

Attachment D

**Voluntary Planning Agreement – 2 Chifley
Square, Sydney**

Planning agreement

The Council of the City of Sydney ABN 22 636 550 790 and

The Trust Company (Australia) Limited ABN 21 000 000 993
in its capacity as trustee for the 167 Macquarie Street Trust and

The Trust Company (Australia) Limited ABN 21 000 000 993
in its capacity as custodian of the DVP2 Chifley Investment Trust

2 Chifley Square, Sydney

Environmental Planning and Assessment Act 1979

Reference: X085141 | VPA/2021/13

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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) **The Trust Company (Australia) Limited** ABN 21 000 000 993 as trustee for the 167 Macquarie Street Trust and **The Trust Company (Australia) Limited** ABN 21 000 000 993 as custodian of the DVP2 Chifley Investment Trust c/- Level 20, 1 Martin Place, Sydney NSW 2000 (the **Developer**).

BACKGROUND

- (A) The Developer is the owner of the Land and the proponent of the Planning Proposal and intends to undertake the Development on the Land.
- (B) The Developer has offered to enter into this document with the City to provide 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).

Adverse Affectation has the same meaning as in Part 3 of Schedule 3 of the *Conveyancing (Sale of Land) Regulation 2010* (NSW).

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.

Right of Carriageway and Breakthrough Works means the works contemplated by Annexure B.

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 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.

Commitment Agreement is an agreement between the NABERS National Administrator, the Department of Planning and Environment (Environment and Heritage) and the Developer to design, build and commission the premises to achieve the applicable NABERS Energy star rating as described in Schedule 3 and otherwise has the meaning attributed to 'Commitment Agreement' under NABERS.

Completion has the meaning set out in clause 6.1.

Completion Notice means a notice issued by the Developer in accordance with clause 6.2.

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.

Contamination has the meaning given to that word in the *Contaminated Land Management Act 1997* (NSW).

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.

Deed of Consent means the consent in the form of Deed of Novation set out in Annexure A.

Defect means any error, omission, defect, non-conformity, discrepancy, shrinkage, blemish in appearance or other fault in the Public Benefits or any other matter which prevents the Public Benefits from complying with the terms of this document.

Defects Liability Period means in relation to the Public Benefits, the period of 12 months from the date on which the Developer's Works reach Completion.

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

Developer's Works means those parts of the Public Benefit described as "Developer's Works" in clause 1 of Schedule 3, to be delivered by the Developer in accordance with this document.

Development means the development of the Land by the Developer 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 section 4.55 (or section 4.56 if applicable) of 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.

Energy Efficient Review means an independent design review undertaken by a NABERS Certified Independent Design Reviewer sufficiently early in the design process to enable design changes to be made.

Environmental Excellence Initiatives means those parts of the Public Benefit described as 'Environmental Excellence Initiatives' in clause 1 of Schedule 3, to be delivered by the Developer in accordance with this document.

Environmental Laws means all laws and legislation relating to environmental protection, building, planning, health, safety or work health and safety matters and includes the following:

- (a) the *Work Health and Safety Act 2011* (NSW);
- (b) the *Protection of the Environment Operations Act 1997* (NSW); and
- (c) the *Contaminated Land Management Act 1997* (NSW).

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.

Gross Floor Area has the meaning given to that term in the *Sydney Local Environment Plan* in effect at the date of this document.

GST means the same as in the GST Act.

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

Guarantee means a bank guarantee or documentary performance bond for the Guarantee Amount which must:

- (a) be denominated in Australian dollars;
- (b) be an unconditional undertaking;
- (c) be signed and issued by a bank licensed to carry on business in Australia, an Australian Prudential Regulation Authority (APRA) regulated authorised deposit taking institution or an insurer authorised by APRA to conduct new or renewal insurance business in Australia having at all times an investment grade security rating from an industry recognised rating agency of at least:
 - (i) BBB + (Standard & Poors and Fitch);
 - (ii) Baa 1 (Moody's); or
 - (iii) Bbb (Bests);
- (d) be issued on behalf of the Developer;
- (e) have no expiry or end date;
- (f) state the beneficiary as the City;
- (g) be irrevocable;
- (h) state the Guarantee Amount as the minimum amount required by this document to be lodged as security;
- (i) state the purpose of the security as required in accordance with this document; and
- (j) be on such other terms approved by the City.

Guarantee Amount(s) means the total amount listed in Item 6 of Schedule 1 of this document.

Guarantee Amount(s) Due Date means the date or milestone by which the Developer must provide the Guarantee Amount to the City, set out at Item 7 of Schedule 1.

Index Number means the Consumer Price Index (Sydney all groups) published by the Australian Bureau of Statistics from time to time.

Insolvency Event means:

- (a) having a controller, receiver, manager, administrator, provisional liquidator, liquidator or analogous person appointed;
- (b) an application being made to a court for an order to appoint a controller, provisional liquidator, trustee for creditors or in bankruptcy or analogous person to the person or any of the person's property
- (c) the person being taken under section 459F(1) of the Corporations Act to have failed to comply with a statutory demand;
- (d) an application being made to a court for an order for its winding up;
- (e) an order being made, or the person passing a resolution, for its winding up;
- (f) the person:
 - (i) suspending payment of its debts, ceasing (or threatening to cease) to carry on all or a material part of its business, stating that it is unable to pay its debts or being or becoming otherwise insolvent; or
 - (ii) being unable to pay its debts or otherwise insolvent;
- (g) the person taking any step toward entering into a compromise or arrangement with, or assignment for the benefit of, any of its members or creditors;
- (h) a court or other authority enforcing any judgment or order against the person for the payment of money or the recovery of any property; or
- (i) any analogous event under the laws of any applicable jurisdiction,

unless this takes place as part of a solvent reconstruction, amalgamation, merger or consolidation that has been approved by the other party.

Instrument means the easement for right of carriageway and the positive covenant contemplated by Annexure B.

Instrument Change means an amendment to the Sydney LEP in accordance with the Planning Proposal.

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

Laws means all applicable laws, regulations, industry codes and standards, including all Environmental Laws.

Monetary Contribution means that part of the Public Benefits described as "Monetary Contribution" in clause 1 of Schedule 3 to be paid by the Developer to the City in accordance with this document.

NABERS means the National Australian Built Environment Rating System that measures the environmental performance of Australian buildings, tenancies and homes and is managed nationally by the NSW Office of Environment and Heritage, on behalf of Commonwealth, state and territory governments.

NABERS National Administrator has the meaning attributed to 'Commitment Agreement' under NABERS.

Occupation Certificate has the same meaning as in the Act.

Personal Information means:

- (a) personal information within the meaning of the *Privacy and Personal Information Protection Act 1998* (NSW);
- (b) health information within the meaning of the *Health Records and Information Privacy Act 2002* (NSW); and
- (c) any information which does not fall within the scope of paragraphs (a) and (b) above, but is personal information within the meaning of the *Privacy Act 1988* (Cth).

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

Planning Proposal means the planning proposal for the Land which received Gateway Determination from the Department of Planning and Environment on 8 February 2022.

Privacy Laws means the *Privacy Act 1988* (Cth), the *Privacy and Personal Information Protection Act 1998* (NSW), the *Health Records and Information Privacy Act 2002* (NSW); the *Spam Act 2003* (Cth), the *Do Not Call Register Act 2006* (Cth) and any other applicable legislation, regulations, guidelines, codes and the City's 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 2021* (NSW).

Standards means the policies, procedures and standards for carrying out the Developer's Works.

Subdivision of Land has the same meaning as in the Act.

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 Instrument Change.

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**

- (a) 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.
- (b) For the avoidance of doubt, if the City imposes a condition on a Development Consent for the Development under section 7.11 or section 7.12 of the Act requiring payment of a contribution authorised by a contributions plan, no further contributions pursuant to section 7.11 or section 7.12 of the Act are payable in relation to the Development.

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 205 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 later of:

- (a) the date of execution of this document by all parties to this document; and
- (b) the date the Instrument Change comes into force.

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;
 - (iii) all work performed by the Developer 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 Developer's size and experience; and
 - (iv) 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 Maintenance of Developer's Works

(a) In this clause 5.2, the following definitions apply:

Maintain means works to bring an item to a state of reasonable condition and in accordance with relevant standards applicable at the time of construction of the item, but does not include removing graffiti or repairing any item damaged as a consequence of vandalism. **Maintained** and **Maintenance** have corresponding meanings.

Maintenance Period is the period of 12 months from the date on which the Developer's Works reach Completion.

Maintenance Schedule means the schedule of proposed Maintenance works.

(b) The Developer's Works must be Maintained by the Developer during the Maintenance Period in accordance with the Maintenance Schedule.

(c) The Developer must follow the City's Policies and obtain and comply with all Authorisations necessary to carry out the Maintenance required under this clause 5.2.

