

Voluntary Planning Agreement

Date:

City of Parramatta Council

ABN 49 907 174 773

Holdmark Properties Pty Ltd

ABN 11 125 227 429

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Agreement

Date

Parties

First party

Name	City of Parramatta Council (Council)
ACN	49 907 174 773
Contact	Manager, Land Use Planning
Telephone	(02) 9806 5050

Second party

Name	Holdmark Properties Pty Ltd (Landowner)
ABN	11 125 227 429
Contact	Chief Executive Officer
Telephone	(02) 9989 5540

Background

- A. The Landowner owns the Land. The Landowner through its agent, Holdmark NSW Pty Ltd (**Developer**) has sought a change to an environmental planning instrument applying to the Land and proposes to make a Development Application for Development Consent to carry out the Development on the Land.
- B. In or around 2016, the Planning Proposal was submitted to the Department of Planning, Industry and Environment for gateway determination.
- C. A gateway determination was issued on 13 July 2017 for the Planning Proposal.
- D. The Developer submitted a revised Planning Proposal altering the intended use of the Land so that the Development complies with clause 7.4(2) of the *Parramatta Local Environmental Plan 2011*.
- E. On 11 May 2020, Council resolved to endorse the amended Planning Proposal, provided it complies with the conditions of the gateway determination.
- F. On 29 May 2020, Council submitted a request to the Department of Planning, Industry and Environment for alteration and extension of the gateway determination.
- G. The Instrument Change application was accompanied by an offer to enter into this agreement to make contributions for public purposes associated with the Instrument Change and the Development.

Operative part

1 Definitions

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

Act means the *Environmental Planning and Assessment Act 1979* (NSW);

Additional GFA means any additional floor space permitted under the LEP or the Affordable Rental Housing SEPP by reason of building height that exceeds the maximum height shown for the Land on the height of buildings map in the LEP or an amount of floor space that exceeds the maximum floor space ratio for the Land on the floor space ratio map in the LEP;

Address means a party's address set out in the Notices clause of this agreement;

Affordable Rental Housing SEPP means *State Environmental Planning Policy (Affordable Rental Housing) 2009* and any future environmental planning instrument that provides for affordable housing;

Approval means any certificate, licence, consent, permit, approval or other requirement of any Authority having jurisdiction in connection with the activities contemplated by this agreement;

Approved GFA means the total GFA approved, excluding any Additional GFA, for the Development under a Development Consent, including any Modification of a Development Consent;

Authority means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person;

Bank Guarantee means an irrevocable and unconditional undertaking that is not limited in time and does not expire by one of the following trading banks:

- (a) Australia and New Zealand Banking Group Limited,
- (b) Commonwealth Bank of Australia,
- (c) Macquarie Bank,
- (d) National Australia Bank,
- (e) St George Bank Limited,
- (f) Westpac Banking Corporation, or
- (g) Other financial institution approved by the Council,

to pay an amount or amounts of money to the Council on demand and containing terms and conditions reasonably acceptable to the Council;

Base GFA means the gross floor area of residential development able to be achieved on the Land under the planning controls applicable prior to the Instrument Change, being 16,253.8sqm;

Business Day means a day on which banks are open for general banking business in Sydney, excluding Saturdays and Sundays;

CI Rate is \$150 per square metre or the dollar per square metre rate determined by any Community Infrastructure Policy adopted by Council as at the time of execution of this agreement, whichever is the greater;

Claim means any claim, loss, liability, damage, proceeding, order, judgment or expense arising out of the operation of this agreement;

Construction Certificate means a construction certificate as defined under section 6.4 of the Act;

CPI means the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics;

Dealing, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land;

Development means redevelopment of the Land for either a mixed use development incorporating a residential component, or a wholly commercial development;

Development Application has the same meaning as in the Act;

Development Consent has the same meaning as in the Act;

Easement Terms means the terms of a public access easement as set out in Schedule 1;

GFA means gross floor area, as defined in the LEP;

GST has the same meaning as in the GST Law;

GST Law has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition of or administration of the GST;

Insolvent means, in relation to a party:

- (a) that party makes an arrangement, compromise or composition with, or assignment for, the benefit of its creditors or a class of them;
- (b) a receiver, receiver and manager, administrator, provisional liquidator, trustee, controller, inspector or analogous person is appointed in relation to, or over, all or any part of that party's business, assets or securities;
- (c) a presumption of insolvency has arisen under legislation because of the party's failure to comply with a statutory demand or analogous process;
- (d) an application for the winding up of, or for the appointment of a receiver to, that party, other than winding up for the purpose of solvent reconstruction or re amalgamation, is presented and not withdrawn or dismissed within 21 days (or such longer period agreed to by the parties), or an order is made or an effective resolution is passed for the winding up of, or for the appointment of a receiver to, that party, or any analogous application is made or proceedings initiated;
- (e) any shareholder or director of that party convenes a meeting for the purpose of considering or passing any resolution for the winding up or administration of that party;
- (f) that is an individual, a creditor's petition or a debtor's petition is presented to the Official Receiver or analogous authority in relation to that party;
- (g) an execution or analogous process is levied or enforced against the property of that party;
- (h) that party ceases or suspends, or threatens to cease or suspend, the conduct of all or a substantial part of its business;
- (i) that party disposes of, or threatens to dispose of, a substantial part of its assets;
- (j) that party stops or suspends, or threatens to stop or suspend, payment of all or a class of its debts; or
- (k) that party is unable to pay the party's debts as and when they become due and payable.

