

# **Planning Agreement**

## ***Environmental Planning and Assessment Act 1979***


2, 2A & 4 Rothwell Avenue, Concord West

**Minister for Planning and Public Spaces (ABN 20 770 707 468)**

**Eloura Holdings Pty Ltd (ACN 117 032 103)**

**Powells Creek Developments Pty Ltd (ACN 167 684 595)** in its capacity as trustee of the Powells Creek Trust

**Concord Partners Holdings Pty Limited (ACN 162 008 068)**



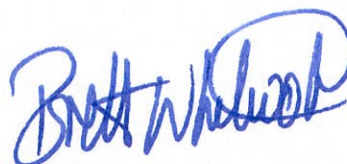
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This deed is dated

8 April 2021



## Parties:

### Minister

**Minister for Planning and Public Spaces** (ABN 20 770 707 468)

c/- NSW Department of Planning, Industry and Environment of Level 11, 4 Parramatta Square, 12 Darcy Street, Parramatta, New South Wales 2150

### Eloura

**Eloura Holdings Pty Ltd** (ACN 117 032 103) c/- Hamdan & Associates, 9 Bestic Street, Rockdale, New South Wales 2216

### Landowner(s)

**Powells Creek Developments Pty Ltd** (ACN 167 684 595) in its capacity as trustee of the Powells Creek Trust c/- Hamdan & Associates, 9 Bestic Street, Rockdale, New South Wales 2216; and

**Concord Partners Holdings Pty Limited** (ACN 162 008 068) c/- Hamdan & Associates, 9 Bestic Street, Rockdale, New South Wales 2216,

(each a **Landowner** and together referred to as the **Landowners**)

## Introduction:

- A The Landowners own the Land.
- B The Developer proposes to carry out the Development on the Land.
- C The Developer's representative has made a Development Application to the Consent Authority in respect of the Land.
- D Clause 6.9 of the LEP provides that the Consent Authority must not grant Development Consent to the Development unless the Secretary has certified in writing to the Consent Authority that satisfactory arrangements have been made to contribute to the provision of designated State public infrastructure referred to in that clause.
- E The Developer has offered to enter into this deed with the Minister to secure the Development Contribution in order to enable the Secretary to provide the certification required by the LEP.

## 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 2 or any new address notified by any party to all other parties as its new Address for Service.

**Affordable Housing** has the same meaning as in the Act.

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

**Bank Guarantee** means an irrevocable and unconditional undertaking:

- (a) by an Australian bank which is an eligible financial institution for the purposes of Treasury Circular NSW TC14/01 dated 24 January 2014 as amended, supplemented or substituted from time to time; and
- (b) on terms acceptable to the Minister, in the Minister's absolute discretion,

to pay the face value of that undertaking (being such amount as is required under this deed) on demand.

**Base CPI** means the CPI number for the quarter ending 31 March 2020.

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

**CoRD Holder Consent** means the electronic document lodged through an ELNO that provides consent to the registration of instruments and plans.

**Consent Authority** has the same meaning as in the Act.

**Contribution Amount** means the amount of the monetary contribution to be paid by the Developer as described in Schedule 4.

**CPI** means the Consumer Price Index (All Groups Index) for Sydney published by the Commonwealth Statistician, or if that index no longer exists, any similar index that the Minister specifies, in his or her sole discretion, for the purposes of this deed.

**CPI Adjustment Date** means 1 July 2021 and each anniversary of 1 July 2021.

**Current CPI** means the CPI number for the quarter ending 31 March in the calendar year in which the relevant adjustment is made.

**Dealing** means, in relation to the Land, to sell, transfer, assign, mortgage, charge, dispose of, encumber or otherwise deal with the Land in whole or part.

**Developer** means Eloura and the Landowners, jointly and severally.

**Development** means the proposed demolition of all existing structures on the Land for erection of three (3) four-storey Residential Flat Buildings, comprising eighty-eight (88) Residential Lots and a basement level car park for ninety-one (91) vehicles, generally in accordance with Development Application DA2019/0160 lodged with the City of Canada Bay Council.

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

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

**Development Contribution** means the contributions to be provided by the Developer in accordance with Schedule 4.

**ELNO** has the same meaning as in the *Electronic Conveyancing National Law (NSW)*.

**Explanatory Note** means the note exhibited with a copy of this deed when this deed is made available for inspection by the public pursuant to the Act, as required by the Regulation.

**General Register of Deeds** means the land register maintained under the *Conveyancing Act 1919* (NSW) and so titled.

**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).

**Insurance Bond** means an irrevocable and unconditional undertaking:

(c) by an Insurance Company which is an eligible financial institution for the purposes of Treasury Circular NSW TC14/01 dated 24 January 2014 as amended, supplemented or substituted from time to time; and

(d) on terms acceptable to the Minister, in the Minister's absolute discretion,

to pay the face value of that undertaking (being such amount as is required under this deed) on demand.

