

## **Planning Agreement**

**229 Macquarie Grove Road, Kirkham (Wivenhoe)**

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The Council of Camden (ABN 31 117 341 764) (**Council**)

Trustees of the Sisters of the Good Samaritan (ABN 42 062 542 036) (**Developer**)

Prepared by:

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# Planning Agreement

## 229 Macquarie Grove Road, Kirkham (Wivenhoe)

### Parties

<b>Council</b>	<b>Name</b>	The Council of Camden
	<b>Address</b>	37 John Street CAMDEN NSW 2570
	<b>ABN</b>	31 117 341 764
<b>Developer</b>	<b>Name</b>	The Trustees of the Sisters of the Good Samaritan
	<b>Address</b>	1A Harris Road FIVE DOCK NSW 2046
	<b>ABN</b>	42 062 542 036

### Background

- A** The Developer is the registered proprietor of the land contained in certificate of folio identifier 1/217570 and known as 229 Macquarie Grove Road, Kirkham (**Land**).
- B** The Developer has lodged the Development Application with Council.
- C** The Developer has offered to provide the Contributions in accordance with this agreement if the Development Consent is granted.

### Operative Provisions

#### 1 Agreement

The agreement of the parties is:

- (1) made in consideration of, amongst other things, the mutual promises contained in this agreement; and
- (2) set out in these Operative Provisions.

#### 2 Definitions

##### 2.1 Defined terms

In this agreement, words beginning with a capital letter that are defined in Part 1 of **Schedule 1** have the meaning ascribed to them in that schedule.

##### 2.2 Interpretation

The interpretational rules contained in Part 2 of **Schedule 1** apply in the interpretation of this agreement.

#### 3 Application and operation of agreement

##### 3.1 Planning agreement

The parties agree that this agreement is a planning agreement:

- 
- (1) within the meaning set out in section 93F of the Act; and
  - (2) governed by Subdivision 2 of Division 6 of Part 4 of the Act.

### **3.2 Application**

This agreement applies to the Development.

### **3.3 Operation**

- (1) Unless set out in paragraph (2) this agreement operates upon the Developer obtaining any Construction Certificate with respect to the Development Consent, within the meaning set out in clause 109C(1)(b) of the *Environmental Planning and Assessment Act 1979* (NSW).
- (2) This agreement does not operate to require the Developer to make any Contributions unless and until the Council grants the Development Consent.

### **3.4 Heads of Planning Agreement**

The parties agree that on the date that this agreement is entered into the Heads of Agreement is terminated.

## **4 Provision of Contributions**

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### **4.1 Provision**

The Developer acknowledges that if this agreement were not entered into, the Council would have been entitled to impose conditions in the Development Consent pursuant to section 94 of the Act.

### **4.2 Contribution Works**

The Developer must, at its cost:

- (1) obtain development consent, and any other form of consent required by a relevant Authority, for the construction and use of the Works;
- (2) carry out and complete the Works to the satisfaction of the Council by the time specified in Part B of **Schedule 2**;
- (3) carry out and complete the Works:
  - (a) in accordance with any relevant development consent;
  - (b) in accordance with the requirements of any consent or approval required for the Works by any Authority;
  - (c) in accordance with any Australian Standards applicable to works of the same nature as each aspect of the Works; and
  - (d) in a proper and workmanlike manner complying with current industry practice and standards relating to each aspect of the Works.

### **4.3 Embellishment**

As soon as possible after the date of this agreement the parties will negotiate in good faith concerning any embellishments to be carried out by the Developer in the proposed parks set out in Part B of **Schedule 2**.

### **4.4 Financial Contributions**

The Developer must pay the Financial Contributions by the time specified in Part A of **Schedule 2**.

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#### 4.5 Indexation of amounts

The Financial Contributions are to be adjusted (with the calculation to be made as from the date any such amount is due to be paid under this agreement) in accordance with the following formula:

$$A = B \times C/D$$

where:

- A** = the adjusted amount;
- B** = the relevant amount as set out in this agreement;
- C** = the CPI most recently published before the date that the relevant payment or the calculation with respect to the relevant amount is to be made; and
- D** = the CPI most recently published before the date of this agreement.

