# Director-General of the Department of Planning for and on behalf of the Crown in right of the State of New South Wales

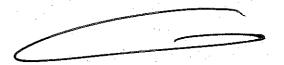
ABN 38 755 709 681

# **SH Camden Valley Pty Limited**

ACN 137 331 376

# Special Infrastructure Contributions Works-in-Kind Agreement

Portion of the Badgally Road Extension



# SPECIAL INFRASTRUCTURE CONTRIBUTIONS OFFSETS AGREEMENT – PORTION OF THE BADGALLY ROAD EXTENSION

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# **EXECUTED AS A DEED**

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2010

THIS Deed is dated

#### PARTIES:

**DIRECTOR-GENERAL OF THE DEPARTMENT OF PLANNING FOR AND ON BEHALF OF THE CROWN IN RIGHT OF THE STATE OF NEW SOUTH WALES** (ABN 38 755 709 681) of 23-33 Bridge Street, Sydney, New South Wales, 2000 (**Director-General**); and

**SH CAMDEN VALLEY PTY LIMITED** (ACN 137 331 376) of Level 18, 60 Castlereagh Street, Sydney, New South Wales, 2000 (**Developer**)

#### **INTRODUCTION:**

- A The Developer proposes to carry out Development within the Growth Centres.
- Infrastructure Contribution is payable in respect of the development of land within the Growth Centres and that the contributions will be calculated and collected in accordance with the Practice Note. The Minister has issued a direction under section 94EF of the Act directing the consent authority "to impose a condition (determined in accordance with section 94EE) on a grant of development consent" in relation to land within the Growth Centres.
- The Practice Note provides that the Growth Centres Commission may, with the approval of the Minister, "accept the dedication of land, construction of capital works or other service in lieu of a monetary contribution for future residential or industrial development ... The value of a Works-in-Kind arrangement will be the 100% attributable cost of the works" as listed in Section 2 of the Practice Note or part there of as determined by the Director-General (or his Nominated Officer). The Commission has been dissolved and the Director-General has assumed the operational functions of the Commission.
- D The Developer is obliged, as a condition of any Development Consent granted to the Developer within the Growth Centres, to pay a Special Infrastructure Contribution.
- E The Developer proposes to construct and provide certain infrastructure and the Director-General wishes to accept the infrastructure works, in lieu of the Developer making monetary payment of its Special Infrastructure Contributions' obligations imposed under any Development Consents.
- F The Parties have agreed to enter into this Deed to give effect to the above arrangements.

For the avoidance of doubt, the parties intend this Deed to constitute the entire agreement and understanding between them in relation to the subject matter of this Deed and have agreed that any prior arrangements between them relating to the subject matter of this Deed are rescinded and have no further force or effect.

#### IT IS AGREED:

#### 1 DEFINITIONS AND INTERPRETATION

#### 1.1 Definitions

In this **Deed**, unless the context clearly indicates otherwise:

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

Address for Service means the address of each party appearing in Schedule 4 or any new address notified by any party to all other parties as its new Address for Service:

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

**Approval** means any approvals, consents, certificates, permits, endorsements, licences, conditions or requirements (and any modifications or variations to them) which may be required for the commencement and carrying out of the works the subject of this Deed or the Development generally;

**Attributable Cost**, in relation to Road Work, has the same meaning as in the Practice Note:

**Authorised Progress Claim Certificates** means a certificate signed by a director of the Developer confirming that the Developer has paid the amount specified in that Certificate to the third party contractor for work performed under the Construction Contract;

**Business Day** means any day that is not a Saturday, Sunday, gazetted public holiday or bank holiday in Sydney, and concludes at 5 pm on that day;

**Consent Authority** means the Authority having the function to determine an application for Approval;

**Construction Contract** means a contract between the Developer and a third party, meeting the requirements of clause 3.2, for the carrying out of the Road Work by that third party;

Department means the NSW Department of Planning;

