

# North Sydney Council

## Legal Document

### LD 7359 Attached

Please ensure that this coversheet remains attached to this Legal Doc

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North Sydney Council

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Rozene Pty Limited

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Rosemate Pty Limited

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# Voluntary Planning Agreement

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## Date

# Parties

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

**Rozene Pty Limited** ACN 001 407 021 of Level 1, 161-163 Military Road, Neutral Bay, NSW 2089

**Rosemate Pty Limited** ACN 057 715 054 of Level 16, 168 Walker Street, North Sydney, NSW 2060

(together, the **Developer**)

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## Background

- A The Developer owns the Land.
- B The Developer proposes to carry out the Development which will include a mixed use residential flat building above a commercial podium.
- C Council has adopted the St Leonards/Crows Nest Planning Study – Precinct 1 which identifies the Land as being within the "Redevelopment Strip". The Study makes provision for an increase in building heights in the area and recommends a whole of building floor space ratio be applied to sites seeking to increase the building height control.
- D Clause 4.3(2) of the LEP 2013 provides that a building must not be erected on any land in excess of the maximum height shown for the land on the Height of Buildings Map. The Height of Buildings Map provides a maximum height of 26 metres for the Land.
- E Clause 4.4(2) of the LEP 2013 provides that the maximum FSR for a building on any land is not to exceed the FSR shown for the land on the Floor Space Ratio Map. The Floor Space Ratio Map currently does not show an FSR for the Land.
- F The Developer has sought a change to LEP 2013 through the Planning Proposal including:
  - a. amending the Height of Buildings Map to allow a maximum building height of 56m on the Land; and
  - b. amending the Floor Space Ratio Map to allow a maximum FSR for the Land of 7.0:1.
- G The amendment to the LEP 2013 will facilitate the preferred concept plan for the Land which includes:
  - a. retention of the extant significant features of the Marco Building;
  - b. a tower located over the podium up to a height of 56m; and

- c. potential increase in GFA of 4,147 sqm for the Land.
  - H The Developer also proposes to design the Development to conform with setbacks on the various frontages and a view line constraint.
  - I The Developer has made an offer to enter into a planning agreement with Council and the Council has accepted the offer. The Parties wish to formalise that arrangement by entering into this Agreement in accordance with section 7.4 of the Act.
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## Agreed terms

### 1 Definitions and interpretation

#### 1.1 Definitions

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

#### 1.2 General

In this Agreement the following definitions apply:

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

is also prohibited from doing or omitting to do anything which allows or causes that thing to be done;

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

## 2 Planning agreement under the Act

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

## 3 Application of this Agreement

This Agreement applies to:

- (a) the Land;

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

## 4 Operation of this Agreement

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

## 5 Contributions to be made under this Agreement

- (a) The Developer will, for the purpose of enabling Council to fund Public Open Space in the North Sydney Local Government Area, provide a Monetary Contribution in an amount equivalent to \$991 for each square metre of Additional GFA approved pursuant to any Development Consent (as modified), increased but not decreased, in accordance with movements in the CPI from the date of this Agreement to the date of payment.
- (b) The Monetary Contribution must be paid by way of a bank cheque in favour of North Sydney Council in accordance with the following timing:
  - (i) for the Additional GFA approved pursuant to the first Development Consent (as modified) (**Original Consent Additional GFA**), prior to the issue of any Construction Certificate that applies to or with respect to any future building or development approved pursuant to that Development Consent (as modified); and
  - (ii) for any Additional GFA (which is more than the Original Consent Additional GFA) that is approved after the issue of a Construction Certificate for the Development pursuant to a Modification Application or a separate Development Application, prior to the issue of the Occupation Certificate for the Development.
- (c) The Developer agrees and acknowledges that if the Instrument Change is made, any future building on the Land will be set back 3m from the boundary along the Pacific Highway, except where extant significant features of the Marco Building already exist in this Setback Area.
- (d) The Developer agrees and acknowledges that:
  - (i) a Development Consent or Modification relating to, a building on the Land may require development of the Setback Area so described in **clause 5(c)**, so it is consistent with the public domain and at grade flush with the adjacent public footpath;
  - (ii) prior to the issue of any Occupation Certificate for a building approved under a Development Consent (as modified), it will design and construct the Setback Area in accordance with the technical requirements for footpaths in *North Sydney Development Control Plan 2013* and Council's Public Domain Style Manual and



