

North Sydney Council

Legal Document

LD 7452 Attached

Planning Agreement for
PP3/19 at 173-179 Walker St & 11-17 Hampden St,
North Sydney

Please ensure that this coversheet remains attached to this Legal Doc

Planning Agreement

North Sydney Council

Cbus Property R3 Pty Ltd

Eswod Home Units Pty Ltd

Contents

1. Defined meanings	1
2. Status of this Agreement	1
3. Application of other development contribution provisions	3
4. Development Contributions	4
5. Dedicating land as a Development Contribution	5
6. Defect rectification	9
8. Registration	10
9. Transfer, assignment or novation	11
10. Security for the Dedication Dwellings	13
11. Enforcement in relation to the Dedication Dwellings	15
12. Termination	16
13. Breach of obligations	16
14. Dispute resolution	18
15. General provisions	19
16. Definitions and interpretation	25
Schedule 1 – Land ownership	31
Schedule 3 – Development Contributions	33
Schedule 4 – Dedication Dwellings criteria	36
Schedule 5 – Valuation of Dedication Dwellings	39
Schedule 6 – Form of unconditional undertaking	42
Annexure A – Draft Deed of Novation	45
1. Defined meanings	47
2. Novation	47
3. Consent	47
4. Release and Indemnity	48
5. Representations and Warranties	48
6. General provisions	49
7. Definitions and interpretation	51

Planning Agreement

Dated 30th May 2022

Parties

1. **North Sydney Council** of 200 Miller Street North Sydney NSW 2060 (**the Council**)
2. **Cbus Property R3 Pty Ltd** ACN 638 166 300 of Level 14, 447 Collins Street Melbourne Vic 3000 (**Developer**)
3. **Eswod Home Units Pty Ltd** ACN 000 246 702 of 11 Hampden Street North Sydney NSW 2060 (**Eswod**)

Background

- A. The Developer and Eswod own the Land as set out in schedule 1.
- B. The Land is located in the North Sydney local government area.
- C. The Developer wishes to carry out the Development on the Land.
- D. The Developer has sought a change to the environmental planning instruments applying to the Land to enable the Development to be carried out.
- E. The Developer has offered to enter into a planning agreement and to make Development Contributions in connection with the change to the environmental planning instruments and the carrying out of the Development, in accordance with the terms and conditions of this Agreement.

Operative provisions

1. Defined meanings

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

2. Status of this Agreement

2.1 Planning Agreement

This Agreement is a planning agreement within the meaning of section 7.4(1) of the Act.

2.2 Land

This Agreement applies to the Land.

2.3 Development

This Agreement applies to the Development.

2.4 Instrument Change

This Agreement applies to the Instrument Change.

2.5 Effect and obligations

- (a) This Agreement commences and has force and effect on and from the date when the parties have both executed this Agreement.
- (b) The party who last signed is to insert the date when this Agreement commences in space provided on page 1.
- (c) Despite any other provision of this Agreement, the Developer is under no obligation to make any Development Contribution in accordance with this Agreement unless the Instrument Change has been made.

2.6 Warranties

The parties warrant to each other that they:

- (a) have full capacity to enter into this Agreement; and
- (b) are able to fully comply with their obligations under this Agreement.

2.7 Further agreements

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

2.8 Surrender of right of appeal, etc.

- (a) The Developer is not:
 - (i) to commence or maintain; or
 - (ii) to cause or procure the commencement or maintenance, of any proceedings in any court or tribunal or similar body appealing against, or questioning the validity of:
 - (A) this Agreement; or
 - (B) a Development Consent relating to the Development,insofar as the subject-matter of the proceedings relates to this Agreement.
- (b) Clause 2.8(a) does not affect the Developer's ability to commence and/or conduct any class 1 proceedings (as set out in section 17 of the *Land and Environment Court Act 1979*) and, in doing so, rely on this Agreement as a matter for consideration under section 4.15(1)(a)(iiia) of the Act, provided that the validity or reasonableness of, or the need for this Agreement is not questioned by the Developer in those proceedings.

2.9 Security

The Council is satisfied this Agreement provides the enforcement of this Agreement by a suitable means in the event of a breach of this Agreement by the Developer, particularly by:

- (a) the ability for an Occupation Certificate to be withheld by reason of clause 154E of the Regulation when read in conjunction with:
 - (i) clause 4.1(a);
 - (ii) clause 4.2;
 - (iii) clause 5.3(a); and
 - (iv) clause 3(d) of schedule 4;
- (b) the requirement of the provision of Security, in certain circumstances, before the issue of an Occupation Certificate under clause 10.1;
- (c) the provisions of:
 - (i) clause 6 (Defect rectification);
 - (ii) clause 8 (Registration);
 - (iii) clause 9 (Transfer, assignment or novation);
 - (iv) clause 10 (Security for the Dedication Dwellings);
 - (v) clause 11 (Enforcement in relation to the Dedication Dwellings); and
 - (vi) clause 13 (Breach of obligations).

3. Application of other development contribution provisions

3.1 Local infrastructure contributions — general

- (a) This Agreement does not exclude the application of section 7.11 of the Act to the Development.
- (b) The benefits under this Agreement are not to be taken into consideration in determining a development contribution under section 7.11 of the Act.

3.2 Local infrastructure contributions — fixed levies

This Agreement does not exclude the application of section 7.12 of the Act to the Development.

3.3 Special infrastructure contributions

This Agreement does not exclude the application of section 7.24 of the Act.

4. Development Contributions

4.1 Nature, extent and timing

- (a) The Developer is to make Development Contributions to the Council:
 - (i) in accordance with Column 3 of the Table;
 - (ii) at the point-in-time set out in Column 5 of the Table;
 - (iii) for the purposes of the public purpose set out in Column 4 of the Table; and
 - (iv) in accordance with the provisions of this Agreement relating to making of Development Contributions.

- (b) Nothing in this Agreement precludes the Developer from electing to make a Development Contribution earlier than it is required to do so.

- (c) Despite clause 4.1(a), if a consent authority requires as a condition of Development Consent works or other contributions (other than monetary contributions) to social and community infrastructure in relation to the development of the Land above or in excess of what would ordinarily be required for the Development, the contributions to be provided by the Developer under this Agreement for the Development will be reduced by an amount and in a manner that must be agreed between the Council and the Developer to be equivalent to the value of the excess contributions that are delivered by the Developer in accordance with the Development Consent (and the Council and the Developer must each act in good faith and each must not unreasonably withhold their respective agreement).

For example, if contributions to social and community infrastructure are required that would not ordinarily be required for the Development and the parties agree that the value of that infrastructure is equal to half the value of the Development Contributions to be provided by the Developer under this Agreement (taking into account any increases in CPI), this will result in a 50 per cent reduction in Development Contributions to be provided by the Developer under this Agreement (in accordance with the agreement of the Council and the Developer), provided that the contributions to social and community infrastructure are delivered by the Developer.

- (d) Despite clause 4.1(a), if a consent authority imposes a requirement to pay monetary contributions under section 7.11 or section 7.12 of the Act in excess of those contributions that would otherwise be payable in accordance with the contributions plan that applies to the Land as at the date of this agreement, including any indexation calculated to the date the contributions are payable, the monetary contributions to be provided by the Developer under this Agreement for the Development is reduced by an amount that is equivalent to the excess contributions payable.

For example, a condition of Development Consent will be imposed requiring the payment of monetary contributions in accordance with the contributions plan applicable at the date the Development Consent is granted. If the monetary contributions payable under that condition (indexed to the date of payment in accordance with the relevant contributions plan) are higher than the monetary contributions payable under the contributions plan applying at the date of this agreement (indexed to the date of payment in accordance with that contributions plan), then the monetary contributions payable under this Agreement for the Development will be reduced by the difference.

- (e) Nothing in this clause 4.1 allows a reduction of contributions to be paid or delivered under this Agreement to less than zero and nothing in this Agreement requires

Council to pay any amount to a Developer or otherwise provide any portion of a contribution required under this Agreement.

4.2 Consequences of a breach for further Certificates

- (a) For the avoidance of doubt:
 - (i) where this Agreement requires that a Development Contribution be made at a point-in-time; and
 - (ii) the Development Contribution is not made in breach of this Agreement,
 - (iii) then, despite the breach, it is a requirement,that no further Construction Certificate or Occupation Certificate may be issued for the Development until the Development Contribution (that was not made) is made.
- (b) Clause 4.2(a) does not apply when the failure to make the Development Contribution has been made good by the Council's recourse to Security.

5. Dedicating land as a Development Contribution

5.1 Identification of the Dedication Dwellings

- (a) Prior to the making of Item 1 or Item 2 Development Contribution in full, the Developer must not cause or permit a Development Application for a Development Consent to carry out a Development unless the Development Application:
 - (i) identifies the dwellings within the Development that are proposed (subject to any later election to make the Item 2 Development Contribution in lieu of the Item 1 Development Contribution) to be dedicated to the Council to meet the requirements of the Item 1 Development Contribution; and
 - (ii) includes details and specifications for the proposed location, layout and fitout of the Dedication Dwellings.
- (b) Clause 5.1(a) applies (where there is a proposed relevant change to a floor plan) to a Modification Application.
- (c) For avoidance of doubt any identification or specification made under clause 5.1(a) may be amended as part of an amendment of any Development Application or Modification Application in accordance with either clause 55 of the Regulation or section 64 of the *Civil Procedure Act 2005* (or both), subject to clauses 5.1(d), (e) and (f).
- (d) The Dedication Dwellings identified in any Development Application, Modification Application or amended Development Application must meet the criteria specified in Schedule 4.
- (e) If the proposed Dedication Dwellings do not meet the criteria specified in Schedule 4, the Council may, acting reasonably, require the Developer to amend the Development Application or Modification Application such that the proposed Dedication Dwellings meet the criteria specified in Schedule 4.
- (f) The Developer must propose the amendments reasonably required by Council under clause 5.1(e) and take all reasonable steps to seek approval for the amendment under either clause 55 of the Regulation or section 64 of the *Civil Procedure Act 2005* (or both).