**Development** means any development the subject of Development Consents granted to the Developer within the Growth Centres before or after the date of this Deed;

Development Consent has the same meaning as in the Act;

Director-General means the Director-General of the Department;

Growth Centres means each and any of:

- (a) the North West Growth Centre; and
- (b) the South West Growth Centre of Sydney;

GST means any form of goods and services tax payable under the GST Legislation;

**GST Legislation** means the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth);

**Milestone** means works or other activities specified in Column 3 of the Table in Schedule 1 relating to the carrying out of the Road Work;

**Milestone Notice** means a written notice from the Developer to the Director-General notifying the Director-General that the Developer has achieved the Milestone specified in the notice.

Minister means the Minister for Planning;

**Ministerial Determination** means the determination made by the Minister under section 94EE of the Act in relation to the North West and South West Growth Centres dated 14 November 2008 as amended, supplemented or substituted from time to time;

**Ministerial Direction** means the direction made by the Minister to the Consent Authority for the Development under section 94EF of the Act dated 18 November 2008 as amended, supplemented or substituted from time to time;

**Nominated Officer** means the officer of the Department of Planning for the time being holding the position nominated by the Director-General for the purpose of this Deed;

Plans means the plans listed in Schedule 2;

**Practice Note** means the document entitled *Growth Centres Commission Special Infrastructure Contribution Practice Note, November 2008* as amended, supplemented or substituted from time to time;

Road has the same meaning as in the Roads Act 1993;

Roads Authority has the same meaning as in the Roads Act 1993;

**Road Work** means those works described in Schedule 3 to be transferred to the relevant Roads Authority in accordance with clause 3.5;

**Road Work Land** means the land on which the Road Work is to be constructed including adequate provision for verges and intersections;

SIC Discharge Amount means the amounts specified in Column 2 of the Table and corresponding to a Milestone specified in Column 3 of the Table and indexed in accordance with the Practice Note as set out in Schedule 1 and applied under clause 3.4:

SIC Discharge Certificate means a certificate referred to in clause 3.3(c)(ii) as amended from time to time under clause 3.4(b).

**Special Infrastructure Contribution (SIC)** means a contribution towards the provision of infrastructure determined in accordance with the Ministerial Determination and the Practice Note;

Table means the Table in Schedule 1 relating to the Road Work.

#### 1.2 Interpretation

In this Deed unless the context clearly indicates otherwise:

- (a) a reference to this Deed or another document means this Deed or that other document and any document which varies, supplements, replaces, assigns or novates this Deed or that other document;
- (b) a reference to **legislation** or a **legislative provision** includes any statutory modification, or substitution of that legislation or legislative provision and any subordinate legislation issued under that legislation or legislative provision;
- (c) a reference to a body or authority which ceases to exist is a reference to either a body or authority that the parties agree to substitute for the named body or authority or, failing agreement, to a body or authority having substantially the same objects as the named body or authority;

- (d) a reference to the introduction, a clause, schedule or annexure is a reference to the introduction, a clause, a schedule or an annexure to or of this Deed;
- (e) clause headings, the introduction and the table of contents are inserted for convenience only and do not form part of this Deed;
- (f) the schedules form part of this Deed;
- (g) a reference to a **person** includes a natural person, corporation, statutory corporation, partnership, the Crown or any other organisation or legal entity;
- (h) a reference to a **natural person** includes their personal representatives, successors and permitted assigns;
- (i) a reference to a **corporation** includes its successors and permitted assigns;
- (j) a reference to a right or obligation of a party is a reference to a right or obligation of that party under this Deed;
- (k) an **obligation** or **warranty** on the part of 2 or more persons binds them jointly and severally and an obligation or warranty in favour of 2 or more persons benefits them jointly and severally;
- 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;
- (m) including and includes are not words of limitation;
- (n) a word that is derived from a defined word has a corresponding meaning;
- (o) monetary amounts are expressed in Australian dollars;
- (p) the singular includes the plural and vice-versa;
- (q) words importing one gender include all other genders;
- (r) a reference to a thing includes each part of that thing; and
- (s) neither this Deed 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.

