

Attachment D

Draft Voluntary Planning Agreement

Planning Agreement

The Council of the City of Sydney

and

George Hay Pty Ltd

ACN 000 412 242

and

OARE No. 3 Pty Ltd

ABN 91 986 780 196

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THIS PLANNING AGREEMENT is made on

2019.

BETWEEN:

- (1) **The Council of the City of Sydney ABN 22 636 550 790** of Town Hall House, 456 Kent Street, SYDNEY NSW 2000 (**the City**); and
- (2) **George Hay Pty Ltd ACN 000 412 242** of 49-51 Greek Street, Glebe NSW 2037 (**the Developer**)
- (3) **OARE No. 3 Pty Ltd ABN 91 986 780 196** of
(**the Operator**)

BACKGROUND

- (A) The Developer is the owner of the Land.
- (B) The Operator intends to undertake the Development on the Land.
- (C) The Developer and the Operator have entered into an agreement to allow the Operator to undertake the Development on the Land.
- (D) The Developer and Operator has offered to enter into this document with the City for the provision of the Public Benefits on the terms of this document.

THE PARTIES AGREE AS FOLLOWS:

1. **INTERPRETATION**

1.1 **Definitions**

The following definitions apply in this document.

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

Advertising Deed means the draft advertising deed attached as Annexure B to this document.

Attributed Value means the value the City and the Developer agree is to be attributed to each element of the Public Benefits as at the date of this document, as set out in clause 1 of Schedule 3 of this document.

Authorisation means:

- (a) an approval, authorisation, consent, declaration, exemption, permit, licence, notarisation or waiver, however it is described, and including any condition attached to it; and
- (b) in relation to anything that could be prohibited or restricted by law if a Government Agency acts in any way within a specified period, the expiry of that period without that action being taken,

including any renewal or amendment.

Business Day means a day (other than a Saturday, Sunday or public holiday) on which banks are open for general banking business in Sydney, Australia.

City's Personal Information means Personal Information to which the Developer, or any third party engaged by the Developer, has access directly or indirectly in connection with this document, including the Personal Information of any personnel, customer or supplier of the City (other than the Developer).

City's Policies means all policies and procedures relevant to the provision of the Public Benefits, as notified by the City in writing to the Developer.

City's Representative means the person named in Item 3 of Schedule 1 or his/her delegate.

Confidential Information means:

- (a) information of a party (**disclosing party**) that is:
 - (i) made available by or on behalf of the disclosing party to the other party (**receiving party**), or is otherwise obtained by or on behalf of the receiving party; and
 - (ii) by its nature confidential or the receiving party knows, or ought reasonably to know, is confidential.

Confidential Information may be made available or obtained directly or indirectly, and before, on or after the date of this document.

Confidential Information does not include information that:

- (a) is in or enters the public domain through no fault of the receiving party or any of its officers, employees or agents;
- (b) is or was made available to the receiving party by a person (other than the disclosing party) who is not or was not then under an obligation of confidence to the disclosing party in relation to that information; or
- (c) is or was developed by the receiving party independently of the disclosing party and any of its officers, employees or agents.

Construction Certificate has the same meaning as in the Act.

Corporations Act means the *Corporations Act 2001* (Cth).

Dealing means selling, transferring, assigning, novating, mortgaging, charging, or encumbering and, where appearing, **Deal** has the same meaning.

Developer's Representative means the person named in Item 4 of Schedule 1 or his/her delegate.

Development means the development of the Land described at Item 2 of Schedule 1.

Development Application means the development application identified in Item 5 of Schedule 1 and includes all plans, reports models, photomontages,

material boards (as amended supplemented) submitted to the consent authority before the determination of that Development Application.

Development Consent means the consent granted to the Development Application for the Development and includes all modifications made under the Act.

Dispute means any dispute or difference between the parties arising out of, relating to or in connection with this document, including any dispute or difference as to the formation, validity, existence or termination of this document.

Government Agency means:

- (a) a government or government department or other body;
- (b) a governmental, semi-governmental or judicial person; or
- (c) a person (whether autonomous or not) who is charged with the administration of a law.

GST means the same as in the GST Act.

GST Act means *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Land means the land described in Item 1 of Schedule 1 of this document.

Occupation Certificate has the same meaning as in the Act.

Personal Information has the meaning set out in the *Privacy Act 1988* (Cth).

Personnel means the Developer's officers, employees, agents, contractors or subcontractors.

Positive Covenant means the interest, materially in the terms of the Positive Covenant Instrument, to be created over the Positive Covenant Land in accordance with Schedule 3 of this document which constitute the Public Benefits.

Positive Covenant Instrument means the document attached as Annexure A to this document, with the document described as "Annexure B" in that document being the Advertising Deed.

Positive Covenant Land means land over which the Positive Covenant is to be created being the Land

Privacy Laws means the *Privacy Act 1988* (Cth), the *Privacy and Personal Information Protection Act 1998* (NSW), the *Spam Act 2003* (Cth), the *Do Not Call Register Act 2006* (Cth) and any other applicable legislation, principles, industry codes and policies relating to the handling of Personal Information.

Public Benefits means the provision of benefits to the community by the Developer in the form and at the times specified in Schedule 3.

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

Tax means a tax, levy, duty, rate, charge, deduction or withholding, however it is described, that is imposed by law or by a Government Agency, together with any related interest, penalty, fine or other charge.

1.2 Rules for interpreting this document

Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this document, except where the context makes it clear that a rule is not intended to apply.

- (a) A reference to:
 - (i) a legislative provision or legislation (including subordinate legislation) is to that provision or legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
 - (ii) a document (including this document) or agreement, or a provision of a document (including this document) or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;
 - (iii) a party to this document or to any other document or agreement includes a permitted substitute or a permitted assign of that party;
 - (iv) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person; and
 - (v) anything (including a right, obligation or concept) includes each part of it.
- (b) A singular word includes the plural, and vice versa.
- (c) A word which suggests one gender includes the other genders.
- (d) If a word or phrase is defined, any other grammatical form of that word or phrase has a corresponding meaning.
- (e) If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.
- (f) A reference to **including** means “including, without limitation”.
- (g) A reference to **dollars** or **\$** is to an amount in Australian currency.
- (h) A reference to **this document** includes the agreement recorded by this document.
- (i) Words defined in the GST Act have the same meaning in clauses about GST.

- (j) This document is not to be interpreted against the interests of a party merely because that party proposed this document or some provision in it or because that party relies on a provision of this document to protect itself.

2. APPLICATION OF THE ACT AND THE REGULATION

2.1 Application of this document

This document is a planning agreement within the meaning of section 7.4 of the Act and applies to:

- (a) the Land; and
- (b) the Development.

2.2 Public Benefits to be made by Developer

Clause 5 and Schedule 3 set out the details of the:

- (a) Public Benefits to be delivered by the Developer;
- (b) time or times by which the Developer must deliver the Public Benefits; and
- (c) manner in which the Developer must deliver the Public Benefits.

2.3 Application of sections 7.11, 7.12 and 7.24 of the Act

The application of sections 7.11, 7.12 and 7.24 of the Act are excluded to the extent set out in Items 5 and 6 of Schedule 2 to this document.

2.4 City rights

This document does not impose an obligation on the City to:

- (a) grant Development Consent for the Development; or
- (b) exercise any function under the Act in relation to a change to an environmental planning instrument, including the making or revocation of an environmental planning instrument.

