

Planning Agreement for the provision of Contributions in lieu of Parking Spaces

60 Kitchener Parade, Bankstown – Lot 5 DP 546155

ZKFK Pty Ltd as Trustee for the ZKFK Unit Trust (ABN 32 391 229 963) (**Developer**)

Canterbury Bankstown City Council (ABN 45 985 891 846) (**Council**)

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Parties

Developer	Name	ZKFK Pty Ltd as Trustee for the ZKFK Unit Trust
	Address	Suite 1, Level 1 200 The Boulevard PUNCHBOWL NSW 2196
	ABN	32 391 229 963
	Contact Name	Adel Kheir adel@kheiraccountants.com.au
Council	Name	Canterbury Bankstown Council
	Address	Bankstown Civic Centre 66-72 Rickard Road BANKSTOWN NSW 2200
	ABN	45 985 891 846
	Contact Name	Mr Simon Manoski, Director Planning simon.manoski@cbc.city.nsw.gov.au

Background

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- A** The Developer is the registered proprietor of the Land.
- B** The Developer has obtained the benefit of the Development Consent.
- C** The Development Consent is subject to a deferred commencement condition requiring the Developer to enter into this Agreement to provide the Monetary Contribution to Council.

Operative Provisions

1 Agreement

The agreement of the parties is set out in the Operative Provisions of this agreement, in consideration of, among other things, the mutual promises contained in this agreement.

2 Definitions and interpretation

2.1 Defined terms

In this agreement, words beginning with a capital letter that are defined in Part 1 of **Schedule 1** have the meaning ascribed to them in that schedule.

2.2 Interpretation

The interpretational rules contained in Part 2 of **Schedule 1** apply in the interpretation of this agreement.

3 Application and operation of this agreement

3.1 Planning agreement

This agreement is a planning agreement:

- (1) within the meaning set out in section 7.4 of the Act; and
- (2) governed by Subdivision 2 of Division 7.1 of Part 7 of the Act.

3.2 Application

This agreement applies to both the Land and the Development.

3.3 Operation

- (1) This Agreement operates from the date it is executed by both parties.

3.4 Acknowledgement

The Developer acknowledges that Council will use its reasonable endeavours to ensure that the Monetary Contributions are used to provide public car parking within the Bankstown Central Business District however Council is under no obligation to do so and may use that contribution for the provision of public car parking in any other part of the Council's Local Government Area.

4 Application of sections 7.11 and 7.12

4.1 Application

This agreement does not exclude the application of section 7.11 or section 7.12 of the Act to the Development.

4.2 Consideration of benefits

Section 7.11(6) of the Act does not apply to the Contributions that are to be carried out or provided pursuant to this agreement.

5 Registration of this agreement

5.1 Registration

This agreement will be registered on the title of the Land pursuant to section 7.6 of the Act.

5.2 Obligations of the Developer

The Developer must:

- (1) do all things necessary to allow the registration of this agreement to occur under clause 5.1; and
- (2) pay any reasonable costs incurred by Council in undertaking that registration.

6 Provision of Monetary Contributions

6.1 Not used

6.2 Obligation to make Monetary Contributions

Subject to clause 6.4, the Developer must pay the Monetary Contributions to Council as set out in Part 1 of **Schedule 3**.

6.3 Developer's undertaking

The Developer undertakes to Council not to make an application for the issue of any Occupation Certificate until it has made the payments required to be made to Council under clause 6.2.

6.4 Indexation of Amounts payable by Developer

The Monetary Contributions are to be increased (with the calculation to be made as from the date any such amount is due to be paid under this agreement) in accordance with the following formula:

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

where:

A = the indexed amount;

B = the relevant amount as set out in this agreement;

C = the Index most recently published before the date that the relevant payment or the calculation with respect to the relevant amount is to be made; and

D = the Index most recently published before the commencement date of this agreement.

If **A** is less than **B**, then the amount of the relevant Monetary Contribution will not change.

7 Developer warranties

The Developer warrants to Council that:

- (1) it is legally and beneficially entitled to the Land;
- (2) it is able to fully comply with its obligations under this agreement;
- (3) it has full capacity to enter into this agreement; and
- (4) there is no legal impediment to it entering into this agreement, or performing the obligations imposed on it under this agreement.

