

North Sydney Council

Legal Document

1 of 1

LD 2023/025 Attached

PP2/2022 – 12-14 Waters Road
Voluntary Planning Agreement

Please ensure that this coversheet remains attached to this Legal Doc

Voluntary Planning Agreement

North Sydney Council

ABN 32 353 260 317

CE Waters Pty Limited (ACN 636 274 578) as trustee for CE Waters Development Trust and CE Waters Retail Pty Ltd (ACN 653 124 488) as trustee for CE Waters Retail Trust

A handwritten signature in blue ink, consisting of two lines of cursive script. The top line is more stylized and the bottom line is more legible, appearing to read 'J. Lane'.

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Agreement

Date 25 August 2023

Parties

First party

Name North Sydney Council (**Council**)
ABN 32 353 260 317
Contact General Manager
Telephone (02) 9936 8100

Second party

Name CE Waters Pty Ltd as trustee for CE Waters Development Trust
ACN 636 274 578
Contact Director
Telephone (02) 9957 5019

Third party

Name CE Waters Retail Pty Ltd as trustee for CE Waters Retail Trust
ACN 653 124 488
Contact Director
Telephone (02) 9957 5019

(Second and Third Parties together, **Developer**)

Background

- A. The Developer owns the Land at 12-14 Waters Road, Neutral Bay.
- B. The Developer proposes to carry out the Development which will include a mixed use residential and commercial development, with basement parking and public domain works.
- C. To facilitate the Development, the Developer has lodged the Planning Proposal seeking amendments to LEP 2013.
- D. The Developer has made an offer to enter into this agreement to provide public benefits in connection with the Instrument Change and proposed future Development of the Land.
- E. The Planning Proposal was publicly exhibited from 22 February 2023 to 22 March 2023.
- F. On 5 June 2023, Council resolved to proceed with this Agreement, and granted delegation to the General Manager to finalise this Agreement.

Operative part

1 Definitions

In this Agreement, unless the context indicates a contrary intention:

Act means the Environmental Planning and Assessment Act 1979 (NSW);

Address means a party's address set out in the Notices clause of this Agreement;

Agreement means this agreement, as may be varied from time to time in accordance with clauses 9 and 16.4;

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

Authority means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person; agency or entity and includes a registered certifier under the Building and Development Certifiers Act 2018 (NSW).

Business Day means a day on which banks are open for general banking business in Sydney, excluding Saturdays and Sundays;

Claim means any claim, loss, liability, damage, proceeding, order, judgment or expense arising out of the operation of this Agreement;

Construction Certificate means a construction certificate as defined under section 6.4 of the Act;

CPI means the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics;

Dealing, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land;

Developer means CE Waters Pty Ltd as trustee for CE Waters Development Trust and CE Waters Retail Pty Ltd as trustee for CE Waters Retail Trust, jointly and severally.

Development means a mixed use residential and commercial development, with basement parking and public domain works, on the Land as modified from time to time, including development facilitated by the Instrument Change as generally anticipated in the Planning Proposal;

Development Application has the same meaning as in the Act;

Development Consent has the same meaning as in the Act;

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;

Floor Space Ratio Map means the Floor Space Ratio Map in the LEP 2013;

GST has the same meaning as in the GST Law;

GST Law has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition of or administration of the GST;

Gross Floor Area has the same meaning as in the LEP 2013;

Height of Buildings Map means the Height of Buildings Map in the LEP 2013;

Instrument Change means an amendment to LEP 2013 generally in accordance with the Planning Proposal;

Land means:

- (a) Lots 1 to 16, 32 and 33 in SP68360, Lot 34 in SP75848 and Lot 35 in SP88483, being the lots identified in Schedule 1, known as 12 Waters Road, Neutral Bay; and
- (b) Lot 18 in DP537700, known as 14 Waters Road, Neutral Bay;

Law means:

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

LEP 2013 means the North Sydney Local Environmental Plan 2013;

Monetary Contribution means a monetary contribution payable by the Developer in accordance with clause 6.1;

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

Novation Deed means the draft deed in Annexure A;

Occupation Certificate means an occupation certificate as defined under section 6.4 of the Act, and includes an Occupation Certificate for part of a building;

Planning Proposal means PP2/22 (Council's reference) or PP-2021-7492 (Planning Portal's reference) lodged with the Council on 29 December 2021, amended on 22 March 2022, and further amended on 17 June 2022 as part of a request for rezoning review, seeking the following amendments to LEP 2013:

- (a) an amendment to the Height of Buildings Map to allow a maximum building height of 22m on the Land;
- (b) inclusion of a site specific provision to enable rooftop structures, plant and equipment to a maximum building height of 24m; and
- (c) an amendment to the Non-Residential Floor Space Ratio Map to provide a minimum non-residential floor space ratio for the Land of 1.2:1.

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

Regulation means the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021*;

Relevant Trust means:

- (a) in respect of CE Waters Pty Ltd ACN 636 274 578, the CE Waters Development Trust; and
- (b) in respect of CE Waters Retail Pty Ltd ACN 653 124 488, the CE Waters Retail Trust.

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.

