

# **Walker Hedges & Co**

PLANNING AGREEMENT

**Northern Beaches Council**

**Council**

**Joesandra Pty Limited & CES Developments Pty Limited**

**Developer**

The Walker Hedges & Co contact for this  
Planning Agreement is  
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This Planning Agreement is made on

2016.

## **Parties**

### **Northern Beaches Council**

of Civic Centre, Pittwater Road, Dee Why

("Council")

### **Joesandra Pty Limited**

of 44 Charlton Crescent, Kogarah

&

### **CES Developments Pty Limited**

of 8 Middleton Avenue, Bexley North NSW 2207

("Developer")

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## **• Background**

- A The Developer owns the Land which is located within the Council's local government area.
- B The Developer intends, subject to obtaining appropriate approvals, to develop the Land by carrying out the Development.
- C The Lane is to the rear of the Land.
- D Presently the Lane does not meet appropriate standards to properly operate as a public lane/road.
- E As part of the Development the Developer has offered to provide the Development Contribution to the Council.
- F The parties have agreed to enter into this Agreement so as to give effect to the proposal in recital "E".
- G

- **Operative provisions**

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**1. Planning agreement under the Act**

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

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**2. Application of the planning agreement**

The planning agreement constituted by this Agreement applies to the Land, including the Lane Dedication Land.

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**3. Operation of this planning agreement**

3.1 Subject to clause 3.2, the Parties agree that the terms of this agreement will take effect and bind the parties from the Commencement Date and will remain in force and effect until the Lane Dedication Land is dedicated by the Developer to the Council.

3.2 The parties agree that if the Developer:

(a) has not obtained development consent in respect of the Development on or before the first anniversary of the Commencement Date; or

(b) the Developer withdraws the Development Application for the Development,

then this agreement terminates and will be of no further force or effect and Council must, within 10 Business Days of the happening of such an event, return to the Developer:

(a) the Bank Guarantee; and

(b) the signed Transfer.

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**4. Definitions and interpretation**

**4.1. Definitions**

"Act" means the *Environmental Planning and Assessment Act 1979*.

**"Application"** means an application for any Development Consent.

**"Assignment and Dealing Terms"** means the obligations imposed on the relevant Parties under, and by virtue of, clause 14.

**"Authorised Officer"** means, in the case of any Party, a director or secretary or an officer whose title contains the word "manager" or a person performing the functions of any of them, or any other person appointed by that Party to act as an Authorised Officer for the purpose of this Agreement.

**"Authority"** means any governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity and includes an accredited certifier accredited under section 6 of the *Building Professionals Act 2005*.

**"Bank Guarantee"** means a guarantee or an undertaking by a trading bank or another financial institution acceptable to the Council (acting reasonably) whereby that bank or institution unconditionally and irrevocably agrees to pay the Council on written demand a specified sum of money not less than the amount of the Payment or so much thereof as Council may demand from time to time, and must include an expiry date which is not less than 5 years from the issue date and includes any renewed bank guarantee as referred to in Schedule 6.

**"Business Day"** means any day except for Saturday or Sunday or a day which is a public holiday in Sydney.

**"Certificate of Title"** means the certificate of title issued by LPI NSW in respect of the Lane Dedication Land.

**"Commencement Date"** means the date of this Agreement.

**"Control" or "Controlled"** means in respect of an entity the possession, directly, or indirectly, of the power, whether or not having statutory, legal or equitable force, and whether or not based on statutory, legal or equitable rights, directly or indirectly, to control the membership of the board of directors of the entity or to otherwise, directly or indirectly, direct or influence the direction of the management and/ or policies of that entity, whether by means of trusts, agreements, arrangements, understandings, practices, the ownership of any interest in shares or stock or units or other interests of that entity or otherwise.

**"Costs"** includes reasonable costs, charges and expenses, including those incurred in connection with advisers.

**"Council"** means Northern Beaches Council.

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

**"Development"** means the proposal to redevelop the Land by construction of a shop top housing development, including basement carparking and consolidation of 2 lots into 1.

**"Development Application"** has the meaning given to that term in the Act.

**"Development Consent"** has the meaning given to that term in the Act.

**"Development Contribution"** means the dedication of the Laneway Dedication by the Developer to the Council as a public road.

