

Attachment D

Draft Planning Agreement

Planning agreement

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

and

Fabcot Pty Ltd ABN 55 002 960 983

and

Triton Atlas Corporation Pty Ltd ABN 45 634 827 839

For 923 Bourke Street Waterloo

Reference: S153631

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THIS PLANNING AGREEMENT is made on

2023.

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**);
- (2) **Fabcot Pty Ltd** ABN 55 002 960 983 of 1 Woolworths Way, BELLA VISTA NSW 2153 (the **Developer**); and
- (3) **Triton Atlas Corporation Pty Ltd** ABN 45 634 827 839 of Level 7, 330 Collins Street, MELBOURNE VIC 3000 (the **Landowner**).

BACKGROUND

- (A) The Developer has requested the Planning Proposal and intends to undertake the Development on the Land.
- (B) The Land is owned by the Landowner, and the Landowner consents to the Planning Proposal and the Development on the Land.
- (C) The Developer and the Landowner have 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 2 of the *Conveyancing (Sale of Land) Regulation 2022 (NSW)*.

Affordable Housing has the same meaning as in the Act.

Affordable Housing Restriction means the restriction on the use of land by a prescribed authority pursuant to section 88E of the *Conveyancing Act 1919 (NSW)* on the terms set out in Annexure A.

Affordable Housing Dwellings means the units or lots of Affordable Housing designed, constructed and fitted out by the Developer on the Land as part of the Development to meet the requirements of the Onsite Affordable Housing and, where the context permits, includes the land title and ownership of those units or lots.

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.

BASIX means the Building Sustainability Index scheme implemented by the NSW government under the Act.

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.

Community Housing Provider means the Eligible Community Housing Provider with which the Developer and the Landowner have or will enter into the Community Housing Provider Agreement.

Community Housing Provider Agreement means the legally binding contract between the Developer, Landowner and Community Housing Provider that provides for the transfer of the Affordable Housing Dwellings to the Community Housing Provider to operate as Affordable Housing and that meets the requirements set out in clause 2.5 of Schedule 3.

Completion means the point at which:

- (a) the Developer's Works are complete except for minor defects:
 - (i) the existence of which do not prevent the Developer's Works being reasonably capable of being used for their intended purpose;
 - (ii) which the Developer has grounds for not promptly rectifying; and
 - (iii) rectification of which will not affect the immediate and convenient use of the Developer's Works for their intended purpose; and
- (b) to the extent the RAB (CEP) Act or the DBP Act (as applicable) applies to the Developer's Works, the Developer has obtained and submitted all Occupation Certificate(s) for the Developer's Works to the City (and such Occupation Certificates are not invalid by reason of the RAB (CEP) Act or the DBP Act) (as applicable).

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.

Construction Issued Regulated Design means, in respect of the Developer's Works, a "construction issued regulated design" as that term is defined in the DBP Regulation.

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

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

DBP Act means the *Design and Building Practitioners Act 2020* (NSW).

DBP Regulation means the *Design and Building Practitioners Regulation 2021* (NSW).

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

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; and

Design Compliance Declaration means, in respect of the Developer's Works, a "design compliance declaration" as that term is defined in the DBP Act.

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 “Onsite Affordable Housing” and “EV Infrastructure” in clause 1 of Schedule 3, to be delivered by the Developer and the Landowner 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 6 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 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.

Electric Vehicle (EV) Infrastructure means those parts of the Public Benefit described as “EV Infrastructure” in clause 1 of Schedule 3, to be delivered by the Developer in accordance with this document.

Eligible Community Housing Provider means a community housing provider registered in NSW under the *Community Housing Providers (Adoption of National Law) Act 2012* (NSW) that has a registration category of Tier 1 or Tier 2, as those tiers are defined in the Registrar of Community Housing NSW Local Scheme Tier Guidelines.

Energy Efficient Review means an independent design review undertaken by a NABERS Certified Independent Design Reviewer in accordance with NABERS requirements.

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.

Green Star Buildings means the sustainability rating tool for new buildings that is managed by the Green Building Council of Australia being Greenstar buildings v1 Rating scheme dated 10 December 2021 and Greenstar Interiors v 1.3 dated 2 October 2019.

Gross Floor Area (GFA) has the meaning given to that term in the *Sydney Local Environmental Plan 2012* 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 7 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 8 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 Change means an amendment to the *Sydney Local Environment Plan 2012* in accordance with the Planning Proposal.

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

Landowner's Representative means the person named in Item 5 of Schedule 1 or his/her delegate.

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

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 Department of Planning and Environment, on behalf of Commonwealth, state and territory governments as assessed pursuant to NABERS Rules – Energy and Water for Offices v4.1 (August

2020), NABERS Rules – Energy and Water for Shopping Centres v4.1 (February 2022) and NABERS Rules – Metering and Consumption v1.3 (July 2021).

NABERS Energy Commitment Agreement is an agreement between the NABERS National Administrator, the Department of Planning and Environment and the Developer to design, build and commission the premises to achieve the applicable NABERS energy star rating and otherwise has the meaning attributed to 'Commitment Agreement' under NABERS.

NABERS National Administrator is the entity responsible for administering, managing and developing NABERS on behalf of the State of NSW.

Net Zero Emissions means the Development consumes no more total energy, including electricity, natural gas, and thermal energy (but excluding diesel used for emergency back-up generation and other emissions including refrigerants), other than is provided by:

- (a) renewable energy generated on the Land; and/or
- (b) renewable energy sourced or procured from sources other than those in (a) for a period of at least 5 years from the date of the first Occupation Certificate for the Development,

and where the renewable energy sourced or procured under (b) can be demonstrated by GreenPower certified power plans, power purchase agreements with renewable energy generators, or retiring large-scale generation certificates, with an appropriate provision to oversupply to offset total forecast non-electrical energy use (including natural gas).

Occupation Certificate has the same meaning as in the Act.

Onsite Affordable Housing means those parts of the Public Benefit described as "Onsite Affordable Housing" in clause 1 of Schedule 3.

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, or the Landowner's officer, employees, agents, contractors or subcontractors, as the context requires.

Planning Proposal means the planning proposal for the Land which received Gateway Determination from the Department of Planning and Environment on 18 January 2023 (PP-2021-6962).

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 clause 1 of Schedule 3.

RAB (CEP) Act means the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW).

RAB (CEP) Regulation means the *Residential Apartment Buildings (Compliance and Enforcement Powers) Regulation 2020* (NSW).

Regulated Design means, in respect of the Developer's Works, a "regulated design" as that term is defined in the DBP Act.

Regulation means the *Environmental Planning and Assessment Regulation 2021* (NSW).

Standards means the policies, procedures and standards for carrying out the Developer's Works, listed non-exhaustively at clause 7 of Schedule 3.

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

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

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.

Total Floor Area (TFA) has the meaning given to that term in clause 7.13 of the *Sydney Local Environmental Plan 2012* in effect at the date of this document.

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

2.2 **Public Benefits to be made by Developer and Landowner**

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

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

- (c) manner in which the Developer and Landowner must deliver the Public Benefits.