(d) If, during the Maintenance Period:

- (i) the Developer fails to materially comply with the approved Maintenance Schedule and does not rectify that failure within 15 Business Days of being notified of that failure by the City or within a reasonable period of time agreed between the parties; or
- (ii) the City becomes aware of an item of the Developer's Works that requires urgent Maintenance to ensure public safety or avoid damage or loss to the public or property,

the City may, by itself, its employees, contractors or agents, carry out the required works and may recover as a debt due and owing to the City, any difference between the amount of the Guarantee and the costs incurred by the City in carrying out the Maintenance work.

6. COMPLETION

6.1 Date of Completion

The Developer must ensure that the Public Benefits are achieved on or before the dates or milestones referred to as the 'Due Date' in clause 1 of Schedule 3 of this document (**Completion**).

6.2 Developer completion notice – Public Benefits

- (a) When, in the reasonable opinion of the Developer, a Public Benefit has reached Completion, the Developer must notify the City’s Representative in writing and must include in that notice:
- (i) in relation to the Environmental Excellence Initiatives:
 - (A) a copy of the executive summary of the Energy Efficient Review prepared by a NABERS certified Independent Design Reviewer in accordance with the NABERS requirements;
 - (B) a copy of 12 months of sub-metering data for energy and water that informed the NABERS rating; and
 - (C) evidence that the NABERS rating for energy and water has been achieved;
 - (D) evidence of the Building Climate Active certification following completion of NABERS ratings;
 - (E) evidence post-occupancy of formal rating for NABERS Waste;
 - (ii) in relation to the Instrument, evidence that the Instrument has been lodged for registration on the title for the Land in accordance with clause 1 of Schedule 3; and
 - (iii) in relation to the Public Art, a statement that the Public Art installation has been completed,

(Completion Notice). For the avoidance of doubt, the Developer can issue separate Completion Notices at separate times for different elements of the Public Benefits, however the Developer must ensure that Completion is achieved for the Public Benefits before the due date specified in Item 1 of Schedule 3.

- (b) If the Environmental Excellence Initiatives have not been achieved on or before the date or milestone referred to in Item 1 of Schedule 3 to this document:
- (i) the Developer must make a request in writing to meet the City to agree what alternative measures it will put into place in order to achieve a sustainable commercial development; or
 - (ii) if alternative measures have been previously agreed, the City may permit the Developer not to achieve the Environmental Excellence Initiatives as set out in this document by issuing a notice in writing to the Developer stating that completion of the items identified in that notice is not required to fulfil the Developer’s obligations under this document.

6.3 **Inspection by the City**

- (a) The City's Representative must inspect the Developer's Works within 5 Business Days of the date that the Completion Notice is received by the City. The City's Representative may refuse to complete the inspection until the Completion Notice has been issued with all required documentation attached in accordance with clause 6.2. Within 10 Business Days of the date of the inspection by the City's Representative, the City must by written notice to the Developer:
 - (i) state that Completion has been achieved;
 - (ii) state that Completion has not been achieved and, if so, identify the Defects, errors or omissions which, in the opinion of the City's Representative, prevent Completion; or
 - (iii) issue a notice under clause 6.4(a).
- (b) Nothing in this clause 6.3, or any notice issued under this clause 6.3, will:
 - (i) reduce or waive in any manner the Developer's responsibility to:
 - (A) deliver the Developer's Works in accordance with this document; or
 - (B) the Developer's responsibility to correct Defects, errors or omissions, whether or not these are identified by the City; or
 - (ii) create any liability for the City in relation to any defective aspect of the Developer's Works.

6.4 **Non-completion of Public Benefits**

- (a) If the Developer makes a request by notice in writing not to complete the Public Benefits (or any part of the Public Benefits):
 - (i) the City may permit the Developer not to complete the Public Benefits (or any part of the Public Benefits) by issuing a notice in writing to the Developer stating that completion of the items identified in that notice is not required to fulfil the Developer's obligations under this document; and
 - (ii) the City may make a claim on the Guarantee in such amount as the City considers necessary to complete the portion of Public Benefit not being delivered by the Developer.
- (b) If the Developer fails to complete the whole of the Public Benefits in the form and to the standards required under the Development Consent or this document then the City may either:
 - (i) complete the Public Benefits itself; or
 - (ii) modify the Public Benefits to reasonably achieve the objectives identified in the Development Consent and this document,

and may recover all costs of and reasonably incidental to that work from the Developer. The City can claim on the Guarantee in order to exercise this right, in which case the provisions of clause 10 will apply. To the extent that the City's costs exceed the amount of the Guarantee, the City can recover this amount from the Developer as a debt due and owing to the City.

- (c) If the City exercises its rights under this clause 6.4 to complete the Public Benefits, the Developer grants the City a licence for the period necessary for the City to access the Land to carry out, or procure the carrying out, of the Public Benefits.

7. **INDEMNITY**

The Developer indemnifies the City against all damage, expense, loss or liability of any nature suffered or incurred by the City its officers, employees, agents and contractors 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 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 City (or any person engaged by the City).

8. **DEFECTS LIABILITY**

8.1 **Security for Defects Liability Period**

Until the expiry of the relevant Defects Liability Period, the City may retain from the Guarantee an amount equal to 10% of the Attributed Value of the Public Benefits as security for the Developer's performance of its obligations under this clause 8. The Developer must make any necessary arrangements to allow the provision of the Guarantee for the Defects Liability Period in accordance with this clause.

8.2 **Defect in the Public Benefits**

- (a) If:
 - (i) the Developer is in breach of clause 4.2 of this document; or
 - (ii) the City notifies the Developer of a Defect in the Public Benefits within the Defects Liability Period,

then, following written notice from the City, the Developer must promptly correct or replace (at the Developer's expense) the defective elements of the Public Benefits.

- (b) If the Developer is unable or unwilling to comply with clause 8.2(a), or fails to rectify the Defect within three months of receiving notice from the City under clause 8.2(a), the City may:
 - (i) rectify the Defect itself;
 - (ii) make a claim on the Guarantee in accordance with clause 3 of Schedule 3 for the reasonable costs of the City in rectifying the Defect; and

- (iii) to the extent the costs incurred to rectify the Defect exceeds the Guarantee, recover the reasonable costs from the Developer as a debt due and owing to the City.
- (c) If the City requires access to the Land to rectify any Defect, the Developer grants the City and its contractors a licence for such period as is necessary for the City and its contractors to access the Land to carry out, or procure the carrying out, of the rectification works.

9. REGISTRATION AND CAVEAT

9.1 Registration of this document

- (a) The Developer:
 - (i) consents to the registration of this document at the NSW Land Registry Services on the certificate of title to the Land;
 - (ii) warrants that it has obtained all consents to the registration of this document on the certificate of title to the Land; and
 - (iii) must within 10 Business Days of a written request from the City do all things necessary to allow the City to register this document on the certificate of title to the Land, including but not limited to:
 - (A) producing any documents or letters of consent required by the Registrar-General of the NSW Land Registry Services; and
 - (B) pay to the City the registration and electronic lodgement (PEXA) fees payable in relation to registration of this document at NSW Land Registry Services.
 - (iv) 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.

9.2 Caveat

- (a) The City may, at any time after the date of this document, register a caveat over the Land preventing any dealing with the Land that is inconsistent with this document. Provided that the City complies with this clause 9.2, the Developer must not object to the registration of this caveat and may not attempt to have the caveat removed from the certificate of title to the Land.
- (b) In exercising its rights under this clause 9.2 the City must do all things reasonably required to:
 - (i) remove the caveat from the Land once this document has been registered on the certificate of title to the Land; and
 - (ii) consent to the registration of:
 - (A) this document; and

- (B) any plan of consolidation, plan of subdivision or other dealing required by this document or the Development Consent.

9.3 **Release of this document**

If the City is satisfied that the Developer has provided all Public Benefits and otherwise complied with this document then the City must promptly do all things reasonably required to remove this document from the certificate of title to the Land.

10. **ENFORCEMENT**

10.1 **Developer to provide Guarantee**

The Developer must deliver the Guarantee for the Guarantee Amount to the City by the Guarantee Amount Due Date.

10.2 **Adjustment of Guarantee Amount**

- (a) Subject to clause 10.2(b), following each anniversary of the date of the Guarantee (the "Adjustment Date") and at any time prior to the expiry of the Defects Liability Period, the Guarantee Amounts are to be adjusted to a revised amount by applying the following formula:

$$\mathbf{RGA} = \mathbf{GA} \times (\mathbf{A/B})$$

where:

RGA is the revised guarantee amount applicable from the relevant Adjustment Date

GA is the Guarantee Amount that is current on the relevant Adjustment Date

A is the Index Number most recently published before the relevant Adjustment Date

B is the Index Number most recently published:

- (i) before the date of the Guarantee for the first Adjustment Date; and
- (ii) before the preceding Adjustment Date for every subsequent Adjustment Date

If after the formula is applied the revised Guarantee Amount will be less than the amount held at the preceding Adjustment Date, the Guarantee Amount will not be adjusted.