2.5 Explanatory note

The explanatory note prepared in accordance with clause 25E of the Regulation must not be used to assist in construing this document.

3. OPERATION OF THIS PLANNING AGREEMENT

3.1 Commencement

This document will commence on the date of execution of this document by all parties to this document.

4. **WARRANTIES**

4.1 **Mutual warranties**

Each party represents and warrants that:

- (a) **(power)** it has full legal capacity and power to enter into this document and to carry out the transactions that it contemplates;
- (b) **(corporate authority)** it has taken all corporate action that is necessary or desirable to authorise its entry into this document and to carry out the transactions contemplated;
- (c) **(Authorisations)** it holds each Authorisation that is necessary or desirable to:
 - (i) enable it to properly execute this document and to carry out the transactions that it contemplates;
 - (ii) ensure that this document is legal, valid, binding and admissible in evidence; or
 - (iii) enable it to properly carry on its business as it is now being conducted,and it is complying with any conditions to which any of these Authorisations is subject;
- (d) **(documents effective)** this document constitutes its legal, valid and binding obligations, enforceable against it in accordance with its terms (except to the extent limited by equitable principles and laws affecting creditors' rights generally), subject to any necessary stamping or registration;
- (e) **(solvency)** there are no reasonable grounds to suspect that it will not be able to pay its debts as and when they become due and payable; and
- (f) **(no controller)** no controller is currently appointed in relation to any of its property, or any property of any of its subsidiaries.

4.2 **Developer warranties**

- (a) The Developer warrants to the City that, at the date of this document:
 - (i) it is the registered proprietor of the Land;
 - (ii) it is legally entitled to obtain all consents and approvals that are required by this document and do all things necessary to give effect to this document; and
 - (iii) it is not aware of any matter which may materially affect the Developer's ability to perform its obligations under this document.

- (b) The Developer warrants to the City that, prior to commencing delivery of the Public Benefits it will have obtained all Authorisations and insurances required under any Law to carry out its obligations under this document.

5. PUBLIC BENEFITS

5.1 Developer to provide Public Benefits

The Developer must, at its cost and risk, provide the Public Benefits to the City in accordance with this document.

5.2 Advertising Deed

The Operator must on or before the date of this document enter into the Advertising Deed with the City.

5.3 Creation – Developer

The Developer must, at its cost, take all steps required to create the Positive Covenant by the relevant due date specified in clause 1 of Schedule 3.

5.4 Obligations satisfied

- (a) The requirement for the Developer to create the Positive Covenant is satisfied where:
 - (i) an instrument in registrable form under the *Real Property Act 1900* (NSW) creating the Positive Covenant is registered at Land Registry Services NSW; and
 - (ii) the Developer provides the City with written notice confirming the registration contemplated in clause 5.4(a)(i) above together with the registration notice provided by Land Registry Services NSW.
- (b) The Developer and the City are each do all things reasonably necessary to enable registration of the instrument creating the Positive Covenant to occur.

6. INDEMNITY

The Developer indemnifies the City against all damage, expense, loss or liability of any nature suffered or incurred by the City arising from any act or omission by the Developer (or any Personnel) in connection with the performance of the Developer's obligations under this document, except where the damage, expense, loss or liability suffered or incurred is caused by, or contributed to by, any wilful or negligent act or omission of the City (or any person engaged by the City).

7. REGISTRATION

7.1 Registration of this document – obligations of the Developer

The Developer:

- (a) consents to the registration of this document by NSW Land Registry Services making an entry in the relevant folio of the Register kept under the *Real Property Act 1900*;
- (b) warrants that it has obtained all consents to the registration of this document as contemplated by clause 7.1(a); and
- (c) must within 10 Business Days of a written request from the City do all things reasonably necessary to allow the City to register this document as contemplated by clause 7.1(a), including but not limited to:
 - (i) producing any documents or letters of consent required by the Registrar-General of the NSW Land Registry Services;
 - (ii) providing the production slip number when the Developer produces the certificate of title to the Land at the NSW Land Registry Services; and
 - (iii) providing the City with a cheque for registration fees payable in relation to registration of this document at NSW Land Registry Services.

The Developer must act promptly in complying with and assisting to respond to any requisitions raised by the NSW Land Registry Services that relate to registration of this document.

7.2 **Registration of this document – obligations of the City**

The City:

- (a) agrees to apply to NSW Land Registry Services for the registration of this document by making an entry in the relevant folio of the Register kept under the *Real Property Act 1900*; and
- (b) must within 10 Business Days of a written request from the Developer do all things reasonably necessary to register this document in this way.

The City must act promptly in complying with and assisting to respond to any requisitions raised by the NSW Land Registry Services that relate to registration of this document.

7.3 **Release of this document**

If the City is satisfied, acting reasonably, that the Positive Covenant has been recorded in the Register kept under the *Real Property Act 1900* and there are no outstanding breaches (that have not been cured by that recording) the City must promptly do all things reasonably required to remove this document from the relevant folio of the Register.

8. **DISPUTE RESOLUTION**

8.1 **Application**

Any Dispute must be determined in accordance with the procedure in this clause 8.

8.2 **Negotiation**

(a) If any Dispute arises, a party to the Dispute (**Referring Party**) may by giving notice to the other party or parties to the Dispute (**Dispute Notice**) refer the Dispute to the Operator's Representative, Developer's Representative and the City's Representative for resolution. The Dispute Notice must:

- (i) be in writing;
- (ii) state that it is given pursuant to this clause 8; and
- (iii) include or be accompanied by reasonable particulars of the Dispute including:
 - (A) a brief description of the circumstances in which the Dispute arose;
 - (B) references to any:
 - (aa) provisions of this document; and
 - (bb) acts or omissions of any person, relevant to the Dispute; and
 - (C) where applicable, the amount in dispute (whether monetary or any other commodity) and if not precisely known, the best estimate available.

(b) Within 10 Business Days of the Referring Party issuing the Dispute Notice (**Resolution Period**), the Developer's Representative and the City's Representative must meet at least once to attempt to resolve the Dispute.

(c) The Developer's Representative and the City's Representative may meet more than once to resolve a Dispute. The Developer's Representative and the City's Representative may meet in person, via telephone, videoconference, internet-based instant messaging or any other agreed means of instantaneous communication to effect the meeting.

8.3 **Not use information**

The purpose of any exchange of information or documents or the making of any offer of settlement under this clause 8 is to attempt to settle the Dispute. No party may use any information or documents obtained through any dispute resolution process undertaken under this clause 8 for any purpose other than in an attempt to settle the Dispute.

8.4 **Condition precedent to litigation**

Subject to clause 8.5, a party must not commence legal proceedings in respect of a Dispute unless:

- (a) a Dispute Notice has been given; and
- (b) the Resolution Period has expired.

8.5 **Summary or urgent relief**

- (a) Nothing in this clause 8 will prevent a party from instituting proceedings to seek urgent injunctive, interlocutory or declaratory relief in respect of a Dispute; or
- (b) instituting class 1 proceedings within the meaning of the *Land and Environment Court Act 1979*.

9. **TAXES AND GST**

9.1 **Responsibility for Taxes**

- (a) The Developer is responsible for any and all Taxes and other like liabilities which may arise under any Commonwealth, State or Territory legislation (as amended from time to time) as a result of or in connection with this document or the Public Benefits.
- (b) The Developer must indemnify the City in relation to any claims, liabilities and costs (including penalties and interest) arising as a result of any Tax or other like liability for which the Developer is responsible under clause 9.1(a).

