

THIS Deed of Agreement is made the day of 2014 between the following Parties:

PARTIES

1. **Warringah Council** of 725 Pittwater Road, Dee Why, New South Wales ("Council")
2. **Kelly Trust No. 3 Pty Ltd** of 268 Anzac Parade, Kensington, New South Wales ("the Developer")

Background

- A. In October 2014 the Developer lodged the Current Development Application for Development Consent to carry out the Development on the Land.
- B. The Current Development Application was accompanied by an offer by the Developer to enter in to this Deed to provide the material public benefit if that Development Consent was granted.
- C. The Land currently has the benefit of the Existing Development Consent. The Existing Development Consent approves a form of development that exceeds the height controls in the LEP on that part of the Land that fronts Roger Street and Old Pittwater Road.
- D. The Development Application seeks approval for an additional storey of residential development on that part of the site fronting Roger Street and Old Pittwater Road over and above that which is approved by the Existing Development Consent but does not seek any additional height on that part of the Land fronting Pittwater Road, generally occupied by the Brookvale Hotel.
- E. The Development Application includes provision of the Pedestrian Link.
- F. Council is considering the preparation of a Master Plan for the Brookvale Town Centre, within which the Land is located, which Master Plan may lead to revised development controls for the Land at some time in the future.

- G. Council is prepared to consider allowing additional height on the Roger Street and Old Pittwater Road portion of the site, albeit with a commensurate restriction in the height of any future development in the location of the Brookvale Hotel on the Land unless and until the Master Plan is prepared and put into effect by way of a new or amending Local Environmental Plan applying to the Land.
- H. The Applicant is prepared to provide an easement in favour of the Council for use of the Pedestrian Link by members of the general public.
- I. In entering into this Agreement the Council does not intend to fetter its discretion with respect to the Current Development Application and will undertake a full assessment of the Current Development Application in accordance with the provisions of the Act, the LEP and the DCP.

THIS DEED WITNESSES

1. Planning Agreement Under the Act

The Parties agree this Deed is a Planning Agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

2. Application of this Deed

The Planning Agreement constituted by this Deed applies to:

- 2.1 The Land; and
- 2.2 The Development.

3. Operation of this Deed

- 3.1 Until this Deed operates, this document constitutes the Developer's irrevocable offer to enter into the Deed if Development Consent is granted to the Current Development Application.
- 3.2 This Deed only operates if Development Consent is granted to the Current Development Application.

4. Definitions and Interpretations

4.1 In this Deed the following definitions apply:

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

Current Development Application means the Development Application for the Development lodged with Council in October 2014.

Dealing, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering, or otherwise dealing with the Land but does not include the registration of a plan of subdivision relating to the Land.

Developer means the Kelly Trust No. 3 Pty Ltd, or its servants, successors, agents or assigns.

Development means:

- (a) A 5 storey shop top housing building comprising 6 offices suites, 3 ground floor retail units, 6 work/live retail/residential units and 73 residential units with 2 levels of underground carparking; and
- (b) Alterations and additions to the existing Brookvale Hotel including provision of on site parking for 40 cars, 32 of which spaces are for the Hotel and 8 spaces to be provided to the shop top housing component by way of easement; and
- (c) The Pedestrian Link.

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost and/or the provision of a material public benefit.

DCP means Warringah Development Control Plan 2011.

Environmental Planning Instrument has the same meaning as in the Act.

Existing Development Consent means the Development Consent granted by the Land and Environment Court in proceedings 11106 of 2011, *Kelly Trust No. 3 Pty Ltd v Warringah Council*, by order dated 8 June 2012.

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 or administration of the GST.

Land means Lot 11 in Deposited Plan 1000708, commonly known as 511-513 Pittwater Road, Brookvale, New South Wales 2100, or any lot or lots created by subdivision of that lot.

LEP means Warringah Local Environmental Plan 2011.

Material Public Benefit means the material public benefit described in Schedule 3 to this Deed.

Party means a Party to this Deed including its successors and assigns.

Pedestrian Link means the Pedestrian Link generally following the northern boundary of the Land connecting the northern most portion of the site fronting Pittwater Road with the northern most portion of the site fronting Old Pittwater Road as depicted in the plans accompanying the Current Development Application.

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

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

- (a) Headings are inserted for convenience only and do not effect the interpretation of this Deed.