Instrument Change means the amendments to the LEP in response to the Planning Proposal;

Land means Lot 1 DP 710335 and Lot 1 DP233150, known as 197-207 Church Street and 89 Marsden Street Parramatta NSW;

Law means:

- (a) any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation;

- (b) any Approval, including any condition or requirement under it; and
- (c) any fees and charges payable in connection with the things referred to in paragraphs (a) and (b);

LEP means the *Parramatta Local Environmental Plan 2011*;

Modification Application means any application to modify the Development Consent under section 4.55 of the Act;

Monetary Contribution means the monetary contribution payable by the Landowner under clause 6 of this agreement;

Non-Residential GFA means the total GFA approved as part of the Development for any purposes other than Residential Accommodation;

Occupation Certificate means an occupation certificate as defined under section 6.4 of the Act and includes a partial Occupation Certificate;

Planning Proposal means the planning proposal numbered PP_2016_COPAR_015_00 (as modified) seeking to amend provisions of LEP applying to the Land including to:

- (a) apply a maximum floor space ratio of 10:1;
- (b) apply a maximum building height of part 105m and part 12m;
- (c) require a minimum 1:1 commercial floor space in any redevelopment and allow for unlimited commercial floor space to be provided; and
- (d) apply car parking rates under clause 7.14 of the LEP; and
- (e) provide a satisfactory arrangements clause to enable contributions to be levied for State public infrastructure.

Register means the Torrens title register maintained under the *Real Property Act 1900* (NSW);

Regulation means the *Environmental Planning and Assessment Regulation 2000*;

Related Body Corporate has the meaning given to that term in s 9 of the *Corporations Act 2001* (Cth);

Residential Accommodation has the same meaning as in the LEP except that it does not include boarding houses and affordable housing (as defined in the LEP);

Setback Area means an area along the length of the boundary of the Land adjacent to Marsden Road, 2m wide, and limited in depth to 100mm to accommodate tiling and bedding, and limited in height to 4.2m as shown on the diagram in Annexure A; and

Transferee has the meaning given in clause 12.3.

2 Interpretation

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

- (a) **(documents)** a reference to this agreement or another document includes any document which varies, supplements, replaces, assigns or novates this agreement or that other document;
- (b) **(references)** a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this agreement;
- (c) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this agreement;

- (d) **(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 personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns;
- (e) **(party)** a reference to a party to a document includes that party's personal representatives, executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) **(president, CEO, general manager or managing director)** the president, CEO, general manager or managing director of a body or Authority includes any person acting in that capacity;
- (g) **(requirements)** a requirement to do any thing includes a requirement to cause that thing to be done, and a requirement not to do any thing includes a requirement to prevent that thing being done;
- (h) **(including)** including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind;
- (i) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (j) **(singular)** the singular includes the plural and vice-versa;
- (k) **(gender)** words importing one gender include all other genders;
- (l) **(parts)** a reference to one or more things includes each part and all parts of that thing or group of things but nothing in this clause implies that part performance of an obligation constitutes performance of that obligation;
- (m) **(rules of construction)** neither this agreement 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;
- (n) **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (o) **(time and date)** a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in Sydney, Australia, even if the obligation is to be performed elsewhere;
- (p) **(joint and several)** an agreement, representation, covenant, 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;
- (q) **(writing)** a reference to a notice, consent, request, approval or other communication under this agreement or an agreement between the parties means a written notice, request, consent, approval or agreement;
- (r) **(replacement bodies)** a reference to a body (including an institute, association or Authority) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions;
- (s) **(Australian currency)** a reference to dollars or \$ is to Australian currency;
- (t) **(month)** a reference to a month is a reference to a calendar month; and
- (u) **(year)** a reference to a year is a reference to twelve consecutive calendar months.

3 Planning Agreement under the Act

- (a) The parties agree that this agreement is a planning agreement within the meaning of section 7.4 of the Act.
- (b) Schedule 2 of this agreement summarises the requirements for planning agreements under section 7.4 of the Act and the way this agreement addresses those requirements.

4 Application of this agreement

This agreement applies to:

- (a) the Instrument Change, and
- (b) the Development, and
- (c) the Land.

5 Operation of this agreement

- (a) This agreement commences on and from the date it is executed by all parties.
- (b) For the avoidance of doubt, the obligations under clause do not take effect unless and until the Instrument Change occurs.

6 Contributions to be made under this agreement

6.1 Monetary Contributions

- (a) This clause 6.1 applies only if Development Consent is granted for Development that includes use of the Land or any part of the Land for residential purposes.
- (b) The Landowner must pay to Council a Monetary Contribution calculated in accordance with this clause (**Monetary Contribution**).
- (c) If the Non-Residential GFA is less than or equal to the Base GFA, the Monetary Contribution payable under this clause is to be calculated in accordance with the following formula:
$$\text{Monetary Contribution} = \text{CI Rate} \times (\text{Approved GFA} - \text{Base GFA}).$$
- (d) If the Non-Residential GFA is greater than the Base GFA, the Monetary Contribution payable under this clause is to be calculated in accordance with the following formula:
$$\text{Monetary Contribution} = \text{CI Rate} \times (\text{Approved GFA} - \text{Non-Residential GFA}).$$
- (e) The Monetary Contribution payable under this clause is to be adjusted in accordance with CPI on the basis of the following formula:

$$\text{Monetary Contribution} \quad (\$) \quad \times \quad \frac{\text{The CPI at the time of payment}}{\text{The CPI at the date of this agreement}}$$