9.2 **GST free supply**

To the extent that Divisions 81 and 82 of the GST Law apply to a supply made under this document:

- (a) no additional amount will be payable by a party on account of GST; and
- (b) no tax invoices will be exchanged between the parties.

9.3 **Supply subject to GST**

To the extent that clause 9.2 does not apply to a supply made under this document, this clause 9.3 will apply.

- (a) If one party (**Supplying Party**) makes a taxable supply and the consideration for that supply does not expressly include GST, the party that is liable to provide the consideration (**Receiving Party**) must also pay an amount (**GST Amount**) equal to the GST payable in respect of that supply.
- (b) Subject to first receiving a tax invoice or adjustment note as appropriate, the receiving party must pay the GST amount when it is liable to provide the consideration.

- (c) If one party must indemnify or reimburse another party (**Payee**) for any loss or expense incurred by the Payee, the required payment does not include any amount which the Payee (or an entity that is in the same GST group as the Payee) is entitled to claim as an input tax credit, but will be increased under clause 9.3(a) if the payment is consideration for a taxable supply.
- (d) If an adjustment event arises in respect of a taxable supply made by a Supplying Party, the GST Amount payable by the Receiving Party under clause 9.3(a) will be recalculated to reflect the adjustment event and a payment will be made by the Receiving Party to the Supplying Party, or by the Supplying Party to the Receiving Party, as the case requires.
- (e) The Developer will assume the City is not entitled to any input tax credit when calculating any amounts payable under this clause 9.3.
- (f) In this document:
 - (i) consideration includes non-monetary consideration, in respect of which the parties must agree on a market value, acting reasonably; and
 - (ii) in addition to the meaning given in the GST Act, the term "GST" includes a notional liability for GST.

10. **DEALINGS**

10.1 **Dealing by the City**

- (a) The City may Deal with its interest in this document without the consent of the Developer if the Dealing is with a Government Agency. The City must give the Developer notice of the Dealing within five Business Days of the date of the Dealing.
- (b) The City may not otherwise Deal with its interest in this document without the consent of the Developer, such consent not to be unreasonably withheld or delayed.

10.2 **Dealing by the Developer**

- (a) Prior to registration of this document in accordance with clause 7, the Developer must not Deal with this document or the Land without:
 - (i) the prior written consent of the City (which must not be unreasonably withheld or delayed); and
 - (ii) the City, the Developer and the third party the subject of the Dealing entering into a deed of consent to the Dealing on terms acceptable to the City.
- (b) The City is required to promptly enter into the deed of consent and in doing so:
 - (i) must be reasonable in determining the deed's terms; and

- (ii) any such terms must not impose new substantive obligations on the Developer or any person who is proposed to replace either or both parties.
- (c) On and from registration of this document in accordance with clause 7:
 - (i) the Developer may Deal with this document without the consent of the City only as a result of the sale of the whole of the Land (without subdivision) to a purchaser of the Land;
 - (ii) the Developer must not otherwise Deal with this document to a third party that is not a purchaser of the whole or any part of the Land without:
 - (A) the prior written consent of the City (which must not be unreasonably withheld or delayed); and
 - (B) the City, the Developer and the third party the subject of the Dealing entering into a deed of consent to the Dealing on terms acceptable to the City (being terms that do not seek to impose new substantive obligations on the Developer or any person who is proposed to replace either or both parties).
- (d) The Developer must pay the City's reasonable costs and expenses relating to any consent or documentation required due to the operation of this clause 10.2.

11. **TERMINATION**

- (a) Any party may terminate this document by giving notice in writing to the other party, if either:
 - (i) the Development Consent lapses;
 - (ii) the Development Consent is surrendered;
 - (iii) the Development Consent is revoked;
 - (iv) the Development Application is refused; or
 - (v) the Development Application is withdrawn.
- (b) If this document is terminated, then:
 - (i) the rights of each party that arose before the termination or which may arise at any future time for any breach or non-observance of obligations occurring prior to the termination are not affected;
 - (ii) each Party must take all steps reasonably necessary to minimise any loss that each party may suffer as a result of the termination of this document; and
 - (iii) the City will, at the Developer's cost, do all things reasonably required to remove this document from the certificate of title to the Land.

12. **CONFIDENTIALITY AND DISCLOSURES**

12.1 **Use and disclosure of Confidential Information**

A party (**receiving party**) which acquires Confidential Information of another party (**disclosing party**) must not:

- (a) use any of the Confidential Information except to the extent necessary to exercise its rights and perform its obligations under this document; or
- (b) disclose any of the Confidential Information except in accordance with clauses 12.2 or 12.3.

12.2 **Disclosures to personnel and advisers**

- (a) The receiving party may disclose Confidential Information to an officer, employee, agent, contractor, or legal, financial or other professional adviser if:
 - (i) the disclosure is necessary to enable the receiving party to perform its obligations or to exercise its rights under this document; and
 - (ii) prior to disclosure, the receiving party informs the person of the receiving party's obligations in relation to the Confidential Information under this document and obtains an undertaking from the person to comply with those obligations.
- (b) The receiving party:
 - (i) must ensure that any person to whom Confidential Information is disclosed under clause 12.2(a) keeps the Confidential Information confidential and does not use it for any purpose other than as permitted under clause 12.2(a); and
 - (ii) is liable for the actions of any officer, employee, agent, contractor or legal, financial or other professional adviser that causes a breach of the obligations set out in clause 12.2(b)(i).

12.3 **Disclosures required by law**

- (a) Subject to clause 12.3(b), the receiving party may disclose Confidential Information that the receiving party is required to disclose:
 - (i) by law or by order of any court or tribunal of competent jurisdiction; or
 - (ii) by any Government Agency, stock exchange or other regulatory body.
- (b) If the receiving party is required to make a disclosure under clause 12.3(a), the receiving party must:
 - (i) to the extent possible, notify the disclosing party immediately it anticipates that it may be required to disclose any of the Confidential Information;

- (ii) consult with and follow any reasonable directions from the disclosing party to minimise disclosure; and
- (iii) if disclosure cannot be avoided:
 - (A) only disclose Confidential Information to the extent necessary to comply; and
 - (B) use reasonable efforts to ensure that any Confidential Information disclosed is kept confidential.

12.4 **Receiving party's return or destruction of documents**

On termination of this document the receiving party must immediately:

- (a) deliver to the disclosing party all documents and other materials containing, recording or referring to Confidential Information; and
- (b) erase or destroy in another way all electronic and other intangible records containing, recording or referring to Confidential Information,

which are in the possession, power or control of the receiving party or of any person to whom the receiving party has given access.

12.5 **Security and control**

The receiving party must:

- (a) keep effective control of the Confidential Information; and
- (b) ensure that the Confidential Information is kept secure from theft, loss, damage or unauthorised access or alteration.

13. **NOTICES**

- (a) A notice, consent or other communication under this document is only effective if it is in writing, signed and either left at the addressee's address or sent to the addressee by mail or fax. If it is sent by mail, it is taken to have been received 5 Business Days after it is posted. If it is sent by fax, it is taken to have been received when the addressee actually receives it in full and in legible form.
- (b) A person's address and fax number are those set out in Schedule 1 for the City's Representative and the Developer's Representative, or as the person notifies the sender in writing from time to time.