**Insurance Company** means an insurance company authorised under the *Insurance Act 1973* and subject to prudential supervision by Australian Prudential Regulatory Authority.

**Land** means the land described in Schedule 3.

**LEP** means *Canada Bay Local Environmental Plan 2013*.

**Lot** has the same meaning as in the *Strata Schemes Development Act 2015* (NSW).

**Mediation Program** means the Mediation Program of the Law Society of New South Wales as published on its website and as varied from time to time.

**Minister** means the Minister for Planning and Public Spaces and includes the Secretary and the Secretary's nominee.

**Mortgagee in Possession** means a person who is:

(a) a mortgagee in possession within the meaning of 'owner' in the *Local Government Act 1993*; and

(b) bound by this deed by reason of section 7.6(3) of the Act.

**Occupation Certificate** has the same meaning as in the Act.

**Planning Application** means:

(a) a Development Application; or

(b) any other application required under the Act,

which seeks approval for the carrying out of the Development on the Land.

**Real Property Act** means the *Real Property Act 1900* (NSW).

**Register** means the Torrens title register maintained under the Real Property Act.

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

**Residential Accommodation** has the same meaning as in the standard local environmental plan prescribed by the *Standard Instrument (Local Environmental Plans) Order 2006* as at the date of this deed.

**Residential Flat Building** has the same meaning as in the standard local environmental plan prescribed by the *Standard Instrument (Local Environmental Plans) Order 2006* as at the date of this deed.

**Residential Lot** means a strata lot that is created for the purposes of Residential Accommodation.

**Satisfactory Arrangements Certificate** means a certificate issued by the Secretary that satisfactory arrangements have been made to contribute to the provision of designated State public infrastructure in accordance with clause 6.9 of the LEP.

**Secretary** means the Secretary of the Department of Planning, Industry and Environment.

**Security** means a Bank Guarantee or an Insurance Bond.

**Strata Certificate** has the same meaning as in the *Strata Schemes Development Act 2015* (NSW).

**Strata Plan** has the same meaning as in the *Strata Schemes Development Act 2015* (NSW), but also includes a strata plan of subdivision within the meaning of that Act.

**Tax** means a tax, duty (including stamp duty and any other transaction duty), levy, impost, charge, fee (including a registration fee) together with all interest, penalties, fines and costs concerning them.

## 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 made 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**, a **schedule** or an **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** and **annexures** 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;
- (l) 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 and application of this deed**

### **2.1 Operation**

This deed commences on the date that this deed is signed by all the parties.

### **2.2 Planning agreement under the Act**

This deed constitutes a planning agreement within the meaning of section 7.4 of the Act and the parties agree on the matters set out in Schedule 1.

### **2.3 Application**

This deed applies to:

- (a) the Land; and
- (b) the Development.

## **3. Application of sections 7.11, 7.12 and 7.24 of the Act**

The application of sections 7.11, 7.12 and 7.24 of the Act is excluded to the extent stated in Schedule 1.

## **4. Development Contribution**

### **4.1 Developer to provide Development Contribution**

The Developer undertakes to provide to the Minister, or the Minister's nominee, the Development Contribution in accordance with the provisions of Schedule 4.

### **4.2 Special Infrastructure Contribution**

- (a) This clause applies where:
  - (i) the Minister determines a special infrastructure contribution (SIC) under section 7.23 of the Act for a special contributions area that includes any part of the Land (SIC Determination); and



- (ii) the SIC Determination takes effect on or after the commencement of this deed, but before the Development Contribution has been paid in full.
- (b) If the SIC Amount for the Development authorised by the relevant Development Consent is less than the Development Contribution that would otherwise be payable under this deed for the Development, then:
  - (i) the Developer is required to pay only the SIC Amount; and
  - (ii) that amount is to be treated as the relevant Contribution Amount for the purposes of clause 4.1, and clauses 1(b) and 2 of Schedule 4.
- (c) Clause 4.2(b) applies only if the Development Contribution has not been paid in full and is not due and payable at the time the SIC Determination takes effect. To avoid doubt, the Minister is not required to refund or reimburse any part of the Development Contribution paid before that time.
- (d) In this clause 4.2, a reference to the SIC Amount for the Development authorised by the relevant Development Consent is a reference to the amount of the monetary contribution for the Development calculated in accordance with the SIC Determination, being the amount that would have been payable if the application of section 7.24 of the Act had not been excluded by this deed and the Development Consent had been granted on or after the SIC Determination took effect.

#### **4.3 Acknowledgement**

The Developer acknowledges and agrees that, subject to section 7.3 of the Act, the Minister:

- (a) has no obligation to use or expend the Development Contribution for a particular purpose despite any provision of this deed to the contrary and has no obligation to repay the Development Contribution; and
- (b) in circumstances where the Development Contribution is transferred to any Authority, has not made any representation or warranty that the Development Contribution will or must be used for a particular purpose by that Authority.