**"Development Contribution Schedule"** means Schedule 2 of this Agreement.

**"Development Procedures"** means the terms and conditions imposed on the relevant Parties under, and by virtue of, Schedule 3.

**"Development Program"** means the timetable and milestones for each Development Contribution described in Schedule 4.

**"Dispute Resolution Procedures"** means the procedures imposed on the relevant Parties under clause 10.

**"Explanatory Note"** means the explanatory note relating to this Agreement, as required by clause 25E of the Regulation, and attached as Exhibit A to this Agreement.

**"GST"** has the meaning it has in the GST Act.

**"GST Act"** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**"Land"** means Lot 2 in DP 363933 and Lot 1 in DP 34961 known as 341 - 343 Condamine Street, Manly Vale.

**"Lane"** means Sommerville Place, Manly Vale.

**"Lane Dedication"** means the dedication of the Lane Dedication Land, to the Council for the purposes of widening the Lane to make it appropriately trafficable.

**"Lane Dedication Land"** means part of the Land, namely a strip of land located on the western boundary of the Land 2.3m wide and variable.

**"Law"** means:

- (a) the common law including principles of equity; and
- (b) the requirements of all statutes, rules, ordinances, codes, regulations, proclamations, by-laws or consents by an Authority.

**"LEP"** means *Warringah Local Environmental Plan 2011*.

**"LGA"** means the *Local Government Act 1993*, as amended.

**"LPI NSW"** means Land and Property Information Service New South Wales.

**"Parent"** means any person who Controls the Developer.

**"Party"** means a party to this Agreement, including their respective successors and assigns.

**"Real Property Act"** means the *Real Property Act 1900*.

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

**"Related Entity"** has the meaning "related entity" has in the *Corporations Act 2001* (Cth).



**"Register"** means the Torrens title register maintained under the Real Property Act.

**"Release and Discharge Terms"** means the obligations imposed on the relevant Parties under, and by virtue of, Schedule 5.

**"Review Procedures"** means the procedures set out in clause 9.

**"Security Arrangements"** means those security arrangements set out in clause 11.

**"Transfer"** means the transfer (in registrable form but not stamped for stamp duty) of the Lane Dedication Land from the Developer to the Council.

#### **4.2. General**

In this Agreement unless the contrary intention appears:

- (a) a reference to a document or another instrument includes any variation or replacement of any of them;
- (b) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (c) the singular includes the plural and vice versa;
- (d) the word "person" includes a firm, a body corporate, an unincorporated association or an authority;
- (e) a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including, without limitation, persons taking by novation) and assigns;

- (f) an agreement, representation or warranty in favour of two or more persons is for the benefit of them jointly and severally;
- (g) an agreement, representation or warranty on the part of two or more persons binds them jointly and severally;
- (h) a reference to any thing (including, without limitation, any amount) is a reference to the whole and each part of it and a reference to a group of persons is a reference to all of them collectively, to any two or more of them collectively and to each of them individually;
- (i) "include" or "including" when introducing a list of items does not limit the meaning of the words to which the list relates to those items or to items of a similar kind;
- (j) if a Party is prohibited from doing anything, it is also prohibited from:
  - (i) allowing or causing it to be done; and
  - (ii) doing or omitting to do anything which results in it happening;
- (k) a reference to a statute, ordinance, code or law includes a statute, ordinance code or law of the Commonwealth of Australia;
- (l) a reference to a body, whether statutory or not which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions;
- (m) no rule of construction applies to the disadvantage of a Party because that Party was responsible for the preparation of this Agreement;
- (n) any capitalised term used, but not defined in this Agreement, will have the meaning ascribed to it under, and by virtue of, the Act; and
- (o) the Schedules and Exhibits form part of this Agreement.

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## **5. Development Contribution to be made under this Agreement**

The Developer will provide, or procure the provision of, the Development Contribution (in Schedule 2) by following the Development Procedures (in Schedule 3) in accordance with the Development Program (in Schedule 4).

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## **6. Application of the Development Contribution**

The Developer will provide, or procure the provision of, the Development Contribution (in Schedule 2) at the time or times and in accordance with and or in the manner set out in the Development Contribution (in Schedule 2) by following the Development Procedures (in Schedule 3) in accordance with the Development Program (in Schedule 4).