Design Code and any development consent granted for those works;

- (iii) prior to the issue of any Occupation Certificate for a building approved under a Development Consent (as modified), an Easement in Gross will be registered against the title to a stratum lot created over the Setback Area from the title of the Land at no cost to the Council; and
- (iv) the Easement in Gross referred to in **clause 5(d)(iii)** will require the owner of the Setback Area to:
  - (A) maintain and repair the land to the satisfaction of the Council;
  - (B) maintain sufficient public liability insurance;
  - (C) ensure that no buildings or structures are erected on the setback area at ground level other than structures:
    - (1) consented to by the Council, such consent not to be unreasonably withheld;
    - (2) for the purposes of enhancing public domain areas as approved by the Consent Authority; and
    - (3) that are required for building support, services, drainage or as required by any Development Consent, authority or building code requirement; and
  - (D) ensure that any rules made by an Owner's Corporation relating to the Setback Area are approved by the Council, provided that:
    - (1) if the Council does not respond to any request for approval within 25 business days of receiving the request, the Council will be deemed to have approved the rules; and
    - (2) if Council requests an amendment that is unlawful, then the relevant amendment is not required to be incorporated into the rules.
- (e) Subject to **clause 5(f)**, the Developer agrees and acknowledges that:
  - (i) a Development Application or Modification Application for a building on the Land will not include any building or development above RL 116.50 on the portion of the Land marked with an "X" on the plan in **Annexure A** (other than landscaping and fencing);
  - (ii) prior to the issue of a Construction Certificate for any part of the Development, a covenant will be registered against the title to the Land prohibiting any building or development above RL 116.50 on the portion of the Land marked with an "X" on the plan in **Annexure A** (other than landscaping and fencing);

- (iii) a Development Application or Modification Application for a building on the Land will not include any building or development above RL 102.30 on the portion of the Land marked with a "Y" on the plan in **Annexure A** (other than landscaping, air-conditioning, fencing, lift overruns, skylights or non-habitable common room areas forming part of the common property approved by the Consent Authority); and
  - (iv) prior to the issue of a Construction Certificate for any part of the Development, a covenant will be registered against the title to the Land prohibiting any building or development above RL 102.30 on the portion of the Land marked with a "Y" on the plan in **Annexure A** (other than landscaping, air-conditioning, fencing, lift overruns, skylights or non-habitable common room areas forming part of the common property approved by the Consent Authority).
- (f) The Council agrees that the Developer's obligations under **clause 5(e)** including the covenants registered on the title of the Land are to be released upon an amendment to an environmental planning instrument applying to the Land being made which provides for any additional GFA or FSR above that which is provided under the Instrument Change and Council will do all things necessary to effect the release of the covenants from the title of the Land including signing any documents or providing any consent.
- (g) The Council agrees that:
- (i) upon the issue of an Occupation Certificate for the final form of the Development, as agreed between the Parties, acting reasonably and having regard to the concept development set out in the Planning Proposal, the covenants registered on the title of the Land under **clause 5(e)** must be released from the title of any individual strata lots created on the registration of a Strata Certificate; and
  - (ii) it will promptly, after receipt of a request from the Developer, do all things necessary to effect the release of the covenants from the title of any individual strata lots created on registration of a Strata Certificate including signing any documents or providing any consent.

For the avoidance of doubt, the covenants will remain registered on the common property created under the Strata Plan for the final form Development.

## 6 Application of s7.11, s7.12 and s7.24 of the Act to the Developer and benefits under this Agreement

- (a) Sections 7.11, 7.12 and 7.24 of the Act are not excluded and will apply to any future development of the Land.