- (f) The Monetary Contribution must be paid to Council in instalments as follows:
 - (i) 25% of the Monetary Contribution within 5 Business Days of the grant of Development Consent for the Development that includes a residential component;
 - (ii) 50% of the Monetary Contribution prior to the issue of a Construction Certificate for the Development; and

- (iii) 25% of the Monetary Contribution prior to the issue of an Occupation Certificate for the Development, or prior to the registration of any Strata Plan, whichever is earlier.
- (g) The Landowner is not required to pay the instalments of the Monetary Contribution specified in clauses 6.1(f)(i) and (ii) if the Landowner provides to the Council Bank Guarantees in accordance with clause 11.2 as security for those payments, in which case the Landowner must pay the full amount of the Monetary Contribution prior to the issue of an Occupation Certificate for the Development.
- (h) The Monetary Contribution must be paid by way of bank cheque in favour of Council or by deposit by means of electronic funds transfer into an account specified by Council.
- (i) The Monetary Contribution will be taken to have been made when the Council notifies the Landowner in writing that the bank cheque has been received and cleared funds or electronic funds have been deposited in the Council's bank account.
- (j) The parties agree and acknowledge that the Monetary Contribution will be used by the Council towards public domain improvement works within the Parramatta CBD.

6.2 *Public Access and Easements*

- (a) The Landowner will, at no cost to Council, register against the title to the Land:
 - (i) a covenant prohibiting any building or structures, including pillars, other than structures approved by the Council (acting reasonably) for the purposes of enhancing public domain areas or temporary structures required for the construction of the Development that will be removed prior to the issue of an Occupation Certificate for any part of the Development, to be constructed on the Setback Area; and
 - (ii) an easement in gross burdening that part of the Land on which the Setback Area is located in favour of the Council permitting public access to the Setback Area and generally in accordance with the Easement Terms.
- (b) Any requirement to register an easement, covenant or other instrument against the title to the Land will be satisfied when the Landowner provides to the Council a copy of the relevant title search showing the registration of the instrument.
- (c) Any covenant required under clause 6.2(a) must be registered prior to the issue of the first Construction Certificate for any building on the Land forming part of the Development.
- (d) Any easement, required under clause 6.2(a) must be registered prior to the issue of an Occupation Certificate for any building on the Land forming part of the Development.
- (e) The parties agree that the proposed covenant and easement under this clause will serve the public purposes of improving pedestrian circulation and amenity in the vicinity of the Land.
- (f) The Landowner agrees and acknowledges that:
 - (i) Council may require, under any Development Consent, works to construct a public domain area, erect structures or enhance the Setback Area to meet Council's reasonable standards and specifications for public domain areas; and
 - (ii) the Landowner will not object to a requirement to carry out works in accordance with clause 6.2(f)(i), or appeal the imposition of any condition of Development Consent requiring those works; and
 - (iii) the obligations under this clause 6.2 are relevant considerations for the Council or any other consent authority when determining a Development Application or Modification Application relating to the Land and that a failure to comply with those obligations or

any inconsistency with the requirements in those clauses may constitute a reason for refusal of such a Development Application or Modification Application.

7 Application of s 7.11, s 7.12 and s 7.24 of the Act to the Development

- (a) This agreement does not exclude the application of section 7.11 of the Act to the Development.
- (b) This agreement does not exclude the application of section 7.12 of the Act to the Development.
- (c) This agreement does not exclude the application of section 7.24 of the Act to the Development.
- (d) The benefits under this agreement are not to be taken into consideration in determining a development contribution under section 7.11 of the Act.

8 Registration of this agreement

8.1 Landowner Interest

The Landowner represents and warrants to the Council that on the date of this agreement the Landowner is the registered proprietor of the Land.

8.2 Registration of this agreement

- (a) The Landowner agrees to procure the registration of this agreement under the *Real Property Act 1900* (NSW) in the relevant folios of the Register of the Land in accordance with section 7.6 of the Act.
- (b) The Landowner, at its own expense, must:
 - (i) procure the lodgement of this agreement with the Registrar-General as soon as reasonably practicable after this agreement comes into operation, but in any event, no later than 20 Business Days after that date;
 - (ii) procure the registration of this agreement by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this agreement is lodged for registration; and
 - (iii) provide documentary evidence that the registration of this agreement has been completed to Council within 5 Business Days of receiving confirmation that the registration has occurred.
- (c) The Landowner at its own expense will take all practical steps, and otherwise do anything that the Council reasonably requires to procure:
 - (i) The consent of each person who:
 - (A) has an estate or interest in the Land registered under the *Real Property Act 1900* (NSW); or
 - (B) is seized or possessed of an estate or interest in the Land,
 - (ii) An acceptance of the terms of this agreement and an acknowledgement in writing from any existing mortgagee in relation to the Land that the mortgagee will adhere to the provisions of this agreement if it takes possession of the Land as mortgagee in possession,
 - (iii) The execution of any documents; and

- (iv) The production of the relevant duplicate certificates of title, to enable the registration of this agreement in accordance with this clause 8.2.
- (d) The Landowner consents to the registration of the agreement in accordance with this clause 8.2.