5.2 Insurance

- (a) Prior to commencing the construction of any Work in relation to the Dedication Dwellings, the Developer must take out and keep current to the reasonable satisfaction of the Council the following insurances in relation to the relevant Work up until the Work is taken to have been completed in accordance with this Agreement:
 - (i) contract works insurance, noting the Council as an interested party, for the full replacement value of the Work (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover the Developer's liability in respect of damage to or destruction of the Works;
 - (ii) public liability insurance for at least \$20,000,000 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party;
 - (iii) workers compensation insurance as required by law; and
 - (iv) any other insurance required by law.
- (b) If the Developer does not comply with clause 5.2(a), the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Developer to the Council and may be recovered by the Council as a debt due in a court of competent jurisdiction.
- (c) The Developer is not to commence the construction of any Work (required under this Agreement) unless it has first provided to the Council satisfactory written evidence of the relevant insurances specified in clause 5.2(a).

5.3 Completion of Dedication Dwellings

- (a) The Developer is to give the Council 28 days written notice of the date on which it intends to complete Work on a Dedication Dwelling (other than a dwelling in respect of which the Developer has elected to make an Item 2 Development Contribution).
- (b) The Council is to inspect the work the subject of the notice referred to in clause 5.3(a) at least 14 days in advance of the date specified in the notice for completion of the Work.
- (c) Within 5 days of the date of inspection, Council will either:
 - (i) provide written certificate for the Developer that the Work has been completed; or
 - (ii) acting reasonably, give the Developer a written direction to complete, rectify or repair any specified part of the Work to the reasonable satisfaction of the Council.
- (d) The Developer must at its own cost, comply with any direction given under clause 5.3(c)(ii) within 14 days of receiving the direction (or such other time as agreed between the parties having regard to works required) and make a further request under clause 5.3(a) for written certificate that the Work has been completed.
- (e) Any Work by the Developer on the Dedication Dwellings required to be carried out by the Developer under this Agreement is taken to be complete, for the purposes of this Agreement, when the Council gives a written notice to the Developer to that effect under clause 5.3(c)(i).

- (f) The Council must not unreasonably withhold the notice referred to in clause 5.3(c)(i).
- (g) An Occupation Certificate must not be issued in relation to a dwelling to which clause 5.3(a) applies unless a written notice has been given by the Council under clause 5.3(c)(i).
- (h) On completion of the Work, the Developer must as soon as practicable, and no later than 21 days after the date on which a written notice is issued under clause 5.3(c)(i) deliver to 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 for the Developer that the Council may reasonably require, and Approvals of any public utility authority (where relevant); and
 - (iii) copies of all Approvals relevant to the Work.
- (i) The Council assumes responsibility for the Dedication Dwelling if and when it becomes the owner, subject to clause 6.

5.4 When the Dedication Dwellings are taken to be dedicated

- (a) The Developer must, when required to do so under clause 4.1(a), procure the transfer of Dedication Dwelling(s) to the Council in accordance with this Agreement.
- (b) In satisfying its obligations under clause 5.4(a), the Developer must:
 - (i) deliver to the Council:
 - (A) a form of transfer in respect of Dedication Dwelling(s) in favour of the Council free of cost, executed by the Developer and in registrable form, except for acceptance by the transferee and marking by Revenue NSW;
 - (B) the written consent to the registration of the transfer of any person whose consent is required to that registration;
 - (C) the certificate of title for the Dedication Dwelling(s) or electronic equivalent; and
 - (D) an Occupation Certificate for the Dedication Dwelling;
 - (ii) promptly comply, or procure compliance with, any requisitions raised by LRS in relation to the transfer of the Dedication Dwelling(s); and
 - (iii) take any other necessary action to give effect to the transfer of the title of the Dedication Dwelling(s) to the Council free of all encumbrances (including any mortgages, easements, covenants and planning agreements) and affectations (including any charge or liability for rates, Taxes and charges other than:
 - (A) any impositions of a kind that are routinely required as part of strata titled residential apartment development (other than strata fees); and
 - (B) any impositions that relate to the common property of a strata scheme (but not extending to unpaid strata fees).

- (c) For avoidance of doubt, clause 5.4(b)(iii) does not apply in relation to encumbrances or affectations being statutory rights that exist or arise under legislation that are of a type which the Developer or owner of the Dedication Dwellings could not prevent from affecting the Dedication Dwelling(s) and in respect of which no action can be taken by the Developer or owner of the Dedication Dwelling(s), provided that the Developer has notified the Council when it becomes aware that the encumbrance or affectation exists or has arisen.
- (d) Prior to granting or permitting, or agreeing to grant or permit, any encumbrance or affectation on the Land that will affect a Dedication Dwelling or the Council's interest in a Dedication Dwelling, the Developer must provide Council with the proposed terms of the encumbrance or affectation and obtain the consent of Council to the grant or permit the encumbrance or affectation however, the Council must not withhold or delay giving consent for an encumbrance or affectation that is an:
- (i) imposition of a kind that are routinely required as part of strata titled residential apartment development; or
 - (ii) impositions that relate to the common property of a strata scheme; and
- Council is satisfied, acting reasonably, that such encumbrance or affectation does not unreasonably or unduly burden the Dedication Dwelling in comparison to other dwellings in the Development of a similar configuration and similar vertical location within the Development.
- (e) Despite clause 5.4(b)(iii), if, despite having used its best endeavours, the Developer cannot ensure that the land to be dedicated is free from any relevant encumbrance and affectation which would otherwise be the subject of clause 5.4(b)(iii), then:
- (i) the Developer may request that the Council agree to accept the Dedication Dwellings subject to those encumbrances and affectations; and
 - (ii) if the encumbrance or affectation:
 - (A) existed prior to the date of this Agreement or has been granted or permitted with the consent of Council in accordance with clause 5.4(d); and
 - (B) does not prevent the future use of the Dedication Dwellings for the public purpose for which it is to be dedicated under this Agreement; and
 - (C) is not a charge arising as a result of unpaid taxes or charges,

the Council must not unreasonably withhold its agreement to accept the Dedication Dwellings subject to those encumbrances; and
 - (iii) in other circumstances, the Council may withhold the Council's agreement at the Council's absolute discretion.
- (f) The Developer will pay all rates and Taxes owing in respect of the Dedication Dwelling(s) up to and including the date that the Developer delivers the form of transfer and certificates of title for the Dedication Dwellings pursuant to clause 5.4(b), after which time the Council will be responsible for any rates and Taxes in relation to the Dedication Dwelling(s).

5.5 Warranties, Bonds and Insurance

- (a) The Developer must take all reasonable steps to ensure that Council receives the benefit of and is entitled to claim against any warranties, bonds and insurance obtained by it, including but not limited to statutory warranties, bonds and insurance, applicable to other dwellings in the Development.
- (b) 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 with respect to any material or goods incorporated in or forming part of the Work on a Dedication Dwelling.
- (c) To the extent 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.
- (d) The Developer indemnifies Council for all Claims arising as a consequence of the Developer's failure to comply with this clause 5.5.

6. Defect rectification

6.1 Defect rectification

- (a) The Council may, acting reasonably, give the Developer a Rectification Notice in relation to a Dedication Dwelling during the Defects Liability Period.
- (b) The Developer, at its own cost, is to comply with a Rectification Notice according to its terms and to the reasonable satisfaction of the Council.
- (c) The Council is to do such things as are reasonably necessary to enable the Developer to comply with such a Rectification Notice.
- (d) When the Developer considers that the Rectification Notice has been complied with, the Developer must notify the Council and provide documentation, plans or invoices that establish the work required by the Rectification Notice is complete.
- (e) The Council may, acting reasonably, after receiving a notice from the Developer under clause 6.1(d) issue a further Rectification Notice or notify the Developer that the Rectification Notice has been complied with.
- (f) If the Developer fails to comply with a Rectification Notice without reasonable excuse, the Council may notify the Developer of that fact and may do such things or take such action as is reasonably necessary to carry out the work required by the Rectification Notice, and may call on any Security it holds in relation to any Dedication Dwelling, in accordance with clause 10 to meet its reasonable costs of carrying out the work or recover those costs as a debt due to the Council by the Developer.

6.2 Indemnity

The Developer indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in connection with the performance of the Developer's obligations under this Agreement (extending to the performance of the obligation of the Developer by its employees, agents and contractors) except to the extent that, the Claim arises because of the Council's intentional act, negligence or default.

7. Making of a monetary Development Contribution

7.1 Indexation of Monetary Contributions

Each monetary Development Contribution is to be increased, but not decreased, in accordance with changes in the CPI from the date that is 5 years after the date of this Agreement to the date of payment.

7.2 Payment of Monetary Contribution

A monetary Development Contribution is taken to have been made by the Developer when the Council receives the full amount of the contribution payable:

- (a) in cash; or
- (b) upon clearance of an unendorsed bank cheque; or
- (c) by a deposit, by means of electronic funds transfer, of cleared funds into a bank account nominated by the Council.

8. Registration

8.1 Developer and Landowner agreement to registration

- (a) The Developer agrees to the registration of this Agreement under section 7.6(1) of the Act in relation to the allotments that comprise the Land.
- (b) Eswod agrees to the registration of this Agreement under section 7.6(1) of the Act against the title to Lot 1 DP 119732.
- (c) Cbus agrees to obtain the consent of any Owner's Corporation to the registration of this Agreement under section 7.6(1) of the Act in relation to any common property that comprises the Land.

8.2 Registration of this Agreement

- (a) Within 21 days of receiving a copy of this Agreement executed by the Council, the Developer is to lodge with LRS:
 - (i) an instrument requesting registration of this Agreement on the title to the Land duly executed by the Developer;
 - (ii) certificates of title for the Land or electronic equivalent; and
 - (iii) the written consent of each person referred to in section 7.6(1) of the Act to that registration,in order to enable the Agreement to be registered on the title to the Land.
- (b) The Developer is to do such other things as are reasonably necessary to enable registration of this Agreement to occur.
- (c) The Council must, in response to a reasonable request of the Developer, take such action that is reasonably necessary to facilitate efforts by the Relevant Developer to achieve Registration on Title.