#### 4.6 Public Facilities

- (1) The Developer must allow public access to the:
  - (a) sporting field in the general proximity of Wivenhoe (set out at Item 4 of Part B in **Schedule 2**) (**Sportsground**) at reasonable times:
    - (i) on weekdays outside normal school hours (which are agreed to be between 8am and 4pm); and
    - (ii) on weekends; and
  - (b) multipurpose community facilities being the Wivenhoe stables (set out at Item 5 of Part B in **Schedule 2**) (**Stables**) as a minimum during 9am to 6pm from Monday to Friday (by appointment and for approved uses only),  
**(Public Facilities)**.
- (2) If required by the Council, the Developer will do all things necessary to register a public positive covenant on the title of that part of the Land that contains the Public Facilities that will provide for:
  - (a) the Developer providing public access to the relevant facility at reasonable times; and
  - (b) the Developer undertaking the care and maintenance of the relevant facility. For the purpose of clarity the Developer will bear all risk associated with the relevant facility.
- (3) Council will include the Sportsground and the Stables in its schedule of fees and charges to make the public aware of the availability of these facilities. Fees need to be negotiated with Council.
- (4) If access to the Sportsground by the public is hindered to a substantial degree after the Sportsground is Complete, Council may, by notice in writing to the Developer, require the Developer to pay a financial contribution of \$165,317 (to be indexed as per Clause 4.5) on account of the failure of the Developer to provide the relevant material public benefit required by Council under this agreement. Any such payment must be made within sixty (60) days of the date the relevant notice is served.
- (5) If access to the Stables by the public is hindered to a substantial degree after the Stables are Complete, Council may, by notice in writing to the Developer, require the Developer to pay a financial contribution of \$72,477 (to be indexed as per Clause 4.5) on account of the failure of the Developer to provide the relevant material public benefit required by Council under this agreement. Any such payment must be made within sixty (60) days of the date the relevant notice is served.
- (6) The Developer may at any time and at its discretion:

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- (c) pay Council the amount referred to in paragraph 0, in which case it will be relieved of its obligation to make the Sportsground publicly available; or
  - (d) pay Council the amount referred to in paragraph 0, in which case it will be relieved of its obligation to make the Stables publicly available.
- (7) If the Developer pays an amount referred to in paragraph 0 or 0 (either of its own accord or if required to do so by the Council) then the Council must do all things necessary to remove of any public positive covenant registered under paragraph (2) affecting the relevant facility from the title of the Land as and from the date the payment is made.

## **5 Application of s94 & s94A**

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For the purposes of section 93F(3)(d) of the Act, this agreement excludes the application of sections 94 & 94A of the Act to the Development.

## **6 Heritage Works**

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### **6.1 Heritage CMP and Scope of Works**

The Developer warrants that it:

- (1) has lodged the Heritage CMP and Scope of Heritage Works with Council as part of the Development Application;
- (2) will be bound by the terms of the Heritage CMP and Scope of Heritage Works; and
- (3) will carry out the Heritage Conservation Works in accordance with the terms of the Heritage CMP and Scope of Heritage Works.

### **6.2 Maintenance prior to commencement of Heritage Conservation Works**

- (1) Prior to the commencement of the Heritage Conservation Works the Developer will carry out any works on Wivenhoe that are necessary to ensure that it is maintained in its condition at the date the Development Consent is issued.
- (2) Within one (1) month of the Development Consent being issued, the Developer will prepare and submit to Council a condition report detailing the condition of Wivenhoe as at the date the Development Consent is issued.

### **6.3 Timing of Heritage Conservation Works**

- (1) The Developer must commence the Heritage Conservation Works prior to the receipt of a Subdivision Certificate for the 81<sup>st</sup> Final Lot in that part of the Land zoned 7(d)(4) on the areas shown on the Indicative Plan.
- (2) The Developer will complete the Heritage Conservation Works prior to the issue of the final Subdivision Certificate for the Development.
- (3) Until the Developer complies with paragraph (1):
  - (a) the Developer undertakes to the Council not to make an application for; and
  - (b) Council may refuse to issue,  
a Subdivision Certificate for any lots in the Development in excess of the first eighty (80) Final Lots in that part of the Land zoned 7(d)(4) on the areas shown on the Indicative Plan.

### **6.4 Certification of Completion of Heritage Conservation Works**

- (1) For the purpose of this clause a **Heritage Consultant** is a "qualified practising heritage consultant" appointed by the Developer and approved by Council.