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## **7. Application of s94, 94A and s94EF of the Act to the Proposed Development**

The application of sections 94, 94A and 94EF of the Act are not excluded.

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## **8. Registration of this Agreement**

This Agreement is proposed to be registered in accordance with s93H of the Act.

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## **9. Review of Agreement**

The Parties may agree to review this Agreement. Any review or modification will be conducted in the circumstances and in the manner determined by the Parties. Any agreed amendment of this Agreement will:

- (a) be evidenced in writing; and
- (b) accurately record the agreement of the parties.

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## **10. Dispute resolution**

### **(i) 10.1 Notice of Dispute**

If a party claims that a dispute has arisen under this Agreement (Claimant), it must give written notice to the other party (Respondent) stating the matters in dispute and designating as its representative a person to negotiate the dispute (Claim Notice). No party may start court proceedings (except for proceedings seeking interlocutory relief) in respect of a dispute unless it has first complied with this clause 10.

### **(ii) 10.2 Response to Notice**

Within 10 business days of receiving the Claim Notice, the Respondent must notify the Claimant of its representative to negotiate the dispute.

### **(iii) 10.3 Negotiation**

The nominated representative must:

- (1) meet to discuss the matter in good faith within 5 business days after service by the Respondent of notice of its representative;

- (2) use reasonable endeavours to settle or resolve the dispute within 15 business days after they have met.

**(iv) 10.4 Further Notice if Not Settled**

If the dispute is not resolved within 15 business days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (Dispute Notice) by mediation under clause 10.5 or by expert determination under clause 10.6.\*

**(v) 10.5 Mediation**

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

- (1) the parties must agree to the terms of reference of the mediation within 5 business days of the receipt of the Dispute Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);
- (2) the Mediator will be agreed between the parties, or failing agreement within 5 business days of receipt of the Dispute Notice, either party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (3) the Mediator appointed pursuant to this clause 10.5 must:
  - (a) have reasonable qualifications and practical experience in the area of the dispute; and
  - (b) have no interest or duty which conflicts or may conflict with his function as mediator, he being required to fully disclose any such interest or duty before his appointment;
- (4) the Mediator shall be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and performance of his duties;
- (5) the parties must within 5 business days of receipt of the Dispute Notice notify each other of their representatives who will be involved in the mediation;
- (6) the parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement;
- (7) in relation to costs and expenses:
  - (a) each party will bear their own professional and expert costs incurred in connection with the mediation; and

- (b) the costs of the Mediator will be shared equally by the parties unless the Mediator determines a party has engaged in vexatious or unconscionable behaviour in which case the Mediator may require the full costs of the mediation to be borne by that party.

**(vi) 10.6 Expert Determination**

If the dispute is not resolved under clause 10.3 or 10.5, the dispute may, by agreement between the parties, both acting reasonably having regard to the nature of the dispute, be resolved by expert determination, in which event:

- (1) the dispute must be determined by an independent expert in the relevant field:
  - (a) agreed upon and appointed jointly by Council and the Developer; or
  - (b) in the event that no agreement is reached or appointment made within 30 business days, appointed on application of a party by the then current President of the Law Society of New South Wales;
- (2) the expert must be appointed in writing and the terms of appointment must not be inconsistent with this clause;
- (3) the determination of the dispute by such expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (4) the expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (5) each party will bear its own costs in connection with the process and the determination by the expert together with an equal proportion of the expert's fees and costs; and
- (6) any determination made by an expert pursuant to this clause is final and binding upon the parties except where the determination is in respect of, or relates to, termination or purported termination of this agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal and any party may commence litigation in relation to the dispute if it has not been resolved within 20 business days of the expert giving his or her decision.

**(vii) 10.7 Litigation**

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

**(viii) 10.8 Continue to perform obligations**

Each party must continue to perform its obligations under this Agreement, notwithstanding the existence of a dispute.