- (d) The Developer must provide the Council with evidence of lodgement of this Agreement with LRS for registration within 10 Business days of lodgement, and evidence of the registration of this Agreement within 10 Business days of receiving notification from LRS that it has been registered.

8.3 Release and discharge of this Agreement

- (a) The parties agree to do all things reasonably required by the other party to promptly release and discharge this Agreement and remove any notation relating to this Agreement from the title to the Land with respect to:
 - (i) any Final Lot or a Service Lot, upon its creation;
 - (ii) all parts of the Land, upon this Agreement being terminated; or
 - (iii) once the Developer has completed its obligations under this Agreement.
- (b) For the avoidance of doubt, this Agreement is to remain registered against:
 - (i) the title to any Dedication Dwelling until it is transferred or dedicated to Council in accordance with this Agreement; and
 - (ii) the title to any common property of any building in which a Dedication Dwelling is located, until all Dedication Dwellings in that building have been transferred or dedicated to Council in accordance with this Agreement.

9. Transfer, assignment or novation

9.1 Consent for transfer of Land

- (a) The Developer must not transfer a Site or any part of the Site to any person without the consent of the Council.
- (b) This clause 9.1 does not apply to:
 - (i) the dedication of the Dedication Dwellings to the Council; or
 - (ii) to the conversion of that part of the Site into common property (within the meaning of the *Strata Schemes Management Act 2015*); or
 - (iii) the transfer of a Service Lot or Final Lot.

9.2 Consent for assignment or novation of this Agreement

- (a) The Developer must not assign or novate to any person its rights or obligations under this Agreement without the consent of the Council.
- (b) For avoidance of doubt, this clause 9.2 does not preclude a transfer subject to clause 9.1.

9.3 The giving of consent by the Council

- (a) The Council must give its consent under clause 9.1(a) or clause 9.2(a) if:
 - (i) the Developer has, at no cost to the Council, first procured the execution by the person (**Transferee**) to whom:
 - (A) the land will be transferred; or

(B) the rights or obligations under this Agreement are to be assigned or novated,

a deed of novation on reasonable terms (being a deed generally in terms of the Novation Deed);

(ii) the Developer is not in an unremedied material breach of this Agreement; and

(iii) the Transferee has delivered to Council replacement Security (where Security is required to be in place under this Agreement).

(b) The Council, on giving consent under clause 9.3(a) must enter into the deed of novation referred to in clause 9.3(a)(i).

9.4 No requirement for consent when Agreement is registered

Clause 9.1 and clause 9.2 do not apply in connection with the transfer of the whole or any part of a Site if this Agreement is, at the time of transfer, Registered on Title for that Site, provided that the Developer notifies Council of the proposed transfer 14 days prior to the date of transfer and the Transferee delivers any replacement Security (where Security is required to be in place by that Developer under this Agreement).

9.5 Provisions that apply when Agreement is registered

(a) If the whole or any part of a Site is transferred without a Novation Deed being entered into (**Transferred Land**), and this Agreement is Registered on Title, then this Agreement is deemed to include the provisions of the Novation Deed as if it had been entered into:

(i) by the person who has ceased to own the Transferred Land (who is taken to be the Existing Developer in the Novation Deed);

(ii) by the person who has become the owner of the Transferred Land (who is taken to be the New Developer in the Novation Deed); and

(iii) by the Council,

on the basis that:

(iv) the Effective Date is the date that the Existing Developer provides the New Developer with an instrument, in registrable form, that (when registered) will effect the transfer of the title to the Transferred Land from the Existing Developer to the New Developer.

9.6 Land may be used for finance, sales contracts may be exchanged and agreements for lease entered into

(a) This clause 9.6 takes precedence over the other provisions in this clause 9.

(b) For the avoidance of doubt:

(i) the Developer may mortgage, charge, encumber and/or grant a security interest (however defined or described) over or in respect of all or any of the Developer's right, powers, title, benefit and/or interest in, to, under or derived from a Site, this Agreement and/or any other asset or property of the Developer to or in favour of any financier or creditor of the Developer (or to or in favour of any agent or trustee of or for any such financier or creditor) (any such person being a **Mortgagee**), provided that such

mortgage, charge, encumbrance or security interest will not affect the title to any Dedication Dwelling when it is transferred to Council; and

- (ii) the Developer may enter into any agreement to sell, transfer, option or lease which, if exercised, may result in the formation of an agreement to sell, transfer or lease any Final Lot comprised in or forming part of the Development, provided that the sale, transfer, option or lease cannot be exercised under the agreement until the Final Lot is the subject of an Occupation Certificate.

10. Security for the Dedication Dwellings

10.1 Provision of Security

- (a) In relation to Item 1 (and except where the Developer has made an Item 2 contribution) the Developer must provide the relevant Security to the Council in accordance with the amount set out in column 6 of the Table for Item 1 (as indexed as set out in clause 10.1(d)).
- (b) There is no obligation to provide the Security under clause 10.1(a) prior to the issue of the relevant Occupation Certificate referred to in column 5 of the Table for Item 1, although the Developer is not precluded from electing to provide the Security earlier if it wishes to do so.
- (c) All delivered Security, other than cash, is transferred in escrow.
- (d) The value of a Security (SV) must be indexed on date of delivery and adjusted annually thereafter in accordance with the following formula:

$$\$SV_p = \frac{\$SV_{(pa)} \times I(p)}{I(epi)}$$

I(epi)

Where:

$\$SV_p$ is the security value payable in relation to a Development Contribution.

$\$SV_{pa}$ is the relevant security value calculated in accordance with Column 6 of Item 1 of the Table.

I(p) is the last published CPI Index value at the time the Security is payable or is to be adjusted.

I(epi) is the last published CPI Index value at the time the Instrument Change is made and comes into effect.

- (e) For the avoidance of doubt:
 - (i) the amount of the Security set out in column 6 of the Table for Item 1 is not indicative of the value of any Work or Dedication Dwelling and is not to be taken as limiting the scope or extent of any Work or the number of Dedication Dwellings required under this agreement; and
 - (ii) if the application of the above formula results in a decrease in the value of a Security, or the same value of Security, no adjustment is required.

10.2 Security obligation to be recalculated

- (a) When:
 - (i) Security has been provided under clause 10.1;
 - (ii) and a part of the relevant Item 1 Development Contribution has been made to Council;

the calculation in clause 10.1 is performed again and the Council's entitlement to Security is reduced by the proportion of the relevant Development Contribution (defined in terms of unit numbers) that has been made.

- (b) The process of recalculation required may be repeated, upon the making of each part of the Development Contribution, until the Council has no entitlement to Security for the relevant Development Contribution.
- (c) Upon the Council's entitlement to a Security being reduced (under clause 10.2(a)) and, if Council is unable to release a part of the Security held, the provision of a replacement Security in the amount to be retained by Council, the Council must promptly release and return the Security (or the relevant portion of the Security) to the Developer (under the terms of clause 10.6).

10.3 Provision of a single Security

- (a) Where this Agreement requires more than one Security to be provided by the Developer at a given point in time, the Developer may provide a single Security in lieu of providing some or all of those Securities.
- (b) The value of the Security provided under clause 10.3(a) must not be less than the sum of the values of the Securities that would have otherwise been provided.

10.4 Substitution of Security

- (a) At any time, the Developer may substitute a Security with one or more Securities of the same value.
- (b) If the value of the Security provided by the Developer exceeds the Council's entitlement to Security under this Agreement at any time, the Developer providing Security may substitute it with another Security or Securities whose value is in accordance with the Council's entitlement to Security under this Agreement at that time.
- (c) To the extent that another Security is provided, the Council must not deduct, and must promptly release and return, the Security that has been substituted.

10.5 Recourse

- (a) The purpose of this clause 10.5 is to allocate the risk pending determination of any disputed entitlement and therefore nothing in this clause 10.5 confers a substantive right on the Council to avoid returning Security (or the value of Security) it is not otherwise entitled to:
 - (i) if the Council's entitlement is disputed by the Developer, and the dispute has been conclusively determined in favour of the Developer; or
 - (ii) in any case, if the Council's asserted entitlement (together with any costs, expenses or interest on such entitlement) is less than the value of the Security called-up by Council.

- (b) Any Security provided under this Agreement by the Developer may only be called-up by the Council where:
 - (i) the Developer has not made the relevant part of the Item 1 or Item 2 Development Contribution at the time required under clause 4.1(a); or
 - (ii) the Developer has made some (but not all) of the relevant part of the Item 1 or Item 2 Development Contribution at the time required under clause 4.1(a); or
 - (iii) in accordance with clause 6.1(f).
- (c) If Council calls up a Security in accordance with clause 10.5(b), Council may apply the proceeds of the Security in satisfaction of any obligation of the Developer under this Agreement and any associated liability, loss, cost charge or expense reasonably incurred by the Council because of the failure by the Developer to comply with this Agreement.
- (d) If clause 10.5(b) applies, at least 28 days must have elapsed since the Council gave written notice to the Developer of its intention to have recourse.

10.6 Reduction and release

- (a) The Council's entitlement to Security for a relevant part of an Item 1 or Item 2 Development Contribution ceases on the making of the relevant part of the Item 1 or Item 2 Development Contribution in full.
- (b) Upon the Council's entitlement to a Security ceasing (under clause 10.6(a)) the Council must promptly release and return the Security for that part to the Developer.

11. Enforcement in relation to the Dedication Dwellings

11.1 Compulsory acquisition agreement

- (a) If the Developer does not make any part of the Item 1 Development Contribution as required by clause 4.1(a) and the Developer has not elected to make an Item 2 Development Contribution instead of the Item 1 Development Contribution, the Council may compulsorily acquire the relevant Dedication Dwellings in accordance with the Just Terms Act for the amount of \$1.00.
- (b) The Developer and the Council agree that:
 - (i) this clause 11.1 is an agreement between them for the purposes of section 30 of the Just Terms Act; and
 - (ii) in this clause 11.1 they have agreed on all relevant matters concerning the compulsory acquisition and the compensation to be paid for the acquisition.