- (b) Benefits under this Agreement are not to be taken into consideration under s7.11(6) of the Act in imposing a condition of consent under 7.11 of the Act requiring the payment of a monetary contribution or the dedication of land free of cost in connection with any future development of the Land.

## 7 Application of the Contributions

- (a) The Council must, on receipt of the Monetary Contribution paid by the Developer in accordance with **clause 5** of this Agreement and within a reasonable time after the date of this Agreement use that Monetary Contribution as it sees fit to:
  - (i) acquire land for the provision of Public Open Space;
  - (ii) attend to the embellishment of the land so acquired for the Public Open Space; and
  - (iii) care for and maintain the said Public Open Space.

Council agrees that the Monetary Contribution must be applied for the purposes in **clause 7(a)(i) – (iii)** within an area that is no more than 2 kilometres from the Land.

- (b) In the event the Council determines not to acquire the land for the purposes of establishing new open space areas, the Council agrees that the contributions made under this Agreement will be applied towards the embellishment and maintenance of other land for the purposes of Public Open Space and recreation within the North Sydney Local Government Area.
- (c) For the avoidance of doubt, nothing in this Agreement requires the Council to:
  - (i) spend the Monetary Contribution made under this Agreement by any particular date; or
  - (ii) refund to the Developer any contribution made under this Agreement.
- (d) The Parties acknowledge and agree that the setback of buildings and height limitations under **clauses 5(d) to 5(e)** will provide more space for pedestrian use and increase the amenity of that area for pedestrians and other users, ensure that the Development on the Land does not create an unacceptable impact in terms of visual amenity and retain view corridors across the Land.

## 8 Registration of this Agreement

### 8.1 Registration

- (a) The Developer represents and warrants that it is the registered proprietor of the Land.
- (b) The Developer agrees that it will procure the registration of this Agreement, under the *Real Property Act 1900* (NSW) in the relevant folios of the register for the Land in accordance with section 7.6 of the Act.
- (c) The Developer at its own expense will, promptly after this Agreement comes into operation, take all practical steps, and otherwise do anything that the Council reasonably requires, to procure:
  - (i) the consent of each person who:
    - (A) has an estate or interest in the Land; or
    - (B) is seized or possessed of an estate or interest in the Land;
  - (ii) the execution of any documents; and
  - (iii) the production of the relevant duplicate certificates of title, to enable the registration of this Agreement in accordance with **clause 8.1(b)**.
- (d) The Developer at its own expense, will 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 90 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.

### 8.2 Removal of registration

The Council will promptly after receipt of a request from the Developer provide a release and discharge of this Agreement so that it may be removed from the folios of the register for the Land (or any part of it) provided Council is satisfied that the developer has duly fulfilled its obligations under this Agreement in connection with the final form of the Development. The final form of the Development is to be agreed between the Parties, acting reasonably and having regard to the concept development set out in the Planning Proposal.

### 8.3 Caveat

- (a) The Developer acknowledges and agrees that:
  - (i) when this Agreement is executed, Council is deemed to have acquired, and the Developer is deemed to have granted, an

equitable estate and interest in each relevant parcel of the Land for the purposes of section 74F(1) of the *Real Property Act 1900* (NSW) and consequently Council has sufficient interest in the Land in respect of which to lodge a caveat over the Land notifying that interest;

- (ii) it will not object to Council lodging a caveat in the relevant folios of the Register held by the LPI for the Land nor will it seek to remove any caveat lodged by Council provided the caveat does not prevent registration of any dealing or plan other than a transfer; and
- (iii) Council must lodge a withdrawal of any caveat in respect of the Land on the earlier of:
  - (A) the date that the Developer lodges this Agreement for registration under **clause 8.1** so that the withdrawal of the caveat will take effect on the registration of this Agreement; or
  - (B) the date upon which the Developer would otherwise be entitled to a release under **clause 8.2**.
- (b) If the Land is transferred in accordance with **clause 14**, Council must within 10 business days of the Developer giving notice to Council, provide to the Developer either a consent to register a transfer to the third party or, if the caveat can be withdrawn in accordance with this clause, a withdrawal of caveat to permit registration of the transfer.

