

Deed

849-859 Pacific Highway, 2 Wilson Street and Lot 1 O'Brien St, Chatswood Planning Agreement

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Willoughby City Council

**853 Pacific Highway Pty Ltd as trustee for the 2017 PHC Unit
Trust**

Executed Date: 10 May 2023

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St, Chatswood Planning Agreement**

Summary Sheet

Council:

Name: Willoughby City Council

Address: Level 4, 31 Victor Street, Chatswood, New South Wales 2067

Telephone: (02) 9777 1000

Email: email@willoughby.nsw.gov.au

Representative: Chief Executive Officer (CEO)

Developer:

Name: 853 Pacific Highway Pty Ltd as trustee for the 2017 PHC Unit Trust

Address: PO Box 885, North Willoughby 2068

Telephone: 0405 450 258

Email: Nicholas@sanctuarypartners.com.au

Representative: Nicholas Andrijic

Regulatory Compliance Tables

Table 1 – Provisions of Act

Act Provision	Requirement	Compliance
S7.4(1)	'Planning Authority'	Council
	'Developer'	Developer
	Development Contributions	See clause 9, Part 2, Part 3, Part 4 and Schedule 2
S7.4(1), (2)	Public Purpose	See column 2 of Schedule 2
S7.4(3)(a)	Land	See Definition of ' <i>Land</i> ' in clause 1.1
S7.4(3)(b)(i)	Instrument Change	See definition of LEP Amendment in clause 1.1
S7.4(3)(b)(ii)	Development	See definition of ' <i>Development</i> ' in clause 1.1
S7.4(3)(c)	Details of Developer's Provision	See clause 9, Part 2, and Schedule 2
S7.4(3)(d)	Whether s7.11, s7.12 and s7.24 of the Act Apply to the Development	See clause 8
S7.4(3)(e)	Whether Benefits under this Deed are or are not to be taken into consideration in determining a Development Contribution under s7.11	The benefits under this Deed are not to be taken into consideration in determining a Development Contribution under s7.11 of the Act to the Development. See clause 8
S7.4(3)(f)	Mechanism for the Resolution of Disputes under the Agreement	See Part 5
S7.4(3)(g)	Enforcement of the Agreement by a Suitable Means in the Event of Breach by the Developer	See clause 13 and Part 6
S7.4 (10)	Conformity of Agreement with Act, Environmental	Yes

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	Planning Instruments, & Development Consents Applying to the Land	
S7.5	Public Notice & Public Inspection of Draft Agreement	Yes
S6.15(1)(d)	If the Development involves the subdivision of land, does this Agreement impose requirements that are required to be complied with before a subdivision certificate is issued?	No
Clause 48 Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021	If an occupation certificate is required in respect of the Development, does the Agreement impose requirements that are required to be complied with before such a certificate is issued?	Yes

Table 2 – Provisions of Regulation

Regulation Provision	Requirement	Compliance
Clause 203(1)	Form & Subject-Matter	Yes
Clause 203(7)	Secretary's Practice Note	Yes
Clause 204	Public Notice & Public Inspection of Draft Agreement	Yes
Clause 205	Explanatory Note	See Appendix
Clause 21 Environmental Planning and Assessment (Development	If the Development involves building work or subdivision work, does the Agreement specify	No

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Certification and Fire Safety) Regulation 2021	requirements that are required to be complied with before a construction certificate for the work is issued?	
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849-859 Pacific Hwy, 2 Wilson St & Lot 1 O'Brien St, Chatswood Planning Agreement

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Parties

Willoughby City Council ABN 47 974 826 099 of Level 4, 31 Victor Street,
Chatswood, New South Wales 2067 (Council)

and

853 Pacific Highway Pty Ltd ACN 620 640 413 ATF the 2017 PHC Unit Trust
of PO Box 885, North Willoughby 2068 (Developer)

Background

- A The Developer has requested the Council to adopt a Planning Proposal to facilitate the LEP Amendment so as to make permissible the carrying out of the Development on the Land.
- B The Developer has made or proposes to make a Development Application to carry out the Development on the Land.
- C The Developer offers to make Development Contributions to the Council on the terms set out in this Deed in connection with the carrying out of Development in accordance with the LEP Amendment.

Operative provisions

Part 1 – Preliminary

1 Interpretation

- 1.1 In this Deed the following definitions apply:

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

Approval includes approval, consent, licence, permission or the like and includes, without limitation, a Development Consent and a Certificate under Part 6 of the Act.

Authority means the Commonwealth or New South Wales government, a Minister of the Crown, a government department, a public authority established by or under any Act, a council or county council constituted under the *Local Government Act 1993*, or a person or body exercising functions under any Act including a commission, panel, court, tribunal and the like.

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Bank Guarantee means an irrevocable and unconditional undertaking without any expiry or end date in favour of the Council on terms acceptable to the Council to pay an amount or amounts of money to the Council on demand issued by:

- (a) one of the following trading banks:
 - (i) Australia and New Zealand Banking Group Limited,
 - (ii) Commonwealth Bank of Australia,
 - (iii) Macquarie Bank Limited,
 - (iv) National Australia Bank Limited,
 - (iv) St George Bank Limited,
 - (v) Westpac Banking Corporation, or
- (b) any other financial institution approved by the Council in its absolute discretion.

Claim includes a claim, demand, remedy, suit, injury, damage, loss, Cost, liability, action, proceeding or right of action.

Confidential Information means any information and all other knowledge at any time disclosed (whether in writing or orally) by the Parties to each other, or acquired by the Parties in relation to the other's activities or services which is not already in the public domain and which:

- (a) is by its nature confidential;
- (b) is designated, or marked, or stipulated by either Party as confidential (whether in writing or otherwise);
- (c) any Party knows or ought to know is confidential; or
- (d) is information which may reasonably be considered to be of a confidential nature.

Contribution Item means an item of Development Contribution specified in Column 1 of Schedule 2.

Cost means a cost, charge, expense, outgoing, payment, fee and other expenditure of any nature.

Deed means this Deed and includes any schedules, annexures and appendices to this Deed.

Dedication Land means a Contribution Item comprising land specified or described in Part C of Schedule 2 of this Deed.

