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planning • environment • local government

Deed

2-36 Church Street, Lidcombe

Planning Agreement

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

Cumberland City Council

Lidcombe Church Property Pty Ltd

New South Wales Land and Housing Corporation

[26 October 2020]

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lindsaytaylorlawyers

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

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

LTL Pty Ltd trading as **Lindsay Taylor Lawyers** • ABN 78 607 889 887

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2-36 Church Street, Lidcombe

Planning Agreement

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2-36 Church Street, Lidcombe Planning Agreement

Summary Sheet

Council:

Name: Cumberland City Council
Address: PO Box 42 MERRYLANDS NSW 2160
Telephone: (02) 8757 9000
Email: council@cumberland.nsw.gov.au
Representative: The General Manager (Mr Hamish McNulty)

Developer:

Name: Lidcombe Church Property Pty Ltd (ABN 48 627 115 762)
Address: Suite 101, 25 Angas Street, MEADOWBANK NSW 2114
Telephone: [Insert Details]
Email: [Insert Details]
Representative: [Insert Details]

Landowner:

Name: New South Wales Land and Housing Corporation
Address: [Insert Details]
Telephone: [Insert Details]
Email: [Insert Details]
Representative: [Insert Details]

Land:

See definition of *Land* in clause 1.1.

Development:

See definition of *Development* in clause 1.1.

Development Contributions:

See Clause 9 and Schedule 1.

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

See clause 8.

Security:

See Part 4.

Registration:

See clause 17.

Restriction on dealings:

See clause 18.

Dispute Resolution:

See Part 3.

2-36 Church Street, Lidcombe Planning Agreement

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

Parties

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

and

Lidcombe Church Property Pty Ltd ABN 48 627 115 762 of Suite 101, 25 Angas Street, MEADOWBANK NSW 2114 (**Developer**)

and

New South Wales Land and Housing Corporation ABN 24 960 729 253 of [Insert Address] (**Landowner**)

Background

- A The Landowner owns the Land.
- B The Land is subject of the Planning Proposal.
- C On 11 December 2019, the Sydney Central City Planning Panel approved a development application (DA94/2019; Panel decision PPSSCC-11) Development consent has been granted for construction of four residential apartment buildings of 4-10 storeys in height, with 262 apartments and basement car parking on the Land.
- D The Landowner has entered into the Project Delivery Agreement with the Developer.
- E The Developer has sought and the Council supports the Planning Proposal so as to accommodate an additional 112 residential units from the number currently approved.
- F The Developer has offered to make Development Contributions in accordance with this Deed in connection with the Planning Proposal to provide the shared value uplift of Land because of the making of the LEP Amendment.

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.

Bank Guarantee means an irrevocable and unconditional undertaking without any expiry or end date in favour of 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.

Construction Certificate has the same meaning as in the Act.

Contribution Value means the \$ amount agreed between the Parties as the value of a Development Contribution made under this Deed.

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 any development on the Land, within the meaning of the Act, in accordance with a Development Consent (as modified or substituted from time to time under the Act) granted as a result of the making of 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.

Gross Floor Area means the gross floor area (within the meaning of the LEP) of the Development, from time to time.

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.

Item means an item specified in Column 1 of Schedule 1.

Land means the land identified as Lots 1-18 in DP 217589 and shown on the Location Plan.

LEP means the *Auburn Local Environmental Plan 2010*.

LEP Amendment means the amendment of the LEP resulting from the Planning Proposal.

Location Plan means the plan in Schedule 2.

Party means a party to this Deed.

Planning Proposal means the document proposing amendments to the LEP for which a gateway determination was issued on 24 July 2020 (as altered from time to time) under s3.34 of the Act and as varied pursuant to s3.35 of the Act, proposing

- (a) increasing the height of building control under the LEP for the Land from part 14.9 m, 16.9 m, 22.9 m, 27 m to part 22 m, 32 m and 40 m; and
- (b) increasing the floor space ratio under the LEP for the Land from part 1.29:1, 1.49:1, 2.49:1 and 2.6:1 to 3.2:1.