## 9 Review of this Agreement

### 9.1 Review by agreement

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

### 9.2 State Infrastructure Contribution

- (a) The Parties acknowledge that as at the date of this Agreement, the NSW State Government is reviewing the quantum, nature and method of delivery of infrastructure required to facilitate development in the St Leonard's Precinct.
- (b) In the event that the Monetary Contributions have not been paid under this Agreement and there is a Special Infrastructure Contribution determination made under Part 7, Division 7.1, Subdivision 4 of the Act or any other similar state or regional development contribution (**SIC**) applies to the Land which imposes a requirement for the Developer to pay a SIC in relation to the Development, then, within 20 days of either Party making a request for a review, the Council and the Developer must meet to review the Agreement in accordance with the principles in **clauses 9.2(c)** and using their best endeavours and acting in good faith.

- (c) If a review of the Agreement is carried out under **clause 9.2(b)**:
  - (i) the Parties must consider during that review process, the quantum of Monetary Contributions payable by the Developer to the Council under this Agreement and a reduction of those Monetary Contributions (and any subsequent release of all or part of the Security provided by the Developer under this Agreement) by the amount of the SIC that is payable by the Developer in connection with the Development; and
  - (ii) for the avoidance of doubt, if the SIC is calculated on the basis of any height allowances or additional GFA or FSR above that which is provided under the Instrument Change, then the Monetary Contributions will only be reduced by that proportion of the SIC applicable to the height, GFA or FSR allowances under the Instrument Change; and
  - (iii) for the avoidance of doubt, before seeking to reduce the quantum of Monetary Contributions payable under this Agreement, the Developer must apply for an offset against any liability to pay a SIC on the basis that the Developer is obliged to pay the Monetary Contributions under this Agreement.
- (d) A failure by a Party to agree to participate in a review under this **clause 9.2** is taken to be a dispute for the purposes of **clause 10**.
- (e) If the Parties cannot agree to the terms of any amendment following a review under **clause 9.2**, either Party may refer the matter to dispute resolution under **clause 10**.
- (f) Nothing in this **clause 9.2** operates as a requirement for Council to pay any money to the Developer (for example if the SIC is greater than the quantum of Monetary Contributions otherwise payable by the Developer) or to refund to the Developer or any other entity, any amount paid to it under this Agreement or for any other purpose.

## 10 Dispute Resolution

### 10.1 Dispute

If any dispute arises out of this Agreement (**Dispute**), a Party to the Agreement must not commence any court or arbitration proceedings unless the Parties to the Dispute have complied with the following paragraphs of this clause except where a Party seeks urgent interlocutory relief.

### 10.2 Notice of Dispute

A Party to this Agreement claiming that a dispute has arisen out of or in relation to this Agreement must give written notice (**Notice**) to the other Party to this Agreement specifying the nature of the dispute.

### 10.3 Dispute Resolution

If the Parties do not agree within seven days of receipt of the Notice (or such further period as agreed in writing by them) as to:

- (a) the dispute resolution technique (eg expert determination) and procedures to be adopted;
- (b) the timetable for all steps in those procedures; and
- (c) the selection and compensation of the independent person required for such technique,

the Parties must mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales as published by the Law Society of New South Wales from time to time, and, the President of the Law Society of New South Wales or the President's nominee will select the mediator and determine the mediator's remuneration.

