

Deed of Variation to Planning Agreement

Draft 3

13 June 2019

Parramatta City Council
ABN 49 907 174 773

JKN Para Pty Ltd
ACN 159 177 170

Toplace Pty Ltd
ACN 135 918 491

Jean Nassif

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Deed

Date

Parties

First party

Name Parramatta City Council (**Council**)
ACN 49 907 174 773
Contact The Chief Executive Officer
Telephone (02) 9806 5050

Second party

Name JKN Para Pty Ltd (**Developer**)
ACN 159 177 170
Contact Jean Nassif
Telephone

Third party

Name Toplace Pty Ltd (**Toplace**)
ACN 135 918 491
Contact Jean Nassif
Telephone

Fourth party

Name Jean Nassif (**Nassif**)
Telephone

Background

- A. On or about 15 April 2015, the parties executed a Planning Agreement (**Planning Agreement**) pursuant to the then section 93F of the *Environmental Planning and Assessment Act 1979* (now section 7.4 of that Act).
- B. The Planning Agreement was entered into in connection with proposed amendments to the *Parramatta City Centre Local Environmental Plan 2007* and proposed development of the Land for the purposes of a mixed use development in accordance with development consent granted to Development Application DA852852/2013. That development consent was granted on 15 April 2015.
- C. The Planning Agreement requires the dedication of a Public Car Park and containing at least 650 car spaces, road works and streetscape works, the construction and the dedication of a public pedestrian thoroughfare.
- D. The Developer has partly constructed the mixed use development on the Land.

- E. Council has received an offer to vary the contributions to be provided under the Planning Agreement.
- F. Clause 25C(3) of the *Environmental Planning and Assessment Regulation 2000* permits the parties to vary the Planning Agreement by further written agreement executed by the parties.
- G. The parties have agreed to vary the Planning Agreement in accordance with the terms of this deed.

Operative part

1 Definitions

In this deed, unless the context indicates a contrary intention:

Planning Agreement means the agreement referred to in Recital A of this deed;

Variation Date means the date this deed is executed by all parties; and

all other capitalised terms have the same meaning as in the Planning Agreement.

2 Interpretation

2.1 General

In this deed, unless the context indicates a contrary intention:

- (a) **(documents)** a reference to a document is to the document as varied, amended, supplemented, novated or replaced from time to time;
- (b) **(references)** a reference to a party, clause, paragraph, schedule or annexure is to a party, clause, paragraph, schedule or annexure to or of this deed;
- (c) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect the interpretation of this deed;
- (d) **(Background)** the Background forms part of this deed;
- (e) **(person)** a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their permitted novatees, permitted assignees, personal representatives and successors;
- (f) **(including)** including and includes (and any other similar expressions) are not words of limitation and a list of examples is not limited to those items or to items of a similar kind;
- (g) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (h) **(singular and plural)** the singular includes the plural and the plural includes the singular;
- (i) **(gender)** words importing one gender include all other genders;
- (j) **(legislation)** a reference to legislation or any legislative provision includes:
 - (i) any modification or substitution of that legislative provision; and

- (ii) any subordinate legislation issued under that legislation or legislative provision including under that legislation or legislative provision as modified or substituted;
- (k) **(time and date)** a reference to a time or date is to the time and date in Sydney, Australia;
- (l) **(joint and several)** an agreement, representation, covenant, warranty, right or obligation:
 - (i) in favour of two or more persons is for the benefit of them jointly and severally; and
 - (ii) on the part of two or more persons binds them jointly and severally;
- (m) **(replacement bodies)** a reference to a body that ceases to exist or whose powers or functions are transferred to another body is to the body that replaces it or that substantially succeeds to its powers or functions; and
- (n) **(Australian currency)** a reference to dollars or \$ is to Australian currency.

2.2 Construction

Neither this deed nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting.

2.3 Timing of acts or things

- (a) If the time for doing any act or thing required to be done under this deed or a notice period specified in this deed expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.
- (b) If any act or thing done under this deed is done after 5 pm on a day, it is taken to have been done on the following Business Day.

3 Variation of the Planning Agreement

3.1 Variation

- (a) Pursuant to clause 25C of the Regulation, the parties agree that the Planning Agreement is varied as set out in Schedule 1 to this deed.
- (b) In all other respects, the Planning Agreement remains unchanged.
- (c) In the event of any inconsistency between the amendments effected by this deed and the remainder of the Planning Agreement, the amendments effected by this deed shall prevail to the extent of any inconsistency.

