

# Planning Agreement

---

Hornsby Shire Council

May Harlow Pty Ltd

The Owners - Strata Plan 42931

**gadens**

77 Castlereagh Street  
Sydney NSW 2000  
Australia

T +61 2 9931 4999  
F +61 2 9931 4888  
Ref 34604238

Document No: 13577944.1 AAG AAG

## **Contents**

---

1. Defined meanings	1
2. Status of this Agreement	1
3. Application of other development contribution provisions	2
4. Development Contributions	3
5. Dedicating land as a Development Contribution	3
6. Risk and warranties in relation to the Dedicated Land	4
7. Registration	5
8. Transfer, assignment or novation	6
9. Security in relation to the dedication of land	7
10. Termination	7
11. Dispute resolution	8
12. General provisions	10
13. Definitions and interpretation	13
Schedule 1 – Development Contributions	17
Annexure A – Draft Deed of Novation	19
Annexure B – Open Space Dedication Area Drawing	28

# Planning Agreement

Dated

## Parties

1. **Hornsby Shire Council** of 296 Pacific Highway, Hornsby NSW 2077 (**the Council**)
2. **May Harlow Pty Ltd** ACN 001 317 942 of 1 Conrad Street, North Ryde NSW 2113 (**May Harlow**)
3. **The Owners - Strata Plan 42931** of 1 Conrad Street, North Ryde NSW 2113 (**The Owners Corporation**)

## Background

- A. The Development Application has been made in relation to the Land and other land.
- B. May Harlow and the Owners Corporation are associated with the person who was the applicant for the Development Application.
- C. May Harlow and the Owners Corporation will have the benefit of the Relevant Development Consent, if it is granted.
- D. May Harlow and the Owners Corporation have offered to dedicate the Open Space Land to Council in connection with the carrying out of the Relevant Development Consent.

## Operative provisions

### 1. **Defined meanings**

---

Words used in this document and the rules of interpretation that apply are set out and explained in the definitions and interpretation clause at the back of this document.

### 2. **Status of this Agreement**

---

#### 2.1 **Planning Agreement**

This Agreement is a planning agreement within the meaning of section 93F(1) of the Act.

#### 2.2 **Land**

This Agreement applies to the Land.

### **2.3 Development**

This Agreement applies to the Development.

### **2.4 No obligation to grant or modify a Development Consent**

- (a) This Agreement does not impose an obligation on the Council to grant or modify any Development Consent.
- (b) For avoidance of doubt, clause 2.4(a) does not affect any obligation of the consent authority (under section 79C(1)(a)(iia) of the Act) to take this Agreement into consideration.

### **2.5 No breach, etc of a Development Consent**

Despite any other provision of this Agreement, this Agreement does not require, allow or preclude anything from being done if by so doing it would cause the Developer to:

- (a) be in breach; or
- (b) not fulfil a requirement,

of a Development Consent in force and applying to the Land.

### **2.6 Effect and obligations**

- (a) This Agreement does not take effect unless the Relevant Development Consent is granted.
- (b) Despite any other provision of this Agreement, the Developer is under no obligation to make any Development Contribution in accordance with this Agreement unless:
  - (i) a Construction Certificate has been issued in relation to the Relevant Development Consent; and
  - (ii) the Development has been physically commenced in reliance on the Relevant Development Consent; and
  - (iii) the relevant circumstances set out in this Agreement as to when the Development Contribution must be made have arisen.

### **2.7 Security**

The Council is satisfied this Agreement provides the enforcement of this Agreement by a suitable means in the event of a breach of this Agreement by the Developer, namely by:

- (a) the ability for an Occupation Certificate to be withheld by reason of section 109H(2) of the Act when read in conjunction with clause 4.1(a); and
- (b) the provisions of clause 7 and clause 9.

## **3. Application of other development contribution provisions**

---

### **3.1 Local infrastructure contributions - general**

- (a) This Agreement does not exclude the application of section 94 of the Act.

- (b) The benefits under this Agreement are not to be taken into consideration in determining a development contribution under section 94.

### **3.2 Local infrastructure contributions - fixed levies**

This Agreement does not exclude the application of section 94A of the Act.

### **3.3 Special infrastructure contributions**

This Agreement does not exclude the application of section 94EF of the Act.

## **4. Development Contributions**

---

### **4.1 Nature, extent and timing**

- (a) The Developer must make the Development Contribution in Column 2 of the table set out in Schedule 1 (**the Table**) at the point in time set out in Column 4 of the Table.
- (b) Nothing in this Agreement precludes a Developer from electing to make a Development Contribution earlier than it is required to do so.
- (c) The reason that the parties have agreed to each Development Contribution is set out in Column 5 of the Table.

### **4.2 Public purpose of the Development Contributions**

- (a) The Council must use the Development Contributions for the public purpose set out in Column 3 of the Table.

## **5. Dedicating land as a Development Contribution**

---

### **5.1 When land is taken to be dedicated**

A Development Contribution that is the dedication of land is taken to have been made (and made free of cost) if:

- (a) the land is dedicated as a public reserve or drainage reserve and vests in the Council for an estate in fee simple under section 49(1) of the *Local Government Act 1993*;
- (b) the Council is given an instrument by the Developer, in registrable form, that (when registered) will effect the transfer of the title to the land to the Council.

