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3. Delegate authority to the General Manager to finalise the draft submission, including minor typographical changes.
4. Write to Local State Members of Parliament seeking their advocacy on this issue.

The Motion on being Put was declared **CARRIED** Unanimously.

Councillor Hamed left the Meeting at 7:52pm during the consideration of this item.

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**Min.053                    C03/22-34 Draft Planning Agreement for 399 Guildford Road, Guildford**

**Motion (Garrard/Christou)**

That Council:

1. Endorse the draft Planning Agreement at 399 Guildford Road, Guildford;
2. Exhibit the draft Planning Agreement in accordance with Part 7.5 of the *Environmental Planning and Assessment Act 1979*; and
3. Authorise the Mayor and General Manager to sign and execute the Planning Agreement after the exhibition period, provided no substantial objections have been made to the planning agreement.

The Motion on being Put was declared **CARRIED**.

Councillor(s) For the Motion: Christou, Colman, Cummings, Elmore, Farooqui, Garrard, Huang, Hughes, Hussein, Lake, Saha, Sarkis and Zaiter.

Councillor(s) Against the Motion: Nil.

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**Min.054                    Alteration of Order of Business**

**Resolved (Sarkis/Christou)**

That in accordance with Clause 8.2 of the Code of Meeting Practice, Council alter the Order of Business to allow Item C03/22-37 to be brought forward for consideration at this time of the Meeting.

The Motion on being Put was declared **CARRIED** Unanimously.

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**Min.055                    C03/22-37 Australian Local Government Association (ALGA) National General Assembly- Motions for Submission**

**Motion (Saha/Sarkis)**

Item No: C03/22-34

## DRAFT PLANNING AGREEMENT FOR 399 GUILDFORD ROAD, GUILDFORD

Responsible Division: Environment & Planning  
Officer: Director Environment & Planning  
File Number: DA-2019/395/1  
Community Strategic Plan Goal: *A resilient built environment*

### **SUMMARY**

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Development Application DA-2019/395/1 was approved by the NSW Land and Environment Court on 20 January 2021 for the construction of a four-storey building comprising two business tenancies and six shop top housing dwellings with basement parking, landscaping, and communal open space. The development was approved with a condition for the applicant to enter into a Planning Agreement for the payment of a monetary contribution to Council in the sum of \$75,000 in lieu of 3 commercial vehicle parking spaces that could not be provided on the site due to the site's constraints.

A draft Planning Agreement has since been prepared in accordance with the condition. Following review by Council's solicitors and officers, it is recommended that Council endorse the draft Planning Agreement. The proposal is consistent with Council's Planning Agreements Policy and would provide a public benefit through the future provision and/or upgrading of public, commuter car parking or public transport facilities within the local government area.

### **RECOMMENDATION**

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#### **That Council:**

- 1. Endorse the draft Planning Agreement at 399 Guildford Road, Guildford;**
- 2. Exhibit the draft Planning Agreement in accordance with Part 7.5 of the *Environmental Planning and Assessment Act 1979*; and**
- 3. Authorise the Mayor and General Manager to sign and execute the Planning Agreement after the exhibition period, provided no substantial objections have been made to the planning agreement.**

### **REPORT**

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#### ***Context***

Development Application DA-2019/395/1 was approved by the NSW Land and Environment Court on 20 January 2021 the construction of a four-storey building comprising two business tenancies and six shop top housing dwellings with basement parking, landscaping, and communal open space. The development was approved with a condition for the applicant to enter into a Planning Agreement for the payment of a monetary contribution to Council in the sum of \$75,000 in lieu of 3 commercial vehicle parking spaces that could not be provided on the site due to the site's constraints. It is noted that the development did not propose any uplift as part of the proposed offer to Council.

### ***Proposed Draft Planning Agreement***

The proposed Draft Planning Agreement is for the payment of a monetary contribution in the sum of \$75,000 in lieu of 3 commercial vehicle parking spaces that could not be provided on the site. Further details of the draft planning agreement are also provided in Attachment 1.

Council's solicitors and officers have undertaken a review of the draft planning agreement and are satisfied that it is consistent with Council's Planning Agreements Policy.



Figure 1 – Proposed development highlighted in red

### ***Public Benefit***

The proposed draft planning agreement would provide a public benefit given that the contribution is to be put towards the future provision and/or upgrading of public, commuter car parking or public transport facilities within the local government area. The monetary contribution is payable prior to the release of the construction certificate for the development. The agreement does not exclude the application of Section 7.11 contributions.