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## **11. Security and enforcement**

- 11.1 Nothing in this Agreement prevents Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement (including the breach of this Agreement by the Developer) or any matter to which this Agreement relates.
- 11.2 Until such time as the Development Contribution has been paid in full the Developer must:
- a) notify Council in writing of the name and contact details of any Certifying Authority to which it has applied for a Construction Certificate at the same time that such application is made;
  - b) at the time it lodges any application for a construction certificate notify the Certifying Authority in writing of the existence and terms of this Agreement;
  - c) procure and provide to Council a written acknowledgement from the Certifying Authority addressed to Council confirming that the Certifying Authority will not issue a Construction Certificate until Council provides written confirmation that the Development Contribution has been paid.
- 11.3 The Developer acknowledges and agrees that Council has a caveatable interest in the Land from the date of Development Consent and shall be entitled to lodge and maintain a caveat on the title to the Land notifying Council's interest created by this Agreement.
- 11.4 The Developer will upon execution of this Agreement deliver to Council a caveat in registrable form with the consent to caveat signed by the Developer notifying Council's interest created by this Agreement together with a cheque in favour of Land & Property Information, NSW for the registration fee on the caveat.
- 11.5 Council will provide such written consents and registrable documents to the Developer to enable the Land to be mortgaged provided that the mortgagee acknowledges Council's interest in the Land under this Agreement and agrees to the registration of this Agreement in accordance with its terms.
- 11.6 Upon registration of the Agreement on the title to the Land in accordance with clause 8 or payment/provision of the Development Contribution to Council or surrender of the Development Consent, the Developer will be entitled to withdrawal of the caveat.
- 11.7 In addition to the above, the Developer must provide the Security Arrangements as set out in Schedule 6.

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## **12. Notices**

- (i) 12.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

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

**(ii) Council**

Address: Civic Centre, 725 Pittwater Road, DEE WHY NSW

Fax: (02) 9971 4522

Email: council@warringah.nsw.gov.au

Attention: General Manager

**(iii) Developer**

Address: Joesandra Pty Limited  
44 Charlton Crescent  
Kogarah NSW 2217

&

CES Developments Pty Limited

8 Middleton Avenue  
Bexley North NSW 2207

Email: joe@zs.com.au

Attention: Joe Sleiman

- (iv) 12.2** If a Party gives the other Party 3 business days' notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.

- (v) 12.3** Any notice, consent, information, application or request is to be treated as given or made at the following time:

- (a) If it is delivered, when it is left at the relevant address.
- (b) If it is sent by post, 2 business days after it is posted.
- (c) If it is sent by fax, as soon as the sender receives from the sender's fax

machine a report of an error free transmission to the correct fax number.

- (vi) 12.4 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.

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### **13. Approvals and Consent**

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

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### **14. Assignment and dealings**

Until the Development Contribution is paid in full, the Developer cannot sell, transfer, assign, novate, charge, encumber or otherwise deal with the Land or attempt or purport to do so unless the Developer:

- (a) gives Council no less than ten (10) Business Days' notice in writing of the proposed sale, transfer, assignment, novation, charge, encumbrance or other dealing with its rights in respect of the Land;
- (b) procures that any buyer, transferee, assignee or novatee promptly executes an Agreement in favour of Council whereby the buyer, transferee, assignee or novatee becomes contractually bound with Council to perform the Developer's obligations under this Agreement;
- (c) in the event of a proposed charge, mortgage, encumbrance or other dealing with the Land, provides to Council a bank guarantee unlimited in time from a bank and on terms acceptable to Council to secure the payment of the Development Contribution.

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### **15. Costs**

Council's costs of and incidental to the preparation and execution of this Agreement and any related documents and registration of same shall be borne by the Developer.