### **5. Interest**

#### **5.1 Interest for late payment**

- (a) If the Developer fails to pay a Contribution Amount (as indexed in accordance with Schedule 4) due to the Minister on the due date for payment, the Developer must also pay to the Minister interest at a rate of 2% above the loan reference rate charged by the Commonwealth Bank of Australia from time to time.
- (b) Interest is payable on the daily balance of amounts due from the due date for payment of those amounts until all outstanding amounts (including interest on those amounts) have been paid to the Minister.

### **6. Enforcement**

#### **6.1 Developer to provide Security**

The Developer has agreed to provide security to the Minister for the performance of the Developer's obligations under this deed by providing the Security to the Minister in accordance with the terms and procedures set out in Schedule 5.

## **7. Registration**

### **7.1 Registration of deed**

- (a) Within 15 Business Days of receiving a copy of this deed executed by the Minister, the Developer at its own expense to take all practical steps and otherwise do anything to procure:
  - (i) the consent of each person, as required by the Registrar-General, who:
    - (A) has an estate or interest in the Land registered under the Real Property Act; or
    - (B) is seized or possessed of an estate or interest in the Land,
 to register this deed on the title to the Land and to the terms of this deed; and
  - (ii) the execution of any documents;
  - (iii) the production of the relevant certificates of title or electronic lodgement of the relevant CoRD Holder Consents through an ELNO; and
  - (iv) the lodgement of this deed in a registrable form at the NSW Land Registry Services for registration by the Registrar-General in the relevant folio of the Register for the Land, or in the General Register of Deeds if this deed relates to land not under the Real Property Act.
- (b) The Developer will take all practical steps and otherwise do anything to procure the registration of this deed within three months of the date of this deed in the relevant folio of the Register for the Land, or in the General Register of Deeds if this deed relates to land not under the Real Property Act, including promptly responding to any requisitions made by the Registrar-General in respect of this deed and/or any ancillary documents.

### **7.2 Evidence of registration**

- (a) The Developer must provide the Minister with evidence of the lodgement of this deed pursuant to clause 7.1(a)(iv) within 10 Business Days of such lodgement at the NSW Land Registry Services.
- (b) The Developer will provide the Minister with a copy of the relevant folio of the Register for the Land and a copy of the registered dealing containing this deed within 10 Business Days of registration of this deed.

### **7.3 Release and discharge of deed**

- (a) The Minister agrees to do all things reasonably required by the Developer to release and discharge this deed with respect to any part of the Land upon the Developer satisfying all of its obligations under this deed in respect of that part of the Land.
- (b) For the purposes of clause 7.3(a), the Developer has not satisfied all of its obligations under this deed if all applicable Occupation Certificates have not yet been issued for the Residential Flat Buildings authorised to be erected by the Development Consent for the Development on the Land.

### **7.4 Interest in Land**

The Landowners represent and warrant that they are:

- (a) the owner of their respective part of the Land; and

- (b) legally and beneficially entitled to obtain all consents and approvals and to compel any person referred to in or contemplated by clause 7.1(a)(i) to assist, cooperate and to otherwise do all things necessary for the Developer to comply with their obligations under clause 7.

## **7.5 Right to lodge caveat**

- (a) Subject to clause 7.5(b), until such time as this deed is registered on the title of the Land in accordance with clause 7.1, the Landowners acknowledge that this deed confers on the Minister an interest in the Land and entitles the Minister to lodge and maintain a caveat on the title to the Land to prevent any Dealing in respect of the Land.
- (b) If the Minister lodges a caveat in accordance with clause 7.5(a), then the Minister will do all things reasonably necessary to:
  - (i) ensure that the caveat does not prevent or delay the registration of this deed; and
  - (ii) remove the caveat from the title to the Land promptly, following registration of this deed in accordance with clause 7.1.
- (c) If, after three months of receipt of a copy of this deed executed by the Minister, the Developer has failed or has been unable to achieve the registration of this deed in accordance with clause 7.1, the Developer must pay the Minister's reasonable costs and expenses, including legal costs, of exercising the Minister's rights under clause 7.5(a) to lodge and withdraw a caveat(s) (as applicable).

## **8. Dispute Resolution**

### **8.1 Not commence**

A party must not commence any court proceedings relating to a dispute unless it complies with this clause 8.

### **8.2 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.

### **8.3 Attempt to resolve**

On receipt of notice under clause 8.2, the parties must endeavour in good faith to resolve the dispute expeditiously using informal dispute resolution processes such as mediation, expert evaluation or other methods agreed by them.

### **8.4 Mediation**

If the parties do not agree within 21 Business Days of receipt of notice under clause 8.2 (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 Program. 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.

## **8.5 Court proceedings**

If the dispute is not resolved within 60 Business Days after notice is given under clause 8.2 then any party which has complied with the provisions of this clause 8 may in writing terminate any dispute resolution process undertaken under this clause and may then commence court proceedings in relation to the dispute.

## **8.6 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 8 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 8 for any purpose other than in an attempt to settle the dispute.

## **8.7 No prejudice**

This clause 8 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.