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- (2) The Developer must serve a notice (**Heritage Works Completion Notice**) on the Council advising that, in the opinion of the Developer, the Heritage Conservation Works have been Completed.
  - (3) As soon as possible after a Heritage Works Completion Notice is served, Council must ensure that the Heritage Consultant inspects the Heritage Conservation Works to assess if they have been Completed.
  - (4) Within seventy two (72) days of the date a Heritage Works Completion Notice is served, Council must provide notice in writing to the Developer that the Heritage Conservation Works set out in the Heritage Works Completion Notice have, in the opinion of the Heritage Consultant:
    - (a) been Completed; or
    - (b) not been Completed, in which case the notice must also detail:
      - (i) those aspects of the Heritage Conservation Works which have not been Completed; and
      - (ii) the work the Council requires the Developer to carry out in order to rectify the deficiencies in those Heritage Conservation Works (**Rectification Notice**).
  - (5) If Council does not provide the Developer with a notice in accordance with paragraph (4), the Heritage Conservation Works will be deemed to have been Completed.
  - (6) Where Council serves a Rectification Notice on the Developer, the Developer must:
    - (a) rectify the Heritage Conservation Works in accordance with that notice within three (3) months from the date it is issued by Council; or
    - (b) serve a notice on Council that it disputes the matters set out in the Rectification Notice.
  - (7) Where the Developer:
    - (a) serves notice on Council in accordance with paragraph (6)(b), the dispute resolution provisions of this agreement apply; or
    - (b) rectifies the Heritage Conservation Works in accordance with paragraph (6)(a), it must serve upon Council a new Heritage Works Completion Notice for the Heritage Conservation Works it has rectified.
  - (8) The costs incurred in connection with the Heritage Consultant under this clause must be met by the Developer.

## 6.5 Ongoing Maintenance of Wivenhoe

After Completion of the Heritage Conservation Works, the Developer must continue to maintain and conserve Wivenhoe so as to ensure the continuity of outcomes set out in the Heritage CMP.

## 7 Bushland Conservation

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### 7.1 Bushland CMS & Bushland CMP

The Developer warrants that it:

- (1) has lodged the Bushland CMP with Council as part of its Development Application;
- (2) will be bound by the terms of the Bushland CMS & Bushland CMP; and
- (3) will carry out the Bushland Conservation Works in accordance with the terms of the Bushland CMS, the Bushland CMP and this agreement.

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## 7.2 Maintenance prior to commencement of Bushland Conservation Works

- (1) Prior to the commencement of the Bushland Conservation Works the Developer will carry out any works on the Bushland Areas that are necessary to ensure that those areas are not further degraded from their condition at the date the Development Consent is issued.
- (2) The works referred to in paragraph (1) must not be inconsistent with the Bushland CMS and the Bushland CMP.

## 7.3 Timing of works

The Developer will adhere to the program for the completion of the Bushland Conservation Works set out in the Bushland CMP.

## 7.4 Annual reports

- (1) The Developer must provide Council with a report on each anniversary of the date on which the Development Consent is issued by Council that sets out:
  - (a) the Bushland Conservation Works carried out in the preceding twelve (12) month period;
  - (b) any matters that may impact upon the Developer's ability to carry out further Bushland Conservation Works in accordance with the Bushland CMS and the Bushland CMP; and
  - (c) the extent to which the desired outcomes set out in the Bushland CMS and the Bushland CMP were achieved in the preceding twelve (12) months.
- (2) The Developer will be discharged from its obligation under paragraph (1) upon completion of the Bushland Conservation Works.

## 7.5 Completion of the Bushland Conservation Works

- (1) The Bushland Conservation Works are Complete when they have been completed in accordance with the Bushland CMP.
- (2) Upon Completion of the Bushland Conservation Works, the Developer must ensure that it complies with any obligations imposed on it under the CMP in respect of the maintenance of the Bushland Areas retained in its ownership by the establishment of a National Heritage Trust or similar conservation trust (**Trust**).
- (3) Once it is established, the Trust will:
  - (a) facilitate the funding requirements of the obligations imposed on the Developer pursuant to paragraph (2); and
  - (b) discharge any ongoing responsibility imposed on the Developer in respect of the maintenance of the Bushland Areas retained in the ownership of the Developer.
- (4) For the purpose of clarity, nothing in this clause 7.5 relieves the Developer from any liability for the obligations referred to in paragraph (2), however the Council acknowledges and agrees that those obligations will be discharged by the Trust.