8.3 *Removal from Register*

- (a) The Council will provide a release and discharge of this agreement so that it may be removed from the folios of the Register for the Land (or any part of it) provided the Council is satisfied the Landowner has duly fulfilled its obligations under this agreement, and are not otherwise in default of any of the obligations under this agreement.
- (b) The Council agrees that obligations of the Landowner will be taken to have been satisfied when:
 - (i) the Monetary Contribution has been paid in full, or an Occupation Certificate has been sought for a wholly commercial development on the Land and the Council considers, acting reasonably and having regard to the maximum floor space ratio control applying to the Land under the LEP, that the Development will not include a residential component; and
 - (ii) Council has received written confirmation of the registration of the easement and restrictive covenant under clause 6.2(a).

8.4 *Caveat*

- (a) The Landowner acknowledges and agrees that:
 - (i) when this agreement is executed, the Council is deemed to have acquired and the Landowner 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 plan or dealing other than a transfer.
- (b) The Council must, at the Council's cost, register a withdrawal of its caveat in respect of the Land immediately upon request by the Landowner to enable the registration of this agreement if requested by the Landowner and must not lodge any other caveats on the titles to any of the Land.

9 *Review of this agreement*

9.1 *Review by agreement*

- (a) This agreement may be reviewed or modified by agreement between the parties using their best endeavours and acting in good faith.
- (b) For the purposes of clause 9.1 of this agreement and subject to clause 9.2, no modification or review of this agreement will be of any force or effect unless it is in writing and signed by the parties to this agreement.
- (c) For the purposes of clause 9.1 of this agreement and subject to clause 9.2, a party is not in breach of this agreement if it does not agree to an amendment to this agreement requested by a party in, or as a consequence of, a review.

9.2 *Change to Development Contributions*

- (a) The parties acknowledge that as at the date of this agreement:
- (i) Council is proposing to amend the LEP to address the provision of community infrastructure within the Parramatta CBD and to adopt an accompanying Infrastructure Strategy and Development Guideline;
 - (ii) the Monetary Contribution for this agreement has been calculated on the basis of a monetary rate per square metre of land (**Community Infrastructure Rate**), being a percentage of land value uplift (as defined in the Council's Planning Agreements Policy); and
 - (iii) the Community Infrastructure Rate is being applied by Council at the date of this agreement, but may change when the planning proposal for the Parramatta CBD is finalised.
- (b) If, at the time the first instalment of the Monetary Contribution becomes payable (**Payment Date**):
- (i) the Community Infrastructure Rate adopted by Council is less than the lowest rate that can be applied under this agreement (being \$150 per square metre); and
 - (ii) as a consequence of the reduction of the Community Infrastructure Rate, Council amends the Development Contributions Plan, or adopts a new Development Contributions Plan that applies to the Land, so that the Development Contributions payable for the Development are higher, per square metre or other basis of measurement used to determine the quantum of contributions, than they would otherwise have been as at the date of this agreement;
- then, within 20 Business Days of either party making a request for review, the Council and the Landowner must meet to review this agreement in accordance with the principles in clause 9.2(c) and using their best endeavours and in good faith.
- (c) If a review of this agreement is carried out under clause 9.2(b) the parties must consider during that review process, the quantum of Monetary Contribution payable by the Landowner to the Council under this agreement and a reduction of the Monetary Contribution by an amount equivalent to the difference between:
- (i) the Development Contributions calculated as at the date of this agreement, indexed in accordance with increases in CPI from the date of this agreement to the Payment Date; and
 - (ii) the Development Contributions calculated as at the Payment Date.
- (d) Any agreement reached during a review under this clause 9.2 will not constitute an amendment to this agreement until the amendment has been:
- (i) confirmed in writing as a proposed amendment to this agreement;
 - (ii) publicly notified in accordance with the Regulation;
 - (iii) approved by Council after consideration of any public submissions; and
 - (iv) signed by the parties.
- (e) A failure by a party to agree to participate in a review under this clause 9.2 is taken to be a dispute for the purposes of clause 10.

- (f) If the parties cannot agree to the terms of any amendment to this agreement following a review under clause 9.2, either party may refer the matter to dispute resolution under clause 10.
- (g) Nothing in this clause 9.2:
 - (i) affects the obligation under the Act to pay contributions in accordance with section 7.11 or section 7.12 of the Act; or
 - (ii) requires the Council to pay any money to the Landowner or to refund to the Landowner or any other entity, any amount paid to it under this agreement or for any other purpose.

10 Dispute Resolution

10.1 Reference to Dispute

If a dispute arises between the parties in relation to this agreement, the parties must not commence any court proceedings relating to the dispute unless the parties have complied with this clause, except where a party seeks urgent interlocutory relief.

10.2 Notice of Dispute

The party wishing to commence the dispute resolution process must give written notice (**Notice of Dispute**) to the other parties of:

- (a) The nature of the dispute,
- (b) The alleged basis of the dispute, and
- (c) The position which the party issuing the Notice of Dispute believes is correct.

10.3 Representatives of Parties to Meet

- (a) The representatives of the parties must promptly (and in any event within 20 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.
- (b) The parties may, without limitation:
 - (i) resolve the dispute during the course of that meeting,
 - (ii) agree that further material or expert determination in accordance with clause 10.6 about a particular issue or consideration is needed to effectively resolve the dispute (in which event the parties will, in good faith, agree to a timetable for resolution); or
 - (iii) agree that the parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

10.4 Further Notice if Not Settled

If the dispute is not resolved within 10 Business Days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (**Determination Notice**) by mediation under clause 10.5 or by expert determination under clause 10.6.