2 Interpretation

In this Agreement, unless the context indicates a contrary intention:

- (a) **(documents)** a reference to this Agreement or another document includes any document which varies, supplements, replaces, assigns or novates this Agreement or that other document;
- (b) **(references)** a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this Agreement;
- (c) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this Agreement;
- (d) **(person)** a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns;
- (e) **(party)** a reference to a party to a document includes that party's personal representatives, executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) **(president, CEO or managing director)** the president, CEO or managing director of a body or Authority means any person acting in that capacity;
- (g) **(requirements)** a requirement to do any thing includes a requirement to cause that thing to be done, and a requirement not to do any thing includes a requirement to prevent that thing being done;
- (h) **(including)** including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind;
- (i) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (j) **(singular)** the singular includes the plural and vice-versa;
- (k) **(gender)** words importing one gender include all other genders;

- (l) **(parts)** a reference to one or more things includes each part and all parts of that thing or group of things but nothing in this clause implies that part performance of an obligation constitutes performance of that obligation;
- (m) **(rules of construction)** neither this Agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting;
- (n) **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (o) **(time and date)** a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in Sydney, Australia, even if the obligation is to be performed elsewhere;
- (p) **(joint and several)** an agreement, representation, covenant, right or obligation:
 - (i) in favour of two or more persons is for the benefit of them jointly and severally; and
 - (ii) on the part of two or more persons binds them jointly and severally;
- (q) **(writing)** a reference to a notice, consent, request, approval or other communication under this Agreement or an agreement between the parties means a written notice, request, consent, approval or agreement;
- (r) **(replacement bodies)** a reference to a body (including an institute, association or Authority) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions;
- (s) **(Australian currency)** a reference to dollars or \$ is to Australian currency;
- (t) **(month)** a reference to a month is a reference to a calendar month; and
- (u) **(year)** a reference to a year is a reference to twelve consecutive calendar months.

3 Planning Agreement under the Act

- (a) The parties agree that this Agreement is a planning agreement within the meaning of section 7.4 of the Act.
- (b) **Schedule 1** of this Agreement summarises the requirements for planning agreements under s 7.4 of the Act and the way this Agreement addresses those requirements.

4 Application of this Agreement

This Agreement applies to:

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

5 Operation of this Agreement

- (a) This Agreement commences on and from the date it is executed by all parties.
- (b) For the avoidance of doubt, the obligation to pay monetary contributions under **clause 6.1** does not arise unless and until the Instrument Change is made.

6 Contributions to be made under this Agreement

6.1 Monetary Contribution

The Monetary Contribution is \$1,900,000.00, indexed in accordance with increases in the CPI from the date of commencement of this Agreement to the date of payment.

6.2 Payment of the Monetary Contribution

- (a) The Developer must pay to Council the Monetary Contribution in accordance with this **clause 6**.
- (b) The Monetary Contribution must be paid to Council prior to the issue of an Occupation Certificate for any part of the Development.
- (c) The Monetary Contribution must be paid by way of bank cheque in favour of Council or by deposit by means of electronic funds transfer into an account specified by Council.
- (d) The Monetary Contribution will be taken to have been made when:
 - (i) the bank cheque has been received; or
 - (ii) cleared funds or electronic funds have been deposited in the Council's bank account.
- (e) The Council must notify the Developer forthwith upon the Council receiving the bank cheque, cleared funds or electronic funds under **clause 6.2(d)**.
- (f) The parties agree and acknowledge that the Monetary Contribution will be used by the Council for the delivery of public domain improvements in the Neutral Bay Town Centre.
- (g) For the avoidance of doubt, nothing in this Agreement requires the Council to:
 - (i) spend the Monetary Contribution made under this Agreement by a particular date; or
 - (ii) refund to the Developer any contribution made under this Agreement.

7 Application of s 7.11, s 7.12 and s 7.24 of the Act

- (a) This Agreement does not exclude the application of section 7.11 of the Act to the Development.
- (b) This Agreement does not exclude the application of section 7.12 of the Act to the Development.
- (c) This Agreement does not exclude the application of section 7.24 of the Act to the Development.
- (d) The benefits under this Agreement are not to be taken into consideration in determining a development contribution under section 7.11 of the Act.

8 Registration of this Agreement

8.1 Developer Interest

The Developer represents and warrants to the Council that on the date of this agreement:

- (a) CE Waters Pty Ltd ACN 636 274 578 as trustee for CE Waters Development Trust is the registered proprietor of Lots 1 to 16, 32 and 33 in SP68360, Lot 34 in Strata Plan 75848 and Lot 35 in Strata Plan 88483, being the property known as 12 Waters Road, Neutral Bay; and

- (b) CE Waters Retail Pty Ltd ACN 653 124 488 as trustee for CE Waters Retail Trust and CE Waters Pty Ltd ACN 636 274 578 as trustee for CE Waters Development Trust is the registered proprietor of Lot 18 in Deposited Plan 53770, being the property known as 14 Waters Road, Neutral Bay.

8.2 Registration of this Agreement

- (a) The Developer agrees to procure the registration of this Agreement under the *Real Property Act 1900* (NSW) in the relevant folios of the Register of the Land in accordance with section 7.6 of the Act.
- (b) The Developer must, at its own expense, promptly after the execution of this Agreement, take all practical steps, and otherwise do anything that the Council reasonably requires to procure:
 - (i) the consent of each person who:
 - (A) has an estate or interest in the Land registered under the *Real Property Act 1900* (NSW); or
 - (B) is seized or possessed of an estate or interest in the Land;
 - (ii) the execution of any documents; and
 - (iii) the production of the relevant duplicate certificates of title or electronic equivalents to enable the registration of this Agreement in accordance with this **clause 8.2**.
- (c) The Developer must, at its own expense, take all practical steps, and otherwise do anything that the Council reasonably requires:
 - (i) to procure the lodgement of this Agreement with the Registrar-General as soon as reasonably practicable after this Agreement comes into operation, but in any event, no later than ten (10) Business Days after that date; and
 - (ii) to procure the registration of this Agreement by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this Agreement is lodged for registration.

8.3 Removal from Register

The Council must provide a release and discharge of this Agreement so that it may be removed from the folios of the Register for the Land (and any part of it) if the Council agrees, acting reasonably (and such agreement is not to be unreasonably withheld):

- (a) that the Developer has provided the Monetary Contribution in accordance with this Agreement; and
- (b) that the Developer is not otherwise in a material unremedied default of any of the obligations under this Agreement; or
- (c) the Instrument Change does not occur within 1 year after this Agreement comes into operation.