### ***Next Steps***

Should Council endorse the draft Planning Agreement, the documentation will be publicly notified in accordance with Section 7.5 of the *Environmental Planning and*

*Assessment Act 1979.* The notification and finalisation of the Planning Agreement shall be undertaken in accordance with Council's resolution.

Should Council not support the proposed draft Planning Agreement, Development Application DA-2019/395/1 cannot proceed.

## **COMMUNITY ENGAGEMENT**

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Should the draft Planning Agreement be endorsed by Council, the documentation will be publicly notified in accordance with section 7.5 of the *Environmental Planning and Assessment Act 1979* and Council's Planning Agreements Policy.

## **POLICY IMPLICATIONS**

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Policy implications are outlined in the body of the report.

## **RISK IMPLICATIONS**

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There are minimal risk implications for Council associated with this report.

## **FINANCIAL IMPLICATIONS**

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Financial implications are outlined in the body of the report.

## **CONCLUSION**

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Development Application DA-2019/395/1 was approved by the NSW Land and Environment Court, which includes a condition to enter into a Planning Agreement with Council for the payment of a monetary contribution in the sum of \$75,000 in lieu of 3 commercial vehicle parking spaces that could not be provided on the site.

Following review by Council's solicitors and officers, it is recommended that Council endorse the proposed draft Planning Agreement. The proposal is consistent with Council's Planning Agreements Policy as it would provide a public benefit through the future provision and/or upgrading of public, commuter car parking or public transport facilities within the local government area.

## **ATTACHMENTS**

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1. 399 Guildford Road, Guildford - Draft Planning Agreement [!\[\]\(3292f5442e3b4027aa0bb60988f9fc82\_img.jpg\)](#)

**DOCUMENTS  
ASSOCIATED WITH  
REPORT C03/22-34**

**Attachment 1**

**399 Guildford Road, Guildford -  
Draft Planning Agreement**

**Deed**

**399 Guildford Road, Guildford**  
**Planning Agreement**

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

**Cumberland Council**  
**Albert Street Group Pty Ltd**

Date:

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**399 Guildford Road, Guildford**  
**Planning Agreement**

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Exhibition Draft:  
CUMB\_CUMB21003\_018

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**Cumberland Council**  
**Albert Street Group Pty Ltd**

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**399 Guildford Road, Guildford**  
**Cumberland Council**  
**Albert Street Group Pty Ltd**

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## **399 Guildford Road, Guildford Planning Agreement**

### **Summary Sheet**

#### **Council:**

**Name:** Cumberland Council  
**Address:** PO Box 42 MERRYLANDS NSW 2160  
**Telephone:** 8757 9000  
**Email:** council@cumberland.nsw.gov.au  
**Representative:** The General Manager

#### **Developer:**

**Name:** Albert Street Group Pty Ltd  
**Address:** C/o Swaab  
Level 4, 20 Hunter Street  
Sydney NSW 2000  
**Telephone:** 0410 879 203  
**Email:** rozayounis@optusnet.com.au  
**Representative:** Roza Younis

#### **Land:**

See definition of *Land* in clause 1.1.

#### **Development:**

See definition of *Development* in clause 1.1.

#### **Development Contributions:**

See clause 9.

#### **Application of s7.11, s7.12 and s7.24 of the Act:**

See clause 8.

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**Security:**

See Part 4.

**Registration:**

See clause 16.

**Restriction on dealings:**

See clause 17.

**Dispute Resolution:**

See Part 3.

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**399 Guildford Road, Guildford**  
**Cumberland Council**  
**Albert Street Group Pty Ltd**

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## **399 Guildford Road, Guildford Planning Agreement**

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

### **Parties**

**Cumberland Council** ABN 22 798 563 329 of PO Box 42 MERRYLANDS NSW 2160 (Council)

and

**Albert Street Group Pty Ltd** ACN 165 735 660 of 1 Herbert Street WEST RYDE NSW 2114 (Developer)

### **Background**

- A The Developer owns the Land.
- B On 20 January 2021, the Land and Environment Court granted Development Consent to a four storey shop top development on the Land, subject to conditions. Condition 34 of the Development Consent requires a planning agreement to be entered into in the terms of an offer dated 2 November 2020
- C The Developer has offered to make Development Contributions in connection with the Development and the Parties enter into this Deed pursuant to condition 34 of the Development Consent.