10.5 Mediation

If a party gives a Determination Notice calling for the dispute to be mediated:

- (a) The parties must agree to the terms of reference of the mediation within 15 Business Days of the receipt of the Determination Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);

- (b) The mediator will be agreed between the parties, or failing agreement within 15 Business Days of receipt of the Determination Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (c) The mediator appointed pursuant to this clause 10.5 must:
 - (i) Have reasonable qualifications and practical experience in the area of the dispute; and
 - (ii) Have no interest or duty which conflicts or may conflict with his or her function as a mediator he or she being required to fully disclose any such interest or duty before his or her appointment;
- (d) The mediator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties;
- (e) The parties must within 15 Business Days of receipt of the Determination Notice notify each other of their representatives who will be involved in the mediation (except if a resolution of the Council is required to appoint a representative, the Council must advise of the representative within 5 Business Days of the resolution);
- (f) The parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement; and
- (g) In relation to costs and expenses:
 - (i) Each party will bear its own professional and expert costs incurred in connection with the mediation; and
 - (ii) The costs of the mediator will be shared equally by the parties unless the mediator determines that a party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that party.

10.6 *Expert determination*

If the dispute is not resolved under clause 10.3 or clause 10.5, or the parties otherwise agree that the dispute may be resolved by expert determination, the parties may refer the dispute to an expert, in which event:

- (a) The dispute must be determined by an independent expert in the relevant field:
 - (i) Agreed upon and appointed jointly by the parties; and
 - (ii) In the event that no agreement is reached or no appointment is made within 20 Business Days of the agreement to refer the dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales;
- (b) The expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) The determination of the dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (d) The expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (e) Each party will bear its own costs in connection with the process and the determination by the expert and will share equally the expert's fees and costs; and

- (f) Any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
 - (i) Within 20 Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and commences litigation; or
 - (ii) The determination is in respect of, or relates to, termination or purported termination of this agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal.

10.7 *Litigation*

If the dispute is not *finally* resolved in accordance with this clause 10, then either party is at liberty to litigate the dispute.

10.8 *No suspension of contractual obligations*

Subject to any interlocutory order obtained under clause 10.1, the referral to or undertaking of a dispute resolution process under this clause 10 does not suspend the parties' obligations under this agreement.

11 **Enforcement**

11.1 *Default*

- (a) In the event a party considers another party has failed to perform and fulfil an obligation under this agreement, it may give notice in writing to the other party (**Default Notice**) giving all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than 21 days.
- (b) In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (c) If a party disputes the Default Notice it may refer the dispute to dispute resolution under clause 10 of this agreement.

11.2 *Bank Guarantee*

- (a) If the Landowner elects to provide Bank Guarantees instead of paying the first two instalments of the Monetary Contribution in accordance with clause 6.1(g), the Landowner must provide to the Council:
 - (i) a Bank Guarantee in an amount equivalent to 25% of the Monetary Contribution within 5 Business Days of the grant of Development Consent for any Development that includes a residential component; and
 - (ii) a Bank Guarantee in an amount equivalent to 50% of the Monetary Contribution prior to the issue of a Construction Certificate for the Development,
- (b) The Council may reject any Bank Guarantee that contains errors, or if it has received the Bank Guarantee, require at any time the Landowner to obtain a replacement Bank Guarantee that rectifies any such errors or otherwise obtain rectification of the errors. The Landowner must provide the replacement Bank Guarantee, or otherwise obtain rectification of the errors, within five Business Days of receiving the Council's request.
- (c) The Council may call on a Bank Guarantee provided under this clause if:

- (i) the Landowner is in material or substantial breach of this agreement and have failed to rectify the breach within a reasonable period of time after having been given reasonable notice (which must not be less than 21 Business Days) in writing to do so in accordance with clause 11.1 of this agreement; or
 - (ii) the Landowner becomes Insolvent.
- (d) Within 20 Business Days of each anniversary of a Bank Guarantee provided under clause 11.2(a), the Landowner must provide Council with either a supplemental Bank Guarantee or a replacement Bank Guarantee (**Replacement Bank Guarantee**) in an amount calculated in accordance with the following:

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

Where:

A is the amount of the Replacement Bank Guarantee,

B is the amount of the Bank Guarantee to be replaced,

C is the CPI for the quarter ending immediately before the date of the Bank Guarantee to be replaced,

D is the CPI for the quarter ending immediately before the date of the Replacement Bank Guarantee,

provided A is greater than B.

- (e) On receipt of a Replacement Bank Guarantee provided under clause 11.2(d), the Council must release and return to the Landowner, as directed, the Bank Guarantee that has been replaced as soon as reasonably practicable.
- (f) At any time following the provision of a Bank Guarantee under this clause 11.2, the Landowner may provide the Council with one or more replacement Bank Guarantees totalling the amount of all Bank Guarantees required to be provided under this clause for the time being. On receipt of such replacement Bank Guarantee, the Council must release and return to the Landowner, as directed, the Bank Guarantee(s) which it holds that have been replaced as soon as reasonably practicable.
- (g) Subject to clause 11.2(c), the Council may apply the proceeds of a Bank Guarantee in satisfaction of:
 - (i) any obligation of the Landowner under this agreement that is secured by the Bank Guarantee in accordance with clause 11.2(a); and
 - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Landowner to comply with this agreement.
- (h) Nothing in this clause 11.2 prevents or restricts the Council from taking any enforcement action in relation to:
 - (i) any obligation of the Landowner under this agreement; or
 - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Landowner to comply with this agreement,
 that is not or cannot be satisfied by calling on a Bank Guarantee.
- (i) On full and final satisfaction of the Monetary Contributions, Council must promptly release and return any Bank Guarantee(s) which it holds to the Landowner, as directed.