Defect means anything that adversely affects, or is likely to adversely affect, the appearance, structural integrity, functionality or use or enjoyment of a Work or any part of a Work.

Defects Liability Period means the period specified in Item 11 of Schedule 1.

Development means the development specified or described in Item 3 of Schedule 1.

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost, the carrying out of work, or the provision of any

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other material public benefit, or any combination of them, to be used for, or applied towards a public purpose, but does not include any Security or other benefit provided by a Party to the Council to secure the enforcement of that Party's obligations under this Deed for the purposes of s7.4(3)(g) of the Act.

Dispute means a dispute or difference between the Parties under or in relation to this Deed.

Equipment means any equipment, apparatus, vehicle or other equipment or thing to be used by or on behalf of the Developer in connection with the performance of its obligations under this Deed.

Final Lot means:

- (a) any lot created in the Development for separate occupation and disposition, or
- (b) any lot of a kind or created for a purpose that is otherwise agreed by the Parties,

not being a lot created by a subdivision of the Land that is to be dedicated or otherwise transferred to the Council.

Force Majeure Event means any event or circumstance, or a combination of events or circumstances:

- (a) which arises from a cause beyond the reasonable control of a party, including:
 - (i) an act of God,
 - (ii) strike, lockout, other industrial disturbance or labour difficulty,
 - (iii) war (declared or undeclared), act of public enemy, blockade, revolution, riot, insurrection, civil commotion,
 - (iv) lightning, storm, flood, fire, earthquake, explosion, epidemic, quarantine, or
 - (v) embargo, unavailability of any essential equipment or materials, unavoidable accident, lack of transportation;
- (b) which the Developer takes all reasonable precautions to protect itself against, and uses all reasonable endeavours to mitigate the consequences of (which does not require the Developer to settle a labour dispute if, in the Developer's opinion, that is not in its best interests); and
- (c) which the Developer notifies the Council of, as soon as practicable after becoming aware of the event or circumstance.

Form of Novation Deed means the template deed attached at **Schedule 4**.

GST has the same meaning as in the GST Law.

GST Law has the same meaning as 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.

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

Land means the land specified or described in Item 1 of Schedule 1.

LEP means the *Willoughby Local Environmental Plan 2012*.

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LEP Amendment means an amendment to the LEP to which the Planning Proposal relates.

Map means the map in Schedule 3.

Maintain, in relation to a Work, means keep in a good state of repair and working order, and includes repair of any damage to the Work.

Occupation Certificate has the same meaning as in the Act.

Part 6 Certificate means a certificate under Part 6 of the Act

Party means a party to this Deed.

Plan of Subdivision means:

- (a) a plan of subdivision within the meaning of s195 of the *Conveyancing Act 1919*, or
- (b) a strata plan or a strata plan of subdivision within the meaning of the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*.

Planning Proposal means a planning proposal within the meaning of s3.33 of the Act as detailed in Item 2 of Schedule 1.

Rectification Notice means a notice in writing:

- (a) identifying the nature and extent of a Defect,
- (b) specifying the works or actions that are required to Rectify the Defect,
- (c) specifying the date by which or the period within which the Defect is to be rectified.

Rectify means rectify, remedy or correct.

Regulation means the *Environmental Planning and Assessment Regulation 2021*.

Security means a Bank Guarantee, or a bond or other form of security to the satisfaction of the Council.

Subdivision Certificate has the same meaning as in the Act.

Sunset Date means 12 months from the date of execution of this Deed by both parties or such later date as may be agreed between the parties in writing.

Work means the physical result of any building, engineering or construction work in, on, over or under land.

1.2 In the interpretation of this Deed, the following provisions apply unless the context otherwise requires:

- 1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Deed.
- 1.2.2 A reference in this Deed to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- 1.2.3 If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day.
- 1.2.4 A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.

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- 1.2.5 A reference in this Deed to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
- 1.2.6 A reference in this Deed 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.
- 1.2.7 A reference in this Deed to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
- 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- 1.2.10 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.
- 1.2.11 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.
- 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.13 A reference to this Deed includes the agreement recorded in this Deed.
- 1.2.14 A reference to a Party to this Deed includes a reference to the servants, agents and contractors of the Party, the Party's successors and assigns.
- 1.2.15 A reference to 'dedicate' or 'dedication' in relation to land is a reference to dedicate or dedication free of cost.
- 1.2.16 Any schedules, appendices and attachments form part of this Deed.
- 1.2.17 Notes appearing in this Deed are operative provisions of this Deed.

2 Status of this Deed

- 2.1 This Deed is a planning agreement within the meaning of s7.4(1) of the Act.

3 Commencement

- 3.1 This Deed commences and has force and effect on and from the date when:
 - 3.1.1 the Parties have:
 - (a) all executed the same copy of this Deed, or
 - (b) each executed separate counterparts of this Deed and exchanged the counterparts; ,
- 3.2 The Parties are to insert the date when this Deed commences on the front page and on the execution page.

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- 3.3 Despite clause 3.1, the provisions of clauses 8, 9, and 10 do not operate until the LEP Amendment is made.
- 3.4 If the LEP Amendment has not been made by the Sunset Date and the Parties are reasonably of the view that the LEP Amendment will not be made imminently, the Developer may give written notice to the Council that it does not wish to proceed with the LEP Amendment.
- 3.5 If the Developer gives the Council written notice that it does not wish to proceed with the LEP Amendment:
 - 3.5.1 the Council is to, as soon as reasonably practicable after receiving the Developer's notice, make a request to the Minister pursuant to s3.35(4) of the Act that the Planning Proposal not proceed,
 - 3.5.2 this Deed terminates upon the Council making the request referred to in clause 3.5.1, and
 - 3.5.3 the Council must return the Security to the Developer within 10 business days of receipt of the Minister's confirmation that the Planning Proposal is not proceeding.

4 Application of this Deed

- 4.1 This Deed applies to the LEP Amendment, the Land and the Development.

5 Warranties

- 5.1 The Parties warrant to each other that they:
 - 5.1.1 have full capacity to enter into this Deed, and
 - 5.1.2 are able to fully comply with their obligations under this Deed.