### **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.

**Authority** means the Commonwealth or New South Wales government, a Minister of the Crown, a government department, a public authority established by or under any Act, a council or county council constituted under the *Local Government Act 1993*, or a person or body exercising functions under any Act including a commission, panel, court, tribunal and the like.

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

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

**CPI** means the *Consumer Price Index (All Groups – Sydney)* published by the Australian Bureau of Statistics.

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

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

**Development** means development, within the meaning of the Act, of the Land the subject of the Development Consent.

**Development Application** means the development application, within the meaning of the Act, with reference number DA2019/395/1 for the construction of a four-storey building comprising two business tenancies and six shop top housing dwellings with basement parking, landscaping and communal open space on the Land.

**Development Consent** means a development consent, within the meaning of the Act, granted to the Development Application, as modified from time to time.

**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.

**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 land comprised in Lot A DP102447, otherwise known as 399 Guildford Road, Guildford NSW 2161, and includes any lot created by subdivision or consolidation of that land.

**Party** means a party to this Deed.

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

**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.

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**Albert Street Group Pty Ltd**

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- 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 employees, 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 both executed the same copy of this Deed, or
  - 3.1.2 each executed separate counterparts of this Deed and exchanged the counterparts.

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**Albert Street Group Pty Ltd**

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- 3.2 The Parties are to insert the date when this Deed commences on the front page and on the execution page.

#### **4 Application of this Deed**

- 4.1 This Deed applies to the 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.

#### **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 to the Development.
- 8.2 The benefits under this Deed:
  - 8.2.1 are to be taken into consideration in determining a development contribution under s7.11 of the Act for the Development, and
  - 8.2.2 are to be taken into consideration in determining a development contribution towards car parking under s7.11 of the Act for other development, within the meaning of the Act, carried out by the Developer in the Council's local government area.

**399 Guildford Road, Guildford**  
**Cumberland Council**  
**Albert Street Group Pty Ltd**

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## **Part 2 – Development Contributions**

### **9 Provision of Development Contributions**

- 9.1 The Developer is to pay monetary Development Contributions to the Council in the amount of \$75,000 to be applied towards provision and/or upgrading of public, commuter car parking or public transport facilities within the Council's local government area.
- 9.2 The monetary Development Contributions referred to in clause 9.1 are to be paid prior to the issuing of the first Construction Certificate for the Development.
- 9.3 The monetary Development Contributions that are required to be paid under this Deed are to be indexed from the date of this Deed to the date of payment in accordance with the CPI.
- 9.4 Despite clause 9.1, 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.

### **10 Payment of monetary Development Contributions**

- 10.1 A 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 – Dispute Resolution**

### **11 Dispute resolution – expert determination**

- 11.1 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:
  - 11.1.1 the Parties to the Dispute agree that it can be so determined, or
  - 11.1.2 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.
- 11.2 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.
- 11.3 If a notice is given under clause 11.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.

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- 11.4 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.
- 11.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 11.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 11.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

## **12 Dispute Resolution - mediation**

- 12.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute to which clause 11 applies.
- 12.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 12.3 If a notice is given under clause 12.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 12.4 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.
- 12.5 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.
- 12.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 12.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

## **Part 4 - Enforcement**

### **13 Security for performance of obligations**

- 13.1 The Parties acknowledge that pursuant to cl 146A of the Regulation, clause 9.2 operates as a restriction on the issuing of the first Construction Certificate for the Development.

### **14 Breach of obligations**

- 14.1 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:

**399 Guildford Road, Guildford**  
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**Albert Street Group Pty Ltd**

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- 14.1.1 specifying the nature and extent of the breach,
- 14.1.2 requiring the Developer to:
  - (a) rectify the breach if it reasonably considers it is capable of rectification, or
  - (b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification,
- 14.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 14.2 Any costs incurred by the Council in remedying a breach in accordance with clause 14.1 may be recovered by the Council as a debt due in a court of competent jurisdiction.
- 14.3 For the purpose of clause 14.2, the Council's costs of remedying a breach the subject of a notice given under clause 14.1 include, but are not limited to:
  - 14.3.1 the costs of the Council's employees, agents and contractors reasonably incurred for that purpose,
  - 14.3.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
  - 14.3.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- 14.4 Nothing in this clause 14 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.

## **15 Enforcement in a court of competent jurisdiction**

- 15.1 Without limiting any other provision of this Deed, the Parties may enforce this Deed in any court of competent jurisdiction.
- 15.2 For the avoidance of doubt, nothing in this Deed prevents:
  - 15.2.1 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
  - 15.2.2 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 5 – Registration & Restriction on Dealings**

### **16 Registration of this Deed**

- 16.1 The Parties agree to register this Deed for the purposes of s7.6(1) of the Act.