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### **16. Entire agreement**

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



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**17. Further Acts**

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

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**18. Governing Law and Jurisdiction**

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

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**19. Joint and individual liability and benefits**

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

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**20. No fetter**

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

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**21. Representations and warranties**

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

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**22. Severability**

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

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**23. Modification**

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

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## **24. Waiver**

- (a) The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or a breach of obligation by, another Party.
- (b) A waiver by a Party is only effective if it is in writing.
- (c) A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

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## **25. GST**

- (i) 25.1 Unless otherwise indicated, all amounts payable by one party to the other party in relation to a supply under this Agreement have been calculated exclusive of any GST which may be imposed on the supply.
- (ii)
- (iii) 25.2 If any supply made under this Agreement is, or becomes, subject to GST, the party to whom the supply is made ("Recipient") must pay to the party making the supply ("Supplier"), as consideration, in addition to any consideration payable or to be provided elsewhere in this Agreement, subject to issuing a Valid Tax Invoice, an additional amount on account of GST, such amount to be calculated by multiplying the consideration by the applicable rate of GST.
- (iv) 25.3 Any amount in respect of GST payable under clause 25.2 must be paid to the Supplier immediately on receipt of the Valid Tax Invoice.
- (v) 25.4 If any party is required to reimburse or indemnify the other party for a cost or expense ("Cost") incurred by the other party, the amount of that Cost for the purpose of this Agreement is the amount of the Cost incurred, less the amount of any credit for, or refund of, GST, which the party incurring the Cost is entitled to claim in respect of the Cost.
- (vi) 25.5 If GST is linked with the abolition or reduction of other taxes and charges, all amounts payable by the Recipient to the Supplier under this Agreement (excluding GST) must be reduced by the same proportion as the actual total costs of the Supplier (excluding GST) are reduced either directly as a result of the abolition or reduction of other taxes and charges payable by the Supplier or indirectly by way of any reduction in prices (excluding GST) charged

to the Supplier. Both parties must also comply with Part VB of the *Trade Practices Act 1974* (Cth).

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## **26. Explanatory Note**

The Explanatory Note must not be used to assist in construing this Agreement.

## 1.2 Schedule 1 – Section 93F Requirements

The Parties acknowledge and agree that the table set out below provides for certain terms, conditions and procedures to ensure that the planning agreement complies with the Act.

REQUIREMENT UNDER THE ACT	THIS PLANNING AGREEMENT
<p><b>Planning instrument and/or development application - (Section 93F(1))</b></p> <p>The Developer has:</p> <p>(a) sought a change to an environmental planning instrument.</p> <p>(b) made, or proposes to make, a Development Application.</p>	<p>(a) No;</p> <p>(b) Yes, for the Development;</p>
<p><b>Description of land to which this Agreement applies -</b></p> <p>(Section 93F(3)(a))</p>	<p>The Land.</p>
<p><b>Description of change to the environmental planning instrument to which this Agreement applies -</b></p> <p>(Section 93F(3)(b)(i))</p>	<p>Not applicable.</p>
<p><b>Description of the development to which this Agreement applies -</b></p> <p>(Section 93F(3)(b)(ii))</p>	<p>The Development.</p>
<p><b>Description of the nature and extent of the provision to be made by the developer under the agreement, the time or times by which the provision is to be made and the manner by which the provision is to be made.</b></p>	<p>See Schedules 3, 4 &amp; 5.</p>

(Section 93F(3)(c))	
<b>Applicability of section 94 of the Act -</b> (Section 93F(3)(d))	The application of section 94 of the Act to the Development is not excluded.
<b>Applicability of section 94A of the Act -</b> (Section 93F(3)(d))	The application of section 94A of the Act to the Development is not excluded.
<b>Applicability of section 94EF of the Act -</b> (Section 93F(3)(d))	The application of section 94EF of the Act to the Development is not excluded.
<b>Consideration of benefits if under this Agreement section 94 applies -</b> (Section 93F(3)(e))	Not applicable.
<b>Mechanism for Dispute resolution -</b> (Section 93F(3)(f))	See clause 10
<b>Enforcement of this Agreement –</b> (Section 93F(3)(g))	See clause 11
<b>No obligation to grant consent or exercise functions –</b> (Section 93F(9))	See clause 13

### 1.3 Schedule 2 – Development Contribution Schedule

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#### 1. Development Contributions

The Developer undertakes to make the following Development Contribution:

Column 1	Column 2
Development Contribution	Intended use
Dedication to the Council, at no cost to the Council, of the Lane Dedication.	Public Road.

