

Attachment B

Draft Deed of Variation

THIRD DEED OF VARIATION

PEMULWUY PROJECT

The Council of the City of Sydney

and

Aboriginal Housing Co Limited

The Council of the City of Sydney

Town Hall House
456 Kent Street
SYDNEY NSW 2000

Reference: KW S091270

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THIRD DEED OF VARIATION

THIS DEED IS MADE ON

BETWEEN:

- (A) **The Council of the City of Sydney ABN 22 636 550790** of Town Hall House 456 Kent Street Sydney NSW 2000 (**City**); and
- (B) **Aboriginal Housing Co Limited ABN 28 001 154 481** of Level 1, 29 Botany Road, Waterloo NSW 2017 (**AHC**).

BACKGROUND

- (A) The AHC and the City entered into the Deed.
- (B) The Deed was varied on 31 January 2018 and December 2018.
- (C) The City and AHC agree that many of the terms of the Deed have been satisfied.
- (D) The City and AHC have agreed to vary the Deed again in the manner set out in this Third Deed of Variation.
- (E) The AHC has as at the date of this deed, created the Student Housing Restriction pursuant to Deed.
- (F) The City agrees to the creation of the Easement for Overhang by the AHC in accordance with this Deed.
- (G) The parties agree the Pemulwuy Project has Substantially Progressed.

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Third Deed of Variation, except where the context otherwise requires:

Deed means the deed between the City and the AHC dated 31 May 2013 as amended by the deed of variation dated 31 January 2018 and the second deed of variation dated December 2018, copies of which are annexed to this Third Deed of Variation as Annexure A.

Easement for Overhang means the easement referred to in Clause 8 and the terms provided in Annexure D.

Student Housing Restriction means the restriction on use of land in dealing no. AP137679 which has been created a copy of which is attached to this Deed as Annexure B.

Third Deed of Variation means this document and all annexures.

1.2 Interpretation

In this Third Deed of Variation:

- (a) headings are for convenience only and do not affect interpretation;
- (b) a reference to legislation includes legislation as amended, re-enacted, or replaced, and includes any subordinate legislation made under it;
- (c) if a word is defined, then another part of speech is given the same meaning;
- (d) singular includes the plural and vice versa; and
- (e) any example, illustration, or inclusion of a right, obligation or concept does not limit the scope of that thing,
- (f) a reference to a body or authority includes any body or authority that replaces it.

Capitalised terms which are used in this Third Deed of Variation and which are otherwise not defined have the meaning given to those terms in the Deed.

2. Acknowledgment of satisfaction of terms of the Deed

2.1 The parties acknowledge and agree that the following terms of the Deed have been satisfied:

- (a) The City has transferred the Land to AHC in accordance with Clause 6 of the Deed.
- (b) The Pemulwuy Project has Substantially Progressed prior to the Agreed Date as required by clause 9.1 of the Deed.

2.2 The parties acknowledge that the AHC has created the Student Housing Restriction.

3. VARIATION OF DEED

The Deed is varied as follows:

3.1 Clause 1.1 definitions, insert the following words:

Council Lot means Lot 1 in DP803299.

Development Consent means development consent SSD 8135 issued by the Independent Planning Commission on 4 March 2019 for construction of a student accommodation development within Precinct 3 of the Pemulwuy Project.

Easement for Overhang means the easement referred to in Clause 8.5 and the terms provided in Annexure D.

Precinct 3 means the land at 77-123 (odd) Eveleigh Street, Redfern as described in the Development Consent.

Public Domain Land means the land shaded blue on the Public Domain Plan.

Public Domain Plan means plan attached to this Deed and marked Annexure C.

3.2 Clause 1.1 definitions, delete the following words:

Project Approval means the Minister's approval of the Modification Application granted on 21 December 2012, a copy of which is attached in Annexure A.

And replace with following words:

Project Approval means the Minister's approval of the modification application MP11.0093 granted on 21 December 2012 as modified by Modification of Project Approval MP11_0093 MOD1, a copy of which is attached in Annexure A.

3.3 All references to "Section 88B and 88E Instrument" are to be amended to "Section 88B Instrument".

3.4 Delete clause 8.1 and replace with following words:

8.1 AHC to Prepare

The AHC must prepare and provide the Subdivision Plan and the Section 88B Instrument and any required transfer instruments for the Public Domain Land to be dedicated or transferred to the City in accordance with the Project Approval and the Development Consent, to the City (acting as a party to this Deed and not as an Authority):

- (a) *as soon as is reasonably practicable to do so (and in any event before occupation of any part of the Pemulwuy Project);*
- (b) *at no cost to the City;*
- (c) *identifying the land burdened by the Interests in Land in favour of the City; and*
- (d) *identifying the land to be dedicated to the City as a public road; and*
- (e) *identifying the Public Domain Land to be dedicated or transferred to the City in accordance with the Project Approval and the Development Consent (as identified on the Public Domain Plan).*

3.5 Amend clause 8.2(a) by adding the words "and any required transfer instruments for the Public Domain Land to be dedicated or transferred to the City in accordance with the Project Approval and the Development Consent," after the words "Section 88B Instrument".