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**Cumberland Council**  
**Albert Street Group Pty Ltd**

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- 16.2 Upon the commencement of this Deed, the Developer is to deliver to the Council in registrable form:
  - 16.2.1 an instrument requesting registration of this Deed on the title to the Land duly executed by the registered proprietor of the Land, and
  - 16.2.2 the written irrevocable consent of each person referred to in s7.6(1) of the Act to that registration, and
  - 16.2.3 the certificate of title for the Land, or evidence that it has been produced to the NSW Land Registry Services for the purposes of registering this Deed.
- 16.3 The Developer is to do such other things as are reasonably necessary to enable registration of this Deed to occur.
- 16.4 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 once the Developer has completed its obligations under this Deed to the reasonable satisfaction of the Council or this Deed is terminated or otherwise comes to an end for any other reason.

## **17 Restriction on dealings**

- 17.1 The Developer is not to:
  - 17.1.1 sell or transfer the Land, or
  - 17.1.2 assign the Developer's rights or obligations under this Deed, or novate this Deed,to any person unless:
  - 17.1.3 the Developer has, at no cost to the Council, first procured the execution by the person to whom the Land or part is to be sold or transferred of the Developer's rights or obligations under this Deed are to be assigned or novated, of a deed in favour of the Council on terms reasonably satisfactory to the Council, and
  - 17.1.4 the Council has given written notice to the Developer stating that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this Deed, and
  - 17.1.5 the Developer is not in breach of this Deed, and
  - 17.1.6 the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.
- 17.2 Subject to clause 17.3, 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 17.1.
- 17.3 Clause 17.1 does not apply in relation to any sale or transfer of the Land if this Deed is registered on the title to the Land at the time of the sale.

**399 Guildford Road, Guildford**  
**Cumberland Council**  
**Albert Street Group Pty Ltd**

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## **Part 6 – Risk and Release**

### **18 Risk**

18.1 The Developer performs this Deed at its own risk and its own cost.

### **19 Release**

19.1 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 or default.

### **20 Indemnity**

20.1 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 or default.

## **Part 7 – Other Provisions**

### **21 Review of Deed**

21.1 The Parties agree to review this Deed every year, 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.

21.2 For the purposes of clause 21.1, the relevant changes include (but are not limited to) 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.

21.3 For the purposes of addressing any matter arising from a review of this Deed referred to in clause 21.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Deed.

21.4 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.

21.5 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 21.1 (but not 21.4) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.

**399 Guildford Road, Guildford**  
**Cumberland Council**  
**Albert Street Group Pty Ltd**

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## **22 Notices**

- 22.1 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:
  - 22.1.1 delivered or posted to that Party at its address set out in the Summary Sheet, or
  - 22.1.2 emailed to that Party at its email address set out in the Summary Sheet.
- 22.2 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.
- 22.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
  - 22.3.1 delivered, when it is left at the relevant address,
  - 22.3.2 sent by post, 2 business days after it is posted, or
  - 22.3.3 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.
- 22.4 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.

## **23 Approvals and Consent**

- 23.1 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.
- 23.2 A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

## **24 Costs**

- 24.1 The Developer is to pay to the Council the Council's reasonable costs of preparing, negotiating, executing, stamping and registering (and removal of the registration of) this Deed, and any document related to this Deed within 14 days of a written demand by the Council for such payment.
- 24.2 The Developer is also to pay to the Council the Council's reasonable costs of enforcing this Deed within 14 days of a written demand by the Council for such payment.

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## **25 Entire Deed**

- 25.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with.
- 25.2 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.

## **26 Further Acts**

- 26.1 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.

## **27 Governing Law and Jurisdiction**

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

## **28 Joint and Individual Liability and Benefits**

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

## **29 No Fetter**

- 29.1 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.

## **30 Illegality**

- 30.1 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.

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### **31 Severability**

- 31.1 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.
- 31.2 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.

### **32 Amendment**

- 32.1 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 25C of the Regulation.

### **33 Waiver**

- 33.1 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.
- 33.2 A waiver by a Party is only effective if it:
  - 33.2.1 is in writing,
  - 33.2.2 is addressed to the Party whose obligation or breach of obligation is the subject of the waiver,
  - 33.2.3 specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,
  - 33.2.4 is signed and dated by the Party giving the waiver.
- 33.3 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.
- 33.4 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.
- 33.5 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.