8 Determination of this agreement

8.1 Determination

- (1) Subject to paragraph (2), this agreement will determine upon the Developer satisfying all of its obligations under this agreement (including any obligations under this clause 8).
- (2) This agreement will determine immediately if the Development Consent:
 - (a) lapses;
 - (b) is surrendered; or
 - (c) becomes ineffective for any reason, under the Act.

8.2 Effect of determination

Upon the determination of this agreement Council will do all things necessary to allow the Developer to remove this agreement from the title of the whole or any part of the Land as soon as reasonably practicably.

9 Assignment and security

9.1 Prohibition

Neither party may Assign their rights under this agreement without the prior written consent of the other party.

9.2 Assignment of the Land

The Developer must not Assign its interest in the Land unless:

- (1) Council consents to the Assignment, acting reasonably;
- (2) the proposed assignee enters into an agreement to the satisfaction of Council under which the assignee agrees to be bound by the terms of this agreement; and
- (3) the Developer is not in breach of any terms of this agreement.

9.3 Delivery to Council of Bank Guarantee

The Developer must deliver to Council an unconditional bank guarantee in a form acceptable to the Council for an amount, and by the times set out in **Schedule 3 (Bank Guarantee)**.

9.4 Council may call on Bank Guarantee

If the Developer fails to comply with any term of this agreement or does not pay any amount it is required to pay to Council by the time or times and in the manner set out in this agreement, Council may, without limiting any other avenues available to it, call on the relevant Bank Guarantee without notice to the Developer to the extent necessary to meet that liability.

9.5 Return of Bank Guarantee

Council must return the Bank Guarantee (if any) within one (1) month after:

- (1) the Developer has complied with clause 6.2 (if applicable); or
- (2) the determination of this agreement.

10 Review and amendment

10.1 Negotiation of review

If either party requests a review of the whole or any part of this agreement then the parties must use their best endeavours, acting in good faith, to review this agreement in accordance with that request.

10.2 Amendment to be in writing

If the parties agree to amend this agreement as a result of a review conducted under clause 10.1 then any such amendment must be made:

- (1) in writing signed by both parties;
- (2) in accordance with the Act, or any Regulations in force under the Act.

11 Dispute resolution

11.1 Notice of Dispute

If a party believes that there is a dispute in respect of this agreement (**Dispute**) then:

-
- (1) that party must give notice (**Dispute Notice**) in writing to the other party stating that there is a Dispute; and
 - (2) the Dispute Notice must outline:
 - (a) what the party believes the dispute to be;
 - (b) what the party wants to achieve;
 - (c) what the party believes will settle the Dispute; and
 - (d) who will be the party's representatives to negotiate the dispute.

11.2 Consultation between the Representatives

Within fifteen (15) Business Days of a notice served in accordance with clause 11.1(1) the representatives (**Representatives**) of each of the parties must meet in order to resolve the Dispute.

11.3 Exclusivity of dispute resolution procedure

- (1) Both parties must adhere to the dispute resolution procedure set out in this agreement.
- (2) The only time that either party may depart from the dispute resolution procedure set out in this clause is when urgent interlocutory relief is required to restrain a breach or threatened breach of this agreement.

11.4 Settlement of Dispute

If the parties cannot resolve the Dispute after adhering to the dispute resolution procedure set out in this agreement then either party may seek any other avenues available to it in order to resolve the Dispute.

12 Position of Council

12.1 Consent authority

The parties acknowledge that Council is a consent authority with statutory rights and obligations pursuant to the terms of the Planning Legislation.

12.2 Agreement does not fetter discretion

This agreement is not intended to operate to fetter, in any unlawful manner:

- (1) the power of Council to make any Law; or
- (2) the exercise by Council of any statutory power or discretion,
(**Discretion**).

12.3 Severance of provisions

- (1) No provision of this agreement is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this agreement is held by a court of competent jurisdiction to constitute an unlawful fetter on any Discretion, the parties agree:
 - (a) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause 12 is substantially satisfied;
 - (b) in the event that paragraph (1)(a) cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this agreement has full force and effect; and
 - (c) to endeavour to satisfy the common objectives of the parties on relation to the provision of this agreement which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.

