

Deed

629-639 Pacific Highway Chatswood Planning Agreement

Under s7.4 of the Environmental Planning and Assessment Act 1979

Willoughby City Council

Pacific Chatswood Pty Ltd

Date: _____

FOR PUBLIC EXHIBITION

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Summary Sheet

Council:

Name: Willoughby City Council

Address: Level 4, 31 Victor Street, Chatswood, New South Wales 2067

Telephone: (02) 9777 1000

Email: email@willoughby.nsw.gov.au

Representative: Chief Executive Officer (CEO)

Developer:

Name: Pacific Chatswood Pty Ltd

Address: Level 37, Australia Square, 264 George Street, Sydney NSW 2000

Telephone: (02) 9228 1888

Email: leonard.blundell@aqualand.com.au

Representative: Leonard Blundell

Regulatory Compliance Tables

Table 1 – Provisions of Act

Act Provision	Requirement	Compliance
S7.4(1)	'Planning Authority'	Council
	'Developer'	Developer
	Development Contributions	See clause 9, Part 2 and Schedule 2
S7.4(1), (2)	Public Purpose	See column 2 of Schedule 2
S7.4(3)(a)	Land	See Definition of 'Land' in clause 1.1
S7.4(3)(b)(i)	Instrument Change	See definition of 'LEP Amendment' in clause 1.1
S7.4(3)(b)(ii)	Development	See definition of ' <i>Development</i> ' in clause 1.1
S7.4(3)(c)	Details of Developer's Provision	See clause 9, Part 2 and Schedule 2
S7.4(3)(d)	Whether s7.11, s7.12 and s7.24 of the Act Apply to the Development	See clause 8
S7.4(3)(e)	Whether Benefits are or are not to be Taken into Consideration in Determining a Development Contribution under s7.11	No. See clause 8
S7.4(3)(f)	Mechanism for the Resolution of Disputes under the Agreement	See Part 5
S7.4(3)(g)	Enforcement of the Agreement by a Suitable Means in the Event of Breach by the Developer	See Part 6
S7.4 (10)	Conformity of Agreement with Act, Environmental Planning Instruments, & Development Consents Applying to the Land	Yes
S7.5	Public Notice & Public Inspection of Draft Agreement	Yes
S6.15(1)(d)	If the Development involves the subdivision of land, does this Agreement impose	No

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	requirements that are required to be complied with before a subdivision certificate is issued?	
S6.9(1)	If an occupation certificate is required in respect of the Development, does the Agreement impose requirements that are required to be complied with before such a certificate is issued?	No

Table 2 – Provisions of Regulation

Regulation Provision	Requirement	Compliance
Clause 203(1)	Form & Subject Matter	Yes
Clause 203(6)-(7)	Secretary's Practice Note	Yes
Clause 204	Public Notice & Public Inspection of Draft Agreement	Yes
Clause 205	Explanatory Note	See Appendix A
Clause 21 of Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation	If the Development involves building work or subdivision work, does the Agreement specify requirements that are required to be complied with before a construction certificate for the work is issued?	Yes

Table 3 – Ministerial Directions

Direction	Requirement	Compliance
Division 7.1 of the Act	Environmental Planning and Assessment (Planning Agreements) Direction 2019	The agreement does not include any provision for affordable housing.

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Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Parties

Willoughby City Council ABN 47 974 826 099 of Level 4, 31 Victor Street, Chatswood, New South Wales 2067 (Council)

and

Pacific Chatswood Pty Ltd ABN 69 630 101 478 of Level 37, Australia Square, 264 George Street, Sydney NSW 2000 (Developer)

Background

- A The Developer has sought a change to an environmental planning instrument in the form of the LEP Amendment so as to make permissible the carrying out of the Development on the Land.
- B The Council has submitted a planning proposal to facilitate the LEP Amendment for gateway determination.
- C The Minister for Planning has made a gateway determination that the LEP Amendment should proceed, subject to conditions.
- D The Developer has made or proposes to make a Development Application to carry out the Development on the Land.
- E The Developer offers to make Development Contributions to the Council in the terms set out in this Deed in connection with the carrying out of the Development.
- F The Developer is the proprietor of the lots within the Land.

Operative provisions

Part 1 - Preliminary

1 Interpretation

1.1 In this Deed the following definitions apply:

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

Approval includes approval, consent, licence, permission or the like and includes, without limitation, a Development Consent and a Part 6 Certificate.

Approved Institution means:

- (a) an authorised deposit-taking institution within the meaning of the Banking Act 1959 (Cth);
- (b) a general insurer within the meaning of the Insurance Act 1973 (Cth); or

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- (c) any other financial institution or insurer approved by the Council in its absolute discretion.

Bank Guarantee means an irrevocable and unconditional undertaking without any expiry or end date in favour of the Council on terms acceptable to the Council to pay an amount or amounts of money to the Council on demand issued by:

- (a) one of the following trading banks:
- (i) Australia and New Zealand Banking Group Limited,
 - (ii) Commonwealth Bank of Australia,
 - (iii) Macquarie Bank Limited,
 - (iv) National Australia Bank Limited,
 - (iv) St George Bank Limited,
 - (v) Westpac Banking Corporation, or
- (b) any other financial institution approved by the Council in its absolute discretion.

Claim includes a claim, demand, remedy, suit, injury, damage, loss, Cost, liability, action, proceeding or right of action.

Confidential Information means any information and all other knowledge at any time disclosed (whether in writing or orally) by the Parties to each other, or acquired by the Parties in relation to the other's activities or services which is not already in the public domain and which:

- (a) is by its nature confidential;
- (b) is designated, or marked, or stipulated by either Party as confidential (whether in writing or otherwise);
- (c) any Party knows or ought to know is confidential; or
- (d) is information which may reasonably be considered to be of a confidential nature.

Contribution Item means an item of Development Contribution specified in Column 1 of Schedule 2.

Cost means a cost, charge, expense, outgoing, payment, fee and other expenditure of any nature.

CPI means Consumer Price Index published by the Commonwealth Statistician for 'All Groups' for Sydney

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

Development means the development on the Land made possible by the LEP Amendment.

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost, the carrying out of work, or the provision of any other material public benefit, or any combination of them, to be used for, or applied towards a public purpose, but does not include any Security or other benefit provided by a Party to the Council to secure the enforcement of that Party's obligations under this Deed for the purposes of s7.4(3)(g) of the Act.

Dispute means a dispute or difference between the Parties under or in relation to this Deed.

Final Lot means:

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- (a) any lot created in the Development for separate occupation and disposition, or
- (b) any lot of a kind or created for a purpose that is otherwise agreed by the Parties,

not being a lot created by a subdivision of the Land that is to be dedicated or otherwise transferred to the Council.

First Instalment means the first instalment of the monetary Development Contribution referred to in Column 1 of the Table in Schedule 2.