### **5.2 Ancillary obligations of the parties in relation to the dedication of land**

- (a) When the Council has been given an instrument by the Developer under clause 5.1(b), the Council must promptly do all things reasonably necessary to enable registration of the instrument of transfer to occur.
- (b) The Developer must ensure that the land to be dedicated under this Agreement is free of all encumbrances and affectations (whether registered or unregistered and including without limitation any charge or liability for rates, taxes and charges), when the Developer transfers that land to the Council under this Agreement.

- (c) Despite clause 5.2(b), if, despite having used its best endeavours, the Developer cannot ensure that the land to be dedicated is free from any relevant encumbrance and affectation, then:
  - (i) the Developer may request that the Council agree to accept the land subject to those encumbrances and affectations; and
  - (ii) if the encumbrance or affectation:
    - (A) does not prevent the future use of the land for the public purpose for which it is to be dedicated under this Agreement; or
    - (B) is not a charge arising as a result of unpaid taxes or charges, the Council must not withhold its agreement unreasonably; and
  - (iii) in other circumstances, the Council may withhold its agreement at its absolute discretion.

**5.3 No requirement to carry out work, etc**

The Council acknowledges that this Agreement does not require the Developer:

- (a) to remove any fixtures or chattels, rubbish of any description or any debris affixed or present on the Dedicated Land prior to the date of this Agreement; or
- (b) carry out any work in relation to the Dedicated Land or the improvements erected on it, including any work in relation to defects (whether latent or patent).

**6. Risk and warranties in relation to the Dedicated Land**

---

**6.1 No warranties, etc unless express or required**

The parties are not bound by any warranty, representation, collateral agreement or implied term under the general law or imposed by legislation in relation to the Dedicated Land unless:

- (a) that warranty, representation, agreement or term is contained in the express terms of this Agreement; or
- (b) it is an implied term or warranty imposed by statute which is mandatory and cannot be excluded by the parties' agreement.

**6.2 Warranties expressly excluded**

Without limiting the generality of clause 6.1, the Council acknowledges that no representations, inducements or warranties have been made by the Developer or its agents or representatives relating to:

- (a) the present or future state or condition of the Dedicated Land;
- (b) the Dedicated Land's suitability for the Council's purposes; or
- (c) the present or future state of the improvements erected on the Dedicated Land.

### **6.3 The Developer's warranties in relation to the Relevant Lots**

The Developer represents and warrants that it is either:

- (a) the owner; or
- (b) has been granted an option to purchase;  
the Relevant Lots.

## **7. Registration**

---

### **7.1 Developer agreement to registration**

The Developer:

- (a) where the Developer is the owner, as owner of the Relevant Lots; or
- (b) where the Developer has been granted an option to purchase the Relevant Lots, as the grantee of that option and (should the option be exercised) as owner of the Relevant Lots,

agrees to the registration of this Agreement under section 93H of the Act in relation to that land.

### **7.2 Registration of this Agreement**

- (a) Within 60 Business Days of this Agreement coming into effect:
  - (i) the Developer at its own expense will take all reasonably practicable steps to obtain the agreement of the persons specified in section 93H(1) of the Act whose agreement is necessary for the Registration on Title; and
  - (ii) if that agreement is obtained, take all reasonably practicable steps to secure:
    - (A) the execution of any documents; and
    - (B) the production of the relevant certificates of title; and
    - (C) the lodgement and registration of this Agreement, by the Registrar-General in the relevant folio of the Register.
- (b) The Developer must give the Council a copy of the relevant folio of the Register and a copy of the registered dealing within 21 Business Days of registration of this Agreement.

### **7.3 Release and discharge of this Agreement**

The parties agree to do all things reasonably required by the other party to promptly release and discharge this Agreement with respect to any part of the Relevant Lots (such that the Agreement is no longer Registered on Title in relation to that part of the Relevant Lots) upon:

- (a) the issuing of an Occupation Certificate; or
- (b) this Agreement being terminated.

## **8. Transfer, assignment or novation**

---

### **8.1 Consent for transfer of Relevant Lots**

- (a) The Developer must not transfer the Relevant Lots or any part of the Relevant Lots to any person without the consent of the Council.
- (b) This clause 8.1 does not apply to:
  - (i) the dedication of the Dedicated Land to the Council;
  - (ii) to the conversion of that part of the Relevant Lots that is not Dedicated Land into common property (within the meaning of the *Strata Schemes Management Act 1996*); or
  - (iii) the exercise by the Developer of an option to purchase land.

### **8.2 Consent for assignment or novation of this Agreement**

- (a) The Developer must not assign or novate to any person its rights or obligations under this Agreement without the consent of the Council.
- (b) For avoidance of doubt, this clause 8.2 does not preclude the transfer of any part of the Land.

### **8.3 The giving of consent by Council**

- (a) Council must give its consent under clause 8.1(a) or clause 8.2(b) if:
  - (i) the Developer has, at no cost to the Council, first procured the execution by the person to whom:
    - (A) the land will be transferred; or
    - (B) the rights or obligations under this Agreement are to be assigned or novated,a deed of novation on reasonable terms (being a deed generally in terms of the Novation Deed); and
  - (ii) reasonable evidence has been produced to show that the transferee, assignee or novatee is fully capable of performing its obligations under this Agreement; and
  - (iii) the Developer is not in material breach of this Agreement.
- (b) The Council, on giving consent under clause 8.3(a) must enter into the Novation Deed.

