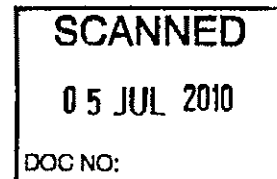


Date 1 / 07 /2010



## **Planning Agreement Under Section 93F of the Environmental Planning & Assessment Act 1979**

**City of Canada Bay Council**

and

**Billbergia Developments Pty Ltd**

**lindsaytaylorlawyers**

Level 7, 1 O'Connell Street, Sydney NSW 2000 Australia

T 02 8235 9700 • F 02 8235 9799 • W [www.lindsaytaylorlawyers.com.au](http://www.lindsaytaylorlawyers.com.au) • E [mail@lindsaytaylorlawyers.com.au](mailto:mail@lindsaytaylorlawyers.com.au)  
ABN 15 695 894 345

Liability limited by a scheme approved under Professional Standards Legislation

Q

O

## Table of Contents

<b>Parties</b> .....	<b>4</b>
<b>Recitals</b> .....	<b>4</b>
<b>Operative Provisions</b> .....	<b>4</b>
1    Definitions .....	4
2    Application Of Agreement.....	7
3    Specific Obligations Of The Developer.....	8
4    Release of Security.....	11
5    Application of s94, s94A and s94EF of the Act .....	12
6    Status of Agreement .....	12
7    Procedures Relating to Payment of Monetary Development Contributions .....	13
8    Procedures Relating to the Dedication of Land .....	13
9    Access to the Land .....	13
10   Protection of People & Property, Indemnity & Insurance .....	14
11   Damage & Repairs to Work .....	14
12   Variation of Work .....	15
13   Procedures Relating to Completion of Work.....	15
14   Rectification of Defects & Maintenance .....	15
15   Failure to Carry out Embellishment Work or Maintenance .....	16
16   Dispute Resolution.....	16
17   No Fetter .....	17
18   GST .....	17
19   General .....	18
20   Notices .....	19
21   Interpretation.....	20
22   Commencement Of Agreement .....	22
23   Ending Of Agreement .....	22
24   Explanatory Note .....	22
<b>Execution</b> .....	<b>23</b>
<b>Schedule 1</b> .....	<b>24</b>
The Land.....	24
<b>Schedule 2</b> .....	<b>25</b>
Staging, Monetary Development Contributions & Security .....	25
<b>Schedule 3</b> .....	<b>27</b>
Public Purposes for Monetary Development Contribution.....	27
<b>Schedule 4</b> .....	<b>28</b>
PART A - Dedication Land.....	28
PART B - Timing of Dedication of Dedication Land .....	29
<b>Schedule 5</b> .....	<b>30</b>
Part A - Embellishment Work.....	30
Part B - Redundant Work.....	31

Part C - Offset Value of Embellishment Work .....32  
Schedule 6 .....33  
Landscape Plan .....33  
Schedule 7 .....34  
Novation Deed .....34  
Appendix .....35

# Rhodes West Planning Agreement

DATE 1 / 07 /2010

## Parties

**City Of Canada Bay Council** ABN 79 130 029 350 of Civic Centre, Marlborough Street, Drummoyne, NSW, 2047 **(Council)**

and

**Billbergia Developments Pty Ltd** ABN 96110961610 of Level 2, 25 Angas St, Meadowbank, NSW, 2114 **(Developer)**

## Recitals

- A The Council proposes to seek the Instrument Change.
- B The Developer proposes to lodge a Development Application with Council once the Instrument Change has occurred.
- C The Developer has agreed to make Development Contributions in connection with the carrying out of the Development if Development Consent is granted to the Development Application and is operative.

## Operative Provisions

### 1 Definitions

1.1 In this document unless expressed or implied to the contrary:

**Act** means the *Environmental Planning & Assessment Act 1979*, as amended.

**Additional Gross Floor Area** means Gross Floor Area exceeding any Gross Floor Area approved for the Land before this Agreement is entered into and that is only permissible on the Land as a result of the Instrument Change.

**Adjustment** has the same meaning given to that term in the GST Act.

**Adjustment Note** has the same meaning given to that term in the GST Act.

**Agreement** means this agreement.

**Amended LEP** means the *Canada Bay Local Environmental Plan 2008* as amended by the Instrument Change.

**Bank Guarantee** means an irrevocable and unconditional undertaking without any expiry or end date, to the satisfaction of Council, acting reasonably, 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 Limited;
- (e) St George Bank Limited;
- (f) Westpac Banking Corporation; or
- (f) any other financial institution approved by the Council in response to a request from the Developer.

**Business Day** means Monday to Friday excluding public holidays in New South Wales.

**Chartered Quantity Surveyor** means a Chartered Quantity Surveyor engaged by the Developer from a list agreed between the Council and the Developer [REDACTED].

**Consideration** means consideration payable under this Agreement in return for a Taxable Supply, but does not include any amount on account of GST.

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

**Dedication Land** means the land shown in Part A of Schedule 4.

**Defects Liability Period** in relation to the Embellishment Work means the period commencing on the date on which written notice is given by the Developer to the Council of compliance with either of clauses 3.2.3(a) or (b) in relation to that Work and ending 6 months after that date.

**Development** means any development of the Land that is permissible under the Amended LEP.

**Development Application** means an application under Part 3A or 4 of the Act relating to the Development.

**Development Consent** means a consent or approval granted under the Act to a Development Application that is operative.

**Development Contribution** means a monetary contribution, the dedication of land free of cost, the carrying out of work, or the provision of any other material public benefit, or any combination of them, to be used for, or applied towards, the provision of Public Infrastructure or another public purpose and includes Embellishment Work.

**Development Contributions Security** means 100% of the value of the monetary Development Contributions determined in accordance with clause 3.1.1 and irrespective of the Offset Value of Embellishment Work.

**Embellishment Work** means:

- (a) Work on the Dedication Land that is to be dedicated to the Council in conjunction with the Dedication Land, or
- (b) Work on any other land agreed in writing between the Developer and the Council,

being Work that is specified in Column 1 of the Table in Part A of Schedule 5 or otherwise agreed in writing between the Council and the Developer.

**Final Lot** means a lot which is not intended by the Developer to be further subdivided (including by a strata subdivision) for the purposes of the Development.

**Floor Space Precinct** has the same meaning as in the *Sydney Regional Environmental Plan No. 29 – Rhodes Peninsula*.

**Gross Floor Area** means the sum of the areas of each floor of a building, where the area of each floor is taken to be the area within the outer face of the external enclosing walls as measured at a height of 1,400 millimetres above each floor level, excluding:

- (a) columns, fin walls, shade devices, and any elements, projections or works outside the general lines of the outer face of the external wall, and
- (b) lift towers, cooling towers, machinery and associated plant rooms, and ancillary storage space and vertical air conditioning ducts, and
- (c) such car, coach and bicycle parking as is required to comply with any development control plan and any internal access to that parking, and
- (d) space for the loading and unloading of goods, and any waste management areas, and
- (e) floor area set aside for communal recreational use within a residential building (not exceeding 5% of the gross floor area of the building, calculated on the basis that this floor area has been included), and
- (f) any terraces and balconies with walls less than 1.5 metres high, and
- (g) enclosed balconies used for residential purposes (not exceeding 5% of the gross floor area of the building, calculated on the basis that this floor area has been included), and
- (h) common or public areas, including arcades and circulation space.

**GST Act** means *A New Tax System (Goods and Services Tax) Act 1999* (as amended).

**GST** has the same meaning given to that term in the GST Act.

**Input Tax Credit** has the same meaning given to that term in the GST Act, but also includes a reduced input tax credit under Division 70 and an adjusted input tax credit under Division 132 of the GST Act.

**Instrument Change** means the making of the Rhodes West LEP.

**Land** means the land specified or identified in Schedule 1.

**Maintenance Obligation** means the obligation imposed on the Developer by clause 14.3.

**Maintenance Period** means the same period as the Defects Liability Period in relation to the same Work to which the Defects Liability Period applies.

**Novation Deed** means a deed substantially in the form of the Deed in Schedule 7.

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

**Offset Value of Embellishment Work** means:

- (a) the amount specified or provided for in Part C of Schedule 5, or
- (b) if no amount is so specified or provided for, the Value of Embellishment Work less the Value of Redundant Work.

**Prescribed Rate** means the rate prescribed from time to time under the *Uniform Civil Procedure Rules 2005* as the rate of interest on judgment debts plus 2%, calculated daily and compounded on the last day of each month.

**Public Infrastructure** has the same meaning as in the Act.

**Recipient** has the same meaning given to that term in the GST Act.

**Rectification Notice** means a notice in writing given by the Council to the Developer at any time during the first two months of the Defects Liability Period that identifies a defect in Embellishment Work and requires rectification of the defect by the end of the Defects Liability Period.

**Redundant Work** means:

- (a) Work specified or described in Column 1 of the Table in Part B of Schedule 5 or
- (b) if no Work is so specified or described, Work that the Developer would have been required to carry out in relation to the Development under the *Sydney Regional Environmental Plan No. 29 – Rhodes Peninsula*, the *Renewing Rhodes Contributions Framework*, the *Renewing Rhodes Development Control Plan 2001*, and master plans for Floor Space Precincts B and C but which are no longer required under the *Rhodes West Draft Master Plan 2010*.

**Regulation** means the *Environmental Planning and Assessment Regulation 2000*, as amended.

**Rhodes West LEP** means the *draft Canada Bay Local Environmental Plan 2008 (Amendment No. 1 – Rhodes West)*.

**Stage** means a stage in the Development:

- (a) authorised by a Development Consent for the Development, or
- (b) otherwise authorised by Schedule 2 for the purposes of this Agreement.