### **34 GST**

- 34.1 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.

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**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.

- 34.2 Subject to clause 34.4, 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.
- 34.3 Clause 34.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.
- 34.4 No additional amount shall be payable by the Council under clause 34.2 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.
- 34.5 If there are Supplies for Consideration which is 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:
  - 34.5.1 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;
  - 34.5.2 that any amounts payable by the Parties in accordance with clause 34.2 (as limited by clause 34.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 34.6 No payment of any amount pursuant to this clause 34, 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.
- 34.7 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.
- 34.8 This clause continues to apply after expiration or termination of this Deed.

## **35 Explanatory Note**

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

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## **Execution**

**Executed as a Deed**

**Dated:**

**Executed on behalf of the Council**

General Manager

Witness

Mayor

Witness

**Executed on behalf of the Developer** in accordance with s127(1) of the  
Corporations Act (Cth) 2001

Name/Position

Name/Position

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**Albert Street Group Pty Ltd**

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## **Appendix**

(Clause 35)

*Environmental Planning and Assessment Regulation 2000*

(Clause 25E)

## **Explanatory Note**

### **Draft Planning Agreement**

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

### **Parties**

**Cumberland Council** ABN 22 798 563 329 of PO Box 42 MERRYLANDS NSW 2160  
(Council)

**Albert Street Group Pty Ltd** ACN 165 735 660 of 1 Herbert Street WEST RYDE NSW 2114 (Developer)

### **Description of the Land to which the Draft Planning Agreement Applies**

This Draft Planning Agreement applies to Lot A DP102447, otherwise known as 399 Guildford Road, Guildford NSW 2161 being the land shown shaded in red in the plan below.



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## **Description of Proposed Development**

This Draft Planning Agreement is in connection with development consent to DA2019/395/1 being for the construction of a four-storey building comprising two business tenancies and six shop top dwellings with basement parking, landscaping and communal open space on the land.

## **Description of Development Contributions**

Under this Draft Planning Agreement, the Developer is to pay monetary Development Contributions to the Council in the amount of \$75,000 to be applied towards provision and/or upgrading of public, commuter car parking or public transport facilities within the Council's local government area.

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

### **Objective, Nature and Effect of Draft Planning Agreement**

The Draft Planning Agreement is a planning agreement under s7.4 of the EPA Act. It is a voluntary agreement, under which the Developer makes Development Contributions (as defined in clause 1.1 of the Draft Planning Agreement) for various public purposes (as defined in s 7.4(2) of the EPA Act).

The objectives of the Draft Planning Agreement are to provide funding for the future provision and/or upgrading of public, commuter car parking or public transport facilities within the Council's local government area.

The Draft Planning Agreement:

- requires the Developer to make monetary development contributions,
- does not exclude the application of s 7.11, s7.12 and 7.24 of the EPA Act to the Development,
- is to be registered on the title to the Land,
- imposes restrictions on the Developer transferring the Land or part of the Land or assigning an interest under the Agreement prior to registration of the agreement,
- provides a dispute resolution method where a dispute arises under the agreement, being mediation and expert determination,
- provides that the agreement is governed by the law of New South Wales,
- provides that the A New Tax System (Goods and Services Tax) Act 1999 (Cth) applies to the agreement.

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## **Assessment of the Merits of the Draft Planning Agreement**

### **How the Draft Planning Agreement Promotes the Public Interest**

The Draft Planning Agreement will provide Council with funding to be applied towards the future provision and/or upgrading of public, commuter car parking or public transport facilities within the Council's local government for the public benefit.

The Draft Planning Agreement:

- promotes the objects of the EPA Act set out in sections 1.3 (c) and (j); and
- enables the funding and provision of public improvements and car parking or public transport facilities for the public benefit and to address demand arising from the development.

The Draft Planning Agreement also promotes the following guiding principles for local councils as set out in s8A of the *Local Government Act 1993* by:

- providing an example of Council working with others, being the Developer, to secure appropriate services for local community needs,
- promoting active engagement with local communities by being required to be publicly notified in accordance with the *Environmental Planning and Assessment Regulation 2000*,
- promoting Council's long-term strategic planning on behalf of the local community.

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

Yes. This Draft Planning Agreement conforms 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**

Yes. This Draft Planning Agreement specifies that the Developer must pay monetary contributions before any construction certificate for the Development is issued.