

AFFORDABLE HOUSING PLANNING AGREEMENT

No. [insert] of 2008

Section 93F of the *Environmental Planning and Assessment Act 1979*

Parties

Waverley Council of New South Wales (**Council**);

and

Toga Development No. 45 Pty Limited (ACN 124 510 541) of Level 5, 45 Ultimo Street Sydney NSW 2007, New South Wales (**Developer**).

Background

- A. On, 12 June 2008, the Developer lodged the Development Application with the Council seeking Development Consent to carry out the Development on the Land.
- B. That Development Application was accompanied by an offer by the Developer to enter into this Agreement to make the Development Contribution towards the provision of affordable housing, pursuant to the *Waverley Council Affordable Housing Program Policy 2007*, if that Development consent was granted.

Operative provisions

1 Planning agreement under the Act

The Parties agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

2 Application of this Agreement

This Agreement applies to the Development Application made in relation to the Land.

3 Operation of this Agreement

The Parties agree that this Agreement will not operate or bind the Parties unless and until the earlier of:

- 3.1 the Development Consent is granted and the Developer notifies the Council in writing that its terms and conditions are satisfactory to the Developer; or
- 3.2 the Developer obtains a Construction Certificate for any part of the Development authorised by the Development Consent.

4 Definitions and interpretation

4.1 In this Agreement the following definitions apply:

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

Construction Certificate has the meaning contained in the Act.

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

Development means a mixed use development on the Land consisting of three basement parking levels, upper and lower street levels and four to seven upper storeys, and comprising:

- (a) a serviced apartment hotel with a gross floor area of 6607 sqm;
- (b) a residential component with a gross floor area of 4302 sqm;
- (c) a retail and commercial component with a gross floor area of 4022 sqm.

Development Application means a development application as defined in the Act seeking consent to the carrying out of the Development on the Land.

Development Consent means the granting of development consent for the Development under Part 4 of the Act.

Development Contribution means the Monetary Contribution.

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 or administration of the GST.

Land means the land described in Schedule 1 to this Agreement.

Monetary Contribution means the monetary contribution described in Schedule 2 to this Agreement.

Party means a party to this agreement, including their successors and assigns.

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

4.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.

- (b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- (k) References to the word 'include' or 'including' are to be construed without limitation.
- (l) A reference to this Agreement includes the agreement recorded in this Agreement.
- (m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- (n) Any schedules and attachments form part of this Agreement.

5 Development Contribution to be made under this Agreement

5.1 The Developer must pay the Development Contribution to the Council in cleared funds on the earlier of:

- (a) 1 calendar year after the earliest of the events referred to in clause 3 of this Agreement occurs; or

- (b) the date on which the Developer commences any Development authorised by the Development Consent.

5.2 The Parties agree that the Development Contribution is for the public purpose set out in Schedule 2 to this Agreement.

6 Application of the Development Contribution

The Council must apply the Development Contribution in accordance with:

- 6.1 the *Waverley Council Development Control Plan 2006*; and
- 6.2 the *Waverley Council Affordable Housing Program Policy 2007*.

7 Application of Sections 94F and 94G of the Act to the Development

The Parties agree that:

- 7.1 this Agreement excludes the application of sections 94F and 94G of the Act in so far as they would otherwise relate to the Development and the Development Consent; and
- 7.2 the Council will not seek to impose any conditions on the Development Consent, or require any payment in relation to the Development, pursuant to sections 94F and 94G of the Act.

8 Affordable Housing

The Parties agree that the Monetary Contribution comprising the Developer Contribution is provided as a contribution towards the provision of affordable housing under the *Waverley Council Affordable Housing Program Policy 2007* in satisfaction of the Council's requirements under this policy and the requirements of sections 94F and 94G of the Act for the purposes of the Development.

9 Registration of this Agreement

Not used.

10 Review of this Agreement

This Agreement may not be varied other than with the written Agreement of both of the Parties.

11 Dispute Resolution

11.1 Notice of dispute

- (a) If a difference or dispute (together called a **Dispute**) between the Parties arises out of or relates to this Agreement, or the breach, termination, validity or subject matter of it, or as to any claim in tort, in equity or pursuant to any domestic or

international statute or law, then any Party may give the other Parties a written notice of dispute adequately identifying and providing details of the Dispute (**Notice of Dispute**).

- (b) Notwithstanding the existence of a Dispute, all Parties will, subject to this Agreement, continue to perform the agreement evidenced by this Agreement.

11.2 Conference

Within ten Business Days after receiving a Notice of Dispute, the Parties will confer at least once to resolve the Dispute or to agree on methods of doing so. At every such conference each Party will be represented by a person having authority to conduct negotiations as to such resolution or methods. All aspects of every such conference, except the fact of its occurrence, will be privileged.

11.3 Expert mediation

- (a) If the Parties agree that the Dispute does not relate to a technical matter of the kind referred to in clause 11.4, and is not resolved within the following five business days (or such further period as the representatives may agree is appropriate), the Parties in dispute agree to endeavour in good faith to settle the Dispute by mediation administered by the Australian Commercial Disputes Centre (**ACDC**) before having recourse to litigation.
- (b) The mediation will be conducted in accordance with ACDC Mediation Guidelines which set out the procedures to be adopted, the process of selection of the mediator and the costs involved and the terms of those Guidelines are incorporated in this Agreement.
- (c) This clause does not merge upon dedication or transfer of the Site, nor on termination of this Agreement.