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

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

2.4 **City rights**

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

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

2.5 **Explanatory note**

The explanatory note prepared in accordance with clause 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 date of execution of this document by all parties to this document or the date the Instrument Change comes into effect, whichever is the latter.

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 has obtained the consent of the Landowner for the Planning Proposal and the Development;
 - (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.

4.3 **Landowner warranties**

- (a) The Landowner 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 Landowner 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 Landowner's size and experience; and

- (iv) it is not aware of any matter which may materially affect the Landowner's ability to perform its obligations under this document.
- (b) The Landowner 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 and Landowner to provide Public Benefits**

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

5.2 **Non-completion of Public Benefits**

- (a) If the Developer or the Landowner 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 and Landowner not to complete the Public Benefits (or any part of the Public Benefits) by issuing a notice in writing to the Developer and Landowner stating that completion of the items identified in that notice is not required to fulfil the Developer's and Landowner'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 and the Landowner.
- (b) If the Developer and the Landowner fail 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, including by exercising its right to compulsorily acquire the Affordable Housing Dwellings in accordance with clause 10.6 of this document; 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 and the Landowner. 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 and the Landowner as a debt due and owing to the City.

- (c) If the City exercises its rights under this clause 5.2 to complete the Public Benefits, the Developer and the Landowner grant 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 and, to the extent the DBP Act or the RAB (CEP) Act applies to the Developer's Works, the Developer must

provide all required assistance to the City to enable the City to comply with the DBP Act and the RAB (CEP) Act (as applicable).

5.3 **Satisfaction of required Affordable Housing contributions**

The Onsite Affordable Housing provided by the Developer and Landowner under this document satisfies the contributions required in respect of both:

- (a) the Affordable Housing contribution for the Development required by clause 7.13 of the *Sydney Local Environmental Plan 2012* (NSW); and
- (b) the Affordable Housing contribution for the Planning Proposal, required by the City's 'Affordable Housing Program' adopted 24 August 2020.

6. **COMPLETION OF DEVELOPER'S WORKS**

6.1 **Date of Completion**

The Developer and the Landowner must ensure that the Developer's Works reach Completion on or before the date or milestone referred to in clause 1 of Schedule 3 of this document.

6.2 **Developer completion notice**

When, in the reasonable opinion of the Developer and the Landowner, the Developer's Works have reached Completion, the Developer and the Landowner must notify the City's Representative in writing and must include in that notice:

- (a) a statement from the person with direct responsibility and supervision of that work that in their opinion the Developer's Works have reached Completion;
- (b) copies of any warranties, guarantees, maintenance information or other material reasonably required by the City; and
- (c) at least two sets of the "as built" drawings of the Developer's Works, including one set in electronic format, , prepared in accordance with the City's Public Domain Manual and Technical Specifications or other policies as applicable,

(Completion Notice). For the avoidance of doubt, the Developer and the Landowner can issue separate Completion Notices at separate times for different elements of the Developer's Works, however the Developer and the Landowner must ensure that Completion is achieved for the Developer's Works before the due date specified in clause 1 of Schedule 3.

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 and the Landowner:

- (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 5.2(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 and Landowner's responsibility to:
 - (A) deliver the Developer's Works in accordance with this document; or
 - (B) the Developer's and Landowner'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.

7. **INDEMNITY**

- (a) The Developer indemnifies the City against all damage, expense, loss or liability of any nature suffered or incurred by the City arising from any act or omission by the Developer (or any Personnel) in connection with the performance of the Developer's obligations under this document, except 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).
- (b) The Landowner indemnifies the City against all damage, expense, loss or liability of any nature suffered or incurred by the City arising from any act or omission by the Landowner (or any Personnel) in connection with the performance of the Landowner'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 Developer's Works as security for the Developer's and Landowner's performance of their obligations under this clause 8. The Developer and the Landowner 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 or the Landowner are in breach of clause 4.2 of this document; or
 - (ii) the City notifies the Developer and the Landowner of a Defect in the Public Benefits within the Defects Liability Period,then, following written notice from the City, the Developer or the Landowner 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) or such other reasonable period agreed in writing by the City and the Developer, the City may:
 - (i) rectify the Defect itself;
 - (ii) make a claim on the Guarantee in accordance with clause 10 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 and/or the Landowner as a debt due and owing to the City.
- (c) If the City requires access to the Land to rectify any Defect, the Developer and the Landowner 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

9.1 Registration of this document

- (a) The Landowner:
 - (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) providing the City with payment for registration, electronic lodgement and requisition fees (where applicable) required for registration of this document at NSW Land Registry Services.

- (iv) The Landowner 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 Release of this document

- (a) If the City is satisfied that the Developer and the Landowner have 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.
- (b) The Landowner must, within 10 Business Days of a written request from the City, do all things necessary to allow the City to comply with clause 9.2(a), 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) providing the City with payment for registration, lodgement and requisition fees (where applicable) required for removal of this document from the certificate of title to the Land by NSW Land Registry Services.

10. ENFORCEMENT

10.1 Developer to provide Guarantee

The Developer or the Landowner 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 or Landowner 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 or Landowner that the City is ready to exchange the then current Guarantee held by the City, following which the City and the Developer or Landowner must promptly exchange the then current Guarantee held by the City with a replacement Guarantee for that revised Guarantee Amount from the Developer or Landowner.

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

- (a) The Developer and the Landowner agree that the City may make an appropriation from the Guarantee in such amount as the City, acting reasonably, thinks appropriate if:
 - (i) the City allows the Developer and Landowner not to complete the Public Benefits, or any part of them, in accordance with clauses 5.2(a)(i) and 5.2(a)(ii);
 - (ii) an Insolvency Event occurs in respect of the Developer or the Landowner;
 - (iii) the Developer and the Landowner fail to deliver the Public Benefits in accordance with clause 5.2(b);
 - (iv) the Developer and Landowner fail to rectify a Defect in accordance with clause 8.2 of this document;
 - (v) to the extent the DBP Act applies to the Developer's Works, any Regulated Designs and Design Compliance Declarations for those Regulated Designs in relation to the Developer's Works are not procured by the Developer or Landowner (or the Developer's or Landowner's Personnel) as required by the DBP Act or the DBP Regulation or otherwise not provided to the City as and when required by this document;
 - (vi) to the extent the RAB (CEP) Act applies to the Developer's Works, the City incurs any other cost, expense or liability in exercising its rights to appeal or make representations under clause 6.5(a)(iv) of Schedule 3 or 6.5(a)(vi) of Schedule 3;
 - (vii) the Developer's Works do not reach Completion within 60 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, such agreement not being unreasonably withheld having regard to the City's regulatory obligations);

- (viii) 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 or the Landowner under this document;
 - (ii) carrying out any works required to achieve the Public Benefits;
 - (iii) to the extent the DBP Act applies to the Developer's Works, the costs and expenses incurred by the City rectifying any failure by the Developer or Landowner (or the Developer's or Landowner's Personnel) to procure Regulated Designs and Design Compliance Declarations for those Regulated Designs in relation to the Developer's Works as required by the DBP Act or the DBP Regulation and to provide copies of any Regulated Designs and Design Compliance Declarations for those Regulated Designs in relation to the Developer's Works to the City when required by this document; or
 - (iv) to the extent the RAB (CEP) Act applies to the Developer's Works, any costs, expenses or liabilities incurred by the City in exercising its rights to appeal or make representations under clause 6.5(a)(iv) of Schedule 3 or 6.5(a)(vi) of Schedule 3.