**Supplier** means the entity making a Supply to the Recipient.

**Supply** has the same meaning given to that term in the GST Act.

**Tax Invoice** has the same meaning given to that term in the GST Act.

**Taxable Supply** has the same meaning given to that term in the GST Act.

**Value of Embellishment Work** means:

- (a) the sum of the \$ amounts specified in Column 2 of the Table in Part A of Schedule 5, or
- (b) if no amounts are so specified, the construction cost of the Embellishment Work determined by a Chartered Quantity Surveyor based on the Landscape Plan contained in Schedule 6 or a detailed Landscape Plan otherwise approved by Council.

**Value of Redundant Work** means:

- (a) the sum of the \$ amounts specified in Column 1 of the Table in Part B of Schedule 5, or
- (b) if no amount is so specified, the amount determined by a Chartered Quantity Surveyor of Work which the Developer would have been required to carry out in relation to the Development under the *Sydney Regional Environmental Plan No. 29 – Rhodes Peninsula*, the *Renewing Rhodes Contributions Framework*, the *Renewing Rhodes Development Control Plan 2001*, and master plans for Floor Space Precincts B and C but which are no longer required under the *Rhodes West Draft Master Plan 2010*.

**Work** means the physical result of any building, engineering or construction work in, on, over or under land required to be carried out by the Developer under this Agreement.

## 2 Application Of Agreement

- 2.1 This Agreement applies to the Land, the Dedication Land and to the Development.

### **3 Specific Obligations Of The Developer**

#### **3.1 Monetary Development Contributions**

- 3.1.1 The Developer is to pay a monetary Development Contribution to the Council of:
- (a) \$1,000.00 for each square metre (or part thereof) of Additional Gross Floor Area in the Development that is to be used for the purpose of retail premises within the meaning of the Amended LEP, and
  - (b) \$588.24 for each square metre (or part thereof) of Additional Gross Floor Area in the Development that is to be used for business premises within the meaning of the Amended LEP, and
  - (c) \$588.24 for each square metre (or part thereof) of Additional Gross Floor Area in the Development that is to be used for residential accommodation within the meaning of the Amended LEP
- 3.1.2 If the Developer provides Development Contributions Security to the Council in accordance with clause 3.4.1 and:
- (a) Stages are authorised for the Development:
    - (i) an instalment of the monetary Development Contributions is payable to the Council for each Stage before an application is made for the final Occupation Certificate for the Stage or at such other time or times as is specified in Schedule 2 or otherwise agreed in writing between the Parties, and
    - (ii) are to be calculated for each Stage by reference to the amount of Additional Gross Floor Area authorised for the Stage unless Schedule 2 specifies differently.
  - (b) Stages are not authorised for the Development, the monetary Development Contributions are payable to the Council before an application is made for the final Occupation Certificate for the Development or at such later time as is agreed in writing between the Parties.
- 3.1.3 For the purposes of clause 3.1.2:
- (a) the Developer is to give the Council not less than 7 Business Days notice of its intention to apply for a final Occupation Certificate, and
  - (b) the notice is to be accompanied by a copy of the final Occupation Certificate application and written information setting out the amount of Additional Gross Floor Area to which the final Occupation Certificate application relates and the Offset Value of the Embellishment Work.
- 3.1.4 Money paid under clause 3.1.1 is to be held and applied by the Council towards the public purposes specified in Schedule 3 to this Agreement.
- 3.1.5 Monetary Development Contributions payable under this Agreement are to be indexed between the date of this Agreement and the date of payment in accordance with the

Consumer Price Index (All Groups - Sydney) published by the Australian Bureau of Statistics.

### **3.2 Dedication of Land**

3.2.1 The Developer is to dedicate the Dedication Land to Council:

- (a) at the time or times specified in Part B of Schedule 4, or
- (b) if no time or times are so specified, prior to an application being made for the last Occupation Certificate for the Development.

3.2.2 For the purposes of clause 3.2.1, the Developer is to give the Council not less than 7 Business Days notice of its intention to apply for the last Occupation Certificate, and

3.2.3 Before the Dedication Land is dedicated in accordance with clause 3.2.1:

- (a) an Occupation Certificate for the Embellishment Work on the Dedication Land must be issued, and a copy provided to the Council, or
- (b) other written evidence of substantial completion of the Embellishment Work on that land as agreed between the Parties, acting reasonably, must be provided to the Council.

3.2.4 Land dedicated under clause 3.2.1 is to be held and applied by the Council for the purposes of public open space.

3.2.5 Subject to the issue of a Notice of Dispute under clause 16, Council must not unreasonably withhold its consent to a transfer of the Dedication Land if the Developer has complied with clause 3.2.3.

3.2.6 For the avoidance of doubt, nothing in this Agreement prevents the transfer of the Dedication Land prior to the end of the Defects Liability Period, or Maintenance Period.

### **3.3 Application of Development Contributions by the Council**

3.3.1 Subject to clause 3.1.4, the Council is to apply each Development Contribution made by the Developer under this Agreement towards the public purposes for which it is made and otherwise in accordance with this Agreement.

### **3.4 Provision of Security**

3.4.1 The Developer is to provide the Development Contributions Security to the Council as follows:

- (a) if Stages are authorised for the Development, as a Bank Guarantee for:
  - (i) the monetary Development Contributions payable for a Stage, or
  - (ii) such other amount as is specified in Schedule 2

before the issuing of the first Construction Certificate for the Stage,

- (b) if no Stages are authorised for the Development, as a Bank Guarantee for the Development Contributions Security before the issuing of the first Construction Certificate for the Development.

### 3.5 Embellishment Work

3.5.1 The Developer is to carry out Embellishment Work but only if:

- (a) it is carried out in accordance with plans approved by Council, and
- (b) the Offset Value of Embellishment Work is known.

3.5.2 The Offset Value of Embellishment Work is to be applied as a credit against the Developer's obligation to pay monetary Development Contributions under clause 3.1.1 (**Embellishment Work Credit**) and no monetary Development Contributions are required to be paid to the Council in accordance with this Agreement unless and until the Embellishment Work Credit has been exhausted.

3.5.3 Embellishment Work must be carried out:

- (a) in a manner and to a design and specification approved by the Council, and
- (b) in accordance with any applicable Development Consent or other applicable law.

3.5.4 Council must not unreasonably withhold the approval required under clause 3.5.3(a) and must notify the Developer of its grant of that approval prior to the date on which the Developer is obliged to commence Embellishment Work under this Agreement.

3.5.5 The Offset Value of the Embellishment Work is to be indexed in accordance with the Consumer Price Index (All Groups - Sydney) published by the Australian Bureau of Statistics between:

- (a) if the Offset Value of the Embellishment Work, or the Value of the Embellishment Work and the Value of the Redundant Work is specified in this Agreement - the date of this Agreement; or
- (b) if not - the date on which the Offset Value of the Embellishment Works is first calculated,

and the date on which the Embellishment Work Credit is applied pursuant to this clause 3.5.

### 3.6 Non-Compliance - Generally

3.6.1 If the Developer has not complied with this Agreement in any material respect, the Council may issue a notice requiring the Developer to comply with the Agreement within a period of time specified in the notice, not being less than 14 days, and such period of time must be reasonable, having regard to the nature of the non-compliance.

3.6.2 The Developer agrees that if the Developer has not complied with this Agreement within the period of time specified in a notice issued pursuant to clause 3.6.1, subject to the issue of a Notice to Dispute under clause 16, it will pay to Council on demand, Council's reasonable costs and expenses incurred as a result of the non-compliance.

3.6.3 Subject to the issue of a Notice to Dispute under clause 16, the Council may call-up the Bank Guarantee if, in its absolute discretion and despite clause 3.6.1 and clause 16, it considers that the Developer has materially breached this Agreement.

- 3.6.4 Subject to the issue of a Notice to Dispute under clause 16, if the Council calls on the Bank Guarantee, it may use the \$ amount so paid to it in satisfaction of any costs incurred by it in remedying the Developer's breach being:
- (a) the reasonable costs of the Council's servants, agents and contractors reasonably incurred for that purpose, and
  - (b) all legal costs and expenses reasonably incurred by the Council, by reason of the Developer's breach.
- 3.6.5 The Developer agrees that;
- (a) it will accept a certificate signed by the General Manager of the Council (or the nominee of the General Manager), supported by paid tax invoices, as prima facie proof of the costs and expenses incurred by Council in rectifying the Developer's non-compliance with this Agreement, and
  - (b) Council's costs and expenses will include interest calculated at the Prescribed Rate on all moneys outstanding under this Agreement until they are paid in full.
- 3.6.6 If the Council calls on the Bank Guarantee in accordance with this Agreement, the Council may, by notice in writing to the Developer, require the Developer to provide a further or replacement Bank Guarantee in an amount that, when added to any unused portion of any existing Bank Guarantee, does not exceed the amount of the Bank Guarantee the Council is entitled to hold under clause 3.4.

## **4 Release of Security**

### **4.1 Release & return of Development Contributions Security**

- 4.1.1 Subject to clause 4.1.2, the Council is to progressively release and return the Development Contributions Security to the Developer:
- (a) when the Developer has completed its obligations under this Agreement to make Development Contributions relating to the Development or a Stage of the Development, as the case may be, or at such other time or times as is specified in Schedule 2,
  - (b) when the Developer notifies the Council in writing that:
    - (i) it does not intend to carry out the Development, and
    - (ii) will provide the Development contributions Security to the Council in accordance with this Agreement before it makes any Development Application to develop the Land that involves Additional Gross Floor Area, or
  - (c) when a replacement Development Contributions Security is provided by or on behalf of a party who has entered into the Novation Deed.
- 4.1.2 The Parties agree that:

- (a) the Council may retain 5% of the Development Contributions Security as a bond to secure performance by the Developer of;
    - (i) its obligation to remedy defects in the Embellishment Work during the Defects Liability Period, and
    - (ii) its Maintenance Obligation, and
  - (b) any unused part of the retained Development Contributions Security:
    - (i) at the end of the Defects Liability Period, or
    - (ii) on the date on which the Maintenance Obligation is completed to the reasonable satisfaction of the Council,
- whichever is the later, is to be immediately returned to the Developer by the Council.