- (b) If the Guarantee Amount is adjusted under clause 10.2(a), the Developer is not required to provide the City with a replacement Guarantee for that revised Guarantee Amount until such time as the City notifies the Developer that the City is ready to exchange the then current Guarantee held by the City, following which the City and the Developer must promptly exchange

the then current Guarantee held by the City with a replacement Guarantee for that revised Guarantee Amount from the Developer.

10.3 **Right of City to claim on Guarantee**

- (a) The Developer agrees that the City may make an appropriation from the Guarantee in such amount as the City, acting reasonably, thinks appropriate if:
- (i) the Developer fails to provide detailed design drawings and a detailed costs estimate;
 - (ii) the Developer fails to comply with clause 2 of Schedule 3 (payment of Monetary Contribution);
 - (iii) the City allows the Developer not to complete the Public Benefits, or any part of them, in accordance with clause 6.4(a)(ii);
 - (iv) an Insolvency Event occurs in respect of the Developer;
 - (v) the Developer fails to deliver the Public Benefits in accordance with clause 6.4(b);
 - (vi) the Developer fails to carry out Maintenance in accordance with clause 5.2 of this document;
 - (vii) the Developer fails to rectify a Defect in accordance with clause 8.2 of this document;
 - (viii) the detailed designs for the Developer's Works are not finalised between the parties within 12 months of the date of issue of a Construction Certificate that approves the construction of any structures above the ground floor of the Development;
 - (ix) the Developer's Works do not reach Completion within 36 months of the date of issue of the first Construction Certificate in respect of the Development (or such later time as agreed by the City in writing);
 - (x) the Developer fails to maintain the Developer's Works in accordance with clause 5.2; or
 - (xi) the City incurs any other expense or liability in exercising its rights and powers under this document.
- (b) Any amount of the Guarantee appropriated by the City in accordance with clause 10.2 must be applied only towards:
- (i) the costs and expenses incurred by the City rectifying any default by the Developer under this document; and
 - (ii) carrying out any works required to achieve the Public Benefits.

10.4 **Expenditure by the City**

If the City claims on the Guarantee to Complete the Developer's Works, then the City:

- (a) is not required to expend more money than the Guarantee Amount and may elect not to carry out items of the Developer's Works to ensure that those works can be carried out for an amount equal to or less than the Guarantee Amount; or
- (b) may expend more than the Guarantee Amount. If the City expends more money than the Guarantee Amount then the amount in excess of the Guarantee Amount will be deemed to be a debt due and owing to the City by the Developer.

10.5 **Top-up and return of Guarantee**

- (a) If the City calls upon the Guarantee in accordance with this clause 10 then the Developer must immediately provide to the City a replacement Guarantee to ensure that, at all times until the Guarantee is released in accordance with paragraph (b), the City is in possession of a Guarantee for a face value equivalent to the Guarantee Amount.
- (b) If:
 - (i) the monies secured by the Guarantee have not been expended;
 - (ii) the City has concurred with Completion in accordance with clause 6.3(a)(i) of this document, taking into account any approved non-completion of Public Benefits approved by clause 6.4(a) of this document; and
 - (iii) the City has been provided with the security for the Defects Liability Period in accordance with clause 8.1,then the City will promptly return the Guarantee to the Developer following the issue of a notice pursuant to clause 6.3(a)(i) of this document.
- (c) If, following expiry of the Defects Liability Period, the City is satisfied that all defects have been rectified in accordance with clause 8 then the City must promptly return to the Developer the portion of the Guarantee retained by the City as security for the Defects Liability Period.

11. **DISPUTE RESOLUTION**

11.1 **Application**

Any Dispute must be determined in accordance with the procedure in this clause 11.

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 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 11; 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.

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 11 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 11 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**

Nothing in this clause 11 will prevent a party from instituting proceedings to seek urgent injunctive, interlocutory or declaratory relief in respect of a Dispute.

12. **TAXES AND GST**

12.1 **Responsibility for Taxes**

- (a) The Developer is responsible for any and all Taxes and other like liabilities which may arise under any Commonwealth or State 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 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 Developer 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. **DEALINGS**

13.1 **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 ten Business Days of the date of the Dealing.
- (b) The City may not otherwise Deal with its interest in this document without the written consent of the Developer, such consent not to be unreasonably withheld or delayed.

13.2 **Dealing by the Developer**

- (a) Prior to registration of this document in accordance with clause 9, the Developer must not Deal with this document or the Land without:
 - (i) the prior written consent of the City; 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) On and from registration of this document in accordance with clause 9:
 - (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 may register a plan of strata subdivision, and the City consents to this document remaining registered only on the certificate of title to the common property of the strata plan upon registration of the strata plan; and
 - (iii) 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; 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.
- (c) On provision of an itemised invoice by the City, the Developer must pay the City's costs and expenses relating to any consent or documentation required due to the operation of this clause 13.2.

14. **TERMINATION**

- (a) The City may terminate this document by notice in writing to the Developer if the amended Sydney LEP is:
 - (i) Subsequently amended by an environmental planning instrument made after the planning Proposal in a way that prevents the Development from proceeding; or
 - (ii) Declared to be invalid by a court of competent jurisdiction.
- (b) If the City terminates this document under clause 14(a) 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) the Developer must take all steps reasonably necessary to minimise any loss that the City may suffer as a result of the termination of this document;
 - (iii) the City will return the Guarantee to the Developer after first deducting any amounts owing to the City or costs incurred by the City by operation of this document. If in exercising its rights under this document the City expends more money than the Guarantee Amount then the amount in excess of the Guarantee Amount will be deemed to be a debt due and owing to the City by the Developer; and
 - (iv) 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.

15. **CONFIDENTIALITY, DISCLOSURES AND PRIVACY**

15.1 **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 15.2 or 15.3.

15.2 **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 15.2(a) keeps the Confidential Information confidential and does not use it for any purpose other than as permitted under clause 15.2(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 15.2(b)(i).

15.3 **Disclosures required by law**

- (a) Subject to clause 15.3(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 15.3(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.

15.4 **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.

15.5 **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.

15.6 **Media releases**

The Developer must not issue any information, publication, document or article for publication in any media concerning this document or the Public Benefits without the City's prior written consent (which will not be unreasonably withheld).

15.7 **Privacy**

- (a) Without limiting its obligations at law with respect to privacy and the protection of Personal Information, the Developer:
 - (i) must not, directly or indirectly collect, use or disclose any Personal Information under or in connection with this document except to the extent necessary to perform its obligations under this document; and
 - (ii) must in the delivery of the Public Benefits and the performance of all its other obligations under this document comply with the Privacy Laws and must not do any act or engage in any practice that would breach the Privacy Laws or which if done or engaged in by the City would be a breach of any Privacy Laws.

16. **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 email. 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 email, it is taken to have been received the same day the email was sent, provided that the sender has not received a delivery failure notice (or similar), unless the time of receipt is after 5:00pm in which case it is taken to be received on the next Business Day.

- (b) A person's address and email address 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.

17. CHAIN OF RESPONSIBILITY

- (a) In this clause:
 - (i) **Chain of Responsibility** means legislation that extends liability for Road Law offences to all parties whose actions, inactions or demands influence conduct on the road particularly in relation to speed, fatigue, vehicle standards, vehicle roadworthiness, load restraint, and mass and dimension.
 - (ii) **HVNL** means the *Heavy Vehicle National Law* (NSW), regulations and other instruments under it including any codes of practice and any consolidations, amendments, re-enactments or replacements.
 - (iii) **Heavy Vehicle** has the meaning given to it in the HVNL.
 - (iv) **Road Law** means any law, regulation or rule relating to the use of a road, restrictions on driving hours (in whichever legislative instrument those requirements may appear), mass, load and restraint requirements for the carriage of goods, dangerous goods, environmental impacts and speed and traffic requirements and includes the HVNL.
- (b) The Developer must in connection with any activity carried out under or in relation to this document on land owned by the City:
 - (i) comply with all Chain of Responsibility legislation and must ensure that any activity relating to a Heavy Vehicle used in connection with this document is undertaken in accordance with all applicable Chain of Responsibility obligations (including any fatigue, speed, mass, dimension or load restraint requirements);
 - (ii) not ask, direct or require (directly or indirectly) the driver of a Heavy Vehicle or a party in the Chain of Responsibility to do or not do something the Developer knows, or ought reasonably to know, would have the effect of causing the driver to contravene their Chain of Responsibility obligations, including to breach any fatigue, speed, mass, dimension or load restraint requirements;
 - (iii) ensure that any subcontractors (where any Heavy Vehicle activities are sub-contracted under this document) are contractually bound by similar Chain of Responsibility obligations to those set out in this clause 17(b).
- (c) The Developer will ensure that it has proper processes in place to manage its Chain of Responsibility obligations under this clause 17.
- (d) The Developer must provide the City, upon request, with all information and documentation reasonably required by the City to monitor or audit compliance with this clause (including permitting inspections of vehicles and business premises).