3.6 Amend clause 8.2(b) by adding the words "and the transfer of the Public Domain Land to be dedicated or transferred to the City in accordance with the Project Approval and the Development Consent" after the words "Section 88B Instrument".

3.7 Amend the last hanging paragraph in clause 8.2 by adding the words "and the transfer of the Public Domain Land to be dedicated or transferred to the City in accordance with the Project Approval and the Development Consent" after the words "Section 88B Instrument" the first time it occurs.

3.8 Amend clause 8.3(a) by adding the words "and the transfer or dedication of the Public Domain Land to be dedicated or transferred to the City in accordance with the

Project Approval and the Development Consent” after the words “Section 88B Instrument”.

3.9 Amend clause 8.4(a)(ii) by adding the words “or the area of the Easement for Overhand under clause 8.5” after the words “clause 10”.

3.10 Insert the following provision as clause 8.5:

8.5 REGISTRATION OF EASEMENT FOR OVERHANG

- (a) *The City acknowledges that prior to the transfer of the Council Lot to the City the AHC will create an Easement for Overhang on the terms in Annexure D over that lot.*
- (b) *The area and location for the Easement for Overhang is indicatively shown on the architectural plans annexed as Annexure F and the final area and location for the Easement for Overhang must not materially differ from such area and location.*
- (c) *Subject to clause 8.5(b) being complied with, the City consents to the registration of the Easement for Overhang on the Council Lot.*

3.11 Add to clause 9.3 the following words:

9.3 CAVEAT

- (a) *Subject to clause 9.3(b) the City may lodge any caveat reasonably necessary to prevent a dealing with the Land or any part of it in a manner which is inconsistent with this Deed, including:*
 - (i) *The registration of the Interests in Land;*
 - (ii) *The right to receive payment for the relevant portion of the Land in accordance with clause 10.*
- (b) *Notwithstanding clause 9.3(a) the City must not lodge a caveat over the land in Precinct 3.*

3.12 Delete

Annexure A of the Deed

And replace with

Annexure G of this Third Deed of Variation.

3.13 Delete

Annexure D of the Deed

And replace with

Annexure B of this Third Deed of Variation.

3.14 Delete

Annexure E of the Deed

and replace with

Annexure C of this Third Deed of Variation

4. NO OTHER CHANGE

The parties confirm that the Deed will continue in full force and effect as varied by this Third Deed of Variation. Nothing in this Third Deed of Variation will be read or construed as implying any form of variation or waiver other than as expressly set out in this Third Deed of Variation.

5. FURTHER ASSURANCE

Each party must promptly at its own cost do all things (including executing all documents) necessary or desirable to give full effect to this Third Deed of Variation.

6. LEGAL COSTS

6.1 Each party will bear its own legal costs in relation to the preparation and execution of this Third Deed of Variation.

7. GENERAL

7.1 This Third Deed of Variation contains the entire agreement between the parties and any previous negotiations, agreements, representations or warranties relating to the subject matter of this Third Deed of Variation are of no effect.

7.2 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.

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

7.4 The invalidity, illegality or unenforceability of any provisions of this Third Deed of Variation will not affect the validity or enforceability of any other provisions.

7.5 This Third Deed of Variation may only be varied in writing by the agreement of the parties.

7.6 This Third Deed of Variation is governed by and construed in accordance with the law of the State of New South Wales.

7.7 The parties submit to the non-exclusive jurisdiction of the courts of New South Wales in relation to all matters arising under, or relating to, this Third Deed of Variation.

EXECUTED as a Deed

THE COUNCIL OF THE CITY OF SYDNEY)
by its duly appointed attorney Patricia Monica)
Barone Power of Attorney registered book)
4571 No 672 in the presence of:)
)

Witness:

Patricia Monica Barone

Name (printed):

EXECUTED BY THE ABORIGINAL)
HOUSING CO LIMITED in accordance with)
the provisions of section 127 of the)
Corporations Act 2001 in the presence of:)
)
)

Secretary:

Director:

Name (printed):

Name: (printed)

ANNEXURE A
DEED FOR PEMULWUY PROJECT AS VARIED

ANNEXURE B

INTERESTS IN LAND (SECTION 88B CONVEYANCING ACT 1919)

Definitions

For the purposes of this Instrument, the following words have the following meanings:

Aboriginal Housing Co means the Aboriginal Housing Co Limited.

