

**NORTH SYDNEY COUNCIL**  
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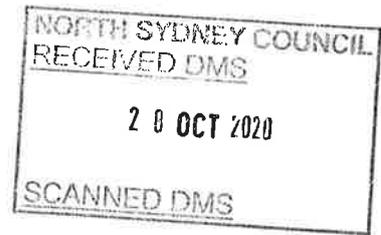
**SCANNED DMS**

# North Sydney Council

## Legal Document

**LD 7412 Attached**

Please ensure that this coversheet remains attached to this Legal Doc



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North Sydney Council

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TWT Property Group Pty Ltd

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Tildoon Pty Ltd as trustee of the Atchison Street  
Trust

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# Voluntary Planning Agreement

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## Date

## Parties

**North Sydney Council** (ABN 32 353 260 317) of 200 Miller Street, North Sydney NSW 2060 (**Council**)

**TWT Property Group Pty Ltd** (ABN 69 611 972 091) of Level 5, 55 Chandos Street, St Leonards NSW 2065 (**Developer**)

**Tildoon Pty Ltd** (ACN 603 442 244) as trustee of the Atchison Street Trust of Suite 22, 1-7 Jordan Street, Gladesville NSW 2111 (**Landowner**)

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## Background

- A The Landowner owns the Land.
- B Council has adopted the St Leonards/Crows Nest Planning Study – Precinct 2 and 3 which identifies the Land as being within “Precinct 3” and is part of the “Oxley Street Masterplan Site”.
- C The Developer proposes to carry out the Development which will include a multi-storey mixed use development with underground car parking and associated landscaping.
- D To facilitate the Development, the Developer has lodged a Planning Proposal seeking an amendment to LEP 2013 as follows:
- a. amending the Height of Buildings Map to allow a maximum building height of 56m on the Land;
  - b. amending the Floor Space Ratio Map to allow a maximum FSR for the Land of 6.3:1; and
  - c. amending the Non-Residential Floor Space Ratio Map to allow a minimum non-residential FSR for the Land of 1.5:1.
- E The Developer and Landowner have made an offer to enter into this Agreement in connection with the Planning Proposal and Development to provide the following public benefits at the Developer’s cost:
- a. provision of the Monetary Contribution;
  - b. dedication of the Contribution Land to Council; and
  - c. creation of an Easement in Gross for a pedestrian Thru Site Link.
- The combined estimated value of the contributions being delivered is \$6,295,000.
- F Council has accepted the offer to enter into this Agreement. The Parties wish to formalise that offer by entering into this Agreement in accordance with section 7.4 of the Act.

## Agreed terms

### 1 Definitions and interpretation

#### 1.1 Definitions

Terms used in this Agreement which are defined in **Schedule 1 (Interpretation)** shall have the same meaning as ascribed to them by that Schedule and such meanings apply unless the contrary intention appears.

#### 1.2 General

In this Agreement the following definitions apply:

- (a) a reference to this Agreement or another instrument includes any variation or replacement of any of them;
- (b) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (c) the singular includes the plural and vice versa;
- (d) the word "person" includes a firm, a body corporate, an unincorporated association or an authority;
- (e) a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including, without limitation, persons taking by novation) and assigns;
- (f) a reference to anything (including, without limitation, any amount) is a reference to the whole and each part of it and a reference to a group of persons is a reference to all of them collectively, to any two or more of them collectively and to each of them individually;
- (g) "include" or "including" when introducing a list of items does not limit the meaning of the words to which the list relates to those items or to items of a similar kind;
- (h) if a Party is required to do something, that includes a requirement to cause that thing to be done. If a Party is prohibited from doing anything, it is also prohibited from doing or omitting to do anything which allows or causes that thing to be done;
- (i) a reference to a statute, ordinance, code or law includes a State ordinance code or law of the Commonwealth of Australia;
- (j) a reference to a body, whether statutory or not which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its powers or functions;

- (k) no rule of construction applies to the disadvantage of a Party because that Party was responsible for the preparation of this Agreement;
- (l) any capitalised term used, but not defined in this Agreement, will have the meaning ascribed to it under, and by virtue of, the Act;
- (m) headings are inserted for convenience only and do not affect the interpretation of this Agreement;
- (n) a reference in this Agreement to a Business Day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney;
- (o) if the day on which any act, matter or thing is to be done under this Agreement is not a Business Day, the act, matter or thing must be done on the next Business Day;
- (p) a reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars;
- (q) a reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced;
- (r) a reference to a clause, part schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement;
- (s) a reference to this Agreement includes the agreement recorded in this Agreement; and
- (t) any schedules and attachments form part of this Agreement.

## **2 Planning agreement under the Act**

The Parties agree that this Agreement is a planning agreement within the meaning of section 7.4 of the Act.

## **3 Application of this Agreement**

This Agreement applies to:

- (a) the Land;
- (b) the Development; and
- (c) the Instrument Change.

## **4 Operation of this Agreement**

The Parties each agree that this Agreement operates on and from the date of this Agreement.

## 5 Contributions to be made under this Agreement

### 5.1 Monetary Contribution

- (a) The Developer must provide the Monetary Contribution increased but not decreased, in accordance with movements in the CPI from the date of this Agreement to the date of payment.
- (b) The Monetary Contribution must be paid by the Developer by way of a bank cheque payable to Council in accordance with the following timing:
  - (i) prior to the issue of a Construction Certificate for any above-ground works approved under a Development Consent, the Developer must pay 50% of the Monetary Contribution increased but not decreased, in accordance with movements in the CPI from the date of this Agreement to the date of payment; and
  - (ii) prior to the issue of the first Occupation Certificate for the Development, the Developer must pay the remaining 50% of the Monetary Contribution increased but not decreased, in accordance with movements in the CPI from the date of this Agreement to the date of payment.
- (c) The Council must, on receipt of the Monetary Contribution paid by the Developer in accordance with **clause 5.1(b)** and within a reasonable time, use that Monetary Contribution as it sees fit to:
  - (i) acquire land for the improvement of the Hume Street Park, as required;
  - (ii) carry out the embellishment of the Hume Street Park; and
  - (iii) care for and maintain the Hume Street Park.
- (d) In the event the Council determines not to acquire the land for the purposes of establishing the Hume Street Park, the Council agrees that the contributions made under this Agreement will be applied towards the embellishment and maintenance of other land for the purposes of public open space and recreation within the North Sydney Local Government Area.
- (e) For the avoidance of doubt, nothing in this Agreement requires the Council to:
  - (i) spend Monetary Contributions made under this Agreement by a particular date; or
  - (ii) refund to the Developer any contribution made under this Agreement.

### 5.2 Works

- (a) Prior to the dedication of the Contribution Land in accordance with **clause 5.3**, the Developer must carry out the Works, in accordance with the Construction Terms.

- (b) The Works or any part of the Works required under this Agreement will be taken to have been completed for the purposes of this Agreement when a Certificate of Practical Completion has been issued for those Works.
- (c) The Works or any part of the Works required under this Agreement will be taken to have been delivered to Council when the land on which those Works are located is dedicated to Council.
- (d) The parties agree and acknowledge that the Works serve the public purpose of providing public open space in the vicinity of the Development.

### **5.3 Dedication or transfer of the Contribution Land**

- (a) The Landowner must dedicate to the Council as public open space the Contribution Land prior to the issue of the first Occupation Certificate for the Development.
- (b) The dedication of the Contribution Land is made for the purposes of this Agreement when:
  - (i) a deposited plan is registered in the register of plans held with the Registrar-General that creates a public reserve under the *Local Government Act 1993* (NSW) and Council must, provided a subdivision certificate has been issued, without delay do all things reasonably necessary including signing documents and providing all such consents to allow for the plan to be registered; or
  - (ii) the Council is given:
    - (A) an instrument in registrable form under the *Real Property Act 1900* (NSW) duly executed by the Landowner as transferor that is effective to transfer the title to the Contribution Land to the Council when executed by the Council as transferee and registered;
    - (B) the written consent to the registration of the transfer of any person whose consent is required to that registration; and
    - (C) a written undertaking from any person holding the certificate of title to the production of the certificate of title for the purposes of registration of the transfer.
- (c) The Landowner is to ensure that the Contribution Land dedicated or transferred to the Council under this Agreement is free of all encumbrances and affectations (including any charge or liability for rates, Taxes and charges) except for the Permitted Encumbrances.
- (d) If, having used all reasonable endeavours, the Landowner cannot ensure that land to be dedicated to the Council under this Agreement is free from all encumbrances and affectations except for the Permitted Encumbrances, the Landowner may request that Council agree to accept

the land subject to those encumbrances and affectations, but the Council may withhold its agreement in its absolute discretion.