# 2 OPERATION OF THIS DEED

#### 2.1 Operation

The parties agree that this Deed will commence from the date:

- (a) this Deed is signed by all the parties; or
- (b) the Minister grants his approval to the "Works-in-kind" arrangement set out in this Deed,

whichever is later.

#### 3 AGREEMENT BETWEEN THE PARTIES

#### 3.1 The Road Work

The parties acknowledge that:

- (a) the Developer will, as a condition of any Development Consent granted or to be granted for a Development, be required to pay SIC in relation to the Development;
- (b) the Developer may elect to carry out the Road Work in accordance with clause 3 of this Deed in lieu of making monetary payment to discharge its SIC's obligations imposed under any Development Consent(s) granted within the Growth Centres;
- (c) the Director-General will, on the terms set out in this Deed, accept the Road Work and the transfer of the Road Work to a Roads Authority in discharge of all or part of the liability of the Developer to pay SIC imposed under any Development Consent(s) granted to the Developer within the Growth Centres; and
- (d) this Deed constitutes a "Works-in-Kind" arrangement under subsection 4.0 of Section One of the Practice Note.

#### 3.2 Construction Contract for the Road Work

- (a) If the Developer elects to carry out the Road Work, the Developer must provide to the Director-General a copy of the Construction Contract for the Road Work.
- (c) The Construction Contract must:

- (i) identify a superintendent for the Road Work;
- (ii) separately identify those works comprising the Road Work, whether through a separate bill of quantities or separate contract;
- (iii) identify the proposed contract value for each item of the Road Work; and
- (iv) identify the terms and conditions applicable to the carrying out of the Road Work.

# 3.3 Attainment of Milestones relating to the Road Work

- (a) If the Developer considers that it has achieved a Milestone, the Developer will forward a Milestone Notice to the Director-General together with an Authorised Progress Claim Certificate (or in the case of the final Milestone Notice, a certificate from each relevant Roads Authority confirming that Road Work or relevant portions thereof have been transferred to the Roads Authority) and such other supporting documentation as is necessary for the Director-General (or his Nominated Officer) to determine whether that Milestone has been achieved. The Developer must promptly provide any additional information requested by the Director-General (or his Nominated Officer).
- (b) The Director-General (or his Nominated Officer) will, within 45 days of receiving the Milestone Notice and all the certificates and information required under clause 3.3(a), determine whether the Milestone specified in the Milestone Notice has been achieved.
  - (c) If the Director-General (or his Nominated Officer), in his or her absolute discretion, is satisfied that the Milestone has been achieved, the Director-General will:
    - (i) accept that portion of the Road Work undertaken that is directly referable to the Milestone in lieu of the Developer making a monetary contribution equal to the SIC Discharge Amount for that Milestone, to discharge the Developer's obligations to pay any SIC imposed on any Development(s); and
    - (ii) in respect of each Milestone achieved, issue a SIC Discharge Certificate to the Developer which will set out the SIC Discharge Amount that has been credited for that Milestone.
- (d) If the Director-General or his Nominated Officer, in his or her absolute discretion, is not satisfied that the Milestone has been achieved, the Director-General or his Nominated Officer will notify the Developer and

provide an explanation as to why he or she considered that the Milestone had not been achieved and, if applicable, provide details of:

- (i) any additional work or tasks which must be undertaken; and/or
- (ii) any information or documents which must be provided,

by the Developer, in order to achieve the Milestone. The Developer may, after taking into account the Director-General or his Nominated Officer's explanation and undertaking the work or providing the information or documents required, re-submit a Milestone Notice together with any necessary documentation.