11.3 *Compulsory Acquisition*

- (a) If the Landowner does not register the easement required under clause 6.2, the Council may compulsorily acquire the relevant interest in the Land, in which case the Landowner consents to the Council compulsorily acquiring that interest for compensation in the amount of \$1.00 without having to follow the pre-acquisition procedures in the *Land Acquisition (Just Terms Compensation) Act 1991*.
- (b) Clause 11.3(a) constitutes an agreement for the purposes of section 30 of the *Land Acquisition (Just Terms Compensation) Act 1991*.
- (c) The Landowner must not create any interest in the Land subject to the Setback Area or do or omit to do anything, which is likely to vitiate, impair, derogate from or prejudice the rights of the public to use the Setback Area in accordance with the Easement Terms.
- (d) The Landowner indemnifies and keeps indemnified the Council against:
 - (i) all costs, including legal costs, incurred by the Council; and
 - (ii) all Claims made against the Council,as a result of any acquisition by the Council of the whole or any part of the interest in the Easement Land under clause 11.3(a).

11.4 *Restriction on the issue of Certificates*

- (a) In accordance with section 6.8 of the Act and clause 146A of the Regulation any obligations (if applicable) to:
 - (i) pay the first two instalments of the Monetary Contribution under clause 6.1(f)(i) and (ii), or lodge a bank guarantee in lieu of those payments in accordance with clause 6.1(g); and
 - (ii) register the covenant required under clause 6.2(a)(i),must be satisfied prior to the issue of a Construction Certificate for the Development or any part of the Development.
- (b) In accordance with section 6.10 of the Act and clause 154E of the Regulation the obligation to pay the whole of the Monetary Contribution (if applicable) and register the easement required under clause 6.2(a)(ii) must be satisfied prior to the issue of an Occupation Certificate for the Development or any part of the Development.

11.5 *General Enforcement*

- (a) Without limiting any other remedies available to the parties, this agreement may be enforced by any party in any Court of competent jurisdiction.
- (b) Nothing in this agreement prevents:
 - (i) a party from bringing proceedings in the Land and Environment Court to enforce any aspect of this agreement or any matter to which this agreement relates; and
 - (ii) the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this agreement or any matter to which this agreement relates.

12 *Assignment and Dealings*

12.1 *Assignment*

- (a) A party must not assign or deal with any right under this agreement without the prior written consent of the other parties.

- (b) Any change of ownership or control (as defined in section 50AA of the *Commonwealth Corporations Act 2001*) of a party (excluding the Council) shall be deemed to be an assignment of this agreement for the purposes of this clause.
- (c) Any purported dealing in breach of this clause is of no effect.

12.2 *Arrangements with Mortgagee*

- (a) The Landowner agrees with the Council that if the Landowner mortgages the Land after this agreement is entered into it must use all reasonable efforts at that time to arrange a multiple party deed of agreement between the Council, the Landowner, and the mortgagee so that the mortgagee accepts that the responsibilities set out in this agreement are binding upon the mortgagee in the event that the Landowner defaults on the mortgage and the mortgagee takes possession of the Land.
- (b) The terms of the adoption of the obligations of the Landowner by the mortgagee shall be as reasonably required by the Council. The agreement shall be prepared at the cost of the Landowner.

12.3 *Transfer of Land*

- (a) The Landowner may not transfer, assign or dispose of the whole or any part of its right, title or interest in the Land (present or future) or in the Development to another person (**Transferee**) unless before it sells, transfers or disposes of that right, title or interest:
 - (i) The Landowner satisfies the Council that the proposed Transferee is financially capable of complying with the obligations of the Landowner under this agreement;
 - (ii) The Landowner satisfies the Council that the rights of the Council will not be diminished or fettered in any way;
 - (iii) The Transferee delivers to the Council a novation deed signed by the Transferee in a form and of such substance as is acceptable to the Council containing provisions under which the Transferee agrees to comply with all the outstanding obligations of the Landowner under this agreement;
 - (iv) The Transferee delivers to the Council replacement Bonds or Bank Guarantees as required by this agreement;
 - (v) Any default under any provisions of this agreement has been remedied or waived by the Council, on such conditions as the Council may determine, and
 - (vi) The Landowner and the Transferee pay the Council's reasonable costs in relation to the assignment.

13 Approvals and consents

Except as otherwise set out in this agreement, and subject to any statutory obligations, a party may give or withhold an approval or consent to be given under this agreement in that party's absolute discretion and subject to any conditions determined by the party. A party is not obligated to give its reasons for giving or withholding consent or for giving consent subject to conditions.

14 No fetter

14.1 *Discretion*

This agreement is not intended to operate to fetter, in any manner, the exercise of any statutory power or discretion of the Council, including, but not limited to, any statutory power or discretion of the Council relating to the Development Application or any other application for Development Consent (all referred to in this agreement as a "**Discretion**").

14.2 *No fetter*

No provision of this agreement is intended to constitute any fetter on the exercise of any Discretion. If, contrary to the operation of this clause, any provision of this agreement is held by a court of competent jurisdiction to constitute a 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 is substantially satisfied,
- (b) In the event that (a) cannot be achieved without giving rise to a fetter on the exercise of a Discretion, the relevant provision is to be severed and the remainder of this agreement has full force and effect, and
- (c) To endeavour to satisfy the common objectives of the parties in relation to the provision of this agreement which is to be held to be a fetter on the extent that is possible having regard to the relevant court judgment.