3.2 Variation Date

The Planning Agreement is varied and this deed becomes effective on the Variation Date.

4 Registration

4.1 Registration

- (a) The Developer agrees that it will procure the registration of this deed, under the *Real Property Act 1900 (NSW)* in the relevant folios of the Register for the Land in accordance with section 7.6 of the Act.

- (b) The Developer at its own expense will, promptly after this deed comes into operation, take all practical steps to procure:
 - (i) the consent of each person who:
 - (A) has an estate or interest in the Land; or
 - (B) is seized or possessed of an estate or interest in the Land; and
 - (ii) the execution of any documents; and
 - (iii) the production of the relevant duplicate certificates of title, to enable the registration of this deed in accordance with clause 4.1(a).
- (c) The Developer at its own expense, will take all practical steps, and otherwise do anything that the Council reasonably requires, including responding to requisitions:
 - (i) to procure the lodgement of this deed with the Registrar-General as soon as reasonably practicable after this deed comes into operation but in any event, no later than 10 Business Days after that date; and
 - (ii) to procure the registration of this deed by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this deed is lodged for registration.

4.2 Removal from Register

The Council agrees that notification of this deed may be removed from the Register of the Land at the same time as notification of the Planning Agreement is removed from the Register of the Land in accordance with clause 8.2 of the Planning Agreement.

4.3 Caveat

- (a) The Developer acknowledges and agrees that:
 - (i) when this deed is executed, the Council is deemed to have acquired and the Developer is deemed to have granted, an equitable estate and interest in the Land for the purposes of section 74F(1) of the Real Property Act 1900 (NSW) and consequently the Council will have a sufficient interest in the Land in respect of which to lodge a caveat over the Land notifying that interest;
 - (ii) it will not object to the Council lodging a caveat in the relevant folios of the Register for the Land nor will it seek to remove any caveat lodged by the Council provided the caveat does not prevent registration of any dealing or plan other than a transfer.
- (b) The Council must, at the Developer's cost, register a withdrawal of any caveat in respect of the Land within five Business Days after the Developer complies with clause 4.1 and must not lodge any other caveats on the titles to any of the Land.

5 General

5.1 Costs and expenses

The Developer agrees to pay Council's reasonable costs of preparing, negotiating, executing, stamping, registering and releasing or discharging this deed and any document related to this deed.

5.2 *Relationship between parties*

- (a) Nothing in this deed:
 - (i) constitutes a partnership between the parties; or
 - (ii) except as expressly provided, makes a party an agent of another party for any purpose.
- (b) A party cannot in any way or for any purpose:
 - (i) bind another party; or
 - (ii) contract in the name of another party.

5.3 *Further assurances*

Except as expressly provided in this deed, each party must, at its own expense, do all things reasonably necessary (including executing documents) to give full effect to this deed and the matters contemplated by it.

5.4 *Variation*

No variation of this deed is effective unless made in writing and signed by each party.

5.5 *No assignment or transfer*

A party cannot assign or otherwise transfer its rights under this deed without the prior consent of the other party.

5.6 *Counterparts*

This deed may be executed in any number of counterparts. All counterparts taken together constitute one instrument.

5.7 *Stamp duty*

The Developer must pay all stamp duty assessed on or in relation to this deed and any instrument or transaction required by or necessary to give effect to this deed.

5.8 *Invalidity*

- (a) A word or provision must be read down if:
 - (i) this deed is void, voidable, or unenforceable if it is not read down;
 - (ii) this deed will not be void, voidable or unenforceable if it is read down; and
 - (iii) the provision is capable of being read down.
- (b) A word or provision must be severed if:
 - (i) despite the operation of clause 4.11(a), the provision is void, voidable or unenforceable if it is not severed; and
 - (ii) this deed will be void, voidable or unenforceable if it is not severed.
- (c) The remainder of this deed has full effect even if clause 4.11(b)(i) or clause 4.11(b)(ii) applies.

5.9 *Waiver*

A right or remedy created by this deed cannot be waived except in writing signed by the party entitled to that right or remedy. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or

in part) by a party of a right or remedy operate as a subsequent waiver of the same right or remedy or of any other right or remedy of that party.