8.4 Caveat

- (a) The Developer acknowledges and agrees that:
 - (i) when this Agreement is executed, the Council will have acquired and the Developer will have granted, an equitable estate and interest in the Land for the purposes of section 74F(1) of the *Real Property Act 1900* (NSW) and consequently the Council

will have a sufficient interest in the Land in respect of which to lodge a caveat over the Land notifying that interest;

- (ii) it will not object to the Council lodging a caveat in the relevant folios of the Register for the Land nor will it seek to remove any caveat lodged by the Council provided the caveat does not prevent registration of any Dealing or plan other than a transfer.
- (b) The Council must, at the Developer's cost, register a withdrawal of any caveat in respect of the Land within five (5) Business Days after the Developer complies with **clause 8.2** and must not lodge any other caveats on the titles to any of the Land.

9 Review of this Agreement

- (a) This Agreement may be reviewed or modified by agreement between the parties using their best endeavours and acting in good faith.
- (b) No modification or review of this Agreement will be of any force or effect unless it is in writing and signed by the parties to this Agreement.
- (c) A party is not in breach of this Agreement if it does not agree to an amendment to this Agreement requested by a party in, or as a consequence of, a review.

10 Dispute Resolution

10.1 Reference to Dispute

- (a) If a dispute arises between the parties in relation to this Agreement, the parties must not commence any court proceedings relating to the dispute unless the parties have complied with this **clause 10**, except where a party seeks urgent interlocutory relief.
- (b) **Clause 10.1(a)** (and the balance of this **clause 10**) 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)(iii) 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.

10.2 Notice of Dispute

The party wishing to commence the dispute resolution process must give written notice (**Notice of Dispute**) to the other parties of:

- (a) The nature of the dispute,
- (b) The alleged basis of the dispute, and
- (c) The position which the party issuing the Notice of Dispute believes is correct.

10.3 Representatives of Parties to Meet

- (a) The representatives of the parties must promptly (and in any event within fifteen (15) Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.
- (b) The parties may, without limitation:
 - (i) resolve the dispute during the course of that meeting,

- (ii) agree that further material or expert determination in accordance with **clause 10.6** about a particular issue or consideration is needed to effectively resolve the dispute (in which event the parties will, in good faith, agree to a timetable for resolution); or
- (iii) agree that the parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

10.4 *Further Notice if Not Settled*

If the dispute is not resolved within fifteen (15) Business Days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (**Determination Notice**) by mediation under **clause 10.5** or by expert determination under **clause 10.6**.

10.5 *Mediation*

If a party gives a Determination Notice calling for the dispute to be mediated:

- (a) The parties must agree to the terms of reference of the mediation within fifteen (15) Business Days of the receipt of the Determination Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply;
- (b) The mediator will be agreed between the parties, or failing agreement within fifteen (15) Business Days of receipt of the Determination Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (c) The mediator appointed pursuant to this **clause 10.5** must:
 - (i) have reasonable qualifications and practical experience in the area of the dispute; and
 - (ii) have no interest or duty which conflicts or may conflict with his or her function as a mediator he or she being required to fully disclose any such interest or duty before his or her appointment;
- (d) The mediator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties;
- (e) The parties must within fifteen (15) Business Days of receipt of the Determination Notice notify each other of their representatives who will be involved in the mediation (except if a resolution of the Council is required to appoint a representative, the Council must advise of the representative within five (5) Business Days of the resolution);
- (f) The parties agree to be bound by any mediation settlement and may only initiate judicial proceedings in respect of a dispute — which is the subject of a mediation settlement — for the purpose of enforcing that mediation settlement; and
- (g) In relation to costs and expenses:
 - (i) Each party must bear its own professional and expert costs incurred in connection with the mediation; and
 - (ii) The costs of the mediator must be shared equally by the parties unless the mediator determines that a party has engaged in vexatious or unconscionable behaviour in

which case the mediator may require the full costs of the mediation to be borne by that party.

10.6 *Expert determination*

If the dispute is not resolved under **clause 10.3** or **clause 10.5**, or the parties otherwise agree that the dispute may be resolved by expert determination, the parties may refer the dispute to an expert, in which event:

- (a) The dispute must be determined by an independent expert in the relevant field:
 - (i) agreed upon and appointed jointly by the parties; and
 - (ii) in the event that no agreement is reached or no appointment is made within fifteen (15) Business Days of the agreement to refer the dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales;
- (b) The expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) The determination of the dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (d) The expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (e) Each party must bear its own costs in connection with the process and the determination by the expert and must share equally the expert's fees and costs; and
- (f) Any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
 - (i) Within twenty (20) Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and commences litigation; or
 - (ii) The determination is in respect of, or relates to, termination or purported termination of this Agreement by any party, in which event the expert will be giving a non-binding appraisal.

10.7 *Litigation*

If the dispute is not finally resolved in accordance with this **clause 10**, then either party is at liberty to litigate the dispute.

10.8 *No suspension of obligations*

Subject to any interlocutory order obtained under **clause 10.1**, the referral to or undertaking of a dispute resolution process under this **clause 10** does not suspend the parties' obligations under this Agreement.

11 **Enforcement**

11.1 *Default*

- (a) In the event a party considers another party has failed to perform and fulfil an obligation under this Agreement, it may give notice in writing to the other party (**Default Notice**) giving all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than twenty (20) Business Days.

- (b) In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (c) If a party disputes the Default Notice it may refer the dispute to dispute resolution under **clause 10** of this Agreement.

