

## **Planning Agreement**

### **90-92 Franklin Road, Cherrybrook**

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Hornsby Shire Council (ABN 20 706 996 972) (**Council**)

Goldmap Two Pty Limited (ABN 45 621 535 653) (**Developer**)

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# Planning Agreement

## 90-92 Franklin Road, Cherrybrook

### Parties

<b>Council</b>	<b>Name</b>	Hornsby Shire Council
	<b>Address</b>	296 Peats Ferry Road Hornsby NSW 2077
	<b>ABN</b>	20 706 996 972
	<b>Phone</b>	(02) 9847 6666
	<b>Email</b>	hsc@hornsby.gov.au
<b>Developer</b>	<b>Name</b>	Goldmap Two Pty Limited
	<b>Address</b>	26 Brunette Drive Castle Hill NSW 2154
	<b>ABN</b>	45 621 535 653
	<b>Phone</b>	0431 992 258
	<b>Email</b>	mw.sydney.au@gmail.com

### Background

- A** The Developer owns the Land.
- B** The Developer wishes to carry out the Development.
- C** The Developer has applied for the Development Consent.
- D** The Developer has agreed to make the Contributions in connection with the Development on and subject to the terms of this document.

### Operative Provisions

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#### 1 Agreement

The agreement of the parties is set out in the Operative Provisions of this document, in consideration of, among other things, the mutual promises contained in this document.

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#### 2 Definitions

##### 2.1 Defined Terms

In this document, words beginning with a capital letter that are defined in Part 1 of **Schedule 2** have the meaning ascribed to them in that schedule.

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## **2.2 Interpretation**

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

## **3 Application and operation of document**

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### **3.1 Planning Agreement**

This document is a planning agreement:

- (1) within the meaning set out in s7.4 of the Act; and
- (2) governed by Subdivision 2 of Part 7 of the Act.

### **3.2 Application**

This document is made in respect of the Development and applies to both the Land and the Development.

### **3.3 Operation**

This document operates:

- (1) as a deed from the date that it is executed by both parties; and
- (2) as a planning agreement for the purpose of the Act from the date that the Development Consent becomes operative.

## **4 Application of s7.11 & s7.12**

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### **4.1 Application**

This document excludes the application of section 7.11 or section 7.12 of the Act to the Development.

### **4.2 Section 7.24**

This document does not exclude the application of s7.24 to the Development.

## **5 Provision of Contributions**

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### **5.1 Indexation of Amounts payable by Developer**

Each Contribution Works Value will be increased (with the calculation to be made as from the date the relevant Contribution is required to be provided to Council under this document) in accordance with the following formula:

$$A = B \times \frac{C}{D}$$

**D**

where:

**A** = the indexed amount;

**B** = the relevant amount as set out in this document;

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**C** = the Index most recently published before the date that the relevant payment or the calculation with respect to the relevant amount is to be made; and

**D** = the Index most recently published before the commencement date of this document.

If **A** is less than **B**, then the relevant Contribution Works Value will not change.

## **5.2 Conduct of Works**

If a Development Consent is granted, the Developer, at its cost, must:

- (1) obtain development consent, and any other form of consent required by a relevant Authority, for the construction and use of the Works;
- (2) carry out and Complete the Works to the reasonable satisfaction of the Council in accordance with **Schedule 3**; and
- (3) carry out and Complete the Works:
  - (a) in accordance with the specifications (if any) referred to in **Schedule 3** for the relevant item of Work or the design and specifications agreed or determined to apply to an item of Work under clause 5.3;
  - (b) in accordance with any relevant Development Consent;
  - (c) in accordance with the requirements of, or consents issued by, any Authority;
  - (d) ensuring that (except to the extent permitted by any Development Consent):
    - (i) all necessary measures are taken to protect people, property, and the Environment;
    - (ii) unnecessary interference with the passage of people and vehicles is avoided;
    - (iii) nuisances and unreasonable noise and disturbances are prevented; and
    - (iv) all relevant laws and regulations with respect to water, air, noise and land pollution (including 'pollution incidents') as defined under the *Protection of the Environment Operations Act 1997* (NSW);
  - (e) in accordance with any Australian Standards applicable to works of the same nature as each aspect of the Works; and
  - (f) in a proper and workmanlike manner complying with current industry practice and standards relating to each aspect of the Works.

## **5.3 Design and specification of Works**

- (1) The Developer must:
  - (a) consult with Council with respect to the development of the detailed design and specification with respect to each item of Works; and
  - (b) ensure that the relevant design is consistent with, and has regard to, any relevant policies of Council as identified in the Development Consent.

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- (2) Before commencing construction of an item of Works, the Developer must submit to Council:
    - (a) for its approval, the detailed design and specification for that item of Works; and
    - (b) a report from a suitable qualified and experienced Quantity Surveyor which estimates the cost to complete the relevant item of Work in accordance with the detailed design.
  - (3) The design and specification for the item of Works must be prepared by the Developer having specific regard to:
    - (a) the specification (if any) for that item of Works set out in **Schedule 3**; and
    - (b) the Contribution Works Value of the relevant item of Works.
  - (4) Within thirty (30) days of the date of the first submission referred to in paragraph (2), Council must do either of the following:
    - (a) Notify the Developer in writing of its approval of the design and specification. The Developer is then to carry out and complete the item of Works in accordance with that design and specification.
    - (b) Notify the Developer in writing that it does not approve of the design and specification and provide the Developer with reasons for this.
  - (5) If Council notifies the Developer in writing that it does not approve of the design and specification, the parties shall consult in good faith to finalise an approved design and specification for the Work and, if those consultations are unsuccessful, the Developer may:
    - (a) elect to amend the design and specification and submit to Council the amended design and specification in which case the approval process set out in this clause 5.3 applies to that amendment; or
    - (b) if the Developer does not agree with the modifications requested by Council, then, it may refer the relevant matter for dispute resolution in accordance with this document.