6 Further agreements

- 6.1 The Parties may, at any time and from time to time, enter into agreements relating to the subject-matter of this Deed that are not inconsistent with this Deed for the purpose of implementing this Deed.

7 Surrender of right of appeal, etc.

- 7.1 The Developer is not to commence or maintain, or to cause or procure the commencement or maintenance, of any proceedings in any court or tribunal or similar body appealing against, or questioning the validity of this Deed, or an Approval relating to the Development in so far as the subject-matter of the proceedings relates to this Deed.

8 Application of s7.11, s7.12 and s7.24 of the Act to the Development

- 8.1 This Deed does not exclude the application of s7.11, s7.12 and s7.24 of the Act to the Development, as provided for in Items 4, 5 and 6 in Schedule 1 respectively.

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- 8.2 The benefits under this Deed are not to be taken into consideration in determining a Development Contribution under s7.11 of the Act to the Development, as provided for in Item 7 in Schedule 1.

9 Provision of Development Contributions

- 9.1 The Developer is to make Development Contributions to the Council in accordance with Schedule 2, any other provision of this Deed relating to the making of Development Contributions and otherwise to the satisfaction of the Council.
- 9.2 The Council is to apply each Development Contribution made by the Developer under this Deed towards the public purpose for which it is made and otherwise in accordance with this Deed.
- 9.3 Despite clause 9.2, the Council may apply a Development Contribution made under this Deed towards a public purpose other than the public purpose specified in this Deed if the Council reasonably considers that the public interest would be better served by applying the Development Contribution towards that other purpose rather than the purpose so specified.

Part 2 – Provisions relating to monetary contributions

10 Payment of monetary Development Contributions

- 10.1 The Developer is to pay to the Council monetary Development Contributions specified in Part A of Schedule 2 in the manner and at the time or times specified in that Part.
- 10.2 The amount of a monetary Development Contribution is to be indexed from the date of this Deed in accordance with the index specified in Item 9 of Schedule 1.
- 10.3 A monetary Development Contribution is made for the purposes of this Deed when the Council receives the full amount of the contribution payable under this Deed 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.

Part 3 – Provisions relating to dedication of land

11 Not used

12 Not used

13 Not used

Part 4 – Provisions relating to carrying out of Work

14 Not used

15 Not used

16 Not used

17 Not used

18 Not used

19 Not used

20 Not used

21 Not used

22 Not used

23 Not used

24 Not used

Part 5 – Dispute Resolution

25 Dispute resolution – expert determination

- 25.1 This clause applies to a Dispute between any of the Parties to this Deed concerning a matter arising in connection with this Deed that can be determined by an appropriately qualified expert if:
- 25.1.1 the Parties to the Dispute agree that it can be so determined, or
- 25.1.2 the Chief Executive Officer of the professional body that represents persons who appear to have the relevant expertise to determine the Dispute gives a written opinion that the Dispute can be determined by a member of that body.
- 25.2 A Dispute to which this clause applies is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 25.3 If a notice is given under clause 25.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 25.4 If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 25.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 25.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 25.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

26 Dispute Resolution - mediation

- 26.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute to which clause 25 applies.
- 26.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 26.3 If a notice is given under clause 26.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 26.4 If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.
- 26.5 If the Dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the Dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.
- 26.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 26.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

Part 6 - Enforcement

27 Security for performance of obligations

- 27.1 The Developer is to provide the Council with Security in the amount specified in Item 12 of Schedule 1 to secure the performance of such of the Developer's obligations under this Deed as are specified or described in Item 13 of Schedule 1.
- 27.2 The Security is to be provided at the time specified in Item 14 of Schedule 1.
- 27.3 The amount of the Security is to be indexed from the date of this Deed in accordance with the index specified in Item 15 of Schedule 1.
- 27.4 The Council is to release and return the Security or any unused part of it to the Developer within 14 days of compliance by the Developer of its obligations under this Deed to the reasonable satisfaction of the Council.
- 27.5 The Developer may at any time provide the Council with a replacement Security, including to, following payment of an instalment of the monetary Development Contributions and registration of this Deed on title, reduce the amount of the Security held by Council so that it is no less than 10% of the monetary Development Contributions owed by the Developer under this Deed.
- 27.6 On receipt of a replacement Security, the Council is to release and return to the Developer, as directed, the Security it holds that has been replaced.
- 27.7 The Council may call-up the Security if it reasonably considers that the Developer has not complied with its obligations under this Deed specified in Item 13 of Schedule 1.
- 27.8 However, the Council is not to call-up the Security unless:
- 27.8.1 it has given the Developer not less than 30 days' notice of its intention to do so and particulars of why it intends to do so, and
- 27.8.2 the Developer has not rectified the non-compliance to the Council's reasonable satisfaction before that period has expired.
- 27.9 If the Council calls-up the Security, it may use the amount paid to it in satisfaction of any costs incurred by it in remedying the non-compliance including but not limited to:
- 27.9.1 the reasonable costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
- 27.9.2 all fees and charges necessarily or reasonably incurred by the Council in order to have the Work carried out, completed or rectified, and
- 27.9.3 all legal costs and expenses reasonably incurred by the Council, by reason of the Developer's non-compliance.
- 27.10 If the Council calls-up the Security, it may, by notice in writing to the Developer, require the Developer to provide a further or replacement Security in an amount that, when added to any unused portion of any existing Security, does not exceed the amount of the Security the Council is entitled to hold under this Deed.
- 27.11 The dispute resolution provisions of this Deed do not apply to any matter the subject of this clause.