14. **GENERAL**

14.1 **Governing law**

- (a) This document is governed by the laws of New South Wales.
- (b) Each party submits to the exclusive jurisdiction of the courts exercising jurisdiction in New South Wales, and any court that may hear appeals from any of those courts, for any proceedings in connection with this document,

and waives any right it might have to claim that those courts are an inconvenient forum.

14.2 **Access to information**

In accordance with section 121 of the *Government Information (Public Access) Act 2009 (NSW)*, the Developer agrees to allow the City immediate access to the following information contained in records held by the Developer:

- (a) information that relates directly to the delivery of the Public Benefits by the Developer;
- (b) information collected by the Developer from members of the public to whom the Developer provides, or offers to provide, services on behalf of the City; and
- (c) information received by the Developer from the City to enable the Developer to deliver the Public Benefits,

but this does not include information referred to in section 121(2) of the *Government Information (Public Access) Act 2009 (NSW)*.

14.3 **Relationship of parties**

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

14.4 **Giving effect to this document**

Each party must do anything (including execute any document), and must ensure that its employees and agents do anything (including execute any document), that the other party may reasonably require to give full effect to this document.

14.5 **Time for doing acts**

- (a) If:
 - (i) the time for doing any act or thing required to be done; or
 - (ii) a notice period specified in this document,

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 5pm on the specified day, it is taken to have been done on the following Business Day.

14.6 **Severance**

If any clause or part of any clause is in any way unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid and legal. If this is not possible, the clause (or where possible, the offending part) is to be severed from this document without affecting the enforceability, validity or legality of the remaining clauses (or parts of those clauses) which will continue in full force and effect.

14.7 **Preservation of existing rights**

The expiration or termination of this document does not affect any right that has accrued to a party before the expiration or termination date.

14.8 **No merger**

Any right or obligation of any party that is expressed to operate or have effect on or after the completion, expiration or termination of this document for any reason, will not merge on the occurrence of that event but will remain in full force and effect.

14.9 **Waiver of rights**

A right may only be waived in writing, signed by the party giving the waiver, and:

- (a) no other conduct of a party (including a failure to exercise, or delay in exercising, the right) operates as a waiver of the right or otherwise prevents the exercise of the right;
- (b) a waiver of a right on one or more occasions does not operate as a waiver of that right if it arises again; and
- (c) the exercise of a right does not prevent any further exercise of that right or of any other right.

14.10 **Operation of this document**

- (a) This document contains the entire agreement between the parties about its subject matter. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by this document and has no further effect.
- (b) Any right that a person may have under this document is in addition to, and does not replace or limit, any other right that the person may have.
- (c) Any provision of this document which is unenforceable or partly unenforceable is, where possible, to be severed to the extent necessary to make this document enforceable, unless this would materially change the intended effect of this document.

14.11 **Operation of indemnities**

- (a) Each indemnity in this document survives the expiry or termination of this document.
- (b) A party may recover a payment under an indemnity in this document before it makes the payment in respect of which the indemnity is given.

14.12 **Inconsistency with other documents**

Unless the contrary intention is expressed, if there is an inconsistency between any of one or more of:

- (a) this document;
- (b) any Schedule to this document; and
- (c) the provisions of any other document of the Developer,

the order of precedence between them will be the order listed above, this document having the highest level of precedence.

14.13 **No fetter**

Nothing in this document in any way restricts or otherwise affects the City's unfettered discretion to exercise its statutory powers as a public authority.

14.14 **Counterparts**

This document may be executed in counterparts.

SCHEDULE 1

Agreement Details

ITEM	TERM	DESCRIPTION
1.	Land	Lot 150 in SP 46789 1 Missenden Road, Camperdown NSW 2050
2.	Development	Removal of existing 42m2 externally illuminated advertising sign affixed to the western wall, and replacement with an internally illuminated digital advertising sign affixed to the western wall, with the same area.
3.	City's Representative	Name: Director, Planning, Development and Transport Address: Level 1, 456 Kent Street Sydney NSW 2000
4.	Developer's Representative	Name: Harold Kopelowitz Address: 49-51 Greek Street, Glebe NSW 2037
5.	Development Application	D/2018/73

SCHEDULE 2

Requirements under the Act and Regulation (clause 2)

The below table summarises how this document complies with the Act and Regulation.

ITEM	SECTION OF ACT OR REGULATION	PROVISION/CLAUSE OF THIS DOCUMENT
1.	<p>Planning instrument and/or development application (section 7.4(1) of the Act)</p> <p>The Developer has:</p> <p>(a) sought a change to an environmental planning instrument;</p> <p>(b) made, or proposes to make, a Development Application; or</p> <p>(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.</p>	<p>(a) No</p> <p>(b) No</p> <p>(c) Yes</p>
2.	<p>Description of land to which this document applies (section 7.4(3)(a) of the Act)</p>	Item 1 of Schedule 1.
3.	<p>Description of change to the environmental planning instrument to which this document applies and/or the development to which this document applies (section 7.4(3)(b) of the Act)</p>	The Development as described in clause 2.1.
4.	<p>The nature and extent of the provision to be made by the developer under this document, the time or times by which the provision is to be made and the manner in which the provision is to be made (section 7.4(3)(c) of the Act)</p>	Schedule 3.

ITEM	SECTION OF ACT OR REGULATION	PROVISION/CLAUSE OF THIS DOCUMENT
5.	Whether this document excludes (wholly or in part) of does not exclude the application of section 7.11, 7.12 or 7.24 to the development (section 7.4(3)(d) of the Act)	Section 7.11 not excluded Section 7.12 not excluded Section 7.24 not excluded
6.	Applicability of section 7.11 of the Act (section 7.4(3)(e) of the Act)	The application of section 7.11 of the Act is not excluded in respect of the Development and contributions (if any) under section 7.11 will be required to be paid.
7.	Consideration of benefits under this document if section 7.11 applies (section 7.4(3)(e) of the Act)	Not applicable because this document excludes section 7.11 of the Act. Benefits are not to be taken into consideration in determining a development contribution under section 7.11 of the Act.
8.	Mechanism for Dispute Resolution (section 7.4(3)(f) of the Act)	Clause 8
9.	Enforcement of this document (section 7.4(3)(g) of the Act)	Clause 7.1
10.	No obligation to grant consent or exercise functions (section 7.4(9) of the Act)	Clause 2.4
11.	Registration of this document (section 7.6 of the Act)	Clause 7
12.	Whether certain requirements of this document must be complied with before a construction certificate is issued (clause 25E(2)(g) of the Regulation)	There are no requirements to be complied with under this document before a construction certificate is issued.

13.	Whether certain requirements of this document must be complied with before a subdivision certificate is issued (clause 25E(2)(g) of the Regulation)	Nil
14.	Whether certain requirements of this document must be complied with before an occupation certificate is issued (clause 25E(2)(g) of the Regulation)	The obligations on the Developer as contained in clause 5.3 must be complied with before an occupation certificate is issued.
15.	Whether the explanatory note that accompanied exhibition of this document may be used to assist in construing this document (clause 25E(7) of the Regulation)	Clause 2.5

SCHEDULE 3

Public Benefits (clause 5)

1. **PUBLIC BENEFITS - OVERVIEW**

The Developer must provide the Public Benefits in accordance with Schedule 3 and this document. The Attributed Value, timing of delivery and additional specifications relating to the Public Benefits is set out in the table below

	Public Benefit	Attributed Value	Due date	Additional specifications
1.	Creation of an Interest in the Land (the recording of a public positive covenant in the Register kept under the <i>Real Property Act 1900</i> with terms materially the same as those set out in the Positive Covenant Instrument).	Nil.	Prior to the first, interim or any Occupation Certificate under the Development Consent.	Nil

EXECUTED as a deed.