11.2 Encumbrances and affectations

When clause 11.1 applies, the Developer must ensure that the relevant Dedication Dwellings are free of all encumbrances and affectations (including any charge or liability for rates, Taxes and charges) to the extent that would otherwise be required by clause 5.2.

11.3 Indemnity and costs

- (a) 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 Dedication Dwellings under this clause 11.
- (b) The Developer must pay the Council, promptly on demand, an amount equivalent to all Costs incurred by the Council in acquiring the whole or any part of the Dedication Dwellings and any other land required in connection with the Dedication Land as contemplated by this clause 11.

11.4 Relationship with Security obligation

If Council holds a Security under clause 10 for a Dedication Dwelling that is to be compulsorily acquired under this clause 11, Council must on acquisition of the Dedication Dwelling, release and return the Security or that part of the Security relevant to the Dedication Dwelling, minus any Costs the Council has incurred under clause 11.3.

12. Termination

- (a) Either the Council (on one hand) or the Developer (on the other hand) may terminate this Agreement by giving 42 days written notice to the other party or parties if either:
 - (i) all of the following circumstances exist:
 - (A) this Agreement has commenced prior to the Instrument Change being made;
 - (B) the Instrument Change has not been made within 12 months of the date this Agreement commenced;
 - (C) the party seeking to terminate this Agreement gives the other party notice of its opinion, which must have been reasonably formed, that the Instrument Change is unlikely to be made;
 - (D) at least one calendar month has elapsed since the date of the notice referred to in clause 12(a)(i)(C); and
 - (E) the Instrument Change has not been made; and
 - (ii) the Council is satisfied, acting reasonably, that the Instrument Change will not be made.
- (b) Any right or obligation of any party that is expressed to operate or have effect on or after the completion, expiration or termination of this Agreement for any reason, will not merge on the occurrence of that event but will remain in full force and effect.

13. Breach of obligations

13.1 Breach notice

- (a) If the Council reasonably considers that the Developer is in breach of any obligation under this Agreement, it may give a written notice (**Breach Notice**) to the Developer:

- (i) specifying the nature and extent of the breach;
 - (ii) requiring the Developer to rectify the breach; and
 - (iii) specifying the period within which the breach is to be rectified, being a period that is reasonable in the circumstances.
- (b) Within 2 Business Days of receiving a Breach Notice, the Developer must advise Council in writing of any existing Mortgagee for that part of the Land subject to the Breach Notice and provide the contact details for the Mortgagee.
- (c) If, within 10 Business Days of receiving the Breach Notice, the Developer provides a report from a builder or other relevantly qualified person confirming that the breach is not capable of rectification, the Council will amend the Breach Notice by requiring the Developer to pay an amount in compensation to the Council in lieu of rectifying the breach.
- (d) For the purposes of clause 13.1(a)(iii), any period is not reasonable in the circumstances if it is less than 30 Business Days after the latter to occur of either of the following:
- (i) the Council giving the Breach Notice to the Developer; and
 - (ii) the Council giving the corresponding Breach Notice to any existing Mortgagee notified to Council in accordance with clause 13.1(b),
- (e) For the avoidance of doubt:
- (i) any failure by Council to give a Breach Notice to a Mortgagee does not invalidate the Breach Notice; and
 - (ii) if the Developer does not advise Council of any existing Mortgagee in accordance with clause 13.1(b), the reasonable period for compliance with the Breach Notice will be taken to be 30 Business Days from the date of the Breach Notice.
- (f) If:
- (i) the Council has given a corresponding Breach Notice to the Developer and a copy of the corresponding Breach Notice to any existing Mortgagee notified to Council in accordance with clause 13.1(b); and
 - (ii) the rectification period corresponding to that breach has ended without either the breach being rectified or reasonable compensation being paid to Council in lieu of rectifying the breach in accordance with clause 13.1(c),

Council may exercise any rights it may have at law or in equity, including calling on any Security provided under clause 10, to remedy the breach subject to the Breach Notice.

13.2 Costs of remedying a breach

- (a) Any reasonable costs incurred by the Council in remedying a breach in accordance with clause 13.1 may be recovered by the Council as a debt due in a court of competent jurisdiction, but only if there has been an actual breach by the Developer of the obligations under this Agreement that were the subject of the Breach Notice. subject to any court order concerning costs or any agreement reached between the parties after dispute resolution.

- (b) For the purpose of this clause 13.2, the Council's costs of remedying a breach the subject of a Breach Notice include, but are not limited to:
 - (i) the costs of the Council's servants, agents and contractors reasonably incurred for that purpose;
 - (ii) all fees and charges necessarily or reasonably incurred by the Council in remedying the breach; and
 - (iii) all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- (c) Nothing in this clause 13 (other than clause 13.1(f)) prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Agreement by the Developer, including but not limited to seeking relief in an appropriate court.

14. Dispute resolution

14.1 Notice of disputes

A dispute arises under this Agreement if one party gives another party a notice in writing specifying particulars of the dispute.

14.2 Negotiated resolution

- (a) If a notice is given under clause 14.1 the parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- (b) If the dispute is not resolved within a further 28 days, the parties are to mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society, or the President's nominee to select a mediator.

14.3 Absence of agreement

If the dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the parties may exercise their legal rights in relation to the dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.

14.4 Costs

- (a) Each party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- (b) The parties are to share equally the costs of the President, the mediator, and the mediation.

14.5 Certain legal proceedings unaffected

- (a) This clause 14:
 - (i) does not affect the Developer's ability to commence and/or conduct any class 1 proceedings (as set out in section 17 of the *Land and Environment Court Act 1979*); and

- (ii) does not prevent urgent injunctive relief to keep a particular position.

15. General provisions

15.1 Risk, release and indemnity

- (a) The Developer performs this Agreement at its own risk and its own cost.
- (b) The Developer indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council and against any Costs incurred arising from any act or omission by the Developer, its servants or agents in connection with the performance of the Developer's obligations under this Agreement, except where the damage, expense, loss or liability suffered or incurred by the Council is caused or contributed to by any intentional or negligent act or intentional or negligent omission of the Council or any of the Council's servants or agents.

15.2 Annual reporting

- (a) The Developer is to provide to the Council (no later than each anniversary of the date on which this Agreement is entered into) a report outlining the performance of its obligations under this Agreement.
- (b) The report under this clause 15.2 is to be in such a form and to address such matters as reasonably required by the Council from time to time.
- (c) This clause 15.2 has no effect unless a Development Consent has been granted for the Development and a Construction Certificate has been issued under such a Development Consent.

15.3 Notices

- (a) Any notice, consent, information, application or request that is to or may be given or made by 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 specified in this provision or most recently notified by the recipient to the sender;
 - (ii) faxed to that party at its fax number specified in this provision or most recently notified by the recipient to the sender; or
 - (iii) emailed to that party at its email address specified in this provision or most recently notified by the recipient to the sender.
- (b) Addresses or numbers for notices:

The Council

North Sydney Council
200 Miller Street
North Sydney NSW 2060
Fax: (02) 9936 8177
Email: council@northsydney.nsw.gov.au
Representative: Neal McCarry

The Developer

Cbus Property R3 Pty Ltd
Level 14, 447 Collins Street
Melbourne VIC 3000
Fax: Not applicable
Email: nmadgwick@cbusproperty.com.au
Representative: Nick Madgwick

Eswod

Eswod Home Units Pty Ltd
11 Hampden Street
North Sydney NSW 2060
Fax: Not applicable
Email: nmadgwick@cbusproperty.com.au
Representative: Nick Madgwick

- (c) Any notice, consent, information, application or request is to be treated as given or made if it is:
- (i) delivered, when it is left at the relevant address,
 - (ii) sent by post, two business days after it is posted,
 - (iii) 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, or
 - (iv) sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.
- (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 5pm on that day in the place of the party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

15.4 Approvals and consents

- (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.

15.5 Costs

- (a) The Developer is to pay to the Council the Council's reasonable costs of preparing, negotiating, executing and stamping this Agreement, and any document related to this Agreement, including the reasonable costs of obtaining any legal advice in connection with this Agreement or any related document, up to a maximum amount of \$20,000.00.
- (b) The costs referred to in clause 15.5(a) are to be paid by the Developer to Council on execution of this Agreement (if the costs are known and notified to the Developer prior to that time) or otherwise within seven days of a written demand by the Council for such payment.

- (c) The Developer is also to pay to the Council the Council's reasonable costs of enforcing this Agreement within seven days of a written demand by the Council for such payment, but only when there is an actual breach of the Agreement by the Developer.

15.6 Entire agreement

- (a) This Agreement contains everything to which the parties have agreed in relation to the matters it deals with.
- (b) No party can rely on an earlier document, or anything said or done by another party, or by a director, officer, agent or employee of that party, before this Agreement was executed, except as permitted by law.

15.7 Further acts

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

15.8 Governing law and jurisdiction

- (a) This Agreement is governed by and construed under the law in the State of New South Wales.
- (b) The parties submit to the non-exclusive jurisdiction of its courts and court of appeal from them.
- (c) The parties are not to object to the exercise of jurisdiction by those courts on any basis.

15.9 Enforcement in a court of competent jurisdiction

- (a) Without limiting any other provision of this Agreement, the parties may enforce this Agreement in any court of competent jurisdiction.
- (b) For the avoidance of doubt, 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; or
 - (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.

15.10 Joint and individual liability and benefits

- (a) Except as otherwise set out in this Agreement:
 - (i) any agreement, covenant, representation or warranty under this Agreement by two or more persons binds them jointly and each of them individually, and
 - (ii) any benefit in favour of two or more persons is for the benefit of them jointly and each of them individually.
- (b) For avoidance of doubt, clause 15.10(a) is subject to clause 16.2(d).