Project Delivery Agreement means the agreement between the Developer and the Landowner to redevelop the Land for the purpose of an integrated neighbourhood as part of the Landowner's *Communities Plus* program under which the Developer is to deliver a mix of social, affordable and private residential units and key community infrastructure.

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

Security means a Bank Guarantee, or a bond or other form of security to the satisfaction of the Council indexed in accordance with the *Consumer Price Index (All Groups – Sydney)* published by the Australian Bureau of Statistics from the date of this Deed.

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 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.
- 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, the LEP Amendment 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 and s7.12 of the Act to the Development.

8.2 The benefits under this Deed are not to be taken into consideration when determining a Development Contribution under s7.11 of the Act in relation to the Development.

8.3 This Deed does not exclude the application of s7.24 to the Development.

Part 2 – Development Contributions

9 Provision of Development Contributions

9.1 The Developer is to make Development Contributions to the Council in accordance with Schedule 1, any other provision of this Deed relating to the making of Development Contributions and otherwise to the satisfaction of the Council.

- 9.2 Any Contribution Value specified in this Deed in relation to a Development Contribution does not serve to define the extent of the Developer's obligation to make the Development Contribution.
- 9.3 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.
- 9.4 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.
- 9.5 If Development Consent is granted or modified, to allow additional Gross Floor Area beyond 10,088m², the Developer is to pay additional Development Contributions to the Council for each additional metre square of Gross Floor Area in the amount of \$471 per metre square not later than 7 days after the grant of Development Consent or the modification of the Development Consent.

10 Payment of monetary Development Contributions

- 10.1 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 the same way that monetary contributions are indexed under the relevant contributions plan made under s7.18 of the Act that is applicable to the Development.
- 10.2 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.
- 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 Developer is to provide Security to the Council in the amount of \$237,500 being 5% of the monetary Development Contributions required to be paid under this Deed, in relation to the performance of its obligations under this Deed.
- 13.2 The Developer is to provide the Security to the Council before it commences any part of the Development unless, before that time, the Council agrees in writing to apportion the Security to different Stages, in which case the

Developer is to provide the portion of the Security relating to a particular Stage to the Council before it commences any part of the Development comprised in the Stage.

- 13.3 The Council may call-up and apply the Security in accordance with clause 14 to remedy any breach of this Deed notwithstanding any other remedy it may have under this Deed, under any Act or otherwise at law or in equity.
- 13.4 The Council is to release and return the Security or any unused part of it to the Developer within 14 days of completion of the obligation to which the Security relates.
- 13.5 The Developer may at any time provide the Council with a replacement Security.
- 13.6 On receipt of a replacement Security, the Council is to release and return the Security that has been replaced to the Developer.
- 13.7 If the Council calls-up the Security or any portion of it, it may, by written notice to the Developer, require the Developer to provide a further or replacement Security to ensure that the amount of Security held by the Council equals the amount it is entitled to hold under this Deed.
- 13.8 The Developer is to ensure that the Security provided to the Council is at all times maintained to the full current indexed value.

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:
 - 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 If the Developer fails to fully comply with a notice referred to in clause 14.1, the Council may, without further notice to the Developer, call-up the Security provided by the Developer under this Deed and apply it to remedy the Developer's breach.
- 14.3 Any costs incurred by the Council in remedying a breach in accordance with clause 14.2 may be recovered by the Council by either or a combination of the following means:
 - 14.3.1 by calling-up and applying the Security provided by the Developer under this Deed, or
 - 14.3.2 as a debt due in a court of competent jurisdiction.

- 14.4 For the purpose of clause 14.3, the Council's costs of remedying a breach the subject of a notice given under clause 14.1 include, but are not limited to:
- 14.4.1 the costs of the Council's employees, agents and contractors reasonably incurred for that purpose,
 - 14.4.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
 - 14.4.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- 14.5 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.
- 16.2 Not later than 10 days after 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 Developer, and
 - 16.2.2 the written irrevocable consent of each person referred to in s7.6(1) of the Act to that registration.
- 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, other than a Final Lot, 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 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 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.