# **9. GST**

## **9.1 Definitions**

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

## **9.2 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.

## **9.3 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 must 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.

## **9.4 Consideration GST exclusive**

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this deed are exclusive of GST. 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 9.

## **9.5 Additional Amounts for GST**

To the extent an amount of GST is payable on a supply made by a party (**Supplier**) under or in connection with this deed (the **GST Amount**), the recipient must pay to the Supplier the GST Amount. However, where a GST Amount is payable by the Minister as recipient of the supply, the Developer must ensure that:

- (a) the Developer makes payment of the GST Amount on behalf of the Minister, including any gross up that may be required; and

- (b) the Developer provides a tax invoice to the Minister.

#### **9.6 Non-monetary consideration**

Clause 9.5 applies to non-monetary consideration.

#### **9.7 Assumptions**

The Developer acknowledges and agrees that in calculating any amounts payable under clause 9.5 the Developer must assume the Minister is not entitled to any input tax credit.

#### **9.8 No merger**

This clause does not merge on completion or termination of this deed.

### **10. Assignment and transfer**

#### **10.1 Right to assign or novate**

- (a) Prior to a proposed assignment or novation of its rights or obligations under this deed, the party seeking to assign its rights or novate its obligations (**Assigning Party**) must seek the consent of the Minister and:
  - (i) satisfy the Minister (acting reasonably) that the person to whom the Assigning Party's rights or obligations are to be assigned or novated (**Incoming Party**) has sufficient assets, resources and expertise required to perform the Assigning Party's obligations under this deed insofar as those obligations are to be novated to the Incoming Party;
  - (ii) procure the execution of an agreement by the Incoming Party with the Minister on terms satisfactory to the Minister (acting reasonably) under which the Incoming Party agrees to comply with the terms and conditions of this deed as though the Incoming Party were the Assigning Party; and
  - (iii) satisfy the Minister, acting reasonably, that it is not in material breach of its obligations under this deed.
- (b) The Assigning Party must pay the Minister's reasonable legal costs and expenses incurred under this clause 10.1.

#### **10.2 Right to transfer Land**

- (a) The Landowner must not sell or transfer to another person (**Transferee**) the whole or part of any part of the Land:
  - (i) on which this deed remains registered under section 7.6 of the Act; or
  - (ii) for which the Development Contribution required under this deed remains outstanding.
- (b) Notwithstanding clause 10.2(a) the Landowner may sell or transfer the whole or any part of the Land to a Transferee if prior to the proposed sale or transfer the Landowner:
  - (i) satisfies the Minister, acting reasonably, that the proposed Transferee has sufficient assets, resources and expertise required to perform any of the remaining obligations of the Landowner under this deed or satisfies the Minister, acting reasonably, that the Landowner will continue to be bound by the terms of this deed after the transfer has been effected;

- (ii) procures the execution of an agreement by the Transferee with the Minister on terms satisfactory to the Minister, acting reasonably, under which the Transferee agrees to comply with the terms and conditions of this deed as though the Transferee were the Landowner; and
  - (iii) satisfies the Minister, acting reasonably, that it is not in material breach of its obligations under this deed.
- (c) The Developer must pay the Minister's reasonable legal costs and expenses incurred under this clause 10.2.
- (d) This clause 10.2 does not affect the entry into a contract of sale by the Developer in respect of a proposed Lot in a proposed Strata Plan, where the Strata Certificate in relation to the proposed Strata Plan has not been issued.
- (e) This clause 10.2 does not affect any right of a Mortgagee in Possession to exercise a power of sale of the whole or any part of the Land.

### **10.3 Replacement Security**

Provided that:

- (a) the Developer has complied with clauses 10.1 and 10.2; and
- (b) the Transferee or Incoming Party (as the case may be) has provided the Minister with a replacement Security in accordance with the requirements of Schedule 5 and on terms acceptable to the Minister,

the Minister will promptly return the Security to the Developer.

## **11. Capacity**

### **11.1 General warranties**

Each party warrants to each other party that:

- (a) 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.

### **11.2 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.

### **11.3 Trustee Developer**

- (a) Powells Creek Developments Pty Ltd (**Trustee**) enters into this deed in its capacity as the trustee for the Powells Creek Trust (**Trust**) constituted by a discretionary trust deed (**Trust Deed**). The Trustee:
  - (i) warrants that:
    - (A) it is the sole trustee of the Trust and no action has been taken to remove or replace it;