15.11 No fetter

- (a) Nothing in this Agreement requires the Council to do anything that would cause the Council to be in breach of any of the Council's obligations at law, and without limitation, nothing in this Agreement limits or fetters in any way the exercise of any statutory discretion or duty. In particular, the Council is not obligated to grant the Development Consent or take any action relating to the Planning Proposal.
- (b) If, contrary to the operation of this clause, any provision of this Agreement is held by a court of competent jurisdiction to constitute a fetter on any statutory discretion of the Council, the parties agree:
 - (i) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause is substantially satisfied,
 - (ii) in the event that 15.11(b)(i) cannot be achieved without giving rise to a fetter on the exercise of statutory discretion, the relevant provision is to be severed and the remainder of this Agreement has full force and effect; and
 - (iii) to endeavour to satisfy the common objectives of the parties in relation to the provision of this Agreement which is to be held to be a fetter on the extent that is possible having regard to the relevant court judgment.
- (c) For the avoidance of doubt, clause 15.11(a) does not affect any obligation of a consent authority (under section 4.15(1)(a)(iiia) of the Act) to take this Agreement into consideration.

15.12 Illegality

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

15.13 Severability

- (a) 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.
- (b) 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.

15.14 Amendment

No amendment of this Agreement will be of any force or effect unless it is in writing and signed by the parties to this Agreement in accordance with clause 25D of the Regulation.

15.15 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:
 - (i) is in writing,

- (ii) is addressed to the party whose obligation or breach of obligation is the subject of the waiver,
 - (iii) specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,
 - (iv) is signed and dated by the party giving the waiver.
- (c) Without limitation, a waiver may be expressed to be conditional on the happening of an event, including the doing of a thing by the party to whom the waiver is given.
 - (d) A waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given, and is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.
 - (e) For the purposes of this Agreement, an obligation or breach of obligation the subject of a waiver is taken not to have been imposed on, or required to be complied with by, the party to whom the waiver is given.

15.16 GST

Note: The parties have a common belief that:

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

This clause 15.16 has been included in the event that the parties are mistaken.

- (a) If GST is payable by a supplier (or by the representative member for a GST group of which the supplier is a member) on any supply made under or in relation to this Agreement, the recipient must pay to the supplier an amount (**GST Amount**) equal to the GST payable on the supply. The GST Amount is payable by the recipient in addition to and at the same time as the net consideration for the supply, provided that the GST Amount is not payable until the supplier issues a tax invoice in this respect.
- (b) If a party is required to make any payment or reimbursement, that payment or reimbursement must be reduced by the amount of any input tax credits or reduced input tax credits to which the other party (or the representative member for a GST group of which it is a member) is entitled for any acquisition relating to that payment or reimbursement.
- (c) This clause 15.16 is subject to any other specific agreement regarding the payment of GST on supplies.

15.17 Explanatory note

Pursuant to clause 25E(7) of the Regulation, the parties agree that the Explanatory Note is not to be used to assist in construing this Agreement.

15.18 Duties

The party at law to pay stamp duty, must promptly, within the initial applicable period prescribed by law, pay any duty payable in relation to the execution, performance and registration of this Agreement, or any agreement or document executed or effected under this Agreement.

15.19 Third parties

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

15.20 Continuing performance

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

15.21 Remedies

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

15.22 Counterparts

This Agreement may be executed in any number of counterparts, all of which taken together are deemed to constitute one and the same document.

15.23 Party acting as trustee

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

- (a) all the powers and discretions conferred by the deed establishing the trust are capable of being validly exercised by the party as trustee and have not been varied or revoked and the trust is a valid and subsisting trust;
- (b) the party is the sole trustee of the trust and has full and unfettered power under the terms of the deed establishing the trust to enter into and be bound by this Agreement on behalf of the trust and that this Agreement is being executed and entered into as part of the due and proper administration of the trust and for the benefit of the beneficiaries of the trust; and
- (c) no restriction on the party's right of indemnity out of, or lien over, the trust's assets exists or will be created or permitted to exist and that right will have priority over the right of the beneficiaries to the trust's assets.

15.24 Review of this Agreement

- (a) The parties must review this Agreement every two years, and otherwise if either party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Agreement.
- (b) For the purposes of this clause 15.24, the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development.
- (c) For the purposes of addressing any matter arising from a review of this Agreement, the parties must use all reasonable endeavours to agree on and implement appropriate amendments to this Agreement.
- (d) A failure by a party to agree to take action requested by the other party as a consequence of a review referred to in clause 15.24(a) is not a breach of this Agreement and is not able to be dealt with under clause 14.

16. Definitions and interpretation

16.1 Definitions

In this Agreement unless the context otherwise requires:

173 -179 Walker Street means the land identified as such in schedule 1 and schedule 2;

11 Hampden Street means the land identified as such in schedule 1 and schedule 2;

15 Hampden Street means the land identified as such in schedule 1 and schedule 2; and

17 Hampden Street means the land identified as such in schedule 1 and schedule 2.

Act means the *Environmental Planning and Assessment Act 1979*;

Agreement or this Agreement means this deed and includes any schedules, annexures and appendices to this deed;

Applicable Valuation — see clause 3(a) of schedule 5;

Approval includes approval, consent, licence, permission or the like;

Approved Institution means:

- (a) an authorised deposit-taking institution within the meaning of the *Banking Act 1959* (Cth);
- (b) a general insurer within the meaning of the *Insurance Act 1973* (Cth); or
- (c) any other financial institution or insurer approved by the Council in its absolute discretion;

Authority means any Federal, State or local government or semi-governmental, statutory, judicial or public person, instrumentality or department;

Business Day means a day that is not a Saturday, Sunday, public holiday or bank holiday in New South Wales;

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

Construction Certificate has the same meaning as in the Act;

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

CPI Index means the Consumer Price Index published by the Commonwealth Statistician for ALL GROUPS for Sydney;

Dedication Dwellings means the dwellings required to be dedicated by the Relevant Developer to the Council under this Agreement;

Defect means anything that adversely affects, or is likely to adversely affect, the appearance, structural integrity, functionality or use or enjoyment of a Work or any part of a Work;

Defects Liability Period means the period of six months commencing on the day immediately after Work is completed, for a given Dedication Dwelling, for the purposes of this Agreement;

Development means the development of the Land for the purposes of a residential flat building(s) of a height, bulk and scale which is made possible by the Instrument Change;

Development Application has the same meaning as in the Act;

Development Consent has the same meaning as in the Act;

Development Contribution means:

- (a) a monetary contribution;
- (b) the dedication of land free of cost;
- (c) the carrying out of work; or
- (d) the provision of any other material public benefit,

or any combination of them, to be used for, or applied towards a public purpose, as set out in the Table;

Final Lot means a lot created in the Development for separate residential, retail or commercial occupation and disposition and which is not:

- (a) intended to be further subdivided (including to create a strata or community lot);
- (b) a Service Lot; or
- (c) a lot of a kind or created for a purpose that is otherwise agreed by the parties;

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

Instrument Change means any change to environmental planning instruments (as defined in the Act) insofar as it applies to the Land such that:

- (a) the maximum height of buildings for the Land is:

- (i) if all lots comprising the Land are amalgamated — RL148; and
- (ii) otherwise —RL133;
- (b) the maximum floor space ratio for the Land is 6.1:1;
- (c) development of the Land must not result in a net increase in overshadowing of Doris Fitton Park between 12pm to 2pm on 21 June; and
- (d) there are no other new or amended provisions of an environmental planning instrument (when compared with what was in place on 20 October 2020) that would have the practical effect of preventing the realisation of a development of the height, bulk and scale anticipated by the above numerical maximums.

Item means the relevant or indicated item in the Table;

Just Terms Act means the *Land Acquisition (Just Terms Compensation) Act 1991*;

Land means the land described in schedule 1;

LRS means Land Registry Services;

Modification Application means an application to modify a Development Consent;

Mortgagee – see clause 9.6(b)(i);

Novation Deed means the draft deed in Annexure A;

Occupation Certificate has the same meaning as in the Act;

Owner — see clause 9.6;

Real Property Act means the *Real Property Act 1900*;

Rectification Notice means a notice in writing:

- (a) identifying the nature and extent of a Defect;
- (b) specifying the works or actions that are required to Rectify the Defect;
- (c) specifying the date by which or the period within which the Defect is to be rectified;

Rectify means rectify, remedy or correct;

Registration on Title means the registration of this Agreement under section 7.6 of the Act in the folio of the Register kept under the Real Property Act, and **Registered on Title** refers to the state of the Agreement being so registered;

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

Security means:

- (a) cash;
- (b) bonds or inscribed stock or their equivalent issued by the Commonwealth of Australia, or a state or territory government within Australia;
- (c) an:

- (i) unconditional undertaking that is, in material respects, the same as the form set out in schedule 6;
- (ii) another form of unconditional undertaking approved by the Council in its absolute discretion; or
- (iii) a performance undertaking approved by the Council in its absolute discretion,

given by an Approved Institution; or

- (d) other form of security approved by the Council in its absolute discretion;

Service Lot means a lot that is created for one or more of the following purposes:

- (a) to be dedicated or otherwise transferred to an Authority;
- (b) for any public utility undertaking (within the meaning of the *Standard Instrument (Local Environmental Plans) Order 2006* as at the date of this Agreement);
- (c) for roads, open space, recreation, environmental conservation, water cycle management or riparian land management;
- (d) for avoidance of doubt — association property within the meaning of the *Community Land Development Act 1989* that is to be used for any one or more of the purposes set out in (c) above;

Site means any one of:

- (a) 173 -179 Walker Street;
- (b) 11 Hampden Street;
- (b) 15 Hampden Street; and
- (d) 17 Hampden Street.