#### **5.4 Thru Site Link**

- (a) The Developer agrees and acknowledges that:
  - (i) any Development Consent or Modification relating to a building on the Land may require development of the Thru Site Link so it is consistent with any standards and specifications provided by the Council, and suitable for public use as a pedestrian thoroughfare; and
  - (ii) prior to the issue of any Occupation Certificate for the Development, it will design and construct the Thru Site Link in accordance with any technical requirements in *North Sydney Development Control Plan 2013* and Council's Public Domain Style Manual and Design Code, unless otherwise specified by the Council, and any Development Consent.
- (b) Prior to the issue of the first Occupation Certificate for the Development, the Developer must register the Easement in Gross.
- (c) The Easement in Gross will require the owner of the Thru Site Link to:
  - (i) maintain and repair the Thru Site Link to the satisfaction of the Council;
  - (ii) maintain sufficient public liability insurance;
  - (iii) ensure that no buildings or structures are erected on the Thru Site Link other than structures:
    - (A) consented to by the Council, such consent not to be unreasonably withheld; and
    - (B) for the purposes of enhancing public domain areas as approved by the Consent Authority; or
    - (C) that are required for building support, services, drainage or as required by the Development Consent, Authority or building code requirement; and
  - (iv) ensure that any rules made by an owner's corporation relating to the Thru Site Link are approved by the Council, provided that:
    - (A) if the Council does not respond to any request for approval within 25 Business Days of receiving the request, the Council will be deemed to have approved the rules; and
    - (B) if Council requests an amendment that is unlawful, then the relevant amendment is not required to be incorporated into the rules.

## 6 Application of s 7.11, s 7.12 and s 7.24 of the Act to the Developer and benefits under this Agreement

- (a) Sections 7.11, 7.12 and 7.24 of the Act are not excluded as they apply to the Land and the Development.
- (b) Benefits under this Agreement are not to be taken into consideration under section 7.11(6) of the Act.

## 7 Registration of this Agreement

### 7.1 Registration

- (a) The Landowner represents and warrants that it is the registered proprietor of the Land.
- (b) The Landowner agrees that it will procure the registration of this Agreement in the relevant folios of the Register for the Land in accordance with section 7.6 of the Act.
- (c) The Landowner must, promptly after this Agreement comes into operation, take all practical steps, and otherwise do anything that the Council reasonably requires, to procure:
  - (i) the consent of each person who:
    - (A) has an estate or interest in the Land; or
    - (B) is seized or possessed of an estate or interest in the Land;
  - (ii) the execution of any documents; and
  - (iii) the production of the relevant duplicate certificates of title, to enable the registration of this Agreement in accordance with **clause 7.1(b)**.
- (d) The Landowner must take all practical steps, and otherwise do anything that the Council reasonably requires:
  - (i) to procure the lodgement of this Agreement as soon as reasonably practicable after this Agreement comes into operation but in any event, no later than 10 Business Days after that date; and
  - (ii) to procure the registration of this Agreement in the relevant folios of the Register for the Land as soon as reasonably practicable after this Agreement is lodged for registration.
- (e) The Landowner agrees that, in the event the Developer fails to satisfy any obligations imposed on the Developer under this Agreement, or if the Developer becomes insolvent, the Landowner will be responsible for those obligations as if it had entered into this Agreement as the Developer, and Council will be entitled to take enforcement action against either, or both the Developer and the Landowner.

## 7.2 Removal of registration

The Council will promptly after receipt of a request from the Developer, provide a release and discharge of this Agreement so that it may be removed from the folios of the Register for the Land (or any part of it) in the event that Council is satisfied that the Developer has duly fulfilled its obligations under this Agreement.

## 7.3 Caveat

- (a) The Landowner acknowledges and agrees that:
- (i) when this Agreement is executed, Council is deemed to have acquired, and the Landowner is deemed to have granted, an equitable estate and interest in each relevant parcel of the Land for the purposes of section 74F(1) of the *Real Property Act 1900* (NSW) and consequently Council has sufficient interest in the Land in respect of which to lodge a caveat over the Land notifying that interest;
  - (ii) it will not object to Council lodging a caveat in the relevant folios of the Register held by LRS for the Land nor will it seek to remove any caveat lodged by Council provided the caveat does not prevent registration of any dealing or plan other than a transfer; and
  - (iii) Council must lodge a withdrawal of any caveat in respect of the Land on the earlier of:
    - (A) the date that the Developer lodges this Agreement for registration under **clause 7.1** so that the withdrawal of the caveat will take effect on the registration of this Agreement; or
    - (B) the date upon which the Developer would otherwise be entitled to a release under **clause 7.2**.
- (b) If the Land is transferred in accordance with **clause 13**, Council must within 10 Business Days of the Developer giving notice to Council, provide to the Developer either a consent to register a transfer to the third party or, if the caveat can be withdrawn in accordance with this clause, a withdrawal of the caveat to permit registration of the transfer.

## 8 Review of this Agreement

### 8.1 Review by agreement

This Agreement may be reviewed or modified by the agreement of the Parties using their best endeavours and acting in good faith.

### 8.2 State Infrastructure Contribution

- (a) The Parties acknowledge that as at the date of this Agreement, the NSW State Government is reviewing the quantum, nature and method of

delivery of infrastructure required to facilitate development in the St Leonards and Crows Nest Precinct.

- (b) In the event that the Contributions have not been made under this Agreement and there is a Special Infrastructure Contribution determination made under Part 7, Division 7.1, Subdivision 4 of the Act or any other similar state or regional development contribution (**SIC**) applies to the Land which imposes a requirement for the Landowner or Developer to pay a SIC in relation to the Development or the Land, then, within 20 days of either Party making a request for a review, the Council and the Developer must meet to review the Agreement in accordance with the principles in **clause 8.2(c)** and **clause 8.2(d)** and using their best endeavours and acting in good faith.
- (c) If a review of the Agreement is carried out under **clause 8.2(b)** the Parties must consider during that review process a reduction of the quantum of Monetary Contribution payable by the Developer to the Council under this Agreement (and any subsequent release of all or part of the Security provided by the Developer under this Agreement) by the amount of the SIC that is payable by the Developer in connection with the Development.
- (d) For the avoidance of doubt, before seeking to reduce the quantum of Monetary Contribution payable under this Agreement, the Developer must apply for an offset against any liability to pay a SIC on the basis that the Developer is obliged to pay the Monetary Contribution under this Agreement.
- (e) A failure by a Party to agree to participate in a review under this clause is taken to be a dispute for the purposes of **clause 9**.
- (f) If the Parties cannot agree to the terms of any amendment following a review under **clause 8.2**, either Party may refer the matter to dispute resolution under **clause 9**.
- (g) Nothing in this clause operates as a requirement for Council to pay any money to the Developer (for example if the SIC is greater than the quantum of Monetary Contributions otherwise payable by the Developer) or to refund to the Developer or any other entity, any amount paid to it under this Agreement or for any other purpose.

## **9 Dispute Resolution**

### **9.1 Reference to dispute**

If a dispute arises between the Parties in relation to this Agreement, then either Party must seek to resolve that dispute in accordance with this **clause 9**, prior to commencing any court or arbitration proceedings.

## 9.2 Notice of dispute

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

- (a) the intent to invoke this **clause 9**;
- (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 9**; and
- (c) the outcomes which the notifying Party wishes to achieve (if practicable).

## 9.3 Representatives of parties to meet

- (a) The representatives of the Parties must promptly (and in any event within 14 Business Days of the written notice provided in accordance with **clause 9.2**) 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 opinion 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.

## 9.4 Neither party may constrain

If:

- (a) at least one meeting has been held in accordance with **clause 9.3**; and
- (b) the Parties have been unable to reach an outcome identified in **clause 9.3(b)(i) to 9.3(b)(iii)**; and
- (c) either 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 9.3**,

then, that Party may, by 14 Business Days written notice to the other Party, terminate the dispute resolution process in respect of that dispute and may then commence court proceedings in relation to the dispute. The termination of the process set out in this clause does not of itself amount to a breach of this Agreement.