### **8.4 No requirement for consent when Agreement is registered**

- (a) Clause 8.1 and clause 8.2 do not apply in connection with the transfer of the whole of the Land if this Agreement is, at the time of transfer, Registered on Title.
- (b) If clause 8.1 and clause 8.2 do not apply because of clause 8.4(a) the Novation Deed has effect as if has been entered into:
  - (i) by the person who has ceased to own the land (who is taken to be the Existing Developer in the Novation Deed);



- (ii) by the person has become the owner the land (who is taken to be the New Developer in the Novation Deed); and
- (iii) by Council.

## **9. Security in relation to the dedication of land**

---

### **9.1 Agreement under the Just Terms Act**

- (a) If the Developer does not dedicate the land required to be dedicated under this Agreement:
  - (i) at the time at which it is required to be dedicated under clause 4; or
  - (ii) at any point after that time,

the Developer consents to Council compulsorily acquiring that land for compensation in the amount of \$1 without having to follow the pre-acquisition procedure under the Just Terms Act.
- (b) Clause 9.1(a) is an agreement for the purposes of section 30 of the Just Terms Act.

### **9.2 Ancillary obligations**

- (a) If, as a result of the acquisition referred to in clause 9.1 Council must pay compensation to any person other than the Developer, the Developer must reimburse Council for that amount, upon a written request being made by Council.
- (b) The Developer indemnifies and keeps indemnified, the Council against all claims made against the Council under the Just Terms Act as a result of any acquisition by the Council of the whole or any part of the Land under clause 9.1(a).
- (c) The Developer is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 9, including:
  - (i) signing any documents or forms;
  - (ii) producing certificates of title to the Registrar-General under the Real Property Act; and
  - (iii) paying Council's reasonable costs arising under this clause 9.

## **10. Termination**

---

### **10.1 Termination of this Agreement**

The Developer may terminate this Agreement by giving written notice to Council if:

- (a) this Agreement is executed prior to the giving of the Relevant Development Consent and:
  - (i) the Relevant Development Consent is refused; or
  - (ii) the Relevant Development Consent has not been granted within 3 months of the date of this Agreement and the Developer, acting reasonably, is of

the opinion that the Relevant Development Consent is unlikely to be granted in the future; or

- (b) the Relevant Development Consent is surrendered or otherwise ceases to have effect (provided that no Construction Certificate has been issued in reliance on the Relevant Development Consent); or
- (c) the Developer has made the relevant Development Contributions under this Agreement.

## 10.2 Consequences of the termination of this Agreement

- (a) Subject to clause 10.2(b), the parties are released and discharged from their obligations under this Agreement if this Agreement is terminated under clause 10.1.
- (b) 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 Agreement for any reason, will not merge on the occurrence of that event but will remain in full force and effect.

## 11. Dispute resolution

---

### 11.1 Determination of disputes

If there is any dispute, difference of opinion or failure to agree relating to or arising from this document (**Dispute**) that dispute must be referred for determination under this clause.

### 11.2 No legal proceedings

- (a) The parties must not bring or maintain any action on any Dispute until it has been referred and determined as provided in this clause 12.
- (b) Clause 12.2(a) does not prevent:
  - (i) class 1 proceedings (as set out in section 17 of the *Land and Environment Court Act 1979*) being commenced, maintained and concluded; or
  - (ii) urgent injunctive relief to keep a particular position.

### 11.3 Notice of disputes

A party referring a Dispute for determination must do so by written notice to the other parties (**Dispute Notice**) which must specify the nature of the Dispute and a nominated officer of the referring party with sufficient authority to determine the Dispute.

### 11.4 Negotiated resolution and selection of expert

- (a) On service of the Dispute Notice, the receiving parties must refer the Dispute to an officer with sufficient authority to determine the Dispute. The nominated officers of each party must meet at least once and use reasonable endeavours to resolve the Dispute by negotiation within seven days of service of the Dispute Notice. Any resolution must be recorded in writing and signed by each nominated officer. By agreement, the nominated officers may employ the services of a mediator to assist them in resolving the Dispute.
- (b) If the nominated officers are unable to resolve the Dispute within seven days of service of the Dispute Notice they must endeavour, within the following seven-day period, to appoint an expert by agreement. That appointment must be recorded in writing and signed by each nominated officer.

- (c) If the nominated officers do not record the appointment of an expert within that second seven day period, the expert must be appointed, at the request of any party, by the President for the time being (or if none, the senior elected member) of the Law Society of New South Wales.

#### **11.5 Assistance to the Expert**

- (a) Once the Expert has been appointed (the **Expert**), the parties must:
  - (i) each use their best endeavours to make available to the Expert, all information the Expert requires to settle or determine the Dispute; and
  - (ii) ensure that their employees, agents or consultants are available to appear at any hearing or enquiry called by the Expert.
- (b) The parties may give written submissions to the Expert but must provide copies to the other parties at the same time.

#### **11.6 Expert's decision**

- (a) The decision of the Expert must:
  - (i) be in writing and give reasons; and
  - (ii) be made and delivered to the parties within one month from the date of submission of the dispute to the Expert or the date of completion of the last hearing or enquiry called by the Expert, if later.
- (b) The Expert may conduct the determination of the Dispute in any way it considers appropriate but the Expert may, at its discretion, have regard to the Australian Commercial Disputes Centre's guidelines for expert determination of disputes or such other guidelines as it considers appropriate.
- (c) The Expert's decision is final and binding on the parties.
- (d) The Expert must act as an expert and not as an arbitrator.