Sites mean each Site taken together (except where the context requires that it means more than one Site, but not every Site);

Standard Instrument means the standard instrument for a principal local environmental plan set out in the *Standard Instrument (Local Environmental Plans) Order 2006* as at the date of this Agreement;

Strata Plan means a strata plan, a strata plan of subdivision or a strata plan of consolidation that is registered in accordance with the *Strata Schemes Development Act 2015*;

Table means the table set out in schedule 3 which is to be read subject to the remainder of this Agreement and that remainder prevails to the extent of any inconsistency;

Tax means a tax, duty (including stamp duty and any other transaction duty), levy, impost, charge, fee (including a registration fee) together with all interest, penalties, fines and costs concerning them;

Valuer — see clause 1 of schedule 5;

Work means:

- (a) when a reference to an object, the physical result of any building, engineering or construction work in, on, over or under land; and
- (b) when a reference to activity, activity directed to produce the physical result of any building, engineering or construction work in, on, over or under land.

16.2 Interpretation

- (a) In this Agreement unless the context otherwise requires:
 - (i) clause and subclause headings are for reference purposes only;
 - (ii) the singular includes the plural and vice versa;
 - (iii) words denoting any gender include all genders;
 - (iv) reference to a person includes any other entity recognised by law and vice versa;
 - (v) a reference to a party means a party to this Agreement, including their successors and assigns and a person bound by the Agreement under section 7.6(3) of the Act;
 - (vi) where a word or phrase is defined its other grammatical forms have a corresponding meaning;
 - (vii) any reference to any agreement or document includes that agreement or document as amended at any time;
 - (viii) the use of the word **includes** or **including** is not to be taken as limiting the meaning of the words preceding it;
 - (ix) the expression **at any time** includes reference to past, present and future time and the performance of any action from time to time;
 - (x) an agreement, representation or warranty on the part of two or more persons binds them jointly and severally (subject to clause 16.2(d));
 - (xi) an agreement, representation or warranty on the part of two or more persons is for the benefit of them jointly and severally (subject to clause 16.2(d));
 - (xii) any ambiguities in the interpretation of this Agreement shall not be construed against the drafting party.
 - (xiii) reference to an exhibit, annexure, attachment or schedule is a reference to the corresponding exhibit, annexure, attachment or schedule in this Agreement;
 - (xiv) reference to a provision described, prefaced or qualified by the name, heading or caption of a clause, subclause, paragraph, schedule, item, annexure, exhibit or attachment in this Agreement means a cross reference to that clause, subclause, paragraph, schedule, item, annexure, exhibit or attachment;
 - (xv) when a thing is required to be done or money required to be paid under this Agreement on a day which is not a Business Day, the thing must be done, and the money paid on the immediately following Business Day; and

- (xvi) reference to a statute includes all regulations and amendments to that statute and any statute passed in substitution for that statute or incorporating any of its provisions to the extent that they are incorporated.
- (b) Nothing in this Agreement is to be taken to require the Council to do anything that would cause the Council to be in breach of any of the Council's statutory obligations.
- (c) Nothing in this Agreement requires the Developer:
 - (i) to carry out the Development or any part of it; or
 - (ii) to develop a Site either on a standalone basis or in combination with one or more other Sites.
- (d) Nothing in this Agreement confers any power, right, authority, duty, obligation or liability on a Developer in relation to Site for which the Developer is not identified as the landowner in schedule 1.

16.3 No joint venture, etc

Unless otherwise stated:

- (a) nothing in this Agreement creates a joint venture, partnership, or the relationship of principal and agent, or employee and employer between the parties; and
- (b) no party has the authority to bind any other party by any representation, declaration or admission, or to make any contract or commitment on behalf of any other party or to pledge any other party's credit.

16.4 No obligation to rezone land or grant or modify a Development Consent

- (a) This Agreement does not impose an obligation on any public authority to:
 - (i) change the provisions of an environmental planning instrument at all, or in a particular manner; or
 - (ii) grant any Development Consent.
- (b) For avoidance of doubt, clause 16.4(a) does not affect any obligation of a consent authority (under section 4.15(1)(a)(iia) of the Act) to take this Agreement into consideration.

16.5 No breach, etc of a Development Consent

Despite any other provision of this Agreement, this Agreement does not require, allow or preclude anything from being done if by so doing it would cause the Developer to:

- (a) be in breach; or
- (b) not fulfil a requirement,

of a Development Consent in force and applying to the Land.

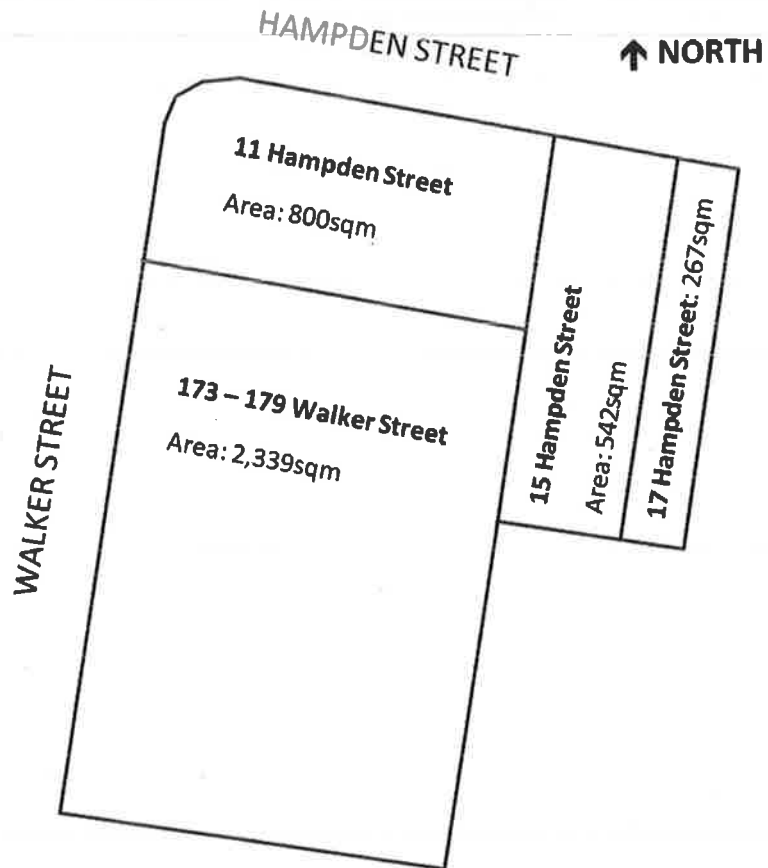
Schedule 1 – Land ownership

(Background – paragraph A, clause 16.1)

Title Details	Street Address (in North Sydney)	Landowner	Identification in this Agreement
Lots 1-6, SP64615	179 Walker Street	Cbus Property R3 Pty Ltd	173 -179 Walker Street
The common property of SP64615	179 Walker Street	The SP64615 owners corporation	173 -179 Walker Street
Lots 1-6, SP9808	177 Walker Street	Cbus Property R3 Pty Ltd	173 -179 Walker Street
The common property of SP9808	177 Walker Street	The SP9808 owners corporation	173 -179 Walker Street
Lots 1-6, SP86752	175 Walker Street	Cbus Property R3 Pty Ltd	173 -179 Walker Street
The common property of SP86752	175 Walker Street	The SP86752 owners corporation	173 -179 Walker Street
Lots 1-6, SP11082	173 Walker Street	Cbus Property R3 Pty Ltd	173 -179 Walker Street
The common property of SP11082	173 Walker Street	The SP11082 owners corporation	173 -179 Walker Street
Lot 1 DP119732	11 Hamden Street	Eswod	11 Hampden Street
Lot 1 DP591516	15 Hamden Street	Cbus Property R3 Pty Ltd	15 Hampden Street
Lot 2 DP 591516	17 Hamden Street	Cbus Property R3 Pty Ltd	17 Hampden Street

Schedule 2 – Sites

(Clauses 16.1 and 16.2(d))



Schedule 3 – Development Contributions

(Clause 16.1)

Table

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Item Number	Name	Description	Public purpose	When contribution is required	Security amount
Dedication of land					
1	Dedication of dwellings	<p>Dedication of dwellings, the number of dwellings being 5 per cent of the dwellings comprising the Development (rounded down to the nearest whole number in accordance with Schedule 4).</p> <p>The Development Consent — together with the applicable identification under clause 2 of schedule 4 — must be used as the basis for calculating the total number of dwellings comprising the Development.</p> <p>(This contribution is not required for the Development if the Developer instead elects, by written notice to the Council, to make monetary contribution under Item 2 in relation to a specific dwelling)</p> <p>This contribution is to be proportionately scaled back for the Development to the extent that:</p> <ul style="list-style-type: none"> any affordable housing contribution is required under any part of any Development Consent; or any special infrastructure contribution or equivalent (whether by planning agreement or other means) is required by the NSW government for affordable housing, <p>without regard to the contributions to be delivered under this Agreement.</p> <p>For example, if a 5 per cent affordable housing contribution is required under the terms of a Development Consent, irrespective of this Agreement, then the obligation for the Development under Item 1</p>	<p>Affordable housing (within the meaning of clause 6 of the <i>State Environmental Planning Policy (Affordable Rental Housing) 2009</i>) — to be managed by a registered community housing provider.</p>	<p>If the Development is not carried out in stages, 15 days after the later of the following:</p> <ul style="list-style-type: none"> the registration, by the LRS, of a strata plan in relation to the Development; or the issue of the first Occupation Certificate for the Development, which Occupation Certificate must apply to the Dedication Dwellings within the Development. <p>For a given stage, 15 days after the later of the following:</p> <ul style="list-style-type: none"> the registration, by the LRS, of a strata plan in relation to the relevant stage of the Development; or the issue of the first Occupation Certificate for the relevant stage of the Development, which Occupation Certificate must apply to the Dedication Dwellings within that stage of the Development. 	<p>If the Development is not to be undertaken in stages — \$538,000 for each Dedication Dwelling in the Development, prior to the issue of an Occupation Certificate for any part of the Development.</p> <p>If the Development is to be undertaken in stages — \$538,000 for each Dedication Dwelling in the given stage of the Development, prior to the issue of an Occupation Certificate for any part of that stage of the Development.</p> <p>The Development Consent — together with the applicable identification under clause 2 of schedule 4 — must be used as the basis for calculating the total number of Dedication Dwellings in a given stage of the Development.</p>

