

THIS PLANNING AGREEMENT is made on the day of 2016

BETWEEN:

Parties

HAWKESBURY CITY COUNCIL ("the Council")

AND:

MR PHILIP THOMAS CLEARY ("the Developer")

Introduction

- A. The Developer is the registered proprietor of the Development Land.
- B. The Developer has made a Development Application to Council for Development Approval to carry out the Proposed Development.
- C. The Developer has offered to provide the Developer's Contribution on the terms and conditions contained in this agreement if Development Approval is granted to the Proposed Development.

And it is agreed as follows

1 Definitions and Interpretation

In this agreement the following words and letters have the meanings set out below.

- 1.1 "**Act**" means the *Environmental Planning and Assessment Act 1979* (NSW) (as amended from time to time).
- 1.2 "**Approval**" means any approvals consents, modifications, certificates (of all types) permits, endorsements, licenses, conditions or requirements (and any variation to them) which may be required by Law for the Proposed Development, the Roads Works or the Community Works.
- 1.3 "**Authority**" means a government, semi-government, local government, statutory, public, ministerial, civil, administrative, fiscal or judicial body, commission, department, agency, tribunal or other authority or body.
- 1.4 "**Base CPI**" means the CPI number for the quarter ending immediately before the commencement of this Agreement.
- 1.5 "**Business Day**" means a day that is not a Saturday, Sunday or any other day which is a public holiday or a bank holiday in the place where an act and thing is to be performed or a payment is to be made.
- 1.6 "**Cash Contribution**" means, subject to clause 3 and clause 6, \$13.57 per square metre within the Development Land.
- 1.7 "**CPI**" means the Consumer Price Index released by the Australian Bureau of Statistics for "Sydney - All Groups" or such other consumer price index that might replace it.

- 1.8 **"CPI Review Date"** means each quarterly anniversary of the date of this agreement.
- 1.9 **"Costs"** include costs, charges, fees, disbursements and expenses, including those incurred in connection with advisers.
- 1.10 **"Current CPI"** means the CPI number for the quarter ending immediately before the relevant CPI Review Date.
- 1.11 **"Developer's Contribution"** has the meaning given in clause 6.
- 1.12 **"Development Application"** means an application under Part 4 of the Act for Development Approval.
- 1.13 **"Development Approval"** means a development consent issued under the Act with respect to all or part of the Proposed Development.
- 1.14 **"Development Land"** means the land comprising Lot 12 DP 1021340, Hall Street, Pitt Town.
- 1.15 **"Dispute"** in connection with this agreement means an argument, a controversy, a difference, a dispute including of opinion or interpretation.
- 1.16 **"Event of Insolvency"** means anyone or more of the following occurrences:
- (i) the Developer becomes bankrupt, is served with a bankruptcy notice or a bankruptcy petition, has committed an act of bankruptcy or has entered into an arrangement within and under the meaning of the *Bankruptcy Act 1976* (Cth); or
 - (ii) the Developer becomes subject to any order or declaration under the *Mental Health Act 2007* (NSW) or is otherwise incapable of managing his or her own affairs.
 - (iii) if the Developer is a company, if:
 - (a) a resolution is passed for the winding up or liquidation of that company;
 - (b) a liquidator, provisional liquidator, receiver, receiver manager, controller, controlling manager, administrator, voluntary administrator or official manager is appointed to the Developer or a resolution is passed for the purposes of placing that party in the control of an external administrator;
 - (c) it suspends payment of its debts or is unable to pay its debts including of money payable under this agreement or is deemed insolvent;
 - (d) it fails to or is taken as having failed to comply with a statutory demand under the *Corporations Act 2001* (Cth);
 - (e) if anything analogous or having substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction with respect to the Developer.