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 and the Landowner.

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 or Landowner 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 5.2(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 or Landowner 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 or Landowner the portion of the Guarantee retained by the City as security for the Defects Liability Period.

10.6 **Compulsory acquisition**

If the Landowner fails to deliver the Onsite Affordable Housing in accordance with Schedule 3 of this document then the City may compulsorily acquire that portion of the Land that comprises, or will comprise, the Affordable Housing Dwellings component of the Onsite Affordable Housing for the amount of \$1.00 in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)*. The City and the Landowner agree that:

- (a) this clause 10.6 is an agreement between the Landowner and the City for the purposes of section 30 of the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)*;
- (b) in this clause 10.6 the Landowner and the City have agreed on all relevant matters concerning the compulsory acquisition and the compensation to be paid for the acquisition; and
- (c) the Landowner must pay the City, promptly on demand, an amount equivalent to all costs incurred by the City in acquiring the whole or any part of the Affordable Housing Dwellings as contemplated by this clause 10.6.

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 and the Landowner are responsible for any and all Taxes and other like liabilities which may arise under any Commonwealth, State or Territory legislation (as amended from time to time) as a result of or in connection with this document or the Public Benefits.
- (b) The Developer and the Landowner 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 or the Landowner, as applicable, 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 and the Landowner if the Dealing is with a Government Agency. The City must give the Developer and the Landowner notice of the Dealing within five Business Days of the date of the Dealing.
- (b) The City may not otherwise Deal with its interest in this document without the consent of the Developer and the Landowner, 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 and the Landowner must not Deal with this document or the Land without:
 - (i) the prior written consent of the City; and
 - (ii) the City, the Developer, the Landowner 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 and the Landowner 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 Landowner 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, and the certificates of title to the Affordable Housing Dwellings upon registration of the strata plan; and
 - (iii) the Developer and the Landowner 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, the Landowner 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) The Developer and the Landowner 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 if the Development Consent lapses or is surrendered by the Developer.
- (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 and the Landowner must take all steps reasonably necessary to minimise any loss the each party may suffer as a result of the termination of this document;
 - (iii) the City will return the Guarantee to the Developer or Landowner 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; and
 - (iv) the City will, at the Landowner'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 and the Landowner 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.

15.7 **Privacy**

- (a) Without limiting its obligations at law with respect to privacy and the protection of Personal Information, the Developer and the Landowner:
 - (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, the Developer's Representative and the Landowner'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 and Landowner must in connection with any activity carried out on land owned by the City under or in relation to this document:
- (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 and Landowner will ensure that it has proper processes in place to manage its Chain of Responsibility obligations under this clause 17.
- (d) The Developer and Landowner 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 and the Landowner agree to allow the City immediate access to the following information contained in records held by the Developer and the Landowner:

- (a) information that relates directly to the delivery of the Public Benefits by the Developer and the Landowner;
- (b) information collected by the Developer or the Landowner 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 or the Landowner 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, administering and enforcing this document.
- (b) The Landowner must pay its own expenses incurred in negotiating, executing, registering, releasing, administering and enforcing this document.
- (c) 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.

SCHEDULE 1

Agreement Details

ITEM	TERM	DESCRIPTION
1.	Land	Lot 1 in SP22322, Lot 2 in SP22322, Lot 3 in SP22322 and CP in SP22322 known as 923 Bourke Road Waterloo NSW 2015.
2.	Development	The redevelopment of the Land for a mixed-use development comprising residential, commercial and retail uses, including a large format supermarket below ground level that is permitted by the controls proposed in the Planning Proposal and subject to the resultant Instrument Change.
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 from time to time and notified in writing to the Developer's Representative</p>
4.	Developer's Representative	<p>Name: Pierre Abrahamse</p> <p>Address: 1 Woolworths way, Bella Vista NSW 2153</p> <p>Email: pabrahamse@woolworths.com.au</p> <p>Or such alternative representative nominated by the Developer from time to time and notified in writing to the City's Representative</p>
5.	Landowner's Representative	<p>Name: Andrew Loveday</p> <p>Address: 1 Woolworths way, Bella Vista NSW 2153</p> <p>Email: aloveday@woolworths.com.au</p> <p>Or such alternative representative nominated by the Landowner from time to time and notified in writing to the City's Representative</p>

ITEM	TERM	DESCRIPTION
6.	Development Application	Any and all development application(s) submitted to the City in connection with the Development.
7.	Guarantee Amount	A total amount of \$6,650,599 excluding GST.
8.	Guarantee Amount Due Date	Prior to the issue of the first Construction Certificate for the Development.

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, Annexure B and Annexure C.
5.	<p>Whether this document excludes (wholly or in part) of does not exclude the application of section 7.11, 7.12 or 7.24 to the development (section 7.4(3)(d) of the Act)</p>	<p>Section 7.11 not excluded</p> <p>Section 7.12 not excluded</p> <p>Section 7.24 not 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)	The application of section 7.11 of the Act is not excluded in respect of the Development and contributions (if any) under section 7.11 will be required to be paid.
7.	Consideration of benefits under this document if section 7.11 applies (section 7.4(3)(e) of the Act)	Benefits are not to be taken into consideration in determining a development contribution under section 7.11 of the Act.
8.	Mechanism for Dispute Resolution (section 7.4(3)(f) of the Act)	Clause 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 (section 205(2) of the Regulation)	Provision of the Public Benefits in items 1(b) and 3(b) of clause 1 of Schedule 3.
13.	Whether certain requirements of this document must be complied with before a subdivision certificate is issued (section 205(2) of the Regulation)	Nil
14.	Whether certain requirements of this document must be complied with before an occupation certificate is issued (section 205(2) of the Regulation)	Provision of the Public Benefits in items 1(a), 1(c), 2, and 3(c) of clause 1 of Schedule 3.
15.	Whether the explanatory note that accompanied exhibition of this document may be used to assist in construing this document (section 205(5) of the Regulation)	Clause 2.5

SCHEDULE 3

Public Benefits (clause 5)

1. **PUBLIC BENEFITS - OVERVIEW**

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

	Public Benefit	Attributed Value	Due date	Additional specifications
1.	Onsite Affordable Housing	\$3,118,024	<p>(a) Prior to the first Occupation Certificate for the residential component of the Development.</p> <p>(b) Prior to the first Construction Certificate for the Development, excluding any Construction Certificate issued for demolition of existing structures on the Land.</p> <p>(c) Prior to the first Occupation Certificate for the residential component of the Development that comprises or will comprise the Onsite Affordable Housing.</p>	<p>(a) Design, construction and fit-out of Affordable Housing on the Land as part of the Development that meets the requirements set out in clause 2 of Schedule 3.</p> <p>(b) Fully executed Community Housing Provider Agreement that meets the requirements set out in clause 3 of Schedule 3.</p> <p>(c) Registration of the Affordable Housing Restriction on each Affordable Housing Dwelling, and transfer of the Affordable Housing Dwellings to the Community Housing Provider in accordance with the Community Housing Provider Agreement and clause 4 of Schedule 3.</p>