#### **5.4 No credit or reimbursement**

- (1) If the Developer's actual cost of carrying out the Works are greater than the Contribution Works Value for those Works, then the Developer is not entitled to claim credit or reimbursement, as the case may be, for the difference.
- (2) If the Developer's actual cost of carrying out the Works are less than the Contribution Works Value for those Works, then Council is not entitled to make any claim (including a claim for contributions under the Act) for the difference.

#### **5.5 Access to Council Land**

- (1) If the Developer or its authorised employees, agents, contractors, sub-contractors and consultants requires access to any land owned by Council for the purposes of constructing an item of Works, the Developer must make an application to Council for access within a reasonable period of time prior to the required access.
- (2) The Developer acknowledges and agrees that:
  - (a) any such application will be considered by Council at the relevant time; and

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- (b) Council must comply with any relevant law with respect to any such application and licence.
  - (3) Council must respond to an application under paragraph (1) within five (5) Business Days of the making of the application.
  - (4) Council may grant access to the Developer (and its authorised employees, agents, contractors, sub-contractors and consultants) to enter, occupy and use that land on conditions including, but not limited to, the following:
    - (a) That access be solely for the purposes of the Developer performing its obligations under this document.
    - (b) That the access be subject to, and in accordance with all relevant Laws, rules regulations and statutory approvals, including but not limited to work, health and safety Laws, rules and regulations.
    - (c) Any other reasonable directions and conditions imposed by Council in relation to that access.

## **5.6 Access to the Land and location of Works**

- (1) The Developer must permit the Council, its officers, employees, agents and contractors to enter the Land at any time, upon giving reasonable prior notice, in order to inspect, examine or test any of the Works.
- (2) The Developer must enable Council, its officers, employees, agents and contractors access to the location of the Works where this is not the Land, Council land or a public road.

## **6 Completion of Works**

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### **6.1 Completion**

For the purpose of this document an item of Works is Completed when:

- (1) the Works are:
  - (a) substantially completed in accordance with the conditions of the applicable Development Consent such that a Subdivision Certificate may be issued in respect of the Works; or
  - (b) deemed to have been Completed in accordance with this clause 6; and
- (2) any other obligation with respect to the relevant item of Works which must be discharged prior to the Completion of that item of Works in accordance with this document has been discharged.

### **6.2 Issue of Completion Notice**

If the Developer considers that any particular item of the Works is complete it must serve a notice on Council which:

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



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(Completion Notice).

### **6.3 Inspection by Council**

- (1) Council must inspect the Works set out in a Completion Notice within five (5) business days of the receipt of that notice.
- (2) If Council fails to carry out an inspection required under paragraph (1) the Works referred to in the relevant Completion Notice will be deemed to be Complete.

### **6.4 Rectification Notice**

- (1) Within five (5) business days of inspecting the Works set out in a Completion Notice Council must provide notice in writing (**Rectification Notice**) to the Developer that the Works set out in the Completion Notice:
  - (a) have been Completed; or
  - (b) have not been Completed, in which case the notice must also detail:
    - (i) those aspects of the Works which have not been Completed; and
    - (ii) the work Council requires the Developer to carry out in order to rectify the deficiencies in those Works.
- (2) If Council does not provide the Developer with a Rectification Notice in accordance with paragraph (1), the Works set out in the Completion Notice will be deemed to have been Completed.
- (3) Where Council serves a Rectification Notice on the Developer, the Developer must:
  - (a) rectify the Works in accordance with that notice; or
  - (b) serve a notice on the Council that it disputes the matters set out in the notice.
- (4) Where the Developer:
  - (a) serves notice on Council in accordance with paragraph (3)(b), the dispute resolution provisions of this document apply; or
  - (b) rectifies the Works in accordance with paragraph (3)(a), it must serve upon the Council a new Completion Notice for the Works it has rectified.

### **6.5 Works-as-executed-plan**

As soon as practicable, and by no later than sixty (60) days after an item of Work is Completed in accordance with this document, the Developer must submit to Council:

- (1) a full works-as-executed-plan for the relevant item of Work; and
- (2) the technical or operation manual, specifications and warranties (if any) for any product that forms part of the relevant item of Work.

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## **7 Defects Liability**

### **7.1 Defects Notice**

- (1) Where any part of the Works has been Completed but those Works contain a Material Defect which:

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- (a) adversely affects the ordinary use and/or enjoyment of the relevant Works; or
  - (b) will require maintenance or rectification works to be performed on them at some time in the future as a result of the existence of the defect;

(**Defect**) Council may issue a defects notice (**Defects Notice**) concerning those Works but only within the Defects Liability Period (time being of the essence).

(2) A Defects Notice must contain the following information:

- (a) the nature and extent of the Defect;
- (b) the work Council requires the Developer to carry out in order to rectify the Defect; and
- (c) the time within which the Defect must be rectified (which must be a reasonable time and not less than fifteen (15) business days).

## **7.2 Developer to Rectify Defects**

- (1) The Developer must rectify the Defects contained within a Defects Notice as soon as practicable after receipt of the Defects Notice.
- (2) The Developer must follow the procedure set out in clause 6 in respect of the satisfaction of the Defects Notice.

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

Council, at its absolute discretion, may enter upon the Land for the purpose of satisfying the Defects Notice where the Developer has failed to comply with a Defects Notice within a reasonable time having regard to the nature of the Defects but only after giving the Developer five (5) business days written notice of its intention to do so.