28 Not used

29 Not used

30 Not used

31 Breach of obligations

- 31.1 If the Council reasonably considers that the Developer is in breach of any obligation under this Deed, it may give a written notice to the Developer:
- 31.1.1 specifying the nature and extent of the breach,
 - 31.1.2 requiring the Developer to:
 - (a) rectify the breach if it reasonably considers it is capable of rectification, or
 - (b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification,
 - 31.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 31.2 If the Developer fails to fully comply with a notice referred to in clause 31.1, the Council may, without further notice to the Developer, call-up the Security provided under this Deed and apply it to remedy the breach.
- 31.3 If the Developer fails to comply with a notice given under clause 31.1 relating to the carrying out of Work under this Deed, the Council may step-in and remedy the breach and may enter, occupy and use any land owned or controlled by the Developer and any Equipment on such land for that purpose.
- 31.4 Any costs incurred by the Council in remedying a breach in accordance with clause 31.2 or clause 31.3 may be recovered by the Council by either or a combination of the following means:
- 31.4.1 by calling-up and applying the Security provided under this Deed, or
 - 31.4.2 as a debt due in a court of competent jurisdiction.
- 31.5 For the purpose of clause 31.4, the Council's costs of remedying a breach the subject of a notice given under clause 31.1 include, but are not limited to:
- 31.5.1 the costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
 - 31.5.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
 - 31.5.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- 31.6 Nothing in this clause 31 prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Deed by the Developer, including but not limited to seeking relief in an appropriate court.

32 Enforcement in a court of competent jurisdiction

- 32.1 Subject only to clauses 25 and 26, the Parties may enforce this Deed in any court of competent jurisdiction.
- 32.2 For the avoidance of doubt, nothing in this Deed prevents:
 - 32.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Deed or any matter to which this Deed relates, or
 - 32.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Deed or any matter to which this Deed relates.

Part 7 – Registration & Restriction on Dealings

33 Registration of this Deed

- 33.1 The Parties agree to register this Deed for the purposes of s7.6(1) of the Act.
- 33.2 The Developer agrees to, within 120 Business Days of the LEP Amendment, deliver to the Council in registrable form:
 - 33.2.1 an instrument requesting registration of this Deed on the title to the Land duly executed by the registered proprietors of the Land Developer and any other person required by the Registrar-General to execute such instrument, and
 - 33.2.2 the written irrevocable consent of each person referred to in s7.6(1) of the Act to that registration.
- 33.3 The Developer at its cost is to:
 - 33.3.1 do such other things as are reasonably necessary to enable registration of this Deed to occur, and
 - 33.3.2 provide the Council with evidence of registration within 5 days of being notified by the Land and Property Information of such registration.
- 33.4 The Parties are to do such things as are reasonably necessary to remove any notation relating to this Deed from the title to the Land:
 - 33.4.1 in so far as the part of the Land concerned is a Final Lot,
- 33.5 in relation to any other part of the Land, once the Developer has completed its obligations under this Deed to the reasonable satisfaction of the Council or this Deed is terminated or otherwise comes to an end for any other reason.

34 Restriction on dealings

- 34.1 The Developer is not to:
 - 34.1.1 sell or transfer the Land, other than a Final Lot, or
 - 34.1.2 assign the Developer's rights or obligations under this Deed, or novate this Deed,

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to any person unless:

- 34.1.3 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 sold or transferred or the Developer's rights or obligations under this Deed are to be assigned or novated, of a deed substantially in the form of the Form of Novation Deed, and
 - 34.1.4 the Council has given written notice to the Developer stating that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this Deed, and
 - 34.1.5 the Developer is not in breach of this Deed, and
 - 34.1.6 the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld or delayed.
- 34.2 Subject to clause 34.3, the Developer acknowledges and agrees that it remains liable to fully perform its obligations under this Deed unless and until it has complied with its obligations under clause 34.1.
- 34.3 Clause 34.1 does not apply in relation to any sale or transfer of the Land if this Deed is registered on the title to the Land at the time of the sale.

Part 8 – Indemnities & Insurance

35 Risk

- 35.1 The Developer performs this Deed at its own risk and its own cost.

36 Release

- 36.1 The Developer releases the Council from any Claim it may have against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

37 Indemnity

- 37.1 The Developer indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

38 Not used

Part 9 – Other Provisions

39 Confidentiality

- 39.1 The terms of this Deed are not confidential and this Deed may be treated as a public document and exhibited or reported without restriction by any Party.
- 39.2 The Parties acknowledge that:
- 39.2.1 Confidential Information may have been supplied to some or all of the Parties in the negotiations leading up to the making of this Deed, and
- 39.2.2 the Parties may disclose to each other further Confidential Information in connection with the subject matter of this Deed.
- 39.3 Subject to clause 39.4 and 39.5, each Party agrees:
- 39.3.1 not to disclose any Confidential Information received before or after the commencement of this Deed to any person without the prior written consent of the Party who supplied the Confidential Information, and
- 39.3.2 to take all reasonable steps to ensure all Confidential Information received before or after the commencement of this Deed is kept confidential and protected against unauthorised use and access.
- 39.4 A Party may disclose Confidential Information in the following circumstances:
- 39.4.1 in order to comply with the Law, or
- 39.4.2 to any of their employees, consultants, advisers, financiers or contractors to whom it is considered necessary to disclose the information, if the employees, consultants, advisers, financiers or contractors undertake to keep the information confidential.
- 39.5 The obligations of confidentiality under this clause do not extend to information which is public knowledge other than as a result of a breach of this clause.

40 Annual report by Developer

- 40.1 The Developer is to provide to the Council by no later than each anniversary of the date on which this Deed is entered into a report detailing the performance of its obligations under this Deed.
- 40.2 The report referred is to be in such a form and to address such matters as required by the Council from time to time.

41 Review of Deed

- 41.1 The Parties agree to review this Deed periodically as specified in Item 17 of Schedule 1, and otherwise if either Party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Deed.

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- 41.2 For the purposes of clause 41.1, the relevant changes include (but are not limited to):
 - 41.2.1 any change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development,
 - 41.2.2 where the additional Residential GFA allowed under the LEP Amendment differs by more than 20% (whether higher or lower) from the additional Residential GFA envisaged in the Planning Proposal.
 - 41.2.3 the lapsing of the Development Consent to the Development pursuant to section 4.53 of the Act,
 - 41.2.4 a Party becoming unable by reason of Force Majeure Event to carry out wholly or in part its obligations under this Deed.
- 41.3 For the purposes of addressing any matter arising from a review of this Deed referred to in clause 41.1 the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Deed.
- 41.4 If this Deed becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.
- 41.5 A failure by a Party to agree to take action requested by the other Party as a consequence of a review referred to in clause 41.1 (but not 41.4) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.