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- (2) Where the Law permits Council to contract out of a provision of that Law or gives Council power to exercise a Discretion, then if Council has in this agreement contracted out of a provision or exercised a Discretion under this agreement, then to the extent of this agreement is not to be taken to be inconsistent with the Law.

12.4 No obligations

Nothing in this agreement will be deemed to impose any obligation on Council to exercise any of its functions under the Act in relation to the Development Consent, the Land or the Development in a certain manner.

13 Confidentiality

13.1 Agreement not Confidential

The terms of this agreement are not confidential, and this agreement may be treated as a public document and exhibited or reported without restriction by any party.

13.2 Other Confidential Information

- (1) The parties acknowledge that:
- (a) Confidential Information may have been supplied to some or all of the parties in the negotiations leading up to the making of this agreement; and
 - (b) The parties may disclose to each other further Confidential Information in connection with the subject matter of this agreement.
 - (c) Subject to paragraphs (2) and (3), each party agrees:
 - (i) not to disclose any Confidential Information received before or after the making of this agreement to any person without the prior written consent of the party who supplied the Confidential Information; or
 - (ii) to take all reasonable steps to ensure all Confidential Information received before or after the making of this agreement is kept confidential and protected against unauthorised use and access.
- (2) A party may disclose Confidential Information in the following circumstances:
- (a) in order to comply with the Law, or the requirements of any Authority; or
 - (b) 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.
- (3) 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.

14 GST

14.1 Defined GST terms

Defined terms used in this clause 14 have the meaning ascribed to them in the GST Law.

14.2 GST to be added to amounts payable

- (1) If GST is payable on a Taxable Supply made under, by reference to or in connection with this agreement, the party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- (2) This clause does not apply to the extent that the Consideration for the Taxable Supply is expressly agreed to be GST inclusive.

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- (3) Unless otherwise expressly stated, prices or other sums payable or Consideration to be provided under or in accordance with this agreement are exclusive of GST.

14.3 GST obligations to survive termination

This clause 14 will continue to apply after the expiration or earlier termination of this agreement.

15 Default in performance

15.1 Events of Default

The Developer commits an **Event of Default** if:

- (1) it breaches a term of this agreement; or
- (2) fails to comply with the terms and conditions of the Development Consent for the Development.

15.2 Consequences of Events of Default

Where the Developer commits an Event of Default, Council may serve a notice on the Developer requiring the relevant breach to be rectified within seventy two (72) days of the date of that notice.

15.3 No restriction on rights

The rights vested in Council pursuant to clause 15.2 do not prevent Council from exercising any other rights that it may possess at law.

15.4 Termination

This agreement terminates in the event Council serves notice on the Developer terminating this agreement where the Developer has failed to comply with a notice issued in accordance with 15.2.

15.5 Consequence of termination

Upon termination of this agreement:

- (1) all future rights and obligations of the parties are discharged; and
- (2) all pre-existing rights and obligations of the parties continue to subsist.

16 Miscellaneous

16.1 Obligation to act in good faith

The parties must at all times:

- (1) cooperate and use their best endeavours to profitably and professionally give effect to their rights and obligations set out in this agreement;
- (2) not unreasonably delay any action, approval, direction, determination or decision which is required of them;
- (3) make approvals or decisions that are required of them in good faith and in a manner consistent with the completion of the transactions set out in this agreement; and
- (4) be just and faithful in their activities and dealings with the other parties.

16.2 Legal costs

The Developer agrees to:

- (1) pay or reimburse the reasonable legal costs and disbursements of Council of the negotiation, preparation and execution of this agreement;
- (2) pay the reasonable legal costs and disbursements referred to in paragraph (1) within fourteen (14) days of receipt of a tax invoice from Council; and

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- (3) pay or reimburse the legal costs and disbursements of Council arising from the ongoing administration and enforcement of this agreement including any breach or default by the Developer of its obligations under this agreement.