## 9.5 Urgent relief

The provisions of this **clause 9** do not prejudice the right of a Party to institute court proceedings for urgent injunctive or declaratory relief in relation to any matter arising out of or relating to this Agreement.

## 10 Enforcement and Security

### 10.1 Monetary Contribution Security

- (a) Prior to the issue of a Construction Certificate for any above-ground works approved under a Development Consent, the Developer is to provide to Council the Monetary Contribution Security.
- (b) The Council may call on the Security provided under this clause if:
  - (i) the Developer is in material or substantial breach of this Agreement by failing to pay the Monetary Contribution and has failed to rectify the breach after having been given reasonable notice (which must not be less than 20 Business Days) in writing to do so; or
  - (ii) the Developer becomes Insolvent.
- (c) Subject to this clause, the Council may apply the proceeds of the Monetary Contribution Security in satisfaction of:
  - (i) any obligation of the Developer to pay the Monetary Contribution under this Agreement; and
  - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this Agreement.

### 10.2 Works Security

- (a) Prior to the issue of a Construction Certificate for any above-ground works approved under a Development Consent, the Developer is to provide to Council the Works Security.
- (b) The Council may call on the Security provided under this clause if:
  - (i) the Developer is in material or substantial breach of this Agreement by failing to carry out the Works as required by this Agreement and has failed to rectify the breach after having been given reasonable notice (which must not be less than 20 Business Days) in writing to do so; or
  - (ii) the Council acquires the Contribution Land or the Easement in Gross in accordance with **clause 10.4**; or
  - (iii) the Developer becomes Insolvent.
- (c) Subject to this clause, the Council may apply the proceeds of a Security in satisfaction of:
  - (i) any obligation of the Developer to carry out the Works;
  - (ii) any obligation of the Developer to pay for the costs of Council acquiring the Contribution Land or the Easement in Gross; and

- (iii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this Agreement.

### 10.3 Securities

- (a) At any time following the provision of any Security, the Developer may provide the Council with one or more replacement Securities totalling the amount of all the Securities required to be provided under this clause for the time being.
- (b) Within 20 business days of each anniversary of any Security provided under this Agreement, the Developer must provide Council with one or more replacement Securities (**replacement Security**) in an amount calculated in accordance with the following:

$$A = \frac{B \times D}{C}$$

Where:

**A** is the amount of the replacement Security;

**B** is the amount of the Security to be replaced;

**C** is the CPI for the quarter ending immediately before the date of the Security to be replaced; and

**D** is the CPI for the quarter ending immediately before the date of the replacement Security,

provided A is greater than B.

- (c) On receipt of any replacement Security, the Council must immediately release and return to the Developer, as directed, the Securities which it holds that have been replaced.
- (d) The Council must promptly return the Security at the request of the Developer, if any of the following circumstances occur:
  - (i) the Developer fulfils the relevant obligations under this Agreement for that Security as set out in **clauses 10.1(c) and 10.2(c)**; or
  - (ii) the Minister refuses to make the Instrument Change and the Developer withdraws the Planning Proposal seeking the Instrument Change; or
  - (iii) a Court of competent jurisdiction invalidates the Instrument Change and all avenues of appeal from that decision have been exhausted.
- (e) Nothing in this **clause 10** prevents or restricts the Council from taking any enforcement action in relation to:
  - (i) any obligation of the Developer under this Agreement; or

- (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this Agreement,

that is not nor cannot be satisfied by calling on the Security.

#### **10.4 Acquisition of Contribution Land and Easement in Gross**

- (a) If the Landowner does not transfer or dedicate the Contribution Land to Council as required by **clause 5.3** or create the Easement in Gross as required by **clause 5.4**, the Council may compulsorily acquire the Contribution Land or Easement in Gross as required, in which case the Landowner consents to the Council compulsorily acquiring those interests for compensation in the amount of \$1.00 without having to follow the pre-acquisition procedures in the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).
- (b) This clause constitutes an agreement for the purposes of section 30 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).
- (c) Except as otherwise agreed between the Landowner and the Council, the Landowner must ensure that the Contribution Land is free of all Encumbrances (other than the Permitted Encumbrances) and affectations, on the date that the Council will acquire the Contribution Land in accordance with this clause.
- (d) The Developer indemnifies and keeps indemnified the Council against all Claims made against the Council as a result of any acquisition by the Council of the whole or any part of the relevant interest in land under this clause.
- (e) The Developer must pay the Council, promptly on demand, an amount equivalent to all reasonable costs and legal costs incurred by the Council acquiring the whole or any part of the relevant interest in land under this clause, and if the Developer fails to do so, the Council may call on the Security provided under **clause 10.2** for the purposes of reimbursing those costs.

#### **10.5 Restriction on the issue of Certificates**

- (a) For the purposes of section 6.8 of the Act and any associated regulations, or if the Former Building and Subdivision Provisions apply, section 109F of the Act and clause 146A of the Regulation, the following obligations must be satisfied prior to the issue of a Construction Certificate for any above-ground works approved under a Development Consent:
  - (i) payment of the first instalment of the Monetary Contribution in accordance with **clause 5.1(b)(i)**;
  - (ii) provision of the Monetary Contribution Security in accordance with **clause 10.1**; and
  - (iii) provision of the Works Security in accordance with **clause 10.2**.

- (b) For the purposes of section 6.10 of the Act and any associated regulations, or if the Former Building and Subdivision Provisions apply, section 109H of the Act, the following obligations must be satisfied prior to the issue of the first Occupation Certificate for the Development:
  - (i) payment of the second instalment of the Monetary Contribution required by **clause 5.1(b)(ii)**;
  - (ii) completion of the Works as required by **clause 5.2**;
  - (iii) dedication or transfer of the Contribution Land as required by **clause 5.35.4(a)**; and
  - (iv) registration of the Easement in Gross as required by **clause 5.4**.

## 10.6 General Enforcement

- (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 the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates; and
  - (ii) the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

## 10.7 Acknowledgement regarding Security

The Parties acknowledge and agree that the security provided under this **clause 10** together with the timing of requirements to pay contributions, the requirements under **clause 7** for registration of this Agreement and the restrictions on assignment of this Agreement under **clause 13** will provide sufficient security for the performance of the Developer's obligations under this Agreement.

## 11 Notices

- (a) Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:
  - (i) delivered or posted to that Party at its address set out below;
  - (ii) faxed to that Party at its fax number set out below; or
  - (iii) emailed to that Party at its email address set out below:

Council           **North Sydney Council**  
Attention:       General Manager  
Address:         200 Miller Street, Sydney NSW 2060  
Fax               (02) 9936 8177

Developer       **TWT Property Group Pty Ltd**  
Attention:       Gavin Zhang  
Address:         Level 5, 55 Chandos Street, St Leonards NSW 2065  
Fax               (02) 9966 0352  
  
Email             gavin.zhang@twtglobal.com.au

Landowner       **Tildoan Pty Ltd as trustee of the Atchison Street Trust**  
Attention:       Gavin Zhang  
Address:         Level 5, 55 Chandos Street, St Leonards NSW 2065  
Fax               (02) 9966 0352  
  
Email             gavin.zhang@twtglobal.com.au

- (b) If a Party gives the other party three Business Days' notice of a change of its address, email address or fax number, any notice, consent, information, application or request is only given or made by that Party if it is delivered, posted, emailed or faxed to the latest address, email address or fax number.
- (c) Any notice, consent, information, application or request is to be treated as given or made at the following time:
- (i) if it is delivered, when it is left at the relevant address;
  - (ii) if it is sent by email, if an "undelivered receipt" is not received;
  - (iii) if it is sent by post, two Business Days after it is posted; or
  - (iv) if it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.
- (d) 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 5:00 pm 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.

## 12 Approvals and Consent

The Parties acknowledge that:

- (a) 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;

- (b) a Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions; and
- (c) this Agreement does not impose any obligation on a Consent Authority to:
  - (i) grant development consent; or
  - (ii) exercise any function under the Act in relation to a change in an environmental planning instrument.