Force Majeure Event means any event or circumstance, or a combination of events or circumstances:

- (a) which arises from a cause beyond the reasonable control of a party, including:
 - (i) an act of God;
 - (ii) strike, lockout, other industrial disturbance or labour difficulty;
 - (iii) war (declared or undeclared), act of public enemy, blockade, revolution, riot, insurrection, civil commotion;
 - (iv) lightning, storm, flood, fire, earthquake, explosion, epidemic, quarantine; or
 - (v) embargo, unavailability of any essential equipment or materials, unavoidable accident, lack of transportation;
- (b) which the Developer takes all reasonable precautions to protect itself against, and uses all reasonable endeavours to mitigate the consequences of (which does not require the Developer to settle a labour dispute if, in the Developer's opinion, that is not in its best interests); and
- (c) which the Developer notifies the Council of, as soon as practicable after becoming aware of the event or circumstance.

GST has the same meaning as in the GST Law.

GST Law has the same meaning as in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

Land means the land specified or described in Item 1 of Schedule 1.

LEP means the *Willoughby Local Environmental Plan 2012*.

LEP Amendment means an amendment to the LEP as a consequence of the Planning Proposal.

Map means the map in Schedule 4.

Novation Deed means the draft deed set out in Appendix B.

Part 6 Certificate a certificate specified in section 6.4 of the EP&A Act.

Party means a party to this Deed.

Planning Proposal means a planning proposal within the meaning of s3.33 of the Act as detailed in Item 2 of Schedule 1.

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

Second Instalment means the second instalment of the monetary Development Contribution referred to in Column 1 of the Table in Schedule 2.

Security means:

- a) cash;
- b) bonds or inscribed stock or their equivalent issued by the Commonwealth of

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Australia, or a state or territory government within Australia;

- c) an:
 - (i) unconditional undertaking without any expiry or end date in favour of the Council that is on terms that are acceptable to the Council to pay an amount or amounts of money to the Council on demand, acting reasonably;
 - (ii) another form of unconditional undertaking approved by the Council in its absolute discretion; or
 - (iii) a performance undertaking approved by the Council in its absolute discretion,
given by an Approved Institution; or
- d) a Bank Guarantee, or
- e) other form of security approved by the Council in its absolute discretion.

Third Instalment means the third instalment of the monetary Development Contribution referred to in Column 1 of the Table in Schedule 2.

1.2 In the interpretation of this Deed, the following provisions apply unless the context otherwise requires:

- 1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Deed.
- 1.2.2 A reference in this Deed to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- 1.2.3 If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day.
- 1.2.4 A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
- 1.2.5 A reference in this Deed to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
- 1.2.6 A reference in this Deed to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- 1.2.7 A reference in this Deed to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
- 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- 1.2.10 Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- 1.2.11 A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.

- 1.2.12 References to the word *'include'* or *'including'* are to be construed without limitation.
- 1.2.13 A reference to this Deed includes the agreement recorded in this Deed.
- 1.2.14 A reference to a Party to this Deed includes a reference to the servants, agents and contractors of the Party, the Party's successors and assigns.
- 1.2.15 A reference to *'dedicate'* or *'dedication'* in relation to land is a reference to dedicate or dedication free of cost.
- 1.2.16 Any schedules, appendices and attachments form part of this Deed.
- 1.2.17 Notes appearing in this Deed are operative provisions of this Deed.

2 Status of this Deed

- 2.1 This Deed is a planning agreement within the meaning of s7.4(1) of the Act.

3 Commencement

- 3.1 This Deed commences and has force and effect on and from the date when the Parties have:
 - 3.1.1 all executed the same copy of this Deed, or
 - 3.1.2 each executed separate counterparts of this Deed and exchanged the counterparts.
- 3.2 The Parties are to insert the date on which the relevant steps in clause 3.1 have been taken on the front page and on the execution page.

4 Application of this Deed

- 4.1 This Deed applies to the LEP Amendment, Land and to the Development.

5 Warranties

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

6 Further agreements

- 6.1 The Parties may, at any time and from time to time, enter into agreements relating to the subject-matter of this Deed that are not inconsistent with this Deed for the purpose of implementing this Deed.

7 Surrender of right of appeal, etc.

- 7.1 The Developer is not to commence or maintain, or to cause or procure the commencement or maintenance, of any proceedings in any court or tribunal or similar body appealing against, or questioning the validity of this Deed, or an Approval relating to the Development in so far as the subject-matter of the proceedings relates to this Deed.

- 7.2 Clause 7.1 does not affect the Developer's ability to commence and/or conduct any class 1 proceedings (as set out in section 17 of the *Land and Environment Court Act 1979*) and, in doing so, the Developer may rely on this Deed as a matter for consideration under section 4.15(1)(a)(iiia) of the Act, provided that the validity or reasonableness of, or the need for this Deed is not questioned by the Developer in those proceedings.

8 Application of s7.11, s7.12 and s7.24 of the Act to the Development

- 8.1 This Deed does not exclude the application of s7.11, s7.12 and s7.24 of the Act to the Development to the extent provided for in Items 4, 5 and 6 in Schedule 1 respectively.
- 8.2 The benefits under this Deed are not to be taken into consideration in determining a Development Contribution under s7.11 of the Act to the Development to the extent provided for in Item 7 in Schedule 1.

9 Provision of Development Contributions

- 9.1 The Developer is to make Development Contributions to the Council in accordance with Schedule 2, and any other provision of this Deed relating to the making of Development Contributions
- 9.2 The Council is to apply each Development Contribution made by the Developer under this Deed towards the public purpose for which it is made and otherwise in accordance with this Deed.
- 9.3 Despite clause 9.2, the Council may apply a Development Contribution made under this Deed towards a public purpose other than the public purpose specified in this Deed if the Council reasonably considers that the public interest would be better served by applying the Development Contribution towards that other purpose rather than the purpose so specified.

Part 2 – Provisions relating to monetary contributions

10 Payment of monetary Development Contributions

- 10.1 The Developer is to pay to the Council the monetary Development Contribution specified in the table in Schedule 2 in the manner and at the times specified in Column 4 of the table.
- 10.2 Nothing in this Deed precludes the Developer from electing to make the Development Contribution earlier than it is required to do so.
- 10.3 The amount of the monetary Development Contribution is to be indexed from the date of this Deed in accordance with the index specified in Item 8 of Schedule 1.
- The monetary Development Contribution is made for the purposes of this Deed when the Council receives the full amount of the contribution payable under this Deed in cash, or by unendorsed bank cheque, or by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by the Council.

Part 3 – Provisions relating to dedication of Land

- 11 Dedication of Dedication Land – Not Used**
- 12 Procedure for Dedication of Dedication Land – Not Used**
- 13 Acquisition of land required to be dedicated – Not Used**

Part 4 – Provisions relating to carrying out of Work – Not Used

- 14 Carrying out of Work – Not Used**
- 15 Variation of Work – Not Used**
- 16 Access to land by Developer – Not Used**
- 17 Access to land by Council – Not Used**
- 18 Council's obligations relating to Work – Not Used**
- 19 Protection of people, property & utilities – Not Used**
- 20 Repair of damage – Not Used**
- 21 Completion of Work – Not Used**
- 22 Rectification of defects – Not Used**
- 23 Works-As-Executed-Plan – Not Used**
- 24 Removal of Equipment – Not Used**

Part 5 – Dispute Resolution

25 Dispute resolution – expert determination

- 25.1 This clause applies to a Dispute between any of the Parties to this Deed concerning a matter arising in connection with this Deed that can be determined by an appropriately qualified expert if:
- 25.1.1 the Parties to the Dispute agree that it can be so determined; or
 - 25.1.2 the Chief Executive Officer of the professional body that represents persons who appear to have the relevant expertise to determine the Dispute gives a written opinion that the Dispute can be determined by a member of that body.
- 25.2 A Dispute to which this clause applies is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 25.3 If a notice is given under clause 25.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 25.4 If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 25.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 25.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 25.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.
- 25.8 This clause 25 does not affect the Developer's ability to commence and/or conduct any class 1 proceedings (as set out in section 17 of the *Land and Environment Court Act 1979*).