## **7.4 Consequence of Step-In**

If Council elects to exercise the step-in rights granted to it under clause 7.3 then:

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

## **7.5 Costs of Council**

Where Council exercises its step-in rights, it may call upon the Defects Security provided by the Developer and recover as a debt due in a court of competent jurisdiction any difference between the amount of the Defects Security and the costs incurred by the Council in rectifying the Defects.

## **7.6 Passing of risk**

Subject to clause 7.2, and unless Council has already issued a Defects Notice in respect of the relevant Defect within the Defects Liability Period, the risk in relation to that Defect in respect of Works will pass to Council upon the expiry of the Defects Liability Period.

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## **8 Variation of scope or timing for provision of Works**

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### **8.1 Variation to the scope of an item of Work**

- (1) The Developer may request that Council approve in writing a variation to the scope any item of Work.
- (2) The scope of an item of Work is not to be varied unless Council and the Developer agree in writing to the variation.
- (3) Council may withhold its consent to a variation of an item of Work at its absolute discretion.

### **8.2 Deferral of the timing of Completion of an item of the Works**

- (1) Notwithstanding any other provision of this document, if the Developer forms the view at any time, that:
  - (a) it is unable to Complete any item of the Works by the time specified in **Schedule 3**; or
  - (b) it believes that there is a risk of damage to any item of the Works if they are delivered by the time required in **Schedule 3**,

(**Deferred Works**), then the Developer may seek Council's approval to defer the Completion of the relevant item of the Works by providing written notice to the Council:

  - (c) identifying the relevant item of Work that the Developer proposes to defer;
  - (d) specifying the reason for the request to defer the Completion of that item of the Works; and
  - (e) identifying the anticipated time for Completion of the relevant item of Work.
- (2) The Council, acting reasonably, must give the Developer a written notice within thirty (30) business days of the date upon which the Developer serves written notice upon Council in accordance with paragraph (1) stating:
  - (a) whether or not it consents to the deferral of the Deferred Works;
  - (b) the revised date for Completion required by Council; and
  - (c) any reasonable conditions Council requires with respect to the deferral (including any requirement for additional Security on account of that deferral, but only to the extent necessary to ensure that Council holds adequate security based on the then estimated cost to complete the relevant item of the Works).
- (3) If the Council consents to the deferral of the Deferred Works, then the following applies:
  - (a) The Developer must comply with any conditions required by Council under paragraph (2)(c) above.
  - (b) Provided the Developer satisfies those conditions, the Developer will not be considered to be in breach of this document as a result of a failure to achieve Completion of the relevant Deferred Works by the time for Completion specified in this document.
  - (c) The time for completion of the Deferred Works under this document is the revised date for Completion approved by Council.

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## **9 Developer Warranties and Indemnities**

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### **9.1 Warranties**

The Developer warrants to Council that:

- (1) it is legally and beneficially entitled to the Land;
- (2) it is able to fully comply with its obligations under this document;
- (3) it has full capacity to enter into this document; and
- (4) there is no legal impediment to it entering into this document, or performing the obligations imposed under it.

### **9.2 Indemnity by Developer**

The Developer indemnifies Council in respect of any Claim that may arise as a result of the conduct of the Works up to Completion and any breach of the Developer's obligations under this agreement but only to the extent that any such Claim does not arise as a result of the negligent acts or omissions of Council.

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## **10 Security**

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### **10.1 Provision of Security**

- (1) Subject to paragraph (2), the Developer must deliver to Council one (1) or more Bank Guarantees to the satisfaction of Council:
  - (a) prior to the Completion of an item of Works, for an amount equivalent to ten (10%) of the Contribution Works Value of that item of Works (**Defects Security**),  
  
(collectively referred to as the **Security**).
- (2) The Developer may satisfy its obligations under paragraph (1) (either in whole or in part), by directing Council to retain any Security held by Council which is required to be released by Council under this document.

### **10.2 Replacement of Security**

- (1) The Developer may replace any Security provided by it at any time, provided that the amount of that replacement is not less than that which is required to be provided under this document.
- (2) On receipt of a replacement Security, Council must immediately release the Security being replaced and return it to the Developer.

### **10.3 Council may call on Security**

- (1) If the Developer commits an Event of Default Council, without limiting any other remedies available to it, may call on any Security provided by the Developer.
- (2) If Council calls on any Security, it may use the amount so paid to it in satisfaction of any costs incurred by it in remedying the relevant Event of Default.

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#### **10.4 Top up of Security**

If Council calls on the Security, Council, by notice in writing to the Developer, may require the Developer to provide a further or replacement Security in an amount that, when added to any unused portion of any Security then held by Council, does not exceed the amount of the Security Council is entitled to hold at that time under this document.

#### **10.5 [not used]**

#### **10.6 Release of Defects Security**

Unless:

- (1) there are unremedied Defects of which the Developer was notified by the Council during the Defects Liability Period and/or Council has made or intends to make a demand against the Defects Security in relation to unremedied Defects; or
- (2) the relevant Defects Liability Period has not expired;

Council, upon a written request being made by the Developer, must return the Defects Security within ten (10) business days of such a request being made.

#### **10.7 Council may withhold Subdivision Certificate**

- (1) The Developer may only make, or cause, suffer or permit the making of, an application for a Subdivision Certificate in respect of the Development if, at the date of the application, the Developer is not in breach of its obligation to make any Contribution under this document.
- (2) Council may withhold the issue of a Subdivision Certificate if, at the relevant time, the Developer is in breach of any obligation to make any Contribution under this document until such time as the breach is rectified.