## 13 Assignment and Dealings

The Developer or Landowner may not sell, transfer, assign or novate or similarly deal with its right, title or interest in the Land (if any) or rights or obligations under the terms of this Agreement, or allow any interest in them to arise or be varied, in each case, without Council's consent and unless, prior to any such sale, transfer, assignment, charge, encumbrance or novation, the Developer or Landowner:

- (a) at no cost to Council, first procures the execution by that person of all necessary documents in favour of Council by which that person agrees to be bound by the Agreement as if they were a party to the original Agreement; and
- (b) satisfies the Council that the Developer or Landowner is not in material breach of this Agreement.

## 14 Costs

The Developer agrees to pay or reimburse Council all reasonable costs incurred in connection with:

- (a) the negotiation, preparation and execution of this Agreement, including the reasonable costs of any legal advice Council has received in connection with this Agreement to a maximum amount of \$20,000;
- (b) advertising and exhibition of this Agreement in accordance with the Act; and
- (c) any other costs required to be paid by the Developer under this Agreement,

within 10 Business Days after receipt of a notice from the Council as to the amount of those costs.

## 15 Entire Agreement

This Agreement constitutes the entire agreement of the Parties about its subject matter and supersedes all previous agreements, understandings and negotiations on that subject matter.

## 16 Further Acts

Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.

## 17 Governing Law and Jurisdiction

This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its Courts and Courts of Appeal. The Parties will not object to the exercise of jurisdiction by those Courts on any basis.

Without preventing any other method of service, any document in an action may be served on a Party by being delivered or left at that Party's address set out in **clause 11(a)**.

## 18 Joint and individual liability and benefits

Except as otherwise set out in this Agreement, any agreement, covenant, representation or warranty under this Agreement by two or more persons binds them jointly and each of them individually, and any benefit in favour of two or more persons is for the benefit of them jointly and each of them individually.

## 19 No fetter

Nothing in this Agreement 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.

## 20 Representations and warranties

The Parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under the Agreement and that entry into this Agreement will not result in the breach of any law.

## 21 Severability

- (a) The Parties acknowledge that under and by virtue of section 7.4(4) of the Act, any provision of this Agreement is not invalid by reason only that there is no connection between the Planning Proposal or the Development and the object of the expenditure of any money required to be paid by that provision.
- (b) The Parties agree that to the extent permitted by law, this Agreement prevails to the extent of its inconsistency with any law.
- (c) If a clause or part of a clause of this Agreement 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.
- (d) 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 Agreement, but the rest of this Agreement is not affected.

## 22 Modification

No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement and is in accordance with the provisions of the Act.

## 23 Waiver

- (a) The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- (b) A waiver by a Party is only effective if it is in writing.
- (c) A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It 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.

## 24 GST

### 24.1 Construction

In this clause 24:

- (a) unless there is a contrary indication, words and expressions which are not defined in this Agreement but which have a defined meaning in the GST Law have the same meaning as in the GST Law; and
- (b) **GST Law** has the same meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) or, if that Act does

not exist for any reason, means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulation made under that Act.

## **24.2 GST not payable**

The Parties agree, in accordance with Class Ruling CR2013/13, that the contributions required to be made under this Agreement are exempt from GST.

## **24.3 Additional amount of GST payable**

If GST is imposed on any supply made under or in accordance with this Agreement, the Developer must pay the GST or pay to the Council an amount equal to the GST payable on or for the taxable supply, whichever is appropriate in the circumstances.

## **25 Discharge of Developer's Obligations**

The Developer's obligations under this Agreement shall be discharged on the occurrence of any of the following:

- (a) the Developer's obligations have been fully carried out in accordance with this Agreement; or
- (b) Council and the Developer otherwise agree to the modification or discharge of this Agreement.

## **26 Explanatory Note**

The Explanatory Note attached at **Schedule 2** prepared in connection with this Agreement pursuant to the Regulation is not to be used to interpret this Agreement.

## **27 Counterparts**

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

## **28 Capacity**

### **28.1 General warranties**

Each party warrants to each other party that:

- (a) this Agreement creates legal, valid and binding obligations, enforceable against the relevant party in accordance with its terms; and
- (b) unless otherwise stated, it has not entered into this Agreement in the capacity of trustee of any trust.

## 28.2 Power of attorney

If an attorney executes this Agreement on behalf of any party, the attorney declares that it has no notice of the revocation of that power of attorney.

## 28.3 Trustee Landowner

- (a) Tildoon Pty Ltd (ACN 603 442 244) (**Trustee**) enters into this Agreement in its capacity as the trustee for the Atchison Street Unit Trust (**Trust**) constituted by a trust deed (**Trust Deed**).
- (b) The Trustee warrants that:
  - (i) it is the sole trustee of the Trust and no action has been taken to remove or replace it;
  - (ii) entry into this Agreement is for the benefit of the beneficiaries of the Trust and as trustee it is authorised and empowered under the Trust Deed to enter into and to perform its obligations and satisfy or discharge its liabilities under this Agreement;
  - (iii) it is not in breach of the Trust Deed;
  - (iv) it is entitled under the Trust Deed to be indemnified in full in respect of the obligations and liabilities incurred by it under this Agreement;
  - (v) it is not aware of any reason why the assets of the Trust might be insufficient to satisfy or discharge the obligations and liabilities incurred by it under this Agreement; and
  - (vi) it has the power under the Trust Deed to execute and perform its obligations and discharge its liabilities under this Agreement and all necessary action has been taken to authorise the execution and performance of this Agreement under the Trust Deed.
- (c) The Trustee indemnifies the Council, and agrees to keep the Council indemnified, in respect of any loss or liability in any way connected with a breach of a warranty in **clause 28.3(b)**.
- (d) Prior to the Trustee being replaced as the trustee of the Trust in accordance with the Trust Deed:
  - (i) the Trustee must procure that the replacement trustee enters into a new agreement with the Council on the same terms as this Agreement;
  - (ii) the Trustee (as outgoing trustee) must procure an agreement from the Council, under which the Council releases the Trustee from the requirement to observe and perform any future obligation under this Agreement;
  - (iii) the Trustee (as outgoing trustee) must release the Council, from the requirement to observe and perform any future obligation under this Agreement; and

- (iv) the Trustee (as the outgoing trustee) must pay the reasonable costs and expenses of the Council in relation to entering into a new agreement under this **clause 28.3(d)** and the costs and expenses of registering any new agreement on the title to the Land.
- (e) Subject to **clause 28.3(f)**, liability arising under or in connection with this agreement (except under or in connection with **clause 28.3(d)** above) is limited and can be enforced against the Trustee only to the extent to which the Trustee, having sought indemnification to the maximum extent possible, is actually indemnified in respect of that liability out of the assets of the Trust.
- (f) Notwithstanding any other provision of this Agreement, **clause 28.3(e)** does not apply to any obligation or liability of the Trustee to the extent to which there is, in respect of that obligation or liability, whether under the Trust Deed or by operation of law, a reduction in the extent of the Trustee's indemnification, or loss of the Trustee's right of indemnification, out of the assets of the Trust as a result of Trustee's failure to properly perform its duties as trustee of the Trust.

# Schedule 1

## Interpretation

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

**Approval** means any certificate, licence, consent, permit, approval or other requirement of any Authority having jurisdiction in connection with the activities contemplated by this Agreement.

**Authority** means any governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity and includes a certifier accredited under the *Building Professionals Act 2005* (NSW).

**Bank Guarantee** means an irrevocable and unconditional undertaking that is not limited in time by one of the following trading banks:

- (a) Australia and New Zealand Banking Group Limited;
- (b) Commonwealth Bank of Australia;
- (c) Macquarie Bank;
- (d) National Australia Bank Limited;
- (e) St George Bank Limited;
- (f) Westpac Banking Corporation; or
- (g) other financial institution approved by the Council,

to pay an amount or amounts of money to the Council on demand and containing terms and conditions reasonably acceptable to the Council.

**Bond** means a documentary performance bond in favour of Council which is signed and issued by an AA- credit rated insurer and that is in a form and substance satisfactory to Council, acting reasonably.

**Business Day** means any day except for Saturday or Sunday or a day which is a public holiday in Sydney.

**Certificate of Practical Completion** means the written certificate confirming the Works, or part of the Works, have been completed to the Council's satisfaction issued in accordance with **clause 8.1** of the Construction Terms.