#### **11.7 Expert's costs**

- (a) The Expert must also determine how the expenses relating to the reference of the Dispute (including the Expert's remuneration) should be apportioned between the parties and in default of a decision by the Expert, those expenses must be borne by the parties equally.
- (b) In determining the apportionment of costs, the Expert may have regard to what the Expert, in its reasonable opinion, considers to be a lack of good faith or a failure to use reasonable endeavours by any party, in assisting the Expert or resolving the dispute between the parties' nominated officers as required by this clause.

#### **11.8 Continual performance**

Each party must continue to perform its obligations under this document while any dispute is being determined under this clause.

## 12. General provisions

---

### 12.1 Costs

- (a) The Developer is to pay to Council the Council's reasonable costs of preparing, negotiating, executing and stamping this Agreement within 7 days of a written demand by the Council for such payment.
- (b) All costs that have been disclosed in writing by the Council to the Developer prior to execution of this Agreement by the Developer are deemed to be reasonable for the purposes of this clause 12.1.

### 12.2 GST

- (a) If GST is payable by a supplier (or by the representative member for a GST group of which the supplier is a member) on any supply made under or in relation to this Agreement, the recipient must pay to the supplier an amount (**GST Amount**) equal to the GST payable on the supply. The GST Amount is payable by the recipient in addition to and at the same time as the net consideration for the supply.
- (b) If a party is required to make any payment or reimbursement, that payment or reimbursement must be reduced by the amount of any input tax credits or reduced input tax credits to which the other party (or the representative member for a GST group of which it is a member) is entitled for any acquisition relating to that payment or reimbursement.
- (c) This clause is subject to any other specific agreement regarding the payment of GST on supplies.

### 12.3 Duties

The party at law to pay stamp duty, must promptly, within the initial applicable period prescribed by law, pay any duty payable in relation to the execution, performance and registration of this Agreement, or any agreement or document executed or effected under this Agreement.

### 12.4 Assignment

A party must not transfer any right or liability under this Agreement without the prior consent of each other party, except where this Agreement provides otherwise.

### 12.5 Notices

- (a) Any notice to or by a party under this Agreement must be in writing and signed by the sender or, if a corporate party, an authorised officer of the sender.
- (b) Any notice may be served by delivery in person or by post or transmission by facsimile to the address or number of the recipient specified in this provision or most recently notified by the recipient to the sender.

Addresses or numbers for notices:

#### **The Council**

Hornsby Shire Council  
296 Pacific Highway, Hornsby NSW 2077  
Fax: (02) 9847 6999

### **The Developer**

May Harlow Pty Ltd  
PO Box 52 Hornsby NSW 2077  
Fax: (02) 9477 7093

The Owners - Strata Plan 42931  
PO Box 52 Hornsby NSW 2077  
Fax: (02) 9477 7093

- (c) Any notice is effective for the purposes of this Agreement upon delivery to the recipient or production to the sender of a facsimile transmittal confirmation report before 4.00pm local time on a day in the place in or to which the written notice is delivered or sent or otherwise at 9.00am on the next day following delivery or receipt.
- (d) A notice to the Developer must be given in relation to each of the person who are identified as the Developer in clause 12.5(b).

### **12.6 Governing law and jurisdiction**

- (a) This Agreement is governed by and construed under the law in the State of New South Wales.
- (b) Any legal action in relation to this Agreement against any party or its property may be brought in any court of competent jurisdiction in the State of New South Wales.
- (c) Each party by execution of this Agreement irrevocably, generally and unconditionally submits to the non-exclusive jurisdiction of any court specified in this provision in relation to both itself and its property.

### **12.7 Amendments**

This Agreement may be amended or revoked by further agreement in writing signed by the parties (including by means of a further planning agreement).

### **12.8 Third parties**

This Agreement confers rights only upon a person expressed to be a party, and not upon any other person.

### **12.9 Precontractual negotiation**

This Agreement:

- (a) expresses and incorporates the entire agreement between the parties in relation to its subject matter, and all the terms of that agreement; and
- (b) supersedes and excludes any prior or collateral negotiation, understanding, communication or agreement by or between the parties in relation to that subject matter or any term of that agreement.

### **12.10 Further assurance**

Each party must execute any document and perform any action necessary to give full effect to this Agreement, whether before or after performance of this Agreement.

#### **12.11 Continuing performance**

- (a) The provisions of this Agreement do not merge with any action performed or document executed by any party for the purposes of performance of this Agreement.
- (b) Any representation in this Agreement survives the execution of any document for the purposes of, and continues after, performance of this Agreement.
- (c) Any indemnity agreed by any party under this Agreement:
  - (i) constitutes a liability of that party separate and independent from any other liability of that party under this Agreement or any other agreement; and
  - (ii) survives and continues after performance of this Agreement.

#### **12.12 Waivers**

Any failure by any party to exercise any right under this Agreement does not operate as a waiver and the single or partial exercise of any right by that party does not preclude any other or further exercise of that or any other right by that party.

#### **12.13 Remedies**

The rights of a party under this Agreement are cumulative and not exclusive of any rights provided by law.

#### **12.14 Severability**

Any provision of this Agreement which is invalid in any jurisdiction is invalid in that jurisdiction to that extent, without invalidating or affecting the remaining provisions of this Agreement or the validity of that provision in any other jurisdiction.

#### **12.15 Counterparts**

This Agreement may be executed in any number of counterparts, all of which taken together are deemed to constitute one and the same document.