Signed, sealed and delivered for
**THE COUNCIL OF THE CITY OF
SYDNEY** by its duly authorised
officer, in the presence of:

Signature of officer

Signature of witness

Name of officer

Name

Position of officer

456 Kent Street, Sydney NSW 2000

Address of witness

EXECUTED by **George Hay Pty Ltd
ACN 000 412 242** in accordance
with s127(1) of the Corporations Act
2001 (Cth):

Signature of director

Signature of director/secretary

Name

Name

EXECUTED by **OARE No. 3 Pty Ltd
ABN 91 986 780 196** in accordance
with s127(1) of the Corporations Act
2001 (Cth):

Signature of director

Signature of director/secretary

Name

Name

ANNEXURE A: DRAFT ADVERTISING DEED

Advertising Deed

The Council of the City of Sydney

and

[Name of Advertiser]

[ABN of Advertiser]

File number: X018204
Trim ref: 2019/098832

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THIS DEED is made on

2019.

BETWEEN:

- (1) **The Council of the City of Sydney ABN 22 636 550 790** of Town Hall House, 456 Kent Street, SYDNEY NSW 2000 (the **City**); and
- (2) **[Insert advertise name]** of **[insert address]** (the **Advertiser**).

BACKGROUND

- (A) **[Insert Advertiser name and address]** of **[insert Advertise address]** (the **Advertiser**) has the right in property law to operate Sign located within Lot 150 in SP46789 located at 1 Missenden Road, Camperdown NSW 2050 (the **Land**).
- (B) A public positive covenant requires the owner of the Land to ensure that the Advertiser does not commence operating the Sign without first offering to enter into an advertising deed with the City.
- (C) The City and the Advertiser have agreed to enter into this Deed as a requirement of the Positive Covenant.

THE PARTIES AGREE AS FOLLOWS:

1. **INTERPRETATION**

1.1 **Definitions**

The following definitions apply in this document.

Advertising Content means one or more community related advertisements or messages provided by the City for display on the Sign.

Advertising Time means 10 per cent of the advertising time displayed on the Sign in any given 12-hour period measured from:

- (a) 6am to before 6pm; and
- (b) 6pm to before 6am.

Artwork Address means the email or portal address provided by the Advertiser to the City from time-to-time for the receipt of Advertising Content from the City.

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

Development Application means the development application lodged with the City that is known as D/2018/73.

Development Consent means the consent granted to the Development Application and includes all modifications made under the Act.

Emergency Messaging means any message concerning an event that presents an imminent and serious threat to life or injury to persons within the City of Sydney local government area.

Media Upload Fee means the fee charged per community advertisement or message constituting the Advertising Content for display in a Advertising Cycle.

Production Guidelines means the technical specifications for the Advertising Content to be displayed by the Advertiser on the Sign, being specifications determined by the Advertiser from time-to-time (acting reasonably) and notified to the City ..

Sign means the digital LED display sign located within the Land.

Term means the period of time that the Advertiser is operating the Sign.

1.2 **Rules for interpreting this document**

Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this document, except where the context makes it clear that a rule is not intended to apply.

- (a) A reference to:
 - (i) a legislative provision or legislation (including subordinate legislation) is to that provision or legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
 - (ii) a document (including this document) or agreement, or a provision of a document (including this document) or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;
 - (iii) a party to this document or to any other document or agreement includes a permitted substitute or a permitted assign of that party;
 - (iv) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person; and
 - (v) anything (including a right, obligation or concept) includes each part of it.
- (b) A singular word includes the plural, and vice versa.
- (c) A word which suggests one gender includes the other genders.
- (d) If a word or phrase is defined, any other grammatical form of that word or phrase has a corresponding meaning.
- (e) If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.
- (f) A reference to **including** means "including, without limitation".
- (g) A reference to **dollars** or **\$** is to an amount in Australian currency.

- (h) A reference to **this document** includes the agreement recorded by this document.
- (i) Words defined in the GST Act have the same meaning in clauses about GST.
- (j) This document is not to be interpreted against the interests of a party merely because that party proposed this document or some provision in it or because that party relies on a provision of this document to protect itself.

2. **OPERATION OF THIS DEED**

2.1 **Commencement**

This document will commence on the date of execution of this document by all parties to this document.

3. **RIGHTS GRANTED TO CITY**

3.1 **Advertiser to provide the City with Advertising Time**

The Advertiser must provide the City with the Advertising Time on the Sign for the Advertising Content in accordance with this document.

3.2 **Consistent display of Advertising Content**

- (a) When requested by the City, and in accordance with clause 4.1, the Advertiser must:
 - (i) display the Advertising Content for the Advertising Time; and
 - (ii) ensure the Advertising Content is displayed consistently and equitably over each of the following periods:
 - (A) the 12-hour period commencing on 6am and ending before 6pm each day; and
 - (B) the 12-hour period commencing on 6pm and ending before 6am each day.
- (b) The Advertiser may sell up to 50 per cent of the time in any given 12-hour period as a block of time to a single customer and if this happens:
 - (i) the Advertiser is not obliged to display the Advertising Content in that block of time; and
 - (ii) the Advertiser is obliged to ensure that the Advertising Content is still displayed for the Advertising Time (but outside the block of time booked by the customer, but within the same 12-hour period).
- (c) The Advertiser may sell up to six entire days (ie six 24-hour periods) in each calendar year as block time to a customer or customers (either individually or as group, either in series or separately) and if this happens:

- (i) the Advertiser is not obliged to display the Advertising Content in that block time;
 - (ii) the Advertiser is obliged to ensure that the Advertising Content is still displayed for the Advertising Time (but outside that block time booked by the customer, but within a reasonable period before or after the given block time); and
 - (iii) the display of that Advertising Content must be additional to the display of Advertising Content that would have been required in any relevant 12-hour period in any event.
- (d) If it becomes apparent that the Advertiser has not complied with the obligation to display Advertising Content in accordance this clause 3.2, the Advertiser must, as soon as the non-compliance has become apparent, allocate additional time to display the Advertising Content until any identified shortfall in Advertising Content is remedied.
- (e) The display of additional Advertising Time under clause 3.2(d) must take place such that the shortfall is remedied as soon as it is reasonably practicable to do so.
- (f) The remedy of a given non-compliance with this clause 3.2 under clause 3.2(d) and clause 3.2(e) is a complete remedy that non-compliance and the City cannot make any other claim (for any damage, expense, loss or liability of any nature) against the Advertiser arising from that non-compliance.

4. **ADVERTISING CONTENT**

4.1 **Approval of Advertising Content**

- (a) To ensure the timely and accurate display of Advertising Content, the City must:
- (i) no later than seven (7) Business Days prior to the intended display of the Advertising Content, provide to the Advertiser via the Artwork Address the proposed Advertising Content;
 - (ii) provide the Advertising Content in a form complying with the Production Guidelines and apply a identifiable name to each file (for example: Advertiser_Campaign Name_Date i.e. *Cityofsydney_NYE_16.12.2018*); and
 - (iii) notify the Advertiser as to the frequency, times of day and/or days of the week that the City would like to see each individual message or advertisement constituting the Advertising Content displayed during the Advertising Time.
- (b) If the Advertiser forms the view, acting reasonably, that the proposed Advertising Content provided by the City pursuant to clause 4.1(a) is not in a form suitable for display, it must, on the day it receives the proposed Advertising Content, or within three (3) Business Days afterwards, provide the City with written notice of this and within this notice detail the remedial

action the City needs to take to so that the City can be resupply the Advertising Content in a compliant form.