- 1.17 **"GST"** has the same meaning as the GST Act and other words or expressions used in the GST Act which have a particular defined meaning (including any applicable legislative determinations and Australian Taxation Office public rulings) have the same meaning.
- 1.18 **"GST Act"** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (as amended from time to time).
- 1.19 **"Land"** means Lot 12 DP 1021340, Hall Street, Pitt Town.
- 1.20 **"Law"** means:
- (i) the common law and principles of equity;
 - (ii) the requirements of legislation, regulations and by-laws; and
 - (iii) a binding order made by an Authority.
- 1.21 **"LPI"** means Land and Property Information.
- 1.22 **"Mortgage"** means a mortgage charge, lien pledge, title retention, deposit arrangement, caveat or equitable interest.
- 1.23 **"Party"** means a party to this agreement, including their successors and assigns.
- 1.24 **"Proposed Development"** means the subdivision of the Development Land into 11 residential allotments and one open space allotment.
- 1.25 **"Residential Allotment"** means a lot comprising part of the Development Land to be created as part of the Proposed Development that is intended to be used for the purposes of a single dwelling house without being further sub-divided.
- 1.26 **"Subdivision Certificate"** means a certificate issued under section 109C(d) of the Act with respect to the Proposed Development.
- 1.27 **"Transfer"** means to settle, assign, transfer, convey, alienate, otherwise dispose of or part with possession of.

2 Interpretation:

In this agreement unless the contrary intention appears:

- 2.1 One gender includes the opposite gender.
- 2.2 The singular includes the plural and the plural includes the singular.
- 2.3 A party includes that party's executors, administrators, successors, permitted assigns, permitted legal representatives and substitutes.
- 2.4 Dollars or \$ means Australia dollars and all money payable under this agreement is payable in that currency.
- 2.5 "Including" and similar expressions are not words of limitation.
- 2.6 Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.

- 2.7 Headings, any table of contents or index are for convenience only and do not affect interpretation of this agreement.
- 2.8 An explanatory note which relates to this agreement does not affect the interpretation of this agreement.
- 2.9 A provision of this agreement must not be construed to the disadvantage of a party merely because that party was responsible wholly or partly for the preparation of this agreement or the inclusion of a term or condition in this agreement.
- 2.10 If an act and thing must be done on a specific day which is not a business day, it must be done instead on the next business day.
- 2.11 A person means and includes a person, a body corporate, Authority, firm, body of persons, association, trust, joint venture or other legal commercial entity or undertaking recognized by law whether or not incorporated.

3 Planning Agreement

- 3.1 This agreement
- 3.1.1 applies to the Development Land;
 - 3.1.2 is a planning agreement within the meaning set out in section 93F of the Act;
 - 3.1.3 is to be registered on the title of the Development Land under section 93H of the Act;
 - 3.1.4 is not a confidential document and may be exhibited without restriction by either party.
- 3.2 Subject to clause 3.3, this agreement operates from the date it is executed.
- 3.3 Clause 6 of this agreement will only operate if and when Council grants Development Approval (or Development Approvals as the case may be) to the Proposed Development on the Development Land.

4 Application of s94 and s94A of the Act to the Development

This agreement excludes the application of section 94A and section 94 of the Act to the Proposed Development.

5 Registration of this Agreement

- (a) Either:
- (i) within 20 Business Days of the date of the Gazettal; or
 - (ii) within 120 days from the commencement of this Agreement;
- whichever is the latter, the Developer must take all reasonable steps to procure the registration of the Agreement on the relevant folios of the register held by the LPI pertaining to the Development Land.
- (b) The Council agrees:

- (i) to provide a release and discharge of this Agreement with respect to the Development Land or any lot, including a strata lot, created on subdivision of the Development Land on satisfaction by the Developer of the obligation to provide the Developer's Contribution: and
 - (ii) to do all things reasonably necessary, including the execution of any documents, to enable the Developer to remove the notation of this Agreement on the relevant folios of the register, held by the LPI pertaining to the Land.
- (c) The Council acknowledges that the registration of this Agreement on the relevant folios of the register held by the LPI pertaining to the Development Land constitutes suitable means of enforcement of this Agreement for the purposes of s93F(3)(g) under the *Environmental Planning and Assessment Act 1979*.

