

Draft Voluntary Planning Agreement

29 June 2021

Canterbury-Bankstown Council

ABN 45 985 891 846

Sydney Water

ABN 49 776 225 038

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Agreement

Date

Parties

First party

Name	Canterbury-Bankstown Council (Council)
ABN	45 985 891 846
Contact	General Manager
Email	council@cbc.city.nsw.gov.au

Second party

Name	Sydney Water (Landowner, subject to clause 1)
ABN	49 776 225 038
Contact	Christian Pollock, Project Manager Disposals, Group Property
Email	christian.pollock@sydneywater.com.au

Background

- A. The Landowner made an application to the Council for the Instrument Change for the purpose of making a Development Application to the Council for Development Consent to carry out the Development on the Development Land.
- B. The Instrument Change application was accompanied by an offer by the Landowner to enter into this agreement to make contributions for public purposes associated with the Instrument Change and the Development.

Operative part

1 Definitions

In this agreement, unless the context indicates a contrary intention:

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

Address means a party's address set out in the Notices clause of this agreement;

Approval means any certificate, licence, consent, permit, approval or other requirement of any Authority having jurisdiction in connection with the activities contemplated by this agreement;

Authority means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person;

Bank Guarantee means an irrevocable and unconditional undertaking that is not limited in time and does not expire by one of the following trading banks:

- (a) Australia and New Zealand Banking Group Limited,
- (b) Commonwealth Bank of Australia,
- (c) Macquarie Bank,
- (d) National Australia Bank,
- (e) St George Bank Limited,
- (f) Westpac Banking Corporation, or
- (g) Other financial institution approved by the Council,

to pay an amount or amounts of money to the Council on demand and containing terms and conditions reasonably acceptable to the Council;

Business Day means a day on which banks are open for general banking business in Sydney, excluding Saturdays and Sundays;

CDC has the same meaning as complying development certificate in the Act;

Claim means any claim, loss, liability, damage, proceeding, order, judgment or expense arising out of the operation of this agreement;

Contributions Plan has the same meaning as under the Act;

CPI means the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics;

Damages means all liabilities, losses, damages, costs and expenses, including legal fees and disbursements and costs of investigation, litigation, settlement, judgment, interest and penalties;

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

Dedication Land means that part of the Development Land:

- (a) on which the Public Works are to be located; and
- (b) that is to be dedicated to Council in accordance with this agreement;

Defects Liability Period means the date that is 12 months from the date that the Public Works have achieved Practical Completion and the Landowner has provided written evidence to Council in accordance with clause 6.2(b)(i);

Development means the subdivision of the Development Land into separate allotments, to enable R2 Development, and the Dedication Land;

Development Application has the same meaning as in the Act;

Development Consent has the same meaning as in the Act and includes a CDC;

Development Land means that part of the Land that, pursuant to the Instrument Change, is to be rezoned from SP2 Infrastructure (Water Supply System) to R2 Low Density Residential under the LEP;

Gross Floor Area means the total gross floor area (as that term is defined in the LEP) of all development on the Development Land the subject of a Development Consent permitting Residential Development;

GST has the same meaning as in the GST Law;

GST Law has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition of or administration of the GST;

Housing Contribution means \$329 per m² for the provision of affordable housing contributions, as adjusted in accordance with clause 6.3;

Insolvent means, in relation to a party:

- (a) that party makes an arrangement, compromise or composition with, or assignment for, the benefit of its creditors or a class of them;
- (b) a receiver, receiver and manager, administrator, provisional liquidator, trustee, controller, inspector or analogous person is appointed in relation to, or over, all or any part of that party's business, assets or securities;
- (c) a presumption of insolvency has arisen under legislation because of the party's failure to comply with a statutory demand or analogous process;
- (d) an application for the winding up of, or for the appointment of a receiver to, that party, other than winding up for the purpose of solvent reconstruction or re amalgamation, is presented and not withdrawn or dismissed within [21] days (or such longer period agreed to by the parties), or an order is made or an effective resolution is passed for the winding up of, or for the appointment of a receiver to, that party, or any analogous application is made or proceedings initiated;
- (e) any shareholder or director of that party convenes a meeting for the purpose of considering or passing any resolution for the winding up or administration of that party;
- (f) that is an individual, a creditor's petition or a debtor's petition is presented to the Official Receiver or analogous authority in relation to that party;
- (g) an execution or analogous process is levied or enforced against the property of that party;
- (h) that party ceases or suspends, or threatens to cease or suspend, the conduct of all or a substantial part of its business;
- (i) that party disposes of, or threatens to dispose of, a substantial part of its assets;
- (j) that party stops or suspends, or threatens to stop or suspend, payment of all or a class of its debts; or
- (k) that party is unable to pay the party's debts as and when they become due and payable.