18. GENERAL

18.1 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.

18.2 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.

18.3 Liability for expenses

- (a) The Developer must pay its own and the City's expenses incurred in negotiating, executing, registering, releasing, administering and enforcing this document.
- (b) The Developer must pay for all reasonable costs and expenses associated with the preparation and giving of public notice of this document and the explanatory note prepared in accordance with the Regulations and for any consent the City is required to provide under this document.

18.4 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.

18.5 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.

18.6 **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.

18.7 **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.

18.8 **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.

18.9 **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.

18.10 **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.

18.11 **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.

18.12 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.

18.13 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 Developer,

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

18.14 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.

18.15 Counterparts

This document may be executed in counterparts.

18.16 Developer Limitation of Liability

18.16.1 The Trust Company (Australia) Limited as trustee for 167 Macquarie Street Trust

- (a) The Trust Company (Australia) Limited ("Trustee") enters into this document only in its capacity as Trustee of the 167 Macquarie Street Trust ("the Trust") and in no other capacity. A liability arising under or in connection with this document is limited to and can be enforced against Trustee only to the extent to which it can be satisfied out of property of the Trust out of which Trustee is actually indemnified for the liability. This limitation of Trustee's liability applies despite any other provision of this document and extends to all liabilities and obligations of Trustee in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this document.

- (b) The parties other than Trustee may not sue Trustee in any capacity other than as Trustee of the Trust, including seek the appointment of a receiver (except in relation to property of the Trust), a liquidator, an administrator or any similar person to Trustee as Trustee or prove in any liquidation, administration or arrangement of or affecting Trustee (except in relation to property of the Trust).
- (c) The provisions of this clause 18.16.1 shall, subject to clause 18.16.1(d), not apply to any obligation or liability of Trustee to the extent that it is not satisfied because under the constitution establishing the Trust or by operation of law there is a reduction in the extent of Trustee's indemnification out of the assets of the Trust , as a result of Trustee's failure to properly perform its duties as Trustee. For these purposes, it is agreed that Trustee cannot be regarded as having failed to properly perform its duties as Trustee to the extent to which any failure by Trustee to satisfy its obligations or breach of representation or warranty under this document has been caused or contributed to by a failure by any other party to fulfil its obligations under the document or any other act or omission of any other party.
- (d) Nothing in clause 18.16.1(c) shall make Trustee liable to any claim for an amount greater than the amount which the other parties would have been able to claim and recover from the assets of the Trust in relation to the relevant liability if Trustee's right of indemnification out of the assets of the Trust has not been prejudiced by Trustee's failure to properly perform its duties.
- (e) Trustee is not obliged to do or refrain from doing anything under this document (including incur any liability) unless Trustee's liability is limited in the same manner as set out in paragraphs 18.16.1 (a)-(d) of this clause.

18.16.2(A) The Trust Company (Australia) Limited as custodian for DVP2 Chifley Investment Trust

- (a) The Trust Company (Australia) Limited ("Custodian") enters into this agreement only as agent of Bieson Pty Limited as trustee of DVP2 Chifley Investment Trust ("Trustee"). The Custodian can only act in accordance with the terms of the agreement under which it is appointed as the Trustee's agent and is not liable under any circumstances to any party under this agreement. This limitation of the Custodian's liability applies despite any other provision of this agreement and extends to all liabilities and obligations of the Custodian in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this agreement.
- (b) The Custodian is not obliged to do or refrain from doing anything under this agreement (including, without limitation, incur any liability) unless the Custodian's liability is limited in the same manner as set out in clause 18.16.2(B).

- (c) No attorney, agent, receiver or receiver and manager appointed in accordance with this agreement has authority to act on behalf of the Custodian in a way which exposes the Custodian to any liability.
- (d) If, whether by the express provisions of this agreement or by implication of law, the Custodian makes or is taken to have made any representation or warranty then, except for the representations and warranties that can only be within the Custodian's actual corporate knowledge, those representations and warranties are taken to have been made by the Trustee.

18.16.2(B) **Bieson Pty Limited as trustee for DVP2 Chifley Investment Trust**

- (a) This limitation of the liability of Bieson Pty Limited ("Trustee") as trustee DVP2 Chifley Investment Trust ("Trust") applies despite any other provisions of this document and extends to all Obligations of the Trustee in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this document and to the extent of any inconsistency between the operation of this clause and any other provision of this document, the terms of this clause will prevail.
- (b) The Trustee enters into this document as trustee of the Trust and in no other capacity.
- (c) The parties other than the Trustee acknowledge that the Trustee incurs the Obligations solely in its capacity as trustee of the Trust and that the Trustee will cease to have any obligation under this document if the Trustee ceases for any reason to be trustee of the Trust.
- (d) Except in the case of and to the extent of fraud, negligence or breach of trust on the part of the Trustee, the Trustee will not be liable to pay or satisfy any Obligations except out of the Assets against which it is actually indemnified in respect of any liability incurred by it as trustee of the Trust.
- (e) Except in the case of and to the extent of fraud, negligence or breach of trust on the part of the Trustee, the parties other than the Trustee may enforce their rights against the Trustee arising from non-performance of the Obligations only to the extent of the Trustee's right of indemnity out of the Assets of the Trust.
- (f) Except in the case of and to the extent of fraud, negligence or breach of trust on the part of the Trustee, if any party other than the Trustee does not recover all money owing to it arising from non-performance of the Obligations it may not seek to recover the shortfall by:
 - (i) bringing proceedings against the Trustee in its personal capacity; or
 - (ii) applying to have the Trustee put into administration or wound up or applying to have a receiver or similar person appointed to the Trustee or proving in the administration or winding up of the Trustee.
- (g) Except in the case of and to the extent of fraud, negligence or breach of trust on the part of the Trustee, the parties other than the Trustee waive

their rights and release the Trustee from any personal liability whatsoever, in respect of any loss or damage:

- (i) which they may suffer as a result of any:
 - (A) breach by the Trustee of any of its Obligations; or
 - (B) non-performance by the Trustee of the Obligations; and
 - (ii) which cannot be paid or satisfied out of the Assets of which the Trustee is entitled to be indemnified in respect of any liability incurred by it as trustee of the Trust.
- (h) The parties other than the Trustee acknowledge that the whole of this contract is subject to this clause and the Trustee will in no circumstances be required to satisfy any liability of the Trustee arising under, or for non-performance or breach of any of its Obligations under or in respect of, this contract or under or in respect of any other document to which it is expressed to be a party out of any funds, property or assets other than the Assets of the Trust under the Trustee's control and in its possession as and when they are available to the Trustee to be applied in exoneration for such liability PROVIDED THAT if the liability of the Trustee is not fully satisfied out of the Assets of the Trust as referred to in this clause, the Trustee will be liable to pay out of its own funds, property and assets the unsatisfied amount of that liability but only to the extent of the total amount, if any, by which the Assets of the Trust have been reduced by reasons of fraud, negligence or breach of trust by the Trustee in the performance of the Trustee's duties as trustee of the Trust.
- (i) No attorney, agent or other person appointed in accordance with this document has authority to act on behalf of the Trustee in a way which exposes the Trustee to any personal liability (except in accordance with the provisions of this clause), and no act or omission of such a person will be considered fraud, negligence or breach of trust of the Trustee for the purposes of this clause.
 - (j) In this clause 18.16.2(B)
 - (i) "Assets" includes all assets, property and rights of the Trust (real and personal of any value whatsoever); and
 - (ii) "Obligations" means all obligations and liabilities of whatever kind undertaken or incurred by, or devolving upon, the Trustee under or in respect of this document.