Art or Craft Work means any two or three dimensional work, including painting, drawing, etching, lithograph, photograph, video, computer-generated or computer enhanced medium, sculpture, carving, jewellery, furniture, or mixed media work.

Council means the Council of the City of Sydney.

Instrument means this s.88B instrument.

Lot Burdened means that part of the land having the burden of an easement or restriction on use (whichever is applicable) which the Plan indicates is the site of an easement or restriction.

Plan means the plan of subdivision to which this Instrument relates.

2. **Restriction on Use: Affordable Housing**

The Lot Burdened shown on the Plan as being subject to this restriction may only be used for the purposes of affordable housing (as described in the *State Environmental Planning Policy (Affordable Rental Housing) 2009*, as amended by the *State Environmental Planning Policy 2011*), duly administered by:

- (a) the Aboriginal Housing Co (being the registered proprietor of the Land as at the date of registration of this restriction) or
- (b) by a provider of affordable housing as duly registered with the Department of Human Services (Housing NSW – Centre for Affordable Housing), duly authorized by the registered proprietor of the land from time to time.

Every person (which term includes a corporation) who is at any time entitled to an estate or interest in the Lot Burdened, including without limitation any freehold or leasehold estate or interest in possession in the Lot Burdened and each part of the Lot Burdened, must ensure that the 62 dwellings constructed in accordance the Minister's approval of the modification application MP11.0093 granted on 21 December 2012 as modified by Modification of Project Approval MP11_0093 are provided as affordable housing (as described in the *State Environmental Planning Policy (Affordable Rental Housing) 2009*, as amended by the *State Environmental Planning Policy 2011*).

[Note: This restriction applies to those lots which

contain townhouses or similar buildings, constructed for the purposes of provision of residential accommodation - this note is not to be replicated in the S88B instrument]

3. ***Restriction on Use: Gallery***

The Lot Burdened may be used only for the purposes of creation, fabrication, or exhibition of Art of Craft Works, education, recreation, health, arts and crafts and culture (including parades, dramatic productions, dance and movement) and for any other community purpose approved by the Council (in its capacity as a grantee to this restriction and in no other capacity) from time to time.

[Note: This restriction applies to the lot(s) on which there is to be constructed a community gallery. - this note is not to be replicated in the S88B instrument]

4. ***Restriction on Use: Child Care***

The Lot Burdened may be used only for the purposes of a long stay child care centre, before and after school care centre, occasional care, school vacation program, or for any other community purpose approved by the Council (in its capacity as a grantee to this restriction and in no other capacity) from time to time.

[Note: This restriction applies only to the lot(s) on which is there is to be constructed premises to be used for child care purposes. - this note is not to be replicated in the S88B instrument]

5. ***Release and Variation of Easements and Restrictions***

5.1 The Council is solely empowered to release each Easement and Restriction.

5.2 Each Easement and Restriction may only be varied by written agreement between the Council and the Aboriginal Housing Company.

ANNEXURE C
PUBLIC DOMAIN PLAN

ANNEXURE D
EASEMENT FOR OVERHANG

Easement for overhang

- 1 *The owner of the lot benefited:*
 - (a) *may, in accordance with the Development Consent, construct structures on the lot benefited which overhang the site of the easement shown as [##] on the plan (the **overhanging structure**) and may insist that any parts of the overhanging structure remain, but only to the extent they are within the site of this easement, and*
 - (b) *must keep the overhanging structure in good repair and safe condition, and*
 - (c) *may do anything reasonably necessary for those purposes, including:*
 - i. *on giving reasonable written notice to the owner of the lot burdened, entering the lot burdened, and*
 - ii. *taking anything on to the lot burdened, and*
 - iii. *carrying out work.*
- 2 *In exercising those powers, the owner of the lot benefited must:*
 - (a) *ensure all work is done properly and is appropriately insured, and*
 - (b) *cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and*
 - (c) *restore the lot burdened as nearly as is practicable to its former condition, and*
 - (d) *make good any collateral damage.*
- 3 *The owner of the lot burdened may insist that this easement be extinguished when the overhanging structure on the lot benefited is removed.*
- 4 *The owner of the lot burdened must not do or allow anything to be done to damage or interfere with the overhanging structure.*

ANNEXURE E
STUDENT HOUSING RESTRICTION

ANNEXURE F
ARCHITECTURAL PLANS SHOWING OVERHANG

ANNEXURE G
PROJECT APPROVAL AND MODIFICATION APPLICATION