



lindsaytaylorlawyers

planning • environment • local government

Homebush Bay Bridge Planning Agreement

Deed of Variation and Termination

Under cl25C(3) of the *Environmental Planning and Assessment Regulation 2000*

Roads and Maritime Services

Fairmead Business Pty Ltd

Date: *30 September 2016*

3436-1176-9858v4

lindsaytaylorlawyers

Level 9, Suite 3, 420 George Street, Sydney NSW 2000, Australia

T 02 8235 9700 • **F** 02 8235 9799 • **W** www.lindsaytaylorlawyers.com.au • **E** mail@lindsaytaylorlawyers.com.au

ABN 29 682 671 304

Liability limited by a scheme approved under Professional Standards Legislation



Deed of Variation and Termination

Homebush Bay Bridge Planning Agreement

Table of Contents

Summary Sheet.....	3
Parties	4
Background	4
Operative provisions	5
1 Interpretation.....	5
2 Status of this Deed	5
3 Commencement	5
4 Warranties	6
5 Variation of Planning Agreement.....	6
6 Costs.....	6
7 Dispute Resolution.....	6
8 Notices	7
9 Entire Deed	8
10 Further Acts	8
11 Governing Law and Jurisdiction	8
12 No Fetter.....	8
13 Severability	8
14 Modification.....	8
15 Waiver.....	9
16 Explanatory Note	9
Execution.....	10
Appendix	11



Summary Sheet

RMS:

Name: Roads and Maritime Services

Address: 27-31 Argyle Street, Parramatta NSW 2150

Telephone: (02) 8849 2120

Facsimile: (02) 8849 2747

Representative: Colin Langford, Executive Manager Sydney

The Developer:

Name: Fairmead Business Pty Limited

Address: Suite 101, 25 Angas Street, Meadowbank NSW 2114

Telephone: (02) 8878 6900

Facsimile: (02) 8878 6995

Email: john.kinsella@billbergia.com.au

Representative: John Kinsella



Deed of Variation and Termination to Homebush Bay Bridge Planning Agreement

Under cl25C(3) of the *Environmental Planning and Assessment Regulation 2000*

Parties

Roads and Maritime Services ABN 76 236 371 088 a NSW Government agency and corporation incorporated under section 46 of the *Transport Administration Act 1988* (NSW) of 20 - 44 Ennis Road, Milsons Point, New South Wales 2061 (**RMS**)

and

Fairmead Business Pty Limited ABN 76 069 006 426 of Suite 101, 25 Angus Street, Meadowbank, New South Wales 2114 (**Developer**)

Background

- A The Parties to this Deed are parties to the Planning Agreement.
- B The majority of the obligations of the Developer under the Planning Agreement have been complied with, including the construction of the Bridge.
- C Certain Bridge Road Works comprising the Additional Bridge Road Works are yet to be completed by the Developer.
- D The Parties have entered into the WAD and the Further WAD.
- E The WAD and the Further WAD contain provisions similar to those contained in the Planning Agreement.
- F The Developer has proposed, and RMS has agreed, that the Planning Agreement be varied to provide for the early release and termination of the Planning Agreement, on the basis that the substantive provisions of the Planning Agreement and the WAD which have not been complied with by the Developer at the date of this Deed have been incorporated into the Further WAD.



Operative provisions

1 Interpretation

- 1.1 In this Deed the following definitions apply:

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

Additional Bridge Road Works means the road works to be undertaken by the Developer to:

- (a) complete the Footbridge Boulevard works; and
- (b) connect Footbridge Boulevard to Burroway Road, Wentworth Point, to be known as "Wentworth Place",

as more particularly described in the Further WAD.

Business Day means a day other than a Saturday, Sunday or public holiday in New South Wales and specifically excluding 27, 28, 29, 30 and 31 December.

Deed means this Deed of Variation and Termination and includes any schedules, annexures and appendices to this Deed.

Further WAD means the *Major Works Authorisation Deed – Private Financing & Construction – Additional Bridge Road Works Associated with Homebush Bay Bridge* entered into by the Parties on

Planning Agreement means the Homebush Bay Bridge Planning Agreement pursuant to s93F of the Act entered into between the Parties on 6 December 2013.

Regulation means the *Environmental Planning and Assessment Regulation 2000* (NSW).

WAD means the *Major Works Authorisation Deed – Private Financing & Construction – Homebush Bay Bridge and Bridge Road Works* entered into by the Parties on 17 July 2014.