- (B) entry into this deed is for the benefit of the beneficiaries of the Trust and as trustee it is authorised and empowered under the Trust Deed to enter into and to perform its obligations and satisfy or discharge its liabilities under this deed;
  - (C) it is not in breach of the Trust Deed;
  - (D) it is entitled under the Trust Deed to be indemnified in full in respect of the obligations and liabilities incurred by it under this deed;
  - (E) 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; and
  - (F) it has the power under the Trust Deed to execute and perform its obligations and discharge its liabilities under this deed and all necessary action has been taken to authorise the execution and performance of this deed under the Trust Deed; and
- (ii) indemnifies the Minister, and agrees to keep the Minister indemnified, in respect of any loss or liability in any way connected with a breach of a warranty in clause 11.3(a)(i).
- (b) Prior to the Trustee being replaced as the trustee of the Trust in accordance with the Trust Deed:
  - (i) the Trustee must procure that the replacement trustee enters into a new deed with the Minister on the same terms as this deed;
  - (ii) the Trustee (as outgoing trustee) must procure an agreement from the Minister, under which the Minister releases the Trustee from the requirement to observe and perform any future obligation under this deed;
  - (iii) the Trustee (as outgoing trustee) must release the Minister, from the requirement to observe and perform any future obligation under this deed; and
  - (iv) the Trustee (as the outgoing trustee) must pay the reasonable costs and expenses of the Minister in relation to entering into a new deed under this clause 11.3(b) and the costs and expenses of registering any new deed on the title to the Land.
- (c) Subject to clause 11.3(e), liability arising under or in connection with this deed (except under or in connection with clause 11.3(a) above) is limited and can be enforced against the Trustee only to the extent to which the Trustee, having sought indemnification to the maximum extent possible, is actually indemnified in respect of that liability out of the assets of the Trust. This limitation of the Trustee's liability extends to all liabilities and obligations of the Trustee in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this deed.
- (d) No party to this deed or any person claiming through or on behalf of them will be entitled to:
  - (i) claim from or commence proceedings against the Trustee in respect of any liability in any capacity other than as the trustee of the Trust;
  - (ii) seek the appointment of a receiver, receiver and manager, liquidator, an administrator or any similar office-holder to the Trustee, or prove in any liquidation, administration or arrangement of or affecting the Trustee, except in relation to the assets of the Trust; or

- (iii) enforce or seek to enforce any judgment in respect of a liability under this deed or otherwise against the Trustee in any capacity other than as Trustee of the Trust, except under or in connection with clause 11.3(a) above.
- (e) Notwithstanding any other provision of this deed, clauses 11.3(c) and 11.3(d) do not apply to any obligation or liability of the Trustee to the extent to which there is, in respect of that obligation or liability, whether under the Trust Deed or by operation of law, a reduction in the extent of the Trustee's indemnification, or loss of the Trustee's right of indemnification, out of the assets of the Trust as a result of Trustee's failure to properly perform its duties as trustee of the Trust.
- (f) Nothing in clause 11.3(e) will make the Trustee liable for any claim for an amount greater than the amount which the Minister would have been able to claim and recover from the assets of the Trust in relation to the relevant obligation or liability if the Trustee's right of indemnification, out of the assets of the Trust had not been prejudiced by the failure of the Trustee to properly perform its duties.

## **12. Reporting requirement**

- (a) By 1 September each year or as otherwise agreed with the Secretary, the Developer must deliver to the Secretary a report (in a format acceptable to the Secretary) for the period 1 July to 30 June of the preceding financial year which must include the following matters, as applicable:
  - (i) details of all Development Consents, Strata Certificates, and Occupation Certificates issued in relation to the Development;
  - (ii) a description of the status of the Development including a plan that identifies what parts of the Development have been completed, are under construction and are to be constructed;
  - (iii) a forecast in relation to the anticipated progression and completion of the Development;
  - (iv) a compliance schedule showing the details of all Contribution Amounts provided under this deed as at the date of the report and indicating any non-compliance with this deed and the reason for the non-compliance; and
  - (v) when the Developer expects to lodge the next Planning Application.
- (b) Upon the Secretary's request, the Developer must deliver to the Secretary all documents and other information which, in the reasonable opinion of the Secretary are necessary for the Secretary to assess the status of the Development and the Developer's compliance with this deed.

## **13. General Provisions**

### **13.1 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.

### **13.2 Variation**

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



**13.3 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.

**13.4 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.

**13.5 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.

**13.6 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.

**13.7 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.

**13.8 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.

**13.9 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, does not merge on the occurrence of that event but remains in full force and effect.

**13.10 Counterparts**

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

**13.11 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.

**13.12 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.

**13.13 No fetter**

Nothing in this deed is to be construed as requiring the Minister to do anything that would cause the Minister to breach any of the Minister'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 Minister in exercising any of the Minister's statutory functions, powers, authorities or duties.

**13.14 Explanatory note**

The Explanatory Note must not be used to assist in construing this deed.

**13.15 Expenses and stamp duty**

- (a) The Developer must pay its own and the Minister's reasonable valuation costs, legal costs and disbursements in connection with the negotiation, preparation, execution and carrying into effect of this deed.
- (b) The Developer must pay for all costs and expenses associated with the giving of public notice of this deed and the Explanatory Note in accordance with the Regulation.
- (c) The Developer must pay all Taxes assessed on or in respect of this deed and any instrument or transaction required or contemplated by or necessary to give effect to this deed (including stamp duty and registration fees, if applicable).
- (d) The Developer must provide the Minister with bank cheques, or an alternative method of payment if agreed with the Minister, in respect of the Minister's costs pursuant to clauses 13.15(a) and (b):
  - (i) where the Minister has provided the Developer with written notice of the sum of such costs prior to execution, on the date of execution of this deed; or
  - (ii) where the Minister has not provided the Developer with prior written notice of the sum of such costs prior to execution, within 30 Business Days of demand by the Minister for payment.