Part 6 – Indemnities & Insurance

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 Annual report by Developer

- 21.1 The Developer is to provide to the Council by not 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.
- 21.2 The report referred is to be in such a form and to address such matters as required by the Council from time to time.

22 Review of Deed

- 22.1 The Parties agree to review this Deed every 2 years, 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.
- 22.2 For the purposes of clause 22.1, 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.
- 22.3 For the purposes of addressing any matter arising from a review of this Deed referred to in clause 22.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Deed.
- 22.4 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.
- 22.5 A failure by a Party to agree to take action requested by the other Party as a result of a review referred to in clause 22.1 (but not 22.4) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.

23 Notices

- 23.1 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:
- 23.1.1 delivered or posted to that Party at its address set out in the Summary Sheet, or
- 23.1.2 emailed to that Party at its email address set out in the Summary Sheet.
- 23.2 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.

- 23.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 23.3.1 delivered, when it is left at the relevant address,
 - 23.3.2 sent by post, 2 business days after it is posted, or
 - 23.3.3 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.
- 23.4 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.

24 Approvals and Consent

- 24.1 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.
- 24.2 A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

25 Costs

- 25.1 The Developer is to pay to the Council the Council's costs of preparing, negotiating, executing and stamping this Deed on an indemnity basis, and any document related to this Deed within 7 days of a written demand by the Council for such payment.
- 25.2 The Developer is also to pay to the Council the Council's reasonable costs of enforcing this Deed within 7 days of a written demand by the Council for such payment.

26 Entire Deed

- 26.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with.
- 26.2 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.

27 Further Acts

- 27.1 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.

28 Governing Law and Jurisdiction

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

29 Joint and Individual Liability and Benefits

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

30 No Fetter

- 30.1 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.

31 Illegality

- 31.1 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.

32 Severability

- 32.1 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.
- 32.2 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.

33 Amendment

- 33.1 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.

34 Waiver

- 34.1 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.
- 34.2 A waiver by a Party is only effective if it:
- 34.2.1 is in writing,
 - 34.2.2 is addressed to the Party whose obligation or breach of obligation is the subject of the waiver,
 - 34.2.3 specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,
 - 34.2.4 is signed and dated by the Party giving the waiver.
- 34.3 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.
- 34.4 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.
- 34.5 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.

35 GST

- 35.1 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.



- 35.2 Subject to clause 35.4, 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.
- 35.3 Clause 35.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.
- 35.4 No additional amount shall be payable by the Council under clause 35.2 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.
- 35.5 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:
- 35.5.1 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;
- 35.5.2 that any amounts payable by the Parties in accordance with clause 35.2 (as limited by clause 35.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 35.6 No payment of any amount pursuant to this clause 35, 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.
- 35.7 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.
- 35.8 This clause continues to apply after expiration or termination of this Deed.

36 Explanatory Note

- 36.1 The Appendix contains the Explanatory Note relating to this Deed required by clause 25E of the Regulation.
- 36.2 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.



Schedule 1

(Clause 9)

Development Contributions

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

A. Monetary Contributions

1. \$4,750,000	Public domain improvements in Lidcombe Town Centre, enhanced pedestrian links between the Land and Lidcombe train station and upgraded facilities at Phillips Park, Lidcombe.	One half of the estimated land value uplift based on the Gross Floor Area of the Development	Prior to the issue of any Construction Certificate relating to the Development
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Schedule 2

(Clause 1)

Location Plan





Execution

Executed as a Deed

Dated:

Signed Sealed and Delivered on behalf of the Council

General Manager

Witness

Mayor

Witness

Signed Sealed and delivered on behalf of the Developer in accordance with s127(1) of the Corporations Act (Cth) 2001