	Public Benefit	Attributed Value	Due date	Additional specifications
2.	EV Infrastructure	\$451,610	Prior to the first Occupation Certificate for the basement component of the Development.	Provision of the EV infrastructure in the Development as set out in Annexure B.
3.	Sustainability Initiatives	\$3,080,965	<p>(a) Prior to Development Consent.</p> <p>(b) Prior to the first Construction Certificate for the Development, excluding any Construction Certificate issued for demolition of existing structures on the Land.</p> <p>(c) Prior to the first Occupation Certificate for the Development, excluding any Occupation Certificate issued for the supermarket fitout works.</p> <p>(d) Within 13 months of the first Occupation Certificate for the Development.</p>	<p>(a) Sustainable design requirements as set out in section 1 of Annexure C.</p> <p>(b) Sustainable planning requirements as set out in section 2 of Annexure C.</p> <p>(c) Net Zero Emissions requirements as set out in section 3 of Annexure C.</p> <p>(d) Sustainability certifications as set out in section 4 of Annexure C.</p>

2. **ONSITE AFFORDABLE HOUSING**

2.1 **Calculation of Affordable Housing**

- (a) The minimum total square meterage (Gross Floor Area) of Affordable Housing to be provided on the Land as part of the Development, as required by clause 1(a) of Schedule 3, is to be calculated using the following formula:

$$\mathbf{AHGFA = (12\% \times 3,267) + (3\% \times RTFA) + (1\% \times NRTFA)}$$

where

AHGFA is the minimum Gross Floor Area of Onsite Affordable Housing

3,267 is the total square meterage of the large format supermarket below ground level that is permitted by the controls proposed in the Planning Proposal and subject to the resultant Instrument Change

RTFA is the Total Floor Area of that part of the Development that is intended to be used for residential purposes, as determined in the Development Consent

NRTFA is the Total Floor Area of that part of the Development that is not intended to be used for residential purposes, as determined in the Development Consent

2.2 **Affordable Housing requirements**

- (a) The Onsite Affordable Housing must meet the affordable housing principles set out in the City's 'Affordable Housing Program' adopted 24 August 2020 or any such updated or amended version of this document in effect at the time of lodgement of the Development Application.
- (b) Subject to any approval provided by the City under clause 2.5(f) of Schedule 3, the required square meterage of Affordable Housing, as determined in accordance with clause 2.1 of Schedule 3, must be in the form of Affordable Housing Dwellings, excluding car or storage spaces, and cannot include common circulation areas except where all Affordable Housing Dwellings are provided as a full floor of a building or a standalone building and the inclusion of the common circulation areas in the square meterage is agreed by the City.
- (c) The Developer and Landowner must design, construct and fit-out the Affordable Housing Dwellings, at their cost.
- (d) Each Affordable Housing Dwelling must have a total minimum floor area of 35 square metres (excluding any car or storage spaces).
- (e) The amenity objectives established by the Apartment Design Guide published by the NSW Department of Planning and Environment in effect at the time of lodgement of the Development Application must be generally achieved for all Affordable Housing Dwellings (e.g. 70% of the Affordable Housing Dwellings should achieve adequate solar access).
- (f) Subject to clause 2.2(g) of Schedule 3, all Affordable Housing Dwellings must be designed, constructed and fitted out to the same standard, and with a fit-out of the same scope, as the other residential dwellings in the Development. The Affordable Housing Dwellings must not be differentiated as affordable housing compared with the design, construction and fit-out of other housing in the Development.
- (g) The Developer and Landowner must make changes to the design, construction and fit-out of the Affordable Housing Dwellings as reasonably required by the Community Housing Provider to suit the Community Housing Provider's future use and maintenance program for the Affordable Housing Dwellings, including changes that relate to:

- (i) the configuration and/or layout of the Affordable Housing Dwellings;
- (ii) the finishes, materiality and/or durability of the construction and/or fit-out of the Affordable Housing Dwellings; or
- (iii) any accessibility requirements for the Affordable Housing Dwellings.

2.3 **Affordable Housing consultation and reporting**

- (a) The Developer and Landowner must consult with the Community Housing Provider during all stages of the design, construction, fit-out and transfer of the Affordable Housing Dwellings, including:
 - (i) providing regular updates on progress of the Development Application and the design, construction, fit-out and transfer of the Affordable Housing Dwellings;
 - (ii) providing regular opportunities for the Community Housing Provider to inspect the construction and fit-out of the Affordable Housing Dwellings;
 - (iii) ensuring the Community Housing Provider has a full understanding of the likely strata requirements that will be in place once the Development is complete, including the likely costs that will apply to the Affordable Housing Dwellings; and
 - (iv) obtaining the Community Housing Provider's agreement to any changes to or affecting the design, construction, fit-out and/or transfer of the Affordable Housing Dwellings.
- (b) Where requested by the City, the Developer and Landowner must provide evidence, endorsed by the Community Housing Provider, of:
 - (i) how any changes to the design, construction and fit-out of the Affordable Housing Dwellings required by the Community Housing Provider in accordance with clause 2.2(g) of Schedule 3 have been addressed; and
 - (ii) the consultation with the Community Housing Provider required by clause 2.3 of Schedule 3.
- (c) The Developer and Landowner must provide progress updates to the City, endorsed by the Community Housing Provider, in respect of the design, construction, fit-out and transfer of the Affordable Housing Dwellings, and each party's compliance with the terms of the Community Housing Provider Agreement, where requested by the City.

2.4 **Development Application requirements**

- (a) The Developer and Landowner must obtain the Community Housing Provider's approval of the proposed Affordable Housing Dwellings prior to the lodgement of the Development Application.

- (b) The Developer and Landowner must identify the Affordable Housing Dwellings in the Development Application, and demonstrate how the Affordable Housing requirements in clause 2.2 of Schedule 3 have been met.
- (c) The Developer and Landowner must submit a letter of support for the proposed Affordable Housing Dwellings from the Community Housing Provider as part of the Development Application that demonstrates the Community Housing Provider's in principle approval of the Affordable Housing Dwellings, confirmation the Affordable Housing Dwellings meet the Community Housing Provider's requirements, and in principle agreement to enter into the Community Housing Provider Agreement and accept the transfer of the Affordable Housing Dwellings.