**13.16 Notices**

- (a) 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:
  - (i) hand delivered; or

- (ii) sent by prepaid ordinary mail within Australia; or
  - (iii) in the case of a Notice to be given by the Minister or Secretary, sent by email.
- (b) A Notice is given if:
- (i) hand delivered, on the date of delivery but if delivery occurs after 5pm New South Wales time or a day that is not a Business Day, is taken to be given on the next Business Day;
  - (ii) sent by prepaid ordinary mail within Australia, on the date that is 2 Business Days after the date of posting; or
  - (iii) sent by email:
    - (A) before 5 pm on a Business Day, on that Day;
    - (B) after 5 pm on a Business Day, on the next Business Day after it is sent; or
    - (C) on a day that it is not a Business Day, on the next Business Day after it is sent, and the sender does not receive a delivery failure notice.

## Schedule 1

**Table 1 - Requirements under section 7.4 of the Act (clause 2.2)**

The parties acknowledge and agree that the table set out below provides for certain terms, conditions and procedures for the purpose of the deed complying with the Act.

<b>Requirement under the Act</b>	<b>This deed</b>
<b>Planning instrument and/or development application – (section 7.4(1))</b>  The Developer has: <ul style="list-style-type: none"> <li>(a) sought a change to an environmental planning instrument.</li> <li>(b) made, or proposes to make, a Development Application.</li> <li>(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.</li> </ul>	<ul style="list-style-type: none"> <li>(a) No</li> <li>(b) Yes</li> <li>(c) No</li> </ul>
<b>Description of land to which this deed applies – (section 7.4(3)(a))</b>	See Schedule 3
<b>Description of development to which this deed applies – (section 7.4(3)(b))</b>	See definition of Development in clause 1.1
<b>Description of change to the environmental planning instrument to which this deed applies – (section 7.4(3)(b))</b>	N/A
<b>The scope, timing and manner of delivery of contribution required by this deed – (section 7.4(3)(c))</b>	See Schedule 4
<b>Applicability of sections 7.11 and 7.12 of the Act – (section 7.4(3)(d))</b>	The application of sections 7.11 and 7.12 of the Act is not excluded in respect of the Development.
<b>Applicability of section 7.24 of the Act – (section 7.4(3)(d))</b>	The application of section 7.24 of the Act is excluded in respect of the Development.
<b>Consideration of benefits under this deed if section 7.11 applies – (section 7.4(3)(e))</b>	No
<b>Mechanism for Dispute Resolution – (section 7.4(3)(f))</b>	See clause 8
<b>Enforcement of this deed – (section 7.4(3)(g))</b>	See clause 6
<b>No obligation to grant consent or exercise functions – (section 7.4(10))</b>	See clause 13.13

Table 2 – Other matters

<b>Requirement under the Act</b>	<b>This deed</b>
<b>Registration of the Planning Agreement – (section 7.6 of the Act)</b>	Yes (see clause 7)
<b>Whether the Planning Agreement specifies that certain requirements of the agreement must be complied with before a construction certificate is issued – (clause 25E(2)(g) of the Regulation)</b>	No
<b>Whether the Planning Agreement specifies that certain requirements of the agreement must be complied with before an occupation certificate is issued – (clause 25E(2)(g) of the Regulation)</b>	Yes (see clause 3 of Schedule 4)
<b>Whether the Planning Agreement specifies that certain requirements of the agreement must be complied with before a subdivision certificate is issued – (clause 25E(2)(g) of the Regulation)</b>	No

## Schedule 2

### Address for Service (clause 1.1)

#### Minister

**Contact:** The Secretary

**Address:** NSW Department of Planning, Industry and Environment  
4 Parramatta Square  
12 Darcy Street  
PARRAMATTA NSW 2150

**Email:** [planningagreements@planning.nsw.gov.au](mailto:planningagreements@planning.nsw.gov.au)

#### Developer

**Contact:** Directors and Company Secretary  
Eloura Holdings Pty Ltd

**Address:** c/- Hamdan & Associates  
9 Bestic Street  
ROCKDALE NSW 2216

**Email:** [a.harb@elouraholdings.com.au](mailto:a.harb@elouraholdings.com.au)

#### Landowners

**Contact:** Directors and Company Secretary  
Powells Creek Developments Pty Ltd

**Address:** c/- Hamdan & Associates  
9 Bestic Street  
ROCKDALE NSW 2216

**Email:** [a.harb@elouraholdings.com.au](mailto:a.harb@elouraholdings.com.au)

**Contact:** Directors and Company Secretary  
Concord Partners Holdings Pty Limited

**Address:** c/- Hamdan & Associates  
9 Bestic Street  
ROCKDALE NSW 2216

**Email:** [a.harb@elouraholdings.com.au](mailto:a.harb@elouraholdings.com.au)

**Schedule 3****Land (clause 1.1)****1. Lots proposed for development**

Lot	Deposited Plan	Folio Identifier
1	215341	1/215341
2	215341	2/215341
X	404807	X/404807