#### **12.16 Party acting as trustee**

If a party enters into this document as trustee of a trust, that party and its successors as trustee of the trust will be liable under this document in its own right and as trustee of the trust. Nothing releases the party from any liability in its personal capacity. The party warrants that at the date of this document:

- (a) all the powers and discretions conferred by the deed establishing the trust are capable of being validly exercised by the party as trustee and have not been varied or revoked and the trust is a valid and subsisting trust;
- (b) the party is the sole trustee of the trust and has full and unfettered power under the terms of the deed establishing the trust to enter into and be bound by this document on behalf of the trust and that this document is being executed and entered into as part of the due and proper administration of the trust and for the benefit of the beneficiaries of the trust; and
- (c) no restriction on the party's right of indemnity out of, or lien over, the trust's assets exists or will be created or permitted to exist and that right will have priority over the right of the beneficiaries to the trust's assets.

## 13. Definitions and interpretation

---

### 13.1 Definitions

In this document unless the context otherwise requires:

**Act** means the *Environmental Planning and Assessment Act 1979*;

**Agreement** means this Agreement and includes any schedules, annexures and appendices to this Agreement;

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

**Construction Certificate** has the same meaning as in the Act;

**Dedicated Land** means the land to be, or that is, dedicated under this Agreement;

**Developer** means any one of May Harlow or the Owners Corporation, or all of them, as the context requires;

**Development** means the development of the Land for the purposes of residential flat buildings generally in accordance with that described in the Development Application;

**Development Application** means the development application DA/1370/2013, lodged with the Council, as amended;

**Development Consent** has the same meaning as in the Act;

**Development Contribution** means either or both of the following:

- (a) the monetary contribution;
- (b) the dedication of land free of cost,

provided for in this Agreement;

**Encumbrance** includes any mortgage or charge, lease, (or other right of occupancy) or profit a prendre;

**GST** has the meaning given by section 195-1 of the *A New Tax System (Goods and Services Tax) Act (1999)* (Cth);

**Just Terms Act** means the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

**Land** means:

- (a) Lot 87 DP 660202;
- (b) Lot A DP 950827;
- (c) Lot 3 DP 129713;
- (d) Lot B DP 322006;
- (e) Lot A DP 322006;
- (f) Lot 2 DP 129713;

- (g) Lot B DP 170871;
- (h) Lot 1 DP 129713;
- (i) Lot 1 SP 42931;
- (j) Lot 2 SP 42931;
- (k) The common property of SP 42931;
- (l) Lot 100 DP 667424;
- (m) Lot 1 DP 945629;
- (n) Lot 2 DP 211638;
- (o) Lot 1 DP 211638;
- (p) Lot 2 DP 303913; and
- (q) Lot 1 DP 303913;

**Novation Deed** means the draft deed in Annexure A;

**Occupation Certificate** has the same meaning as in the Act;

**Open Space Dedication Area** means an area of the Relevant Lots:

- (a) that is substantially the same as the hatched area marked as 'open space ownership dedication' on drawing No DA02.201[1] Revision 2 prepared by Bates Smart and dated 7 April 2014, as annexed to this Agreement and marked 'B'; and
- (b) that is also identified in the Land Reservation Acquisition Map of the *Hornsby Local Environmental Plan 2013* as 'Local open space (RE1)'.

**Planning Legislation** means the Act, the *Local Government Act 1993* (NSW) and the *Roads Act 1993* (NSW).

**Real Property Act** means the *Real Property Act 1900*;

**Registration on Title** means the registration of this Agreement under section 93H of the Act in the folio of the Register kept under the Real Property Act in relation to the Relevant Lots, and **Registered on Title** refers to the state of the Agreement being so registered;

**Relevant Development Consent** means a Development Consent granted as a consequence of the determination of the Development Application (if any);

**Relevant Lots** means:

- (a) Lot 1 SP 42931;
- (b) Lot 2 SP 42931;
- (c) The common property of SP 42931;
- (d) Lot 1 DP 303913;
- (e) Lot 2 DP 303913; and



- (f) Lot 1 DP 211638.

### 13.2 Interpretation

- (a) In this Agreement unless the context otherwise requires:
- (i) clause and subclause headings are for reference purposes only;
  - (ii) the singular includes the plural and vice versa;
  - (iii) words denoting any gender include all genders;
  - (iv) reference to a person includes any other entity recognised by law and vice versa;
  - (v) a reference to a party means a party to this Agreement, including their successors and assigns and a person bound by the Agreement under section 93H(3) of the Act;
  - (vi) where a word or phrase is defined its other grammatical forms have a corresponding meaning;
  - (vii) any reference to any agreement or document includes that agreement or document as amended at any time;
  - (viii) the use of the word **includes** or **including** is not to be taken as limiting the meaning of the words preceding it;
  - (ix) the expression **at any time** includes reference to past, present and future time and the performance of any action from time to time;
  - (x) an agreement, representation or warranty on the part of two or more persons binds them jointly and severally;
  - (xi) an agreement, representation or warranty on the part of two or more persons is for the benefit of them jointly and severally;
  - (xii) any ambiguities in the interpretation of this Agreement shall not be construed against the drafting party.
  - (xiii) reference to an exhibit, annexure, attachment or schedule is a reference to the corresponding exhibit, annexure, attachment or schedule in this Agreement;
  - (xiv) reference to a provision described, prefaced or qualified by the name, heading or caption of a clause, subclause, paragraph, schedule, item, annexure, exhibit or attachment in this Agreement means a cross reference to that clause, subclause, paragraph, schedule, item, annexure, exhibit or attachment;
  - (xv) when a thing is required to be done or money required to be paid under this Agreement on a day which is not a Business Day, the thing must be done and the money paid on the immediately following Business Day; and
  - (xvi) reference to a statute includes all regulations and amendments to that statute and any statute passed in substitution for that statute or incorporating any of its provisions to the extent that they are incorporated.
- (b) Nothing in this Agreement is to be taken to require the Council to do anything that would cause it to be in breach of any of its statutory obligations.