## 11 Enforcement and Security

### 11.1 Security

- (a) Prior to the Instrument Change, the Developer is to provide to the Council Security in the amount of \$3,442,500.
- (b) The Council may call on the Security provided under this clause if:
  - (i) the Developer is in material or substantial breach of this Agreement by failing to pay the Monetary Contribution and has failed to rectify the breach after having been given reasonable notice (which must not be less than 20 business days) in writing to do so; or
  - (ii) the Developer becomes Insolvent.
- (c) At any time following the provision of Security, the Developer may provide the Council with one or more replacement Securities totalling the amount of all the Securities required to be provided under this clause for the time being.
- (d) Within 20 business days of each anniversary of a Bank Guarantee provided under clause (a), the Developer must provide Council with one or more replacement Bank Guarantees (replacement Bank Guarantee) in an amount calculated in accordance with the following:

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

Where:

A is the amount of the replacement Bank Guarantee,

B is the amount of the Bank Guarantee to be replaced,

C is the CPI for the quarter ending immediately before the date of the Bank Guarantee to be replaced,

D is the CPI for the quarter ending immediately before the date of the replacement Bank Guarantee,

provided A is greater than B.

- (e) On receipt of any replacement Security, the Council must immediately release and return to the Developer, as directed, the Securities which it holds that have been replaced.
- (f) Subject to this clause, the Council may apply the proceeds of a Security in satisfaction of:
  - (i) any obligation of the Developer to pay the Monetary Contribution under this Agreement; and
  - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this Agreement.
- (g) The Council must promptly return the Security at the request of the Developer, if any of the following circumstances occur:
  - (i) The Developer has paid the Monetary Contribution to Council in accordance with **clause 5**; or
  - (ii) The Minister refuses to make the Instrument Change and the Developer withdraws the Planning Proposal seeking the Instrument Change; or
  - (iii) A Court of competent jurisdiction invalidates the Instrument Change and all avenues of appeal from that decision have been exhausted.
- (h) Nothing in this **clause 11.1** prevents or restricts the Council from taking any enforcement action in relation to:
  - (i) any obligation of the Developer under this Agreement; or
  - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this Agreement,

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

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

- (a) For the purpose of section 6.8 of the Act and any association regulations, or if the Former Building and Subdivision Provisions apply, section 109F and clause 146A of the Regulation, the following obligations must be satisfied prior to the issue of a Construction Certificate for the Development, or any part of the Development:
  - (i) provision of the Monetary Contribution in accordance with **clause 5(b)(i)**; and



- (ii) registration of the covenants required under **clause 5(e)**.
- (b) For the purpose of section 6.10 of the Act and any associated regulations, or if the Former Building and Subdivision Provisions apply, section 109H(2) of the Act, the following obligations must be satisfied prior to the issue of any Occupation Certificate for the Development or any part of the Development:
  - (i) provision of the Monetary Contribution in accordance with **clause 5(b)(ii)**;
  - (ii) completion, to the Council's satisfaction acting reasonably, of the construction of the Setback Area as required under **clause 5(d)(ii)**; and
  - (iii) registration of the Easement in Gross under **clause 5(d)(iii)**.

### **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.

### **11.4 Acknowledgement regarding Security**

The Parties acknowledge and agree that the security provided under this **clause 11** together with the timing of requirements to pay contributions, the requirements under **clause 8** for registration of this Agreement and the restrictions on assignment of this Agreement under **clause 14** will provide sufficient security for the performance of the Developer's obligations under this Agreement.

## **12 Notices**

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

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

Developer **Rozene Pty Ltd**  
Attention: Harry Andrews  
Address: Level 1, 161-163 Military Road  
Neutral Bay NSW 2089  
Fax 02 9953 8722  
Email harrya@equitibuild.com.au

Developer **Rosemate Pty Limited**  
Attention: George Manettas  
Address: Level 16, 168 Walker Street  
North Sydney NSW 2060  
Fax 02 9953 8722  
Email gmanettas@goodbran.com.au

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

## 13 Approvals and Consent

The Parties acknowledge that:

- (a) except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in that Party's absolute discretion and subject to any conditions determined by the Party;
- (b) a Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions; and
- (c) this Agreement does not impose any obligation on a Consent Authority to:
  - (i) grant development consent; or
  - (ii) exercise any function under the Act in relation to a change in an environmental planning instrument.

## 14 Assignment and Dealings

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

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

## 15 Costs

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

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

within ten business days after receipt of a notice from the Council as to the amount of those costs.