26 Dispute Resolution - mediation

- 26.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute to which clause 25 applies.
- 26.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 26.3 If a notice is given under clause 26.2 the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 26.4 If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.
- 26.5 If the Dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the Dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.
- 26.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.

- 26.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.
- 26.8 This clause 26 does not affect the Developer's ability to commence and/or conduct any class 1 proceedings (as set out in section 17 of the *Land and Environment Court Act 1979*).

Part 6 - Enforcement

27 Security for performance of obligations

Financial Security

- 27.1 Nothing in this clause 27 or clause 28 confers a substantive right on the Council to avoid returning Security (or the value of Security) it is not otherwise entitled to:
 - 27.1.1 if the Council's entitlement is disputed by the Developer, once the dispute has been conclusively determined; or
 - 27.1.2 in any case, if the Council's asserted entitlement (together with any costs, expenses or interest on such entitlement) is less than the value of the Security called-up.
- 27.2 On execution of this Deed, the Developer is to provide the Council with Security such that Council holds Security in the amounts specified in Item 9 of Schedule 1 and to secure the performance of such of the Developer's obligations under this Deed as are specified or described in Item 10 of Schedule 1.
- 27.3 The amount of the Security is to be indexed from the date of this Deed in accordance with the index specified in Item 11 of Schedule 1.
- 27.4 The Council is to release and return the Security or any unused part of it to the Developer within 14 days of compliance by the Developer of its obligations under Item 10 of Schedule 1.
- 27.5 The Developer may at any time provide the Council with a replacement Security.
- 27.6 On receipt of a replacement Security, the Council is to release and return to the Developer, as directed, the Security it holds that has been replaced.
- 27.7 The Council may call-up the Security in either of the following circumstances:
 - 27.7.1 if the Developer has not complied with its obligations under this Deed specified in Item 10 of Schedule 1 by or at the required time,
 - 27.7.2 if the Developer has notified the Council in writing that the Security may be called up to satisfy part of the Second Instalment.
- 27.8 However, the Council is not to call-up the Security pursuant to clause 27.7.1 unless:
 - 27.8.1 it has given the Developer not less than 30 days' notice of its intention to do so and particulars of why it intends to do so; and
 - 27.8.2 the Developer has not rectified the non-compliance to the Council's reasonable satisfaction before that period has expired.
- 27.9 If the Council calls-up the Security, it may use the amount paid to it in satisfaction of the obligation (or part) to which it relates or any reasonable costs incurred by it in remedying the non-compliance including but not limited to:

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- 27.9.1 the reasonable costs of the Council's servants, agents and contractors reasonably incurred for that purpose;
 - 27.9.2 all fees and charges necessarily or reasonably incurred by the Council in order to have the Work carried out, completed or rectified; and
 - 27.9.3 all legal costs and expenses reasonably incurred by the Council, by reason of the Developer's non-compliance.
- 27.10 If the Council calls-up the Security, it may, by notice in writing to the Developer, require the Developer to provide a further or replacement Security in an amount that, when added to any unused portion of any existing Security, does not exceed the amount of the Security the Council is entitled to hold under this Deed.

Deferred commencement condition

- 27.11 Notwithstanding any Security provided by the Developer to the Council under this Deed, the Developer agrees that Council may impose a condition on any Development Consent for the Development under s4.16(3) of the Act that the consent is not to operate until the Developer satisfies the Council that First Instalment and the Second Instalment have been paid.
- 27.12 Without limiting clause 7, the Developer is not to commence or maintain, or to cause or procure the commencement or maintenance, of any proceedings in any court or tribunal or similar body appealing against, or questioning the validity of, a condition referred to in clause 27.11.

Restriction on issuing of certain Construction Certificates

- 27.13 For the avoidance of doubt, for the purposes of cl 21 of the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021*, the Parties agree that payment of the Second Instalment and Third Instalment and any other unpaid monetary Development Contributions is a precondition to the issuing of the first Construction Certificate for the Development (excluding any Construction Certificate for demolition, preparatory site works, excavation and/or shoring).
- 27.14 The dispute resolution provisions of this Deed do not apply to any matter the subject of this clause.

28 Grant of Charge – Not Used

29 Caveat and Discharge – Not Used

30 Priority – Not Used

31 Breach of obligations

- 31.1 If the Council reasonably considers that the Developer is in breach of any obligation under this Deed, it may give a written notice to the Developer:
- 31.1.1 specifying the nature and extent of the breach,
 - 31.1.2 requiring the Developer to:
 - (a) rectify the breach if it reasonably considers it is capable of rectification, or
 - (b) pay reasonable compensation to the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification; and
 - 31.1.3 specifying a period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 31.2 For the purposes of clause 31.1.3 any period is not reasonable in the circumstances if it is less than 15 business days after the Council giving the written notice to the Developer
- 31.3 If the Developer fails to fully comply with a notice referred to in clause 31.1, the Council may, without further notice to the Developer, call-up the Security provided under this Deed and apply it to remedy the breach.
- 31.4 Any costs incurred by the Council in remedying a breach in accordance with clause 31.3 may be recovered by the Council by either or a combination of the following means:
- 31.4.1 by calling-up and applying the Security provided under this Deed , or
 - 31.4.2 as a debt due in a court of competent jurisdiction.
- 31.5 For the purpose of clause 31.4, the Council's costs of remedying a breach the subject of a notice given under clause 31.1 include, but are not limited to:
- 31.5.1 the costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
 - 31.5.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
 - 31.5.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- 31.6 For avoidance of doubt, nothing in this clause 31 prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Deed by the Developer, including but not limited to seeking relief in an appropriate court.

32 Enforcement in a court of competent jurisdiction

- 32.1 Subject only to clauses 25 and 26, the Parties may enforce this Deed in any court of competent jurisdiction.
- 32.2 For the avoidance of doubt, nothing in this Deed prevents:
- 32.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Deed or any matter to which this Deed relates, or
 - 32.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Deed or any matter to which this Deed relates.