2.5 **Changes to Gross Floor Area of Affordable Housing**

- (a) Where a Development Consent is modified under section 4.55 of the Act in a manner that decreases the minimum Gross Floor Area of Onsite Affordable Housing, as calculated in accordance with clause 2.1 of Schedule 3, the minimum Gross Floor Area of Affordable Housing to be provided on the Land as part of the Development will be decreased accordingly.
- (b) Where a Development Consent is modified under section 4.55 of the Act:
 - (i) in a manner that increases the minimum Gross Floor Area of Onsite Affordable Housing, and
 - (ii) the modification occurs prior to the first Construction Certificate for that Development Consent being issued, excluding any Construction Certificate issued for demolition of existing structures on the Land,

the Developer and Landowner must ensure any increase to the Gross Floor Area of Onsite Affordable Housing, calculated in accordance with clause 2.1 of Schedule 3, is provided in the form of Affordable Housing Dwellings.
- (c) Where a Development Consent is modified under section 4.55 of the Act:
 - (i) in a manner that increases the minimum Gross Floor Area of Onsite Affordable Housing, and
 - (ii) the modification occurs on or after the first Construction Certificate for that Development Consent being issued, excluding any Construction Certificate issued for demolition of existing structures on the Land,

the Developer and Landowner must use their best endeavours to ensure any increase to the Gross Floor Area of Onsite Affordable Housing, calculated in accordance with clause 2.1 of Schedule 3, is provided in the form of Affordable Housing Dwellings.
- (d) Where the Developer and Landowner cannot provide the increase to the Gross Floor Area of Onsite Affordable Housing required by clause 2.5(c) of Schedule 3 in the form of Affordable Housing Dwellings, the Developer and Landowner may seek the City's written approval to provide the increase to the Gross Floor Area of Onsite Affordable Housing in the form of a monetary contribution.

- (e) In seeking approval under clause 2.5(d) of Schedule 3, the Developer and Landowner must provide evidence to the satisfaction of the City that the increase to the Gross Floor Area of Onsite Affordable Housing cannot reasonably be delivered in the form of Affordable Housing Dwellings.
- (f) Where the City approves the increase to the Gross Floor Area of Onsite Affordable Housing required by clause 2.5(c) of Schedule 3 being provided in the form of a monetary contribution:
 - i) The monetary contribution will be calculated in accordance with the contribution amount per square metre specified in the City's 'Affordable Housing Program' adopted 24 August 2020 or any such updated or amended version of this document in effect at the time the contribution is due; and
 - ii) The monetary contribution must be paid by the Developer and Landowner prior to the first Occupation Certificate for the residential component of the Development that comprises or will comprise the Onsite Affordable Housing.

3. COMMUNITY HOUSING PROVIDER AGREEMENT

3.1 Agreement requirements

The Developer and the Landowner must, at their cost, prepare and, subject to clause 3.2 of Schedule 3, enter into the Community Housing Provider Agreement by the due date specified in clause 1 of Schedule 3 that:

- (a) provides for the transfer of the Affordable Housing Dwellings to the Community Housing Provider, at no cost to the Community Housing Provider;
- (b) requires each Affordable Housing Dwelling have the Affordable Housing Restriction registered on title, prior to the transfer of the Affordable Housing Dwellings to the Community Housing Provider;
- (c) requires all parties comply with the City's 'Affordable Housing Program' adopted 24 August 2020 as updated or amended from time to time, in respect of the Affordable Housing Dwellings;
- (d) specifies each of the Affordable Housing Dwellings including the size and location of each Affordable Housing Dwelling and the design, construction fit-out specifications, as agreed between the Developer, the Landowner and the Community Housing Provider;
- (e) requires that the Developer and Landowner not amend, change or otherwise alter the size or location of the Affordable Housing Dwellings, or the design, construction and fit-out specifications agreed between the Developer, the Landowner and the Community Housing Provider except with the written approval of the Community Housing Provider;
- (f) specifies the process that will apply where any party to the Community Housing Provider Agreement seeks changes to the agreed size or location

of the Affordable Housing Dwellings, or the design, construction and fit-out specifications;

- (g) specifies the process and timings for the Developer and Landowner to provide regular updates to the Community Housing Provider on the Development Application and the design, construction, fit-out and transfer of the Affordable Housing Dwellings;
- (h) sets out the processes for:
 - (i) ensuring the Community Housing Provider is reasonably satisfied with the design, construction and fit-out of the Affordable Housing Dwellings; and
 - (ii) acceptance of the Affordable Housing Dwellings by the Community Housing Provider following construction and fit-out, and prior to transfer of the Affordable Housing Dwellings to the Community Housing Provider;
- (i) sets out a fair and reasonable process for dispute resolution, including for disputes relating to the size, location, design, construction, fit-out and transfer of the Affordable Housing Dwellings, with resolution by an independent expert where the value of the dispute exceeds \$100,000 and the dispute has not been resolved by the parties within 20 Business Days;
- (j) provides the Community Housing Provider with a right to terminate the Community Housing Provider Agreement, without penalty, where the Community Housing Provider reasonably believes the Developer and/or the Landowner have breached any provision of the Community Housing Provider Agreement and that breach is incapable of remedy or has continued for 10 Business Days after the date the Community Housing Provider gives notice requiring the breach be remedied;
- (k) requires that the Developer and Landowner promptly rectify, at the Developer's cost, any Defects in the Affordable Housing Dwellings identified by the Community Housing Provider and notified to the Developer or Landowner during the 12-month period commencing on the date the Affordable Housing Dwellings are transferred to the Community Housing Provider; and
- (l) indemnifies the Community Housing Provider against all claims made against the Community Housing Provider as a result of any Contamination in, over, under or migrating from the whole or any part of the Affordable Housing Dwellings in relation to Contamination that existed on or before the date that the Affordable Housing Dwellings are transferred to the Community Housing Provider.

3.2 **City review of Agreement**

The Developer and Landowner must provide a copy of the proposed Community Housing Provider Agreement to the City, and obtain the City's written confirmation that the proposed Community Housing Provider Agreement meets the requirements of clause 3.1 of Schedule 3, prior to execution of the Community Housing Provider Agreement.

3.3 **Variation or breach of Agreement**

The Developer and Landowner must:

- (a) seek the City's prior written approval of any variations to the Community Housing Provider Agreement; and
- (b) notify the City of any notice alleging breach of the Community Housing Provider Agreement received or issued by the Developer or Landowner, and the nature of the alleged breach set out in the notice, within 5 Business Days of receipt or issue, as applicable.

3.4 **Termination of Agreement**

If the Community Housing Provider Agreement is terminated for any reason prior to the transfer of the Affordable Housing Dwellings to the Community Housing Provider, the Developer or Landowner must notify the City within 5 Business Days of the date of termination, and the Developer and the Landowner must enter into a new agreement with an Eligible Community Housing Provider within a further 2 months, or such other period as agreed in writing by the City, on substantially the same terms.

4. **TRANSFER OF AFFORDABLE HOUSING DWELLINGS**

4.1 **Transfer of land**

The Landowner must, at its cost, take all steps required to transfer the Affordable Housing Dwellings to the Community Housing Provider, consistent with the Community Housing Provider Agreement, and at no cost to the Community Housing Provider, by the due date specified in clause 1 of Schedule 3.

4.2 **Evidence of transfer**

The requirement for the Landowner to transfer the Affordable Housing Dwellings to the Community Housing Provider is satisfied where the Landowner has provided the City with title searches showing that ownership of each Affordable Housing Dwelling has been transferred to the Community Housing Provider in accordance with the requirements of this document.

4.3 **General obligations**

- (a) The Landowner must ensure that the title to each Affordable Housing Dwelling is free of all encumbrances, leases, licences and affectations (whether registered or unregistered and including without limitation any charge or liability for rates, taxes and charges) except for the Affordable Housing Restriction and any encumbrances agreed in writing by both the Community Housing Provider and the City.
- (b) The Landowner warrants that as at the date of this deed the Land is not subject to any Adverse Affectation and warrants as to those matters in Schedule 3 of the *Conveyancing (Sale of Land) Regulation 2022(NSW)*, unless otherwise notified to and agreed by the City in writing in its absolute discretion.