## **5 Application of s94, s94A and s94EF of the Act**

### **5.1 Application of s94, s94A and s94EF of the Act**

- 5.1.1 This Agreement excludes the application of s94 of the Act to the Development.
- 5.1.2 This Agreement excludes the application of s94A of the Act to the Development.
- 5.1.3 This Agreement does not exclude the application of s94EF of the Act to the Development.
- 5.1.4 The Developer agrees to make monetary Development Contributions in relation to the Development (including in relation to any Additional Gross Floor Area) calculated in accordance with the *Renewing Rhodes Contributions Framework*.
- 5.1.5 The monetary Development Contributions required by clause 5.1.4 are to be paid in accordance with clause 3.1.2.
- 5.1.6 The Council will not have regard to any other Development Contributions made under this Agreement when calculating the amount of the monetary Development Contributions to be paid under clause 5.1.4.

## **6 Status of Agreement**

- 6.1 The Developer is under no obligation to make Development Contributions to the Council as provided for in this Agreement unless and until the following matters have occurred in sequence:
  - 6.1.1 the Instrument Change has occurred, and
  - 6.1.2 an operative Development Consent is granted to in relation to the Development or any Stage of the Development that authorises the Developer to take-up Additional Gross Floor Area and operates to require the Development Contributions in this Agreement to be made.
- 6.2 Until then, this Agreement contains the Developer's irrevocable offer to make the Development Contributions once the matters specified in clause 6.1 have occurred.

- 6.3 The Council must notify the Developer immediately after the Council executes this Agreement and promptly provide the Developer with the Agreement as executed by the Council.

## **7 Procedures Relating to Payment of Monetary Development Contributions**

- 7.1 A monetary Development Contribution is made for the purposes of this Agreement when the Council receives the full amount of the contribution payable under this Agreement in cash or by unendorsed bank cheque or by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by the Council.
- 7.2 The Developer is to give the Council not less than 2 Business Days written notice of its intention to pay a monetary Development Contribution.
- 7.3 The Developer is not in breach of this Agreement if it fails to pay a monetary Development Contribution at the time required by this Agreement by reason only of the Council's failure to give to the Developer a tax invoice in relation to the amount proposed to be paid by it.

## **8 Procedures Relating to the Dedication of Land**

- 8.1 A Development Contribution comprising the dedication of land is made for the purposes of this Agreement when the Council is given an instrument or plan in registrable form under the *Real Property Act 1900* that is effective to transfer the title to the land to the Council when registered.
- 8.2 For the purposes of clause 8.1:
- 8.2.1 the Developer is to give the Council, for execution by the Council as transferee, an instrument of transfer under the *Real Property Act 1900* relating to the land to be dedicated, and
- 8.2.2 the Council is to execute the instrument of transfer and return it to the Developer within 7 Business Days of receiving it from the Developer,
- 8.2.3 the Developer is to lodge the instrument of transfer for registration at the Land and Property Management Authority within 7 Business Days of receiving it from the Council duly executed,
- 8.2.4 the Parties are to do all things reasonably necessary to enable registration of the instrument of transfer to occur.
- 8.3 The Developer is to give to the Council the instrument of transfer relating to Dedication Land not later than 7 Business Days after:
- 8.3.1 an Occupation Certificate for Embellishment Work on the land is issued, or
- 8.3.2 other written evidence of substantial completion of the Embellishment Work on that land as agreed between the Parties is provided to the Council.

## **9 Access to the Land**

- 9.1 The Developer is to permit the Council, its officers, employees, agents and contractors to enter the Land at any time, upon giving reasonable prior notice, in order to inspect, examine or test any Work or to remedy any breach of the Developer relating to the carrying out of a Work.
- 9.2 Once the Dedication Land is transferred to the Council, the Council must permit the Developer, its officers, employees, agents and contractors to enter the Dedication Land at any time, upon giving reasonable prior notice, in order for the Developer to carry out its obligation under this Agreement to rectify defects in the Embellishment Works, and the Maintenance Obligation.

## **10 Protection of People & Property, Indemnity & Insurance**

- 10.1 The Developer is to ensure to the fullest extent reasonably practicable in relation to the carrying out of any Work that the Developer complies with all laws including all conditions of any applicable Development Consent, environmental laws and occupational health and safety laws.
- 10.2 The Developer indemnifies the Council, its employees, officers, agents, contractors and workmen from and against all losses, damages, costs (including legal costs on a full indemnity basis), charges, expenses, actions, claims and demands whatsoever which may be sustained, suffered, recovered or made arising in connection with the carrying out by the Developer of Embellishment Work between the date the Dedication Land is dedicated to the Council and the date that Embellishment Work is completed for the purposes of this Agreement.
- 10.3 The Developer is to take out and keep current to the satisfaction of the Council the following insurances in relation to the carrying out by the Developer of Embellishment Work between the date the Dedication Land is dedicated to the Council and the date that Embellishment Work is completed for the purposes of this Agreement:
  - 10.3.1 public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party,
  - 10.3.2 workers compensation insurance as required by law, and
  - 10.3.3 any other insurance required by law.
- 10.4 If the Developer fails to comply with clause 10.3, the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Developer to the Council and may be recovered by the Council as it deems appropriate including:
  - 10.4.1 by calling upon the Development Contributions Security, or
  - 10.4.2 recovery as a debt due in a court of competent jurisdiction.
- 10.5 The Developer is not to commence to carry out any Embellishment Work unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 10.3.

## **11 Damage & Repairs to Work**

- 11.1 Subject to the resolution of a Dispute under clause 16, the Developer, at its own cost, is to repair and make good to the reasonable satisfaction of the Council, any loss or damage to Embellishment Work required to be carried out under this Agreement from any cause whatsoever resulting from action or inaction by the Developer, its agents, employees or contractors, which occurs before the date on which the Embellishment Work is completed..

## **12 Variation of Work**

- 12.1 Embellishment Work is not to be varied by the Developer, unless:
- 12.1.1 the parties agree in writing to the variation, and
  - 12.1.2 any consent or approval required under the Act or any other law to the variation is first obtained, and
  - 12.1.3 the Developer bears all of the Council's reasonable costs of and incidental to agreeing to and approving the variation, except where the variation is requested by Council after the approval of the Landscape Plan by Council..
- 12.2 For the purposes of clause 12.1 a variation may relate to any matter in relation to the Embellishment Works that is dealt with by this Agreement.

## **13 Procedures Relating to Completion of Work**

- 13.1 A Development Contribution comprising Embellishment Work is made for the purposes of this Agreement when the Embellishment Work is completed.
- 13.2 Embellishment Work is completed for the purposes of this Agreement:
- 13.2.1 at the end of the Defects Liability Period, or
  - 13.2.2 at such later time when the Developer complies with a Rectification Notice to the reasonable satisfaction of the Council.

## **14 Rectification of Defects & Maintenance**

- 14.1 Subject to the resolution of a dispute in accordance with clause 16, the Developer is to comply with a Rectification Notice within the Defects Liability Period at its own cost according to its terms and to the reasonable satisfaction of the Council.
- 14.2 Subject to the resolution of a dispute in accordance with clause 16, if the Developer breaches clause 14.1, the Council may have the relevant defect rectified and may, after giving the Developer not less than 10 Business Days notice in writing, recover its costs of so doing:
- 14.2.1 by calling upon the retained Development Contributions Security referred to in clause 4.1.2, or
  - 14.2.2 as a debt due in a court of competent jurisdiction.
- 14.3 The Developer is to maintain Embellishment Work during the Maintenance Period in accordance with any relevant conditions of Development Consent for the Development and otherwise to the reasonable satisfaction of the Council.

## 15 Failure to Carry out Embellishment Work or Maintenance

- 15.1 If the Council reasonably considers that the Developer is in breach of a material obligation under this Agreement relating to the carrying out of Embellishment Work or the Maintenance Obligation, the Council may give the Developer a notice requiring:
- 15.1.1 the carrying out of further work relating to the Embellishment Work or the doing of anything relating to the Maintenance Obligation to immediately cease except in relation to the rectification of the breach, and
  - 15.1.2 the breach to be rectified to the Council's reasonable satisfaction.
- 15.2 A notice given under clause 15.1 is to allow the Developer a period of not less than 28 days or such further period as the Council considers reasonable in the circumstances to rectify the breach.
- 15.3 Subject to the resolution of a dispute in accordance with clause 16, without limiting any other rights the Council has to enforce this Agreement, the Council may, if the Developer does not comply with a notice given under clause 15.1:
- 15.3.1 call upon the Development Contributions Security, and
  - 15.3.2 carry out and complete the Embellishment Work or the Maintenance Obligation the subject of the Developer's breach.

## 16 Dispute Resolution

- 16.1 If a dispute between Council and the Developer arises out of or is in any way connected with this Agreement, then either party may deliver by hand or send by certified mail or pre-paid express post to the other party a notice of dispute (**Notice of Dispute**) which must:
- 16.1.1 identify and provide adequate details of the dispute so as to enable the other party to fully understand the nature of the dispute, and
  - 16.1.2 designate as a party's representative in negotiations a person with authority to settle the dispute.
- 16.2 Within 5 Business Days after a party receives a Notice of Dispute under this clause (**Recipient Party**) it must give a notice to the other party designating the Recipient Party's representative who will have authority to settle the dispute.
- 16.3 The designated representatives under clauses 16.1.2 and 16.2 will have 10 Business Days from the date of the Notice of Dispute within which to negotiate a resolution of the dispute.
- 16.4 The parties will ensure that the designated representatives use their best endeavours to settle the dispute by negotiation within that period.
- 16.5 In the event that the persons negotiating pursuant to clause 16.3 cannot resolve the dispute within the 10 Business Days of referral, either party may give notice of particulars of such dispute to the other party and require that such dispute be resolved by an expert acceptable to both parties.
- 16.6 If the parties are unable to agree on an expert within 10 Business Days of the date of such notice of dispute, either party may require the President for time being of the Institute of Arbitrators and

Mediators in Australia (New South Wales Chapter) nominate an appropriate person or persons (having regard to the matters the subject of dispute) to determine the matters so under dispute and the parties agree to accept as expert the person so nominated.