SCHEDULE 1

Agreement Details

ITEM	TERM	DESCRIPTION
1.	Land	F/I 10/777545 known as 2 Chifley Square, Sydney
2.	Development	<p>Development of the Land to construct a new commercial tower on the southern portion of the Land above the existing podium and an increase of the podium height as detailed in the Planning Proposal and subject to the resultant Instrument Change (Development).</p> <p>(The total Gross Floor Area for the Land is 130,891 square metres)</p>
3.	City's Representative	<p>Name: Director, Planning, Development and Transport</p> <p>Address: Level 1, 456 Kent Street, Sydney NSW 2000</p> <p>Email: planningsystemsadmin@cityofsydney.nsw.gov.au</p> <p>Or such alternative representative nominated by the City and notified to the Developer's Representative from time to time.</p>
4.	Developer's Representative	<p>Name: Hugh Irving</p> <p>Address: Level 20, 1 Martin Place, Sydney NSW 2000</p> <p>Email: hugh.irving@charterhall.com.au</p> <p>Or such alternative representative nominated by the developer and notified to the City's Representative from time to time.</p>
5.	Development Application	Any development application submitted to the City in connection with the Development.
6.	Guarantee Amount	Nil
7.	Guarantee Amount Due Date	N/A

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) Yes</p> <p>(b) Yes</p> <p>(c) No</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 environmental planning instrument 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
5.	<p>Whether this document excludes (wholly or in part) or 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)</p>	<p>Section 7.11 excluded</p> <p>Section 7.12 not excluded</p> <p>Section 7.24 excluded</p>

ITEM	SECTION OF ACT OR REGULATION	PROVISION/CLAUSE OF THIS DOCUMENT
6.	Applicability of section 7.11 of the Act (section 7.4(3)(e) of the Act)	There is no application of section 7.11 of the Act in respect of the Development and contributions (if any) under section 7.11 will not 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)	No consideration because there is no application of section 7.11 of the Act.
8.	Mechanism for Dispute Resolution (section 7.4(3)(f) of the Act)	Clause 11
9.	Enforcement of this document (section 7.4(3)(g) of the Act)	Clause 10
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 9
12.	Whether certain requirements of this document must be complied with before a construction certificate is issued (clause 205(2) of the Regulation)	Payment of the Monetary Contribution – Infrastructure Payment of the Monetary Contribution – Chifley Square Public Domain Upgrade
13.	Whether certain requirements of this document must be complied with before a subdivision certificate is issued (clause 205(2) of the Regulation)	Nil
14.	Whether certain requirements of this document must be complied with before an occupation certificate is issued (clause 205(2) of the Regulation)	As per clause 6 and Schedule 3, completion of: Registration of the Instrument Public Art
15.	Whether the explanatory note that accompanied exhibition of this document may be used to assist in construing this document (clause 205(5) 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

Item	Public Benefit	Attributed Value	Due date	Additional specifications
Monetary Contribution				
1.	Monetary Contribution – Infrastructure	3% of the cost of the Development (estimated at \$14,700,000)	On or before the date of issue of the Construction Certificate for the Development (excluding enabling works comprising plant relocations and basement modifications)	Inclusive of all infrastructure contributions applicable under s7.12 of the Act.
2.	Monetary Contribution - Chifley Square Public Domain Upgrade	\$900,000	On or before the date of issue of the Construction Certificate for the Development (excluding enabling works comprising plant relocations and basement modifications)	Monetary contribution towards the public domain upgrades within the vicinity of the Development (including activation to Chifley Square). The upgrades would be classified under 'Public Domain Improvements and Open Space' in Table 2 – Community Infrastructure in the <i>Central Sydney Infrastructure Plan 2020</i>
Instrument				
3.	Provision for right of carriageway and breakthrough works and Instrument	N/A	Right of carriageway Provision for the right of carriage way to be made on or before the date of issue of any Occupation Certificate in respect of the tower development (excluding an	Provision for vehicular driveway crossover and easement to 165-169 Macquarie Street, Sydney as follows: <ul style="list-style-type: none"> Design to accommodate a consolidated vehicular access point and structural capacity for a future connection to 165-

Item	Public Benefit	Attributed Value	Due date	Additional specifications
			<p>Occupation Certificate for enabling works, podium or similar)</p> <p>Instrument</p> <p>The Developer will submit the Instrument to NSW LRS for registration on title on or before the date of issue of any Occupation Certificate in respect of the tower development (excluding an Occupation Certificate for enabling works, podium or similar). However, the Instrument will only come into effect upon issue of an Occupation Certificate for the use of the basement in a future redevelopment of 165-169 Macquarie Street.</p>	<p>169 Macquarie Street via the existing 2 Chifley Square vehicular cross over on Bent Street, to service the Site and 165-169 Macquarie Street in the event that 165-169 Macquarie Street is redeveloped in the future.</p> <ul style="list-style-type: none"> • The provision for the breakthrough will be no more than the smallest dimension for height and width along the existing access ramp measured from the street through access point. Access will be limited to passenger and light commercial vehicles that the existing access-way is designed to accommodate. The existing height limit is 3.3m and the existing restriction on vehicle length is 8.8m. • No works required; No breakthrough panels to be removed in connection with the Development or this Agreement. Breakthrough panel works would occur in the future when the locations and design is determined following future development consent for 165-169 Macquarie Street.

Item	Public Benefit	Attributed Value	Due date	Additional specifications
				Granting and registering the Instrument described in Annexure B.
Project Specific Initiatives				
4.	Sustainability Commitments	N/A	Within 12 months after issuing of the final Occupation Certificate	<ul style="list-style-type: none"> 6-star Green Star Buildings v1 certified rating
			Within 12 months after issuing of the final Occupation Certificate	<ul style="list-style-type: none"> 5.5 Star NABERS Energy rating (Commitment Agreement)
				<ul style="list-style-type: none"> 4 Star NABERS Water rating (target)
			Three (3) months after the last of the first round of post-occupancy NABERS ratings (referred to above) is achieved	<ul style="list-style-type: none"> 5 Star NABERS Waste rating (target)
5.	Public Art	\$2,800,000	Prior to the issue of the final Occupation Certificate for the Development.	<p>In accordance with the <i>Guideline for Site Specific Planning Proposals in Central Sydney and Central Sydney Infrastructure Plan 2020 and any Public Art Strategy approved under a Development Consent</i></p> <p>Developer to provide evidence of invoices demonstrating spend of at least \$2,800,000 on public art consultation or commissioning.</p>
6.	Developer's Works	NIL	N/A	

2. PAYMENT OF MONETARY CONTRIBUTION

2.1 Payment

- (a) The Developer must pay each Monetary Contributions to the City on the due date set out in the table in clause 1 above by electronic funds transfer or unendorsed bank cheque or as otherwise directed by the City.
- (b) At least 30 days prior to each of the Monetary Contributions falling due, the Developer must inform the City of its intention to seek a Construction Certificate and may request from the City written confirmation of the current amount of that Monetary Contribution (calculated as 3% of the cost of the Development in accordance with clause 1 of this Schedule 3).
- (c) After receiving the notice under clause 2.1(b) above, the City will issue a letter to the Developer confirming the Monetary Contribution and providing payment details.

2.2 Indexation

If the Monetary Contributions are not paid to the City on the date of this document then at the date of payment the Monetary Contributions must be indexed as follows:

Monetary Contribution (to be provided) =

Monetary Contribution (as per item 1 of clause 1 above) x
(A/B)

where:

A is the Index Number most recently published before the date the Monetary Contribution is to be paid

B is the Index Number most recently published before the date this agreement commenced in accordance with clause 3.1 of this document.

If after the formula is applied the Monetary Contribution will be less than the amount stated in item 1 of clause 1 above, the Monetary Contribution will not be adjusted.

2.3 No trust

Nothing in this document creates any form of trust arrangement or fiduciary duty between the City and the Developer. Following receipt of the Monetary Contribution, the City is not required to separately account for the Monetary Contribution, report to the Developer regarding expenditure of the Monetary Contribution or comply with any request by the Developer to trace the Monetary Contribution.

2.4 Expenditure by the City

The City will use:

- (a) the Monetary Contribution – Infrastructure (item 1 in the table at clause 1 above) to achieve the public benefit of community infrastructure in central Sydney; and
- (b) the Monetary Contribution - Chifley Square Public Domain Upgrade (item 2 in the table at clause 1 above) for public domain upgrades within the vicinity of the Development, including for activation of Chifley Square.

3. **TRANSFER LAND**

Not used.

4. **DEVELOPER'S WORKS**

Not used.

5. **CONSTRUCTION OF DEVELOPER'S WORKS**

Not used.

6. **SUSTAINABILITY COMMITMENTS**

6.1 **Environmental Performance Commitment**

- (a) Within 6 months of the final Construction Certificate for the Development, excluding any Construction Certificate issued for demolition of existing structures on the Land, early works or works below ground level, the Developer must submit to the City's Representative:
 - (i) the signed Commitment Agreement;
 - (ii) a hydraulic engineer report demonstrating water efficiency and how the proposed building is likely to achieve a 4 star NABERS water rating for the commercial component; and
 - (iii) the executive summary of the Energy Efficient Review prepared by a NABERS certified Independent Design Reviewer;together being the "Environmental Performance Commitment".
- (b) If the Developer fails to provide an Environmental Performance Commitment that will achieve the required NABERS ratings contained in Item 4 of Clause 1 of Schedule 3, then the Developer will meet with the City to agree on alternative measures it will put in place in order to achieve a sustainable commercial development.
- (c) The Developer will keep the City informed of its progress in relation to the achievement of its Sustainability Commitments at regular intervals.

6.2 **Guidelines**

The following list of Guidelines are included for information purposes only for the general nature of the work identified as Sustainability Commitments in this document. The City makes no representation or warranty as to the currency and completeness of the guidelines identified, or their application on the final design

of the Sustainability Commitments. The Developer must make its own enquiries regarding whether any guideline has been replaced or supplemented.