- (b) A reference in this Deed to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (c) If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
- (e) 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.
- (f) A reference in this Deed to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or Government Agency.
- (i) 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.
- (j) 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 the other genders.

- (k) References to the word "include" or "including" are to be construed without limitation.
- (l) A reference to this Deed includes the agreement recorded in this Deed.
- (m) A reference to a Party to this Deed includes a reference to the servants, agents and contractors of the Party, and the Parties successors and assigns.
- (n) Any Schedules and attachments form part of this Deed.

4.3 In the interpretation of this Deed terms defined in the Act or the LEP have the same meaning as in these instruments unless elsewhere defined in this Deed.

5. Development Contributions to be Made Under this Deed

The Parties agree that:

- 5.1 The Developer will provide the Material Public Benefit set out in Schedule 1 and as provided in this Deed.
- 5.2 The Developer agrees to register an easement over the Pedestrian Link in favour of Council permitting pedestrian access through the Land between the hours of 7am and 10pm. That easement shall be registered on title prior to the issue of any occupation certificate for the Development for which approval is sought.
- 5.3 The Developer acknowledges the additional height sought on the shop top housing component of the site by the Current Development Application. The Developer agrees to make no Development Application in respect of the Land that would, if approved, result in any building or buildings being constructed on or immediately above that portion of the Brookvale Hotel building proposed to be retained by the Development Application. This obligation shall cease on the coming into force of any change to the planning controls applicable to the Land.

6. Application of Section 94 and Section 94A of the Act to the Development

6.1 The application of Section 94 or 94A of the Act to the proposed Development is not excluded.

7. Registration of this Deed

This Deed is not required to be registered.

8. Assignment and Dealings

The Developer shall not sell, transfer, assign or novate or similarly deal with ("Dealing") their right, title or interest in the Land (if any) or any of their rights or obligations under this Deed, or allow any interest in them to arise or be varied unless the Developer:

8.1 Gives the Council no less than 28 days notice in writing of the proposed Dealing; and

8.2 Procures that the transferee, assignee or novatee executes and delivers to the Council prior to any such dealing taking effect a deed in favour of the Council in form and substance acceptable to the Council, acting reasonable whereby the transferee, assignee or novatee becomes contractually bound with the Council to perform all of the Developers obligations and have the benefit of the Developer's rights under this Deed.

9. Review of this Deed

Any amendment or revocation of this Deed shall be by agreement in writing and in compliance with section 93G of the Act.

10. Dispute Resolution

10.1 Notice of dispute

If a Party claims that a dispute has arisen under this Deed ("Claimant"), it must give written notice to the other Party ("Respondent") stating the matters in dispute and designating as its representative a person to negotiate the dispute ("Claim Notice").

No Party may start Court proceedings (except for proceedings seeking interlocutory relief) in respect of a dispute unless it has first complied with this clause.

10.2 Response to notice

Within ten business days of receiving the claim notice, the respondent must notify the Claimant of its representative to negotiate the dispute.

10.3 The nominated representative must:

- (i) Meet to discuss the matter in good faith within five business days after services by the Respondent of notice of its representatives;
- (ii) Use reasonable endeavours to settle or resolve the dispute within 15 business days after they have met.

10.4 Further notice if not settled

If the dispute is not resolved within 15 business days after the nominated representatives have met, either Party may give to the other a written notice calling for determination of the dispute ("Dispute Notice") by mediation under clause 10.5 or by expert determination under clause 10.6.

10.5 Mediation

If a Party gives a Dispute Notice calling for the dispute to be mediated:

- (i) The Parties must agree to the terms of reference of the mediation within five business days of the receipt of the Dispute Notice (the terms shall include a requirement that the mediation rules and the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);
- (ii) The mediator will be agreed between the Parties, or failing agreement within five business days of receipt of the Dispute Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (iii) The mediator appointed pursuant to this Clause 10.5 must;
 - (a) Have reasonable qualifications and practical experience in the area of disputes; and
 - (b) Have no interest or duty which conflicts or may conflict with his function as mediator, he being required to fully disclose any such interest or duty before his appointment;
- (iv) The mediator shall be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and performance of his duties;
- (v) The Parties must within five business days of receipt of the Dispute Notice notify each other of their representatives who will be involved in the mediation.
- (vi) 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.