- 1.2 All other capitalised words used in this Deed have the meanings given to those words in the Planning Agreement.

2 Status of this Deed

- 2.1 This Deed is a deed to vary and terminate the Planning Agreement.
- 2.2 This Deed is not a planning agreement within the meaning of s93F(1) of the Act.

3 Commencement

- 3.1 This Deed takes effect on the date when both Parties have executed this Deed.

- 3.2 The Party who executes this Deed last is to insert on the front page the date they did so and provide a copy of the fully executed and dated Deed to any other person who is a Party.

4 Warranties

- 4.1 The Parties warrant to each other that they:
- 4.1.1 have full capacity to enter into this Deed, and
 - 4.1.2 are able to fully comply with their obligations under this Deed.

5 Variation of Planning Agreement

- 5.1 The Planning Agreement is varied to include the following clauses after clause 26:

26A Early Release and Termination

Despite any other provision of this Deed, the Parties may agree to remove the notation of the Deed from the title to Lot 4 in Community Plan DP 270778 (now comprising Lots 11 to 15 inclusive in Community Plan DP270778) or any part thereof, or to terminate this Deed, or both, prior to the satisfaction of all of the Developer's obligations under this Deed if a further Works Authorisation Deed (**Further WAD**) is entered into under which all outstanding obligations of the Developer under this Deed are required to be met.

26B Termination of Planning Agreement

26B.1 This Deed will terminate on the later to occur of:

- 26B1.1 entry into the Further WAD by the Parties containing the Incorporated Provisions; and
- 26B1.2 provision by the Developer to RMS of the 'Approved Security' as defined under the Further WAD.

26B.2 For the purposes of this clause 26B:

Incorporated Provisions means the terms of clauses 1, 9, 10, 11, 13 and 15 of the Planning Agreement.

6 Costs

- 6.1 The Developer is to pay RMS' reasonable costs up to a maximum of \$7,500 (exclusive of GST) of preparing, negotiating, executing and stamping this Deed.
- 6.2 This clause continues to apply after expiration or termination of this Deed.

7 Dispute Resolution

- 7.1 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**).

- 7.2 Within 10 Business Days of receiving the Claim Notice, the Respondent must notify the Claimant of its representative to negotiate the dispute.
- 7.3 The nominated representatives must:
 - 7.3.1 meet to discuss the matter in good faith within 10 Business Days after service by the Respondent of the notices of its representative; and
 - 7.3.2 use reasonable endeavours to settle or resolve the dispute within 15 Business Days after they have met.
- 7.4 If the dispute is not resolved within 15 Business Days after the nominated representatives have met, then senior representatives (being senior managers, executives or directors) of the Parties must:
 - 7.4.1 meet to discuss the matter in good faith; and
 - 7.4.2 use reasonable endeavours to settle or resolve the dispute, or agree a process for settling/resolving the dispute, such as referral to a technical expert or mediation.
- 7.5 If the dispute is not resolved within 60 Business Days after issue of a Claim Notice, clause 7.6 applies.
- 7.6 If the dispute is not finally resolved in accordance with clause 7.3, or a dispute process agreed under clause 7.4, either party is at liberty to litigate the dispute.
- 7.7 Each party must continue to perform its obligations under this Deed, notwithstanding the existence of a dispute.

8 Notices

- 8.1 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:
 - 8.1.1 delivered or posted to that Party at its address set out in the Summary Sheet, or
 - 8.1.2 faxed to that Party at its fax number set out in the Summary Sheet.
- 8.2 If a Party gives the other Party 3 Business Days' notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.
- 8.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
 - 8.3.1 delivered, when it is left at the relevant address,
 - 8.3.2 sent by post, 2 Business Days after it is posted, or
 - 8.3.3 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.
- 8.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a Business Day, or if on a Business Day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next Business Day.

9 Entire Deed

- 9.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with at the date the Deed is entered into.
- 9.2 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.

10 Further Acts

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

11 Governing Law and Jurisdiction

- 11.1 This Deed is governed by the Law of New South Wales.
- 11.2 The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.
- 11.3 The Parties are not to object to the exercise of jurisdiction by those courts on any basis.

12 No Fetter

- 12.1 Nothing in this Deed shall be construed as requiring RMS 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.

13 Severability

- 13.1 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.
- 13.2 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 Deed, but the rest of this Deed is not affected.

14 Modification

- 14.1 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.