## Schedule 4

### Development Contribution (clause 4)

#### 1. Development Contribution

- (a) The Developer undertakes to provide the Development Contribution in the manner set out in the table below:

Development Contribution	Value	Timing
Contribution Amount - Monetary contribution towards designated State public infrastructure	\$10,548 for each Residential Lot in the Development adjusted in accordance with clause 2 of this Schedule 4.	Pursuant to clause 3 of this Schedule 4

- (b) The Minister and Developer acknowledge and agree that the Development Contribution is the sum of all Contribution Amounts payable under this deed.

#### 2. Calculation of the value of a Contribution Amount

- (a) A Contribution Amount will be an amount equal to the sum represented by "X" in the following formula:

$$X = N \times \$10,548$$

"N" means the number of Residential Lots in the Residential Flat building or part of a Residential Flat Building in the Development in respect of which an Occupation Certificate is sought.

- (b) On the CPI Adjustment Date, any Contribution Amount that is yet to be paid is to be adjusted by multiplying the Contribution Amount payable by an amount equal to the Current CPI divided by the Base CPI.
- (c) For the avoidance of doubt, the omission or absence of any adjustment to the Contribution Amount in accordance with clause 2(b) of this Schedule 4, does not waive the requirement for the Contribution Amount to be adjusted in accordance with that clause.

#### 3. Payment of Contribution Amounts

- (a) The Developer must pay to the Minister or the Minister's nominee the Contribution Amount prior to the issue of the relevant Occupation Certificate.
- (b) The Developer must provide the Minister with not less than 10 Business Days' written notice of its intention to lodge an application for the Occupation Certificate.
- (c) The parties agree that the requirement to make a payment under this clause is a restriction on the issue of the Occupation Certificate within the meaning of clause 154E of the Regulation.



#### **4. Affordable Housing**

Notwithstanding clauses 1(a) and 2(a) of this Schedule 4, the parties agree that the number of Residential Lots in respect of which a Contribution Amount is to be calculated is reduced by the number of Residential Lots that is to be used for the purposes of Affordable Housing.

## Schedule 5

### Security terms (clause 6)

#### 1. Developer to provide Security

- (a) In order to secure the payment or performance of the Development Contribution the Developer has agreed to provide the Security.
- (b) The Security must:
  - (i) name the “Minister for Planning and Public Spaces” and the “Department of Planning, Industry and Environment ABN 20 770 707 468” as the relevant beneficiaries; and
  - (ii) not have an expiry date.

#### 2. Security

- (a) The Developer agrees that clauses 1 and 2 of this Schedule 5 operate as a deed poll in favour of the Minister from the date of execution by the Developer of this deed.
- (b) To avoid doubt, clauses 1 and 2 of this Schedule 5 commence from the date of execution by the Developer, even though this deed has not commenced pursuant to clause 2.1 of this deed.
- (c) At the time the Developer executes this deed, the Developer must provide the Security to the Minister having a face value amount equivalent to 100% of the Development Contribution (being the amount of \$928,224, as at the date of this deed) (**Security Amount**) in order to secure the Developer’s obligations to make a Development Contribution under this deed when it is executed by the Minister.
- (d) From the date the Developer executes this deed until the date that the Developer has provided the Development Contribution, the Minister is entitled to retain the Security and call upon it in the circumstances set out in clause 3 of this Schedule 5.
- (e) To the extent necessary, the definitions in clause 1 of this deed apply to the construction of the deed poll created by this clause 2 of Schedule 5.
- (f) The deed poll created by this clause 2 of Schedule 5 will cease to operate 6 months from the execution by the Developer of this deed unless the Minister has executed the deed within that period.

#### 3. Claims under Security

- (a) The Minister may:
  - (i) call upon the Security where the Developer has failed to pay a Contribution Amount for the Development on or after the date for payment under this deed; and
  - (ii) retain and apply such monies towards the Contribution Amount and any costs and expenses incurred by the Minister in rectifying any default by the Developer under this deed.
- (b) Prior to calling upon the Security the Minister must give the Developer not less than 10 Business Days written notice of his or her intention to call upon the Security and consider any representation that the Developer may make.

- (c) If:
- (i) the Minister calls upon the Security; and
  - (ii) applies all or part of such monies towards the Contribution Amount and any costs and expenses incurred by the Minister in rectifying any default by the Developer under this deed; and
  - (iii) has notified the Developer of the call upon the Security in accordance with clause 3(b) of this Schedule 5,

then, the Developer must provide to the Minister a replacement Security to ensure that at all times until the date that the Security is released in accordance with clause 4 of this Schedule, the Minister is in possession of Security for a face value equivalent to the Security Amount.