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

**Construction Certificate** means a construction certificate as defined under the Act.

**Construction Terms** means the terms set out in **Schedule 3**.

**Contribution Land** means the five-metre wide strip of land adjacent to Oxley Street with an area of 170m<sup>2</sup>, as depicted on the plan shown at **Annexure A**, to be dedicated to the Council in accordance with **clause 5.3** of this Agreement. The Contribution Land may be limited in depth to no less than 3 metres below ground level.

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

**Development** means the proposed multi-storey mixed use development with underground car parking and associated landscaping as modified from time to time.

**Development Application** means a development application lodged under the Act for the Development.

**Development Consent** means the determination of a Development Application by way of approval.

**Easement in Gross** means an easement in gross limited in depth to no greater than 1 metre below ground level and limited in height to no less than 1 storey above ground level granted in favour of the Council that permits public access via the Thru Site Link and is generally in the terms set out in **Schedule 5**.

**Floor Space Ratio Map** means the Floor Space Ratio Map in the LEP 2013.

**Former Building and Subdivision Provisions** has the same meaning as in clause 18 of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017*.

**FSR** means floor space ratio as defined in the LEP 2013.

**GFA** means gross floor area as defined in the LEP 2013.

**Height of Buildings Map** means the Height of Buildings Map in the LEP 2013.

**Hume Street Park** means the public open space between Hume Street and Clarke Street, St Leonards.

**Insolvent** means the occurrence of any of the following:

- (a) a Party is liquidated, whether compulsorily or voluntarily (other than for the purpose of amalgamation or reconstruction whilst solvent);
- (b) a Party becomes unable to pay its debts as they fall due;
- (c) a Party enters into any arrangement with creditors;
- (d) a Party becomes subject to external administration within the meaning of Chapter 5 of the *Corporations Act 2001* (Cth), including having a receiver or administrator appointed over all or any part of its assets; or
- (e) anything analogous (such as analogous bankruptcy processes) or having a substantially similar effect to the events specified in **clauses (a) to (b)** above occurs in relation to a Party, including the court appointment of a receiver.

**Instrument Change** means an amendment to LEP 2013 to amend:

- (a) the Height of Buildings Map to allow a maximum building height on the Land of 56m;
- (b) the Floor Space Ratio Map to allow a maximum FSR of 6.3:1 on the Land; and
- (c) the Non-Residential Floor Space Ratio Map to allow a minimum non-residential FSR of 1.5:1 for the Land.

**Insurer** means an insurer that is licensed by the Australian Prudential Regulatory Authority to operate in Australia or has an investment grade rating from an industry recognised rating agency such as Moodies, Standard & Poors or Bests.

**Land** means Lots 27 to 31 of Section 10 in Deposited Plan 2872 and Lot 321 in Deposited Plan 566480, known as 23-35 Atchison Street, St Leonards.

**Law** means:

- (a) any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation;
- (b) any Approval, including any condition or requirement under it; and
- (c) any fees and charges payable in connection with the things referred to in paragraphs (a) and (b).

**LEP 2013** means the *North Sydney Local Environmental Plan 2013*.

**LRS** means the NSW Land Registry Services.

**Modification** means any modification of the Development Consent under section 4.55 of the Act.

**Monetary Contribution** means an amount of \$2,800,000.

**Monetary Contribution Security** means a Bond or Bank Guarantee in an amount that is equivalent to \$1,400,000 increased but not decreased in accordance with movements in the CPI from the date of this Agreement to the date the Security is provided to Council (being an amount equivalent to 50% of the Monetary Contribution).

**Non-Residential Floor Space Ratio Map** means the Non-Residential Floor Space Ratio Map in the LEP 2013.

**Occupation Certificate** means an occupation certificate as defined under the Act.

**Party** means a party to this Agreement, including their successors and assigns.

**Permitted Encumbrance** means easements in favour of utility service providers or required by any Authority or as otherwise agreed in writing by Council.

**Planning Proposal** means PP 1/18 seeking the Instrument Change and lodged with the Council on 16 January 2018, as modified from time to time.

**Register** means the Torrens title register maintained under the *Real Property Act 1900* (NSW).

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

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

**Subdivision Certificate** means a subdivision certificate as defined in the Act.

**Taxes** means taxes, levies, imposts, deductions, charges and duties (including stamp and transaction duties), together with any related interest, penalties, fines and expenses in connection with them.

**Thru Site Link** means a pedestrian thoroughfare six metres wide with an area of 210m<sup>2</sup> connecting Atchison Street to Albany Lane, as generally identified in the location on the plan attached at **Annexure A**.

**Works** means the works required to embellish the Contribution Land and any adjoining land as a public park, including but not limited to design, survey, planning, obtaining approvals, engineering and construction generally in accordance with the Concept Design in **Schedule 4**.

**Works Security** means an amount that is equivalent to the estimated cost of the Works determined by a qualified quantity surveyor taking into account the Detailed Design prepared and approved by Council in accordance with the Construction.

## Schedule 2

### Explanatory Note

#### Explanatory Note

#### Exhibition of draft Voluntary Planning Agreement

#### PP1/18: 23-35 Atchison Street, St Leonards

*Environmental Planning & Assessment Regulation 2000 (clause 25E)*

#### Planning Agreement

The purpose of this Explanatory Note is to provide a plain English Summary to support the notification of a draft voluntary Planning Agreement ("the **Planning Agreement**") under Clause 7.4 of the *Environmental Planning and Assessment Act 1979* ("the **Act**").

The Planning Agreement will require the provisions for both monetary and in-kind contributions to community infrastructure in the St Leonards/Crows Nest precinct in connection with a proposed change to provisions of the *North Sydney Local Environmental Plan 2013 (NSLEP 2013)*. The contributions include:

- a. The dedication of a 5-metre-wide strip for the purpose of a linear park along Oxley Street;
- b. Provision of a publically accessible 6-metre-wide laneway from Atchison Street to Albany Lane along the western boundary of the site; and
- c. A \$2,800,000 monetary contribution towards the upgrade of Hume Street Park or public open space within the North Sydney Local Government Area.

This Explanatory Note has been prepared jointly between the parties as required by clause 25E of the *Environmental Planning and Assessment Regulation 2000* ("the **Regulations**").

This Explanatory Note is not to be used to assist in construing the Planning Agreement.

#### Parties

TWT Property Group Pty Limited ("the **Developer**") made an offer to North Sydney Council ("the **Council**") to enter into a Planning Agreement, in connection with a Planning Proposal for land at 23-35 Atchison Street, St Leonards.

Tiloon Pty Ltd (as trustee of the Atchison Street Trust) is the registered proprietor of the subject land and is also a party to the Planning Agreement.

#### Description of subject land

The land to which the Planning Agreement applies is described as follows:

- The property located at 23-35 Atchison Street, St Leonards (being Lots 27, 28, 29, 30, 31, Section 10 in Deposited Plan 2872 and Lot 321 in Deposited Plan 566480) ("the **Land**").
- The land is 2,109.8sqm in area and has frontages to Atchison Street, Oxley Street and Albany Lane.

#### Description of the Planning Proposal to which the Planning Agreement applies

The Planning Proposal seeks to amend the NSLEP 2013 to:

- a) increase the maximum height limit for the Land from 20 metres to 56 metres consistent with the St Leonards/Crows Nest Planning Study;

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- b) increase the minimum non-residential floor space ratio (FSR) from 0.6:1 to 1.5:1; and
- c) apply a maximum FSR of 6.3:1.

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

### Monetary Contribution

The Planning Agreement requires the Developer to pay Council the amount of \$2,800,000 to be applied towards the acquisition, embellishment and maintenance of Hume Street Park or the embellishment and maintenance of other land for the purpose of public open space and recreation within the North Sydney Local Government Area.

The monetary contribution will be payable in instalments, with 50% of the amount payable prior to the issue of a Construction Certification and the remaining 50% of the amount payable prior to the issue of the first Occupation Certificate. The monetary contribution will be indexed in accordance with increases in the Consumer Price Index from the date of agreement to the date of payment.

### Dedication or transfer of the Contribution Land

The Planning Agreement requires dedication of a 5m strip of land from the Oxley Street frontage ("the Contribution Land") to contribute to the Oxley Street linear park and provide additional open space that supports the future residential and working community.

The Planning Agreement requires works to be carried out to embellish the Contribution Land in accordance with the *North Sydney Public Domain Style Manual and Design Code*. These works will need to be completed prior to the dedication to Council. The dedication to Council of the Contribution Land will be made prior to the issue of the first Occupation Certificate.