4.2 **No third party advertising**

The parties acknowledge and agree that:

- (a) the Advertising Content must not contain any Sponsor or third-party placements; and
- (b) the Advertising Content must objectively be for a public purpose (and cannot be for a private purpose).

4.3 **Records**

The Advertiser agrees to keep records and store Advertising Content provided by the City for a period of 12 months after that Advertising Content ceases to be displayed on the Sign without any fee or charge to the City, after which time the Advertising Content may be destroyed at the Advertiser's discretion.

5. **ADVERTISING TIME**

The Advertising Time does not accumulate (and the obligation under clause 3.2 does not apply):

- (a) to the extent that any Advertising Time that is not taken up by the City in a 24-hour period is forfeited to the Advertiser; and
- (b) for any period of time that the Sign is not operational.

6. **NO FEES PAYABLE**

6.1 **No fees payable**

The Advertiser acknowledges and agrees that the City is not required to pay any Media Upload Fees for:

- (a) the Advertising Time displaying Advertising Content, including but not limited to artwork upload fees; and
- (b) any Emergency Messaging that the Advertiser displays on the Sign as requested by the City.

6.2 **City responsible for artwork costs**

The City will bear its own costs in relation to the creation of artwork, the reformatting of files or any other works that may be necessary to ensure the Advertising Content is suitable and/or in the correct format to be displayed on the Sign.

7. EMERGENCY MESSAGING

7.1 Requested by the City

The City may, at any time, request that the Advertiser display Emergency Messaging on the Sign.

7.2 Advertiser must display

As soon as practicable after receiving the Advertising Content for any Emergency Messaging from the City (and in any event, no later than 24 hours after receiving the Advertising Content), the Advertiser will, subject to it having no commitments with other advertisers that would prohibit or prevent it from displaying the Emergency Messaging, display the Emergency Messaging on the Sign, but only during the period in which the relevant imminent and serious threat to life or injury to persons within the City of Sydney local government area is continuing (any in any event, for no longer than seven days).

7.3 Production Guidelines to apply to Emergency Messaging

The City will provide the Advertising Content for any Emergency Messaging in conformity with the Production Guidelines.

8. REPORTING

8.1 Business as Usual Reports and Meetings

- (a) The City and the Advertiser will meet when necessary, at least annually (and no more than once per quarter), to discuss:
 - (i) the reports provided under this clause 8;
 - (ii) satisfaction of the Advertiser's obligation to provide the Advertising Time; and
 - (iii) any other matter related to this document.

8.2 Progress reports

The Advertiser must deliver to the City during the Term, as reasonably requested (and no more than once a quarter) by the City from time to time, a written report providing full details of:

- (a) the Advertiser's progress in supplying the Advertising Time and ability to other action items:
- (b) details of the Advertiser's compliance with this document, specifically:
 - (i) the name or description of item of Advertising Content;
 - (ii) the date and time of display of each item of Advertising Content; and
 - (iii) the duration of display of each item of Advertising Content; and

- (c) such other information in relation to this document as the City may from time to time reasonably request.

8.3 **Content of reports**

The Advertiser must ensure that all reports provided under this clause 8:

- (a) contain all required information, including but not limited to the current contact information of the person who is managing the Sign on behalf of the Advertiser; and
- (b) are accurate and not misleading in any respect.

9. **WARRANTIES**

9.1 **Mutual warranties**

Each party represents and warrants that:

- (a) **(power)** it has full legal capacity and power to enter into this document and to carry out the transactions that it contemplates;
- (b) **(corporate authority)** it has taken all corporate action that is necessary or desirable to authorise its entry into this document and to carry out the transactions contemplated;
- (c) **(Authorisations)** it holds each Authorisation that is necessary or desirable to:
 - (i) enable it to properly execute this document and to carry out the transactions that it contemplates;
 - (ii) ensure that this document is legal, valid, binding and admissible in evidence; or
 - (iii) enable it to properly carry on its business as it is now being conducted,

and it is complying with any conditions to which any of these Authorisations is subject;

- (d) **(documents effective)** this document constitutes its legal, valid and binding obligations, enforceable against it in accordance with its terms (except to the extent limited by equitable principles and laws affecting creditors' rights generally), subject to any necessary stamping or registration;
- (e) **(solvency)** there are no reasonable grounds to suspect that it will not be able to pay its debts as and when they become due and payable; and
- (f) **(no controller)** no controller is currently appointed in relation to any of its property, or any property of any of its subsidiaries.

9.2 **Advertiser warranties**

The Advertiser warrants to the City that, at the date of this document and every point of time in the future:

- (a) it is legally entitled to obtain all consents and approvals that are required by this document and do all things necessary to give effect to this document;
- (b) all work performed by the Advertiser and the Personnel under this document will be performed with due care and skill and to a standard which is equal to or better than that which a well experienced person in the industry would expect to be provided by an organisation of the Advertiser's size and experience; and
- (c) it is not aware of any matter which may materially affect the Advertiser's ability to perform its obligations under this document.

9.3 **City warranties**

The City warrants to the Advertiser that, at the date of this document and every point in time in the future:

- (a) any Advertising Content provided to the Advertiser by the City does not breach any laws, standards or guidelines that the Advertising Content must or should comply with; and
- (b) the Advertising Content that will be provided to the Advertiser does not breach any rights of a third party.

10. **INDEMNITY**

- (a) The Advertiser indemnifies the City against all reasonably foreseeable damage, expense, loss or liability of any nature suffered or incurred by the City arising from any act or omission by the Advertiser (or any Personnel) in connection with the performance of the Advertiser's obligations under this document, except to the extent that the damage, expense, loss or liability suffered or incurred is caused by, or contributed to by, any wilful or negligent act or omission of the City (or any person engaged by the City). This clause 10(a) does not override clause 3.2(f).
- (b) The City indemnifies the Advertiser against all reasonably foreseeable damage, expense, loss or liability of any nature suffered or incurred by the Advertiser arising from any act or omission by the City (or any Personnel) in connection with the performance of the City's obligations under this document, except to the extent the damage, expense, loss or liability suffered or incurred is caused by, or contributed to by, any wilful or negligent act or omission of the Advertiser (or any person engaged by the Advertiser).

11. **DISPUTE RESOLUTION**

11.1 **Application**

Any Dispute must be determined in accordance with the procedure in this clause 10(b).

11.2 **Negotiation**

(a) If any Dispute arises, a party to the Dispute (**Referring Party**) may by giving notice to the other party or parties to the Dispute (**Dispute Notice**) refer the Dispute to the Advertiser's Representative and the City's Representative for resolution. The Dispute Notice must:

- (i) be in writing;
- (ii) state that it is given pursuant to this clause 10(b); and
- (iii) include or be accompanied by reasonable particulars of the Dispute including:
 - (A) a brief description of the circumstances in which the Dispute arose;
 - (B) references to any:
 - (aa) provisions of this document; and
 - (bb) acts or omissions of any person, relevant to the Dispute; and
 - (C) where applicable, the amount in dispute (whether monetary or any other commodity) and if not precisely known, the best estimate available.