## 3.4 Application of SIC Discharge Amounts

- (a) The Developer is or will be required, from time to time, under the terms of any Development Consents granted in relation to land within the Growth Centres, to make SIC payments. The SIC Discharge Amount represents the value allocated to the portion of the Road Work which the Director-General agrees to accept in discharge or partial discharge of the Developer's obligation to make SIC monetary payments.
- (b) The Developer may request that the Director-General (or his Nominated Officer) amend and reissue the SIC Discharge Certificate in place of making the relevant monetary payment(s) in relation to Development Consents within the Growth Centres. Where the SIC due does not exceed the SIC Discharge Amount stated on the SIC Discharge Certificate, the Director-General will issue a new SIC Discharge Certificate specifying the unapplied SIC Discharge balance.

#### 3.5 Transfer of the Road Work Land

The Developer must transfer the Road Work Land to the relevant Roads Authority as soon as practicable following completion of the Road Work.

#### 4 LAND OWNERSHIP

#### 4.1 Land ownership

(a) The parties acknowledge that as at the date of this Deed, the Developer owns the Road Work Land. (b) The Developer warrants that it has a legally enforceable right to complete the Road Work to enable it to comply with all of its obligations under this Deed as and when they arise.

#### 5 DISPUTE RESOLUTION

#### 5.1 Not commence

A party must not commence any court proceedings relating to a dispute unless it complies with this **clause 5**.

#### 5.2 Written notice of dispute

A party claiming that a dispute has arisen under or in relation to this Deed must give written notice to the other party specifying the nature of the dispute.

#### 5.3 Attempt to resolve

On receipt of notice under clause 5.2, the parties must endeavour in good faith to resolve the dispute expeditiously using informal dispute resolution techniques such as mediation, expert evaluation or other techniques agreed by them.

#### 5.4 Mediation

If the parties do not agree within 21 days of receipt of notice under clause 5.2 (or any further period agreed in writing by them) as to:

- (a) the dispute resolution technique and procedures to be adopted;
- (b) the timetable for all steps in those procedures; or
- (c) the selection and compensation of the independent person required for such technique,

the parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of NSW. The parties must request the president of the Law Society of NSW or the president's nominee to select the mediator and determine the mediator's remuneration.

#### 5.5 Court proceedings

If the dispute is not resolved within 60 days after notice is given under **clause 5.2** then any party which has complied with the provisions of this **clause 5** may in

writing terminate any dispute resolution process undertaken under this clause and may then commence court proceedings in relation to the dispute.

#### 5.6 Not use information

The parties acknowledge the purpose of any exchange of information or documents or the making of any offer of settlement under this **clause 5** is to attempt to settle the dispute. No party may use any information or documents obtained through any dispute resolution process undertaken under this **clause 5** for any purpose other than in an attempt to settle the dispute.

#### 5.7 No prejudice

This **clause 5** does not prejudice the right of a party to institute court proceedings for urgent injunctive or declaratory relief in relation to any matter arising out of or relating to this Deed.

#### 6 GST

#### 6.1 Definitions

Words used in this clause that are defined in the GST Legislation have the meaning given in that legislation.

#### 6.2 Intention of the parties

The parties intend that:

- (a) Divisions 81 and 82 of the GST Legislation apply to the supplies made under and in respect of this Deed; and
- (b) no additional amounts will be payable on account of GST and no tax invoices will be exchanged between the parties.

#### 6.3 Reimbursement

Any payment or reimbursement required to be made under this Deed that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which any entity is entitled for the acquisition to which the cost, expense or amount relates.

#### 6.4 Consideration GST exclusive

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Deed are GST Exclusive. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purposes of this **clause 6**.

#### 6.5 Additional Amounts for GST

To the extent an amount of GST is payable on a supply made by a party under or in connection with this Deed (the GST Amount), the Recipient will pay to the Supplier the GST Amount. However, where a GST Amount is payable by the Director-General as Recipient of the supply, the Developer will ensure that:

- (a) the Developer makes payment of the GST Amount on behalf of the Director-General, including any gross up that may be required; and
- (b) the Developer provides a Tax Invoice to the Director-General.