Part 7 – Registration & Restriction on Dealings

33 Registration of this Deed

- 33.1 The Parties agree to register this Deed in relation to the Land for the purposes of s7.6(1) of the Act.
- 33.2 On commencement of the Deed the Developer is to deliver to the Council in registrable form:
- 33.2.1 an instrument requesting registration of this Deed on the title to the Land duly executed by the registered proprietor(s) of the land and any other person required by the Registrar-General to execute such instrument, and
- 33.2.2 the written consent of each person referred to in s7.6(1) of the Act to that registration.
- 33.3 The Developer at its cost is to:
- 33.3.1 lodge the instrument requesting registration of this Deed with NSW Land Registry Services for registration within 5 days of the commencement of this Deed,
- 33.3.2 do such other things as are reasonably necessary to enable registration of this Deed to occur; and
- 33.3.3 provide the Council with evidence of registration within 5 days of being notified by the NSW Land Registry Services of such registration.
- 33.4 The Council must, in response to a reasonable request of the Developer, and at the cost of the Developer take such action that is reasonably necessary to facilitate efforts by the Developer to fulfill the Developer's obligation under clause 33.3 (including promptly signing any necessary documents).
- 33.5 The Parties are to do such things as are reasonably necessary to remove any notation relating to this Deed from the title to the Land:
- 33.5.1 in so far as the part of the Land concerned is a Final Lot, or
- 33.5.2 in relation to any other part of the Land, once the has completed its obligations under this Deed or this Deed is terminated or otherwise comes to an end for any other reason.

34 Restriction on dealings

- 34.1 The Developer is not to:
- 34.1.1 sell or transfer its interest in the Land, other than a Final Lot, or
- 34.1.2 assign the Developer's rights or obligations under this Deed, or novate this Deed, to any person unless:
- 34.1.3 the Developer has, at no cost to the Council, first procured the execution by the person to whom the interest in the Land or part is to be sold or transferred or the Developer's rights or obligations under this Deed are to be assigned or novated, of a deed in favour of the Council on reasonable terms (being a deed generally in terms of the Novation Deed), and
- 34.1.4 the Council has given written notice to the Developer stating that it considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this Deed (and such a notice must not be unreasonably withheld), and
- 34.1.5 the Developer is not in an unremedied breach of this Deed, and

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- 34.1.6 the Council consents to the transfer, assignment or novation, such consent must be given unless the Council considers, on reasonable grounds, that this clause 34.1 has not been satisfied.
- 34.2 The Council, on giving consent under clause 34.1.6 must enter into the deed of novation referred to in clause 34.1.3.
- 34.3 Subject to clause 34.4, the Developer acknowledges and agrees that it remains liable to fully perform its obligations under this Deed unless and until it has complied with its obligations under clause 34.1.
- 34.4 Clause 34.1 does not apply in relation to any sale or transfer of an interest in the Land if this Deed is registered on the title to the relevant parcel of Land at the time of the sale.
- 34.5 If the whole or any part of a Land is transferred from the Developer to a third party without a Novation Deed being entered into (**Transferred Land**), and this Deed is registered on the title, then this Deed is deemed to include the provisions of the Novation Deed as if it had been entered into:
- 34.5.1 by the person who has ceased to own the Transferred Land (who is taken to be the Existing Developer in the Novation Deed);
- 34.5.2 by the person who has become the owner of the Transferred Land (who is taken to be the New Developer in the Novation Deed); and
- 34.5.3 by the Council,
- 34.5.4 on the basis that:
- the Effective Date is either:
- 34.5.5 if the New Developer was not a party to the Agreement until the transfer of the Transferred Land, the date that the New Developer became a Party under section 7.6(3) of the Act; or
- 34.5.6 if the New Developer was a party prior to the transfer of the Transferred Land, the date that the Existing Developer provides the New Developer with an instrument, in registrable form, that (when registered) will effect the transfer of the title to the Transferred Land from the Existing Developer to the New Developer.
- 34.6 For the avoidance of doubt:
- 34.6.1 the Developer may mortgage, charge, encumber and/or grant a security interest (however defined or described) over or in respect of all or any of the Developer's right, powers, title, benefit and/or interest in, to, under or derived from the Land, this Deed and/or any other asset or property of the Developer to or in favour of any financier or creditor of the Developer (or to or in favour of any agent or trustee of or for any such financier or creditor); and
- 34.6.2 the Developer may enter into any agreement to sell, transfer, option or lease which, if exercised, results in the formation of an agreement to sell, transfer or lease any Final Lot comprised in or forming part of the Development.

This clause 34.6 takes precedence over the other provisions in this clause 34.

Part 8 – Indemnities & Insurance

35 Risk

- 35.1 The Developer performs its obligation under this Deed at its own risk and its own cost.

36 Release

- 36.1 The Developer releases the Council from any Claim it may have against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence, breach or default.

37 Indemnity

- 37.1 The Developer indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence, breach or default.

38 Insurance – Not Used

Part 9 – Other Provisions

38A Termination

- 38A.1 A party may terminate this Deed by giving 42 days written notice to the other party if either:

- 38A.1.1 the LEP Amendment has not commenced within 36 months of the date of this Agreement;
- 38A.1.2 the LEP Amendment is repealed or otherwise ceases to have legal effect prior to the grant of Development Consent for the Development; or
- 38A.1.3 the Developer has completed all of its obligations under this Deed.

- 38A.2 Clause 38A.1 is subject to the following:

- 38A.2.1 the party seeking to terminate this Deed must give the other party notice of its intention and the grounds on which the intention is based; and
- 38A.2.2 at least one calendar month must elapse since the date of the notice referred to in clause 38A.2.1 before the written notice in clause 38A.1 is given.

- 38A.3 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 Agreement for any reason, will not merge on the occurrence of that event but will remain in full force and effect.

39 Confidentiality

- 39.1 The terms of this Deed are not confidential and this Deed may be treated as a public document and exhibited or reported without restriction by any Party.
- 39.2 The Parties acknowledge that:
- 39.2.1 Confidential Information may have been supplied to some or all of the Parties in the negotiations leading up to the making of this Deed, and
 - 39.2.2 the Parties may disclose to each other further Confidential Information in connection with the subject matter of this Deed.
- 39.3 Subject to clause 39.4 and 39.5, each Party agrees:
- 39.3.1 not to disclose any Confidential Information received before or after the commencement of this Deed to any person without the prior written consent of the Party who supplied the Confidential Information, and
 - 39.3.2 to take all reasonable steps to ensure all Confidential Information received before or after the commencement of this Deed is kept confidential and protected against unauthorised use and access.
- 39.4 A Party may disclose Confidential Information in the following circumstances:
- 39.4.1 in order to comply with the Law, or
 - 39.4.2 to any of their employees, consultants, advisers, financiers or contractors to whom it is considered necessary to disclose the information, if the employees, consultants, advisers, financiers or contractors undertake to keep the information confidential.
- 39.5 The obligations of confidentiality under this clause do not extend to information which is public knowledge other than as a result of a breach of this clause.

40 Annual report by Developer

- 40.1 The Developer is to provide to the Council by no later than each anniversary of the date on which this Deed is entered into, a report detailing the performance of its obligations under this Deed.
- 40.2 The report referred to is to be in such a form and to address such matters as reasonably required by the Council from time to time.
- 40.3 This clause 40 ceases to apply once the Developer has completed its substantive obligations under this Deed.