(b) Within 10 Business Days of the Referring Party issuing the Dispute Notice (**Resolution Period**), the Advertiser's Representative and the City's Representative must meet at least once to attempt to resolve the Dispute.

(c) The Advertiser's Representative and the City's Representative may meet more than once to resolve a Dispute. The Advertiser's Representative and the City's Representative may meet in person, via telephone, videoconference, internet-based instant messaging or any other agreed means of instantaneous communication to effect the meeting.

11.3 **Not use information**

The purpose of any exchange of information or documents or the making of any offer of settlement under this clause 10(b) is to attempt to settle the Dispute. Neither party may use any information or documents obtained through any dispute resolution process undertaken under this clause 10(b) for any purpose other than in an attempt to settle the Dispute.

11.4 **Condition precedent to litigation**

Subject to clause 11.5, a party must not commence legal proceedings in respect of a Dispute unless:

- (a) a Dispute Notice has been given; and
- (b) the Resolution Period has expired.

11.5 **Summary or urgent relief**

- (a) Nothing in this clause 10(b) will prevent a party from instituting proceedings to seek urgent injunctive, interlocutory or declaratory relief in respect of a Dispute; or
- (b) instituting class 1 proceedings within the meaning of the *Land and Environment Court Act 1979*.

12. **TAXES AND GST**

12.1 **Responsibility for Taxes**

- (a) The Advertiser is responsible for any and all Taxes and other like liabilities which may arise under any Commonwealth, State or Territory legislation (as amended from time to time) as a result of or in connection with this document.
- (b) The Advertiser must indemnify the City in relation to any claims, liabilities and costs (including penalties and interest) arising as a result of any Tax or other like liability for which the Advertiser is responsible under clause 12.1(a).

12.2 **GST free supply**

To the extent that Divisions 81 and 82 of the GST Law apply to a supply made under this document:

- (a) no additional amount will be payable by a party on account of GST; and
- (b) no tax invoices will be exchanged between the parties.

12.3 **Supply subject to GST**

To the extent that clause 12.2 does not apply to a supply made under this document, this clause 12.3 will apply.

- (a) If one party (**Supplying Party**) makes a taxable supply and the consideration for that supply does not expressly include GST, the party that is liable to provide the consideration (**Receiving Party**) must also pay an amount (**GST Amount**) equal to the GST payable in respect of that supply.
- (b) Subject to first receiving a tax invoice or adjustment note as appropriate, the receiving party must pay the GST amount when it is liable to provide the consideration.

- (c) If one party must indemnify or reimburse another party (**Payee**) for any loss or expense incurred by the Payee, the required payment does not include any amount which the Payee (or an entity that is in the same GST group as the Payee) is entitled to claim as an input tax credit, but will be increased under clause 12.3(a) if the payment is consideration for a taxable supply.
- (d) If an adjustment event arises in respect of a taxable supply made by a Supplying Party, the GST Amount payable by the Receiving Party under clause 12.3(a) will be recalculated to reflect the adjustment event and a payment will be made by the Receiving Party to the Supplying Party, or by the Supplying Party to the Receiving Party, as the case requires.
- (e) The Advertiser will assume the City is not entitled to any input tax credit when calculating any amounts payable under this clause 12.3.
- (f) In this document:
 - (i) consideration includes non-monetary consideration, in respect of which the parties must agree on a market value, acting reasonably; and
 - (ii) in addition to the meaning given in the GST Act, the term "GST" includes a notional liability for GST.

13. **TERMINATION**

- (a) Either party may terminate this document, by giving notice in writing to the other party, if:
 - (i) the Development Consent lapses;
 - (ii) the Development Consent is surrendered;
 - (iii) the Development Consent is revoked;
 - (iv) the Advertiser is no longer has a right in property law to operate the Sign; or
 - (v) the public positive covenant which required the entry into this document is removed from the title of the Land.
- (b) Either party may terminate this document immediately, by giving notice in writing to the other party, if:
 - (i) a substantial breach of this document is committed and which is not remedied within 7 days of written notification; or
 - (ii) there is:
 - (A) a pattern of repeated unremedied minor breaches over an extended period of time;
 - (B) those breaches have not been remedied under clause 3.2(d); and

- (C) attempts to resolve the issue(s) underlying the pattern have been attempted under clause 11 and have not been successful.
- (c) If this document is terminated, then:
 - (i) the rights of each party that arose before the termination or which may arise at any future time for any breach or non-observance of obligations occurring prior to the termination are not affected; and
 - (ii) the parties must take all steps reasonably necessary to minimise any loss the other party may suffer as a result of the termination of this document.

14. **CONFIDENTIALITY AND DISCLOSURES**

14.1 **Use and disclosure of Confidential Information**

A party (**receiving party**) which acquires Confidential Information of another party (**disclosing party**) must not:

- (a) use any of the Confidential Information except to the extent necessary to exercise its rights and perform its obligations under this document; or
- (b) disclose any of the Confidential Information except in accordance with clauses 14.2 or 14.3.

14.2 **Disclosures to personnel and advisers**

- (a) The receiving party may disclose Confidential Information to an officer, employee, agent, contractor, or legal, financial or other professional adviser if:
 - (i) the disclosure is necessary to enable the receiving party to perform its obligations or to exercise its rights under this document; and
 - (ii) prior to disclosure, the receiving party informs the person of the receiving party's obligations in relation to the Confidential Information under this document and obtains an undertaking from the person to comply with those obligations.
- (b) The receiving party:
 - (i) must ensure that any person to whom Confidential Information is disclosed under clause 14.2(a) keeps the Confidential Information confidential and does not use it for any purpose other than as permitted under clause 14.2(a); and
 - (ii) is liable for the actions of any officer, employee, agent, contractor or legal, financial or other professional adviser that causes a breach of the obligations set out in clause 14.2(b)(i).

14.3 **Disclosures required by law**

- (a) Subject to clause 14.3(b), the receiving party may disclose Confidential Information that the receiving party is required to disclose:
 - (i) by law or by order of any court or tribunal of competent jurisdiction; or
 - (ii) by any Government Agency, stock exchange or other regulatory body.
- (b) If the receiving party is required to make a disclosure under clause 14.3(a), the receiving party must:
 - (i) to the extent possible, notify the disclosing party immediately it anticipates that it may be required to disclose any of the Confidential Information;
 - (ii) consult with and follow any reasonable directions from the disclosing party to minimise disclosure; and
 - (iii) if disclosure cannot be avoided:
 - (A) only disclose Confidential Information to the extent necessary to comply; and
 - (B) use reasonable efforts to ensure that any Confidential Information disclosed is kept confidential.

14.4 **Receiving party's return or destruction of documents**

On termination of this document the receiving party must immediately:

- (a) deliver to the disclosing party all documents and other materials containing, recording or referring to Confidential Information; and
- (b) erase or destroy in another way all electronic and other intangible records containing, recording or referring to Confidential Information,

which are in the possession, power or control of the receiving party or of any person to whom the receiving party has given access.

14.5 **Security and control**

The receiving party must:

- (a) keep effective control of the Confidential Information; and
- (b) ensure that the Confidential Information is kept secure from theft, loss, damage or unauthorised access or alteration.

15. **NOTICES**

- (a) A notice, consent or other communication under this document is only effective if it is in writing, signed and either left at the addressee's address

or sent to the addressee by mail. If it is sent by mail, it is taken to have been received 5 Business Days after it is posted.