- Factsheet 4: Preparing for NABERS office rating applications prepared by NSW Office of Environment and Heritage, published August 2011
- Factsheet 7: The NABERS Energy Commitment Agreement prepared by NSW Office of Environment and Heritage, published July 2014
- Guidelines for the use of simulation in Commitment Agreements prepared by NSW Office of Environment and Heritage, version 2011-June
- NABERS Guide to Building Energy Estimation, prepared by NSW Office of Environment and Heritage, published June 2011
- NABERS Guide to Tenancy Energy Estimation, prepared by NSW Office of Environment and Heritage, published June 2011
- Rules for collecting and using data (formerly titled Validation Protocol) version 3.0, February 2013, prepared by NSW Office of Environment and Heritage.
- City of Sydney Sustainable Design Technical Guideline.

EXECUTED as a deed.

Signed, sealed and delivered for
**THE COUNCIL OF THE CITY OF
SYDNEY** (ABN 22 636 550 790) 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

Authorised delegate pursuant to
section 377 of the Local Government
Act 1993

Address of witness

Signed, sealed and delivered for
and on behalf of **The Trust
Company (Australia) Limited** (000
000 993) as trustee for 167
Macquarie Street Trust by its duly
appointed attorney pursuant to Power
of Attorney Registered Book 4676 No
134 dated 18 September 2014 in the
presence of:

Signature of witness

Signature of attorney (I have no
notice of revocation of the power of
attorney under which I sign this
document)

Name of witness (please print)

Name of attorney (please print)

Signed, sealed and delivered for and on behalf of **The Trust Company (Australia) Limited** (000 000 993) as custodian for DVP2 Chifley Investment Trust by its duly appointed attorney pursuant to Power of Attorney Registered Book 4676 No 134 dated 18 September 2014 in the presence of:

Signature of witness

Signature of attorney (I have no notice of revocation of the power of attorney under which I sign this document)

Name of witness (please print)

Name of attorney (please print)

DRAFT

ANNEXURE A

Deed of Consent

(Clause 13.2)

DEED OF NOVATION

THIS DEED OF NOVATION is made on _____ between the following Parties:

1. **The Council of the City of Sydney ABN 22 636 550 790** of Town Hall House, 456 Kent Street, SYDNEY NSW 2000 (“**Council**”), and
2. **[Insert Name, ACN and address]** (*jointly*), the “**Remaining Party**”, and
3. **[Insert Name, ACN and address]** (*jointly*), the “**Outgoing Party**”, and
4. **[Insert Name, ACN and address]** (“**Incoming Party**”).

BACKGROUND

- A. The Council, the Remaining Party and the Outgoing Party are Parties to the VPA.
- B. The VPA relates to the whole of the Land.
- C. The Outgoing Party wishes to transfer the [Land/part of the Land] to the Incoming Party.
- D. The Incoming Party agrees to perform the obligations and seeks to obtain the benefits of the Outgoing Party under the VPA.
- E. The Remaining Party will continue to be a party to the VPA.
- F. The Remaining Party, the Outgoing Party and the Incoming Party have agreed to enter into this Deed of Novation, in accordance with clause 13.2 of the VPA, at the request of the Council.

1. Definitions and Interpretation

VPA is the Planning Agreement entered into between the Council, the Remaining Party and the Outgoing Party on [date], registered number [#].

1.1 Definitions

Words and expressions defined in the VPA have the same meaning in this Deed.

1.2 Headings

Headings do not affect the interpretation of this document.

2. Performance of Obligations

2.1 Incoming Party

On and from the date of this Deed, the Incoming Party:

- (a) is substituted for the Outgoing Party as a party to the VPA and acknowledges itself to be bound by the provisions of the VPA, as if the Incoming Party had originally been named as the Outgoing Party in that VPA;
- (b) without limiting clause 2.1(a), must punctually carry out and perform all other obligations of the Outgoing Party under the VPA which are not performed at the date of this Deed; and
- (c) will be:
 - (i) entitled to the benefit of the VPA; and

(ii) entitled to enforce the VPA against Council,
as if the Incoming Party had originally been named as the Outgoing Party in that VPA.

2.2 Notices

The Council must address all notices and communications to be given or made by it to the Incoming Party under the VPA to the following address:

[Insert Incoming Party address]

3. Performance affected by novation

3.1 Performance by Outgoing Party

The Outgoing Party:

- (a) (subject to clause 3.3 of this Deed) releases and discharges Council and the Remaining Party from their respective obligations under the VPA and from all claims and demands in respect of the performance of and obligations under the VPA that arise on or after the date of this Deed; and
- (b) warrants to the Council, the Remaining Party and the Incoming Party that it has properly performed its obligations under the VPA up to and including the date of this Deed, complying with all contractual requirements.

3.2 [Developer's / Landowner's] obligations

The Incoming Party must perform all of the [Developer's / Landowner's] obligations under the VPA as if named as the [Developer / Landowner], whether or not the relevant obligations relate to works that were to be performed prior to the date of this Deed, including the delivery of all Public Benefits to Council.

3.3 Release by Council

Council and the Remaining Party release and discharge the Outgoing Party from all of its obligations under the VPA and from all claims and demands in respect of the performance of and obligations under the VPA that arise on or after the date of this Deed.

4. Governing Law

This deed is governed by the laws of New South Wales.

5. Further acts

Each party will take all steps, execute all deeds and do everything reasonably required by any other party to give effect to any of the actions contemplated by this deed.

6. Counterparts

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

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 [Outgoing party] in accordance)
with section 127 of the Corporations Act)
)

Signature of Director/Secretary

Signature of Director

Name of Director/Secretary

Name of Director

Executed by [Remaining Party] in)
accordance with section 127 of the)
Corporations Act)

Signature of Director/Secretary

Signature of Director

Name of Director/Secretary

Name of Director

Executed by **[INSERT INCOMING PARTY**)
NAME AND ACN] in accordance with section)
127 of the Corporations Act:)

Signature of Director/Secretary

Signature of Director

Name of Director/Secretary

Name of Director

ANNEXURE B

Right of Carriageway and Breakthrough Works and Instrument

Right of Carriageway and Breakthrough Works

As part of the future redevelopment at 165-169 Macquarie Street, Sydney, and on the timing set out in the Instrument below,, the Developer must construct the right of carriageway and breakthrough works, so as to enable below ground vehicular access suitable for a Small Rigid Vehicle (3.0m high and 6.4m long) to be provided from Bent Street over the Land to the land comprised in Lot 10 DP1034064, currently known as 165-169 Macquarie Street, Sydney in accordance with the terms contained below in this Annexure B. The provision for the Breakthrough Panel will be no more than the smallest dimension for height and width along the Access Ramp measured from the street through access point. Access will be limited to passenger and light commercial vehicles that the existing access-way is designed to accommodate. The existing height limit is 3.3m and the existing restriction on vehicle length is 8.8m.

Instrument

The Developer must grant and register the Instrument in the location generally adjacent to Bent Street on the terms contained below in this Annexure B.

Terms of easement for right of carriageway

Instrument setting out terms of Easements or Profits à Prendre intended to be created or released and of Restrictions on the Use of Land or Positive Covenants intended to be created pursuant to Section 88B Conveyancing Act 1919.

Lengths are in metres

(Sheet **[insert]** of **[insert]** sheets)

Plan:

Plan of Easement for right of carriageway and Positive Covenant covered by Plan No. **[insert]**

Full name and address of the owner of the land:

Trust Company (Australia) Limited
ABN **[insert]**
[Address TBC]

Part 1 (Creation)

Number of item shown in the intention panel on the plan	Identity of easement, right of carriageway or restriction to be created and referred to in the plan.	Burdened (lot(s) or parcel(s):	Benefited lot(s), road(s), bodies or Prescribed Authorities:
1.	Right of carriageway marked as [insert] on the Plan limited in	Lot 10 DP777545	Lot 11 DP1034064

	height and depth as shown on the Plan		
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Part 2 (Terms)

1 Interpretation

1.1 Definitions

In this Instrument:

Access Ramp means the existing Bent Street access ramp on the Lot Burdened.

Authorised User means every person authorised by the Owner of the Lot Benefited for the purposes of the Easement created by this Instrument, including employees, agents, servants, contractors, workmen, tenants and invitees of the Owner of the Lot Benefited.

Authority means any local, state or federal government statutory or public authority or corporation having jurisdiction over the Lot Benefited or the Lot Burdened and includes any consent authority.

Breakthrough means the fixed opening at the boundary of the Easement Site where it meets the boundary of the Lot Benefited.

Breakthrough Panels means the removable panels erected at basement level at the boundary of the Easement Site forming a temporary barrier between the Site and the Lot Benefited.

Council means The Council of the City of Sydney and its successors.