(vii) In relation to costs and expenses

- (a) Each Party will bear their own professional and expert costs incurred in connection with the mediation; and
- (b) The cost for the mediator will be shared equally by the Parties unless the mediator determines a Party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full cost of the mediation to be born by that Party.

10.6 Expert Determination

If the dispute is not resolved under clause 10.3 or 10.5 the dispute may, by agreement between the Parties, both acting reasonably having regard to the nature of the dispute, be resolved by expert determination, in which event:

- (i) The dispute must be determined by an independent expert in the relevant field:
 - (a) Agreed upon and appointed jointly by the Council and the Developer; or
 - (b) In the event that no agreement is reached or appointment made within 30 business days, appointed on application of a Party by the then current President of the Law Society of New South Wales;
- (ii) The expert must be appointed in writing and terms of the appointment must not be inconsistent with this clause;
- (iii) The determination of the dispute by such expert will be made as an expert and not as an arbitrator and will be in writing and containing reasons for the determination;

- (iv) The expert will determine the rules of the conduct for the process, but must conduct the process in accordance with the rules of natural justice;
- (v) Each Party will bear its own costs in connection with the process and the determination by the expert together with an equal proportion of the expert's fees and costs; and
- (vi) Any determination made by an expert pursuant to this clause is final and binding upon the Parties except where the determination is in respect of, or relates to, termination or purported termination of this Deed by any Party, in which event the expert is deemed to be giving a non binding appraisal and any Party may commence litigation in relation to the dispute if it has not been resolved within 20 business days of the expert giving his or her decision.

10.7 Litigation

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

10.8 Continue to Perform Obligations

Each Party must continue to perform its obligations under this Deed, notwithstanding the existence of a dispute.

11. Enforcement

- 11.1 Nothing in this Deed prevents either Party from exercising any function under the Act or any other Act or Law relating to the enforcement of any aspect of this Deed or any matter to which this Agreement relates.
- 11.2 Until such time as the Material Public Benefit has been provided in full the Developer must:

- (a) Notify Council in writing of the name and contact details of any certifying authority to which it has applied for an Occupation Certificate at the same time that such application is made;
- (b) At the time it lodges any application for a Occupation Certificate notify the Certifying Authority in writing of the existence in terms of this Deed;
- (c) Procure and provide to Council a written acknowledgment from the Certifying Authority addressed to Council confirming that the Certifying Authority will not issue a Occupation Certificate until Council provides written confirmation that the Material Public Benefit has been provided.

12. Notices

12.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Deed is only given or made if it is in writing and sent in one of the following ways:

- (a) Delivered or posted to that Party at its address set out below;
- (b) Faxed to that Party at its fax number set out below;
- (c) Emailed to that Party at its email address set out below.

Council

Attention: General Manager

Address: 725 Pittwater Road, Dee Why, NSW, 2099

Fax Number: 02 9971 4522

Email: council@warringah.nsw.gov.au

Developer

Attention: Charles Kelly

Address: PO Box 512, KENSINGTON, NSW, 1465

Fax Number: 02 9313 7047

- 12.2 If a Party gives the other Party three business days notice of a change of its address or fax number, any notice, consent, information, application or requests is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.
- 12.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:
- (a) If it is delivered, when it is left at the relevant address.
 - (b) If it is sent by post, 2 business days after it is posted.
 - (c) If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.
- 12.4 If any notice, consent, information, application or request is delivered, or any error free transmission report it relation to it is received, on a day that is not a business day, or if on a business day, after 5:00pm on that day in the place of the Party to whom it is sent, it is to be treated as being given or made at the beginning of the next business day.

13. Approvals and Consent

Accept as otherwise set out in this Deed, and subject to any Statutory obligations, a Party may give or withhold an approval or consent to be given under this Deed in that Party's absolute discretion and subject to any conditions determined by the Party. A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

14. Assignment and Dealings

Until the Material Public Benefit is provided in full, the Developer cannot sell, transfer, assign, novate, charge, encumber or otherwise deal with the Land or attempt or purport to do so unless the Developer:

- 14.1 Gives Council no less than ten (10) Business Days' notice in writing of the proposed sale, transfer, assignment, novation, charge, encumbrance or other dealing with its rights in respect of the Land;
- 14.2 Procures that any buyer, transferee, assignee or novatee promptly executes a Deed in favour of Council whereby the buyer, transferee, assignee or novatee becomes contractually bound with Council to perform the Developer's obligations under this Deed;
- 14.3 in the event of a proposed charge, mortgage, encumbrance or other dealing with the Land, provides to Council a bank guarantee unlimited in time from a bank and on terms acceptable to Council to secure the payment of the Development Contribution.