14.3 *Planning Certificates*

The Landowner acknowledges that Council may, at its discretion, include advice on any planning certificate issued under section 10.7 of the Act that this agreement affects the Land.

15 Notices

15.1 *Notices*

Any notice given under or in connection with this agreement (**Notice**):

- (a) must be in writing and signed by a person duly authorised by the sender;
- (b) must be addressed as follows and delivered to the intended recipient by hand, by prepaid post or by email or fax at the address or fax number below, or at the address or fax number last notified by the intended recipient to the sender after the date of this agreement:
 - (i) to City of Parramatta Council: PO Box 32, Parramatta, NSW 2124
Fax: 02 9806 5917
Email: council@cityofparramatta.nsw.gov.au
Attention: Manager, Land Use Planning
 - (ii) to Landowner: Suite 2, 2-4 Giffnock Avenue
Macquarie Park NSW 2113
Email: [Email]
Attention: [Contact]
- (c) is taken to be given or made:
 - (i) in the case of hand delivery, when delivered;
 - (ii) in the case of delivery by post, three Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country); and
 - (iii) in the case of a fax, on production of a transmission report by the machine from which the fax was sent that indicates the fax was sent in its entirety to the recipient's fax number; and
- (d) if under clause (c) a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it is

- (b) A party cannot in any way or for any purpose:
 - (i) bind another party; or
 - (ii) contract in the name of another party.
- (c) If a party must fulfil an obligation and that party is dependent on another party, then that other party must do each thing reasonably within its power to assist the other in the performance of that obligation.

16.2 *Time for doing acts*

- (a) If the time for doing any act or thing required to be done or a notice period specified in this agreement expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.
- (b) If any act or thing required to be done is done after 5.00 pm on the specified day, it is taken to have been done on the following Business Day.

16.3 *Further assurances*

Each party must promptly execute all documents and do all other things reasonably necessary or desirable to give effect to the arrangements recorded in this agreement.

16.4 *Joint and individual liability and benefits*

Except as otherwise set out in this agreement, any agreement, covenant, representation or warranty under this agreement by two or more persons binds them jointly and each of them individually, and any benefit in favour of two or more persons is for the benefit of them jointly and each of them individually.

16.5 *Variations and Amendments*

A provision of this agreement can only be varied by a later written document executed by or on behalf of all parties and in accordance with the provisions of the Act.

16.6 *Counterparts*

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

16.7 *Legal expenses and stamp duty*

- (a) The Landowner must pay the Council's legal costs and disbursements in connection with the negotiation, preparation, execution, carrying into effect, enforcement and release and discharge of this agreement, including the reasonable costs of obtaining any legal advice in connection with this agreement, no later than 10 Business Days after receiving a demand from the Council to pay such costs.
- (b) The Landowner agrees to pay or reimburse the costs and expenses incurred by Council in connection with the advertising and exhibition of this agreement in accordance with the Act.
- (c) The Landowner agrees to pay Council any administrative fees as required by Council, acting reasonably, in connection with the administration of this agreement.

16.8 *Entire agreement*

The contents of this agreement constitute the entire agreement between the parties and supersede any prior negotiations, representations, understandings or arrangements made between the parties regarding the subject matter of this agreement, whether orally or in writing.

16.9 *Representations and warranties*

The parties represent and warrant that they have the power and authority to enter into this agreement and comply with their obligations under the agreement and that entry into this agreement will not result in the breach of any law.

16.10 *Severability*

If a clause or part of a clause of this agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this agreement, but the rest of this agreement is not affected.

16.11 *Invalidity*

- (a) A word or provision must be read down if:
 - (i) this agreement is void, voidable, or unenforceable if it is not read down;
 - (ii) this agreement 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 (a), the provision is void, voidable or unenforceable if it is not severed; and
 - (ii) this agreement will be void, voidable or unenforceable if it is not severed.
- (c) The remainder of this agreement has full effect even if clause 16.11(b) applies.

16.12 *Waiver*

- (a) A right or remedy created by this agreement cannot be waived except in writing signed by the party entitled to that right. 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 operate as a subsequent waiver of the same right or of any other right of that party.
- (b) The fact that a party fails to do, or delays in doing, something the party is entitled to do under this agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another party. A waiver by a party is only effective if it is in writing. A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

16.13 *GST*

- (a) Words and expressions which are not defined in this agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this agreement are exclusive of GST.
- (c) If GST is imposed on any supply made under or in accordance with this agreement, the Landowner must pay the GST or pay to the Council an amount equal to the GST payable on or for the taxable supply, whichever is appropriate in the circumstances.

- (d) If the Council is obliged to pay any GST on any supply made under or in accordance with this agreement, the Landowner indemnifies the Council for the amount of any such payment is required to make.

16.14 Governing law and jurisdiction

- (a) The laws applicable in New South Wales govern this agreement.
- (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 Public Access and Easement Terms

In this Schedule:

Easement Land means that part of the Land the subject of the Setback Area.