6 Developer's Contribution

Subject to the terms of this agreement, including clause 3.3, the Developer agrees to provide the Developer's Contribution in the form of the Cash Contribution.

7 Calculation of Developer's Contributions

The Developer and Council acknowledge and agree that a Provisional Contribution based on the latest cost estimates will be calculated on the basis that approximately 10 additional residential allotments can be achieved on the Development Land and the Developer will contribute cash to the value of \$13.57 per square metre for each of those allotments. The difference between the calculated Provisional Contributions and the Actual Contributions, as defined in an adopted section 64 contributions plan, will be adjusted and further payment to Council or the issue of credit to the Developer will be required prior to the issue of the subdivision certificate for stage 2 of the development on the Development Land.

8 CPI Adjustment of Developer's Contributions

On each CPI Review Date the Cash Contribution will be calculated as follows:

$$RAC_C = RAC_B \times \frac{\text{Current CPI}}{\text{Base CPI}}$$

Where:

RAC_B = The Cash Contribution per square metre at the commencement of this Agreement (i.e. \$13.57)

RAC_C = Adjusted Residential Allotment Contribution at CPI review date.

9 Payment of Cash Contribution

The Cash Contribution must be paid to Council, prior to the issue of the Subdivision Certificate, on a 'pro-rata' basis. The pro-rata payment calculation is to be based on the square metre size of the Residential Allotments included in the Subdivision Certificate for the relevant stage.

10 G.S.T

- 10.1 Unless otherwise expressly stated all money or other sums payable or consideration to be provided under this agreement are exclusive of GST.

- 10.2 Despite Clause 6, to the extent that the Commissioner of Taxation, a Court or Tribunal determines that any supply made under or in connection with this agreement is a taxable supply, the GST exclusive consideration otherwise to be paid or provided for that taxable supply is increased by the amount of any GST payable in respect of that taxable supply and that amount must be paid at the same time and in the same manner as the GST exclusive consideration is otherwise to be paid or provided and a valid Tax invoice is to be delivered to the recipient of the taxable supply and this clause will not merge on completion or termination of the agreement.

11 Dispute Resolution

11.1 Reference to Dispute

If a dispute arises between the Parties in relation to this Agreement, then the Parties must resolve that dispute in accordance with this clause.

11.2 Notice of Dispute

The Party wishing to commence the dispute resolution processes must notify the other Party in writing of:

- (a) the intent to invoke this clause;
- (b) the nature or subject matter of the dispute, including a summary of any efforts made to resolve the dispute other than by way of this clause; and
- (c) the outcomes which the notifying Party wishes to achieve (if practicable).

11.3 Representatives of Parties to Meet

- (a) The representatives of the Parties must promptly (and in any event within 15 Business Days of the written notice provided in accordance with clause 11.2 meet in good faith to attempt to resolve the notified dispute.
- (b) The Parties may, without limitation:
 - (i) resolve the dispute during the course of that meeting;
 - (ii) agree that further material, expert determination in accordance with clause 11.5 or consideration is needed to effectively resolve the dispute (in which event the Parties will, in good faith, agree to a timetable for resolution); and
 - (iii) agree that the Parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

11.4 No party may constrain

If:

- (a) at least one meeting has been held in accordance with clause 11.3; and
- (b) the Parties have been unable to reach an outcome identified in clause 11.3; and

- (c) any of the Parties, acting in good faith, forms the view that the dispute is reasonably unlikely to be resolved in accordance with a process agreed under clause 11.3(b)(iii), then, that Party may, by 15 Business Days written notice to the other Party, terminate the dispute resolution process in respect of that dispute. The termination of the process set out in this clause does not of itself amount to a breach of this Agreement.