## **17 No Fetter**

- 17.1 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.

## **18 GST**

### **18.1 GST Exclusive**

- 18.1.1 Except as otherwise provided by this clause, all Consideration payable under this Agreement in relation to any Supply is exclusive of GST.

### **18.2 Increase in Consideration**

- 18.2.1 To the extent that any Supply under this Agreement constitutes a Taxable Supply, the Consideration payable by the Recipient to the Supplier will be increased by the applicable amount of GST (**GST Amount**), which shall be calculated by multiplying the amount upon which GST is payable by the prevailing rate of GST.

### **18.3 Payment of GST**

- 18.3.1 Any GST Amount must be paid by the Recipient to the Supplier at the same time and in the same manner as the relevant Consideration is paid or given under this Agreement, without any right of set-off or deduction (unless otherwise provided in this Agreement).

### **18.4 Reimbursements**

- 18.4.1 If this Agreement requires the Recipient to pay, reimburse or contribute to any expense, loss or outgoing suffered or incurred by the Supplier (**Relevant Expense**), the amount which the Recipient must pay, reimburse or contribute will be the amount net of any Input Tax Credits to which the Supplier is entitled in respect of the Relevant Expense, together with any GST Amount if the payment, reimbursement or contribution constitutes a Taxable Supply by the Supplier to the Recipient.

### **18.5 Tax Invoice**

- 18.5.1 The Supplier must provide to the Recipient a valid Tax Invoice at or prior to the time of payment of any GST Amount.

### **18.6 Adjustments & Adjustment Notes**

- 18.6.1 To the extent that any Adjustment occurs in relation to a Taxable Supply, the Supplier must issue an Adjustment Note to the Recipient within 7 days of becoming aware of the Adjustment, and any payment necessary to give effect to such Adjustment must be made within 7 days after the date of receipt of the Adjustment Note.

## **19 General**

### **19.1 Amendment**

19.1.1 This Agreement may only be varied or replaced by an agreement duly executed by the parties.

### **19.2 Entire Understanding**

19.2.1 This Agreement contains the entire understanding between the parties as to the subject matter contained in it. All previous agreements, representations, warranties, explanations and commitments, expressed or implied, affecting this subject matter are superseded by this document and have no effect.

### **19.3 Further Assurance**

19.3.1 Each party must promptly execute and deliver all documents and take all other action necessary or desirable to effect, perfect or complete the transactions contemplated by this Agreement.

### **19.4 Legal Costs and Expenses**

19.4.1 The Developer must pay the Council's reasonable legal costs and expenses incurred in relation to the negotiation, preparation and execution of this Agreement and other agreements or documents referred to in it, unless expressly stated otherwise.

19.4.2 For the avoidance of doubt, Clause 19.4.1 requires the Developer to pay a share as between it and other developers of the Council's reasonable legal costs of drafting and negotiating the template agreement on which this Agreement is based determined in accordance with the apportionment to the Land of the total Additional Gross Floor Area for Rhodes West identified in the Rhodes West LEP.

### **19.5 Stamp Duty**

19.5.1 The Developer must pay all stamp duty (including all fines and penalties except those arising from the default of another party) on this Agreement and any document executed under it.

### **19.6 Waiver and Exercise of Rights**

19.6.1 A single or partial exercise or waiver of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.

19.6.2 No party will be liable for any loss or expenses incurred by another party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

### **19.7 Assignment**

19.7.1 Unless the matters specified in clause 19.7.2 are satisfied, the Developer is not to do any of the following:

- (a) transfer the Land or any part of it, other than a Final Lot, to any person, or
- (b) assign the Developer's rights or obligations under this Agreement, or novate this Agreement, to any person.

19.7.2 The matters required to be satisfied for the purposes of clause 19.7.1 are as follows:

- (a) the Developer has, at no cost to the Council, first procured the execution by the person to whom the Land or part is to be transferred, or the Developer's rights or obligations are to be assigned, or this Agreement is to be novated, of the Novation Deed,
- (b) the Developer has also executed the Novation Deed, and
- (c) the Developer is not in breach of this Agreement, or, if the Developer has breached the Agreement and has been issued with a notice under clause 3.6.1 or clause 15.1, the Developer has complied with that notice.

**19.8 Time of the Essence**

19.8.1 Time is of the essence as regards all dates, periods of time and times specified in this Agreement.

**19.9 Rule of Construction**

19.9.1 In the interpretation of this Agreement, no rule of construction applies to the disadvantage of the party preparing the document on the basis that it put forward this document or any part of it.

**19.10 Registration**

19.10.1 The parties agree to register this Agreement on the title to the Land and the Dedication Land, pursuant to s93H of the Act, subject to the agreement of the persons referred to in that section.

**20 Notices**

**20.1 Service of Notice**

20.1.1 A notice or other communication required or permitted, under this Agreement, to be served on a person must be in writing and may be served:

- (a) personally on the person,
- (b) by leaving it at the person's current address for service,
- (c) by posting it by prepaid post addressed to that person at the person's current address for service, or
- (d) by facsimile to the person's current number for service.

**20.2 Particulars for Service**

20.2.1 The particulars for service of Council are:

**Address:** Civic Centre, Marlborough Street, Drummoyne, NSW, 2047.

**Facsimile number:** 9911 6550.

**Contact person:** Tony McNamara.

**Email:** tony.mcnamara@canadabay.nsw.gov.au.

20.2.2 The particulars for service of the Developer are:

**Address:** Level 2, 25 Angas St, Meadowbank, NSW, 2114

**Facsimile number:** 02 8878 6995

**Contact person:** Bill McGarry

**Email:** bill.mcgarry@billbergia.com.au

20.2.3 Any party may change the address or facsimile number for service by giving notice to the other parties.

20.2.4 If the person to be served is a company, the notice or other communication may be served on it at the company's registered office.

### **20.3 Time of Service**

20.3.1 A notice or other communication is deemed served:

- (a) if served personally or left at the person's address, upon service,
- (b) if posted within Australia to an Australian address, two Business Days after posting and in any other case, seven Business Days after posting,
- (c) if served by facsimile, subject to clause 20.3.1(d), at the time indicated on the transmission report produced by the sender's facsimile machine indicating that the facsimile was sent in its entirety to the addressee's facsimile,
- (d) if received after 6.00pm in the place of receipt or on a day which is not a Business Day, at 9.00am on the next Business Day.

## **21 Interpretation**

### **21.1 Governing Law and Jurisdiction**

21.1.1 This document is governed by and is to be construed in accordance with the laws of New South Wales. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New South Wales and waives any right to object to proceedings being brought in those courts.

### **21.2 Persons**

21.2.1 In this document, a reference to:

- (a) a person includes a firm, partnership, joint venture, association, corporation or other corporate body,
- (b) a person includes the legal personal representatives, successors and permitted assigns of that person, and
- (c) any body which no longer exists or has been reconstituted, renamed, replaced or whose powers or functions have been removed or transferred to another body or agency, is a reference to the body which most closely serves the purposes or objects of the first-mentioned body.

### **21.3 Joint and Several**

21.3.1 If a party consists of more than one person, this document binds them jointly and each of them severally.

### **21.4 Legislation**

21.4.1 In this document, a reference to a statute includes regulations under it and consolidations, amendments, re-enactments or replacements of any of them.

## **21.5 This Agreement, Clauses and Headings**

### **21.5.1 In this Agreement:**

- (a) a reference to this Agreement or other document includes this Agreement or other document as varied or replaced regardless of any change in the identity of the parties,
- (b) a reference to a clause, Schedule, Appendix or annexure is a reference to a clause, schedule, appendix or annexure in or to this Agreement all of which are deemed part of this Agreement,
- (c) a reference to writing includes all modes of representing or reproducing words in a legible, permanent and visible form,
- (d) headings and sub-headings are inserted for ease of reference only and do not affect the interpretation of this document,
- (e) where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning, and
- (f) where the expression **including** or **includes** is used it means 'including but not limited to' or 'including without limitation'.

## **21.6 Severance**

21.6.1 If a provision in this Agreement is held to be illegal, invalid, void, voidable or unenforceable, that provision must be read down to the extent necessary to ensure that it is not illegal, invalid, void, voidable or unenforceable.

21.6.2 If it is not possible to read down a provision as required in this clause, that provision is severable without affecting the validity or enforceability of the remaining part of that provision or the other provisions in this document.

## **21.7 Counterparts**

21.7.1 This Agreement may be executed in any number of counterparts all of which taken together constitute one instrument.

## **21.8 Currency**

21.8.1 In this document, a reference to '\$' or 'dollars' is a reference to Australian dollars.

## **21.9 Business Day**

21.9.1 If a payment or other act is required by this document to be made or done on a day which is not a Business Day, the payment or act must be made or done on the next following Business Day.

## **21.10 Number and Gender**

21.10.1 In this Agreement, a reference to:

- (a) the singular includes the plural and vice versa, and
- (b) a gender includes the other genders.

## **21.11 Property**

21.11.1 In this Agreement, a reference to any property or assets of a person includes the legal and beneficial interest of that person

in those assets or property, whether as owner, lessee or lessor, licensee or licensor, trustee or beneficiary or otherwise.