### Thru Site Link

The Planning Agreement will facilitate the provision of a 6 metre setback from the western boundary of the subject site. The setback aims to provide a publicly accessible pedestrian Thru Site Link between Atchison Street and Albany Lane.

The Planning Agreement requires that any approval for a building on the land may require development of the Thru Site Link so it is consistent with any standards and specifications provided by the Council and suitable for public use as a pedestrian thoroughfare.

Public access to the Thru Site Link will be achieved by the grant of an easement in favour of Council.

## Assessment of the Merits of the Planning Agreement

### How the Planning Agreement Promotes the Objects of the Act and the public interest

The draft Planning Agreement promotes the following objectives of the Act:

- a. Promotes the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources (section 1.3(a)).
- b. Promotes the orderly and economic use and development of land (section 1.3 (c)).
- c. Promotes good design and amenity of the built environment (section 1.3(g)).

The Planning Agreement will enable the utilisation of the development potential of the Land, while requiring the developer to make provision for public purposes. The Planning Agreement promotes the

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public interest because it will require the provision of public domain improvements that will benefit existing and future residents and workers in the St Leonards / Crows Nest area.

The proposed contributions under the Planning Agreement are consistent with the Council's strategic plans and policy documents.

#### **The Planning Purposes served by the Planning Agreement**

The Planning Agreement facilitates the implementation of Council's endorsed "St Leonards/Crows Nest Planning Study – Precincts 2 & 3" and provides for monetary contributions and building setbacks that will enable the Council to provide adequate public amenities for new development in the area.

The Planning Agreement will require the developer to provide funds for the acquisition, embellishment and maintenance of public open space. It will also require setbacks for the purpose of additional public open space and a pedestrian through site link, improving public amenity and pedestrian connectivity at street level and minimising development impacts.

#### **How the Planning Agreement promotes the objectives of the Local Government Act 1993 and the elements of the Council's Charter**

The Planning Agreement is consistent with the following purposes of the Local Government Act 1993.

- to facilitate engagement with the local community by councils, councillors and other persons and bodies that constitute the system of local government; and
- to provide for a system of local government that is accountable to the community and that is sustainable, flexible and effective.

The provision of public benefits under the Planning Agreement, consistent with the St Leonards / Crows Nest Planning Study and the exhibition of the Planning Agreement are consistent with the following guiding principles for councils set out in section 8A of the Local Government Act 1993 (which has replaced the Council's Charter):

- Councils should provide strong and effective representation, leadership, planning and decision-making.
- Councils should carry out functions in a way that provides the best possible value for residents and ratepayers.
- Councils should plan strategically, using the integrated planning and reporting framework, for the provision of effective and efficient services and regulation to meet the diverse needs of the local community.
- Councils should manage lands and other assets so that current and future local community needs can be met in an affordable way.
- Councils should work with others to secure appropriate services for local community needs.
- Councils should act fairly, ethically and without bias in the interests of the local community.
- Councils should consider the long term and cumulative effects of actions on future generations.
- Council decision-making should be transparent and decision-makers are to be accountable for decisions and omissions.
- Councils should actively engage with their local communities, through the use of the integrated planning and reporting framework and other measures.

#### **Whether the Planning Agreement conforms with the Council's Capital Works Program**

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The Planning Agreement offers contributions that will enable the Council to provide and embellish new public open space areas, the need for which will be created by the Development, and will improve pedestrian amenity in the vicinity of the Development. The Planning Agreement will enable Council to provide for the current and future open space needs of the local community.

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

The Planning Agreement requires:

<u>Contribution</u>	<u>Timing</u>
50% of the monetary contribution to be paid to Council	Prior to the issue of a Construction Certificate
50% of the remaining monetary contribution to be paid to Council	Prior to the issue of the first Occupation Certificate
Dedication of the Contribution Land as public open space to Council* *The Developer must carry out the works on the Contribution Land prior to the dedication to Council.	Prior to the issue of the first Occupation Certificate
The design and construction of the Thru Site Link	Prior to the issue of any Occupation Certificate
Registration of the Easement in Gross for the Thru Site Link	Prior to the issue of the first Occupation Certificate

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## Schedule 3

### Construction Terms

#### 1 Interpretation

For the purposes of this Schedule, the defined terms in this Agreement will apply and, unless context indicates a contrary intention:

**Builder** means any entity contracted under the Construction Contract to carry out the Works.

**Construction Contract** means the contract between the Developer and its Builder to carry out the Works (whether or not that is a contract for the Works only or forms part of a contract for the building of other components of the Development).

**Defects Liability Period** means in respect of each item of building works which together comprise the Works the period of 12 months from the date on which the Works are delivered to Council in accordance with this Agreement.

**Detailed Design** means the final specifications and finishes for the Works prepared in accordance with clause 5.2 of this Schedule and will include the design of the Works, the location for the Works, installation specifications and estimated costs of construction and/or installation.

**Services** means all water, gas, electricity, television, drainage, sewerage, cable TV, data communications, telecommunications and other services which are required under a development consent within the meaning of the Act or an Approval and which are necessary or desirable for the construction or operation of the Development.

**Superintendent** means the Superintendent appointed under any Construction Contract.

#### 2 Requirements of Authorities and Approvals

- (a) These Construction Terms must be read and construed subject to:
  - (i) any requirements or conditions of any Development Consent;
  - (ii) the requirements of and conditions imposed by all relevant Authorities and all Laws relating to the Development and the construction of the Development.
- (b) If the Developer requires any Approvals in order to carry out the obligations under this Agreement, then the Developer will acquire all Approvals necessary to carry out the Works at its own cost.
- (c) The Developer must ensure that the Works carried out under this Agreement are carried out:

- (i) in accordance with the relevant Development Consent for the Works and all Approvals and the requirements of all Laws, including without limitation, work health and safety legislation; and
- (ii) in a good and workmanlike manner and so that they are diligently progressed until completion;

AND it is acknowledged that to the extent that there is any inconsistency between this agreement and any Approval the terms of the Approval shall take precedence.

### **3 Costs of Works**

All costs of the Works must be borne by the Developer.

### **4 Project Management and Contractor Engagement**

- (a) The Developer will be responsible for managing the Works.
- (b) The Developer will ensure that any contractor it engages to carry out the Works agrees to:
  - (i) carry out the Developer's obligations in these Construction Terms as part of any Construction Contract; and
  - (ii) request a Council representative to be present at each on-site meeting attended by the Superintendent and to ensure the Council representative is present at the meeting.

### **5 Design Development and Approvals**

#### **5.1 Concept Design**

- (a) Prior to submitting the Development Application, the Developer must prepare a draft concept design for the Works, in accordance with:
  - (i) the concept plan for the Works at **Schedule 4**;
  - (ii) the St Leonards East Public Domain Upgrade Report (or draft version of that report, whichever is applicable at the time the concept design is prepared);
  - (iii) the North Sydney Public Domain Style Manual and Design Codes;
  - (iv) the North Sydney Infrastructure Specification Manual for Roadworks, Drainage and Miscellaneous Works; and
  - (v) any other standards or specifications provided to the Developer by the Council.
- (b) The Developer and the Council must work in consultation with each other to prepare and agree the concept design and must both act reasonably and with due expedition in their consultations with each other.
- (c) The Developer must incorporate into the final concept design any amendments required by Council, acting reasonably.

## 5.2 Detailed Design

- (a) Prior to submitting an application for a Construction Certificate for the Development, the Developer must provide a copy of the draft Detailed Design to the Council for approval.
- (b) The draft Detailed Design must be consistent with the concept plan for the Works in **Schedule 4**, the standards and specifications referred to in **clause 5.1(a) of this Schedule** and the concept design agreed in accordance with **clause 5.1 of this Schedule**.
- (c) Council and the Developer must work in consultation with each other to prepare and agree the Detailed Design and must both act reasonably and with due expedition in their consultations with each other.
- (d) Within 15 Business Days of receiving the draft Detailed Design, Council will respond to the Developer with any suggested amendments to the Detailed Design.
- (e) If the Detailed Design is not completed and agreed within 15 Business Days of Council providing its suggested amendments in accordance with **clause 5.2(d) of this Schedule**, to avoid possible delays to the issue of a Certificate of Practical Completion, the Council will, in its sole discretion, be entitled to decide on any outstanding or undecided matter or item relating to areas that are to be accessible to the public, provided that any decision made by Council under this clause:
  - (i) is consistent with the obligation of the Developer to carry out the Works and dedicate the Contribution Land under this Agreement;
  - (ii) is consistent with the Development Consent;
  - (iii) does not materially and adversely affect the Development; and
  - (iv) is not unreasonable.
- (f) Any acceptance by the Council of the Detailed Design under this clause is not to be taken as approval of or to any Construction Certificate for the Works.