11.5 Expert Determination

- (a) If a Dispute arises between Parties to this Agreement, the Parties may agree to refer the Dispute to expert determination in Sydney, New South Wales administered by the Australian Commercial Dispute Centre (ACDC).
- (b) The expert determination will be conducted in accordance with the ACDC Rules for Expert Determination (Rules) in force at the date of this Agreement. The Rules set out the procedures to be adopted, the process of selection of the expert and the costs involved, including the Parties' respective responsibilities for the payment of the expert's costs and other costs of the expert determination.
- (c) The expert determination will be final and binding on the Parties.
- (d) This clause # survives termination of this Agreement.

11.6 Urgent Relief

At any time, a Party may, without inconsistency with anything in this clause 11, seek urgent interlocutory relief in respect of a dispute under this Agreement from any Court having jurisdiction.

12 Agreement of the Developer

12.1 The Developer warrants that it:

- 12.1.1 is the legal and beneficial owner of part of the Development Land;
- 12.1.2 will take all practicable steps and use best endeavours and do all acts and things required to procure:
 - 12.1.2.1 the execution of any documents necessary to effect registration of this agreement with LPI; and
 - 12.1.2.2 the production of the relevant certificates of title for the Development Land and the registration of this agreement at LPI on the title of the Development Land within twenty (20) Business Days of the date of the commencement of this agreement.

12.2 Council shall not be required to seal any sub-division plan made pursuant to the Development Approval unless and until this agreement has been registered at LPI on the title of the Development Land.

13 Enforcement by any party

- (a) Without limiting any other remedies available to the Parties, this Agreement may be enforced by any Party in any court of competent jurisdiction.

- (b) Nothing in this Agreement prevents:
 - (i) a Party from bringing proceedings in a court of competent jurisdiction to enforce any aspect of this Agreement or any matter to which this Agreement relates, subject to compliance with clause 14; and
 - (ii) the Council from exercising any function under the Act or any other Act or law.

14 Assignment

- 14.1 The Developer must not Transfer its interest in the whole or any part of the Development Land (other than a Residential Allotment located in a stage for which the relevant Developer's Contribution has been provided to Council) without the written consent of the Council, such consent not to be unreasonably withheld or delayed.
 - 14.1.1 Approval is reasonably withheld if the proposed assignee, or person is not solvent and reputable and the assignment or encumbrance will materially adversely affect the obligations of the Developer and the rights of the Council under this Agreement.
 - 14.1.2 Any request to the Council from the Developer or Land Owner to assign, encumber or deal with any right, obligation or interest under this Agreement to another party must include, but not be limited to, financial details and references relating to that other party. The Council must also be permitted to make reasonable enquiries into these matters of that party.
- 14.2 The transferee must execute a deed in a form and with conditions acceptable to Council acting reasonably, including;
 - 14.2.1 agreement to comply with this agreement as if the transferee was the Developer with respect to that part of the Development Land transferred, including in relation to obligations which arose before the Transfer; and
 - 14.2.2 acknowledgement and agreement that the rights of the Council under this agreement are not diminished in any way.

15 Release

When the Developer has satisfied all of the obligations imposed on it under this agreement in respect of that part of the Development Land for which a Subdivision Certificate has been issued and for which the Developer's Contribution has been delivered then the Council must promptly at the request and at the reasonable expense of the Developer do all acts and things necessary to remove this agreement from the title of that part of the Development Land.

16 Termination

- 16.1 This agreement may be terminated by the Council by written notice to the Developer if:
 - 16.1.1 the Developer commits a breach of any of the terms and conditions of this agreement and fails to remedy such a breach within fourteen (14) days of receipt of a written notice (which specifies the breach and requires the

Developer to remedy the breach) whereupon the date of such termination will be effective on the 15th day from receipt of such written notice; or

16.1.2 an Event of Insolvency occurs.

17 Review Procedures

The parties may agree to review this agreement in circumstances and in a manner determined by the parties. Any amendment, modification, supplement or replacement document which results from a review must be in writing, signed by the parties and registered at LPI under Section 93H of the Act.