#### **21.12 Personal Knowledge**

21.12.1 A reference to a matter being to the knowledge of a person means the matter is to the best of the knowledge and belief of the person after making proper enquiry including enquiry which a reasonable person would be prompted to make by reason of knowledge of a fact.

### **22 Commencement Of Agreement**

22.1 Unless otherwise provided in this Agreement, this Agreement commences on the date on which this Agreement has been executed by all of the Parties.

### **23 Ending Of Agreement**

23.1 This Agreement ends when:

23.1.1 the Developer has complied with all of the obligations imposed on the Developer under this Agreement,

23.1.2 the Developer is prevented from carrying out the Development because the Instrument Change is declared invalid or is not made or the Development Consent lapses or is declared invalid,

23.1.3 the Developer notifies the Council that it will not proceed with the Development,

23.2 As soon as reasonably practicable after the Agreement has ended, Council, will, at the request and at the cost of the Developer make application to the Land and Property Management Authority to cancel the recording of this Agreement on the register.

### **24 Explanatory Note**

24.1 The Appendix contains the Explanatory Note relating to this Agreement required by clause 25E of the Regulation.

24.2 Pursuant to clause 25E(7) of the Regulation, the parties agree that the Explanatory Note in the Appendix is not to be used to assist in construing this Planning Agreement.

## Execution

Executed as an Agreement

Dated:

---

Executed on behalf of the Council

---


General Manager

---

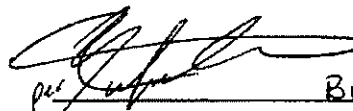
Witness/Name/Position

---

Executed on behalf of the Developer in accordance with s127(1) of the  
Corporations Act (Cth) 2001

 Director

Name/Position

 for  
BILL MCGAERY Project Director

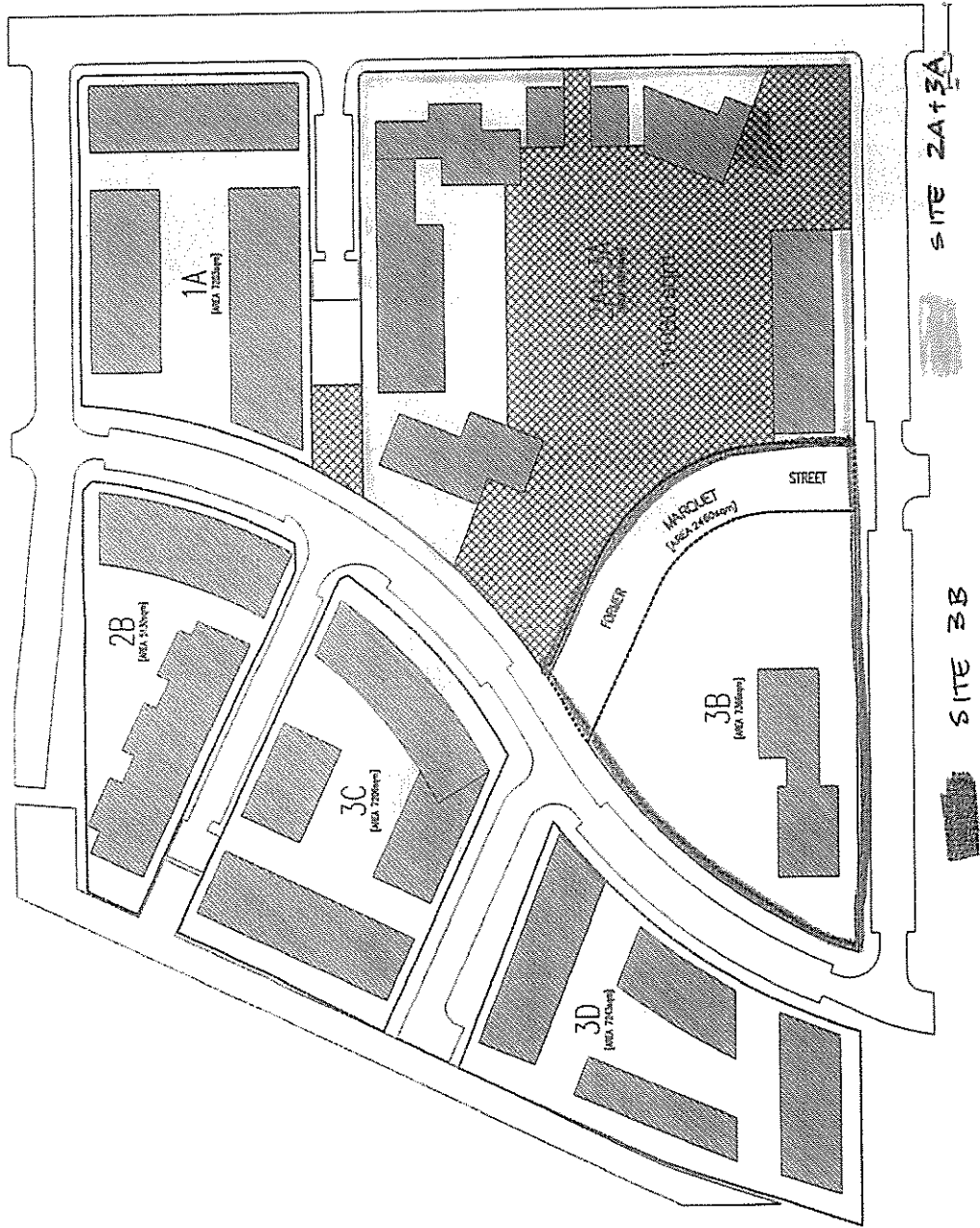
Name/Position

# **Schedule 1**

(Clause 1.1)

## **The Land**

Refer to attachment over "The Land Stage 2a and 3a"



THE LAND  
 STAGE 2A + 3A

**Schedule 2**

(Clause 1.1)

**Staging, Monetary Development Contributions & Security**

See following page

## Staging, Monetary Development Contributions & Security

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9
Stage	Additional Gross Floor Area in Stage	Monetary Development Contribution for Stage <sup>1</sup>	Offset Value of Embellishment Work for Stage <sup>2</sup>	Development Contribution Payable as Cash for Stage <sup>3</sup>	Timing of Security for Embellishment Works for Stage	Timing of Security for Development Contribution Payable as Cash for Stage	Offset Value of Embellishment Work for Which No Security Required <sup>4</sup>	Timing of Release and Return of Development Contributions Security
1	3000sqm	\$1,764,720.00	Refer VPA	Refer VPA	Refer VPA	Refer VPA	Refer VPA	Refer VPA
2	Refer VPA	\$nil	Refer VPA	Refer VPA	Refer VPA	Refer VPA	Refer VPA	Refer VPA
3	4000sqm	\$2,352,960.00	Refer VPA	Refer VPA	Refer VPA	Refer VPA	Refer VPA	Refer VPA
4	7000sqm	\$4,117,680.00	Refer VPA	Refer VPA	Refer VPA	Refer VPA	Refer VPA	Refer VPA
5	1000sqm	\$588,240.00	Refer VPA	Refer VPA	Refer VPA	Refer VPA	Refer VPA	Refer VPA

<sup>1</sup> See clause 3.1.1. This is the same as the Development Contributions Security required for the Stage.

<sup>2</sup> This is also the value of the Security for the Stage for Embellishment Work. The amount to be actually provided for the Stage for Embellishment Work is the amount in Column 4 minus the amount in Column 8.

<sup>3</sup> Security to this value must be provided for the Stage in relation to the cash component of the Development Contribution for the Stage.

<sup>4</sup> An amount should be inserted reflecting the agreed proportion of the amount in Column 4 that is attributable to completed Embellishment Work.

## **Schedule 3**

(Clause 3.1)

### **Public Purposes for Monetary Development Contribution**

- Embellishment of public open space including public toilets in Point Park and other embellishments and public facilities above the current standard of landscape embellishment and facilities provision considered as acceptable for the Rhodes Peninsula based on the Renewing Rhodes Contributions Framework dated November 2001 (Planning Framework); and the Renewing Rhodes Development Control Plan 2000 adopted in November 2001;
- Upgrading of roads and footpaths in Rhodes (East and West) to improve access and traffic flows; vehicular, cyclist and pedestrian safety and management, in and out of the Peninsula; and to improve amenity and safety generally above and in addition to that required in the Planning Framework and Renewing Rhodes Transport Management Plan dated November 2001;
- Bicycle storage and user facilities in addition to those facilities which would have had to be provided under the current Planning Framework and Transport Management Plan;
- Facilities associated with car share schemes, but only those which are available to the general public;
- Construction of a community facilities building.

**lindsaytaylorlawyers**

Level 7, 110 Circular Street, Sydney NSW 2000, Australia

T 02 8235 9700 • F 02 8235 9799 • W [www.lindsaytaylorlawyers.com.au](http://www.lindsaytaylorlawyers.com.au) • E [mail@lindsaytaylorlawyers.com.au](mailto:mail@lindsaytaylorlawyers.com.au)  
ABN 15 695 894 345

Liability limited by a scheme approved under Professional Standards Legislation

**Schedule 4**

(Clause 1.1)

**PART A - Dedication Land**

Title of the Land subject to site auditor sign off; refer to schedule # 1 for the subject Land for the purposes of this agreement.

## **PART B - Timing of Dedication of Dedication Land**

The timing for the dedication will be from the issuance of the first Construction Certificate of that relevant stage.