11.2 *Restriction on the issue of Certificates*

- (a) In accordance with section 6.8 of the Act and clause 21 of the Regulation, a Construction Certificate for any part of the Development that is above 5-storeys and includes residential floorspace must not be issued unless this Agreement has been registered in accordance with **clause 8.2**.
- (b) In accordance with section 6.10 of the Act and clause 48 of the Regulation, and subject to **clause 6.2**, an Occupation Certificate for any part of the Development must not be issued unless the Council, acting reasonably and without delay, has confirmed in writing that the Monetary Contribution required under **clause 6.1** has been paid in full.

11.3 *General Enforcement*

- (a) Without limiting any other remedies available to the parties, this Agreement may be enforced by any party in any Court of competent jurisdiction.
- (b) Nothing in this Agreement prevents:
 - (i) a party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates; and
 - (ii) the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

12 *Assignment and Dealings*

12.1 *Assignment*

- (a) The Developer is not to settle on the sale or assignment or novation of its interest under this Agreement to another party (**Incoming Party**) unless before settlement the Developer:
 - (i) procures the execution by the Incoming Party of an agreement in favour of the Council on the same terms as this Agreement; and
 - (ii) satisfies the Council that the Developer is not in breach of this Agreement at the time of settlement of the sale, assignment or novation.
- (b) Any purported Dealing in breach of this clause is of no effect.
- (c) This **clause 12.1** does not apply:
 - (i) when this Agreement is registered under **clause 8.2**; or
 - (ii) after this Agreement has been removed from the register under **clause 8.3**.

12.2 *Transfer of Land*

- (a) The Developer (**Transferor**) may not transfer, assign or dispose of the whole or any part of its right, title or interest in the Land (present or future) or in the Development to another person (**Transferee**) unless it obtains the consent of Council before it sells, transfers or disposes of that right, title or interest.

- (b) The Council must give its consent under **clause 12.2(a)** if:
 - (i) the Developer has, at no cost to the Council, first procured the execution by the Transferee a deed of novation on reasonable terms (being a deed generally in terms of the Deed of Novation at Annexure A);
 - (ii) the Developer is not in an unremedied material breach of this Agreement; and
 - (iii) the Transferor agrees to pay the Council's reasonable legal costs in relation to the transfer, assignment or disposition, including any costs in connection with the execution of the Deed of Novation.
- (c) The Council, on giving consent under **clause 12.2(a)**, must enter into the Deed of Novation referred to in **clause 12.2(b)(i)**.
- (d) **Clause 12.2(a)** does not apply to a transfer, assignment or disposition of the Developer's interest in the Land:
 - (i) if the Developer has satisfied Council that all obligations of the Developer under this Agreement have been met; or
 - (ii) if the Council has released or discharged the Developer from any obligations under this Agreement in connection with the part of the Land to be transferred.
- (e) This **clause 12.2** does not apply:
 - (i) when this Agreement is registered under **clause 8.2**; or
 - (ii) after this Agreement has been removed from the register under **clause 8.3**.

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

- (a) This **clause 12.3** takes precedence over the other provisions in this **clause 12**.
- (b) For the avoidance of doubt, once this Agreement is registered under **clause 8.2**:
 - (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 the Land, 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); 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.

13 Approvals and consents

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 discretion, acting reasonably, and subject to any conditions determined by the party.

14 No fetter

14.1 Discretion

This Agreement is not intended to operate to fetter, in any manner, the exercise of any statutory power or discretion of the Council, including, but not limited to, any statutory power or discretion of the Council relating to the Planning Proposal, a Development Application or any other application for Approval (all referred to in this Agreement as a “**Discretion**”).

14.2 No fetter

No provision of this Agreement is intended to constitute any fetter on the exercise of any Discretion. If, contrary to the operation of this **clause 14.2**, any provision of this Agreement is held by a court of competent jurisdiction to constitute a fetter on any Discretion, the parties agree:

- (a) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause is substantially satisfied;
- (b) in the event that (a) cannot be achieved without giving rise to a fetter on the exercise of a Discretion, the relevant provision is to be severed and the remainder of this Agreement has full force and effect; and
- (c) 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.

15 Notices

Any notice given under or in connection with this Agreement (**Notice**):

- (a) must be in writing and signed by a person duly authorised by the sender;
- (b) must be addressed as follows and delivered to the intended recipient by hand, by prepaid post or by email at the address below, or at the address last notified by the intended recipient to the sender after the date of this Agreement:
 - (i) to North Sydney Council: 200 Miller Street, North Sydney 2060
Email: council@northsydney.nsw.gov.au
Attention: General Manager
 - (ii) to the Developer: Goodwin Chivas, Level 4 Suite 401, 29-31 Solent Circuit, Baulkham Hills NSW 2153
Email: hello@centralelement.com.au
Attention: Director

- (c) is taken to be given or made:
 - (i) in the case of hand delivery, when delivered;
 - (ii) in the case of delivery by post, three (3) Business Days after the date of posting (if posted to an address in the same country) or seven (7) Business Days after the date of posting (if posted to an address in another country); and
 - (iii) in the case of delivery by email, when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above or when the Notice is first opened or read by the recipient, whichever occurs first; and
- (d) if under **clause 15.1(c)** a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it is taken to have been given or made at the start of business on the next Business Day.

16 General

16.1 *Relationship between parties*

- (a) Nothing in this Agreement:
 - (i) constitutes a partnership between the parties; or
 - (ii) except as expressly provided, makes a party an agent of another party for any purpose.
- (b) A party cannot in any way or for any purpose:
 - (i) bind another party; or
 - (ii) contract in the name of another party.
- (c) If a party must fulfil an obligation and that party is dependent on another party, then that other party must do each thing reasonably within its power to assist the other in the performance of that obligation.

16.2 *Time for doing acts*

- (a) If the time for doing any act or thing required to be done or a notice period specified in this Agreement expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.
- (b) If any act or thing required to be done is done after 5.00 pm on the specified day, it is taken to have been done on the following Business Day.