## 16 Entire Agreement

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

## 17 Further Acts

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

## 18 Governing Law and Jurisdiction

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

Without preventing any other method of service, any document in an action may be served on a Party by being delivered or left at that Party's address set out in **clause 12(a)**.

## 19 Joint and individual liability and benefits

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

## 20 No fetter

Nothing in this Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

## 21 Representations and warranties

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

## 22 Severability

- (a) The Parties acknowledge that under and by virtue of Section 7.4(4) of the Act, any provision of this Agreement is not invalid by reason only that there is no connection between the Planning Proposal or the Development and the object of the expenditure of any money required to be paid by that provision.
- (b) The Parties agree that to the extent permitted by law, this Agreement prevails to the extent of its inconsistency with any law.
- (c) If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way.
- (d) If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

## 23 Modification

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

## 24 Waiver

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

## 25 GST

### 25.1 Construction

In this **clause 25**:

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

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

## **25.2 GST not payable**

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

## **25.3 Additional amount of GST payable**

If GST is imposed on any supply made under or in accordance with this Agreement, the Council agrees that the contributions delivered under this Agreement are inclusive of GST and will pay the GST for the taxable supply.

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

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

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

## **27 Explanatory Note**

The explanatory note prepared in connection with this Agreement pursuant to the Regulation is not to be used to interpret this Agreement.

## **28 Counterparts**

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

# Schedule 1

## Interpretation (clause 1.1)

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

**Additional GFA** means any additional GFA approved for the Land under a Development Consent that is above 5,021sqm and which is facilitated by the Instrument Change (including any additional GFA obtained under a variation sought under clause 4.6 of LEP 2013).

**Bank Guarantee** means an irrevocable and unconditional undertaking by one of the following trading banks:

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

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

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

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

**Construction Certificate** means a construction certificate as defined under section 6.4 of the Act, or if the Former Building and Subdivision Provisions apply, section 109C of the Act.

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

**Development** means the proposed mixed use development on the Land to a maximum height of 56m.

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

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

**Easement in Gross** means an easement in gross limited in depth to a point below ground level that will accommodate basement structures and support and limited in height to no less than 1 storey above ground level granted in favour of the Council that permits public access to the Setback Area.

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

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

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

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

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

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

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

**Instrument Change** means a change to LEP 2013 to:

- (a) the Height of Buildings Map to allow a maximum building height on the Land of 56m; and
- (b) the Floor Space Ratio Map to allow a maximum Floor Space Ratio of 7.0:1 on the Land.

**Land** means the property located at 575-583 Pacific Highway, St Leonards (being Lot A in Deposited Plan 431687, Lot 10 in Deposited Plan 660453 and Lot 1 in Deposited Plan 772247).

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

**Marco Building** means the 1945 heritage listed 3 storey building (Local Heritage Item 11034).

**Modification** means the grant of any Modification Application under s96 of the Act.

**Modification Application** means an application to modify a Development Consent under s96 of the Act.

**Monetary Contribution** means the monetary contribution to be paid by the Developer to the Council in accordance with **clause 5(a)** of this Agreement.



**Occupation Certificate** means an occupation certificate as defined under section 6.4 of the Act, or if the Former Building and Subdivision Provisions apply, section 109C of the Act.

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

**Planning Proposal** means the Application Form dated 2 June 2015 and Planning Proposal dated May 2015 prepared by C/T Group submitted by the Developer and received by Council on 3 June 2015.

**Public Open Space** means public open space within the North Sydney Local Government Area.

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

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

**Setback Area** means the area of the Land created by the set back of a building approved under a Development Consent (as modified) from the Pacific Highway, as required by **clause 5(c)** of this Agreement.