Stage 1: 24 months

Stage 2: 30 months

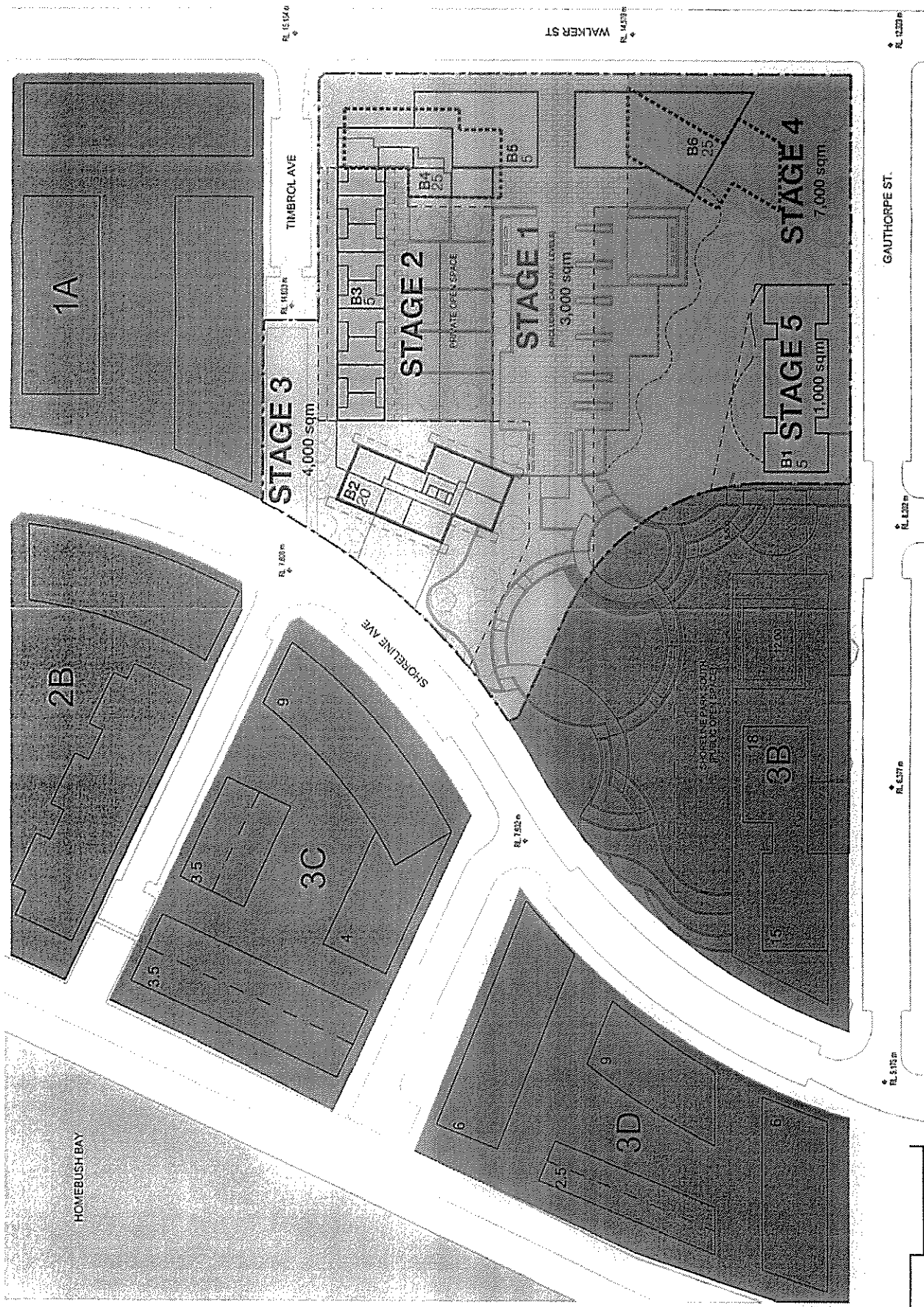
Stage 3: 42 months

Stage 4/5: 60 months

The Land shall be dedicated on the upper plaza level, 42 months after issuance of the first construction certificate for Stage 1

The Land shall be dedicated on the lower or arcade level, 72 months after issuance of the first construction certificate for Stage 1

Please refer to the attached staging plan of the development.



# STAGING PLAN - PODIUM LEVEL

Project	Billbergia - Mixed Use Development	Scale	1:1000	Sheet Size	A3
Location	Walker Street, Rhodes NSW	Date	30/10	Author	GAJ
Client	4410 SK-01	Drawn	JT	Checked	JP
Project No.	4410	Revised		Scale	1

In preparing and issuing this document, the engineer has assumed that all information provided is true and correct. The engineer is not responsible for any errors or omissions in this document. The engineer's liability is limited to the professional services provided. The engineer is not responsible for any structural or other design work. The engineer is not responsible for any construction or other work. The engineer is not responsible for any other work. The engineer is not responsible for any other work.

## Schedule 5

(Clause 1.1)

### Part A - Embellishment Work

Column 1	Column 2
Embellishment Work	Value of Embellishment Work
1. 11030m <sup>2</sup> @\$450/m <sup>2</sup>	\$ 4,963,500.00
2. Not Applicable	\$ Not Applicable
3. Not Applicable	\$ Not Applicable
4. Not Applicable	\$ Not Applicable
5. Not Applicable	\$ Not Applicable

## Part B - Redundant Work

Column 1	Column 2
Redundant Work	Value of Redundant Work
1. Not Applicable	\$ Not Applicable
2. Not Applicable	\$ Not Applicable
3. Not Applicable	\$ Not Applicable
4. Not Applicable	\$ Not Applicable
5. Not Applicable	\$ Not Applicable

Redundant work is not applicable to Billbergia Development as the value of redundant work is built into the sale price agreed with Renewing Homebush Bay (RHB). All obligations required under SREP 29 are RHB responsibility.

## Part C - Offset Value of Embellishment Work

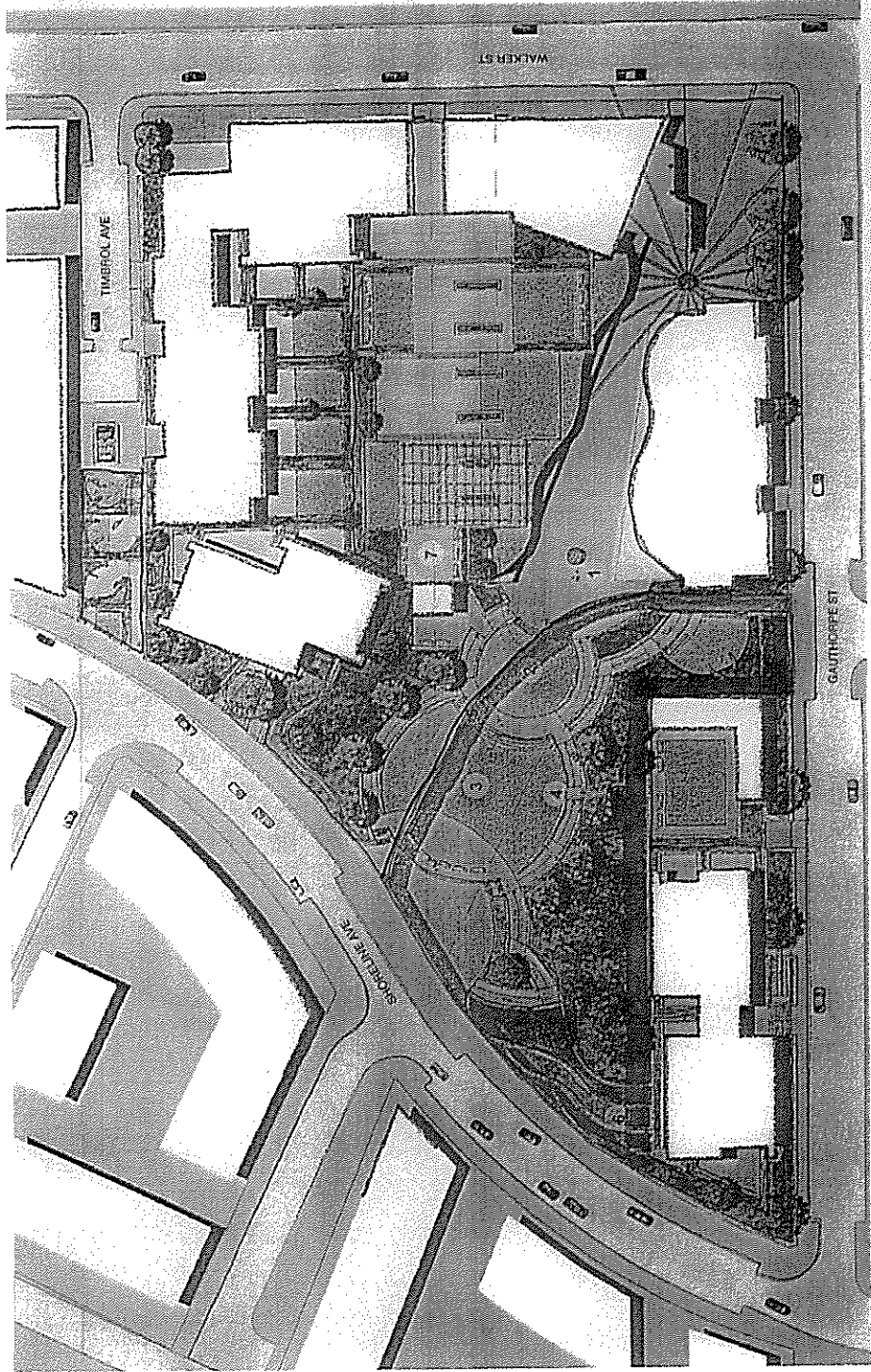
N/A refer to Part B Comments

**Schedule 6**

(Clause ##)