17 Administrative provisions

17.1 Notices

- (1) Any notice, consent or other communication under this agreement must be in writing and signed by or on behalf of the person giving it, addressed to the person to whom it is to be given and:
- (a) delivered to that person's address;
 - (b) sent by pre-paid mail to that person's address; or
 - (c) transmitted by facsimile or other electronic means to that person's address.
- (2) A notice given to a person in accordance with this clause is treated as having been given and received:
- (a) if delivered to a person's address, on the day of delivery if a Business Day, otherwise on the next Business Day;
 - (b) if sent by pre-paid mail, on the third Business Day after posting; and
 - (c) if transmitted by facsimile or other electronic means to a person's address and a correct and complete transmission report is received, on the day of transmission if a Business Day, otherwise on the next Business Day.
- (3) For the purpose of this clause the address of a person is the address set out in this agreement or another address of which that person may from time to time give notice to each other person.

17.2 Entire agreement

This agreement is the entire agreement of the parties on the subject matter. All representations, communications and prior agreements in relation to the subject matter are merged in and superseded by this agreement.

17.3 Waiver

The non-exercise of or delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the parties to be bound by the waiver.

17.4 Cooperation

Each party must sign, execute and deliver all agreements, documents, instruments and act reasonably and effectively to carry out and give full effect to this agreement and the rights and obligations of the parties under it.

17.5 Counterparts

This agreement may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

17.6 Amendment

This agreement may only be amended or supplemented in writing signed by the parties.

17.7 Unenforceability

Any provision of this agreement which is invalid or unenforceable in any jurisdiction is to be read down for the purposes of that jurisdiction, if possible, so as to be valid or enforceable, and is

otherwise capable of being severed to the extent of the invalidity or enforceability, without affecting the remaining provisions of this agreement or affecting the validity or enforceability of that provision in any other jurisdiction.

17.8 Power of Attorney

Each attorney who executes this agreement on behalf of a party declares that the attorney has no notice of:

- (1) the revocation or suspension of the power of attorney by the grantor; or
- (2) the death of the grantor.

17.9 Governing law

The law in force in the State of New South Wales governs this agreement. The parties:

- (1) submit to the exclusive jurisdiction of the courts of New South Wales and any courts that may hear appeal from those courts in respect of any proceedings in connection with this agreement; and
 - (2) may not seek to have any proceedings removed from the jurisdiction of New South Wales on the grounds of *forum non conveniens*.
-

Execution page

Executed as an agreement

Dated:

Executed by the **Developer** in accordance with section 127(1) of the Corporations Act by authority of its directors.

Director/Secretary (Signature)

Director (Signature)

Name of Director/ Secretary (Print Name)

Name of Director (Print Name)

Executed by **Canterbury Bankstown City Council** by its authorised officer in accordance with resolution dated:
(Resolution date)

Authorised Officer (Signature)

Witness (Signature)

Name and Position of Authorised Officer (Print Name)

Name of Witness (Print Name)

Position of Authorised Officer (Print Position)

Schedule 1: Defined terms and interpretation

Part 1 – Definitions

Act	means the <i>Environmental Planning and Assessment Act 1979</i> (NSW).
Assign or Assignment	as the context requires refers to any assignment, sale, transfer, disposition, declaration of trust over or other assignment of a legal and/or beneficial interest.
Authority	means (as appropriate) any: <ul style="list-style-type: none">(1) federal, state or local government;(2) department of any federal, state or local government;(3) any court or administrative tribunal; or(4) statutory corporation or regulatory body.
Confidential Information	means any information and all other knowledge at any time disclosed (whether in writing and 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: <ul style="list-style-type: none">(1) is by its nature confidential;(2) is designated, or marked, or stipulated by either party as confidential (whether in writing or otherwise);(3) any party knows or ought to know is confidential; or(4) is information which may be reasonably considered to be of a confidential nature.
Complete or Completed	means completed in accordance with the requirements of this agreement.
Construction Certificate	has the same meaning as in the Act.
Contributions	means the contributions required to be provided to Council by the Developer in accordance with this agreement and as set out in Schedule 3 .
Development	means the alteration and addition to provide new flooring space at level 4 of the existing commercial building.
Development Consent	means a development consent No. DA960/2019 issued by the Council on 10 August 2020.
GST Law	means <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth) and any other Act or regulation relating to the imposition or administration of the GST.
Index	means the Consumer Price Index (All Groups - Sydney) as published by the Australian Bureau of Statistics from time to time.