16.3 *Further assurances*

Each party must promptly execute all documents and do all other things reasonably necessary or desirable to give effect to the arrangements recorded in this Agreement.

16.4 *Variation*

A provision of this Agreement can only be varied by a later written document executed by or on behalf of all parties and in accordance with the provisions of the Act.

16.5 *Not Used*

16.6 *Legal expenses, costs and stamp duty*

- (a) The Developer must pay Council's reasonable legal costs incurred with the negotiation, preparation, execution, stamping, registering, release and discharge of this Agreement, including the costs of obtaining any legal advice in connection with this Agreement.
- (b) The costs referred to in **clause 16.6(a)** must be paid no later than ten (20) Business Days after receiving a demand from Council to pay such costs.

16.7 *Entire agreement*

The contents of this Agreement constitute the entire agreement between the parties and supersede any prior negotiations, representations, understandings or arrangements made between the parties regarding the subject matter of this Agreement, whether orally or in writing.

16.8 *Representations and warranties*

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

16.9 *Severability*

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. 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.

16.10 *Invalidity*

- (a) A word or provision must be read down if:
 - (i) this Agreement is void, voidable, or unenforceable if it is not read down;
 - (ii) this Agreement will not be void, voidable or unenforceable if it is read down; and
 - (iii) the provision is capable of being read down.
- (b) A word or provision must be severed if:
 - (i) despite the operation of **clause 16.10(a)**, the provision is void, voidable or unenforceable if it is not severed; and
 - (ii) this Agreement will be void, voidable or unenforceable if it is not severed.
- (c) The remainder of this Agreement has full effect even if **clause 16.10(b)** applies.

16.11 *Waiver*

- (a) A right or remedy created by this Agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.
- (b) 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. A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in

respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

16.12 GST

- (a) Words and expressions which are not defined in this Agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST.
- (c) If GST is imposed on any supply made under or in accordance with this Agreement, the Developer must pay the GST or pay to the Council an amount equal to the GST payable on or for the taxable supply, whichever is appropriate in the circumstances.

16.13 Governing law and jurisdiction

- (a) The laws applicable in New South Wales govern this Agreement.
- (b) The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

16.14 Section 10.7 Planning Certificate

- (a) The Developer acknowledges and agrees that the Council will include a notation that this Agreement has been entered into on any Planning Certificate issued under section 10.7 of the Act relating to the Land.
- (b) Council will remove the notation as required under **clause 16.14(a)** in relation to the Land:
 - (i) upon the satisfactory delivery of all aspects of the contribution under this Agreement; or
 - (ii) if the Instrument Change does not occur within 2 years after this Agreement comes into operation, and Council considers the Instrument Change will not occur.

16.15 Explanatory Note

- (a) Annexure B contains the Explanatory Note relating to this Agreement required by clause 205 of the Environmental Planning and Assessment Regulation 2021.
- (b) Pursuant to clause 205(5) of the Environmental Planning and Assessment Regulation 2021, the parties agree that the Explanatory Note is not to be used to assist in construing this Agreement.

16.16 Electronic Signature and Exchange

- (a) This Agreement may be executed electronically by a party using DocuSign (or a similar secure digital signature platform), or by affixing an electronic signature.
- (b) The parties agree to be bound by the electronic version of this Agreement which has been signed in accordance with this clause.
- (c) The parties agree they will be bound by, have complied with and will comply with the *Electronic Transactions Act 2000* (NSW) and any terms and conditions of DocuSign (or a similar secure digital signature platform), in relation to the execution of this Agreement.

17 Developer's Limitation of Liability

- (a) The Developer enters into this Agreement only in its capacity as trustee of the Relevant Trust and in no other capacity.
- (b) A liability arising under or in connection with this Agreement (whether that liability arises under a specific provision of this Agreement, for breach or otherwise) can be enforced against the Developer only to the extent to which it can be satisfied out of property of the Relevant Trust out of which the Developer is actually indemnified for the liability.
- (c) The limitation of the Developer's liability under this clause:
 - (i) applies despite any other provision of this Agreement; and
 - (ii) extends to all liabilities and obligations of the Developer in relation to any representation, warranty, conduct, omission, agreement or transaction related to this Agreement.
- (d) The parties may not:
 - (i) sue the Developer personally;
 - (ii) seek the appointment of a liquidator, administrator, receiver or similar person to the Developer; or
 - (iii) prove in any liquidation, administration or arrangement of or affecting the Developer.

18 Developer's Warranties

- (a) The Developer warrants that:
 - (i) it holds the Land on trust for the Relevant Trust;
 - (ii) it has the power to:
 - (A) enter and deliver its obligations under the Agreement;
 - (B) perform its obligations under the Agreement;
 - (iii) all action to authorise:
 - (A) its execution and delivery of this Agreement; and
 - (B) the performance of its obligations under this Agreement,has been taken;
 - (iv) the execution by it of this Agreement and the performance by it of its obligations or the exercise of its rights under this Agreement does not contravene the Relevant Trust deed;
 - (v) it is the sole trustee and no action is currently taking place or pending to remove it as trustee of the Relevant Trust, or appoint a new or additional trustee to the Relevant Trust;
 - (vi) it has a right to be fully indemnified out of the assets of the Relevant Trust in respect of the obligations incurred by it under this Agreement and it has not released, disposed of or restricted its equitable lien over the Relevant Trust which secures that indemnity;

- (vii) it is not aware of any reason why the assets of the Relevant Trust might be insufficient to satisfy or discharge the obligations and liabilities incurred by it under this Agreement;
 - (viii) it is not and has never been in breach of the Relevant Trust deed;
 - (ix) it has complied with its obligations in connection with the Relevant Trust;
 - (x) the Relevant Trust has not been terminated and no action is pending to terminate the Relevant Trust; and
 - (xi) no vesting date for the Relevant Trust Fund has been determined.
- (b) The Developer indemnifies the Council, and agrees to keep the Council indemnified, in respect of any loss or liability in any way connected with a breach of a warranty in **clause 18(a)**.