5. **FINAL DESIGN OF THE DEVELOPER'S WORKS**

5.1 **Scope of Developer's Works**

As at the date of this document, the nature and extent of the required Developer's Works is set out in those parts of the Public Benefit described as "Onsite Affordable Housing" and "EV Infrastructure" in clause 1 of Schedule 3. The parties agree that further design refinement of the Developer's Works may be necessary, having regard to:

- (a) the extent to which the design of the Developer's Works has been approved by the City;
- (b) conditions affecting the Developer's Works that were not reasonably capable of identification prior to the date of this document;
- (c) the extent of any refinement of the design of the Developer's Works permitted by this clause 5.1 of Schedule 3;
- (d) to the extent the DBP Act applies to the Developer's Works:
 - (i) any refinement of the Regulated Designs for the Developer's Works required to ensure compliance with the DBP Act or DBP Regulation and to enable Design Compliance Declarations to be issued in respect of those Regulated Designs; and
 - (ii) any refinement of the Regulated Designs for the Developer's Works required to enable those Regulated Designs to be Construction Issued Regulated Designs and to enable Design Compliance Declarations to be made in respect of those Construction Issued Regulated Designs;
- (e) any modification to the Development Consent made and approved under section 4.55 of the Act or any other development consent granted that relates to the Developer's Works; and
- (f) the reasonable requirements of the City, including in regard to the Standards.

5.2 **Final design of Developer's Works**

- (a) The Developer or the Landowner must submit the final design of the Developer's Works to the City as part of the Development Application.
- (b) The parties agree that the review and approval of the final design of the Developer's Works, including ensuring its compliance with this document, will occur as part of the Development Application and Development Consent process under the Act. The final design will therefore be a design which is reflected in the Development Consent, the approved plans and Construction Certificates issued pursuant to the Development Consent.
- (c) The Developer and the Landowner agree that the value of the Developer's Works may be adjusted following completion of the process set out in this clause 5.2 of Schedule 3. The Developer and the Landowner acknowledges that the scope of the Developer's Works will not change or reduce if the

costs required to complete those works is greater than the amount estimated at the date of this document.

- (d) The City does not assume or owe any duty of care to the Developer or the Landowner in reviewing any design drawings submitted to it under clause 5.2(a) of Schedule 3 or for any errors, omissions or non-compliance with this document.
- (e) No participation by the City in the development of, the review of, or comments on any design drawings submitted by the Developer or the Landowner will lessen or otherwise affect the Developer's or Landowner's obligations under this document or constitute an acknowledgement by the City that the Developer or the Landowner have complied with their obligations under this document.

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

6.1 **Insurance**

- (a) From commencement of the Developer's Works until expiration of the Defects Liability Period, the Developer and the Landowner must effect and maintain (or cause to be effected and maintained under one or more policies of insurance and without requiring any risk to be double insured) the following insurances held with an insurer licensed by the Australian Prudential Regulation Authority or holding an investment grade rating from Standard & Poors, Moody's or Fitch:
 - (i) worker's compensation insurance or registrations as required by Laws;
 - (ii) public liability insurance written on an occurrence basis with a limit of indemnity of not less than \$20,000,000 covering all aspects of the Developer's Works;
 - (iii) construction works insurance in relation to the Developer's Works; and
 - (iv) motor vehicle third party cover with a limit of indemnity of not less than \$20 million for each and every occurrence.
- (b) The Developer and the Landowner must submit a copy of all certificates of insurance to the City:
 - (i) prior to commencing construction of the Developer's Works; and
 - (ii) promptly following a written request by the City, provided that such a request is not made more than twice in any 12 month period.

6.2 **Approvals and consents**

The Developer and the Landowner must, at their cost, obtain all relevant approvals and consents for the Developer's Works, whether from the City or from any other relevant Government Agency, including any necessary road opening permits. Before commencing the Developer's Works, the Developer or Landowner must give

to the City copies of all approvals and consents for the Developer's Works, other than the Development Consent.

6.3 **Construction work**

The Developer and the Landowner must, at their cost:

- (a) carry out and complete the Developer's Works in accordance with all approvals and consents relating to the Developer's Works, including any approval given by the City under this document;
- (b) ensure that all Developer's Works are constructed in a good and workmanlike manner, in accordance with the plans approved under this document so that the Developer's Works are structurally sound, fit for purpose and suitable for their intended use;
- (c) ensure that the Developer's Works are Complete by the due date specified in clause 1 of Schedule 3 and promptly after becoming aware advise the City's Representative of any significant delays in completing the Developer's Works or delays that may impact the delivery of the Public Benefits by the due date specified in clause 1 of Schedule 3; and
- (d) comply with all reasonable directions of the City in respect to construction of the Developer's Works.

6.4 **Inspections by the City**

The City, as a party to this document and not in its role as a Government Agency, may:

- (a) inspect the Developer's Works during the course of construction at reasonable times and on reasonable notice; and
- (b) notify the Developer's Representative and Landowner's Representative of any material or significant defect, error or omission relating to the construction or installation of the Developer's Works identified during or as the result of an inspection.

Any failure by the City to identify a Defect, error or omission will not be construed as amounting to an acceptance by the City of the Defect, error or omission.

6.5 **RAB (CEP) Act**

This clause 6.5 of Schedule 3 (other than this sentence) applies only to the extent that the RAB (CEP) Act or the RAB (CEP) Regulation applies to the Developer's Works.

- (a) Without limiting any other obligation of the Developer or the Landowner, the Developer and the Landowner:
 - (i) must ensure that the Developer and the Landowner, and the Developer's and Landowner's Personnel and their respective employees and agents:

- (A) comply with, and satisfy all obligations imposed on a developer under, the RAB (CEP) Act and the RAB (CEP) Regulation;
 - (B) do not cause the City to contravene the RAB (CEP) Act or the RAB (CEP) Regulation;
 - (C) do not carry out the Developer's Works in a manner that results in, or could result in:
 - (aa) a serious defect in relation to a residential apartment building;
 - (bb) significant harm or loss to the public or occupiers or potential occupiers of any building to which the Developer's Works relates; or
 - (cc) significant damage to property; and
 - (D) do not, by any act or omission, cause or contribute to any serious defect or the issue of any prohibition order, stop work order or building work rectification order;
- (ii) must immediately provide the City with a copy of any notice issued to the Developer or Landowner under the RAB (CEP) Act, including any prohibition order, stop work order, building work rectification order, notice of proposed building work rectification order and compliance cost notice;
 - (iii) must ensure that, in complying with its obligations under the RAB (CEP) Act, the Developer's Works are not delayed, and the Developer and the Landowner achieve the due dates for the Developer's Works specified in clause 1 of Schedule 3;
 - (iv) must provide all reasonable assistance to the City in exercising any right to make representations concerning any building work rectification order or right of appeal as contemplated by the RAB (CEP) Act, including by providing the City with any information that may be necessary or required by the City for the purposes of any such representation or appeal;
 - (v) acknowledges and agrees that:
 - (A) the RAB (CEP) Act contemplates particular orders and requirements, including:
 - (aa) requirements of an authorised officer;
 - (bb) stop work orders;
 - (cc) building work rectification orders; and
 - (dd) orders of the Court referred to in section 49(3) of the RAB (CEP) Act;