41 Review of Deed

- 41.1 The Parties agree to review this Deed periodically as specified in Item 14 of Schedule 1, and otherwise if either Party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Deed.
- 41.2 For the purposes of clause 41.1, the relevant changes include (but are not limited to):

- 41.2.1 any change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development,
 - 41.2.2 the lapsing of the Development Consent to the Development pursuant to s95 of the Act, and
 - 41.2.3 a Party becoming unable by reason of Force Majeure Event to carry out wholly or in part its obligations under this Deed.
- 41.3 For the purposes of addressing any matter arising from a review of this Deed referred to in clause 41.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Deed.
- 41.4 If this Deed becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.
- 41.5 A failure by a Party to agree to take action requested by the other Party as a consequence of a review referred to in clause 41.1 (but not 41.4) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.

42 Notices

- 42.1 Any notice, consent, information, application or request that is to 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:
- 42.1.1 delivered or posted to that Party at its address set out in the Summary Sheet, or
 - 42.1.2 emailed to that Party at its email address set out in the Summary Sheet.
- 42.2 If a Party gives the other Party 3 business days' notice of a change of its address, or email, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted, or emailed to the latest address.
- 42.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 42.3.1 delivered, when it is left at the relevant address,
 - 42.3.2 sent by post, 2 business days after it is posted, or
 - 42.3.3 sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.
- 42.4 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.

43 Approvals and Consent

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

44 Costs

- 44.1 The Developer is to pay Council all reasonable costs of preparing, negotiating, executing, stamping and registering this Deed, and any charge, caveats or other documents related to this Deed within 7 days of a written demand by the Council for such payment. If required, Council can provide an estimate of its legal costs and provide updates of the associated costs as the matter progresses.
- 44.2 The Developer is also to pay to the Council the Council's reasonable costs of implementing, monitoring and enforcing this Deed (where there has been an actual breach by the Developer) within 7 days of a written demand by the Council for such payment.
- 44.3 The Council's reasonable costs in clauses 44.1 and 44.2 are limited to reasonable costs of third-party fees or service providers engaged by the Council and do not include the costs of the Council's use of its own staff or resources.

45 Entire Deed

- 45.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with.
- 45.2 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.

46 Further Acts

- 46.1 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.

47 Governing Law and Jurisdiction

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

48 Joint and Individual Liability and Benefits

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

49 No Fetter

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

50 Illegality

- 50.1 If this Deed or any part of it becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties are to co-operate and do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.

51 Severability

- 51.1 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.
- 51.2 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.

52 Amendment

- 52.1 No amendment of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed in accordance with clause 203(5) of the Regulation.

53 Waiver

- 53.1 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.
- 53.2 A waiver by a Party is only effective if it:
- 53.2.1 is in writing,
 - 53.2.2 is addressed to the Party whose obligation or breach of obligation is the subject of the waiver,
 - 53.2.3 specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,
 - 53.2.4 is signed and dated by the Party giving the waiver.
- 53.3 Without limitation, a waiver may be expressed to be conditional on the happening of an event, including the doing of a thing by the Party to whom the waiver is given.
- 53.4 A waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given, and 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.
- 53.5 For the purposes of this Deed, an obligation or breach of obligation the subject of a waiver is taken not to have been imposed on, or required to be complied with by, the Party to whom the waiver is given.

54 GST

Note: The parties have a common belief that:

- GST does not apply to transactions for making supplies (commonly referred to as in kind developer contributions) under this Agreement, because the Developer has entered into this Agreement in order to secure a right to develop land (as per Division 82 of the GST Law); and/or
- the Deed provides for fees or charges for a supply of a regulatory nature made by an Australian government agency and are therefore not the provision of consideration (as per Division 81 of the GST Law and regulation 81.15.01 of the *A New Tax System (Goods and Services Tax) Regulations 1999*).

This clause 51 has been included in the event that the parties are mistaken.

54.1 In this clause:

Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice have the meaning given by the GST Law.

GST Amount means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.

GST Law has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Input Tax Credit has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.

Taxable Supply has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.

54.2 Subject to clause 54.4 if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.

54.3 Clause 54.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.

54.4 No additional amount shall be payable by the Council under clause 54.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.

54.5 If there are Supplies for Consideration which are not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:

54.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies; and

54.5.2 that any amounts payable by the Parties in accordance with clause 54.2 (as limited by clause 54.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.

54.6 No payment of any amount pursuant to this clause 54, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.

54.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a

party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.

54.8 This clause continues to apply after expiration or termination of this Deed.

55 Explanatory Note

55.1 Appendix A contains the Explanatory Note relating to this Deed required by clause 205 of the Regulation.

55.2 Pursuant to clause 205(5) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Deed.

DRAFT

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Schedule 1

(Clause 1.1)

Item 1	Land	The land identified in Schedule 3 and as shown on the Map in Schedule 4.
Item 2	Planning Proposal	<p>Planning Proposal PP2017/3 (Council's Ref) the subject of a gateway determination PP-2021-2470 (Planning Portal's Ref) under s3.34 of the Act dated 12 April 2021 which seeks to amend the following planning controls under the LEP applicable to the Land:</p> <ol style="list-style-type: none">1. rezone the land from B5 Business Development to B4 Mixed Use;2. increase the maximum building height from 20 metres to 90 metres;3. increase the maximum floor space ratio from 2.5:1 to 6:1; and4. amend the Special Provisions Areas Map (Sheet SPA_004) to include the Land as 'Area 9', 'Area 11' and 'Area 12'.
Item 3	Development	The development on the Land being a mixed-use development comprising residential and commercial uses authorised by Development Consent and permitted as a consequence of the LEP Amendment.
Item 4	Application of S7.11	Section 7.11 of the Act is not excluded
Item 5	Application of S7.12	Section 7.12 of the Act is not excluded
Item 6	Application of S7.24	Section 7.24 of the Act is not excluded
Item 7	Whether the Benefits under this Deed are to Taken in Consideration in determining a Development Contribution under s7.11	The benefits under this Deed are not to be taken into consideration in determining a Development Contribution under s7.11 of the Act for the Development.
Item 8	Indexation of Monetary Development Contributions	<p>The monetary Development Contributions specified in Schedule 2 of this Deed will be indexed quarterly from the date of this Deed (the "Indexation Date").</p> <p>This will be done in accordance with the following formula:</p> <p>Indexed monetary contribution =</p> $A \times B/C$ <p>Where A is the value of the monetary Development Contribution applicable immediately before the Indexation Date</p> <p>B is the CPI last published at the quarter ending immediately before the date of payment; and</p> <p>C is the CPI last published at the quarter ending immediately before the Indexation Date</p>
Item 9	Security	\$104,250

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Item 10	Obligations to which Security Relates	Payment of the first instalment of the monetary Development contribution and registration of this Deed on title.
Item 11	Timing of Security	On commencement of this Deed
Item 12	Indexation of Security	Security to be indexed in the same way that monetary Development Contributions are indexed in Item 8 of this schedule except that references to 'monetary Development Contributions' are replaced with a reference to 'Security' and references to 'Schedule 2' is replaced with a reference to 'Schedule 1'.
Item 13	Costs	See Clause 44
Item 14	Review of Deed	Every five years

Schedule 2

(Clause 9)

Development Contributions

Table

Column 1	Column 2	Column 3	Column 4
Item/ Contribution	Public Purpose	Manner & Extent	Timing

Monetary Development Contributions

Total of \$2,085,008 payable in the following three (3) instalments:

1. \$208,500	Contributions towards Community Infrastructure works as identified in Appendix A of Council's Planning Agreement Policy – Procedures Manual	Payable as lump sum at the timing set out in Column 4	Within 90 days of the making of the LEP Amendment.
2. \$1,355,255	Contributions towards Community Infrastructure works as identified in Appendix A of Council's Planning Agreement Policy – Procedures Manual	Payable as lump sum at the timing set out in Column 4	Within 30 days of the granting of first Development Consent for the Development.
3. \$521,253	Contributions towards Community Infrastructure works as identified in Appendix A of Council's Planning Agreement Policy – Procedures Manual	Payable as lump sum at the timing set out in Column 4	Immediately prior to the issue of first Construction Certificate for the Development (excluding any Construction Certificate for demolition, preparatory site works, excavation and/or shoring).