### **13.3 No joint venture**

Unless otherwise stated:

- (a) nothing in this deed 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.

### **13.4 Explanatory Note**

In accordance with clause 25E(7) of the *Environmental Planning and Assessment Regulation 2000* the explanatory note must not be used to assist in construing this Agreement.

## Schedule 1 – Development Contributions

---

(Clause 4)

**Table**

Column 1	Column 2	Column 3	Column 4	Column 5
Item	Description	Public purpose	When required	Reason the parties have agreed to the Development Contribution
1	Dedication of the Open Space Dedication Area to the Council	To facilitate the future provision of a public mid-block open space connection, providing a link between dwellings on Orara Street and Romsey Street and existing public open space infrastructure to the east.	Immediately prior to the issue of the Occupation Certificate for the Development.	The proposal by the Developer to realise the theoretical development potential of the Open Space Dedication Area (had it remained zoned residential) on the balance of the land that is the subject of the Development Application.

Executed as a deed.

Executed on behalf of **Hornsby Shire Council** by affixing the seal in accordance with a resolution passed at a duly convened meeting held on in the presence of:

[Redacted signature area]

Print name

Print name

296 PEARS FERRY RD HORNSBY.

Print address

Executed on behalf of **May Harlow Pty Ltd ACN 001 317 942** in accordance with s127(1) of the *Corporations Act 2001 (Cth)* by:

[Redacted signature area]

Print name

Print name

Executed by **The Owners - Strata Plan 42931** by affixing the seal in accordance with s238 of the *Strata Scheme Management Act 1996*:

[Redacted signature area]

Print name

Print name



## **Annexure A – Draft Deed of Novation**

---

# **Deed of Novation**

---

Hornsby Shire Council

[Insert name of existing developer]

[Insert name of new developer]

# Deed of Novation

Dated

## Parties

1. **Hornsby Shire Council** of 48 Longueville Road, Lane Cove NSW 2066 (**Council**)
2. **[Insert name of existing developer]** ACN [insert ACN] of [insert address] (**Existing Developer**)
3. **[Insert name of new developer]** ACN [insert ACN] of [insert address] (**New Developer**)

## Background

- A. Council and the Existing Developer have entered into the Agreement.
- B. The Existing Developer intends to transfer **[Insert title reference(s)]** to the New Developer.

**[If, as a result of the transfer, the Existing Developer will no longer own any of the Relevant Lots:]**

- C. The Existing Developer has agreed to transfer the Rights and Obligations to the New Developer.
- D. Council has consented to the transfer of the Existing Developer's Rights and Obligations to the New Developer and the parties have agreed to enter into this Deed to give effect to their common intentions.

**[If, as a result of the transfer, the Existing Developer will still own part of the Relevant Lots:]**

- C. The New Developer has agreed to accept the Rights and Obligations as a Developer under the Agreement.
- D. Council has consented to the transfer of the relevant land to the New Developer and the inclusion of the New Developer as a Developer party to the Agreement and the parties have agreed to enter into this Deed to give effect to their common intentions.

## Operative provisions

### 1. **Defined meanings**

---

Words used in this document and the rules of interpretation that apply are set out and explained in the definitions and interpretation clause at the back of this document.

## **2. Novation**

---

**[If, as a result of the transfer, the Existing Developer will no longer own any of the Relevant Lots:]**

With effect on and from the Effective Date:

- (a) The New Developer is substituted for the Existing Developer under the Agreement as if the New Developer had originally been a party to the Agreement instead of the Existing Developer and all references in the Agreement to the Existing Developer in any capacity must be read and construed as if they were references to the New Developer; and
- (b) The New Developer is bound by, and must comply with, the provisions of the Agreement and the obligations imposed on the Existing Developer by the Agreement and the New Developer enjoys all the rights and benefits of the Existing Developer under the Agreement (even if an obligation, right or benefit, arose or accrued before the Effective Date).

**[If, as a result of the transfer, the Existing Developer will still own part of the Relevant Lots:]**

With effect on and from the Effective Date:

- (c) The New Developer is taken to be a party to the Agreement and the definition of Developer in in clause 13.1 of the Agreement is taken to include the New Developer; and
- (d) The New Developer is bound by, and must comply with, the provisions of the Agreement and the obligations imposed on the Developer by the Agreement and the New Developer enjoys all the rights and benefits of the Developer under the Agreement (even if an obligation, right or benefit, arose or accrued before the Effective Date).

## **3. Consent**

---

**[If, as a result of the transfer, the Existing Developer will no longer own any of the Relevant Lots:]**

With effect on and from the Effective Date, Council:

- (a) consents to the New Developer being substituted for Existing Developer on the terms outlined at clause 2 of this Deed;
- (b) accepts the assumptions by the New Developer of all the liabilities of the Existing Developer under the Agreement instead of those liabilities being liabilities of the Existing Developer; and
- (c) agrees to be bound by the terms of the Agreement in every way as if the New Developer were a party to the Agreement instead of the Existing Developer.