#### 6.6 Non monetary consideration

Clause 6.5 applies to non-monetary consideration.

#### 6.7 Assumptions

The Developer acknowledges and agrees that in calculating any amounts payable under **clause 6.5** the Developer will assume the Director-General is not entitled to any input tax credit.

#### 6.8 No merger

This clause will not merge on completion or termination of this Deed.

#### 7 ASSIGNMENT

#### 7.1 Consent

This Deed is personal to each party and no party may assign the rights or benefits of this Deed to any person except:

(a) to a related body corporate, after obtaining the consent of the other parties, which the other parties must not withhold if it is reasonably satisfied that the related body corporate has sufficient assets, resources and expertise to perform all of the assigning party's obligations under this Deed; or (b) to any other person, with the prior consent of the other parties, which the other parties may give, give conditionally or withhold in its absolute discretion.

#### 8 WARRANTIES OF CAPACITY

#### 8.1 General warranties

Each party warrants to each other party that:

- this Deed creates legal, valid and binding obligations, enforceable against the relevant party in accordance with its terms; and
- (b) unless otherwise stated, it has not entered into this Deed in the capacity of trustee of any trust.

# 8.2 Power of attorney

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

#### 9 GENERAL PROVISIONS

#### 9.1 Entire Deed

This Deed constitutes the entire agreement between the parties regarding the matters set out in it and supersedes any prior representations, understandings or arrangements made between the parties, whether orally or in writing.

#### 9.2 Variation

This Deed must not be varied except by a later written document executed by all parties.

#### 9.3 Waiver

A right created by this Deed cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right does not constitute a waiver of that right, nor will a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.

#### 9.4 Further assurances

Each party must promptly execute all documents and do every thing necessary or desirable to give full effect to the arrangements contained in this Deed.

# 9.5 Time for doing acts

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

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 pm on the specified day, it is taken to have been done on the following Business Day.

#### 9.6 Governing law and jurisdiction

- (a) The laws applicable in New South Wales govern this Deed.
- (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.

#### 9.7 Severance

If any clause or part of any clause is in any way unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid and legal. If this is not possible, the clause (or where possible, the offending part) is to be severed from this Deed without affecting the enforceability, validity or legality of the remaining clauses (or parts of those clauses) which will continue in full force and effect.

#### 9.8 Preservation of existing rights

The expiration or termination of this Deed does not affect any right that has accrued to a party before the expiration or termination date.

#### 9.9 No merger

Any right or obligation of any party that is expressed to operate or have effect on or after the completion, expiration or termination of this Deed for any reason, will not merge on the occurrence of that event but will remain in full force and effect.

#### 9.10 Counterparts

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

## 9.11 Relationship of parties

Unless otherwise stated:

- (a) nothing in this Deed creates a joint venture, partnership, or the relationship of principal and agent, or employee and employer between the parties; and
- (b) no party has the authority to bind any other party by any representation, declaration or admission, or to make any contract or commitment on behalf of any other party or to pledge any other party's credit.

#### 9.12 Good faith

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

#### 9.13 No fetter

Nothing in this Deed shall be construed as requiring the Director-General to do anything that would cause the Director-General to breach any of the Director-General's obligations at law and without limitation, nothing in this Deed shall be construed as limiting or fettering in any way the discretion of the Director-General in exercising any of the Director-General's statutory functions, powers, authorities or duties.

#### 9.14 Expenses and stamp duty

The Developer must pay all stamp duty assessed on or in respect of this Deed and any instrument or transaction required by or necessary to give effect to this Deed.

#### 9.15 Notices

Any notice, demand, consent, approval, request or other communication (notice) to be given under this Deed must be in writing and must be given to the recipient at its Address for Service by being:

- (a) hand delivered; or
- (b) sent by facsimile transmission.

# A notice is given if:

- (a) hand delivered, on the date of delivery; or
- (b) sent by facsimile transmission during any Business Day, on the date that the sending party's facsimile machine records that the facsimile has been successfully transmitted.