Schedule 1 Land

Lot	Strata Plan
1	68360
2	68360
3	68360
4	68360
5	68360
6	68360
7	68360
8	68360
9	68360
10	68360
11	68360
12	68360
13	68360
14	68360
15	68360
16	68360
32	68360
33	68360
34	75848
35	88483

Schedule 2

Summary of requirements (section 7.4)

Subject and subsection of the Act	Planning Agreement
<p>Planning instrument and/or Development Application – Section 7.4(1)</p> <p>The Developer has:</p> <p>Sought a change to an environmental planning instrument</p> <p>Made, or propose to make a Development Application</p> <p>Entered into an agreement with, or are otherwise associated with, a person to whom paragraph (a) or (b) applies</p>	<p><input checked="" type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes</p> <p><input checked="" type="checkbox"/> No</p>
<p>Description of the land to which the planning Agreement applies – Section 7.4(3)(a)</p>	<p>See the definition of “Land” in clause 1.</p>
<p>Description of proposed change to environmental planning instrument or development – Section 7.4(3)(b)</p>	<p>See the definitions of “Development”, “Instrument Change” and “Planning Proposal” in clause 1.</p>
<p>The scope, timing and manner of delivery of contribution required by the Planning Agreement – Section 7.4(3)(c)</p>	<p>See clause 6</p>
<p>Applicability of section 7.11 of the Act – Section 7.4(3)(d)</p>	<p>The application of section 7.11 of the Act is not excluded in respect of the Development.</p>
<p>Applicability of section 7.12 of the Act – Section 7.4(3)(d)</p>	<p>The application of section 7.12 of the Act is not excluded in respect of the Development.</p>
<p>Applicability of section 7.24 of the Act – Section 7.4(3)(d)</p>	<p>The application of section 7.24 of the Act is not excluded in respect of the Development.</p>
<p>Mechanism for dispute resolution – Section 7.4(3)(f)</p>	<p>See clause 10.</p>
<p>Enforcement of the Planning Agreement – Section 7.4(3)(g)</p>	<p>See clause 8 and clause 11.</p>

Subject and subsection of the Act	Planning Agreement
Registration of the Planning Agreement – Section 7.4(3)(g) and section 7.6	See clause 8.2
No obligation to grant consent or exercise functions – Section 7.4(9)	See clause 14.

Executed as an agreement

Executed for and on behalf of North Sydney Council by its authorised delegate in accordance with a resolution of the Council dated ~~27 September 2021~~ 5 June 2023

[Signature]
Witness

[Signature]
Authorised Delegate

Julie Farmer
Name of Witness 200 Miller Street North Sydney, NSW, 2060

Therese Manns
Name of Authorised Delegate In accordance with section 377 of the Local Government Act 1993

Executed by CE Waters Pty Ltd (ACN 636 274 578) as trustee for CE Waters Development Trust in accordance with section 127 of the Corporations Act 2001 (Cth) by:

Electronic signature of me, Wayne Chivas, affixed by me, or at my direction, on 22.08.23.
[Signature]
Company Secretary/ Director

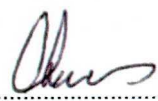
Electronic signature of me, Nathan Chivas, affixed by me, or at my direction, on 22.08.23.
[Signature]
Director

Wayne Chivas
Name of Company Secretary/ Director (print)

Nathan Chivas
Name of Director (print)

Executed by CE Waters Retail Pty Ltd)
(ACN 653 124 488) as trustee for CE)
Waters Retail Trust in accordance with)
section 127 of the *Corporations Act 2001*)
(Cth) by:)
)

Electronic signature of me, Wayne Chivas, affixed
by me, or at my direction, on 22.08.23.

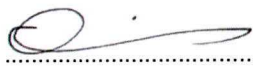


Company Secretary/ Director

Wayne Chivas

Name of Company Secretary/ Director
(print)

Electronic signature of me, Nathan Chivas, affixed
by me, or at my direction, on 22.08.23.



Director

Nathan Chivas

Name of Director (print)

Deed of Novation

North Sydney Council

ABN 32 353 260 317

CE Waters Pty Limited (ACN 636 274 578) as trustee for CE Waters Development Trust and CE Waters Retail Pty Ltd (ACN 653 124 488) as trustee for CE Waters Retail Trust

[Insert name of new developer]

Deed of Novation

Dated

Parties

North Sydney Council of 200 Miller Street North Sydney NSW 2060 (**Council**)

CE Waters Pty Ltd (ACN 636 274 578) as trustee for CE Waters Development Trust and CE Waters Retail Pty Ltd (ACN 653 124 488) as trustee for CE Waters Retail Trust of Goodwin Chivas, Level 4, Suite 401, 29-31 Solent Circuit, Baulkham Hills NSW 2153
(Existing Developer)

[Drafting Note: insert details of Transferee] (**New Developer**)

Background

- A. The Council and the Existing Developer are parties to the Agreement.
- B. The Agreement relates to the whole of the Land.
- C. 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:]

- D. The Existing Developer has agreed to transfer the Rights and Obligations to the New Developer, and the New Developer has agreed to accept the Rights and Obligations.
- E. 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.

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

- F. The New Developer has agreed to accept the Rights and Obligations as a Developer under the Agreement.
- G. 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.

Operative provisions

1 Defined meanings

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

2 Novation

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

- 2.1 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;
- (b) The New Developer is bound by, and must comply with, the provisions of the Agreement and the Liabilities, Rights and 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); and
- (c) If, as a consequence of clauses 2.1(a) and (b), the Developer under the Agreement comprises more than one entity, any agreement, representation, covenant, or obligation under the Agreement on the part of the Developer binds those entities jointly and severally.