## 7.6 Alternative strategies

Council will give full and proper consideration to any proposal by the Developer to alter the methods by which the desired outcomes of the Bushland CMS and/or the Bushland CMP can be achieved.

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## **8 Completion of Works**

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### **8.1 Issue of Completion Notice**

If the Developer considers that any particular Item of Work is Complete it will serve a notice on Council which:

- (1) is in writing;
- (2) identifies the particular Item of Work to which it relates; and
- (3) specifies the date on which, the Developer believes the relevant Item of Work was Completed;

**(Completion Notice).**

### **8.2 Inspection by Council**

Council must inspect each Item of Work set out in a Completion Notice within fourteen (14) days of the receipt of that notice.

### **8.3 Rectification Notice**

- (1) Within twenty eight (28) days of the end of the time period referred to in clause 8.2, Council must provide notice in writing (**Rectification Notice**) to the Developer that the Items of Work set out in the Completion Notice:
  - (a) have been Completed; or
  - (b) have not been Completed, in which case the notice must also detail:
    - (i) those aspects of the Items of Work which have not been Completed; and
    - (ii) the work the Council requires the Developer to carry out in order to rectify the deficiencies in those Items of Work.
- (2) If Council does not provide the Developer with a Rectification Notice in accordance with paragraph (1), the Items of Work set out in the Completion Notice will be deemed to have been Completed.
- (3) Where Council serves a Rectification Notice on the Developer the Developer must:
  - (a) rectify the relevant Items of Work in accordance with that notice within three (3) months from the date it is issued by the Council; or
  - (b) serve a notice on the Council that it disputes the matters set out in the notice.
- (4) Where the Developer:
  - (a) serves notice on Council in accordance with paragraph (3)(b), the dispute resolution provisions of this agreement apply; or
  - (b) rectifies the Works in accordance with paragraph (3)(a), it must serve upon the Council a new Completion Notice for the Works it has rectified.

### **8.4 Works-As-Executed-Plan**

No later than sixty (60) days after an Item of Work is Complete, the Developer will submit to the Council a copy of a full Works-As-Executed-Plan in respect of that Item of Work.

### **8.5 Public Access**

- (1) The parties will do all things reasonably necessary to procure that public positive covenants (**Covenants**) are registered on the title of those parts of the Land:
  - (a) upon which an Item of Work set out in items 2, 6 and 7 of Part B of **Schedule 2** is erected; or

- 
- (b) which is zoned 7(d) under the New LEP,  
as soon as possible after the relevant part of the Land is created as a separate lot.
- (2) The parties will do all things reasonably necessary to procure that easements (**Easements**) are registered on the title of those parts of the Land upon which an Item of Work set out in item 3 of Part B of **Schedule 2** is erected as soon as possible after the relevant part of the Land is created as a separate lot.
- (3) The terms of any Covenant or Easement will provide for:
- (a) the Developer to provide public access to the relevant Item of Work or part of the Land at all reasonable times; and
- (b) the Developer will undertake the care and maintenance of the relevant Item of Work or part of the Land. For the purpose of clarity the Developer will bear all risk associated with the relevant Item of Work or Part of the Land.

## **9 Defects Liability**

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### **9.1 Defects Notice**

- (1) Where any Item of Work has been Completed but that item contains a defect which adversely affects the ordinary use and/or enjoyment of the relevant item (**Defect**) Council may issue a defects notice (**Defects Notice**) concerning that item but only within the Defects Liability Period.
- (2) A Defects Notice must contain the following information:
- (a) the nature and extent of the Defect;
- (b) the work Council requires the Developer to carry out in order to rectify the Defect; and
- (c) the time within which the Defect must be rectified (which must be a reasonable time and not less than fourteen (14) days).

### **9.2 Developer to Rectify Defects**

- (1) The Developer must rectify the Defects contained within a Defects Notice as soon as practicable after receipt of the Defects Notice.
- (2) The Developer must follow the procedure set out in clause 8 in respect of the satisfaction of the Defects Notice.

### **9.3 Right of Council to Step-In**

Council may, at its absolute discretion, enter upon the Land for the purpose of satisfying the Defects Notice where the Developer has failed to comply with a Defects Notice but only after giving the Developer seven (7) days written notice of its intention to do so.