## 5.3 Good faith

The parties must act promptly and in good faith to consult in relation to the concept design and the Detailed Design.

## 6 Carrying out of Works

### 6.1 Communication

The Developer must keep Council reasonably informed of progress of the Works and provide to Council such information about the Works as Council reasonably requests.

## 6.2 Standard of Works

- (a) Unless otherwise provided, the Developer shall, and must cause the Builder to, use suitable new materials and proper and tradesmanlike workmanship when carrying out the Works.
- (b) The qualitative standard of the design and finishes for the Works must be in accordance with Council's specifications for the Works as provided during the preparation of the concept design and Detailed Design.
- (c) The Developer will obtain any relevant standards (including design standards), specifications, or guidelines and any other requirements or policies referred to in clause 6.2 of this Schedule from Council if the Council fails to deliver them to the Developer.
- (d) The Developer may but is not obliged to reinstate any Works where damage or destruction is as a result of:
  - (i) Any act or omission of the Council or its employees, consultants or agents relating to any part of the Works under this agreement; or
  - (ii) The use or occupation by the Council or its employees, consultants or agents, Council's representatives or other contractor of the Council of any part of the Works.

## 7 Inspection

- (a) On completion of the Detailed Design, the Council will provide a schedule of inspections to be undertaken by Council (**Inspection Schedule**) to occur at specified stages of the construction of the Works (**Inspection Stage**). If the Council does not provide the Inspection Schedule, the Developer must request the Inspection Schedule from the Council prior to the Works commencing.
- (b) Five Business Days prior to reaching an Inspection Stage as set out in the Inspection Schedule, the Developer must notify the Council of the proposed inspection date (**Inspection Date**).
- (c) On the Inspection Date, or other agreed date, the Developer must ensure that any employees, contractors, agents or representatives of Council have access to and may enter the Land to inspect the Works.
- (d) In addition to carrying out inspections in accordance with the Inspection Schedule, the Council may enter the Land or any part of the Land on which the Works are located to inspect the progress of the Works, subject to:
  - (i) the terms of the Construction Contract (save for any clause of the Construction Contract which prevents the Council from accessing the Land);
  - (ii) giving reasonable notice to the Developer;
  - (iii) complying with all reasonable directions of the Developer; and

- (iv) being accompanied by the Developer or a nominee, or as otherwise agreed.
- (e) The Council may, acting reasonably, within 5 Business Days of carrying out an inspection (either under **clause 7(c) or 7(d) of this Schedule**), notify the Developer of any defect or non-compliance in the Works and direct the Developer to carry out work to rectify that defect or non-compliance within a reasonable period of time. Such work may include, but is not limited to:
  - (i) removal of defective or non-complying material;
  - (ii) demolishing defective or non-complying work;
  - (iii) reconstructing, replacing or correcting any defective or non-complying work; and
  - (iv) not delivering any defective or non-complying material to the site of the Works.
- (f) If the Developer is issued a direction to carry out further work under **clause 7(e) of this Schedule**, the Developer must, at its cost, rectify the defect or non-compliance specified in the Notice within the time period specified in the Notice, provided that it is reasonable having regard to the nature of the works.
- (g) If the Developer fails to comply with a direction to carry out work given under **clause 7(e) of this Schedule**, the Council will be entitled to refuse to accept that the Works (or the relevant part of the Works) meet the Council's standards and specifications and may refuse to issue a Certificate of Practical Completion, until the required Works have been completed to the Council's satisfaction, acting reasonably.
- (h) For the avoidance of doubt, any acceptance by the Council that the Developer has rectified a defect or non-compliance identified in a notice issued under **clause 7(e) of this Schedule** does not constitute:
  - (i) acceptance by the Council that the Works comply with all Approvals and Laws; or
  - (ii) an Approval by the Council in respect of the Works; or
  - (iii) an agreement or acknowledgment by the Council that the Works or the relevant part of the Works are complete and may be delivered to the Council in accordance with this agreement.

## **8 Completion**

### **8.1 Practical Completion**

- (a) When the Developer considers that the Works, or any part of the Works, are complete, the Developer must send a Notice to the Council accompanied by complete works as executed plans, any relevant certificates or consents of

any public utility authority and a request for written certification from the Council that the Works are complete.

- (b) Within 10 Business Days of receipt of the notice under **clause 8.1(a) of this Schedule**, the Council will carry out an inspection of the Works and will, acting reasonably, either:
  - (i) provide written certification to the Developer that the Works have been completed; or
  - (ii) notify the Developer of any additional information required or matters which must be addressed by the Developer prior to the certification being issued.
- (c) If the Developer is required to provide additional information or address any matters under **clause 8.1(b)(ii) of this Schedule**, the Developer will provide that information to Council or address those matters within 10 Business Days of receiving the notice or within a reasonable period of time and make a further request under **clause 8.1(a) of this Schedule** for written certification that the Works have been completed.
- (d) Practical completion will be achieved in relation to the Works or any part of the Works when a Certificate of Practical Completion has been issued for those Works.

## **8.2 Delivery of documents**

- (a) The Developer must as soon as practicable, and no later than 20 Business Days after the date on which the Certificate of Practical Completion is issued in respect of the Works or any part of the Works deliver to the Council, complete and legible copies of:
  - (i) all "as built" full-sized drawings, specifications and relevant operation and service manuals;
  - (ii) all necessary certificates including the certificates of any consultants of the Developer that the Council may reasonably require, and Approvals of any public utility authority (where relevant); and
  - (iii) copies of all Approvals required for use of the land subject to the Works.
- (b) The Developer must as soon as practicable, and no later than 20 Business Days after the date on which the Certificate of Practical Completion is issued in respect of the Works or any part of the Works, provide the Council with a tour of the land subject to the Works and provide reasonable instructions on the operation and use of the Services on that land.

## **8.3 Assignment of Warranties and Causes of Action**

- (a) The Developer must assign (as beneficial owner) or cause to be assigned to Council the benefit of any warranties and guarantees obtained by the Developer and the Builder (and capable of assignment) with respect to any material or goods incorporated in or forming part of the Works.

- (b) To the extent that any such warranties or guarantees cannot be assigned, the Developer must at the request of Council do anything reasonably required by Council to enforce such warranties or guarantees for the benefit of Council.

#### **8.4 Defects Liability Period**

- (a) During the Defects Liability Period, the Council (acting reasonably) may give to the Developer a notice (**Rectification Notice**) in writing that identifies a defect in the Works and specifies:
  - (i) action required to be undertaken by the Developer to rectify that defect (**Rectification Works**); and
  - (ii) the date on which the defect must be rectified (**Rectification Date**).
- (b) The Developer must comply with the Rectification Notice by:
  - (i) procuring the performance of the Rectification Works by the Rectification Date, or such other date as agreed between the parties;
  - (ii) keeping the Council reasonably informed of the action to be taken to rectify the defect; and
  - (iii) carrying out the Rectification Works.
- (c) The Council must give the Developer and its contractors any access required to carry out the Rectification Works.
- (d) When the Developer considers that the Rectification Works are complete, either the Developer must notify the Council and provide documentation, plans or invoices which establish that the Rectification Works were carried out.
- (e) The Council may inspect the Rectification Works within 15 Business Days of receiving a Notice from the Developer under **clause 8.4(d) of this Schedule** and, acting reasonably:
  - (i) issue a further Rectification Notice if it is not reasonably satisfied that the Rectification Works are complete; or
  - (ii) notify the Developer in writing that it is satisfied the Rectification Works are complete.
- (f) The Developer must meet all costs of and incidental to rectification of defects under this **clause 8.4**.
- (g) If the Developer fails to comply with a Rectification Notice, then the Council may do such things or take such action as is necessary to carry out the Rectification Works, including accessing and occupying any part of the Land without further notice to the Developer, and may:
  - (i) call upon any Bond or Bank Guarantee provided to the Council under **clause 8.5** of this Schedule to meet its costs of carrying out Rectification Works; and

- (ii) recover as a debt due to the Council by the Developer in a court of competent jurisdiction, any difference between the amount of the security deposit and the costs incurred by the Council in carrying out Rectification Works.
- (h) The Developer must request that Council inspect the Works 28 days prior to the end of the Defects Liability Period. The Council must inspect the Works at any time after receiving the request from the Developer and before the end of the Defects Liability Period.
- (i) If, prior to the end of the Defects Liability Period the Developer fails to request the inspection, the Council may extend the Defects Liability Period so that the inspection may be carried out.