42 Notices

- 42.1 Any notice, consent, information, application or request that is to or may be given or made to a Party under this Deed is only given or made if it is in writing and sent in one of the following ways:
 - 42.1.1 delivered or posted to that Party at its address set out in the Summary Sheet,
 - 42.1.2 emailed to that Party at its email address set out in the Summary Sheet.
- 42.2 If a Party gives the other Party 3 business days' notice of a change of its address, or email, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted, or emailed to the latest address.
- 42.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
 - 42.3.1 delivered, when it is left at the relevant address,
 - 42.3.2 sent by post, 2 business days after it is posted, or
 - 42.3.3 sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.
- 42.4 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.

43 Approvals and Consent

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

44 Costs

- 44.1 The Developer is to pay Council all reasonable costs of preparing, negotiating, executing, stamping and registering this Deed, and any charge, caveats or other documents related to this Deed within 7 days of a written demand by the Council for such payment.
- 44.2 The Developer is also to pay to the Council the Council's reasonable costs of implementing, monitoring and enforcing this Deed within 7 days of a written demand by the Council for such payment. Council's claims for costs under this clause 44.2 in respect of implementing and monitoring this Deed are limited to circumstances in which the Developer has an outstanding obligation or a where a Dispute or requirement for review of this Deed arises under this Deed and Council seeks external legal or other consultants' advice or services in respect of the issue.

45 Entire Deed

- 45.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with.
- 45.2 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 Deed was executed, except as permitted by law.

46 Further Acts

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

47 Notations on section 10.7(2) Planning Certificates

- 47.1 The Developer acknowledges that the Council may, in its absolute discretion, make a notation under section 10.7(5) of the Act regarding this Agreement on any certificate issued under section 10.7(2) of the Act relating to the Land, and is not to raise an objection, make any claim or demand or bring any action in that regard.

48 Governing Law and Jurisdiction

- 48.1 This Deed is governed by the law of New South Wales.

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- 48.2 The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.
- 48.3 The Parties are not to object to the exercise of jurisdiction by those courts on any basis.

49 Joint and Individual Liability and Benefits

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

50 No Fetter

- 50.1 Nothing in this Deed 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.

51 Illegality

- 51.1 If this Deed or any part of it becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties are to co-operate and do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.

52 Severability

- 52.1 If a clause or part of a clause of this Deed 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.
- 52.2 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 Deed, but the rest of this Deed is not affected.

53 Amendment

- 53.1 No amendment of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed in accordance with clause 203(5) of the Regulation.

54 Waiver

- 54.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- 54.2 A waiver by a Party is only effective if it:
- 54.2.1 is in writing,
 - 54.2.2 is addressed to the Party whose obligation or breach of obligation is the subject of the waiver,
 - 54.2.3 specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,
 - 54.2.4 is signed and dated by the Party giving the waiver.
- 54.3 Without limitation, a waiver may be expressed to be conditional on the happening of an event, including the doing of a thing by the Party to whom the waiver is given.
- 54.4 A waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given, and 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.
- 54.5 For the purposes of this Deed, an obligation or breach of obligation the subject of a waiver is taken not to have been imposed on, or required to be complied with by, the Party to whom the waiver is given.

55 GST

- 55.1 In this clause:
- Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice** have the meaning given by the GST Law.
- GST Amount** means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.
- GST Law** has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.
- Input Tax Credit** has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.
- Taxable Supply** has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.
- 55.2 Subject to clause 55.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- 55.3 Clause 55.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.

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- 55.4 No additional amount shall be payable by the Council under clause 55.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.
- 55.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:
- 55.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;
- 55.5.2 that any amounts payable by the Parties in accordance with clause 55.2 (as limited by clause 55.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 55.6 No payment of any amount pursuant to this clause 55, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 55.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- 55.8 This clause continues to apply after expiration or termination of this Deed.

56 Explanatory Note

- 56.1 The Appendix contains the Explanatory Note relating to this Deed required by clause 205 of the Regulation.
- 56.2 Pursuant to clause 205(5) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Deed.

57 Trustee Developer

- 57.1 The Developer enters into this deed in its capacity as trustee for the 2017 PHC Unit Trust (**Trust**) constituted by the trust deed (**Trust Deed**).
- 57.2 The Developer warrants as follows:
- 57.2.1 it is the sole trustee of the trust;
- 57.2.2 it has not been removed as trustee and no action has been taken to remove or replace it as trustee, or to terminate the Trust;
- 57.2.3 no release or revocation of its powers under the Trust Deed has occurred;
- 57.2.4 it is authorised and empowered under the Trust Deed to enter into and to perform its obligations and satisfy or discharge its liabilities under this Deed;
- 57.2.5 it is not in breach of the Trust Deed;

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- 57.2.6 it is entitled under the Trust Deed to be indemnified in full in respect of the obligations and liabilities incurred by it under this Deed; and
- 57.2.7 it is not aware of any reason why the assets of the Trust might be insufficient to satisfy or discharge the obligations and liabilities incurred by it under this Deed.
- 57.3 The Developer indemnifies the Council, and agrees to keep the Council indemnified, in respect of any loss or liability in any way connected with a breach of a warranty in clause 57.2;
- 57.4 If the Developer is to be replaced as trustee of the Trust then:
- 57.4.1 prior to the replacement, it must:
- (a) notify the Council in writing of the proposed replacement, and
 - (b) novate its obligations and liabilities under this Deed to the incoming trustee of the Trust on and from the date the Developer ceases to be a trustee of the Trust; and
- 57.4.2 the novation is to be on terms substantially in the form of the Form of Novation Deed.
- 57.5 Immediately upon the Developer becoming aware of a proposed termination of the Trust, the Developer is to notify the Council, and the Parties are to negotiate in good faith and without delay, any necessary changes to this Deed, or other arrangements arising from the proposed termination of the Trust, to secure the provision of the Developer's obligations under this Deed.
- 57.6 A liability arising under or in connection with this Deed is limited to and can be enforced against the Developer only to the extent to which it can be and is in fact satisfied out of property of the Trust from which the Developer is actually indemnified for the liability. Subject to clause 57.8, this limitation of the Developer's liability applies despite any other provision of this Deed and extends to all liabilities and obligations of the Developer in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this Deed.
- 57.7 No party to this Deed may sue the Developer in any capacity other than as the trustee of the Trust, including seeking the appointment of a receiver (except in relation to property of the Trust), a liquidator, an administrator or any similar person to the Developer or proving in any liquidation, administration or arrangement of or affecting the Developer (except in relation to property of the Trust).
- 57.8 Clauses 57.6 and 57.7 shall not apply to any obligation or liability of the Developer to the extent that it is not satisfied because, under this Deed or by operation of law, there is a reduction in the extent of the Developer's indemnification out of the assets of the Trust as a result of the Developer's failure to properly perform its duties as trustee of the Trust.
- 57.9 The Developer is not obliged to do or refrain from doing anything under this Deed (including incur any liability) unless its liability is limited in the same manner as set out in clauses 57.6 to 57.8.
- 57.10 The warranties and representations in this clause 57 survive the execution of and any termination of this Deed and the novation and assignment of this Deed.