18 Notices

18.1 Any notice, request for information to be made or information to be given under this agreement must, in order to be valid, be in writing and must be given to or served upon a party:

18.1.1 by being left at that party's address or such other address as may be notified to the first party giving or serving any such document which will be deemed served when so left; or

18.1.2 'by being posted in a pre-paid ordinary, certified or registered letter addressed to that party at such address which will be deemed duly served three (3) Business Days after the posting of the same; or

18.1.3 by being dispatched by facsimile transmission to that party and which will be deemed served at the time recorded on the facsimile machine of the party serving such document of an error free transmission to the correct facsimile number.

18.2 For the purposes of this clause the parties' contact details for service are:

The Developer

Address:

Facsimile:

Council

Address:

Hawkesbury City Council
Attention: General Manager
366 George Street,
WINDSOR NSW 2571

Telephone: 4560 4444
Facsimile: 4587 7740

19 Proper Law and Jurisdiction

This agreement is made and will be construed and governed in accordance with the Law of the State of NSW South Wales. Each party submits to the exclusive jurisdiction of each and every Court or Tribunal of the said State having jurisdiction to hear the matter submitted to it.

20 Severance

20.1 If it is held by any Court or Tribunal that:

20.1.1 any part or condition of this agreement is void, invalid, illegal or otherwise unenforceable, or

20.1.2 this agreement would be void, voidable, invalid, illegal or otherwise unenforceable unless any part or condition of this agreement was severed then that part or provision which is severed from this agreement will not affect the continued operation of the remainder of this agreement which has not been severed nor the validity or enforceability of that part or condition, provided that the fundamental purpose of or the intentions expressed by the parties under this agreement is not substantially altered.

21 Waiver

21.1 No failure on the part of a party to exercise and no delay in exercising and no cause of dealing with respect to, any condition and the rights, powers or remedies of that party under this agreement will impair any of those rights, powers or remedies, nor constitute a waiver of any of those rights, powers or remedies.

21.2 No single or partial exercise by a party of any condition and rights, powers or remedies under this agreement will preclude any other or further exercise of those or exercise of any other conditions rights or remedies.

21.3 Any condition and the rights, powers or remedies under or relating to this agreement are cumulative and will not exclude any other rights, powers or remedies under or relating to this agreement at Law.

21.4 No waiver of any of the conditions of this agreement will be effective unless in writing signed by the party against whom such waiver is sought to be enforced.

21.5 Any waiver of the conditions of this agreement will be effective only in the specific instance and for the specific purpose given and the waiver will not be deemed a waiver of such obligations or of any subsequent breach of the same or some other obligation.

22 Approvals and Consent

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

23 Assignment and Dealings

None of the parties to this agreement may assign or otherwise deal with their rights, powers, obligations and remedies under this agreement or allow any interest in them to arise or be varied, save and except as provided in clause 14.

24 Entire Agreement

This agreement contains all the terms and conditions to which the parties have agreed on in relation to the matters which they have dealt with. No party can rely on an earlier document, anything said or done by another party, or omitted to be relied upon, said or done except as permitted by Law.

25 No Fetter

25.1 Nothing in the agreement is to be construed as requiring the Council to do anything

25.1.1 that would cause it to be in breach of any of its obligations at Law;

25.1.2 limiting or fettering in any way the exercise of any statutory discretion or duty; at Law; or

25.1.3 imposing any obligations to grant an Approval.

26 Representatives and Warranties

Each party agrees that it has the power and authority to enter into this agreement and comply with its obligations and that entry into this agreement will not result in a breach of Law.

27 Costs

Each party must bear and pay its own costs of and incidental to the preparation and execution of this agreement.

Executed as an agreement on

2016

Execution by Council

Signed by Hawkesbury City Council by
its authorised officer in the presence of:

Signature of witness

Signature of authorised officer

Name of witness

Authorised Officer's Name:
Signing on behalf of: Hawkesbury City Council
Power of Attorney Book:
No: _____

Address of witness

Execution by Philip Thomas Cleary

Signed by :

Signature of director/company secretary

Signature of director

Print name

Print name