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

2.2 With effect on and from the Effective Date:

- (a) The New Developer is taken to be a party to the Agreement and references to the Developer in the Agreement are taken to include the New Developer; and
- (b) The New Developer is bound by, and must comply with, the provisions of the Agreement and the Liabilities, Rights and 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); and
- (c) If, as a consequence of clauses 2.2(a) and (b), the Developer under the Agreement comprises more than one entity, any agreement, representation, covenant, or obligation under the Agreement on the part of the Developer binds those entities jointly and severally.

3 Consent

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

3.1 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, Rights and Obligations of the Existing Developer under the Agreement;
- (c) subject to clause 4.4, releases the Existing Developer from all Liabilities, Rights and Obligations under the Agreement; and
- (d) 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:]

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

- (a) consents to the New Developer becoming a Developer under the terms of the Agreement as outlined at clause 2 of this Deed;
- (b) 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 releases 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 from all their obligations under the Agreement and from all Claims that it may have against the Council under or in respect of the Agreement.

4.3 Indemnity

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

4.4 Liability before Effective Date

Notwithstanding clauses 4.1 to 4.3, the Existing Developer is not released, relieved or discharged from liability under the Agreement before the Effective Date, or any breach of any provision of the Agreement by the Existing Developer before the Effective Date (to the extent that it is not remedied by the Effective Date) insofar as the Agreement relates to the Liabilities, Rights and Obligations.

[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 Each party represents and warrants that:

- (a) **(power)** it has power to enter into this Deed and comply with its obligations;
- (b) **(no contravention or exceeding power)** this Deed does not contravene its constituent documents (if any) or any law or obligation by which it is bound or to which any of its assets are subject, or cause a limitation on its powers or the powers of its officers to be exceeded;
- (c) **(authorisations)** it has in full force and effect the authorisations necessary for it to enter into this Deed, to comply with its obligations and exercise its rights under this Deed and to allow this Deed to be enforced;
- (d) **(validity of obligations)** its obligations under this Deed are valid and binding and are enforceable against it in accordance with the terms of the Deed;
- (e) **(no immunity)** it does not have immunity from the jurisdiction of a court or from legal process;
- (f) **(benefit)** it benefits by entering into this Deed to which it is a party.

5.2 Reliance by the Council

The Existing Developer and the New Developer 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 Affirmation of the Agreement

The Agreement will be read and construed subject to this Deed, and in all other respects of the provisions of the Agreement are ratified and confirmed and, subject to the variation and novation contained in this Deed, the Agreement will continue in full force and effect.

6.2 Developer Costs

The Existing Developer and the New Developer 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.

6.3 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.

6.4 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.

6.5 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.

6.6 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.

6.7 Notices

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

- (i) to North Sydney Council: 200 Miller Street, North Sydney 2060
Email: council@northsydney.nsw.gov.au
Attention: General Manager

(ii) to CE Waters Pty Ltd ACN 636 274 578 as trustee for CE Waters Development Trust and CE Waters Retail Pty Ltd ACN 653 124 488 as trustee for CE Waters Retail Trust: Goodwin Chivas, Level 4, Suite 401, 29-31 Solent Circuit, Baulkham Hills NSW 2153
Email: hello@centralelement.com.au
Attention: Director

(iii) [INSERT PARTY]: [INSERT ADDRESS]
Email: [INSERT EMAIL]
Attention: [INSERT NAME]

- (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:
- (i) upon delivery to the recipient; or
 - (ii) production to the sender of a facsimile transmittal confirmation report; or
 - (iii) when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above, or when the Notice is first opened or read by the recipient, whichever occurs first.
- (d) If a Notice under clause 6.7(c) would be taken to be given or made on a day that is not a Business Day in the place to which the Notice was sent, or later than 4:00 pm (local time), it is taken to have been given or made at the start of business on the next Business Day.

6.8 *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.

6.9 *Amendments*

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

6.10 *Relationship between the parties*

- (a) Nothing in this Deed:
 - (i) constitutes a partnership between the parties; or
 - (ii) except as expressly provided, makes a party an agent of another party for any purpose.

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

6.11 *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.

6.12 *Further assurance*

- (a) 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.
- (b) This Deed binds each party that signs it even if other parties do not, or is the execution by other parties is defective, void or voidable.

6.13 *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.

6.14 *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.

6.15 *Remedies*

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

6.16 *Severability*

If a clause or part of a clause of this Deed can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. 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.

6.17 *Invalidity*

- (a) A word or provision must be read down if:
 - (i) the Deed is void, voidable or unenforceable if it is not read down;
 - (ii) this Deed will not be void, voidable or unenforceable if it is read down; and

- (iii) the provision is capable of being read down.
- (b) A word or provision must be severed if:
 - (i) despite the operation of clause 6.16(a), the provision is void, voidable or unenforceable if it is not severed; and
 - (ii) this Deed will be void, voidable or unenforceable if it is not severed.
- (c) The remainder of this Deed has full effect, even if clause 6.16(b) applies.

6.18 Counterparts

This Deed may consist of a number of counterparts and the counterparts taken together constitute one and the same instrument.

6.19 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.

Land has the meaning given to that term in the Agreement.

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

[insert definition of Relevant Land if Existing Developer will still own part of the Land]

Relevant Land means that part of [title reference to the Land of which part is being transferred] to be transferred from the Existing Developer to the New Developer, as shown on the plan at **Annexure B**.

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 several;
- (k) an agreement, representation or warranty on the part of two or more persons is for the benefit of them jointly and severally;
- (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 to this Deed]

[If the Existing Developer will still own part of the Land, insert a plan indicating the Relevant Land being transferred to the New Developer as Annexure B to this Deed]

Annexure B Explanatory Note

Explanatory Note

Exhibition of draft Voluntary Planning Agreement

PP2/22: 12-14 Waters Road, Neutral Bay

Environmental Planning & Assessment Regulation 2021 (section 205)

Planning Agreement

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

Section 205(1) of the *Environmental Planning and Assessment Regulation 2021* (“**the EPA Regulation**”) requires that an Explanatory Note must be prepared to accompany a planning agreement.