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Schedule 3

(Clause 1.1 and Schedule 1)

Land title references

Title Details	Street Address (in Chatswood)	Landowner
Lot 9 DP 4138	637-639 Pacific Highway	Pacific Chatswood Pty Ltd
Lot 10 DP 4138	637-639 Pacific Highway	Pacific Chatswood Pty Ltd
Lot 11 DP 4138	629 Pacific Highway	Pacific Chatswood Pty Ltd
Lot 12 DP 4138	629 Pacific Highway	Pacific Chatswood Pty Ltd
Lot 13 DP 4138	629 Pacific Highway	Pacific Chatswood Pty Ltd
Lot 14 DP 4138	629 Pacific Highway	Pacific Chatswood Pty Ltd

Schedule 4

(Clause 1.1)

Map



Execution

Executed as a Deed

Dated:

Executed on behalf of the Council

Chief Executive Officer (CEO)

Witness Name:

Position:

Executed on behalf of the Developer by Shangjin Lin as attorney for Pacific Chatswood Pty Ltd under power of attorney dated 2 November 2020 registered book 4780 number 238, in the presence of:

Name: Shangjin Lin

Witness Name:

Position: Attorney for Pacific

Position:

Chatswood Pty Ltd

By executing this agreement, the attorney states that the attorney has received no notice of revocation of the power of attorney.

Appendix A

(Clause 55)

Environmental Planning and Assessment Regulation 2021

(Clause 205)

Explanatory Note

Draft Planning Agreement

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Parties

Willoughby City Council ABN 47 974 826 099 of Level 4, 31 Victor Street, Chatswood, New South Wales 2067 (**Council**)

Pacific Chatswood Pty Ltd ABN 69 630 101 478 of Level 37, Australia Square, 264 George Street, Sydney NSW 2000 (**Developer**)

Description of the Land to which the Draft Planning Agreement Applies

The Draft Planning Agreement applies to land held within Lots 9-14 DP 4138, also known as 629-639 Pacific Highway Chatswood. The land is shown visually in this image:



Description of Proposed LEP Amendment and Development

The Draft Planning Agreement is in connection with planning proposal PP2017/3 (Council's Ref) the subject of a gateway determination PP-2021-2470 (Planning Portal's Ref) which seeks to amend the *Willoughby Local Environmental Plan 2012* to facilitate a mixed use development comprising residential and commercial uses on this Land by:

- a) rezoning the land from B5 Business Development to B4 Mixed Use;
- b) increasing the maximum building height from 20 metres to 90 metres;
- c) increasing the maximum floor space ratio from 2.5:1 to 6:1 (including affordable housing); and
- d) amending the Special Provisions Areas Map (Sheet SPA_004) to include the Land as 'Area 9', 'Area 11' and 'Area 12'.

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This Draft Planning Agreement applies to the development on this Land as authorised by the future Development Consent granted as a result of the LEP Amendment.

Summary of Objectives, Nature and Effect of the Draft Planning Agreement

Objectives of Draft Planning Agreement

The objective of the agreement is to provide a mechanism by which monetary contributions can be made to benefit the community.

Nature of Draft Planning Agreement

The agreement will be a voluntary agreement under section 7.4 of the *Environmental Planning and Assessment Act 1979 (the Act)*.

An agreement of this kind may require a developer to dedicate land free of cost, pay a monetary contribution, or provide another material public benefit to be used for or applied towards a public purpose.

In this particular case, the agreement provides that the developer will make a monetary contribution of \$2,085,008 (to be paid in 3 instalments) towards the Council's Community Infrastructure Contribution scheme (**CIC**) for the Chatswood CBD. The public purpose of the monetary development contribution will be to ensure there is adequate funding for civil infrastructure, public domain and open space and community facilities as set out in the Council's CIC in the *Willoughby Planning Agreement Policy Procedures Manual*.

Effect of the Draft Planning Agreement

The Draft Planning Agreement:

- relates to the carrying out of the Development (as defined in clause 1.1 of the Draft Planning Agreement) on the Land by the Developer,
- does not exclude the application of s7.11, s7.12 or s7.24 of the Act to the Development,
- is to be registered on the title to the Land,
- imposes restrictions on the Parties transferring the Land or part of the Land or assigning, or novating an interest under the agreement,
- the agreement provides for the enforcement of the agreement by a suitable means if there is a breach by the developer,
- where it is relevant to a development application, a consent authority must take into consideration a planning agreement – or any draft planning agreement – that a developer has entered into or offered to enter into (respectively),
- however, a planning agreement cannot impose an obligation on a planning authority to actually grant a development consent – a merit assessment of the proposed development must still be carried out.

Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

The Draft Planning Agreement:

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- promotes and co-ordinates the orderly and economic use and development of the Land to which it applies,
- provides increased opportunity for public involvement and participation in environmental planning and assessment of the Development,
- facilitates the provision of a monetary contribution to meet the demands for infrastructure in relation to roads, public open space, drainage and stormwater management, public transport infrastructure and public community facilities in the Chatswood CBD, and
- contributes to the public infrastructure required for future growth in the Chatswood CBD. enables the development to mitigate the potential impacts of the Development on existing infrastructure.

How the Draft Planning Agreement Promotes the Public Interest

The Draft Planning Agreement promotes the public interest by promoting the objects of the Act as set out in s1.3(c) and (j) of the Act.

If the planning proposal is finalised and implemented, the Draft Planning Agreement will promote the public interest by securing a monetary contribution from the Developer to the Council which will be used to support new public infrastructure generally of the kind set out in Appendix A of the *Willoughby Planning Agreement Policy - Procedures Manual*, as published by the Council.

This Draft Planning Agreement provides a public benefit to the community, above and beyond the normal contributions regime. The Developer will also still need to make the routine contributions to local infrastructure and affordable housing.

For Planning Authorities:

Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities

N/A

How the Draft Planning Agreement Promotes the Principles for Local Government Contained in Chapter 3 of the Local Government Act 1993

The Draft Planning Agreement promotes the principles for local government by:

- keeping the local and wider community informed about its activities,
- Providing adequate, equitable and appropriate service and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively.