**Landscape Plan**

Landscape Plan Attached Over



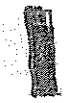
PUBLIC DOMAIN

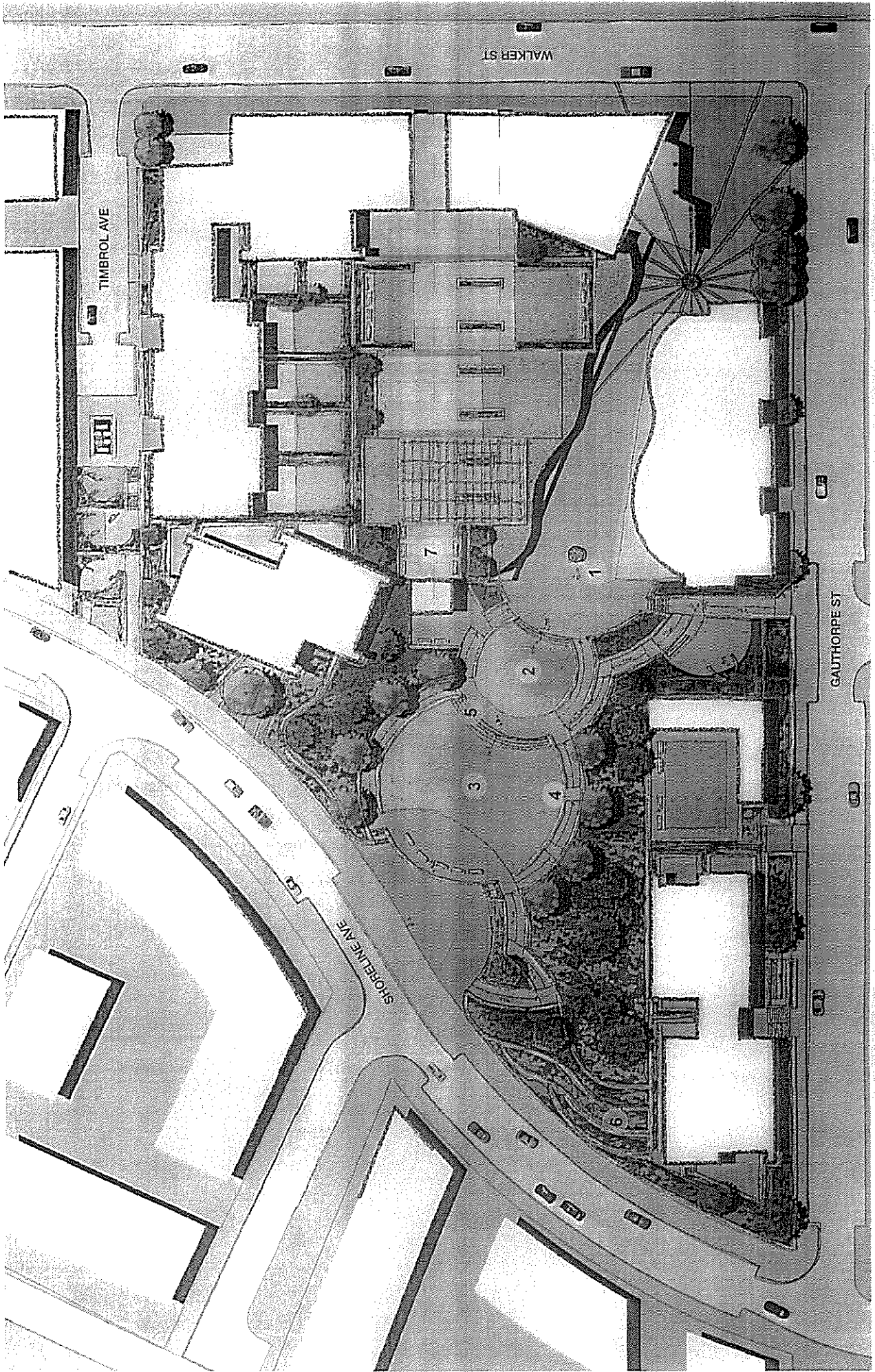
SITE 2A + 3A

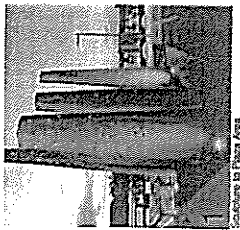


PUBLIC DOMAIN

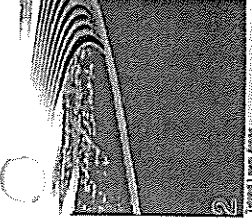
SITE 3B







INDICATIVE ONLY

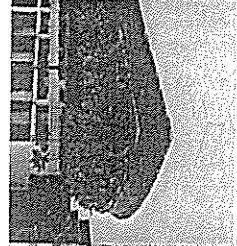


2

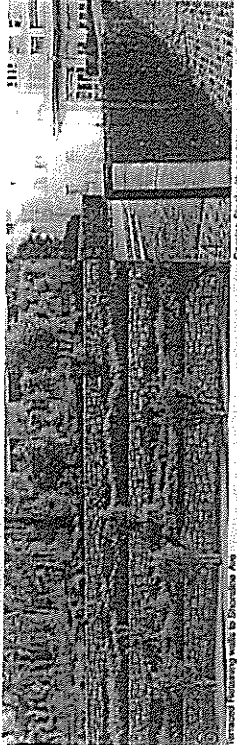
Concrete Slab with Aluminium core to allow finish



Concrete Slab with Aluminium core to allow finish

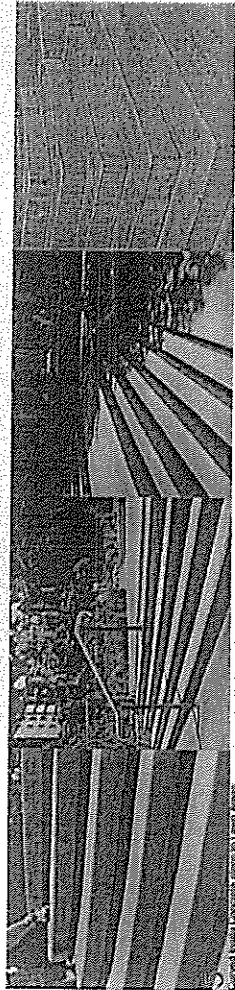


Concrete Slab with Aluminium core to allow finish

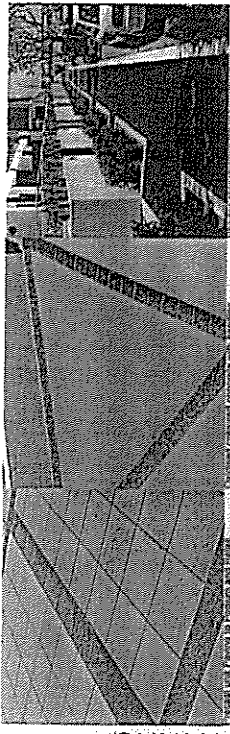


Concrete Slab with Aluminium core to allow finish

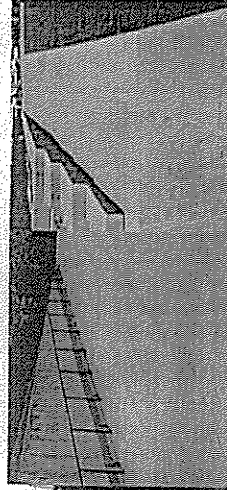
WALLS



STEPS



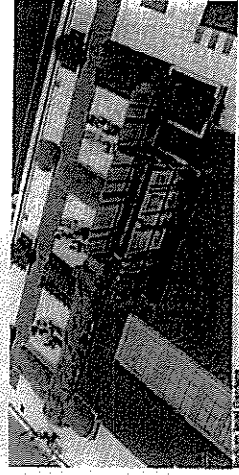
PAVING



RAMPS



FURNITURE



**SITE IMAGE**  
Landscape Architects

Sydney 28 Bowden Street Alexandria NSW 2015 Australia | Tel: +61 2 8588 2877 | Fax: +61 2 8588 2877 | www.siteimage.com.au | Site Image (NSW) Pty Ltd ABN 44 891 282 310

**RHODES COMMUNITY PARK**

**MATERIALS & DESIGN IMAGES**

DRAWING NO: SK591  
ISSUE: A  
CLIENT: BILLBERGIA / MULTIPLEX  
SI JOB NO: 5510-1663  
DATE: 21.05.2010

**Schedule 7**

(Clause 19.7)

**Novation Deed**

## **Appendix**

(Clause 24)

### **Explanatory Note**

#### **Draft Planning Agreement**

Under s116T of the Environmental Planning and Assessment Act 1979

#### **Parties**

**City of Canada Bay Council** ABN 79 130 029 350 of Civic Centre, Marlborough Street, Drummoyne, NSW, 2047 (Council)

**Billbergia Developments Pty Ltd** ABN 96110961610 of Level 2, 25 Angas St, Meadowbank, NSW, 2114 (Developer)

#### **Description of the Land to which the Draft Planning Agreement Applies**

The land is located on the Western Side of Walker St at Rhodes. The Site has a frontage to Walker Street. The Site is also bounded by Timbrol Ave and Gauthorpe Streets and Shoreline Ave. The Has an area of approximately 19,871 m<sup>2</sup>

#### **Description of Proposed Development**

The proposed development comprises of six buildings to be built over 5 stages. Three of the residential buildings will have non-residential uses at ground level. The non-residential uses will front Walker Street and the diagonal pedestrian plaza. There is approximately 700 residential apartments and 770 resident and visitor parking spaces.

A total of approximately 11000 m<sup>2</sup> of public open space.

An area of private and common open space for use by the residents and visitors.

Once level of basement car parking and one level partially above ground car parking.

#### **Summary of Objectives, Nature and Effect of the Draft Planning Agreement**

##### **Objectives of Draft Planning Agreement**

The objective of the Draft Planning Agreement is to provide suitable Development Contributions (within the meaning of Act) towards the provision of community infrastructure to meet the needs of residents within the locality.