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Schedule 1

(Clause 1.1)

Item 1	Land	<p>The land identified as such on the Map in Schedule 3</p> <p>The land which at the date of this Deed is identified as SP1496, SP60178 and SP10110 (known as 849-859 Pacific Highway, Chatswood); SP52947 (known as 2 Wilson St, Chatswood) and Lot 1, DP1189541 (known as Lot 1 O'Brien St, Chatswood) including any land created as a result of the termination of the strata scheme, or a subdivision or consolidation of that land.</p>
Item 2	Planning Proposal	<p>Planning Proposal (Council Ref: PP2021/7; ePlanning Portal Ref:PP2021-6560) which seeks to amend the LEP to provide the following on the Land:</p> <ul style="list-style-type: none"> • Rezoning the Land to B4 Mixed Use (excluding that portion of the Land zoned SP2 which fronts the Pacific Highway and has been earmarked for road widening); • Applying a maximum building height control of 90m; • Applying a maximum floor space ratio (FSR) control of 6:1
Item 3	Development	<p>The development, within the meaning of the Act, of the Land being a mixed-use development authorised by Development Consent and permitted as a consequence of the LEP Amendment .</p>
Item 4	Application of S7.11	<p>Section 7.11 of the Act is not excluded</p>
Item 5	Application of S7.12	<p>Section 7.12 of the Act is not excluded</p>
Item 6	Application of S7.24	<p>Section 7.24 of the Act is not excluded</p>
Item 7	Whether the Benefits under this Deed are to Taken in Consideration in determining a Development Contribution under s7.11	<p>The benefits under this Deed are not to be taken into consideration in determining a Development Contribution under s7.11 of the Act to the Development.</p> <p>See clause 8</p>
Item 8	Indexation of Contribution Values	<p>N/A</p>

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Item 9	Indexation of Monetary Development Contributions	<p>The monetary Development Contributions specified in Schedule 2 of this Deed will be indexed quarterly from the date of this Deed (the "Indexation Date").</p> <p>This will be done in accordance with the following formula:</p> <p>Indexed monetary contribution = A x B/C</p> <p>Where A is the value of the monetary Development Contribution applicable immediately before the Indexation Date</p> <p>B is the CPI last published at the quarter ending immediately before the date of payment; and</p> <p>C is the CPI last published at the quarter ending immediately before the Indexation Date</p>
Item 10	Access to Council owned or controlled land	N/A
Item 11	Defects Liability Period	N/A
Item 12	Security	\$3,252,060.90
Item 13	Obligations to which Security Relates	Performance of the Developer's obligation to pay the Monetary Contributions in accordance with the terms of this Deed and registration of this Deed on title
Item 14	Timing of Security	Security to be provided within 10 business days following execution of this Deed by both parties.
Item 15	Indexation of Security	The Security specified in Item 12 will be indexed quarterly from the date of this Deed (the "Indexation Date") in the same way that monetary contributions are indexed in Item 9 of this schedule except that references to 'monetary Development Contributions' are replaced with a reference to 'Security'.
Item 16	Costs	See Clause 44
Item 17	Review of Deed	Every 2 years

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Schedule 2

(Clause 9)

Development Contributions

Table

Column 1	Column 2	Column 3	Column 4
Item/ Contribution	Public Purpose	Manner & Extent	Timing
A. Monetary Development Contributions			
Total of \$10,840,203 payable in the following three (3) instalments:			
1. \$1,084,000	Towards Community Infrastructure as identified in Appendix A to Council's Planning Agreement Policy and Procedures Manual.	Payable in lump sum instalments, as per Column 4	Amount to be paid to Council within 90 Business Days of the making of the LEP Amendment;
2. \$4,878,093	Towards Community Infrastructure as identified in Appendix A to Council's Planning Agreement Policy and Procedures Manual.	Payable in lump sum instalments, as per Column 4	To be provided to Council within 7 days prior to issue of the first Construction Certificate for the Development;
3. \$4,878,110	Towards Community Infrastructure as identified in Appendix A to Council's Planning Agreement Policy and Procedures Manual.	Payable in lump sum instalments, as per Column 4	To be provided to Council within 7 days prior to issue of the first Occupation Certificate for the Development or prior to registration of a Strata Plan for the Development, whichever is earlier.