Name/Position

Name/Position



Signed Sealed and delivered on behalf of the Landowner in accordance with [Drafting Note: LAHC to provide execution details]

Name/Position

Name/Position

DRAFT

Appendix

(Clause 36)

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Planning Agreement

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

Parties

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

and

**Lidcombe Church Property Pty Ltd ABN 48 627 115 762 of Suite 101, 25
Angas Street, MEADOWBANK NSW 2114 (Developer)**

and

**New South Wales Land and Housing Corporation ABN 24 960 729 253 of
[Insert Address] (Landowner)**

Description of the Land to which the Draft Planning Agreement Applies

This draft Planning Agreement applies to the lots 1-18 in DP 217589 and shown in Schedule 2.

Description of Proposed Development

This draft Planning Agreement applies to the planning proposal submitted by the Developer and supported by the Council for which a Gateway determination was issued on 24 July 2020

(as altered from time to time) under s3.34 of the Act and as varied pursuant to s3.35 of the Act, proposing:

- (a) increasing the height of building control for the Land under the Auburn Local Environmental Plan 2010 from part 14.9 m, 16.9 m, 22.9 m, 27 m to part 22 m, 32 m and 40 m; and
- (b) increasing the floor space ratio for the Land under the Auburn Local Environmental Plan 2010 from part 1.29:1, 1.49:1, 2.49:1 and 2.6:1 to 3.2:1.

This draft Planning Agreement applies to the development, within the meaning of the Act, on the Land in accordance with a Development Consent (as modified or substituted from time to time under the Act) granted as a consequence of the making of the LEP Amendment.

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

Objectives of Draft Planning Agreement

The objectives of the Draft Planning Agreement are to provide funding for public domain improvements in Lidcombe Town Centre, enhanced pedestrian links between the Land and Lidcombe train station and upgraded facilities at Phillips Park, Lidcombe.

Nature 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).

Effect of the Draft Planning Agreement

The Draft Planning Agreement:

- requires monetary contributions to be paid by the Developer,
- relates to the taking effect of the Planning Proposal and the carrying out by the Developer of the Development,
- does not exclude the application of s 7.11 and s7.12 of the EPA Act to the Development,
- does not exclude the application of s 7.24 of the EPA Act to the Development,
- is to be registered on the titles to the Land,
- imposes restrictions on the Developer transferring the Land or part of the Land or any affordable housing units or assigning an interest under 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.

Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

The Draft Planning Agreement:

- promotes and co-ordinates the orderly and economic use and development of the land to which the Planning Agreement applies,
- captures the shared uplift value of land through the delivery of public services and public amenities.

The Draft Planning Agreement provides a reasonable means of achieving these planning purposes by requiring the Developer to make monetary contributions to Council, to facilitate public domain improvements in Lidcombe Town Centre, enhanced pedestrian links between the Land and Lidcombe train station and upgraded facilities at Phillips Park, Lidcombe.

How the Draft Planning Agreement Promotes the Public Interest

The Draft Planning Agreement promotes the public interest by:

- promoting the objects of the EPA Act set out in sections 1.3(a), (c) and (j); and
- enabling the funding and provision of public domain improvements and public facilities for the benefit of the public and to address demand arising from the Development.

For Planning Authorities:

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

N/A

Other Public Authorities – How the Draft Planning Agreement Promotes the Objects (if any) of the Act under which it is Constituted

N/A

Councils – How the Draft Planning Agreement Promotes the Elements of the Council's Charter

The Draft Planning Agreement promotes the elements of the Council's charter by:

- the management of lands and other assets so that current and future local community needs can be met in an affordable way,
- working with others to secure appropriate services for local community needs,
- promoting Council's long-term strategic planning on behalf of the local community.

***All Planning Authorities – Whether the Draft Planning Agreement
Conforms with the Authority’s Capital Works Program***

[Drafting Note: To be completed by Council]

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

This Draft Planning Agreement contains requirements that must be complied with before any Construction Certificate is issued.

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