- 1 The owner of the Easement Land grants to the Council and members of the public full and free right to go, pass and repass over the Easement Land at all times:
 - (a) with or without animals; and
 - (b) on foot without vehicles (other than wheelchairs or other disabled access aids);for all lawful purposes.
- 2 The owner of the Easement Land must, to the satisfaction of Council, acting reasonably:
 - (a) keep the Easement Land in good repair and condition, including ensuring that damage is not caused to services in, on or under the Easement Land;
 - (b) maintain and repair the Easement Land and all improvements on the Easement Land (excluding any improvement installed by Council);
 - (c) keep the Easement Land clean and free from rubbish;
 - (d) maintain sufficient public liability insurance covering the use of the Easement Land in accordance with these terms; and
 - (e) rectify any defects in structures, embellishment works, landscaping or any other improvements on the Easement Land except for any structure, embellishment works, landscaping or any improvements erected by Council.
- 3 If the owner of the Easement Land does not perform any obligation under clause 2 then the Council may, acting reasonably, undertake the required work and recover the costs of all such work from the owner of the Easement Land as a liquidated debt.
- 4 The owner of the Easement Land must ensure that any rules made by an Owner's Corporation relating to the Easement Land have been approved by the Council, acting reasonably.
- 5 If any member or members of the public loiter or congregate, for any purpose which the owner of the Easement Land, acting reasonably, considers to be a nuisance or a safety risk, the owner may either remove those members of the public, or arrange for their removal by an appropriate authority.
- 6 The owner of the Easement Land may erect safety signage and any other appropriate signage and may erect CCTV cameras in the Easement Land.
- 7 The owner of the Easement Land may engage security personnel to monitor and control the behaviour of the public using the Easement Land, including but not limited to prohibiting smoking, consumption of alcohol (except within licensed areas), passage of animals, bicycles and skateboards and the like in accordance with any rules made by an Owner's Corporation relating to the Easement Land.
- 8 The owner of the Easement Land may with the Council's prior written consent (which consent must not be unreasonably delayed or withheld, except in the case of an emergency, in which case the Council's prior written consent is not required) temporarily close or restrict access through all or part of the Easement Land for the time and to the extent necessary but only on reasonable grounds for the purposes of:

- (a) construction, construction access, repairs, maintenance, replacement and alteration to the Easement Land or any improvements in, on or under the Easement Land; or
 - (b) security, public safety or evacuation of the Easement Land and adjoining buildings
- 9 Subject to ensuring the provision of access in accordance with above clause 1 of this Schedule, the owner of the Easement Land may, provided any necessary planning approvals are obtained:
 - (a) Install or erect works of art, street furniture, awnings, tables and chairs associated with ground floor commercial premises, notice boards or any other similar improvements at ground level on the Easement Land; and
 - (b) Use the Easement Land,
in a manner consistent with Parramatta City Council Outdoor Dining Policy approved on 25 February 2019, or any such policy of the Council that replaces that policy.
- 10 The Council is solely empowered to release this easement.
- 11 This easement may only be varied by written agreement between the Council and the owner of the Easement Land.

Schedule 2

Summary of requirements (section 7.4)

Subject and subsection of the Act	Planning Agreement
<p>Planning instrument and/or Development Application – Section 7.4(1)</p> <p>The Landowner has:</p> <p>(a) Sought a change to an environmental planning instrument</p> <p>(b) Made, or propose to make a Development Application</p> <p>(c) Entered into an agreement with, or are otherwise associated with, a person to whom paragraph (a) or (b) applies</p>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>
<p>Description of the land to which the planning Agreement applies – Section 7.4(3)(a)</p>	<p>See the definition of Land in clause 1: Lot 1 DP 710335 and Lot 1 DP233150, known as 197-207 Church Street and 89 Marsden Street Parramatta NSW.</p>
<p>Description of the application – Section 7.4(3)(b)</p>	<p>See the definitions of Development and Planning Proposal in clause 1.</p>
<p>The scope, timing and manner of delivery of contribution required by the Planning Agreement – Section 7.4(3)(c)</p>	<p>See clause 6.</p>
<p>Applicability of section 7.11 of the Act – Section 7.4(3)(d)</p>	<p>This section is not excluded by this agreement. See clause 7. Contributions under this agreement are not to be taken into account when determining any section 7.11 contribution.</p>
<p>Applicability of section 7.12 of the Act – Section 7.4(3)(d)</p>	<p>This section is not excluded by this agreement. See clause 7.</p>
<p>Applicability of section 7.24 of the Act – Section 7.4(3)(d)</p>	<p>This section is not excluded by this agreement. See clause 7.</p>
<p>Mechanism for dispute resolution – Section 7.4(3)(f)</p>	<p>See clause 10.</p>
<p>Enforcement of the Planning Agreement – Section 7.4(3)(g)</p>	<p>See clause 11 requiring bank guarantees for deferred payment of development contributions, compulsory acquisition of interests in land and restrictions on the issue of certificates under Part 6 of the Act.</p>

Registration of the Planning Agreement – Section 7.6	See clause 8.2.
No obligation to grant consent or exercise functions – Section 7.4(9)	See clause 14 (no fetter).

Executed as an agreement

Signed on behalf of **City of Parramatta Council** (ABN 49 907 174 773) by its authorised delegate pursuant to section 377 of the *Local Government Act 1993* in the presence of:

Signature of witness

Signature of authorised delegate

Name of witness

Name of authorised delegate

Address of witness

Position of authorised delegate

Executed by Holdmark Properties Pty Ltd
ABN 11 125 227 429 in accordance with
section 127(1) of the Corporations Act
2001 (Cth) by:

Signature of Sole Director & Secretary

Sarkis Nassif

Annexure A

Diagram showing Setback Area