### **8.5 Security for Defects Liability**

- (a) Prior to the issue of a Certificate of Practical Completion for each item of the Works the Developer must deliver to the Council Bonds or Bank Guarantees in an amount equivalent to 2.5% of the construction costs for the particular item of Works.
- (b) The Developer advises and the Council acknowledges its awareness that the Bonds or Bank Guarantees may be supplied by the Builder and form a part of the security held by the Developer from the Builder under the terms of the Construction Contract, provided that:
  - (i) any Bond or Bank Guarantee provided by the Builder benefits the Council and satisfies the requirements of this agreement; and
  - (ii) the Developer procures an agreement from the Builder and the Builder's bank that the Council will be entitled to call on any Bond or Bank Guarantee provided by the Builder, in accordance with the terms of this agreement and the terms of any Construction Contract.
- (c) Within 10 Business Days after the Defects Liability Period for a particular item of Works has expired Council must (if it has not called on it) return the Bond or Bank Guarantee referred to in **clause 8.5(a) of this Schedule** for that item of Works (or any remaining balance of it) to the Developer.
- (d) Notwithstanding **clause 8.4(c) of this Schedule**, if during the Defects Liability Period for a particular item of Works, the Council issues a Rectification Notice and the Rectification Notice is not complied with, then the Council need not deliver the balance of any Bonds or Bank Guarantees provided to it until that defect has been rectified.
- (e) The Council must deliver the balance of any Bond or Bank Guarantee for the Defects Liability Period to the Developer within 14 days after the Defects Liability Period has ended.

## **9 Risk**

The Developer undertakes the Works entirely at its own risk.

**10 Insurance**

- (a) Prior to the commencement of the construction of any of the Works, the Developer must ensure the Builder effects and the Developer must produce evidence to the Council of the following insurances issued by an insurer approved by the Council (acting reasonably) in a form approved by the Council (acting reasonably):
  - (i) construction works insurance for the value of the Works;
  - (ii) public risk insurance for at least \$20 million; and
  - (iii) workers compensation insurance as required by Law.
- (b) The Developer must provide evidence of currency of insurance required by clause 10(a) of this Schedule upon request by the Council, acting reasonably, throughout the term of this agreement.

**11 Indemnities**

The Developer indemnifies the Council, its employees, officers, agents and contractors from and against all Claims in connection with the carrying out by the Developer of the Works except to the extent such Claim arises either directly or indirectly as a result of the Council or its employees, officers, agents, contractors or workmen's negligence, default, act or omission.

**12 Intellectual Property Rights**

The Council acknowledges that the Developer or its contractors hold all rights to copyright and any intellectual property which may exist in the Works. To the extent the Developer has or receives intellectual property rights for the Works, the Developer shall assign those intellectual property rights to Council or permit use thereof.

**13 Risk of contamination**

The Developer acknowledges and agrees:

- (a) that it is responsible for the management and remediation of any contamination present upon or under the land on which the Works are to be carried out;
- (b) it will attend to any necessary remediation at its own cost; and
- (c) to the fullest extent permitted by Law indemnify and release the Council from any Claim which might arise from any contamination with respect to the land on which the Works are to be carried out.

**14 Plans**

The parties acknowledge and agree that further detail and refinement of plans and documents in connection with this agreement may be necessary having regard to the following matters:

- (a) matters affecting Works not capable of identification on or before the date of this agreement; or
- (b) by agreement between the parties.

# Schedule 4

## Concept Plan for Works



## Schedule 5

### Easement in Gross

#### Definitions

For the purpose of this Schedule 5 of this Agreement, the following words have the following meanings:

**Council** means North Sydney Council and its successors;

**Easement** means the Easement created in accordance with this Schedule 5 of this Agreement;

**Easement Site** means the location of the Thru Site Link as defined in Schedule 1 of this Agreement;

**Lot Burdened** means the Land;

**Owner of the Lot Burdened** means the registered proprietor of the Lot Burdened from time to time.

#### Easement Terms

1. The owner of the Lot Burdened grants to the Council and members of the public full and free right to go, pass and repass over the Lot Burdened at all times (but only within the Easement Site):
  - (a) with or without companion animals (as defined in the *Companion Animals Act 1998*) or other small pet animals; and
  - (b) on foot without vehicles (other than wheelchairs or other disabled access aids), unless vehicles are being used to access the building on the Land via clearly identified entry and exit points;for all lawful purposes.
2. The owner of the Lot Burdened must, to the satisfaction of Council, acting reasonably:
  - (a) keep the Easement Site (including any services in, on or under the Lot Burdened) in good repair and condition;
  - (b) maintain and repair the Easement Site and all improvements on it;
  - (c) keep the Easement Site clean and free from rubbish; and
  - (d) maintain sufficient public liability insurance covering the use of the Easement Site in accordance with the terms of this Easement.
3. The owner of the Lot Burdened must ensure that any rules made by an Owner's Corporation relating to the Easement Site have been approved by the Council, acting reasonably.
4. If any member or members of the public loiter or congregate, for any purpose which the owner of the Lot Burdened, acting reasonably, considers to be a nuisance or a safety risk, the owner may either remove those members of the public, or arrange for their removal by an appropriate authority.

5. The owner of the Lot Burdened may erect safety signage and any other appropriate signage and may erect CCTV cameras on the Lot Burdened.
6. The owner of the Lot Burdened may engage security personnel to monitor and control the behaviour of the public including but not limited to prohibiting smoking, consumption of alcohol (except within licensed areas), passage of animals apart from those referred to in 1(a), bicycles and skateboards and the like in accordance with any rules made by an Owner's Corporation relating to the Lot Burdened.
7. The owner of the Lot Burdened may with the Council's prior written consent (except in the case of an emergency, in which case the Council's prior written consent is not required) temporarily close or temporarily restrict access through all or part of the Lot Burdened for the time and to the extent necessary but only on reasonable grounds for the purposes of:
  - (a) construction, construction access, repairs, maintenance, replacement and alteration to the Lot Burdened or any improvements in, on or under the Lot Burdened; or
  - (b) security, public safety or evacuation of the Lot Burdened and adjoining buildings.
8. Subject to ensuring the provision of access in accordance with clause 1 of this Easement, the owner of the Lot Burdened may, with the consent of Council:
  - (a) carry out works in the Lot Burdened for the purposes of enhancing the Lot Burdened;
  - (b) install or erect works of art, street furniture, awnings, tables and chairs associated with ground floor commercial premises, notice boards or any other similar improvements at ground level within the Lot Burdened; and
  - (c) use the Lot Burdened,in a manner consistent with any outdoor or footway dining policy of the Council.
9. The Council is solely empowered to release this Easement.

**Release and Variation of Easement**

- (a) The Council is solely empowered to release the Easement.
- (b) The Easement may only be varied by written agreement between the Council and the Owner of the Lot Burdened.

Executed as deed.

Executed by North Sydney Council by )  
its duly appointed officer in the presence )  
of: )



Witness

CARLI MCCONKEY  
Name of Witness (print)



Officer

KM Gouldthorp  
Name of Officer (print) General Manager

17.09.20

Executed by TWT Property Group Pty )  
Ltd ABN 69 611 972 091 pursuant to )  
section 127 of the Corporations Act 2001 :)



Company Secretary/Director

Wendy Zhang  
Name of Company Secretary/Director  
(print)



Director

Tina Zou  
Name of Director (print)

Executed by Tildoon Pty Ltd ACN 603 )  
442 244 in its capacity as trustee of the )  
Atchison Street Trust pursuant to section )  
127 of the Corporations Act 2001:

.....  
Company Secretary/Director

.....  
Name of Company Secretary/Director  
(print)



Director

Tina Zou  
Name of Director (print)

# Annexure A - Contribution Land and Thru Site Link