Development Consent means any development consent or other planning approval over all or part of the Lot Benefited that is relied upon to authorise the use of the Lot Benefited.

Easement means the easement in this Instrument and includes the conditions in relation to that easement.

Easement Management Plan means a plan prepared by the Owner of the Lot Burdened and approved by the Council which addresses the following issues:

- (a) design and operational details of the car park (including a traffic control system where reasonably required) for the use of the Easement Site including:
 - (i) use and replacement of security access cards or equivalent to the owners and occupiers of the Lot Benefited;
 - (ii) access arrangements for emergency and other service vehicles using the Easement Site to access the Lot Benefited;
 - (iii) signals for traffic flow if reasonably required;

- (iv) 24-hour emergency contact details; and
- (v) other security measures as may be reasonably necessary;
- (b) details of signage to be installed in the Easement Site to direct vehicles to the various areas serviced by the Easement;
- (c) the proposed method of managing possible traffic conflicts within the Easement Site; and
- (d) the proposed method of formulating and adopting rules for the use of the Easement by owners and occupiers of both the Lot Benefited and the Lot Burdened and any other Authorised Users.

Easement Site means, in relation to the Easement in this Instrument:

- (a) the approximate site of the Easement on the Plan, being the western wall of the Access Ramp, between GF (RL29) and B1 (RL25), being:
 - (i) subject to final design and survey;
 - (ii) subject to structural engineering review and traffic engineering review (to confirm there are no material impacts on the existing building on the Lot Burdened); and
 - (iii) no greater than the smallest dimension for height and width along the Access Ramp measured from the street through access point, with access limited to passenger and light commercial vehicles that the existing access-way is designed to accommodate (the existing height limit being 3.3m and the existing restriction on vehicle length being 8.8m); and
- (b) all items within the site of the Easement identified on the Plan which are the subject of the Easement.

Emergency Situation means any circumstance involving a need, for reasons of safety, for evacuation or egress from a building or other place, including fire, earthquake, flooding, terrorist activity and any training or test of such evacuation or egress.

Instrument means this instrument under section 88B of the *Conveyancing Act 1919* (NSW).

Liability means actions, claims, demands, damages, losses, costs, expenses and other liabilities (whether in contract, tort (including negligence) or otherwise).

Lot Benefited means the land referred to in Part 1 of this Instrument as being the land benefited by the Easement, or any part of it.

Lot Burdened means the land referred to in Part 1 of this Instrument as being the land burdened by the Easement, or any part of it.

Owner of the Lot Benefited means every person who is at any time entitled to an estate or interest in the Lot Benefited, including any freehold, strata, stratum or leasehold estate or interest in possession in the Lot Benefited and each part of the Lot Benefited.

Owner of the Lot Burdened means every person who is at any time entitled to an estate or interest in the Lot Burdened, including any freehold or leasehold estate or interest in possession in the Lot Burdened and each part of the Lot Burdened.

Plan means DP[**insert**], being a plan of subdivision or consolidation of the Site.

Site means the land comprised in folio identifier 10/777545 being 2 Chifley Square, Sydney.

1.2 Interpretation

- (a) The singular includes the plural and the plural includes the singular.
- (b) A gender includes all genders.
- (c) Where a word or phrase is defined, its other grammatical forms have a corresponding meaning.
- (d) "clause", "paragraph", "schedule" or "sub-clause" means a clause, paragraph, schedule or sub-clause respectively of this Instrument.
- (e) Unless stated otherwise, one provision does not limit the effect of another provision.
- (f) A reference to any law or to any provision of any law includes any modification or re-enactment of it, any legislative provisions substituted for it and all regulations and statutory instruments issued under it or them.
- (g) A reference to conduct includes any omission, statement or undertaking, whether or not in writing.
- (h) Headings in this Instrument are for information purposes only and do not affect the interpretation of this Instrument.
- (i) A reference to 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.
- (j) An agreement on the part of, or in favour of, two or more persons binds, or is for the benefit of, them jointly and severally.
- (k) **Includes** means includes but without limitation.

1.3 Conditions

Each of the provisions of this Easement will constitute and be covenants and agreements by and between the Owner of the Lot Burdened and the Owner of the

Lot Benefited and, in relation to the positive covenant, the Council for themselves and their respective successors, assigns and transferees with the intention and agreement that the benefit and burden of such covenants and agreements will pass with the benefit and burden of the Easement.

1.4 **No fetter**

- (a) Nothing in this Instrument in any way restricts or otherwise affects the unfettered discretion of the Council in the exercise of its statutory powers as a public authority.
- (b) If any conflict arises between the unfettered discretion of the Council in the exercise of its powers as a statutory authority and the performance of any right or obligation in this Instrument, the former prevails.

1.5 **GST**

- (a) In this clause 1.6:
 - (i) **GST Law** has the meaning given in the A New Tax System (Goods and Services Tax) Act 1999 (Cth); and
 - (ii) terms used in this clause which are not defined in this Instrument, but which are defined in the GST Law, have the meanings given in the GST Law.
- (b) Unless otherwise stated in this Instrument, amounts payable, and consideration to be provided, under any other provision of this document exclude GST.
- (c) If GST is payable on a supply made in connection with this Instrument, the recipient must pay the party making the supply (supplier) an additional amount equal to the GST payable on that supply provided that the supplier first issues a tax invoice to the recipient.
- (d) If an adjustment event arises in connection with a supply made in connection with this Instrument:
 - (i) the supplier must recalculate the GST payable to reflect the adjustment event;
 - (ii) the supplier must give the recipient an adjustment note as soon as reasonably practicable after the supplier becomes aware of the adjustment event; and
 - (iii) the adjustment amount must be paid without delay either by the recipient to the supplier or by the supplier to the recipient as the case requires.
- (e) If a payment to a party under this Instrument is a reimbursement or indemnification, calculated by reference to a loss, cost or expense incurred by that party, the payment will be:

- (i) reduced by the amount of any input tax credit to which that party is entitled for that loss, cost or expense; and
- (ii) then, increased by an amount equal to the GST payable if and to the extent that the payment is consideration for a taxable supply.

2 Terms of Right of Carriageway numbered 1 above

2.1 Terms of the Easement

Subject to clauses 2.2 to 2.8 and the removal of the Breakthrough Panels in accordance with clause 3.2, the Owner of the Lot Burdened grants to the Owner of the Lot Benefited and its Authorised Users full and free right to go, pass and repass over the Easement Site at all times with all types of vehicles for which the carriageway is designed for the purpose of accessing and servicing the Lot Benefited through the Breakthrough and to do anything reasonably necessary for that purpose, upon grant of an Occupation Certificate for the use of the basement in a future redevelopment at 165-169 Macquarie Street, Sydney.

2.2 No force or effect until Development Consent obtained and development complete

The rights and obligations granted under this Instrument have no force or effect until:

- (a) the Owner of the Lot Benefited has obtained Development Consent for a development on the Lot Benefited that has basement access corresponding with the location of the Breakthrough;
- (b) that development is completed; and
- (c) an Occupation Certificate for the use of the basement in a redevelopment of the Lot Benefited is issued.

2.3 Restriction on use for construction

Despite any other provision of this Instrument, the Easement Site cannot be used for vehicular access (or otherwise) to the Lot Benefited for the purposes of carrying out any demolition, excavation or construction works on the Lot Benefited, except for the necessary works carried out in accordance with clause 3.2.

2.4 Conditions of access

- (a) Once the Breakthrough Panels have been removed from the Easement Site the Owner of the Lot Burdened:
 - (i) must not use the Easement Site in such a way as to obstruct or unreasonably interfere with the use and enjoyment of the Easement Site by the Owner of the Lot Benefited, including ensuring that the area of the Easement Site immediately adjoining the Breakthrough is kept clear at all times; and

- (ii) may not install additional security measures at the entrance to the Easement Site unless:
 - (A) appropriate keys, security card-keys or other access authorities are provided to the Owner of the Lot Benefited and its Authorised Users on request;
 - (B) the security measures are operational 24-hours a day; and
 - (C) a 24-hour emergency call service is available in case of failure of the security measures to operate as designed.
- (b) The Owner of the Lot Benefited and its Authorised Users:
 - (i) must not unreasonably interfere with the enjoyment of the Easement Site by the Owner of the Lot Burdened;
 - (ii) must promptly reimburse to the Owner of the Lot Burdened the reasonable costs incurred by the Owner of the Lot Burdened in restoring any damage to the improvements erected within the Easement Site caused by the negligent or improper use of the Easement Site by the Owner of the Lot Benefited or its Authorised Users, which amount shall be a liquidated debt owed by the Owner of the Lot Benefited to the Owner of the Lot Burdened;
 - (iii) must comply with any reasonable directions of the Owner of the Lot Burdened in relation to the safe and orderly use of the Easement Site; and
 - (iv) must not cause any disturbance or damage to the Easement Site or do anything that would cause the Easement Site to fall into disrepair.

