provision of:
    - (A) any Law, authorisation, ruling, consent, judgment, order or decree of any Authority; or
    - (B) its constituent documents,
 and does not and will not result in a breach or default in any material respect under any agreement binding it; and
  - (iii) any authorisations required in connection with the execution, delivery and performance by it and the validity and enforceability against it of this deed have been obtained or effected and are in full force, and there has been no material default by it in the performance of any of the terms and conditions of any of those authorisations.
- (b) **[OPTIONAL CLAUSE – If Transferee is a trustee then include this clause]** - The Transferee entering into this deed as a trustee warrants that:
  - (i) it holds the Land on trust for the **[name of trust] (Trust)**;
  - (ii) it has the power under the **[name of trust deed] (Trust Deed)**:
    - (A) enter and deliver this Deed; and
    - (B) perform its obligations under this Deed;
  - (iii) all action required by the Trust Deed to authorise:
    - (A) its execution and delivery of this Deed; and
    - (B) the performance of its obligations under this Deed,
 has been taken;
  - (iv) the execution by it of this Deed and the performance by it of its obligations or the exercise of its rights under this Deed does not contravene the Trust Deed;

- (v) it is the sole trustee and no action is currently taking place or pending to remove it as trustee of the Trust or appoint a new or additional trustee of the Trust;
  - (vi) it has a right to be fully indemnified out of the assets of the Trust in respect of the obligations incurred by it under this Deed and it has not released, disposed of or restricted its equitable lien over Trust which secures that indemnity;
  - (vii) it is not aware of any reason why the assets of the Trust Deed might be insufficient to satisfy or discharge the obligations and liabilities incurred by it under this Deed;
  - (viii) it is not and has never been in breach of the Trust Deed;
  - (ix) it has complied with its obligations in connection with the Trust;
  - (x) the Trust has not been terminated and no action is pending to terminate the Trust; and
  - (xi) no vesting date for the Trust has been determined.
- (c) The Transferee indemnifies the Council, and agrees to keep the Council indemnified, in respect of any loss or liability in any way connected with a breach of a warranty in clause 2(b).

### 6.3 *Invalidity*

- (a) A word or provision must be read down if:
  - (i) this deed is void, voidable, or unenforceable if it is not read down;
  - (ii) this deed 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 6.3(a), the provision is void, voidable or unenforceable if it is not severed; and
  - (ii) this deed will be void, voidable or unenforceable if it is not severed.
- (c) The remainder of this deed has full effect even if clause 6.3(b)(i) or (ii) applies.

### 6.4 *Notices*

Any notice given under or in connection with this deed (**Notice**):

- (a) must be in writing;
- (b) must be addressed and delivered to the intended recipient by hand, by post, or by email at the address below or to the latest address for the party as notified in writing:
  - (i) to Council: [\[Address\]](#)  
[Email: \[email\]](#)  
[Attention: \[contact\]](#)

- (ii) to Developer [Address]  
Email: [email]  
Attention: [contact]
- (iii) to Landowner: [Address]  
Email: [email]  
Attention: [contact]
- (iv) to Transferee [Address]  
Email: [email]  
Attention: [contact]

- (c) is taken to be given and received:
  - (i) in the case of hand delivery, when delivered;
  - (ii) in the case of email, if an “undelivered receipt” is not received; and
  - (iii) in the case of delivery by post, five 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).
- (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 5:00 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.

## 6.5 *Assignment*

A party may not assign or otherwise deal with their rights under this deed or allow any interest in them to arise or be varied without the consent of the other parties.

## 6.6 *Governing law*

This deed is governed by the law in force in the place specified in the New South Wales and the parties submit to the non-exclusive jurisdiction of the courts of that place.

## 6.7 *Counterparts and electronic execution*

- (a) This deed may be executed electronically by electronic signature and may be executed in any number of counterparts and the counterparts taken together constitute one and the same instrument.
- (b) In this clause 6.7 electronic signature means a digital signature or other visual representation of a person’s handwritten signature or mark placed or typed on a copy of this agreement by electronic or mechanical means (or any other means of electronic signing this agreement used by agreement between the parties) and electronically signed has a corresponding meaning.
- (c) Where this agreement is electronically signed by or on behalf of a party, the party warrants and agrees that the electronic signature has been used to identify the person signing and to indicate that the party intends to be bound by this agreement.

Executed as a deed

[Insert execution blocks for Novation Deed]