#### **EXECUTED** as a Deed

Signed sealed and delivered by the Director-General of the Department of Planning for and on behalf of the Crown in right of the State of New South Wales, in the presence of:

	Standard_
Signature of Witness	Signature of the Director-General
IAN REGINCIPS	
Name of Witness in full	Sam Haddad
Signed sealed and delivered by SH Camden Valley Pty Limited in accordance with section 127 of the Corporations Act:	
with section 127 of the Corporations Act.	
Town	Affray
Signature of Director	Signature of Director/Secretary
Toru Abe	Rodney Gray
Name of Director	Name of Director/Secretary
ENDORSEMENT by the Minister for Plannii	ng DATED:
Endorsed by the Minister for Planning, in	
the presence of:	
Sharaw andrey	Tong Kelly
Signature of Witness	Signature of the Minister for Planning
SHARON ARMSTRONG	3

Tony Kelly, MLC

Name of Witness in full

# SIC Discharge Amounts - Table (clause 3.3)

#### Notes relating to Schedule 1

**Column 1** specifies, in dollars, the Attributable Cost of the Road Work as at 31 December 2008 which will be indexed in accordance with the Practice Note.

**Column 2** specifies, in dollars the SIC Discharge Amount to which the Developer will be entitled on completion of a Milestone as at 31 December 2008 which is 20% of the Attributable Cost for the Road Work. This amount will be indexed in accordance with the Practice Note.

Column 3 describes a Milestone, as defined in clause 1.1

Column 1	Column 2	Column 3		
Attributable Cost	SIC Discharge Amount per Milestone	Milestones		
Cost		No.	Description	
\$5,421,000	\$1,084,200	. 1	Expenditure of 25% of the value of the Construction Contract	
	\$1,084,200	2	Expenditure of 50% of the value of the Construction Contract	
	\$1,084,200	3	Expenditure of 75% of the value of the Construction Contract	
	\$1,084,200	4	Expenditure of 100% of the value of the Construction Contract	
	\$1,084,200	5	The later of handover of the Road Work, acceptance of the Road Work by the relevant Roads Authority, and satisfactory completion of any defects liability period for the Road Work.	

## Plans (clause 1.1)

The drawings entitled "Badgally Road Ultimate Construction Certificate", comprising:

- (a) Title Sheet and Drawing List, Drawing Number 294073-CC-000, Revision A;
- (b) Cut Fill Plan, Drawing Number 294073-CC-015, Revision A;
- (c) General Arrangement Plan & Alignment Control, Drawing Number 294073-CC-020, Revision A;
- (d) Typical Cross Sections, Drawing Number 294073-CC-100, Revision A;
- (e) Roadworks and Stormwater Plan Sheet 1, Drawing Number 294073-CC-300, Revision A;
- (f) Roadworks and Stormwater Plan Sheet 2, Drawing Number 294073-CC-301, Revision A;
- (g) Roadworks and Stormwater Plan Sheet 3, Drawing Number 294073-CC-302, Revision A; and
- (h) Roadworks and Stormwater Plan Sheet 4, Drawing Number 294073-CC-303, Revision A.

# The Road Work (clause 1.1)

The construction of a portion of the extension of Badgally Road, specifically the two east bound lanes from the Camden Valley Way intersection currently under construction for a distance of approximately 1.2km, including intersections and ancillaries, generally in accordance with the Plans.

# Address for Service (clause 9.15)

# **Director-General of the Department of Planning**

Contact: Director-General, Department of Planning

Attention: Executive Director, Strategy and Infrastructure Planning

Address: 23-33 Bridge Street

Sydney, New South Wales, 2000

Facsimile No: (02) 9228 6455

# **SH Camden Valley Pty Limited**

Contact: General Manager SHD Services Pty Limited

Address: Level 18, 60 Castlereagh Street

Sydney, New South Wales, 2000

Facsimile No: (02) 9017 7905