15 Waiver

- 15.1 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.
- 15.2 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.
- 15.3 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 Explanatory Note

- 16.1 The Appendix contains the Explanatory Note relating to this Deed required by clause 25E of the Regulation.
- 16.2 Pursuant to clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Deed.

Deed of Variation and Termination – Homebush Bay Bridge Planning Agreement

Roads and Maritime Services

Fairmead Business Pty Ltd



Execution

Executed as a Deed

Dated: 30 September 2016

Executed by RMS by its duly authorised officer in the presence of

Witness

Cathy Hume
Legal Counsel
Environment, Planning & Property
Legal Branch
Roads and Maritime Services

Officer

Gwyn Jones

Name of Officer

Executed by the Developer in accordance with s127(1) of the Corporations Act 2001 (Cth)

Company Secretary/Director

William Kinsella

Name

Director

John Kinsella

Name



Appendix

(Clause 16)

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Deed of Variation to and Termination of Homebush Bay Bridge Planning Agreement

Under cl25C(3) of the *Environmental Planning and Assessment Regulation 2000*

Parties

Roads and Maritime Services ABN 76 236 371 088 a NSW Government agency and corporation incorporated under section 46 of the *Transport Administration Act 1988* (NSW) of 20 - 44 Ennis Road, Milsons Point, New South Wales 2061 (**RMS**)

and

Fairmead Business Pty Limited ABN 76 069 006 426 of Suite 101, 25 Angas Street, Meadowbank, New South Wales 2114 (**Developer**)

Description of the Land to which the Draft Deed of Variation and Termination Applies

The land formerly known as Lot 3 in Community Plan DP270778 (now known as Lots 5 to 7 in Community Plan DP 270778) and formerly known as Lot 4 in Community Plan DP270778 (now known as Lots 11 to 15 in Community Plan DP270778) at Wentworth Point, New South Wales (**Land**).

Description of Development

Urban development of the Land and Other Land at Wentworth Point with a height or floor space ratio in excess of what could have been achieved before the making of the *Homebush Bay West Development Control Plan 2004 Amendment No 1*.

Summary of Objectives, Nature and Effect of the Draft Deed of Variation and Termination

Objectives of Draft Deed of Variation and Termination

The objective of the Draft Deed of Variation and Termination is to vary the Planning Agreement to provide for early termination of that agreement by the Parties and to transfer any outstanding obligations of the Developer under the Planning Agreement and the WAD governing the completion of certain road works into the Further WAD.

Nature of Draft Deed of Variation and Termination

The Draft Deed of Variation and Termination is not a planning agreement.

Effect of the Draft Deed of Variation and Termination

The Draft Deed of Variation and Termination will have the effect of terminating the Planning Agreement following the incorporation of the Developer's outstanding obligations relevant to completion of certain road works into the Further WAD between the Parties.

Assessment of the Merits of the Draft Deed of Variation and Termination

The Planning Purposes Served by the Draft Deed of Variation and Termination

The Draft Deed of Variation and Termination protects the rights and interests of the Parties and the public in ensuring the completion of the remaining road works to be carried out under the Planning Agreement by providing that the Planning Agreement is not terminated until the Further WAD, incorporating appropriate security provisions, is entered into under which those works are required to be carried out on terms similar to the terms of the Planning Agreement.

The termination of the Planning Agreement enables the economic and orderly development of the Land to proceed which in turn involves the provision of community facility under separate planning agreements.



How the Draft Deed of Variation and Termination Promotes the Public Interest

The Draft Deed of Variation and Termination promotes the public interest by enabling the development of the Land to proceed including the provision of further community benefits, whilst ensuring the public interest in completion of the works covered by the Planning Agreement is met.

For Planning Authorities:

Development Corporations - How the Draft Deed of Variation and Termination Promotes its Statutory Responsibilities

N/A

Other Public Authorities – How the Draft Deed of Variation and Termination Promotes the Objects (if any) of the Act under which it is Constituted

The Draft Deed of Variation and Termination promotes the objects of the *Transport Administration Act 1988* (NSW) by:

- Promoting the integration of the transport system; and
- Facilitating the delivery of transport infrastructure and services.

Councils – How the Draft Deed of Variation and Termination Promotes the Elements of the Council's Charter

N/A

All Planning Authorities – Whether the Draft Deed of Variation and Termination Conforms with the Authority's Capital Works Program

N/A

All Planning Authorities – Whether the Draft Deed of Variation and Termination specifies that certain requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued

The Draft Deed of Variation and Termination does not specify that any requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued for the development to which the Planning Agreement relates.