#### **10.8 Council may withhold Occupation Certificate**

- (1) The Developer may only make, or cause, suffer or permit the making of, an application for an Occupation Certificate in respect of the Development if, at the date of the application, the Developer is not in breach of its obligation to make any Contribution under this document.
- (2) Council may withhold the issue of an Occupation Certificate if, at the relevant time, the Developer is in breach of any obligation to make any Contribution under this document until such time as the breach is rectified.

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### **11 Registration of this document**

#### **11.1 Registration of this document**

The Developer acknowledges and agrees that:

- (1) this document must be registered on the title to the Land pursuant to section 7.6 of the Act; and
- (2) subject to clause 11.2:
  - (a) Council will undertake the registration in paragraph (1); and
  - (b) the Developer will pay or reimburse Council for all its reasonable legal and registration costs associated with that registration.

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## **11.2 Obligations of Developer**

- (1) The Developer, at its own expense must, promptly after this document comes into operation, and before the issue of any Construction Certificate or Subdivision Certificate for the Development, take all necessary and practical steps, and otherwise do anything that the Council reasonably requires, to procure:
  - (a) the consent of each person who:
    - (i) has an estate or interest in the Land; or
    - (ii) is seized or possessed of an estate or interest in the Land;
  - (b) the execution of any documents; and
  - (c) the production of the relevant title documentation,to enable the registration of this document in accordance with clause 11.1.
- (2) The Developer, at its own expense, will take all necessary and practical steps, and otherwise do anything that the Council reasonably requires:
  - (a) to allow the lodgement of this document with the Registrar-General as soon as reasonably practicable after this document comes into operation but in any event, no later than thirty (30) business days after that date; and
  - (b) to allow the registration of this document by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this document is lodged for registration.

## **11.3 Discharge from the Register**

The Council will provide its consent to the release and discharge of this document so that it may be removed from the folios of the Register for the Land (or any part of it) within 14 days of either of the following events:

- (1) the Works have been Completed in accordance with this document; or
- (2) if this document is terminated or otherwise comes to an end for any other reason.

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## **12 Assignment**

### **12.1 Restriction on Assignment**

Other than in accordance with this clause 12.1 the Developer may not:

- (1) Assign any part of the Land; and/or
- (2) Assign their rights or obligations under this document.

### **12.2 Procedure for Assignment**

- (1) If the Developer:
  - (a) wishes to Assign any part of the Land; and/or

- 
- (b) wishes to Assign its rights or obligations under this document,

then the Developer must:

- (c) provide a written request to Council for the consent of Council to the relevant Assignment;
- (d) provide Council with any evidence required by Council, acting reasonably, to satisfy Council that the third party in whose favour the Assignment is to be made (**Assignee**) is reasonably capable of performing the obligations under this document that are to be Assigned to it;
- (e) obtain written consent of Council to the relevant Assignment (such consent which must not be unreasonably withheld subject to the Developer complying with this clause 12.2); and
- (f) at no cost to Council, procure:
- (i) the execution by the Assignee of an appropriate deed where the Assignee agrees to be bound by the terms of this document; and
  - (ii) the provision of all Securities to Council by the Assignee that the Developer is required to provide under this document (and any additional securities if required by Council acting reasonably) at the same time as, or prior to, entering into that deed.
- (2) Council is under no obligation to consider granting its consent to any request made by the Developer under paragraph (1)(c) if, at the time the request is made, the Developer is in breach of this document.

## **13 Dispute Resolution**

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### **13.1 Notice of dispute**

- (1) If a dispute or lack of certainty between the parties arises in connection with this document or its subject matter (**Dispute**), then either party (**First Party**) must give to the other (**Second Party**) a notice which:
- (a) is in writing;
  - (b) adequately identifies and provides details of the Dispute;
  - (c) stipulates what the First Party believes will resolve the Dispute; and
  - (d) designates its representative (**Representative**) to negotiate the Dispute.
- (2) The Second Party must, within five (5) Business Days of service of the notice of dispute, provide a notice to the First Party designating as its representative a person to negotiate the Dispute (the representatives designated by the parties being together, the **Representatives**).

### **13.2 Conduct pending resolution**

The parties must continue to perform their respective obligations under this document if there is a Dispute but will not be required to complete the matter the subject of the Dispute, unless the appropriate party indemnifies the other parties against costs, damages and all losses suffered

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in completing the disputed matter if the Dispute is not resolved in favour of the indemnifying party.

### **13.3 Further steps required before proceedings**

Subject to clauses 13.14 and 13.15 and except as otherwise expressly provided in this document, any Dispute must, as a condition precedent to the commencement of litigation, mediation under clause 13.5 or determination by an expert under clause 13.6, first be referred to the Representatives. The Representatives must endeavour to resolve the dispute within five (5) Business Days of the date a notice under clause 13.1(2) is served.

### **13.4 Disputes for mediation or expert determination**

If the Representatives have not been able to resolve the Dispute, then the parties must agree within five (5) Business Days to either refer the matter to mediation under clause 13.5 or expert resolution under clause 13.6.

### **13.5 Disputes for mediation**

- (1) If the parties agree in accordance with clause 13.4 to refer the Dispute to mediation, the mediation must be conducted by a mediator agreed by the parties and, if the parties cannot agree within five (5) Business Days, then by a mediator appointed by the President of the Law Society of New South Wales for the time being.
- (2) If the mediation referred to in paragraph (1) has not resulted in settlement of the Dispute and has been terminated, the parties may agree to have the matter determined by expert determination under clause 13.6.