15. Costs

Council's costs of and incidental to the preparation and execution of this Deed and any related documents and registration of same shall be borne by the Developer.

16. Entire Deed

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.

17. Further acts

Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Deed and all transactions incidental to it.

18. Governing law and jurisdiction

This Deed is governed by the law of New South Wales. The Parties submit to the nonexclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

19. Joint and individual liability and benefits

Except as otherwise set out in this Deed, any agreement, covenant, representation or warranty under this Deed by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

20. No fetter

Nothing in this Deed shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

21. 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.

22. Severability

If a clause or part of a clause of this Deed 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.

23. Modification

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

24. Waiver

The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, 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.

25. GST

- 25.1 Unless otherwise indicated, all amounts payable by one Party to the other Party in relation to a supply under this Deed have been calculated exclusive of any GST which may be imposed on the supply.
- 25.2 If any supply made under this Deed is, or becomes, subject to GST, the Party to whom the supply is made ("**Recipient**") must pay to the Party making the supply ("**Supplier**"), as consideration, in addition to any consideration payable or to be provided elsewhere in this Deed, subject to issuing a Valid Tax Invoice, an additional amount on account of GST, such amount to be calculated by multiplying the consideration by the applicable rate of GST.
- 25.3 Any amount in respect of GST payable under clause 25.2 must be paid to the Supplier immediately on receipt of the Valid Tax Invoice.
- 25.4 If any Party is required to reimburse or indemnify the other Party for a cost or expense ("**Cost**") incurred by the other Party, the amount of that Cost for the purpose of this Deed is the amount of the Cost incurred, less the amount of any credit for, or refund of, GST, which the Party incurring the Cost is entitled to claim in respect of the Cost.
- 25.5 If GST is linked with the abolition or reduction of other taxes and charges, all amounts payable by the Recipient to the Supplier under this Deed (excluding GST) must be reduced by the same proportion as the actual total costs of the Supplier (excluding GST) are reduced either directly as a result of the abolition or reduction of other taxes and charges payable by the Supplier or indirectly by way of any

reduction in prices (excluding GST) charged to the Supplier. Both Parties must also comply with Part VB of the *Trade Practices Act 1974* (Cth).

26. Explanatory Note Relating to this Deed

26.1 Schedule 2 contains an explanatory note relating to this Deed required by clause 25E of the Regulation.

26.2 Pursuant to clause 25E(7) of the Regulation, the Parties agree that the explanatory note in Schedule 2 is not to be used to assist in construing the Deed.

EXECUTED by the Parties as a deed.

EXECUTED BY **THE COUNCIL OF**)
WARRINGAH)
)
 Date.....)
)

 Director / Secretary

EXECUTED AS A DEED BY)
)
 Date.....)
)

 Director / Secretary

SCHEDULE 1 – DEVELOPMENT CONTRIBUTIONS SCHEDULE

The Developer agrees to provide the following material benefits to Council:

MATERIAL PUBLIC BENEFIT TO BE PROVIDED BY THE DEVELOPER		
The Developer includes in the Current Development Application in respect of the Land the Material Public Benefit set out below:		
Column 1	Column 2	Column 3
Development Contribution for Material Public Benefit	Intended Use/purpose	Date to be provided by the Developer
<ul style="list-style-type: none"> Construct as part of the Development approved by the Development Consent a Pedestrian Through Site Link connecting the northern most portion of the frontage of the Land to Pittwater Road with the northern most portion of the frontage of the Land to Old Pittwater Road and generally following the alignment of the northern boundary of the Land as depicted in the plans accompanying the Current Development Application Grant an easement in favour of Council and free of cost to Council pursuant to section 88B of the <i>Conveyancing Act 1919</i> permitting pedestrian access along the Pedestrian Link between the hours of 7am and 10pm. 	<ul style="list-style-type: none"> The provision of public amenities/infrastructure relating to the Land. 	<ul style="list-style-type: none"> To be created prior to the issue of an Occupation Certificate.