- (B) such orders and requirements may be given or otherwise communicated directly to the Developer or Landowner or otherwise; and
 - (C) the Developer and Landowner must ensure that the Developer, the Landowner, the Developer's and Landowner's Personnel and their respective employees and agents comply with any such orders and requirements, whether they are given or otherwise communicated directly to the Developer or the Landowner or to any other person; and
- (vi) must comply with any compliance cost notice and reimburse the City for any costs incurred by the City in respect of any compliance cost notice, to the extent any such compliance cost notice relates to the Developer's Works.
- (b) The Developer indemnifies the City against any claims against, damages, expenses, losses or liability suffered or incurred by, the City arising out of, or in any way in connection with, any breach by the Developer of clause 6.5(a) of Schedule 3
 - (c) The Developer will not be entitled to make, and the City will not be liable upon, any claim, damage, expense, loss or liability arising out of, or in any way in connection with, the Developer's obligations under this clause 6.5 of Schedule 3.
 - (d) The Landowner indemnifies the City against any claims against, damages, expenses, losses or liability suffered or incurred by, the City arising out of, or in any way in connection with, any breach by the Landowner of clause 6.5(a) of Schedule 3.
 - (e) The Landowner will not be entitled to make, and the City will not be liable upon, any claim, damage, expense, loss or liability arising out of, or in any way in connection with, the Landowner's obligations under this clause 6.5 of Schedule 3.
 - (f) Except as otherwise provided in clause 1.1, all terms used in this clause 6.5 of Schedule 3 have the meanings given to them in the RAB (CEP) Act.

6.6 **DBP Act and DBP Regulation**

This clause 6.6 of Schedule 3 (other than this sentence) applies only to the extent that the DBP Act and the DBP Regulation applies to the Developer's Works.

- (a) Without limiting any other obligation of the Developer or the Landowner, the Developer and the Landowner must ensure that the Developer, the Landowner, the Developer's and Landowner's Personnel and their respective employees and agents:
 - (i) comply with the DBP Act and the DBP Regulation, including by preparing, providing and lodging all necessary or relevant documentation as and when required by, and in the form and method required by, the DBP Act and the DBP Regulation;

- (ii) will be registered as required by the DBP Act and the DBP Regulation;
 - (iii) do not carry out the Developer's Works in a manner that results in, or could result in:
 - (A) significant harm or loss to the public or occupiers or potential occupiers of any building to which the Developer's Works relates; or
 - (B) significant damage to property; and
 - (iv) do not, by any act or omission, cause or contribute to the issue of any stop work order.
- (b) The Developer warrants to the City that the Developer will perform the Developer's Works so as to avoid, and to otherwise not cause or contribute to, any economic loss (as contemplated by Part 4 of the DBP Act) on the part of any owner arising out of or in connection with any defect or otherwise arising out of or in connection with the Developer's Works.
- (c) The Landowner warrants to the City that the Landowner will perform the Developer's Works so as to avoid, and to otherwise not cause or contribute to, any economic loss (as contemplated by Part 4 of the DBP Act) on the part of any owner arising out of or in connection with any defect or otherwise arising out of or in connection with the Developer's Works.
- (d) In addition to and without limiting any other duty or obligation assumed by the Developer, the Developer acknowledges and agrees that it owes a duty to the City to exercise reasonable care to avoid economic loss (as contemplated by Part 4 of the DBP Act and whether suffered or incurred by the City or any owner) arising out of or in connection with any defect or otherwise arising out of or in connection with the Developer's Works.
- (e) In the event the City compulsorily acquires any of the Land under clause 10.6, the Developer indemnifies the City against any claims against, damages, expenses, losses or liabilities suffered or incurred by, the City arising out of, or in any way in connection with, any breach by the Developer of this clause 6.6 of Schedule 3.
- (f) In addition to and without limiting any other duty or obligation assumed by the Landowner, the Landowner acknowledges and agrees that if it carries out the Developer's Works it owes a duty to the City to exercise reasonable care to avoid economic loss (as contemplated by Part 4 of the DBP Act and whether suffered or incurred by the City or any owner) arising out of or in connection with any defect or otherwise arising out of or in connection with the Developer's Works.
- (g) The Landowner indemnifies the City against any claims against, damages, expenses, losses or liabilities suffered or incurred by, the City arising out of, or in any way in connection with, any breach by the Landowner of this clause 6.6 of Schedule 3.
- (h) The Developer and the Landowner must include in any Completion Notice provided under clause 6.2 a statement from each person directly

responsible for the lodgement of documents as required by the DBP Act that all necessary and relevant documentation relating to the Developer's Works has been prepared, provided and lodged as and when required by, and in the form and method required by, the DBP Act and DBP Regulation. The Developer and the Landowner must provide a copy of all such documentation referred to in this clause 6.6(h) of Schedule 3 to the City with any Completion Notice.

- (i) The Developer will not be entitled to make, and the City will not be liable upon, any claim, damage, expense, loss or liability arising out of, or in any way in connection with, the Developer's obligations under this clause 6.6 of Schedule 3.
- (j) The Landowner will not be entitled to make, and the City will not be liable upon, any claim, damage, expense, loss or liability arising out of, or in any way in connection with, the Landowner's obligations under this clause 6.6 of Schedule 3.
- (k) Except as otherwise provided in clause 1.1, all terms used in this clause 6.6 of Schedule 3 have the meanings given to them in the DBP Act and the DBP Regulation.

7. GUIDELINES FOR SUSTAINABILITY INITIATIVES

The following list of guidelines are included for information purposes only for the general nature of the Sustainability Initiatives 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 Initiatives. The Developer and the Landowner must make their 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 5: Preparing for NABERS hotel rating prepared by NSW Office of Environment and Heritage, published September 2014
- 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 dated 2020.

EXECUTION

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 of witness

Position of officer

456 Kent Street, Sydney NSW 2000

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

Address of witness

EXECUTED by **FABCOT PTY LTD**
(ACN 002 960 983) in accordance with
s127(1) of the Corporations Act 2001
(Cth):

Signature of director

Signature of director/secretary

Name

Name

EXECUTED by **TRITON ATLAS
CORPORATION PTY LTD** (ACN 634
827 839) in accordance with s127(1)
of the Corporations Act 2001 (Cth):

Signature of director

Signature of director/secretary

Name

Name

ANNEXURE A

Affordable Housing Restriction

1. DEFINITIONS

Act means the *Environmental Planning and Assessment Act 1979* (NSW) as amended or varied from time to time

Affordable Housing has the meaning given in the Act.

Council means the Council of the City of Sydney (ABN 22 636 550 790).

Land means the land contained within Certificate of Title Folio Identifier [insert], also known as [insert address].

Owner means the registered proprietor of the Land.