### **13.6 Choice of expert**

- (1) If the Dispute is to be determined by expert determination, this clause 13.6 applies.
- (2) The Dispute must be determined by an independent expert in the relevant field:
  - (a) agreed between and appointed jointly by the parties; or
  - (b) in the absence of agreement within five (5) Business Days after the date that the matter is required to be determined by expert determination, appointed by the President of the Law Society of New South Wales for the time being.
- (3) If the parties fail to agree as to the relevant field within five (5) Business Days after the date that the matter is required to be determined by expert determination, either party may refer the matter to the President of the Law Society of New South Wales for the time being whose decision as to the relevant field is final and binding on the parties.
- (4) The expert appointed to determine a Dispute:
  - (a) must have a technical understanding of the issues in dispute;
  - (b) must not have a significantly greater understanding of one party's business, functions or operations which might allow the other side to construe this greater understanding as a bias; and
  - (c) must inform the parties before being appointed of the extent of the expert's understanding of each party's business or operations and, if that information indicates a possible bias, then that expert must not be appointed except with the written approval of the parties.



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- (5) The parties must promptly enter into an agreement with the expert appointed under this clause 13.6 setting out the terms of the expert's determination and the fees payable to the expert.

### **13.7 Directions to expert**

- (1) In reaching a determination in respect of a dispute under clause 13.6, the independent expert must give effect to the intent of the parties entering into this document and the purposes of this document.
- (2) The expert must:
- (a) act as an expert and not as an arbitrator;
  - (b) proceed in any manner as the expert thinks fit without being bound to observe the rules of natural justice or the rules of evidence;
  - (c) not accept verbal submissions unless both parties are present;
  - (d) on receipt of a written submission from one party, ensure that a copy of that submission is given promptly to the other party;
  - (e) take into consideration all documents, information and other material which the parties give the expert which the expert in its absolute discretion considers relevant to the determination of the Dispute;
  - (f) not be expected or required to obtain or refer to any other documents, information or material (but may do so if the expert so wishes);
  - (g) issue a draft certificate stating the expert's intended determination (together with written reasons), giving each party ten (10) Business Days to make further submissions;
  - (h) issue a final certificate stating the expert's determination (together with written reasons); and
  - (i) act with expedition with a view to issuing the final certificate as soon as practicable.
- (3) The parties must comply with all directions given by the expert in relation to the resolution of the Dispute and must within the time period specified by the expert, give the expert:
- (a) a short statement of facts;
  - (b) a description of the Dispute; and
  - (c) any other documents, records or information which the expert requests.

### **13.8 Expert may commission reports**

- (1) Subject to paragraph (2):
- (a) the expert may commission the expert's own advisers or consultants (including lawyers, accountants, bankers, engineers, surveyors or other technical consultants) to provide information to assist the expert in making a determination; and

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- (b) the parties must indemnify the expert for the cost of those advisers or consultants in accordance with clause 13.6(5) of this deed.
  - (2) The parties must approve the costs of those advisers or consultants in writing prior to the expert engaging those advisers or consultants.

### **13.9 Expert may convene meetings**

- (1) The expert must hold a meeting with all of the parties present to discuss the Dispute. The meeting must be conducted in a manner which the expert considers appropriate. The meeting may be adjourned to, and resumed at, a later time in the expert's discretion.
- (2) The parties agree that a meeting under paragraph (1) is not a hearing and is not an arbitration.

### **13.10 Other courses of action**

If:

- (1) the parties cannot agree in accordance with clause 13.4 to refer the matter to mediation or determination by an expert; or
- (2) the mediation referred to in clause 13.5 has not resulted in settlement of the dispute, the mediation has been terminated and the parties have not agreed to refer the matter to expert determination within five (5) Business Days after termination of the mediation,

then either party may take whatever course of action it deems appropriate for the purpose of resolving the Dispute.

### **13.11 Confidentiality of information provided in dispute resolution process**

- (1) The parties agree, and must procure that the mediator and the expert agree as a condition of his or her appointment:
  - (a) subject to paragraph (2), to keep confidential all documents, information and other material disclosed to them during or in relation to the mediation or expert determination;
  - (b) not to disclose any confidential documents, information and other material except:
    - (i) to a party or adviser or consultant who has signed a confidentiality undertaking; or
    - (ii) if required by Law or any Authority to do so; and
  - (c) not to use confidential documents, information or other material disclosed to them during or in relation to the mediation or expert determination for a purpose other than the mediation or expert determination.
- (2) The parties must keep confidential and must not disclose or rely upon or make the subject of a subpoena to give evidence or produce documents in any arbitral, judicial or other proceedings:
  - (a) views expressed or proposals or suggestions made by a party or the mediator or the expert during the expert determination or mediation relating to a possible settlement of the Dispute;

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- (b) admissions or concessions made by a party during the mediation or expert determination in relation to the Dispute; and
  - (c) information, documents or other material concerning the dispute which are disclosed by a party during the mediation or expert determination unless such information, documents or facts would be discoverable in judicial or arbitral proceedings.

### **13.12 Final determination of expert**

The parties agree that the final determination by an expert will be final and binding upon them except in the case of fraud or misfeasance by the expert.

### **13.13 Costs**

If any independent expert does not award costs, each party must contribute equally to the expert's costs in making the determination.

### **13.14 Remedies available under the Act**

This clause 13 does not operate to limit the availability of any remedies available to Council under the Act.

### **13.15 Urgent relief**

This clause 13 does not prevent a party from seeking urgent injunctive or declaratory relief concerning any matter arising out of this document.

## **14 Breach of this document**

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### **14.1 Breach Notice**

If the Developer breaches this document, Council may serve a notice on the Developer (**Breach Notice**) specifying:

- (1) the nature and extent of the alleged breach;
- (2) if:
  - (a) the breach is capable of being rectified other than by the payment of compensation, what Council requires the Developer to do in order to rectify the breach; or
  - (b) the breach is not capable of being rectified other than by payment of compensation, the amount of compensation Council requires the Developer to pay in order to rectify the breach, and
- (3) the time within which Council requires the breach to be rectified, which must be a reasonable time of not less than forty (40) business days.