2.5 **No parking**

Once the Breakthrough Panels have been removed from the Easement Site neither the Owner of the Lot Burdened nor the Owner of the Lot Benefited may authorise any person to park a vehicle on the Easement Site at any time. Prior to the removal of the Breakthrough Panels from the Easement Site the Owner of the Lot Burdened may use the Easement Site for the purpose of visitor parking or storage.

2.6 **Works to Lot Burdened**

Subject to compliance with the requirements of clause 2.6, the Owner of the Lot Burdened may carry out works of any nature on or about the Lot Burdened, including without limitation, constructing, installing, removing, redeveloping or otherwise changing improvements on or about the Easement Site.

2.7 **Restrictions on access**

The Owner of the Lot Burdened may temporarily restrict access through part (but not all of) the Easement Site for the purpose of, or as a result of:

- (a) the construction, repair or maintenance of any improvement on the Site;
or
- (b) carrying out obligations under paragraph 3.1 or any other obligation under this Instrument,

provided that:

- (c) such restriction is for a period not exceeding 48 hours or such other period of time as agreed by the Owner of the Lot Benefited; and
- (d) the Owner of the Lot Burdened:
 - (i) obtains the prior written consent of the Owner of the Lot Benefited and complies with any reasonable conditions imposed on that consent; and
 - (ii) gives at least one month's written notice to the Owner of the Lot Benefited prior to works commencing;
 - (iii) takes all reasonable steps to:
 - (A) minimise noise, dust, air pollution and disruption to access to the Easement Site by the Owner of the Lot Benefited and its Authorised Users;
 - (B) maintain security;
 - (C) maintain all services to and passing through Easement Site; and
 - (D) maintain access to the Lot Benefited,
except as may be necessary to facilitate works undertaken in accordance with clause 2.7(a) above.

2.8 **Emergencies**

The Owner of the Lot Burdened may restrict temporarily access to the Easement Site in an Emergency Situation provided that it gives as much notice as is practicable to the Owner of the Lot Benefited and uses all reasonable endeavours to resolve the Emergency Situation and restore access to the Easement Site as soon as possible.

2.9 **Release**

The Owner of the Lot Benefited and its Authorised Users use the Easement Site at their own risk and release the Owner of the Lot Burdened, its employees, agents and contractors (each an Indemnified Party) from all Liabilities arising out of or in connection with the use of the Easement Site by the Owner of the Lot Benefited and its Authorised Users except to the extent that that Liability arises from the default or negligent or wilful act or omission of an Indemnified Party.

2.10 **Persons empowered to release, vary or modify the Right of Carriageway**

This Right of Carriageway may only be released, varied or modified with the consent of each of the Council, the Owner of the Lot Burdened and the Owner of the Lot Benefited.

3 Terms of Positive Covenant in relation to the Right of Carriageway numbered 1 on the Plan

3.1 **Maintenance of Easement Site**

The Owner of the Lot Burdened:

- (a) Must at all times, keep the Easement Site in a state of good repair;
- (b) Must at all times maintain, light and manage the Easement Site so as to ensure the safe and orderly use of the Easement;
- (c) Must not permit the Easement Site to fall into disrepair so that the use of the Easement Site becomes unsafe, impractical or impossible;
- (d) Must keep the Easement Site clean and free from rubbish; and
- (e) Is entitled to charge the Owner of the Lot Benefited an operations and maintenance fee, based upon equitable use and frequency of use between the two basements or as otherwise agreed between the Owner of the Lot Burdened and the Owner of the Lot Benefited, at the same time the Owner of the Lot Benefited commences uses of the Easement,

3.2 **Creation of Breakthrough Panels**

If,

- (a) the Owner of the Lot Benefited has obtained a Development Consent for a development on the Lot Benefited that has basement access corresponding with the location of the Breakthrough; and
- (b) the Owner of the Lot Benefited and the Owner of the Lot Burdened have agreed upon the design and use (which must be complementary to the development on the Lot Burdened), construction and timing of the Breakthrough,

the Owner of the Lot Burdened must construct the Breakthrough Panels within 6 months after Owner of the Lot Benefited has received the first Construction Certificate for the development on the Lot Benefited referred to in clause 3.2(a).

3.3 **Removal of Breakthrough Panels**

- (a) If the Owner of the Lot Benefited has obtained a development consent for a development on the Lot Benefited that has basement access corresponding with the location of the Breakthrough, the Owner of the Lot Benefited may, by giving at least 60 days' notice to the Owner of the Lot Burdened, require the Owner of the Lot Burdened to provide access to the Owner of the Lot Benefited and its Authorised Users to perform works to

remove the Breakthrough Panels and prepare new line markings over the Easement Site.

- (b) Prior to the Owner of the Lot Benefited providing a notice under clause 3.2(a), the Owner of the Lot Benefited must provide to the Owner of the Lot Burdened:
 - (i) a dilapidation report capturing the condition of the vehicular access point, basement ramp, basement, basement Breakthrough and Breakthrough Panels;
 - (ii) safe work method statements for the proposed work for approval or endorsement by the Owner of the Lot Burdened (acting reasonably);
 - (iii) a Construction Methodology Plan for the proposed work outlining how the Breakthrough Panels will be removed and how the future tunnel connection will connect into the basement of the Lot Burdened without compromising the structural integrity or watertightness of the structure of the Lot Burdened for approval or endorsement by the Owner of the Lot Burdened (acting reasonably);
 - (iv) a structural report with modelling that demonstrates that the structure of the Lot Burdened will not be adversely affected by the proposed works or construction methodology to perform said works;
 - (v) an access management plan that details how access within the basement of the Lot Burdened will be maintained for the duration of the works for approval or endorsement by the Owner of the Lot Burdened (acting reasonably);
 - (vi) a copy of the plan showing the new signage and line marking to be implemented on completion of the works and evidence of endorsement or approval by Council and a suitably qualified traffic engineer; and
 - (vii) a copy of the required construction certificate(s) to undertake the development contemplated by the Development Consent and before it obtains the required occupation certificate(s) for the development contemplated by the Development Consent.
- (c) The Owner of the Lot Benefited must not issue a notice under clause (a) prior to receiving approval or endorsement of the items listed under clause (b) which require approval or endorsement from the relevant party.
- (d) The notice served under clause (a) must include contact details of the relevant officer at Council that is responsible for the assessment of the Development Consent for the purpose of clause 3.5(a).
- (e) Subject to clause (b) and (c), if the Owner of the Lot Benefited provides a notice under clause (a), the Owner of the Lot Burdened must provide

access to the Owner of the Lot Benefited and its Authorised Users to remove the Breakthrough Panel and prepare new line markings over the Easement Site within 3 months of the expiry of the notice period under that notice.

- (f) At or before the time of removing the Breakthrough Panel the Owner of the Lot Benefited must install in a good and workmanlike manner such fire doors within its site as may be required to comply with fire safety regulations in force at that time.

3.4 **Emergency Vehicles and services**

Despite any other provision of this Instrument the Owner of the Lot Burdened:

- (a) must allow the Easement Site to be used for access by all emergency and other essential service organisations; and
- (b) must not interfere with such access.

3.5 **Easement Management Plan**

- (a) The Owner of the Lot Burdened must prepare an Easement Management Plan within 6 months of receipt of notice from the Owner of the Lot Benefited that the Lot Benefited has obtained a Development Consent for a development on the Lot Benefited that has basement access corresponding with the location of the Breakthrough and provide it to the Owner of the Lot Benefited and Council for approval (with such approval not to be unreasonably withheld or delayed).
- (b) The Owner of the Lot Burdened and the Owner of the Lot Benefited must comply with the approved Easement Management Plan.
- (c) Council and the Owner of the Lot Benefited may review the effectiveness of the Easement Management Plan and require it to be amended, but no more than once in any 12-month period.

3.6 **Insurance**

- (a) Each of the Owner of the Lot Burdened and the Owner of the Lot Benefited must take out and maintain:
 - (i) a public liability insurance policy with respect to any Liabilities to any person for the death or injury of any person within or about the Easement Site for an amount in respect of any single accident of not less than \$20 million; and
 - (ii) industrial special risks insurance in respect of its improvements and operations on the Easement Site for their full replacement value.
- (b) The certificates of currency for the policy referred to in paragraph 3.5(a)(i) must note the other owner as an interested party.

- (c) The policies referred to in paragraphs 3.5(a) must be taken out and maintained with an insurer licensed by the Australian Prudential Regulation Authority to operate in Australia or have an investment grade security rating from an industry recognised rating agency such as Standard and Poors, Moodys or Bests.

3.7 **Persons empowered to release, vary or modify the Positive Covenant**

This Positive Covenant may only be released, varied or modified with the consent of each of the Council, the Owner of the Lot Benefited and the Owner of the Lot Burdened.

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