The Explanatory Note must address the requirements of section 205(1)(a)-(b) of the EPA Regulation. This Explanatory Note has been prepared to address these requirements.

Additionally, in preparing the Explanatory Note, the planning authority must consider any relevant practice note prepared by the Planning Secretary under clause 203(6). The relevant practice note is *Planning agreements: Practice note – February 2021* published by the former NSW Department of Planning, Industry and Environment (now the Department of Planning and Environment).

This practice note has been considered by the parties in the course of preparing this Explanatory Note.

Parties

CE Waters Pty Limited as trustee for CE Waters Development Trust and CE Waters Retail Pty Ltd as trustee for CE Waters Retail Trust (“**Developer**”) made an offer to North Sydney Council (“**Council**”) to enter into a Planning Agreement, in connection with a Planning Proposal for land at 12-14 Waters Road, Neutral Bay.

Description of subject land

The land to which the Planning Agreement applies is:

- (a) Lots 1 to 16, 32 and 33 in SP 68360;
- (b) Lot 34 in SP 75848;
- (c) Lot 35 in SP88483; and
- (d) Lot 18 in DP 537700,

known as 12-14 Waters Road, Neutral Bay (“**the Land**”).

The Development

The Planning Agreement relates to proposed development of the Land to which the Planning Agreement applies for redevelopment of the Land for the purpose of a mixed use residential and commercial development with basement parking and public domain works, including development generally anticipated in the Planning Proposal.

Description of the Planning Proposal to which the Planning Agreement applies

To facilitate the Development, the Developer has lodged a Planning Proposal. The Planning Proposal (PP2/22 -Council's reference and PP-2021-7492 Department of Planning and Environment's reference) which was issued a Gateway Determination) by the Department of Planning and Environment on 23 December 2022 seeks to amend the *North Sydney Local Environmental Plan 2013* ("**NSLEP 2013**") to:

- (a) increase the maximum building height for the Land on the Height of Buildings Map to 22m;
- (b) include a site specific provision to enable rooftop structures, plant and equipment to a maximum building height of 24m; and
- (c) provide a minimum non-residential floor space ratio for the Land on the Non-Residential Floor Space Ratio Map of 1.2:1.

Summary of Objectives, Nature and Effect of the Planning Agreement

Objectives

The objective of the Planning Agreement is to provide a mechanism by which contributions towards public purposes can be made in connection with the future development of the Land to benefit the community.

The public benefits include the provision of monetary contributions to be used towards the improvement of the public domain within the Neutral Bay Town Centre.

Nature

A Planning Agreement of this kind may require a developer to dedicate land free of costs, pay a monetary contribution, or provide any other material public benefit to be used for or applied towards a public purpose.

In this case, the Planning Agreement will require payment of \$1,900,000.

The monetary contribution will be used towards the delivery of community infrastructure and public domain upgrades within the Neutral Bay Town Centre.

The monetary contribution will be payable prior to the issue of an Occupation Certificate for any part of the Development. The monetary contribution amount will be indexed in accordance with increases in the consumer price index from the date of agreement to the date of payment.

Effect

In general terms, delivery of the contributions is timed in a way that is practicable for the Developer and still provides for the enhancement of public domain and open space to meet the needs of the new residents and the community.

The Planning Agreement provides for the enforcement of the Planning Agreement by a suitable means if there is a breach by the Developer. The contributions are to be delivered prior to the issue of an occupation certificate for the Development or any part of the Development. An occupation certificate cannot be lawfully issued if the required contributions have not been made.

The Planning Agreement is to be registered on the title to the Land.

Where it is relevant to a development application, a consent authority must take into consideration a planning agreement — or any draft planning agreement — that a developer has entered into or offered to enter into (respectively).

A planning agreement cannot impose an obligation on a planning authority to actually grant a development consent. A merit assessment of the proposed development must still be carried out.

Assessment of the Merits of the Planning Agreement

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

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

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

The Planning Agreement will enable the utilisation of the development potential of the Land, while requiring the Developer to make provision for public purposes. The Planning Agreement promotes the public interest because it will require the provision of public domain improvements that will benefit existing and future residents and workers in the area. These contributions will have a positive impact on the public and will provide for the social and economic welfare of the community.

The contribution required under the Planning Agreement is additional to any normal contribution that will ordinarily need to be made in relation to the development.

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

The Planning Purposes served by the Planning Agreement

The Planning Agreement facilitates the implementation of Council's strategic plans and will enable the Council to provide improved public amenities and facilities for new development in the locality of the Development.

The Planning Agreement will require development contributions that will improve public amenity.

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

The Planning Agreement offers a monetary contribution that will enable the Council to embellish and maintain public domain in the vicinity of the Development. The Planning Agreement will enable the Council to provide public domain and community facilities to meet the current and future needs of the local community.

The contribution proposed under the Planning Agreement does not conform with the Council's capital works program. This is because the opportunity to obtain the contributions has arisen outside of the Council's capital works program.

The Planning Agreement will not have an adverse effect on this capital works program. Overall, the Planning Agreement is likely to result in more capital works (to the benefit of the community) than would be the case without the Planning Agreement.

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

The Planning Agreement requires the monetary contribution to be paid before the issue of an **occupation certificate** for the Development. The registration of the Planning Agreement must be completed prior to the issue of a **construction certificate** for the Development.

Status of the Explanatory Note

This Explanatory Note has been prepared jointly between the parties.

The parties have agreed that this Explanatory Note is not to be used to assist in construing the Planning Agreement.