Land	means the land contained in certificate of title folio identifier 5/546155 and known as 60 Kitchener Parade, Bankstown NSW 2200.
Law	means all legislation, regulations, by-laws, common law and other binding order made by any Authority.
Monetary Contributions	means any monetary contribution (if any) required to be made by the Developer as set out in Schedule 3 .
Occupation Certificate	has the same meaning as in the Act.
Planning Legislation	means the Act, the <i>Local Government Act 1993</i> (NSW) and the <i>Roads Act 1993</i> (NSW).

Part 2 - Interpretational Rules

clauses, annexures and schedules	a clause, annexure or schedule is a reference to a clause in or annexure or schedule to this agreement.
reference to statutes	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.
singular includes plural	the singular includes the plural and vice versa.
person	the word "person" includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association or any government agency.
executors, administrators, successors	a particular person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns.
dollars	Australian dollars, dollars, \$ or A\$ is a reference to the lawful currency of Australia.
calculation of time	if a period of time dates from a given day or the day of an act or event, it is to be calculated exclusive of that day.
reference to a day	a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later.
accounting terms	an accounting term is a reference to that term as it is used in accounting standards under the Corporations Act or, if not inconsistent with those standards, in accounting principles and practices generally accepted in Australia.
reference to a group of persons	a group of persons or things is a reference to any two or more of them jointly and to each of them individually.
meaning not limited	the words "include", "including", "for example" or "such as" are not used as, nor are they to be interpreted as, words of limitation, and,

	when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind.
next day	if an act under this agreement to be done by a party on or by a given day is done after 4.30pm on that day, it is taken to be done on the next day.
next Business Day	if an event must occur on a stipulated day which is not a Business Day then the stipulated day will be taken to be the next Business Day.
time of day	time is a reference to Sydney time.
headings	headings (including those in brackets at the beginning of paragraphs) are for convenience only and do not affect the interpretation of this agreement.
agreement	a reference to any agreement, Agreement or instrument includes the same as varied, supplemented, novated or replaced from time to time.

Schedule 2:
Requirements under section 7.4 of the Act

Requirement under the Act	This Planning Agreement
Planning instrument and/or development application – (Section 7.4(1) of the Act) The Developer has: <ul style="list-style-type: none"> (a) sought a change to an environmental planning instrument. (b) made, or proposes to make, a Development Application. (c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies. 	<ul style="list-style-type: none"> (a) No (b) Yes (c) Yes
Description of land to which this agreement applies – (Section 7.4(3)(a) of the Act)	The land contained in certificate of title folio identifier 5/546155 and known as 60 Kitchener Parade, Bankstown NSW 2200.
Description of the development to which this agreement applies – (Section 7.4(3)(b) of the Act)	DA-960/2019 – Alteration and addition to level 4 / commercial building
Application of section 7.11 of the Act – (Section 7.4(3)(d) of the Act)	Refer to clause 4 of the Planning Agreement.
Applicability of section 7.12 of the Act – (Section 7.4(3)(d) of the Act)	Refer to clause 4 of the Planning Agreement.
Consideration of benefits under this agreement if section 7.11 applies – (Section 7.4(3)(e) of the Act)	Refer to clause 4 of the Planning Agreement.
Mechanism for Dispute resolution – (Section 7.4(3)(f) of the Act)	Refer to clause 11 of the Planning Agreement.
Enforcement of this agreement (Section 7.4(3)(g))	Refer to clause 5 and 9 of the Planning Agreement.
No obligation to grant consent or exercise functions – (Section 7.4(9))	Refer to clause 12 of the Planning Agreement.

**Schedule 3:
Contributions**

Item	Time for Completion	Contribution Value	Timing of Bank Guarantee
Monetary Contributions First Payment	Prior to the issue of Occupation Certificate for the Development.	(No. of parking spaces shortfall x CPI adjusted contribution per space = Total Contribution Value) 2 x \$35,592.44 = \$71,184.88	Prior to the issue of Construction Certificate for the Development.