### **14.2 Events of Default**

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

- (1) Fails to comply with a Breach Notice; or
- (2) becomes subject to an Insolvency Event.

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### **14.3 Consequences of Events of default**

Where the Developer commits an Event of Default, Council may, in addition to any rights it has at Law:

- (1) exercise the Step in Rights so as to carry out any work specified in the relevant Breach Notice; or
- (2) call on the Security to the extent of any compensation claimed in a Breach Notice and not paid by the Developer.

## **15 Termination, Rescission or Determination**

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### **15.1 Termination**

This document terminates in the following events:

- (1) The parties agree in writing to terminate the operation of this document at any time.
- (2) Council serves notice on the Developer terminating this Planning Agreement where the Developer has failed to comply with a notice issued in accordance with clause 14.1.
- (3) The Development Consent lapses.

### **15.2 Consequence of termination**

Upon termination of this Planning Agreement:

- (1) all future rights and obligations of the parties are discharged; and
- (2) all pre-existing rights and obligations of the parties continue to subsist.

### **15.3 Determination**

This document will determine upon the Developer satisfying all of the obligations imposed on it in full.

## **16 Position of Council**

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### **16.1 Consent authority**

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

### **16.2 Document does not fetter discretion**

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

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

### **16.3 Severance of provisions**

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

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is held by a court of competent jurisdiction to constitute an unlawful fetter on any Discretion, the parties agree:

- (a) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause 16 is substantially satisfied; and
  - (b) in the event that paragraph (1)(a) cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this document has full force and effect; and
  - (c) to endeavour to satisfy the common objectives of the parties on relation to the provision of this document which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.
- (2) Where the Law permits Council to contract out of a provision of that Law or gives Council power to exercise a Discretion, then if Council has in this document contracted out of a provision or exercised a Discretion under this document, then to the extent of this document is not to be taken to be inconsistent with the Law.

#### **16.4 No Obligations**

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

### **17 Confidentiality**

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#### **17.1 Document not Confidential**

The terms of this document are not confidential and this document may be treated as a public document and exhibited or reported without restriction by any party.

#### **17.2 Other Confidential Information**

- (1) The parties acknowledge that:
- (a) Confidential Information may have been supplied to some or all of the parties in the negotiations leading up to the making of this document; and
  - (b) The parties may disclose to each other further Confidential Information in connection with the subject matter of this document.
  - (c) Subject to paragraphs (2) and (3), each party agrees:
    - (i) not to disclose any Confidential document received before or after the making of this document to any person without the prior written consent of the party who supplied the Confidential Information; or
    - (ii) to take all reasonable steps to ensure all Confidential Information received before or after the making of this document is kept confidential and protected against unauthorised use and access.
- (2) A party may disclose Confidential Information in the following circumstances:
- (a) in order to comply with the Law, or the requirements of any Authority; or
  - (b) to any of their employees, consultants, advisers, financiers or contractors to whom it is considered necessary to disclose the information, if the employees,

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consultants, advisers, financiers or contractors undertake to keep the information confidential.

- (3) The obligations of confidentiality under this clause do not extend to information which is public knowledge other than as a result of a breach of this clause.

## **18 GST**

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### **18.1 Defined GST Terms**

Defined terms used in this clause 18 have the meaning ascribed to them in the GST Law.

### **18.2 GST to be Added to Amounts Payable**

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

### **18.3 GST Obligations to Survive Termination**

This clause 18 will continue to apply after expiration of termination of this document.

## **19 Miscellaneous**

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

The parties must at all times:

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

### **19.2 Legal costs**

The Developer agrees to:

- (1) pay or reimburse the reasonable legal costs and disbursements of Council of the negotiation, preparation, execution, and stamping of this document;
- (2) pay or reimburse the reasonable legal costs and disbursements of Council in relation to:
- (a) the registration or removal of this document on the title to the Land in accordance with clause 11; and
- (b) any breach or default by the Developer of its obligations under this document,

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within ten (10) business days of receipt of a tax invoice from Council.

## **20 Administrative Provisions**

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### **20.1 Notices**

- (1) Any notice, consent or other communication under this document must be in writing and signed by or on behalf of the person giving it, addressed to the person to whom it is to be given and:
  - (a) delivered to that person's address;
  - (b) sent by pre-paid mail to that person's address; or
  - (c) transmitted by facsimile or email to that person's address.
- (2) A notice given to a person in accordance with this clause is treated as having been given and received:
  - (a) if delivered to a person's address, on the day of delivery if a business day, otherwise on the next business day;
  - (b) if sent by pre-paid mail, on the third business day after posting;
  - (c) if transmitted by facsimile to a person's address and a correct and complete transmission report is received, on the day of transmission if a business day, otherwise on the next business day; and
  - (d) if sent by email and the sender does not receive a delivery failure message from the sender, within a period of twenty four (24) hours of the email being sent.
- (3) For the purpose of this clause the address of a person is the address set out in this document or another address of which that person may from time to time give notice to each other person.

### **20.2 Entire Document**

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

### **20.3 Waiver**

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

### **20.4 Cooperation**

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

### **20.5 Counterparts**

This document may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument. A party who has executed a counterpart of this document may exchange it with another party by emailing a pdf (portable document

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format) copy of, the executed counterpart to that other party, and if requested by that other party, will promptly deliver the original by hand or post. Failure to make that delivery will not affect the validity and enforceability of this document.

#### **20.6 Amendment**

This document may only be amended or supplemented in writing signed by the parties.