5.10 *Governing law and jurisdiction*

- (a) The laws applicable in New South Wales govern this deed.
- (b) The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

Schedule 1 Variations to Planning Agreement

The Planning Agreement is varied from the Variation Date as follows:

- 1 **Amend** the definition of Public Car Park in clause 1 – “Definitions” to include the underlined words below:

***Public Car Park** means the public car park, as defined in the Local Government Act 1993, forming part of the Development containing at least 650 car spaces and includes electronic signage for the car park.*
- 2 **Add** the following definition of “Subdivision Certificate” in clause 1 – “Definitions”:

***Subdivision Certificate** has the same meaning as in the Act.*
- 3 **Amend** clause 4 as follows:

Insert on a new line after “The Development”,

For the avoidance of doubt, this Agreement may be taken into account for the purposes of determining any future development application applying to the Land, including development applications for the subdivision of the mixed used development constructed on the Land.
- 4 **Delete** clause 6.1 and **insert** the following:

6.1 Public Car Park

 - (a) *The Developer will design, finance, construct and operate (or cause to be operated), as part of the Development, the Public Car Park.*
 - (b) *The Developer and the Council acknowledge and agree that the purpose of the Public Car Park is to improve the public car parking in the area surrounding the Development.*
 - (c) *The Public Car Park must be completed and ready for operation prior to the issue of an Occupation Certificate for the Development.*
 - (d) *The Public Car Park must be operated and maintained as a public car park (as defined in the Local Government Act 1993) from the date the Development is occupied until such time as the Developer, or owner of the land at the relevant time, demonstrates to Council’s satisfaction that a public car park is no longer required by the community and obtains all relevant approvals (including any amendment to this Agreement) to change the use partly or wholly.*
 - (e) *At the same time as the registration of a subdivision plan creating a lot containing the Public Car Park or prior to the issue of any Occupation Certificate for any residential component of the Development, whichever occurs first the Developer must register positive and restrictive covenants containing terms acceptable to Council on that part of the Land containing the Public Car Park in favour of Council to give effect to the requirement in clause 6.1(d).*
 - (f) *For the avoidance of doubt the Public Car Park will not be owned by Council.*
- 5 **Delete** clause 6.2(e)(ii) and **insert** the following:

- (ii) *with respect to the Streetscape Works and Public Thoroughfare Works, the Land has been subdivided to the satisfaction of Council to create a separate lot (or lots) containing those works and an easement or easements in favour of Council and on terms satisfactory to Council have been created, permitting unrestricted and perpetual rights of access for the public to that part of the Land on which those works are located, which easement or easements may be released, varied or modified only with Council's consent.*

6 **Delete** clause 6.2(h) and **insert** the following:

- (h) *For the avoidance of doubt:*
 - (i) *the Council will not own the land subject to the Streetscape Works and Public Thoroughfare Works, unless any part of those works is to be carried out on land already owned by Council as part of existing road reserve; and*
 - (ii) *the Developer must create an easement or easements in favour of Council and on terms satisfactory to Council over that part of the Land containing the Streetscape Works and Public Thoroughfare Works that permit unrestricted and perpetual rights of access for the public to that land.*

7 **Insert** the following after clause 6.2:

6.3 Plan of Management

- (a) *At least 20 Business Days prior to the issue of Subdivision Certificate for any subdivision creating a lot containing the Public Car Park or prior to the issue of any Occupation Certificate for any residential component of the Development, whichever occurs first, the Developer must prepare and submit to Council a draft Plan of Management for the Public Car Park.*
- (b) *The draft Plan of Management must specify how the Public Car Park is to be operated and must be consistent with the following "operating principles":*
 - (i) *Pricing structures must not encourage private vehicles to enter the Parramatta CBD during the traffic peak period, to ensure that the operation of the car park is not contrary to Council and Roads and Maritime Services policies that seek to manage peak hour traffic conditions.*
 - (ii) *The Public Car Park must operate 24 hours a day and must be open to all members of the public, to ensure the facility supports the CBD night-time economy.*
 - (iii) *No customers are to be provided with special pricing that operates outside of normal market pricing structures, to avoid car parking spaces in the Public Car Park from being leased or effectively sold to residents or occupants of the Development in a manner that would undermine the purpose of Council's car parking policies.*