## **1.4 Schedule 3 – Development Procedures**

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- 1.1 The Developer shall amend the Development Application in respect of the Development so as to divide the Lane Dedication Land from the balance of the Land on or before the first anniversary of the Commencement Date.
- 1.2 The Council must, if it is the consent authority, determine the Development Application, as proposed to be amended by clause 1.1 of this schedule, in accordance with the Act and in accordance with its obligations as Local Government authority, paying specific regard to clauses 13 and 20 of this Agreement.
- 1.3 Within 14 Business Days of the determination of the Development Application in respect of the Development, the Developer must provide written notice to the Council stating that:
- (a) if the Consent for the Development is granted:
    - (i) it accepts that Consent and the conditions imposed and does not intend to appeal that Consent; or
    - (ii) the conditions imposed are irreparably and unacceptably inconsistent with this Agreement but that it does not intend to appeal; or
    - (iii) it does not accept that Consent and the conditions imposed and intends to appeal that Consent to the Land and Environment Court.
  - (b) if the Development Application for the Development is refused, either:
    - (i) it accepts the refusal of that Development Application; or
    - (ii) it does not accept the refusal of that Development Application and intends to appeal (including continuing with any appeal that is presently on foot) the determination of that Application to the Land and Environment Court.
- 1.4 Within 14 Business Days of the determination of an appeal under paragraph 1.3(a)(iii) or 1.3(b)(ii), the Developer must provide written notice to the Council stating that:
- (a) if the Development is approved:

- (i) it accepts the Court's decision and does not intend to appeal; or
    - (ii) it accepts the Court's decision and does not intend to appeal but that the conditions are irreparably and unacceptably inconsistent with this Agreement; or
    - (ii) it does not accept the Court's decision and intends to appeal the decision or the consent authority lodges an appeal against that decision.
  - (b) if the Development is refused development consent, that either:
    - (i) it accepts the refusal and clause 3 will apply; or
    - (ii) it does not accept the refusal and intends to appeal the determination under section 56A of the *Land and Environment Court Act* 1993 or to a higher Court, as the case may be.
- 1.5 The provisions of clause 1.4 will apply to any subsequent appeal commenced by either the Developer or consent authority, as the case may be.
- 1.6 Clause 3.2 of this Agreement will apply on the provision of written notice under paragraph 1.3(a)(ii), 1.3(b)(i), 1.4(a)(ii) or 1.4(b)(i).
- 1.7 On receipt of the written notice contemplated in paragraph 1.3(a)(i) or 1.4(a)(i):
- (a) the Developer must take all necessary and reasonable steps so as to procure the registration of a subdivision of the Land so as to sever the Lane Dedication Land from it;
  - (b) upon the subdivision referred to in clause 1.7(a) occurring (and separate titles issuing), the Developer must provide to the Council a transfer in registrable form (but not stamped for stamp duty) in respect of the Land Dedication Land and the Certificate of Title for the Land Dedication Land; and
  - (c) the Council must take all steps necessary to then procure the registration of that transfer, effecting the Dedication of the Lane Dedication Land as a Public Road within 28 Calendar Days of receipt of that notice.
- 1.8 Should the Developer fail to provide the notice required under either clause 1.3 or 1.4, then the Consent for the Development shall be deemed to be on terms acceptable to the Developer and in which case clause 1.7 above shall apply at the expiration of the requisite notice giving period.





## **1.5 Schedule 4 – Development Program**

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1.1 The Developer shall effect the Development Contribution by:

- (a) the provision of written notice to Council in accordance with paragraphs 1.3(a)(i) or 1.4(a)(i) of Schedule 3 whereby:
  - (i) the Developer must take all necessary and reasonable steps so as to procure the registration of a subdivision of the Land so as to sever the Lane Dedication Land from it;
  - (ii) upon the subdivision referred to in clause 1.1(a)(i) occurring (and separate titles issuing), the Developer must provide to the Council a transfer in registrable form (but not stamped for stamp duty) in respect of the Land Dedication Land and the Certificate of Title for the Land Dedication Land; and
  - (iii) the Council must take all steps necessary to then procure the registration of that transfer, effecting the Dedication of the Lane Dedication Land as a Public Road within 14 Business Days of receipt of that notice.