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Item Number	Name	Description	Public purpose	When contribution is required	Security amount
		<p>(and Item 2) will be nil. The contribution under this Agreement cannot be reduced to less than nil and nothing in this Agreement requires Council to pay any amount to the Developer or to contribute to the delivery of any contributions under this Agreement.</p> <p>This contribution is not to be reduced if any obligation under a Development Consent has been calculated or determined having regard to the contributions being delivered under this Agreement. For example, if a 10 per cent affordable housing contribution is required in connection with a Development Consent, and the Development Consent reduces that requirement to 5 per cent, having regard to the contributions to be provided under this Agreement, no reduction of the contributions under this Agreement will apply.</p>			
Monetary contribution					
2	Payment of a monetary contribution in lieu of the dedication of dwellings	<p>Payment of a monetary contribution equal to the Applicable Valuation for each specific dwelling that would otherwise (under Item 1) be required to be dedicated. The method of valuing a dwelling for this purpose is to be as set out in schedule 5.</p> <p>This contribution is not required for if the Developer does not make an election to pay the monetary contribution in relation to the specific dwelling, as referred under Item 1.</p>	Affordable housing (with n the meaning of clause 6 of the <i>State Environmental Planning Policy (Affordable Rental Housing) 2009</i>) — to be managed by a registered community housing provider.	<ul style="list-style-type: none"> Prior to the issue of the first Occupation Certificate for the Development. 	See Item 1
3	Payment of a monetary contribution for community infrastructure	<p>A monetary contribution of \$15,100 per net additional dwellings on the land that is the subject of the Development (excluding any dwellings to be dedicated to the Council under Item 1 or for which a contribution is made under Item 2 in lieu of such dedication).</p> <p>This contribution is to be proportionately scaled back for the Development to the extent that any special infrastructure contribution or equivalent (whether by planning agreement or other means) is</p>	Community infrastructure, which may include a 'pocket park' at the eastern end of Hampden Street.	<p>Immediately prior to the issue of an Occupation Certificate for dwellings within the Development, but:</p> <ul style="list-style-type: none"> only in relation to the dwellings that are the subject of the certificate; and only in relation to dwellings in relation to which a contribution is payable. <p>Note: A contribution is not payable in relation to dwellings that are to be dedicated to the Council. A contribution is not payable in relation to initial</p>	

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Item Number	Name	Description	Public purpose	When contribution is required	Security amount
		<p>required by the NSW government. For example, if an amount that is equivalent to \$15,100 per net additional dwellings is required, then the obligation under this Item 3 for the Development will be nil. The contribution under this Agreement cannot be reduced to less than nil and nothing in this Agreement requires Council to pay any amount to the Developer or to contribute to the delivery of any contributions under this Agreement.</p> <p>This contribution is not to be reduced if any special infrastructure contribution or equivalent has been calculated or determined having regard to the contributions being delivered under this Agreement. For example, if a special infrastructure contribution of \$17,000 per net additional dwelling is required, and that requirement is reduced to \$1,900 per net additional dwelling, having regard to the contributions to be provided under this Agreement, no reduction of the contributions under this Agreement will apply.</p>		<p>dwellings that that merely replace those that were already on the Site. Prior to this Development, there were already 44 dwellings on the Land. This number is broken up between Sites as follows:</p> <ul style="list-style-type: none"> • 173 -179 Walker Street — 24; • 11 Hampden Street — 18; • 15 Hampden Street — 1; and • 17 Hampden Street — 1. 	

Schedule 4 – Dedication Dwellings criteria

(Item 1 of the Table)

1 Nature

- (a) The Dedication Dwellings are to be residential apartments, being dwellings that are included in a residential apartment development within the meaning of the *State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development* as at the date of this Agreement.
- (b) The Dedication Dwellings must be designed and constructed in accordance with any relevant Australian Standard and any relevant design standards or guidelines and any other requirements or policies applied by Council from time to time.
- (c) The Developer must obtain any relevant standards (including design standards), specifications or guidelines and any other requirements or policies referred to in clause 1(b) of this schedule from Council.
- (d) The Dedication Dwellings must be constructed and fitted out using suitable new materials and proper and workmanlike manner so that they are diligently progressed to completion and must be constructed and fitted out to the same standard as other dwellings of a similar configuration and similar vertical location within the Development.

2 Identification

- (a) Subject to clause 2(b) of this schedule 4, the Dedication Dwellings are those identified by the Developer in a Development Application (or, where there is a proposed relevant change to a floor plan, a Modification Application) under clause 5.1 of this Agreement — provided that, in making that identification, this schedule 4 must be complied with.
- (b) The Developer may revise the identification by written notice to the Council (and that revised identification has effect) if:
 - (i) the Development Consent to a Development Application is granted subject to a condition that materially modifies the floor plans of the Development; and
 - (ii) the purpose of the revised identification is to make an identification that is equivalent to the identification in the Development Application, but adjusted to address the modified floor plans; and
 - (iii) that the Dedication Dwellings subject to the revised identification meet the criteria specified in this Schedule 4.

3 Number

- (a) The total number of Dedication Dwellings is to be 5 per cent of the dwellings comprising the Development (rounded down to the nearest whole number).
- (b) Where the Development is to be undertaken in stages:
 - (i) the delivery of Dedication Dwellings must be proportional for each stage (subject to adjustments necessary to ensure that the distribution of Dedication Dwellings over the overall Development complies with the

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limitations on the locations of Dedication Dwellings under clause 4(c)-(d) of this schedule 4); and

- (ii) the Development Consent — together with the applicable identification under clause 2 of this schedule 4 — must be used as the basis for calculating the total number of Dedication Dwellings; and
 - (iii) if all lots comprising the Land are developed together, all Development Consents together must be used as the basis for calculating the total number of Dedication Dwellings.
- (c) The Dedication Dwellings within the Development is to be, to the extent that it is practicable, in the following mix within the Development:
- (i) 35 per cent are to be studio apartments;
 - (ii) 40 per cent are to be one-bedroom apartments; and
 - (iii) 25 per cent are to be two-bedroom apartments.
- (d) Where there is a need to round (to ensure that there is no fraction in relation to Dedication Dwelling numbers) in making the calculations under clause 3(b)-(c) of this schedule 4, the number should be rounded down, provided that clause 3(a) of this schedule 4 must still be satisfied prior to:
- (i) if the Development is to be undertaken in stages — the issue of any Occupation Certificate for the final stage of the Development; and
 - (ii) in other circumstances — the issue of any Occupation Certificate for the Development.

4 Specifications

- (a) The dwellings are not to include car spaces.
- (b) Each dwelling must, at the time of dedication, be ready for occupation, including final:
 - (i) finishes;
 - (ii) plastering;
 - (iii) tiling;
 - (iv) windows and frames;
 - (v) cabinets and wardrobes;
 - (vi) fixtures and fittings;
 - (vii) kitchen stove and oven;
 - (viii) dishwasher;
 - (ix) sink; and
 - (x) toilet and shower facilities,

however, each dwelling must not include:

- (xi) curtains and blinds;
 - (xii) refrigeration units;
 - (xiii) washing and drying machines; and
 - (xiv) other movable appliances.
- (c) Dwellings are to be located on various floors in the lower-third of the building.
- (d) Dwellings are not to have harbour views and may have a mix of aspects.
- (e) The quality (in terms of finish, fixtures and appliances) of the dwellings must be equivalent to that provided for other dwellings within the Development (or where such quality varies across the Development, such quality must be equivalent to that provided for other dwellings of a similar configuration and similar vertical location within the Development).

Schedule 5 – Valuation of Dedication Dwellings

(Item 2 of the Table)

1 Valuer

In this schedule 5 a **Valuer** means a person who:

- (a) is both an Associate (or a Fellow) Member and a Certified Practising Valuer of the Australian Property Institute (Inc) NSW Division;
- (b) is then practising as a valuer;
- (c) is independent and not related to any party to this Agreement; and
- (d) has at least 5 years' experience in valuations.

2 Provision of a valuation by the Developer

As soon as practicable after the Developer elects (by written notice to the Council) that it will make an Item 2 Development Contribution in lieu of the relevant Item 1 Development Contribution — in relation to a given Dedication Dwelling — the Developer must give the council a valuation of that Dedication Dwelling prepared by a Valuer.

3 Provision of a valuation by the Council

Where the Developer has given the Council a valuation of a Dedication Dwelling in accordance with clause 2, the Council, must within 20 business days of receiving the valuation either:

- (a) accept the valuation as the amount that is to be paid to the Council as the Item 2 Development Contribution in lieu of the dedication of that dwelling (**the Applicable Valuation**); or
- (b) must appoint a Valuer to prepare a valuation report for the Dedication Dwelling for the Council.

4 The valuations

- (a) Any valuation provided by each Party's Valuer must comply with the following:
 - (i) the valuation report prepared by the Valuer must confirm that the Valuer satisfies each of the requirements set out in this clause 4;
 - (ii) the Valuer is required to determine the market value of the Dedication Dwelling with vacant possession as at the date of inspection;
 - (iii) in determining the market value of the Dedication Dwelling, the Valuer must assume that the Dedication Dwelling is complete and complies with the criteria in schedule 4;
 - (iv) in determining the market value of the Dedication Dwelling, the Valuer must comply with the applicable Practice Standards and Guidance Notes for such valuations as published from time to time by the Australian Property Institute (NSW Division), except where such standards and guidelines conflict with this clause 4, in which case this clause 4 prevails;

- (v) the Valuer must provide a comprehensive valuation report which must include the following matters:
 - (A) confirmation of instructions;
 - (B) identification of the subject land being valued;
 - (C) date of inspection and valuation;
 - (D) registered proprietor;
 - (E) legal description of the subject land including the certificate of title folio identifier and reference to any easements, rights of way, covenants, caveats and/or other encumbrances on title;
 - (F) services and amenities;
 - (G) site identification;
 - (H) location description, including any external factors that influence the desirability of the Dedication Dwelling, either positively or negatively;
 - (I) a detailed explanation of the valuation methodologies adopted including all calculations and workings;
 - (J) details of relevant comparable sales and rental evidence appropriately analysed to support the valuation; and
 - (K) the valuation amount.
- (b) Where more than one Dedication Dwelling is subject to the same report, and the facts for each dwelling is sufficiently similar between the dwellings, any analysis may be common to each of those dwellings.