Whether the Draft Planning Agreement Conforms with the Authority's Capital Works Program

Yes. The proposed contributions are consistent with the community infrastructure identified in the Council's *Planning Agreements Policy - Procedures Manual* and aligns with Council's capital works program.

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

The agreement requires that the third instalment of the monetary development contribution is made prior to the issue of the first construction certificate and also provides that payment of the second and third instalments and any other unpaid monetary development contributions is a precondition to the issuing of the first construction certificate (excluding any Construction Certificate for demolition, preparatory site works, excavation and/or shoring)

The agreement does not specify any requirement that must be complied with before any subsequent construction certificates, any occupation certificate or any subdivision certificate is issued.

Status of this explanatory note

This explanatory note has been agreed by parties proposing to enter into the agreement.

Clause 205(1) of the *Environmental Planning and Assessment Regulation 2021* requires that an explanatory note must be prepared to accompany a planning agreement.

The explanatory note must address the requirements of clause 205(1)(a)-(b) of the Regulation. This explanatory note has been prepared to address these requirements.

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

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

The parties have agreed that this explanatory note is not to be used to assist in construing the agreement.

Appendix B

(Clause 1.1)

Deed of Novation

Willoughby City Council

[Insert name of existing developer]

[Insert name of new developer]

Deed of Novation

Dated

Parties

1. **Willoughby City Council** ABN 47 974 826 099 of Level 4, 31 Victor Street, Chatswood, NSW 2067 (**Council**)
2. **[Drafting Note: insert details of Transferor] (Existing Developer)**
3. **[Drafting Note: insert details of Transferee] (New Developer)**
4. **[Drafting Note: insert details of each of the continuing developers] (Continuing Developer)**

Background

- A. The Council, the Existing Developer and the Continuing Developer(s) have entered into the Agreement.
- B. The Existing Developer intends to transfer **[Insert title reference(s)]** to the New Developer.

[If, as a result of the transfer, the Existing Developer will no longer own any of the Land:]

- C. The Existing Developer has agreed to transfer the Rights and Obligations to the New Developer.
- D. The Council has consented to the transfer of the Existing Developer's Rights and Obligations to the New Developer and those parties have agreed to enter into this Deed to give effect to their common intentions.
- E. The Continuing Developer(s) agree to the to enter into this Deed to give effect to the common intentions of the Council, the Existing Developer and the New Developer

[If, as a result of the transfer, the Existing Developer will still own part of the Land:]

- C. The New Developer has agreed to accept the Rights and Obligations as a Developer under the Agreement.

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- D. The Council has consented to the transfer of the relevant land to the New Developer and the inclusion of the New Developer as a Developer party to the Agreement and those parties have agreed to enter into this Deed to give effect to their common intentions.
- E. The Continuing Developer(s) agree to the to enter into this Deed to give effect to the common intentions of the Council, the Existing Developer and the New Developer

Operative provisions

1. Defined meanings

Words used in this Agreement and the rules of interpretation that apply are set out and explained in the definitions and interpretation clause at the back of this Agreement.

2. Novation

[If, as a result of the transfer, the Existing Developer will no longer own any of the Land:]

With effect on and from the Effective Date:

- (a) The New Developer is substituted for the Existing Developer under the Agreement as if the New Developer had originally been a party to the Agreement instead of the Existing Developer and all references in the Agreement to the Existing Developer in any capacity must be read and construed as if they were references to the New Developer; and
- (b) The New Developer is bound by, and must comply with, the provisions of the Agreement and the obligations imposed on the Existing Developer by the Agreement and the New Developer enjoys all the rights and benefits of the Existing Developer under the Agreement (even if an obligation, right or benefit, arose or accrued before the Effective Date).

[If, as a result of the transfer, the Existing Developer will still own part of the Land:]

With effect on and from the Effective Date:

- (a) The New Developer is taken to be a party to the Agreement and the definition of Developer in clause 16.1 of the Agreement is taken to include the New Developer; and
- (b) The New Developer is bound by, and must comply with, the provisions of the Agreement and the obligations imposed on the Developer by the Agreement and the New Developer enjoys all the rights and benefits of the Developer under the Agreement (even if an obligation, right or benefit, arose or accrued before the Effective Date).

3. Consent

[If, as a result of the transfer, the Existing Developer will no longer own any of the Land:]

With effect on and from the Effective Date, the Council:

- (a) consents to the New Developer being substituted for Existing Developer on the terms outlined at clause 2 of this Deed;
- (b) accepts the assumptions by the New Developer of all the liabilities of the Existing Developer under the Agreement instead of those liabilities being liabilities of the Existing Developer; and
- (c) agrees to be bound by the terms of the Agreement in every way as if the New Developer were a party to the Agreement instead of the Existing Developer.

[If, as a result of the transfer, the Existing Developer will still own part of the Land:]

With effect on and from the Effective Date, the Council:

- (a) consents to the New Developer becoming a Developer under the terms of the Agreement as outlined at clause 2 of this Deed;
- (b) agrees to be bound by the terms of the Agreement in every way as if the New Developer were a party to the Agreement.

4. Release and Indemnity

[If, as a result of the transfer, the Existing Developer will no longer own any of the Land:]

4.1 Release and Discharge (the Council)

On and from the Effective Date, the Council and the Continuing Developer(s) release the Existing Developer from all Rights and Obligations and from all Claims that they may have against the Existing Developer under or in respect of the Agreement.

4.2 Release and Discharge (the Existing Developer)

On and from the Effective Date, the Existing Developer releases the Council and the Continuing Developer(s) from all their obligations under the Agreement and from all Claims that it may have against the Council or Continuing Developer(s) under or in respect of the Agreement.

4.3 Indemnity

On and from the Effective Date, the New Developer indemnifies the Existing Developer and the Continuing Developer(s) from and against all Liabilities and Claims that it may have against the Existing Developer in respect of the Agreement.

[Omit clause 4 if, as a result of the transfer, the Existing Developer will still own part of the Land]

5. Representations and Warranties

5.1 Power

Both the Existing Developer, the New Developer and the Continuing Developer(s) represent and warrant to the Council and to each other that:

- (a) it is an individual or corporation validly existing under the laws of Australia;
- (b) if it is a corporation – that it has the corporate power to enter into and perform its obligations under this Deed and has taken all necessary corporate action to authorise execution, delivery and performance of this Deed;
- (c) this Deed is valid and binding upon it and is enforceable against it in accordance with its terms; and
- (d) if it is a corporation – that no application or order has been made for the winding up or liquidation of it, no action has been taken to seize or take possession of any of its assets, there are no unsatisfied judgments against it and it is able to pay its debts as and when they come due and payable.

5.2 Reliance by the Council

The Existing Developer, the New Developer and the Continuing Developers each acknowledge that the Council has entered into this Deed in reliance on the representations and warranties detailed in clause 5.1.

6. General provisions

6.1 Developer Costs

The Existing Developer, the New Developer and the Continuing Developers must pay their own costs in relation to:

- (a) the negotiation, preparation, execution, performance, amendment or registration of, or any consent given or made; and
- (b) the performance of any action by that party in compliance with any liability arising,

under this Deed, or any agreement or document executed or effected under this Deed, unless this Deed provides otherwise.