- (iv) *Public Car Park lease arrangements may be permitted, but all customers (including residents or occupants of the Development) must be required to pay the same market rate under such leases.*
- (c) *The Council will provide any comments or required changes to the draft Plan of Management within 10 Business Days of receiving the draft in accordance with clause 6.3(b).*
- (d) *The Developer must make any changes to the draft Plan of Management requested by the Council and must provide a final version of the Plan of Management to Council for approval.*
- (e) *Within 10 Business Days of receiving the final Plan of Management, Council will notify the Developer that:*
 - (i) *it has approved the Plan of Management, or*
 - (ii) *further changes to the Plan of Management are required, in which case clause 6.3(d) will apply.*
- (f) *The Developer must obtain Council's approval to the final Plan of Management prior to the issue of any Subdivision Certificate for a subdivision creating a lot containing the Public Car Park or prior to the issue of any Occupation Certificate for any residential component of the Development, whichever occurs first.*
- (g) *Any covenant registered against the title to the Public Car Park in accordance with clause 6.1(e) must require the operation of the Public Car Park in accordance with the Plan of Management approved by Council.*

8 Delete clauses 7(b), (c) and (d) and **insert** the following:

- (b) *The parties agree and acknowledge that section 94A contributions payable for the Development were reduced in accordance with an earlier version of this Agreement (**Contributions Discount**), on the basis that the Public Car Park was to be owned by Council and that, as a consequence of amendments to this Agreement, the Developer is not entitled to retain the benefit of the Contributions Discount.*
- (c) *The parties agree and acknowledge that:*
 - (i) *the amount of the Contributions Discount was determined on the basis of an approved car park consisting of 715 parking spaces;*
 - (ii) *the Development as constructed contains less than 715 parking spaces;*
 - (iii) *given the shortfall in approved spaces, the Developer will pay to Council, an amount calculated in accordance with the following formula (**Car Park Shortfall Amount**);*
$$CPSA = CPV \times CPN$$
where
CPSA *means the Car Park Shortfall Amount*

CPV is the value of a car parking space, being \$38,000 increased in accordance with increases in the Consumer Price Index from 15 April 2015 to the date of payment of the CPISA

CPN means the number of car parks less than 715 actually provided as part of the Public Car Park in the Development, as agreed between the Developer and Council, or otherwise determined by an expert appointed in accordance with clause 9.6 of this Agreement

- (iv) *the Car Park Shortfall Amount must be paid by the Developer to Council prior to any Subdivision Certificate being issued for a subdivision creating a lot containing the Public Car Park or prior to the issue of any Occupation Certificate for any residential component of the Development whichever occurs first.*
- (d) *The parties acknowledge that:*
 - (i) *the Land has been sold by Council to the Developer;*
 - (ii) *the value of the Contributions Discount (other than the Car Park Shortfall Amount) was taken into account in the sale price of the Land; and*
 - (iii) *subject to the payment of the Car Park Shortfall Amount required under clause 7(c), Council will not demand any further payment from the Developer in relation to the Contributions Discount.*

Executed as a deed

Signed, sealed and delivered for and on)
behalf of **Parramatta City Council**)
ABN 49 907 174 773, by its authorised)
delegate, who warrants that they are duly)
authorised to execute this document on)
behalf of **Parramatta City Council** in the)
presence of:)
)
)

.....
Signature of Witness

.....
Signature of Authorised Delegate

.....
Print name of Witness

Signed, sealed and delivered for and on)
behalf of **JKN Para Pty Ltd** ACN 159 177)
170 by **Evelyn Nassif** its attorney under a)
Power of Attorney dated 4 September)
2012 [Registered No. 689 Book 4637] and)
the Attorney declares that the Attorney)
has not received notice of the revocation)
of such Power of Attorney in the presence)
of:)

.....
Signature of Witness

.....
Signature of Attorney

.....
Print name of Witness

Signed, sealed and delivered for and on)
behalf of **Toplace Pty Ltd** ACN 135 918)
491 by **Evelyn Nassif** its attorney under a)
Power of Attorney dated 20 December)
2011 [Registered No. 968 Book 4626] and)
the Attorney declares that the Attorney)
has not received notice of the revocation)
of such Power of Attorney in the presence)
of:

.....
Signature of Witness

.....
Signature of Attorney

.....
Print name of Witness

Signed, sealed and delivered for and on)
behalf of **Jean Nassif** by **Evelyn Nassif**)
their attorney under a Power of Attorney)
dated 20 December 2011 [Registered No.)
968 Book 4626] and the Attorney declares)
that the Attorney has not received notice)
of the revocation of such Power of)
Attorney in the presence of:)

.....
Signature of Witness

.....
Signature of Attorney

.....
Print name of Witness