#### 4. Release of Security

If:

- (a) the Developer has satisfied all of its obligations under this deed secured by the Security; and
- (b) the whole of the monies secured by the Security has not been expended and the monies accounted for in accordance with clause 3 of this Schedule 5,

then the Minister will promptly return the Security (less any costs, charges, duties and taxes payable), or the remainder of the monies secured by the Security (as the case may be), to the Developer.

#### 5. Substitution of Security and registration on title

- (a) If the Developer provides the Minister with:
  - (i) evidence of registration of this deed on the title to the Land and the Minister is satisfied such registration has been effected; and
  - (ii) security for a face value amount equivalent to 25% of the Development Contribution (being the amount of \$232,056 as at the date of this deed) (**Replacement Security**),

the Minister will accept the Replacement Security as the Security Amount and return the Security required under clause 2 of this Schedule 5 (**Original Security**) less any costs, charges, duties and taxes payable, or the remainder of the monies secured by the Original Security, to the Developer subject to clause 5(b) of this Schedule 5.

- (b) The Minister will not be obliged to accept the Replacement Security where the Developer is in breach of its obligations under this deed.
- (c) To avoid doubt, the provisions of this Schedule 5 (other than clauses 2(a) – (f)) apply to the Replacement Security in the same way as they apply to the Original Security.

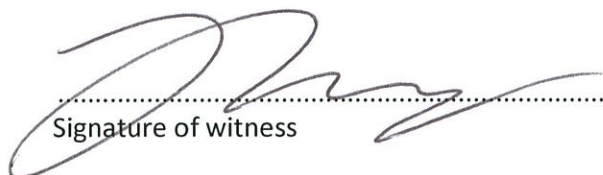
## Schedule 6

Execution page

Executed as a deed

Minister

Signed, sealed and delivered by the Minister  
for Planning and Public Spaces (ABN 20 770  
707 468), in the presence of:

  
Signature of witness

Jeremy Dryer  
Name of witness in full

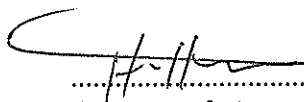
  
Signature of delegate of the Minister for  
Planning and Public Spaces

BRETT WHITWORTH  
Name of delegate of the Minister for Planning  
and Public Spaces

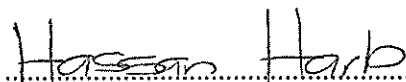
12 Carony Street, Karametta NSW 2150  
Address of witness

**Developer**

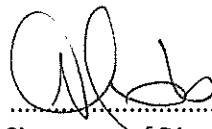
Signed, sealed and delivered by  
**Eloura Holdings Pty Ltd** (ACN 117 032 103) in  
 accordance with section 127(1) of the  
*Corporations Act 2001* (Cth) by:



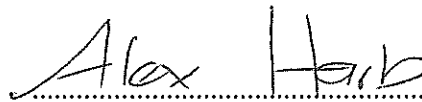
.....  
 Signature of Director/Secretary



.....  
 Full Name of Director/Secretary

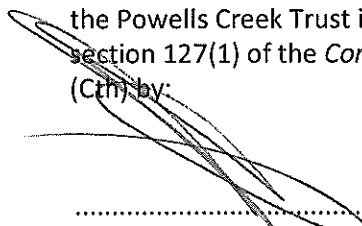


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 Signature of Director

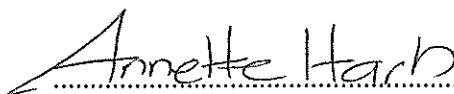


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 Full Name of Director

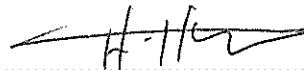
Signed, sealed and delivered by  
**Powells Creek Developments Pty Ltd**  
 (ACN 167 684 595) in its capacity as trustee of  
 the Powells Creek Trust in accordance with  
 section 127(1) of the *Corporations Act 2001*  
 (Cth) by:



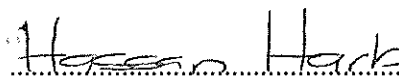
.....  
 Signature of Director/Secretary



.....  
 Full Name of Director/Secretary

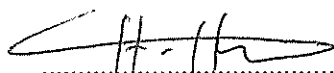


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 Signature of Director

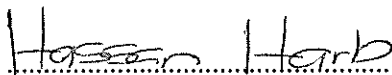


.....  
 Full Name of Director


Signed, sealed and delivered by  
**Concord Partners Holdings Pty Limited**  
 (ACN 162 008 068) in accordance with  
 section 127(1) of the *Corporations Act 2001*  
 (Cth) by:



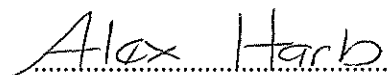
.....  
 Signature of Director/Secretary



.....  
 Full Name of Director/Secretary



.....  
 Signature of Director



.....  
 Full Name of Director