#### **20.7 Unenforceability**

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

#### **20.8 Power of Attorney**

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

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

#### **20.9 Governing law**

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

- (1) submit to the exclusive jurisdiction of the courts of New South Wales and any courts that may hear appeal from those courts in respect of any proceedings in connection with this document; and
  - (2) may not seek to have any proceedings removed from the jurisdiction of New South Wales on the grounds of *forum non conveniens*.
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## Schedule 1– Requirements under s7.4

REQUIREMENT UNDER THE ACT	THIS PLANNING AGREEMENT
<b>Planning instrument and/or development application – (Section 7.4(1))</b> The Developer has: <ul style="list-style-type: none"> <li>(c) sought a change to an environmental planning instrument.</li> <li>(d) made, or proposes to make, a Development Application.</li> <li>(e) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.</li> </ul>	<ul style="list-style-type: none"> <li>(a) No</li> <li>(b) Yes</li> <li>(c) Not applicable</li> </ul>
<b>Description of land to which this agreement applies – (Section 7.4(3)(a))</b>	Lot 18 in Deposited Plan 16975 known as 90-92 Franklin Road, Cherrybrook NSW 2126.
<b>Description of change to the environmental planning instrument to which this agreement applies – (Section 7.4(3)(b))</b>	Not applicable
<b>Application of section 7.11 of the Act – (Section 7.4(3)(d))</b>	Excluded
<b>Applicability of section 7.12 of the Act – (Section 7.4(3)(d))</b>	Excluded
<b>Consideration of benefits under this agreement if section 7.11 applies – (Section 7.4(3)(e))</b>	Not applicable
<b>Mechanism for Dispute resolution – (Section 7.4(3)(f))</b>	See clause 13.
<b>Enforcement of this agreement (Section 7.4(3)(g))</b>	See clause 10.
<b>No obligation to grant consent or exercise functions – (Section 7.4(3)(9))</b>	See clause 15.

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## Schedule 2 – Defined Terms and Interpretation

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### Part 1 – Definitions

<b>Act</b>	means the <i>Environmental Planning and Assessment Act 1979</i> (NSW).
<b>Assign</b>	as the context requires refers to any assignment, sale, transfer, disposition, declaration of trust over or other assignment of a legal and/or beneficial interest.
<b>Authority</b>	means (as appropriate) any:  <ol style="list-style-type: none"><li>(1) federal, state or local government;</li><li>(2) department of any federal, state or local government;</li><li>(3) any court or administrative tribunal; or</li><li>(4) statutory corporation or regulatory body.</li></ol>
<b>Bank Guarantee</b>	means an irrevocable and unconditional undertaking without any expiry or end date by one of the following trading banks:  <ol style="list-style-type: none"><li>(1) Australia and New Zealand Banking Group Limited.</li><li>(2) Commonwealth Bank of Australia.</li><li>(3) Macquarie Bank.</li><li>(4) National Australia Bank Limited.</li><li>(5) St George Bank Limited.</li><li>(6) Westpac Banking Corporation.</li><li>(7) Any other financial institution approved by the Council, in its absolute discretion, in response to a request from the Developer.</li></ol>
<b>Claim</b>	means against any person any allegation, action, demand, cause of action, suit, proceeding, judgement, debt, damage, loss, cost, expense or liability howsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at law, in equity, under statute or otherwise.
<b>Completed</b>	means completed in accordance with the requirements of this document.
<b>Completion Notice</b>	has the meaning ascribed in clause 6.1.
<b>Confidential Information</b>	means any information and all other knowledge at any time disclosed (whether in writing and orally) by the parties to each other, or acquired by the parties in relation to the other's activities or services which is not already in the public domain and which:  <ol style="list-style-type: none"><li>(1) is by its nature confidential;</li><li>(2) is designated, or marked, or stipulated by either party as confidential (whether in writing or otherwise);</li></ol>

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	(3) any party knows or ought to know is confidential;
	(4) is information which may be reasonably considered to be of a confidential nature.
<b>Contributions</b>	means the Works.
<b>Contribution Works Value</b>	means the amount specified in <b>Schedules 3</b> in the column headed "contribution works value" for each item of the Contributions.
<b>Material Defect</b>	means a defect in the Works arising from faulty materials or workmanship which adversely affects the ordinary use and/or enjoyment of the relevant Works or will require maintenance or rectification works to be performed on them at some time in the future as a result of the existence of the defect but excluding any defects or faults relating to normal use, maintenance or fair wear and tear.
<b>Defects Notice</b>	has the meaning ascribed to it in clause 7.1.
<b>Defects Liability Period</b>	means with respect to an item of Work, a period of twelve (12) months commencing on the date of Completion of the relevant item of Work.
<b>Development</b>	means the demolition of structures and subdivision of the Land into nine (9) residential lots and Lot 1.
<b>Development Application</b>	means DA/1146/2020 in connection with the Development.
<b>Development Consent</b>	means development consent issued under the Act in respect of the Development Application.
<b>Dispute</b>	has the meaning ascribed to it in clause 13.1.
<b>Event of Default</b>	has the meaning ascribed to it in clause 14.2.
<b>GST Law</b>	means <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth) and any other Act or regulation relating to the imposition or administration of the GST.
<b>Index</b>	means the Consumer Price Index (All Groups - Sydney) as provided by the Australian Bureau of Statistics.
<b>Insolvency Event</b>	means the happening of any of the following events: <ol style="list-style-type: none"> <li>(1) Application which is not withdrawn or dismissed within fourteen (14) days is made to a court for an order or an order is made that a body corporate be wound up.</li> <li>(2) An application which is not withdrawn or dismissed within fourteen (14) days is made to a court for an order appointing a liquidator or provisional liquidator in respect of a body corporate or one of them is appointed, whether or not under an order.</li> <li>(3) Except to reconstruct or amalgamate while solvent, a body corporate enters into, or resolves to enter into, a scheme of arrangement, agreement of company arrangement or composition with, or assignment for the benefit of, all or any</li> </ol>