### **9.4 Consequence of Step-In**

If Council elects to exercise the step-in rights granted to it under clause 9.3 then:

- (1) Council may:
- (a) enter upon any part of the Land that it requires access to in order to satisfy the obligations of the Developer in accordance with the Defects Notice; and
- (b) rectify the relevant Defects in accordance with the Defects Notice; and
- (2) the Developer must not impede or interfere with Council in undertaking that work.

### **9.5 Costs of Council**

Where Council exercises its step-in rights all, costs incurred by Council in rectifying the relevant Defects may recover those costs as a debt due in a court of competent jurisdiction.

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## 10 Indemnity and Insurance

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### 10.1 Indemnity

The Developer indemnifies the Council, its employees, officers, agents, contractors and workmen against all Claims that arise in connection with the carrying out of the Contribution Works and any other obligation under this agreement except to the extent that any such Claim arose as a result of an act or omission of Council.

### 10.2 Insurance

- (1) The Developer will take out and keep current the following insurances during the following periods in relation to the Works:
  - (a) contract works insurance, noting the Council as an interested party, for the full replacement value of the Works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover the Developer's liability in respect of damage to or destruction of the Works until those works are Complete,
  - (b) public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party until those works are Completed and thereafter during any period that the Developer is required to provide public access to the relevant Work under this agreement,
  - (c) workers compensation insurance as required by law for any employee involved in the construction or maintenance of the Works until those works are Complete, and
  - (d) any other insurance required by law until those works are Complete.
- (2) If the Developer fails to comply with paragraph (1), the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Developer to the Council and may be recovered by the Council as it deems appropriate including:
  - (a) by calling upon the Security provided by the Developer to the Council under this Agreement, or
  - (b) recovery as a debt due in a court of competent jurisdiction.
- (3) The Developer must not commence the Works unless it has first provided to the Council satisfactory written evidence of all the insurances specified in paragraph (1).

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## 11 Force Majeure

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### 11.1 Definition

In this clause 11, **Force Majeure** means any physical or material restraint beyond the reasonable control of a party claiming the Force Majeure and includes, without limitation, fire, and industrial disputes.

### 11.2 Delay by reason of Force Majeure

- (1) If a party is unable by reason of Force Majeure to carry out wholly or in part its obligations under this agreement (except an obligation to pay money), it must:
  - (a) give to the other party prompt notice of the Force Majeure with reasonably full particulars; and
  - (b) suggest an alternative method, if any, of satisfying its obligations under this agreement.

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- (2) If a party is unable to satisfy its obligations under this agreement by an alternative method, the obligations of the parties so far as they are affected by the Force Majeure are then suspended during continuance of the Force Majeure and any further period as may be reasonable in the circumstances.
  - (3) The party giving such notice under this clause must use all reasonable effort and diligence to remove the Force Majeure or ameliorate its effects as quickly as practicable.

### **11.3 Dispute**

If the parties are unable to agree on the existence of an event of Force Majeure or the period during which the obligations of the parties are suspended during the continuance of the Force Majeure, that dispute must be referred for determination under clause 14.

## **12 Security**

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### **12.1 Prohibition**

Neither party may Assign their rights under this agreement without the prior written consent of the other party.

### **12.2 Assignment of Land**

The Developer must not Assign its interest in the Land, other than a Final Lot, unless:

- (1) Council consents to the Assignment, acting reasonably; and
- (2) the proposed assignee enters into an agreement to the satisfaction of Council under which the assignee agrees to be bound by the terms of this agreement in relation to that part of the Land to be assigned.

### **12.3 Registration of this agreement**

- (1) This agreement will be registered on the title of the Land pursuant to s 93H of the Act.
- (2) Council must do all things necessary to allow the Developer to remove this agreement from the title of any part of the Land:
  - (a) with respect to which the Developer has complied with its obligations to provide the Contributions; or
  - (b) upon the issue of a Subdivision Certificate for a plan that, when registered, would create Final Lots with respect to which the Developer has complied with its obligations to provide the Contributions.

### **12.4 Obligations of the Developer**

The Developer must:

- (1) do all things necessary to allow the registration of this agreement to occur under clause 12.3; and
- (2) pay any reasonable costs incurred by Council in undertaking that registration.