1.2 In the event that the deeming provisions referred to in clause 1.8 of Schedule 3 apply:

- (i) the Developer must take all necessary and reasonable steps so as to procure the registration of a subdivision of the Land so as to sever the Lane Dedication Land from it;
- (ii) upon the subdivision referred to in clause 1.1(a)(i) occurring (and separate titles issuing), the Developer must provide to the Council a transfer in registrable form (but not stamped for stamp duty) in respect of the Land Dedication Land and the Certificate of Title for the Land Dedication Land; and
- (iii) the Council must take all steps necessary to then procure the registration of that transfer, effecting the Dedication of the Lane Dedication Land as a Public Road within 28 Calendar Days of receipt of that notice.

## **1.6 Schedule 5 – Release and Discharge Terms**

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The Council agrees:

- (a) that upon the registration of the Transfer and the Certificate of Title by the Council at the LPI NSW consistent with this Agreement, and providing for the Dedication of the Lane Dedication Land to the Council, the Developer would have fully satisfied and discharged its obligations under this Agreement; and
- (b) if so requested by the Developer, to provide to the Developer (or to any other person authorised to act on her behalf) a letter within 30 Business Days of receipt of such a request, prepared on the Council's letterhead, confirming the Council's assessment that the Developer has fully discharged its obligations under this Agreement; and
- (c) Clause (a) has effect whether or not the Council gives the letter to the Developer under clause (b).

## **1.7 Schedule 6 – Security Arrangements**

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- 1.1 Upon execution of this Agreement the Developer must provide to the Council:
- (a) a Bank Guarantee in the sum of \$165,000, such Bank Guarantee not to have an expiry date that is less than 5 years from the issue date; and
  - (b) a signed transfer in registrable form at the LPI NSW (but not stamped for stamp duty) in respect of the Lane Dedication Land.
- 1.2 The Council will hold the Bank Guarantee and the Transfer pending registration of the subdivision creating the Lane Dedication Land.
- 1.3 No later than 4 years from the date the Bank Guarantee, including any replacement Bank Guarantee, is issued the Developer must obtain a replacement Bank Guarantee in the sum of \$165,000, such replacement Bank Guarantee not to have an expiry date that is less than 5 years from the issue date.
- 1.4 In the event this Agreement is terminated in accordance with clause 3.2 or otherwise, the Council must return the Bank Guarantee and the Transfer to the Developer in accordance with clause 3.2.

1.8

## 1.9 Execution Page

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Executed as an Agreement.

**Executed by Northern Beaches** )  
**Council** (ABN 57 284 295 198) by its )  
Attorney pursuant to Power of )  
Attorney Book 4707 No 77

Elizabeth Reeves  
Signature of Witness

Print Name:

Elizabeth Reeves  
725 Pittwater Road  
DEE WHY NSW 2099

Mark Ferguson  
General Manager  
Print Name:

Executed by Joesandra Pty Limited  
ACN 130 126 206 & CES  
Developments Pty Limited ACN  
601 505 097 in accordance with  
s.127 Corporations Act

FOR JOE SANDRA PTY LTD  
Secretary/Director BY

SOLE

Director

SECRETARY

Name of Witness (print)

FOR CES DEVELOPMENTS PTY LTD  
Secretary/Director BY

SOLE

Director

SECRETARY

Name of Witness (print)

JOE SANDRA  
Name of Director (print)

JAMES PROTOCEROS.  
Name of Director (print)

**EXPLANATORY NOTE**

**Planning Agreement**

**Between**

**Northern Beaches Council**

**& Joesandra Pty Ltd & CES Developments Pty Limited**

## **(a) Exhibit A - Explanatory Note**

### **Planning Agreement – Dedication of land at Sommerville Place for public road**

The purpose of this Explanatory Note is to provide a plain English summary to support the notification of a draft Planning Agreement (the “**Planning Agreement**”), under Section 93F of the *Environmental Planning and Assessment Act 1979* (the “**EPA Act**”), for the granting of a development consent (the “**Consent**”) involving the following:

- (a) the construction of a shop top housing development at 341 – 343 Condamine Street, Manly Vale (**Land**), including basement car parking and consolidation of 2 lots into 1; and
  - (b) the dedication of land to the Council as a public road,
- (all known as the “**Proposed Development**”).

This explanatory note has been prepared jointly between the parties as required by clause 25E of the *Environmental Planning and Assessment Regulation 2000*.