- (b) A person's address is set out in Schedule 1 for the City's Representative and the Advertiser's Representative, or as the person notifies the sender in writing from time to time.

16. **GENERAL**

16.1 **Governing law**

- (a) This document is governed by the laws of New South Wales.
- (b) Each party submits to the exclusive jurisdiction of the courts exercising jurisdiction in New South Wales, and any court that may hear appeals from any of those courts, for any proceedings in connection with this document, and waives any right it might have to claim that those courts are an inconvenient forum.

16.2 **Access to information**

In accordance with section 121 of the *Government Information (Public Access) Act 2009 (NSW)*, the Advertiser agrees to allow the City immediate access to the following information contained in records held by the Advertiser:

- (a) information that relates directly to the delivery of the Advertising Content by the Advertiser;
- (b) information collected by the Advertiser from members of the public to whom the Advertiser provides, or offers to provide, services on behalf of the City; and
- (c) information received by the Advertiser from the City to enable the Advertiser to deliver the Advertising Content,

but this does not include information referred to in section 121(2) of the *Government Information (Public Access) Act 2009 (NSW)*.

16.3 **Liability for expenses**

The Advertiser must pay its own expenses incurred in negotiating, executing, registering, releasing, administering and enforcing this document.

16.4 **Relationship of parties**

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

16.5 **Giving effect to this document**

Each party must do anything (including execute any document), and must ensure that its employees and agents do anything (including execute any document), that the other party may reasonably require to give full effect to this document.

16.6 **Time for doing acts**

- (a) If:
 - (i) the time for doing any act or thing required to be done; or
 - (ii) a notice period specified in this document,
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 5pm on the specified day, it is taken to have been done on the following Business Day.

16.7 **Severance**

If any clause or part of any clause is in any way unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid and legal. If this is not possible, the clause (or where possible, the offending part) is to be severed from this document without affecting the enforceability, validity or legality of the remaining clauses (or parts of those clauses) which will continue in full force and effect.

16.8 **Preservation of existing rights**

The expiration or termination of this document does not affect any right that has accrued to a party before the expiration or termination date.

16.9 **No merger**

Any right or obligation of any party that is expressed to operate or have effect on or after the completion, expiration or termination of this document for any reason, will not merge on the occurrence of that event but will remain in full force and effect.

16.10 **Waiver of rights**

A right may only be waived in writing, signed by the party giving the waiver, and:

- (a) no other conduct of a party (including a failure to exercise, or delay in exercising, the right) operates as a waiver of the right or otherwise prevents the exercise of the right;
- (b) a waiver of a right on one or more occasions does not operate as a waiver of that right if it arises again; and
- (c) the exercise of a right does not prevent any further exercise of that right or of any other right.

16.11 **Operation of this document**

- (a) This document contains the entire agreement between the parties about its subject matter. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by this document and has no further effect.
- (b) Any right that a person may have under this document is in addition to, and does not replace or limit, any other right that the person may have.
- (c) Any provision of this document which is unenforceable or partly unenforceable is, where possible, to be severed to the extent necessary to make this document enforceable, unless this would materially change the intended effect of this document.

16.12 **Operation of indemnities**

- (a) Each indemnity in this document survives the expiry or termination of this document.
- (b) A party may recover a payment under an indemnity in this document before it makes the payment in respect of which the indemnity is given.

16.13 **Inconsistency with other documents**

Unless the contrary intention is expressed, if there is an inconsistency between any of one or more of:

- (a) this document;
- (b) any Schedule to this document; and
- (c) the provisions of any other document of the Advertiser,

the order of precedence between them will be the order listed above, this document having the highest level of precedence.

16.14 **No fetter**

Nothing in this document in any way restricts or otherwise affects the City's unfettered discretion to exercise its statutory powers as a public authority.

16.15 **Counterparts**

This document may be executed in counterparts.

SCHEDULE 1

Details

ITEM	TERM	DESCRIPTION
1.	City's Representative	Name: Director, Planning, Development and Transport Address: Level 1, 456 Kent Street, Sydney NSW 2000
2.	Advertiser's Representative	Name: [<i>insert</i>] Address: [<i>insert street address</i>]

EXECUTED as a deed.

Signed, sealed and delivered for
**THE COUNCIL OF THE CITY OF
SYDNEY** by its duly authorised
officer, in the presence of:

Signature of officer

Signature of witness

Name of officer

Name

Position of officer

456 Kent Street, Sydney NSW 2000
Address of witness

EXECUTED by **[insert]** in accordance
with s127(1) of the Corporations Act
2001 (Cth):

Signature of director

Signature of director/secretary

Name

Name

ANNEXURE B POSITIVE COVENANT INSTRUMENT

THIS IS ANNEXURE "A" REFERRED TO IN THE POSITIVE COVENANT BETWEEN THE GEORGE HAY PTY LTD AS REGISTERED PROPRIETOR AND THE COUNCIL OF THE CITY OF SYDNEY AS PRESCRIBED AUTHORITY

DATED:

INSTRUMENT SETTING OUT TERMS OF POSITIVE COVENANT INTENDED TO BE CREATED PURSUANT TO SECTION 88E OF THE CONVEYANCING ACT 1919

(Sheet 1 of 3 Sheets)

Full name and address of the owner of the land

Lot 150 in Strata Plan 46789

**George Hay Pty Ltd
49-51 Greek Street
GLEBE NSW 2037**

1 Definitions

In this instrument:

- (a) **Act** means the *Conveyancing Act 1919* as amended from time to time.
- (b) **Advertising Deed** means a deed in materially the same terms as set out in Annexure "A".
- (c) **Council** means Council of the City of Sydney.
- (d) **Development Consent** means any development consent (within the meaning of the *Environmental Planning and Assessment Act 1979*) granted to development application D/2018/73 (lodged with the City of Sydney on 2 February 2018).
- (e) **Lot Burdened** means Lot 150 in Strata Plan 46789.
- (f) **Operator** means the person who, from time to time, has the right to operate the sign by reason of a lease or licence granted by the Owner, but does not include any person who is an officer, employee, agent, contractor or subcontractor of such a person.
- (g) **Owner** means the Registered Proprietor of the Lot Burdened from time to time.
- (h) **Sign** means any digital light emitting diode (LED) display sign located within the Lot Burdened.

2 Terms of positive covenant

2.1 The Owner

The Owner must not personally operate the Sign.

2.2 The Operator

- (a) The Owner must ensure that the Operator does not commence operating the Sign until it has either:
 - (i) offered to enter the Advertising Deed with the Council (in writing) and that offer has been declined (in writing);
 - (ii) offered to enter the Advertising Deed with the Council (in writing) and the Council has not entered into the Advertising Deed within 14 days of the offer being made; or
 - (iii) entered into the Advertising Deed with the Council.
- (b) The Owner must ensure that — if the Operator has commenced operating the Sign after satisfying either clause 2.2(a)(i) or clause 2.2(a)(ii) — the Operator will promptly enter into the Advertising Deed with the Council, if it receives an offer (in writing) from the Council to enter into the Advertising Deed.

2.3 Release, etc.

Name of the person empowered to release vary or modify this positive covenant:

- (a) if the Development Consent has lapsed, has been surrendered or has been revoked — The Owner.
- (b) in all other circumstances — The Owner and the Council jointly.

[Execution details inserted here]