### **Nature of Draft Planning Agreement**

The Draft Planning Agreement is a voluntary planning agreement under s116T of the Environmental Planning and Assessment Act 1979 (Act), as amended.

## **Effect of the Draft Planning Agreement**

The Draft Planning Agreement:

- relates to the carrying out by the Developer of development on the Land,
- does not exclude the application of Divisions 2 and 3 of Part 5B of the Act to the Development,
- requires monetary Development Contribution and dedication of the Dedication Land,
- enables the carrying out of specified Embellishment Works by the Developer,
- allows the value of Embellishment Works to be offset against the monetary Development Contribution,
- requires the Council to apply the monetary Development Contribution made under the agreement towards the specified public purpose specified in the agreement,
- imposes obligations on the Developer in relation to the carrying out of Embellishment Works, the completion of those Embellishment Works and the rectification of defects in those Embellishment Works,
- requires the Developer to provide the Council with a Development Contributions Security before issuing of the first Construction Certificate for the Development to be called on in satisfaction of any costs incurred by the Council in remedying the Developer's breach of the agreement,
- is to be registered on the title to the Land subject to the Act,
- imposes restrictions on the Parties transferring the Land or part of the Land except in relation to a Final Lot or assigning an interest under the agreement,
- provides a dispute resolution method for a dispute under the agreement,
- provides that the agreement is governed by the law of New South Wales, and
- provides that the A New Tax System (Goods and Services Tax) Act 1999 (Cth) applies to the agreement.

## **Assessment of the Merits of the Draft Planning Agreement**

### **The Planning Purposes Served by the Draft Planning Agreement**

The Draft Planning Agreement:

- promotes the orderly and economic use and development of the Land to which the agreement applies,
- facilitates the provision of land for public purposes in connection with the Development,
- facilitates the provision of community services and facilities, and
- promotes increased opportunity for public in environmental planning and assessment.

### **How the Draft Planning Agreement Promotes the Public Interest**

The Draft Planning Agreement promotes the public interest by promoting the objects of the Act as set out in ss 5(a)(ii), (iv), (v) and 5(c) of the Act.

**For Planning Authorities:**

***Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities***

N/A

***Other Public Authorities - How the Draft Planning Agreement Promotes the Objects (if any) of the Act under which it is Constituted***

N/A

***Councils - How the Draft Planning Agreement Promotes the Elements of the Council's Charter***

The Draft Planning Agreement:

- promotes the provision of adequate, equitable and appropriate services and facilities for the community by making provision for community infrastructure,
- facilitates involvement of the community in decision making regarding the provision of community infrastructure, and
- secures funding for community infrastructure for which it is provided to meet the needs of residents within the locality.

***All Planning Authorities - Whether the Draft Planning Agreement Conforms with the Authority's Capital Works Program***

---

**[Novation/Assignment] Deed**

**City of Canada Bay Council**

and

**[Drafting Note: Billbergia Developments Pty  
Ltd**

**[Drafting Note: Insert name of New Developer]**

# Novation/Assignment Deed

DATE

## Parties

**City Of Canada Bay Council** ABN 79 130 029 350 of Civic Centre, Marlborough Street, Drummoyne, NSW, 2047 **(Council)**

and

**## [Drafting Note. Insert name, ABN & address of Developer] (Billbergia Developments Pty Ltd)**

and

**## [Drafting Note. Insert name, ABN & address of Developer] (New Developer)**

## Background

- A The Council and the Original Developer are parties to the Original Agreement.
- B The Original Agreement relates to the whole of the Land.
- C The Original Developer wishes to transfer **[the whole of] [part or parts of]** the Land comprising Lot **[insert Lot number]** in DP **[insert Deposited Plan number]** to the New Developer. **[Drafting Note: to be included where all or part of the land is to be transferred to the New Developer and the Original Agreement is to be novated].**

**OR**

The Original Developer wishes to novate all of its rights and obligations under the Original Agreement to the New Developer. **[Drafting Note: to be included where there is no transfer of the Land to the New Developer, but the Original Developer has entered into a separate arrangement with the New Developer that requires a novation of all the Original Developer's rights and obligations under the Original Agreement to the New Developer].**

**OR**

The Original Developer wishes to assign its rights and interests under the Original Agreement to the New Developer. **[Drafting Note: to be included where the Original Developer has entered into a separate arrangement with the New Developer and the Original Developer's rights and interests in the Original Agreement are to be assigned].**

## Agreed terms

### 1 Interpretation

## 1.1 Definitions

1.1.1 In this document:

**Effective Date** means [insert].

**Council** means City of Canada Bay Council *[Drafting Note: Only to be included where the Original Agreement is assigned to the New Developer]*.

**Land** has the meaning given to that term in the Original Agreement.

**Original Agreement** means the voluntary planning agreement dated [insert] and made between the Council and the Original Developer.

## 1.2 Construction

1.2.1 Unless expressed to the contrary, in this document:

- (a) words in the singular include the plural and vice versa;
- (b) any gender includes the other genders;
- (c) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (d) "includes" means includes without limitation;
- (e) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it; and
- (f) a reference to:
  - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
  - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
  - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced; and
  - (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation.

## 1.3 Headings

1.3.1 Headings do not affect the interpretation of this document.

## 2 **Novation** *[Drafting Note - Delete clauses 2 and 3 if novation is not applicable]*

### 2.1 Original Agreement

2.1.1 Subject to clause 3 and with effect from the Effective Date:

- (a) the New Developer is substituted for the Original Developer as a party to the Original Agreement;

- (b) the New Developer will be bound by the Original Agreement, and will be entitled to the benefit of the Original Agreement, as if the New Developer was a party to the Original Agreement instead of the Original Developer; and
- (c) the Original Developer is released and discharged from all obligations and liabilities, and from all claims (whether for costs, damages, fees, expenses or otherwise), arising under the Original Agreement.

## **2.2 Reference in Original Agreement**

- 2.2.1 All references to the Original Developer in the Original Agreement are to be construed as references to the New Developer.

## **2.3 Address for notices**

- 2.3.1 The Council must address all notices and communications to be given or made by it to the New Developer under the Original Agreement to the following address:

### **New Developer:**

Address:

Fax:

Contact Person:

Email:

## **3 Affirmation of the Original Agreement**

- 3.1 The Original Agreement will be read and construed subject to this deed, and in all other respects the provisions of the Original Agreement are ratified and confirmed, and, subject to the variation and novation contained in this deed, the Original Agreement will continue in full force and effect.

## **4 Assignment [Drafting Note - Delete if assignment is not applicable]**

### **4.1 Assignment of Rights**

- 4.1.1 The Original Developer assigns to the New Developer absolutely all of the Original Developer's rights (both present, future, actual and contingent) under the Original Agreement or which arise as a result of the Original Developer exercising any right under the Original Agreement; and
- 4.1.2 The New Developer accepts the assignment of the Original Developer's rights (both present, future, actual and contingent) under the Original Agreement on the terms of this deed.

### **4.2 Assumption of obligations**

- 4.2.1 On and from the Effective Date, the New Developer must properly and punctually observe and perform all of the Original Developer's obligations (both present, future, actual and contingent) under the Original Agreement or which arise as a result of the Council exercising any right under the

Original Agreement and which are due to be performed on or after the Effective Date.

## **5 Indemnities**

- 5.1 The New Developer indemnifies the Original Developer on demand against all liabilities, claims, damages and loss which the Original Developer suffers or incurs in relation to the Original Agreement including those which arise or relate to acts or omissions occurring on or after the Effective Date.

## **6 Warranties and representations**

### **6.1 Warranties**

- 6.1.1 Each party represents and warrants that, at the time of execution, and at the Effective Date:
- (a) it has capacity unconditionally to execute, deliver and comply with its obligations under this document;
  - (b) it has taken all necessary action to authorise the unconditional execution and delivery of, and the compliance with, its obligations under this document;
  - (c) this document is a valid and legally binding obligation and is enforceable against it by each other party in accordance with its terms; and
  - (d) its unconditional execution and delivery of, and compliance with its obligations under, this document do not contravene:
    - (i) any law or directive from a government entity;
    - (ii) its constituent documents;
    - (iii) any agreement or instrument to which it is a party; or
    - (iv) any obligation of it to any other person.

### **6.2 Survival of warranties**

- 6.2.1 The warranties and representations in clause 6.1 survive the execution of this document and the [novation/assignment] of the Original Agreement.

## **7 GST**

- 7.1 Where a supply made under this deed gives rise to a liability for GST, the consideration to be provided for that supply (other than under this clause) shall be increased by an additional amount equal to the GST payable on the supply. The additional amount must be paid, and the supplier must provide a tax invoice, at the same time as the other consideration for that supply is to be provided under this deed. Terms used in this clause have the meanings in the A New Tax System (Goods and Services Tax) Act 1999.

## **8 Stamp duty and costs**

- 8.1 The Original Developer and the New Developer are joint and severally responsible for the Council's legal costs incidental to the negotiation, preparation and execution of this deed. [Drafting Note: To be included where the Original Agreement is being assigned.]
- 8.2 The New Developer will pay all stamp duty arising directly or indirectly from this deed.

## **9 Further acts**

- 9.1 Each party will take all steps, execute all deeds and do everything reasonably required by any other party to give effect to any of the actions contemplated by this deed.
- 9.2 This deed binds each party which signs it even if other parties do not, or if the execution by other parties is defective, void or voidable.

## **10 Amendment**

- 10.1 This document may only be varied or replaced by a document executed by the parties.

## **11 Governing law**

- 11.1 This deed is governed by the law in force in the place specified in the New South Wales and the parties submit to the non-exclusive jurisdiction of the courts of that place.

## **12 Counterparts**

- 12.1 This deed may consist of a number of counterparts and the counterparts taken together constitute one and the same instrument.

## **Execution**

**Executed as a Deed**

**Dated:**

---

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