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	class of its creditors, or it proposes a reorganisation, moratorium or other administration involving any of them.
(4)	A body corporate resolves to wind itself up, or otherwise dissolve itself, or gives notice of intention to do so, except to reconstruct or amalgamate while solvent or is otherwise wound up or dissolved.
(5)	A body corporate is or states that it is insolvent.
(6)	As a result of the operation of section 459F(1) of the <i>Corporations Act 2001</i> (Cth) ( <b>Corporations Act</b> ), a body corporate is taken to have failed to comply with a statutory demand;
(7)	A body corporate is or makes a statement from which it may be reasonably deduced that the body corporate is, the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act.
(8)	A body corporate takes any step to obtain protection or is granted protection from its creditors, under any applicable legislation or an administrator is appointed to a body corporate.
(9)	A person becomes an insolvent under administration as defined in section 9 of the Corporations Act or action is taken which could result in that event.
(10)	A receiver, manager or receiver and manager is appointed to the Company.
(11)	A claim is filed in a court against a person that is not defended, released or otherwise settled within twenty eight (28) days of the date of its filing at the court.
(12)	Anything analogous or having a substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction.
<b>Land</b>	means the "Land" set out in <b>Schedule 1</b> .
<b>Law</b>	means all legislation, regulations, by-laws, common law and other binding order made by any Authority.
<b>Lot 1</b>	means that part of the Land currently zoned R2 Residential (Low Density) identified as future road reserve under the <i>Hornsby Local Environmental Plan 2013</i> , comprising of Lot 1 in a plan of subdivision that has, or will, be acquired by Council under a separate contract of sale between Council and the Developer.
<b>Occupation Certificate</b>	has the same meaning as in section 6.4(c) of the Act.
<b>Planning Legislation</b>	means the Act, the <i>Local Government Act 1993</i> (NSW) and the <i>Roads Act 1993</i> (NSW).
<b>Quantity Surveyor</b>	means a person who: <ol style="list-style-type: none"> <li>(1) is a member of their respective professional organisation and has been for at least five (5) years;</li> <li>(2) practises as a quantity surveyor for works of the same nature as the relevant Works;</li> </ol>

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	(3)	is active as a quantity surveyor at the time of his appointment;
	(4)	has at least three (3) years experience in valuing works of the same nature as the relevant Works; and
	(5)	undertakes to act fairly and promptly in accordance with the requirements of this document.
<b>Rectification Notice</b>		has the meaning ascribed to it in clause 6.4.
<b>Security</b>		has the meaning ascribed to it in clause 10.
<b>Subdivision Certificate</b>		has the same meaning as in section 6.4(d) of the Act.
<b>Subdivision Certificate</b>	<b>Works</b>	has the same meaning as in section 6.4(b) of the Act.
<b>Works</b>		means the works specified or described in <b>Schedule 3</b> .

## Part 2 - Interpretational Rules

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<b>clauses, annexures and schedules</b>	a clause, annexure or schedule is a reference to a clause in or annexure or schedule to this document.
<b>reference to statutes</b>	a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them.
<b>singular includes plural</b>	the singular includes the plural and vice versa.
<b>person</b>	the word "person" includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association or any government agency.
<b>executors, administrators, successors</b>	a particular person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns.
<b>dollars</b>	Australian dollars, dollars, \$ or A\$ is a reference to the lawful currency of Australia.
<b>calculation of time</b>	if a period of time dates from a given day or the day of an act or event, it is to be calculated exclusive of that day.
<b>reference to a day</b>	a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later.
<b>accounting terms</b>	an accounting term is a reference to that term as it is used in accounting standards under the Corporations Act or, if not inconsistent with those standards, in accounting principles and practices generally accepted in Australia.
<b>reference to a group of persons</b>	a group of persons or things is a reference to any two or more of them jointly and to each of them individually.
<b>meaning not limited</b>	the words "include", "including", "for example" or "such as" are not used as, nor are they to be interpreted as, words of limitation, and, when introducing an example, do not limit the meaning of the words

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	to which the example relates to that example or examples of a similar kind.
<b>next day</b>	if an act under this document to be done by a party on or by a given day is done after 4.30pm on that day, it is taken to be done on the next day.
<b>next Business Day</b>	if an event must occur on a stipulated day which is not a Business Day then the stipulated day will be taken to be the next Business Day.
<b>time of day</b>	time is a reference to Sydney time.
<b>headings</b>	headings (including those in brackets at the beginning of paragraphs) are for convenience only and do not affect the interpretation of this document.
<b>agreement</b>	a reference to any agreement, document or instrument includes the same as varied, supplemented, novated or replaced from time to time.
<b>Gender</b>	a reference to one gender extends and applies to the other and neuter gender.

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## Schedule 3 - Works

Item of Works	Time for Completion	Contribution Works Value
Construction of civil road and drainage works on the part of the Land reserved for road widening at John Road and Franklin Road, Cherrybrook	Prior to the first to occur of the following:  (1) that date that is twelve (12) months after the date of the grant of a Subdivision Works Certificate in respect of the Works.  (2) the issue of a Subdivision Certificate with respect to the Development.	\$500,000

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## Execution page

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**Executed as a deed.**

Dated:

**Signed, sealed and delivered** by **Hornsby Shire Council** by its General Manager pursuant to delegation from Council:

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General Manager (Signature)

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Name of General Manager (Print Name)

**Signed, sealed and delivered** by **Goldmap Two Pty Limited** in accordance with section 127(1) of the Corporations Act by authority of its sole director and secretary.

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*Xinyong Wang* (Signature)