Registered Community Housing Provider means an entity that provides community housing and that is registered under the *Community Housing Providers (Adoption of National Law) Act 2012* (NSW).

2. TERMS

(a) The Owner must not develop, use or occupy the Land for any purpose other than for the purposes of Affordable Housing.

(b) Any change of use of the Land from Affordable Housing is prohibited.

(c) Any part of the Land that is used for Affordable Housing must be managed by a Registered Community Housing Provider.

(d) The Owner must obtain the consent of Council prior to the Land being subdivided.

(e) Any subdivision of the Land must include a restriction on the same terms as this document burdening all lots.

3. GENERAL

(a) This restriction on use is for the benefit of Council and may only be released or varied with the prior written consent of Council.

(b) 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.

ANNEXURE B

EV Infrastructure

The parking spaces in the Development must be equipped with electric vehicle charging infrastructure as follows:

1. Power supply and distribution boards for electric vehicle charging must comply with section J9D4 'Facilities for electric vehicle charging equipment' in NCC 2022 Volume One – Building Code of Australia.
2. All car spaces must be located within 10 metres of a cable tray sized to accommodate cabling for 100% of the parking spaces it serves and terminates at the closest electric vehicle distribution board.
3. 10% of car spaces designated for use by retail and commercial occupants must be fitted with a level 2 charger or higher.
4. 25% of car spaces designated for use by retail visitors must be fitted with a three phase level 2 electric vehicle charger at 22 kilowatts or higher.
5. A minimum of two level 3 or level 4 rapid electric vehicle chargers must be provided that are publicly accessible during supermarket or retail and commercial operating hours (whichever is the greater), with at least one charger using the 'Combined Charging System (CCS)' standard and the other using a different standard.
6. All electric vehicle chargers in items 3 to 5, above, must be held in common property ownership or the retail stratum, be individually metered, equipped with an Open Charge Protocol compatible payment system, and supplied by renewable energy through a 'GreenPower' power plan, renewable power purchase agreement, or similar, for a period of at least 5 years from the date of the Occupation Certificate.

Where any of the above requirements are expressed as a percentage, this is to be calculated by reference to the total number of car spaces (not square meterage).

ANNEXURE C

Sustainability Initiatives

1. Sustainable design requirements (pre-Development Consent)

- 1.1** The Developer and the Landowner must ensure:
- (a) the Development is designed and constructed to reduce the need for active heating and cooling by incorporating passive design measures including design, location and thermal properties of glazing, natural ventilation, appropriate use of thermal mass and external shading, including vegetation;
 - (b) residential uses in the Development are designed and constructed to achieve BASIX compliance plus 5 points, being an achievement of energy (40) and water (45) based on assessment using the BASIX Online Tool v3.0 and BASIX Thermal Comfort Protocol dated 27 November 2020;
 - (c) commercial and retail premises must be capable of achieving a 4 star NABERS water rating;
 - (d) all plant and equipment in the Development uses natural refrigerants with a low global warming potential, where suitable systems are available;
 - (e) in all multi-tenant or strata-subdivided areas of the Development, electricity sub-metering for lighting, air-conditioning and power is provided within each tenancy or strata unit;
 - (f) electricity sub-metering is provided in the Development for significant end uses that will consume more than 10,000 kWh/annum;
 - (g) the Development incorporates onsite rainwater capture and re-use for non-potable purposes, with all buildings capable of providing a dual reticulation water system for water services and connecting to a non-potable recycled water network configured to supply all toilets, washing machine taps, car wash bays, cooling towers and irrigation usages; and
 - (h) the Development demonstrates best practice site-wide resource recovery for operational waste and recycling systems.
- 1.2** The Developer and Landowner must demonstrate in the Development Application how the sustainability commitments set out in section 1.1, above, have or will be achieved, including referencing all design, performance and features in the 'City of Sydney Design and Environmental Performance Template' submitted with the Development Application.

2. Sustainable planning requirements (pre-Construction Certificate)

- 2.1** The Developer and Landowner must ensure any supermarket that is to operate on the Land has operational waste management plans in place that, at a minimum:

- (a) Establishes targets that match or exceed the targets set out in the NSW Waste and Sustainable Materials Strategy 2042 administered by the NSW Department of Planning and Environment, including:
 - (i) more than 50% recovery of food organics;
 - (ii) 80% resource recovery rate from all waste streams; and
 - (iii) Australia's 2025 National Packaging Targets;
- (b) specifies design and operational measures required to meet those targets;
- (c) commits to attaining Green Star Buildings rating with 'exceptional performance' in credit 4: responsible resource management (or equivalent);
- (d) specifies how it embeds core circular economy principles, including:
 - (i) designing out waste and pollution;
 - (ii) keeping products and materials in use; and
 - (iii) regenerating natural systems; and
- (e) specifies strategies and actions to encourage public recycle for 'return and earn' containers and small household problem waste such as batteries, light bulbs, mobile phones, and small electronics.

2.2 The Developer and Landowner must provide the operational waste management plans that comply with the requirements of section 2.1 above to the City for review and approval.

2.3 The Developer and Landowner must amend the operational waste management plans where required by the City, as part of the review and approval process.

2.4 The Developer and Landowner must identify all sub-meter locations, to meet the requirements set out in sections 1.1(e) and 1.1(f) above, on the plans submitted with the Construction Certificate.

3. Net Zero Emissions requirements (pre-Occupation Certificate)

3.1 The Developer and Landowner must provide evidence to the City's satisfaction that the Development is capable of achieving Net Zero Emissions from energy use through achievement of:

- (a) for retail uses (base building only), either:
 - (i) minimum 5 Star NABERS Energy Commitment Agreement; or
 - (ii) certified Green Star Buildings rating with 'exceptional performance' in credit 22: energy use (or equivalent); or
 - (iii) a maximum of 45 kWh/yr/m² of GFA;

and

- (iv) renewable energy procurement equivalent to Net Zero Emissions.
- (b) for office uses over 1,000 square metres net lettable area (base building only), either:
- (i) minimum 5.5 Star NABERS Energy Commitment Agreement + 25%; or
 - (ii) certified Green Star Buildings rating with 'exceptional performance' in credit 22: energy use (or equivalent); or
 - (iii) a maximum of 45 kWh/yr/m² of GFA;
- and
- (iv) renewable energy procurement equivalent to Net Zero Emissions.

4. Net Zero Emissions certifications (post-Occupation Certificate)

4.1 The Developer and Landowner must provide evidence to the City of the achievement of the Net Zero Emissions requirements, including:

- (a) where a NABERS certification was proposed:
 - (i) evidence that the NABERS rating has been achieved;
 - (ii) a copy of the Energy Efficient Review; and
 - (iii) a copy of 12 months of sub-metering data for energy and water that informed the NABERS rating;
- (b) where a Green Star Buildings rating was proposed, evidence that the Green Star Buildings rating has been achieved;
- (c) where a maximum of 45 kWh/yr/m² of GFA was proposed, consumption data that demonstrates that the usage level was not exceeded; and
- (d) documentation to confirm the renewable energy procurement requirement.

4.2 The Developer and Landowner must provide evidence to the City of the achievement of 4 star NABERS water rating for the commercial and retail premises by way of a third party verification statement.