**[If, as a result of the transfer, the Existing Developer will still own part of the Relevant Lots:]**

With effect on and from the Effective Date, Council:

- (d) consents to the New Developer becoming a Developer under the terms of the Agreement as outlined at clause 2 of this Deed;

- (e) agrees to be bound by the terms of the Agreement in every way as if the New Developer were a party to the Agreement.

#### **4. Release and Indemnity**

---

**[If, as a result of the transfer, the Existing Developer will no longer own any of the Relevant Lots:]**

##### **4.1 Release and Discharge (the Council)**

On and from the Effective Date, Council releases the Existing Developer from all Rights and Obligations and from all Claims that it may have against the Existing Developer under or in respect of the Agreement.

##### **4.2 Release and Discharge (the Existing Developer)**

On and from the Effective Date, the Existing Developer releases Council from all its obligations under the Agreement and from all Claims that it may have against the Council under or in respect of the Agreement.

##### **4.3 Indemnity**

On and from the Effective Date, the New Developer indemnifies the Existing Developer from and against all Liabilities and Claims that it may have against the Existing Developer in respect of the Agreement.

**[Omit clause 4 if, as a result of the transfer, the Existing Developer will still own part of the Relevant Lots]**

#### **5. Representations and Warranties**

---

##### **5.1 Power**

Both of the Existing Developer and the New Developer represent and warrant to Council and to each other that:

- (a) it is an individual or corporation validly existing under the laws of Australia;
- (b) if it is a corporation – that it has the corporate power to enter into and perform its obligations under this Deed and has taken all necessary corporate action to authorise execution, delivery and performance of this Deed;
- (c) this Deed is valid and binding upon it and is enforceable against it in accordance with its terms; and
- (d) if it is a corporation – that no application or order has been made for the winding up or liquidation of it, no action has been taken to seize or take possession of any of its assets, there are no unsatisfied judgments against it and it is able to pay its debts as and when they come due and payable.

##### **5.2 Reliance by the Council**

The Existing Developer and the New Developer each acknowledge that the Council has entered into this Deed in reliance on the representations and warranties detailed in clause 5.1.



## **6. General provisions**

---

### **6.1 Developer Costs**

The Existing Developer and the New Developer must pay their own costs in relation to:

- (a) the negotiation, preparation, execution, performance, amendment or registration of, or any consent given or made; and
- (b) the performance of any action by that party in compliance with any liability arising,

under this Deed, or any agreement or document executed or effected under this Deed, unless this Deed provides otherwise.

### **6.2 Council's Costs**

The Existing Developer and the New Developer are jointly and severally responsible for Council's reasonable legal costs in relation to the negotiation, preparation and execution of this Deed, but are not otherwise liable for the Council's costs in relation to the:

- (a) performance, amendment or registration of, or any consent given or made; and
- (b) the performance of any action by that party in compliance with any liability arising,

under this Deed, or any agreement or document executed or effected under this Deed, unless this Deed provides otherwise.

### **6.3 GST**

If any payment made by one party to any other party under or relating to this Deed constitutes consideration for a taxable supply for the purposes of GST or any similar tax, the amount to be paid for the supply will be increased so that the net amount retained by the supplier after payment of that GST is the same as if the supplier was not liable to pay GST in respect of that supply. This provision is subject to any other agreement regarding the payment of GST on specific supplies, and includes payments for supplies relating to the breach or termination of, and indemnities arising from, this Deed.

### **6.4 Duties**

- (a) The New Developer must promptly, within the initial applicable period prescribed by law, pay any duty payable in relation to the execution, performance and registration of this Deed, or any agreement or document executed or effected under this Deed.
- (b) The New Developer indemnifies Council and the Existing Developer against any loss incurred by any other party in relation to any duty specified in this provision, whether through default by the New Developer under this provision or otherwise.

### **6.5 Assignment**

A party must not transfer any right or liability under this Deed without the prior consent of each other party, except where this Deed provides otherwise.

### **6.6 Notices**

- (a) Any notice may be served by delivery in person or by post or transmission by facsimile to the address or number of the recipient specified in this provision or most recently notified by the recipient to the sender.

**[Insert address for notices for each of the parties]**

- (b) Any notice to or by a party under this Deed must be in writing and signed by either:
  - (i) the sender or, if a corporate party, an authorised officer of the sender; or
  - (ii) the party's solicitor.
- (c) Any notice is effective for the purposes of this Deed upon delivery to the recipient or production to the sender of a facsimile transmittal confirmation report before 4.00pm local time on a day in the place in or to which the written notice is delivered or sent or otherwise at 9.00am on the next day following delivery or receipt.

#### **6.7 Governing law and jurisdiction**

- (a) This Deed is governed by and construed under the law in the State of New South Wales.
- (b) Any legal action in relation to this Deed against any party or its property may be brought in any court of competent jurisdiction in the State of New South Wales.
- (c) Each party by execution of this Deed irrevocably, generally and unconditionally submits to the non-exclusive jurisdiction of any court specified in this provision in relation to both itself and its property.

#### **6.8 Amendments**

Any amendment to this Deed has no force or effect, unless effected by a document executed by the parties.

#### **6.9 Third parties**

This Deed confers rights only upon a person expressed to be a party, and not upon any other person.

#### **6.10 Precontractual negotiation**

This Deed:

- (a) expresses and incorporates the entire agreement between the parties in relation to its subject matter, and all the terms of that agreement; and
- (b) supersedes and excludes any prior or collateral negotiation, understanding, communication or agreement by or between the parties in relation to that subject matter or any term of that agreement.