### **12.5 Bond or Bank Guarantee**

- (1) The Developer will, within fourteen (14) days of being requested to do so by the Council, provide to Council a bank guarantee in an amount of thirty five thousand dollars (\$35,000) to secure the obligations of the Developer under this Agreement.
- (2) The parties acknowledge that the amount of the bond referred to in paragraph (1) has been requested by the Council on the basis that it will secure the payment of any legal costs incurred by the Council in instituting legal proceedings against the Developer as a result of any breach of this Agreement by the Developer.

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## **13 Review & amendment**

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### **13.1 Negotiation of review**

If either party requests a review of the whole or any part of this agreement then the parties must use their best endeavours, acting in good faith, to review this agreement in accordance with that request.

### **13.2 Amendment to be in writing**

If the parties agree to amend this agreement as a result of a review conducted under clause 13.1 then any such amendment will only have effect if it:

- (1) is in writing and signed by both parties; and
- (2) complies with any requirements set out in the Act.

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## **14 Dispute resolution**

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### **14.1 Notice of Dispute**

If a party believes that there is a dispute in respect of this agreement (**Dispute**) then:

- (1) that party must give notice (**Dispute Notice**) in writing to the other party stating that there is a Dispute; and
- (2) the Dispute Notice must outline:
  - (a) what the party believes the dispute to be; and
  - (b) what the party wants to achieve; and
  - (c) what the party believes will settle the Dispute; and
  - (d) who will be the party's representatives to negotiate the dispute.

### **14.2 Consultation between the Representatives**

Within fifteen (15) business days of a notice served in accordance with clause 14.1(1) the representatives (**Representatives**) of each of the parties must meet in order to resolve the Dispute.

### **14.3 Settlement of Dispute and mediation**

- (1) If the Dispute cannot be resolved by the Representatives within a further fifteen (15) business days of a meeting between the Representatives in accordance with clause 14.2 then the Dispute must be submitted to mediation by a mediator selected:
  - (a) by the parties; or
  - (b) if the parties cannot agree on a mediator, by the President of the Australian Commercial Disputes Centre.
- (2) The parties are to appoint a mediator who is appropriately qualified and have practical experience in the area of the Dispute.
- (3) Any costs incurred in the mediation of the Dispute are to be borne equally by the parties.

### **14.4 Exclusivity of dispute resolution procedure**

- (1) Both parties must adhere to the dispute resolution procedure set out in this agreement.
- (2) The only time that either party may depart from the dispute resolution procedure set out in this clause is when urgent interlocutory relief is required to restrain a breach or threatened breach of this agreement.

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## **15 Default**

### **15.1 Events of default**

The Developer commits an "Event of Default" if it:

- (1) breaches a term of this agreement;
- (2) fails to comply with the terms of the Heritage CMP;
- (3) fails to comply with the terms of the Bushland CMP; or
- (4) fails to comply with the terms and conditions of the Development Consent.

### **15.2 Consequences of Events of default**

Where the Developer commits an Event of Default the Council may serve a notice on the Developer requiring the relevant breach to be rectified within a reasonable time (which must be no less than seventy two (72) days) of the date of the notice.

### **15.3 No restriction on rights**

The rights vested in the Council pursuant to clause 15.2 do not prevent Council from exercising any other rights that it may possess at law.

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## **16 Termination**

### **16.1 Termination**

This agreement terminates in the following events:

- (1) the parties agree in writing to terminate the operation of this agreement at any time; or
- (2) the Council serves notice on the Developer terminating this agreement where the Developer has failed to comply with a notice issued in accordance with clause 15.2.

### **16.2 Consequence of termination**

Upon termination of this agreement:

- (1) all future rights and obligations of the parties are discharged;
- (2) the Council must do all things necessary to remove this agreement from the title of the Land;
- (3) any security held under this agreement will be released; and
- (4) all pre-existing rights and obligations of the parties continue to subsist.

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## **17 Position of Council**

### **17.1 Consent authority**

The parties acknowledge that Council is a consent authority with statutory rights and obligations pursuant to the terms of the Planning Legislation.

### **17.2 Agreement does not fetter discretion**

This agreement is not intended to operate to fetter, in any unlawful manner:

- (1) the power of Council to make any Law; or
- (2) the exercise by Council of any statutory power or discretion, (Discretion).