5 Determination of the Applicable Valuation when there are two valuation reports

- (a) If the valuations prepared by each valuer for a given dwelling vary by less than 10 per cent, the average of the valuation amounts for that dwelling will be adopted as the Applicable Valuation.
- (b) If the valuations vary by more than 10 per cent, then the Valuers must meet to compare the valuations and attempt to find common ground (whether this be mutual agreement on value or, at the very least, agreement as to certain valuation drivers, methodologies or inputs).
- (c) Following this meeting, the Valuers must review their valuations.
- (d) If the valuations, once reviewed, vary by less than 10 per cent, the average of the reviewed valuation amounts for that dwelling will be adopted as the Applicable Valuation.
- (e) If the valuations continue to vary by more than 10 per cent, the Applicable Valuation must be determined by a further Valuer appointed by the President of the Australian Property Institute (NSW Division).
- (f) If a further Valuer is appointed that further Valuer must:
 - (i) prepare a valuation report for the given dwelling(s) in accordance with clause 4 of schedule 5; and

- (ii) act as an expert whose decision is final and binding on the parties, in the absence of manifest error.
- (g) The Developer and the Council must pay the costs associated with the appointment of the further Valuer in equal proportions.

Schedule 6 – Form of unconditional undertaking

(Clause 16.1)

At the request of
ACN..... ABN(the *Applicant*) and in consideration of
ACN..... ABN (the *Favouree*) accepting this undertaking
in respect of the *Planning Agreement* for
..... (the *Project*)
ACN..... ABN (the *Surety*) unconditionally
undertakes to pay on demand any sum or sums which may from time to time be demanded by the
Favouree to a maximum aggregate sum of
..... (\$)

The undertaking is to continue until notification has been received from the *Favouree* that the sum is
no longer required by the *Favouree* or until this undertaking is returned to the *Surety* or until
payment to the *Favouree* by the *Surety* of the whole of the sum or such part as the *Favouree*
may require.

Should the *Surety* be notified in writing, purporting to be signed by
for and on behalf of the *Favouree* that the *Favouree* desires payment to be made of the whole or
any part or parts of the sum, it is unconditionally agreed that the *Surety* will make the payment or
payments to the *Favouree* forthwith without reference to the *Applicant* and notwithstanding any
notice given by the *Applicant* not to pay same.

Provided always that the *Surety* may at any time without being required so to do pay to the
Favouree the sum of
..... (\$)
less any amount or amounts it may previously have paid under this undertaking or such lesser sum
as may be required and specified by the *Favouree* and upon payment of a sum or sums totalling
(\$.....) the liability of the *Surety* hereunder
shall immediately cease.

Dated at this day of 20.....

Executed as an agreement

Executed on behalf of **North Sydney Council** by affixing the seal in accordance with a resolution passed at a duly convened meeting held on in the presence of:


Signature of Witness

JAYDEN PERRY
Print name

Signature of Witness

Print name


Signature of the General Manager

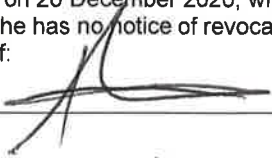
ROS EMERSON
Print name

Signature of the Mayor

Print name

Executed for and on behalf of **Cbus Property R3 Pty Ltd** by its duly appointed attorney, pursuant to Power of Attorney dated 13 August 2014 as amended on 20 December 2020, who declares that he or she has no notice of revocation, in the presence of:

Witness


TRAVIS HEMLEY

Name (please print)

Witness



Name (please print)

Attorney


Adrian Matthew Pozzo

Name (please print)

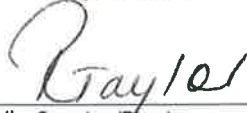
Attorney


Name (please print)

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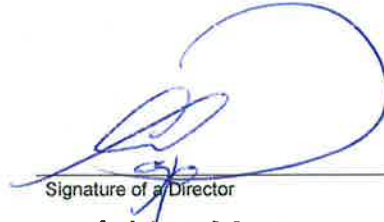
Executed on behalf of **Eswod Home Units Pty Ltd** (ACN 000 246 702) in accordance with s127(1) of the *Corporations Act 2001* (Cth) by:



Signature of the Secretary/Director

RACHEL MARY TAYLOR

Print name



Signature of a Director

Adrian Matthew Pozzo

Print name

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Annexure A – Draft Deed of Novation

Deed of Novation

North Sydney Council

[Insert name of existing developer]

[Insert name of new developer]

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Doc ID 906218653/v1

Deed of Novation

Dated

Parties

1. **North Sydney Council** of 200 Miller Street North Sydney NSW 2060 (**Minister**)
2. **[Drafting Note: insert details of Transferor] (Existing Developer)**
3. **[Drafting Note: insert details of Transferee] (New Developer)**
4. **[Drafting Note: insert details of each of the continuing developers] (Continuing Developer)**

Background

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

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

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

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

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

Operative provisions

1. Defined meanings

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

2. Novation

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

With effect on and from the Effective Date:

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

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

With effect on and from the Effective Date:

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

3. Consent

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

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

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

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

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

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

4. Release and Indemnity

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

4.1 Release and Discharge (the Council)

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

4.2 Release and Discharge (the Existing Developer)

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

4.3 Indemnity

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

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

5. Representations and Warranties

5.1 Power

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

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

5.2 Reliance by the Council

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

6. General provisions

6.1 Developer Costs

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

- (a) the negotiation, preparation, execution, performance, amendment or registration of, or any consent given or made; and
- (b) the performance of any action by that party in compliance with any liability arising, under this Deed, or any agreement or document executed or effected under this Deed, unless this Deed provides otherwise.

6.2 The Council's Costs

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

6.3 GST

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

6.4 Duties

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

6.5 Assignment

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

6.6 Notices

- (a) Any notice may be served by delivery in person or by post or transmission by facsimile to the address or number of the recipient specified in this provision or most recently notified by the recipient to the sender.

[Insert address for notices for each of the parties]

- (b) Any notice to or by a party under this Deed must be in writing and signed by either:
 - (i) the sender or, if a corporate party, an authorised officer of the sender; or
 - (ii) the party's solicitor.
- (c) Any notice is effective for the purposes of this Deed upon delivery to the recipient or production to the sender of a facsimile transmittal confirmation report before 4.00pm local time on a day in the place in or to which the written notice is delivered or sent or otherwise at 9.00am on the next day following delivery or receipt.

6.7 Governing law and jurisdiction

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

6.8 Amendments

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

6.9 Third parties

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

6.10 Pre-contractual negotiation

This Deed:

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

6.11 Further assurance

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

6.12 Continuing performance

- (a) The provisions of this Deed do not merge with any action performed or document executed by any party for the purposes of performance of this Deed.
- (b) Any representation in this Deed survives the execution of any document for the purposes of, and continues after, performance of this Deed.
- (c) Any indemnity agreed by any party under this Deed:

- (i) constitutes a liability of that party separate and independent from any other liability of that party under this Deed or any other agreement; and
- (ii) survives and continues after performance of this Deed,

6.13 Waivers

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

6.14 Remedies

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

6.15 Severability

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

6.16 Party acting as trustee

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

- (a) all the powers and discretions conferred by the deed establishing the trust are capable of being validly exercised by the party as trustee and have not been varied or revoked and the trust is a valid and subsisting trust;
- (b) the party is the sole trustee of the trust and has full and unfettered power under the terms of the deed establishing the trust to enter into and be bound by this Deed on behalf of the trust and that this Deed is being executed and entered into as part of the due and proper administration of the trust and for the benefit of the beneficiaries of the trust; and
- (c) no restriction on the party's right of indemnity out of or lien over the trust's assets exists or will be created or permitted to exist and that right will have priority over the right of the beneficiaries to the trust's assets.

7. Definitions and interpretation

7.1 Definitions

In this Deed unless the context otherwise requires:

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

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

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

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

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

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

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

7.2 Interpretation

In this Deed unless the context otherwise requires:

- (a) clause and subclause headings are for reference purposes only;
- (b) the singular includes the plural and vice versa;
- (c) words denoting any gender include all genders;
- (d) reference to a person includes any other entity recognised by law and vice versa;
- (e) where a word or phrase is defined its other grammatical forms have a corresponding meaning;
- (f) any reference to a party to this Deed includes its successors and permitted assigns;
- (g) any reference to any agreement or document includes that agreement or document as amended at any time;
- (h) the use of the word **includes** or **including** is not to be taken as limiting the meaning of the words preceding it;
- (i) the expression **at any time** includes reference to past, present and future time and the performance of any action from time to time;
- (j) an agreement, representation or warranty on the part of two or more persons binds them jointly and severally (subject to clause 16.2(d) of the Agreement);
- (k) an agreement, representation or warranty on the part of two or more persons is for the benefit of them jointly and severally (subject to clause 16.2(d) of the Agreement);
- (l) any ambiguities in the interpretation of this Deed shall not be construed against the drafting party; and
- (m) reference to an exhibit, annexure, attachment or schedule is a reference to the corresponding exhibit, annexure, attachment or schedule in this Deed.

Executed as a deed.

[Insert relevant attestation clauses]

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

A handwritten signature in black ink, appearing to be 'R. K.', followed by a long horizontal line.A handwritten signature in black ink, appearing to be 'L. J.', followed by a long horizontal line.

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