### **1. Parties to the Planning Agreement**

Joesandra Pty Limited & CES Developments Pty Limited (the “**Developer**”) has made an offer to Northern Beaches Council (the “**Council**”) to enter into a Planning Agreement, for the dedication of part of the Land (namely a strip of land 2.3m wide and variable located on the western boundary of the Land) (called the “**Lane Dedication Land**”) in lieu of the Council compulsorily acquiring that part of the Land or having to pay for it so as to enable Sommerville Place, Manly Vale to be widened and provide an appropriate and safe trafficable public road.

### **2. Description of the Subject Land**

The land to which this Planning Agreement applies is described as follows:



- Lot 2 in DP 363933; and
- Lot 1 in DP 349961,

known as 341 - 343 Condamine Street, Manly Vale.

### **3. Description of Proposed Change to Environmental Planning Instrument**

There is no change proposed to the *Warringah Local Environmental Plan 2011*.

### **4. Summary of Objectives, Nature and Effect of this Planning Agreement**

The objective of the Planning Agreement is to ensure that the Sommerville Place remains an appropriate and trafficable public road under the care and control of the Council for the benefit of current and future generations.

### **5. Timing of delivery of the public community benefit**

The dedication of the public benefit, namely the dedication of the Lane Dedication Land, will occur prior to or within 3 months of the issue of a construction certificate for the Development.

### **6. Assessment of the Merits of this Planning Agreement**

#### **(a) The Planning Purposes Served by this Planning Agreement**

In accordance with Section 93F(2) of the EPA Act 1979, this Planning Agreement promotes the following public purpose;

- *the provision of (or the recoupment of the cost of providing) public amenities or public services*

The parties have assessed this Planning Agreement and state that the provisions of this Planning Agreement, in particular the Proposed Development, provide a reasonable

means of achieving the public purposes set out above by reason that the Lane Dedication Lane will be vested under the care and control of the Council.

**(b) How this Planning Agreement Promotes the Objects of the Environmental Planning and Assessment Act 1979**

In accordance with the EPA Act 1979, this Planning Agreement and the Proposed Development promotes its intent to encourage;

*(ii) the promotion and co-ordination of the orderly and economic use and development of the Land; and*

*(v) the provision and co-ordination of community services and facilities; and*

The Planning Agreement achieves these Objects by requiring the Developer to make the dedication of the Lane Dedication Land which will enable Sommerville Place to be widened and the area to be controlled by the Council as a public road.

By providing the dedication of land the Planning Agreement will result in:

- promotion of the social and economic welfare of the community and a better environment;
- promotion and co-ordination of the orderly and economic use and development of land (a better trafficable public road); and
- provision and co-ordination of community services and facilities (being a public road); and

**(i) (c) How this Planning Agreement Promotes the Public Interest**

This Planning Agreement's intent is to promote the Public Interest through the acquisition of land for public purposes to the Council without the Council having to pay for the land.

This in turn promotes further Public Interest by ensuring that the scarce and valuable resources of the Council are maintained and preserved for the betterment and enjoyment of the community at large.

**(ii) (d) How this Planning Agreement Promotes one or more of the elements of Council's Charter under section 8 of the *Local Government Act 1993***

This Planning Agreement promotes the following elements of the Councils Charter:

- to provide directly or on behalf of other levels of government, after due consultation, adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively; and
- to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development

This Planning Agreement promotes the above elements of the Councils Charter by providing an appropriate and trafficable public road under the care and control of the Council for the benefit of current and future generations.

**(e) The Impact of this Planning Agreement on the Public or any Section of the Public**

The growing population of Warringah requires public roads – particularly those that are both appropriate and safe. This Planning Agreement provides the Council with land which will be dedicated to Council for use as a public road. As a public road, the Lane Dedication Land will be available to all road users to use.

- (f) **Identify whether the Planning Agreement conforms with Council's capital works program (if any)" CI 25E(2)(f)**

The Planning Agreement is not inconsistent with Council's Capital Works Program

**State whether the agreement, amendment or revocation specifies that certain requirements of the agreement must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued CI 25E(2)(g)**

The Planning Agreement does not include a provision that certain requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued.

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