### **17.3 Severance of provisions**

- (1) No provision of this agreement is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this



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agreement is held by a court of competent jurisdiction to constitute an unlawful 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 17 is substantially satisfied; and
  - (b) in the event that paragraph (1)(a) cannot be achieved without giving rise to an unlawful fetter on 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 on relation to the provision of this agreement which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.
- (2) Where the Law permits Council to contract out of a provision of that Law or gives Council power to exercise a Discretion, then if Council has in this agreement contracted out of a provision or exercised a Discretion under this agreement, then to the extent of this agreement is not to be taken to be inconsistent with the Law.

#### **17.4 No Obligations**

Nothing in this agreement will be deemed to impose any obligation on Council to exercise any of its functions under the Act in relation to the Development Consent, the Land or the Development in a certain manner.

### **18 Confidentiality**

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#### **18.1 Agreement not confidential**

The parties acknowledge that this agreement:

- (1) is not confidential;
- (2) may be treated as a public document by the Council; and
- (3) may be publicly exhibited and reported without restriction by either party.

#### **18.2 Non-disclosure**

- (1) A party must not disclose Confidential Information disclosed to it by the other party except:
  - (a) with the prior written consent of the disclosing party; or
  - (b) in accordance with the terms of this agreement.
- (2) A party may not unreasonably withhold its consent to disclosure in accordance with paragraph 18.2(1)(a) where:
  - (a) the requested disclosure is made for the purpose of facilitating the proper performance of a party's obligations under this agreement; and
  - (b) the disclosure is to be made to persons who:
    - (i) reasonably require the disclosure of the information; and
    - (ii) are subject to a duty of confidentiality on the same or similar terms to that contained in this clause.

#### **18.3 Use of Confidential Information**

A party may use, copy, reproduce or otherwise deal with the Confidential Information disclosed to it only:

- (1) during the term of this agreement; and
- (2) in accordance with the terms of this agreement; and

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- (3) in a manner that is related to the proper and lawful conduct and performance of its obligations under this agreement.

#### **18.4 Exceptions to non-disclosure**

A party may disclose Confidential Information that has been disclosed to it:

- (1) where such disclosure is made to those of its employees, advisers, related bodies corporate and shareholders who:
- (a) have a need to know (and only to the extent each has a need to know); and
  - (b) are aware and agree that the information that is to be disclosed must be kept confidential; or
- (2) which, at the time of disclosure, is within the public domain or after disclosure comes into the public domain other than by a breach or breaches by any party (whether the party to this agreement or a third party) of any obligation owed to the other party; or
- (3) where:
- (a) required by law or any order of any court, tribunal, authority, regulatory body or the rules of any securities exchange (whether in Australia or elsewhere) to be disclosed; and
  - (b) the party ensures that information is disclosed only to the extent reasonably and lawfully required.

#### **18.5 Duration of confidentiality obligations**

Unless otherwise agreed by the parties in writing the obligation of confidentiality set out in this agreement operates indefinitely and does not terminate on the expiry or earlier termination of this agreement.

### **19 GST**

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#### **19.1 Defined GST Terms**

Defined terms used in this clause 19 have the meaning ascribed to them in the GST Law.

#### **19.2 GST to be added to amounts payable**

- (1) If GST is payable on a Taxable Supply made under, by reference to or in connection with this agreement, the party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- (2) This clause does not apply to the extent that the Consideration for the Taxable Supply is expressly agreed to be GST inclusive.
- (3) Unless otherwise expressly stated, prices or other sums payable or Consideration to be provided under or in accordance with this agreement are exclusive of GST.

#### **19.3 GST obligations to survive termination**

This clause 19 will continue to apply after expiration of termination of this agreement.

### **20 Change of Laws**

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If, at the time a Contribution is required to be made by the Developer under this agreement a New Law is in force that requires the Developer to make a monetary contribution, carry out work or provide a material public benefit;

- (1) to any Authority;
- (2) for a Public Purpose (as defined in the Act);
- (3) that is the same as, or satisfies the same Public Purpose as, part of the Contributions,

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(New Contribution) then the Developer's obligation to provide that part of the Contributions is discharged if it provides the New Contribution.