6.2 The Council's Costs

The Existing Developer and the New Developer are jointly and severally responsible for Council's reasonable costs in relation to this Deed.

6.3 GST

If any payment made by one party to any other party under or relating to this Deed constitutes consideration for a taxable supply for the purposes of GST or any similar tax, the amount to be paid for the supply will be increased so that the net amount retained by the supplier after payment of that GST is the same as if the supplier was not liable to pay GST in respect of that supply. This provision is subject to any other agreement regarding the payment of GST on specific supplies, and includes payments for supplies relating to the breach or termination of, and indemnities arising from, this Deed.

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6.4 Duties

- (a) The New Developer must promptly, within the initial applicable period prescribed by law, pay any duty payable in relation to the execution, performance and registration of this Deed, or any agreement or document executed or effected under this Deed.
- (b) The New Developer indemnifies Council and the Existing Developer against any loss incurred by any other party in relation to any duty specified in this provision, whether through default by the New Developer under this provision or otherwise.

6.5 Assignment

A party must not transfer any right or liability under this Deed without the prior consent of each other party, except where this Deed provides otherwise.

6.6 Notices

- (a) Any notice may be served by delivery in person or by post or transmission by facsimile to the address or number of the recipient specified in this provision or most recently notified by the recipient to the sender.
[Insert address for notices for each of the parties]
- (b) Any notice to or by a party under this Deed must be in writing and signed by either:
 - (i) the sender or, if a corporate party, an authorised officer of the sender; or
 - (ii) the party's solicitor.
- (c) Any notice is effective for the purposes of this Deed upon delivery to the recipient or production to the sender of a facsimile transmittal confirmation report before 4.00pm local time on a day in the place in or to which the written notice is delivered or sent or otherwise at 9.00am on the next day following delivery or receipt.

6.7 Governing law and jurisdiction

- (a) This Deed is governed by and construed under the law in the State of New South Wales.
- (b) Any legal action in relation to this Deed against any party or its property may be brought in any court of competent jurisdiction in the State of New South Wales.
- (c) Each party by execution of this Deed irrevocably, generally and unconditionally submits to the non-exclusive jurisdiction of any court specified in this provision in relation to both itself and its property.

6.8 Amendments

Any amendment to this Deed has no force or effect, unless effected by a document executed by the parties.

6.9 Third parties

This Deed confers rights only upon a person expressed to be a party, and not upon any other person.

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6.10 Pre-contractual negotiation

This Deed:

- (a) expresses and incorporates the entire agreement between the parties in relation to its subject matter, and all the terms of that agreement; and
- (b) supersedes and excludes any prior or collateral negotiation, understanding, communication or agreement by or between the parties in relation to that subject matter or any term of that agreement.

6.11 Further assurance

Each party must execute any document and perform any action necessary to give full effect to this Deed, whether before or after performance of this Deed.

6.12 Continuing performance

- (a) The provisions of this Deed do not merge with any action performed or document executed by any party for the purposes of performance of this Deed.
- (b) Any representation in this Deed survives the execution of any document for the purposes of, and continues after, performance of this Deed.
- (c) Any indemnity agreed by any party under this Deed:
 - (i) constitutes a liability of that party separate and independent from any other liability of that party under this Deed or any other agreement; and
 - (ii) survives and continues after performance of this Deed.

6.13 Waivers

Any failure by any party to exercise any right under this Deed does not operate as a waiver and the single or partial exercise of any right by that party does not preclude any other or further exercise of that or any other right by that party.

6.14 Remedies

The rights of a party under this Deed are cumulative and not exclusive of any rights provided by law.

6.15 Severability

Any provision of this Deed which is invalid in any jurisdiction is invalid in that jurisdiction to that extent, without invalidating or affecting the remaining provisions of this Deed or the validity of that provision in any other jurisdiction.

6.16 Party acting as trustee

If a party enters into this Deed as trustee of a trust, that party and its successors as trustee of the trust will be liable under this Deed in its own right and as trustee of the trust. Nothing releases the party from any liability in its personal capacity. The party warrants that at the date of this Deed:

- (a) all the powers and discretions conferred by the deed establishing the trust are capable of being validly exercised by the party as trustee and have not been varied or revoked and the trust is a valid and subsisting trust;

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- (b) the party is the sole trustee of the trust and has full and unfettered power under the terms of the deed establishing the trust to enter into and be bound by this Deed on behalf of the trust and that this Deed is being executed and entered into as part of the due and proper administration of the trust and for the benefit of the beneficiaries of the trust; and
- (c) no restriction on the party's right of indemnity out of or lien over the trust's assets exists or will be created or permitted to exist and that right will have priority over the right of the beneficiaries to the trust's assets.

7. Definitions and interpretation

7.1 Definitions

In this Deed unless the context otherwise requires:

Claims includes actions, proceedings, suits, causes of action, arbitration, verdicts and judgments either at law or in equity or arising under a statute, debts, dues, demands, claims of any nature, costs and expenses.

Agreement means the voluntary planning agreement between the Council and the Existing Developer dated [insert date], a copy of which is annexed to this Deed as Annexure **A**.

Deed means this Deed and includes any Annexures to this Deed.

Effective Date means the date upon which the Existing Developer provides the New Developer with an instrument, in registrable form, that (when registered) will effect the transfer of the title to the land from the Existing Developer to the New Developer.

GST means any tax, levy, charge or impost implemented under the *A New Tax System (Goods and Services Tax) Act (GST Act)* or an Act of the Parliament of the Commonwealth of Australia substantially in the form of, or which has a similar effect to, the GST Act;

Liabilities include all liabilities (whether actual, contingent or prospective), losses, damages, costs and expenses of whatever description.

Rights and Obligations means all of the rights, benefits and obligations imposed or conferred on the Existing Developer by the Agreement.

7.2 Interpretation

In this Deed unless the context otherwise requires:

- (a) clause and subclause headings are for reference purposes only;
- (b) the singular includes the plural and vice versa;
- (c) words denoting any gender include all genders;
- (d) reference to a person includes any other entity recognised by law and vice versa;
- (e) where a word or phrase is defined its other grammatical forms have a corresponding meaning;
- (f) any reference to a party to this Deed includes its successors and permitted assigns;
- (g) any reference to any agreement or document includes that agreement or document as amended at any time;

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- (h) the use of the word includes or including is not to be taken as limiting the meaning of the words preceding it;
- (i) the expression at any time includes reference to past, present and future time and the performance of any action from time to time;
- (j) an agreement, representation or warranty on the part of two or more persons binds them jointly and several
- (k) an agreement, representation or warranty on the part of two or more persons is for the benefit of them jointly and severally;
- (l) any ambiguities in the interpretation of this Deed shall not be construed against the drafting party; and
- (m) reference to an exhibit, annexure, attachment or schedule is a reference to the corresponding exhibit, annexure, attachment or schedule in this Deed.

Executed as a deed.

[Insert relevant attestation clauses]

[Insert the executed planning agreement that is the subject of the novation as Annexure A]

DRAFT