11.4 Expert determination

- (a) If the Parties agree that the Dispute relates to a technical matter which requires technical expertise to resolve, and is not resolved within the following five business days (or such further period as the representatives may agree is appropriate), the Parties in dispute agree to settle the dispute by expert determination by an independent expert in the relevant field

agreed on and appointed jointly by the Council and the Developer with the expert determination administered by the ACDC.

- (b) If the Parties cannot agree on the appointment within 5 business days after referral of the dispute to the ACDC, the appointment must be made by the ACDC in accordance with the ACDC Guidelines.
- (c) The expert determination will be conducted in accordance with ACDC expert determination Guidelines and the terms of those Guidelines are incorporated in this Agreement.
- (d) The expert determination is final and binding on the Parties.
- (e) This clause does not merge on dedication or transfer of the Site nor on termination of this Agreement.

11.5 Exchange of information

The Parties acknowledge that the purpose of any exchange of information or documents or the making of any offer of settlement pursuant to this clause is to attempt to settle the Dispute between the Parties. No Party may use any information or documents obtained through the dispute resolution process established by clause 11.1 for any purpose other than an attempt to settle a Dispute between the Parties.

11.6 Termination of dispute resolution

After expiration of the time established by or agreed under this clause for Agreement on the dispute resolution process, any Party which has complied with the provisions of clauses 11.1 to 11.4, may in writing terminate the dispute resolution process provided for in those clauses and may then refer the Dispute to litigation.

12 Enforcement

Not used.

13 Notices

13.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

- (a) Delivered or posted to that Party at its address set out below.
- (b) Faxed to that Party at its fax number set out below.

- (c) Emailed to that Party at its email address set out below.

Council

Attention: [insert]

Address: [insert]

Fax Number: [insert]

Email: [insert]

Developer

Attention: Scott Gregg

Address: Level 5, 45 Ultimo Street

Sydney NSW 2007

Fax Number: 02 9356 1073

Email: sgregg@toga.com.au

- 13.2 If a Party gives the other Party 3 business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.

- 13.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:

- (a) If it is delivered, when it is left at the relevant address.
- (b) If it is sent by post, 2 business days after it is posted.
- (c) If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.

- 13.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

14 Approvals and consent

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 obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

15 Assignment and Dealings

This Agreement may only be assigned by either Party with the consent in writing of the other Party.

16 Costs

Each Party must bear its own costs and expenses of negotiating, preparing, executing and performing its obligations under this Agreement.

17 Entire agreement

This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.

18 Further acts

Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.

19 Governing law and jurisdiction

This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

20 Joint and individual liability and benefits

Except as otherwise set out in this Agreement, any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

21 No fetter

Nothing in this Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

22 Representations and warranties

The Parties represent and warrant that they have power 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.

23 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.

24 Modification

No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

25 Waiver

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.

26 GST

If any Party reasonably decides that it is liable to pay GST on a supply made to the other Party under this Agreement and the supply was not priced to include GST, then recipient of the supply must pay an additional amount equal to the GST on that supply.

Schedule 1 to Planning Agreement No [insert]

The Land

Folio Identifier	Lot and DP	Address
6/4/747	Lot 6 Section 4 DP747	61-67 Hall Street, Bondi NSW 2026
7/4/747	Lot 7 Section 4 DP747	
1/100407	Lot 1 DP100407	
2/ 959661	Lot 2 DP959661	
Auto Consol 12306-221	Lot 1 DP951887	71 Hall Street, Bondi NSW 2026
	Lot 1 DP1032731	
34/662281	Lot 34 DP662281	73– 75 Hall Street, Bondi NSW 2026
2/951887	Lot 2 DP951887	
CP/SP31746	CP SP31746	77-79 Hall Street, Bondi NSW 2026
1/SP31746	Lot 1 SP31746	
2/SP31746	Lot 2 SP31746	
3/SP31746	Lot 3 SP31746	
4/SP31746	Lot 4 SP31746	
5/SP31746	Lot 5 SP31746	
5/SP31746	Lot 6 SP31746	
7/SP31746	Lot 7 SP31746	
8/SP31746	Lot 8 SP31746	
9/SP31746	Lot 9 SP31746	
10/SP31746	Lot 10 SP31746	
11/SP31746	Lot 11 SP31746	
12/SP31746	Lot 12 SP31746	
13/SP31746	Lot 13 SP31746	
14/SP31746	Lot 14 SP31746	

Schedule 2 to Planning Agreement No [insert]

Monetary Contribution

Amount	Public Purpose
\$ 432,580.00	Contribution towards the provision of affordable housing in accordance with the <i>Waverley Council Affordable Housing Program Policy 2007</i> .

Execution of Planning Agreement No. [insert] of 2008

Dated: [insert]

Executed as an Agreement:

On behalf of the Council:

The Seal of Waverley Council was affixed in accordance with a resolution passed at a duly convened meeting held on ## in the presence of:

General Manager

Mayor

On behalf of Toga Development No. 45 Pty Limited

by:

Director/Secretary

Director

Name (please print)

Name (please print)