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Schedule 3

(Clause 1.1)

Map



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Schedule 4

(Clause 1.1)

Novation Deed

Willoughby City Council

853 Pacific Highway Pty Ltd as trustee for the 2017
PHC Unit Trust

[New Developer]

Novation Deed for the 849-859 Pacific Highway and 2 and 8 Wilson Street, Chatswood Planning Agreement

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5.1	Warranties	3
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6	GST	4
6.1	Construction	4
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6.3	Payment of GST	5
6.4	Timing of GST payment	5
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6.6	Adjustment event	5
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Date

Parties

Willoughby City Council ABN 47 974 826 099 of Level 4, 31 Victor Street, Chatswood, New South Wales 2067 (**Council**)

and

853 Pacific Highway Pty Ltd as trustee for the 2017 PHC Unit Trust ABN 12 390 679 581 of [insert] (**Original Developer**)

and

[**New Developer**] ACN [#] [Address] (**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 proposes to transfer the whole of its interests in the Land to the New Developer and wishes to novate all of its rights and obligations under the Original Agreement to the New Developer.]
 - D [*The Original Developer will be replaced by the New Developer as trustee of the Trust and wishes to novate all of its rights and obligations under the Original Agreement to the New Developer]
 - E [Insert any other appropriate recitals]
-

Agreed terms

1 Definitions

In this deed these terms have the following meanings:

- | | |
|-----------------------|---|
| Effective Date | [Insert date of transfer of interests in the Land, or date of replacement of trustee] |
| Land | Has the meaning given to that term in the Original Agreement. |

Original Agreement The planning agreement dated [X] and made between the Council and the Original Developer.
Trust means the 2017 PHC Unit Trust.

2 Novation

2.1 Original Agreement

Subject to **clause 2.2** 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, except in respect of any obligation, liability, claim or breach of the Original Agreement that arose prior to the Effective Date.

2.2 Reference in Original Agreement

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

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: [X]

Fax: [X]

Contact Person: [X]

Email: [X]

3 Affirmation of the Original Agreement

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 Council Satisfaction

- (a) For the purposes of clause 34.1 of the Original Agreement, the Council acknowledges that:
- (i) this Deed is the deed referred to in clause 34.1.3 of the Original Agreement,
 - (ii) the Council is satisfied that the New Developer is reasonably capable of performing the obligations under the Original Agreement, and
 - (iii) as at the date of this Deed, the Original Developer is not in breach of the Planning Agreement, and
 - (iv) the Council consents to the novation.

5 Indemnities

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

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 deed;
- (b) it has taken all necessary action to authorise the unconditional execution and delivery of, and the compliance with, its obligations under this deed;
- (c) this deed 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 deed 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 Trustee Developer

- (a) If the New Developer enters into this deed as trustee of a trust, the New Developer and its successors as trustee of the trust will be liable under this deed in their own right and as trustee of the trust.

- (b) Nothing releases the New Developer and its successors from any liability in their personal capacity.
- (c) The New Developer warrants that at the date of this Deed and as at the Effective Date:
 - (i) all the powers and discretions conferred by the deed establishing the trust are capable of being validly exercised by it as trustee and have not been varied or revoked and the trust is a valid and subsisting trust;
 - (ii) the New Developer is the sole trustee of the trust and has full and unfettered power under the terms of the deed establishing the trust to enter into and be bound by this deed on behalf of the trust and that this deed is being executed and entered into as part of the due and proper administration of the trust and for the benefit of the beneficiaries of the trust; and
 - (iii) no restriction on the New Developer's right of indemnity out of or lien over the trust's assets exists or will be created or permitted to exist and that right will have priority over the right of the beneficiaries to the trust's assets.

6.3 Survival of warranties

The warranties and representations in **clause 6.1** and **6.2** survive the execution of this deed and the novation of the Original Agreement.

7 GST

7.1 Construction

In this **clause 7**:

- (a) unless there is a contrary indication, words and expressions which are not defined in this deed but which have a defined meaning in the GST Law have the same meaning as in the GST Law;
- (b) **GST Law** has the same meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) or, if that Act does not exist for any reason, means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulation made under that Act; and
- (c) references to GST payable and input tax credit entitlements include:
 - (i) notional GST payable by, and notional input tax credit entitlements of the Commonwealth, a State or a Territory (including a government, government body, authority, agency or instrumentality of the Commonwealth, a State or a Territory); and
 - (ii) GST payable by, and the input tax credit entitlements of, the representative member of a GST group of which the entity is a member.

7.2 Consideration GST exclusive

Unless otherwise expressly stated, all consideration, whether monetary or non-monetary, payable or to be provided under this deed is exclusive of GST (**GST-exclusive consideration**).

7.3 Payment of GST

If GST is payable on any supply made by:

- (a) a party; or
- (b) an entity that is taken under the GST Law to make the supply by reason of the capacity in which a party acts,

(**Supplier**) under this deed, the recipient of the supply, or the party providing the consideration for the supply, must pay to the Supplier an amount equal to the GST payable on the supply.

7.4 Timing of GST payment

The amount referred to in **clause 7.3** must be paid in addition to and at the same time and in the same manner (without any set-off or deduction) that the GST-exclusive consideration for the supply is payable or to be provided.

7.5 Tax invoice

The Supplier must deliver a tax invoice or an adjustment note to the recipient of a taxable supply before the Supplier is entitled to payment of an amount under **clause 7.3**.

7.6 Adjustment event

If an adjustment event arises in respect of a supply made by a Supplier under this deed, any amount that is payable under **clause 7.3** will be calculated or recalculated to reflect the adjustment event and a payment will be made by the recipient to the Supplier or by the Supplier to the recipient as the case requires.

7.7 Reimbursements

- (a) Where a party is required under this deed to pay for, reimburse or contribute to any expense, loss, liability or outgoing suffered or incurred by another party or indemnify another party in relation to such an expense, loss, liability or outgoing (**Reimbursable Expense**), the amount required to be paid, reimbursed or contributed by the first party will be reduced by the amount of any input tax credits to which the other party is entitled in respect of the Reimbursable Expense.
- (b) This **clause 7.7** does not limit the application of **clause 7.3**, if appropriate, to the Reimbursable Expense as reduced in accordance with **clause 7.7(a)**.

7.8 Calculations based on other amounts

If an amount of consideration payable or to be provided under this deed is to be calculated by reference to:

- (a) any expense, loss, liability or outgoing suffered or incurred by another person (**Cost**), that reference will be to the amount of that Cost excluding the amount of any input tax credit entitlement of that person relating to the Cost suffered or incurred; and
- (b) any price, value, sales, proceeds, revenue or similar amount (**Revenue**), that reference will be to that Revenue determined by deducting from it an amount equal to the GST payable on the supply for which it is consideration.

7.9 No merger

This **clause 7** does not merge on the completion, rescission or other termination of this deed or on the transfer of any property supplied under this deed.