## **21 Miscellaneous**

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### **21.1 Obligation to act in good faith**

The parties must at all times:

- (1) cooperate and use their best endeavours to profitably and professionally give effect to the rights and obligations of the parties set out in this agreement; and
- (2) not unreasonably delay any action, approval, direction, determination or decision which is required of it; and
- (3) make approvals or decisions that are required of it in good faith; and
- (4) be just and faithful in its activities and dealings with the other parties.

### **21.2 Consultation concerning development applications**

If the Developer is required to lodge an application for development consent for any matter required to be carried out by it under this agreement then it will consult with Council in good faith in relation to the relevant works before lodging any such application.

### **21.3 Legal costs**

Each party must bear its own legal costs in respect of the negotiation, preparation and execution of this agreement.

### **21.4 Taxes**

The Developer must pay all taxes, duties and other governmental fees and charges payable in respect of this agreement.

## **22 Administrative provisions**

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### **22.1 Notices**

- (1) Any notice, consent or other communication under this agreement must be in writing and signed by or on behalf of the person giving it, addressed to the person to whom it is to be given and:
  - (a) delivered to that person's address; or
  - (b) sent by pre-paid mail to that person's address; or
  - (c) transmitted by facsimile to that person's address.
- (2) A notice given to a person in accordance with this clause is treated as having been given and received:
  - (a) if delivered to a person's address, on the day of delivery if a Business Day, otherwise on the next Business Day; and
  - (b) if sent by pre-paid mail, on the third Business Day after posting; and
  - (c) if transmitted by facsimile to a person's address and a correct and complete transmission report is received, on the day of transmission if a Business Day, otherwise on the next Business Day.
- (3) For the purpose of this clause the address of a person is the address set out in this agreement or another address of which that person may from time to time give notice to each other person.

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**22.2 Entire agreement**

This agreement is the entire agreement of the parties on the subject matter. All representations, communications and prior agreements in relation to the subject matter are merged in and superseded by this agreement.

**22.3 Waiver**

The non-exercise of or delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the parties to be bound by the waiver.

**22.4 Cooperation**

Each party must sign, execute and deliver all agreements, documents, instruments and act reasonably and effectively to carry out and give full effect to this agreement and the rights and obligations of the parties under it.

**22.5 Counterparts**

This agreement may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

**22.6 Unenforceability**

Any provision of this agreement which is invalid or unenforceable in any jurisdiction is to be read down for the purposes of that jurisdiction, if possible, so as to be valid or enforceable, and is otherwise capable of being severed to the extent of the invalidity or enforceability, without affecting the remaining provisions of this agreement or affecting the validity or enforceability of that provision in any other jurisdiction.

**22.7 Power of Attorney**

Each attorney who executes this agreement on behalf of a party declares that the attorney has no notice of:

- (1) the revocation or suspension of the power of attorney by the grantor; or
- (2) the death of the grantor.

**22.8 Governing law**

The law in force in the State of New South Wales governs this agreement . The parties:

- (1) submit to the exclusive jurisdiction of the courts of New South Wales and any courts that may hear appeal from those courts in respect of any proceedings in connection with this agreement ; and
  - (2) may not seek to have any proceedings removed from the jurisdiction of New South Wales on the grounds of *forum non conveniens*.
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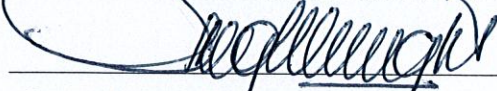
**Execution page**

**Executed as an agreement**

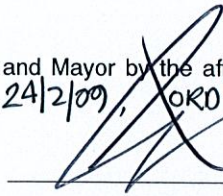
Dated: 24/2/09

**Executed** by CAMDEN COUNCIL by its General Manager and Mayor by the affixing of the Common Seal of Council in accordance with a resolution of the Council dated 24/2/09, OKD 42/09





General Manager (Signature)



Mayor (Signature)

CIREG WRIGHT

Name of General Manager (Print Name)

CR CHRIS PATTERSON

Name of Mayor (Print Name)

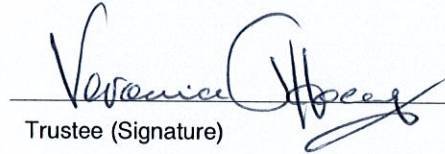
**Executed by the Developer.**



Trustee (Signature)

CLARE T CONDON

Name of Trustee (Print Name)



Trustee (Signature)

VERONICA JOAN HOEY

Name of Trustee (Print Name)

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