**Strata Certificate** has the same meaning as in the Strata Schemes Act.

**Strata Plan** means a strata plan or strata plan of subdivision within the meaning of the Strata Schemes Act.

**Strata Schemes Act** means the Strata Schemes (Freehold Development) Act 1973 (NSW).


# Execution

**Executed** as an agreement.

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

  
.....  
Witness

CARL McCONKEY  
.....  
Name of Witness (print)

  
.....  
Officer

Margaret Palmer  
.....  
Name of Officer (print)

**Executed by Bozere Pty Limited** )  
..... )

  
.....  
Company Secretary/Director

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


  
.....  
Director

NICK ANDREWS  
.....  
Name of Director (print)

**Executed by Rosemate Pty Limited** )  
..... )

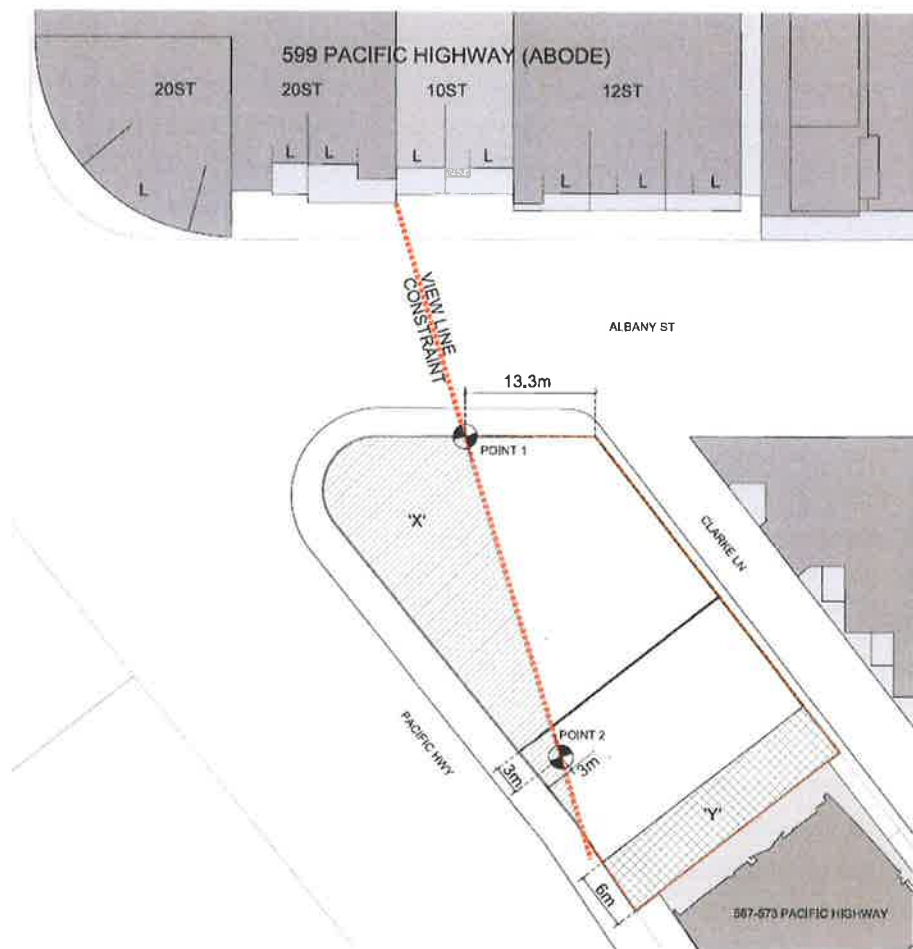
  
.....  
Company Secretary/Director

MARIA M. MANETTAS  
.....  
Name of Company Secretary/Director  
(print)

  
.....  
Director

GEORGE MANETTAS  
.....  
Name of Director (print)

# Annexure A – Plan showing Height Restrictions



575-583 PACIFIC HWY, ST LEONARDS  
 ABODE VIEW LINE SET OUT DRAWING  
 REV 6 - 27/04/2017

14052

AJC  
74 Myrtle St Unit 10/11 Chippendale NSW 2008 AUSTRALIA  
 ph: +61 2 921 1377 fx: +61 2 921 1378 email: ajc@ajc.com.au

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*[Handwritten signatures]*

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