8 Stamp duty and costs

- (a) The New Developer will pay all stamp duty arising directly or indirectly from this deed.
- (b) The [Original Developer/New Developer] will pay the Council's costs related to the negotiation, preparation and execution of this deed *and replacement of trustee of the Trust.

9 Further acts

- (a) 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.
- (b) 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

This deed may only be varied or replaced by a deed executed by the parties.

11 Governing law and jurisdiction

- (a) This deed and the transactions contemplated by this deed are governed by and are to be construed in accordance with the laws applicable in New South Wales.
- (b) Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in New South Wales and any courts which have jurisdiction to hear appeals from any of those

courts and waives any right to object to any proceedings being brought in those courts.

12 Counterparts

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

13 General

13.1 Construction

Unless expressed to the contrary, in this deed:

- (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;
- (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;
 - (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.

13.2 Headings

Headings do not affect the interpretation of this deed.

Execution

Executed as a deed.

Executed on behalf of the **Willoughby**)
City Council in the presence of:)
)

.....
Chief Executive Officer (CEO)

.....
Witness

.....
Position

.....
Name (print)

Executed by 53 Pacific Highway Pty Ltd)
as trustee for the 2017 PHC Unit Trust)
(ABN [insert]) in accordance with section)
127 of the Corporations Act 2001 (Cth) in
the presence of:

.....
Company Secretary/Director

.....
Director

.....
Name of Company Secretary/Director
(print)

.....
Name of Director (print)

Executed by [New Developer] ACN [X] in)
accordance with s127(1) of the)
Corporations Act 2001 (Cth):)

.....
Company Secretary / Director

.....
Director

.....
Name of Company Secretary / Director
(print)

.....
Name of Director (print)

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Planning Agreement

Willoughby City Council


853 Pacific Highway Pty Ltd ATF the 2017 PHC Unit Trust

Execution


Executed as a Deed

Dated: 10 / 5 / 2023

Executed on behalf of the Council

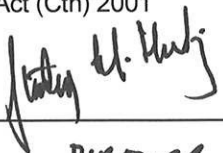


Chief Executive Officer (CEO)
(Name: DEBRA KAY JUST)



Witness
Position: Planning Process & Contribution
Specialist
(Name: Sylvania Mok)

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



Position: DIRECTOR
(Name: STANLEY ELI HURWITZ)



Position: Director
(Name: Nicholas Andrić)

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Appendix

(Clause 56)

Environmental Planning and Assessment Regulation 2021

(Clause 205)

Explanatory Note

Draft Planning Agreement

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Parties

Willoughby City Council ABN 47 974 826 099 of Level 4, 31 Victor Street,
Chatswood, New South Wales 2067 (**Council**)

853 Pacific Highway Pty Ltd ACN 620 640 413 ATF the 2017 PHC Unit Trust
of PO Box 885, North Willoughby 2068 (**Developer**)

Description of the Land to which the Draft Planning Agreement Applies

The Planning Agreement will apply to the following land.

- 849 Pacific Highway, Chatswood, being Strata Plan SP1496;
- 853 Pacific Highway, Chatswood, being Strata Plan SP60178;
- 859 Pacific Highway, Chatswood, being Strata Plan SP10110;
- 2 Wilson Street, Chatswood, being Strata Plan SP52947; and
- Lot 1 O'Brien Street (also known as 8 Wilson Street), Chatswood, being Lot 1 in DP1189541, and

includes any land created as a result of the termination of the strata scheme, or a subdivision or consolidation of that land.

Description of Proposed Development

The Draft Planning Agreement applies to an amendment of the Willoughby Local Environmental Plan 2012 (LEP) in accordance with a Planning Proposal (Council Ref:

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PP2021/7; ePlanning Portal Ref:PP2021-6560) which seeks to amend the LEP to facilitate the development of a mixed use development on the Land, by:

- rezoning the Land to B4 Mixed Use (excluding that portion of the Land zoned SP2 which fronts the Pacific Highway and has been earmarked for road widening);
- applying a maximum building height control of 90m; and
- applying a maximum floor space ratio (FSR) control of 6:1;

The Draft Planning Agreement also applies to development of a mixed-use development on the Land as authorised by the future Development Consent granted as a result of the LEP Amendment to Willoughby Local Environmental Plan 2012.

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

Objectives of Draft Planning Agreement

Provide for a monetary contribution of \$10,840,203 (to be paid in 3 instalments) to be applied towards community infrastructure in accordance with the Council's Planning Agreements Policy and Procedures Manual as in force and effect.

Nature of Draft Planning Agreement

The Draft Planning Agreement is a planning agreement under s7.4(1) of the *Environmental Planning and Assessment Act 1979*. The Draft Planning Agreement is a voluntary agreement under which Development Contributions (as defined in clause 1.1 of the Draft Planning Agreement) are made by the Developer for various public purposes (as defined in s7.4(3) of the Act).

Effect of the Draft Planning Agreement

The Draft Planning Agreement:

- relates to the Planning Proposal and the carrying out of the Development (as defined in clause 1.1 of the Draft Planning Agreement) on the Land by the Developer,
- does not exclude the application of s7.11, s7.12 or s7.24 of the Act to the Development,
- is to be registered on the title to the Land,
- imposes restrictions on the Parties transferring the Land or part of the Land or assigning, or novating an interest under 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 and co-ordinates the orderly and economic use and development of the land to which it applies,
- provides increased opportunity for public involvement and participation in environmental planning and assessment of the Development,

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- provides for additional monetary contributions by a developer to the Council to be used for public purposes, additional to other development contributions under s7.11 or s7.12 and s7.24 required for a proposed Development on the land to which it applies.

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 s1.3(a), (b), (c), (d), (g) and (j) 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 Principles for Local Government Contained in Chapter 3 of the Local Government Act 1993

The Draft Planning Agreement promotes the principles for local government by:

- keeping the local and wider community informed about its activities,

Providing adequate, equitable and appropriate service and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively. ***All Planning Authorities – Whether the Draft Planning Agreement Conforms with the Authority's Capital Works Program***

Yes

All Planning Authorities – Whether the Draft Planning Agreement specifies that certain requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued

Yes