#### **6.11 Further assurance**

Each party must execute any document and perform any action necessary to give full effect to this Deed, whether before or after performance of this Deed.

#### **6.12 Continuing performance**

- (a) The provisions of this Deed do not merge with any action performed or document executed by any party for the purposes of performance of this Deed.
- (b) Any representation in this Deed survives the execution of any document for the purposes of, and continues after, performance of this Deed.
- (c) Any indemnity agreed by any party under this Deed:

- (i) constitutes a liability of that party separate and independent from any other liability of that party under this Deed or any other agreement; and
- (ii) survives and continues after performance of this Deed,

### **6.13 Waivers**

Any failure by any party to exercise any right under this Deed does not operate as a waiver and the single or partial exercise of any right by that party does not preclude any other or further exercise of that or any other right by that party.

### **6.14 Remedies**

The rights of a party under this Deed are cumulative and not exclusive of any rights provided by law.

### **6.15 Severability**

Any provision of this Deed which is invalid in any jurisdiction is invalid in that jurisdiction to that extent, without invalidating or affecting the remaining provisions of this Deed or the validity of that provision in any other jurisdiction.

### **6.16 Counterparts**

This Deed may be executed in any number of counterparts, all of which taken together are deemed to constitute one and the same Deed.

### **6.17 Party acting as trustee**

If a party enters into this Deed as trustee of a trust, that party and its successors as trustee of the trust will be liable under this Deed in its own right and as trustee of the trust. Nothing releases the party from any liability in its personal capacity. The party warrants that at the date of this Deed:

- (a) all the powers and discretions conferred by the deed establishing the trust are capable of being validly exercised by the party as trustee and have not been varied or revoked and the trust is a valid and subsisting trust;
- (b) the party is the sole trustee of the trust and has full and unfettered power under the terms of the deed establishing the trust to enter into and be bound by this Deed on behalf of the trust and that this Deed is being executed and entered into as part of the due and proper administration of the trust and for the benefit of the beneficiaries of the trust;
- (c) no restriction on the party's right of indemnity out of or lien over the trust's assets exists or will be created or permitted to exist and that right will have priority over the right of the beneficiaries to the trust's assets.

## **7. Definitions and interpretation**

---

### **7.1 Definitions**

In this Deed unless the context otherwise requires:

**Claims** includes actions, proceedings, suits, causes of action, arbitration, verdicts and judgments either at law or in equity or arising under a statute, debts, dues, demands, claims of any nature, costs and expenses.

**Agreement** means the voluntary planning agreement between the Council and the Existing Developer dated [insert date], a copy of which is annexed to this Deed as Annexure A.

**Deed** means this Deed and includes any Annexures to this Deed.

**Effective Date** means the date upon which the Existing Developer provides the New Developer with an instrument, in registrable form, that (when registered) will effect the transfer of the title to the land from the Existing Developer to the New Developer.

**GST** means any tax, levy, charge or impost implemented under the *A New Tax System (Goods and Services Tax) Act (GST Act)* or an Act of the Parliament of the Commonwealth of Australia substantially in the form of, or which has a similar effect to, the GST Act;

**Liabilities** include all liabilities (whether actual, contingent or prospective), losses, damages, costs and expenses of whatever description.

**Rights and Obligations** means all of the rights, benefits and obligations imposed or conferred on the Existing Developer by the Agreement.

## 7.2 Interpretation

In this Deed unless the context otherwise requires:

- (a) clause and subclause headings are for reference purposes only;
- (b) the singular includes the plural and vice versa;
- (c) words denoting any gender include all genders;
- (d) reference to a person includes any other entity recognised by law and vice versa;
- (e) where a word or phrase is defined its other grammatical forms have a corresponding meaning;
- (f) any reference to a party to this Deed includes its successors and permitted assigns;
- (g) any reference to any agreement or document includes that agreement or document as amended at any time;
- (h) the use of the word **includes** or **including** is not to be taken as limiting the meaning of the words preceding it;
- (i) the expression **at any time** includes reference to past, present and future time and the performance of any action from time to time;
- (j) an agreement, representation or warranty on the part of two or more persons binds them jointly and severally;
- (k) an agreement, representation or warranty on the part of two or more persons is for the benefit of them jointly and severally;
- (l) any ambiguities in the interpretation of this Deed shall not be construed against the drafting party.
- (m) reference to an exhibit, annexure, attachment or schedule is a reference to the corresponding exhibit, annexure, attachment or schedule in this Deed.

**Executed as a deed.**

**[Insert relevant attestation clauses]**

**[Insert the executed planning agreement that is the subject of the novation as Annexure A]**

## **Annexure B – Open Space Dedication Area Drawing**

---

Small text block containing project details and notes.

- Plan Legend:**
- 1 Bedroom Apt
  - 2 Bedroom Apt
  - 3 Bedroom Apt

The plan will comply with the terms from the building area of each apartment is a sliding door operable to 45% of its area  
 sp: spaces at 1100m high  
 Total Visitor Bicycle spaces = 30

2 04-04-14 Havelock CA 94015  
 1 25-11-13 Havelock CA 94015  
 Wintan Property Group  
 Waitara Avenue  
 Level 00  
 Ground

1:2500@A1  
 Project No: ST1504  
 Date: 7/2/2014 10:32 AM  
 Development Application  
 DA02.20111 2

Matthew J. Havelock Street  
 Sydney NSW 2000  
 02 9550 1111  
 www.batesmart.com.au  
 100 Years of Excellence 1914-2014

**BATESMART.**