Instrument Change means the proposed amendments to the LEP, as described in PP_2020_CBANK_001_00, a copy of which is attached to this agreement.

Land means Lot 1 DP 911478 and Lot 1 DP 115504, known as 165-169 Holden Street, Ashbury;

Landowner means:

- (a) except where paragraph (b) or (c) of this definition applies, Sydney Water;
- (b) except where paragraph (c) of this definition applies, the Transferee referred to in clause 12.3(a), if Sydney Water transfers, assigns or disposes of the whole of its right, title and interest in the Development Land to the Transferee in accordance clause 12.3(a); or
- (c) such other person to whom all or part of the Development Land has been transferred, assigned or disposed of in accordance clause 12.3(a);

Law means:

- (a) any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation;
- (b) any Approval, including any condition or requirement under it; and
- (c) any fees and charges payable in connection with the things referred to in paragraphs (a) and (b);

LEP means the *Canterbury Local Environmental Plan 2012* or any subsequent LEP that replaces it;

Monetary Contribution means the monetary contribution calculated in accordance with clause 6.1(a) of this agreement;

Occupation Certificate means an occupation certificate as defined under section 109C of the Act, and includes an interim Occupation Certificate or a final Occupation Certificate;

Payment Date means the date that each lot resulting from the Development is the subject of Development Consent permitting the carrying out of R2 Development;

Practical Completion means that stage of construction of the Public Works where they are complete, have the benefit of an Occupation Certificate (if Development Consent is required to construct the Public Works), and are free from any defects that prevent them from used for their intended purpose.

Public Works means a 1.8m wide pathway on the Dedication Land with associated signage on Holden Street and Peace Park;

R2 Development means development on any part of the Development Land that includes the construction of a building and is for a purpose that would not have been permissible had the Development Land not been rezoned from SP2 Infrastructure (Water Supply System) to R2 Low Density Residential under the LEP;

Register means the Torrens title register maintained under the *Real Property Act 1900* (NSW);

Related Body Corporate has the meaning given to that term in s 9 of the *Corporations Act 2001* (Cth);

Residential Development means the carrying out of development on the Development Land for the purposes of residential housing;

Site Audit Statement means a site audit statement prepared in accordance with the requirements of the *Contaminated Land Management Act 1997* which certifies that the Dedication Land is suitable for use for use as a pedestrian footpath;

Stage 1 Subdivision means the subdivision of the Land resulting in the Development Land comprising one or more lots that are separate from the balance of the Land;

Stage 1 Subdivision Certificate means a Subdivision Certificate in respect of the Stage 1 Subdivision;

Subdivision Certificate has the same meaning as in the Act;

Transferee has the meaning given in clause 12.3; and

Works means the work set out in Error! Reference source not found..

2 Interpretation

In this agreement, unless the context indicates a contrary intention:

- (a) (documents) a reference to this agreement or another document includes any document which varies, supplements, replaces, assigns or novates this agreement or that other document;
- (b) (references) a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this agreement;
- (c) (headings) clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this agreement;
- (d) (person) a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns;
- (e) (party) a reference to a party to a document includes that party's personal representatives, executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) (president, CEO, general manager or managing director) the president, CEO, general manager or managing director of a body or Authority includes any person acting in that capacity;
- (g) (requirements) a requirement to do any thing includes a requirement to cause that thing to be done, and a requirement not to do any thing includes a requirement to prevent that thing being done;
- (h) (including) including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind;
- (i) (corresponding meanings) a word that is derived from a defined word has a corresponding meaning;
- (j) (singular) the singular includes the plural and vice-versa;
- (k) (gender) words importing one gender include all other genders;
- (l) (parts) a reference to one or more things includes each part and all parts of that thing or group of things but nothing in this clause implies that part performance of an obligation constitutes performance of that obligation;
- (m) (rules of construction) neither this agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting;

- (n) (legislation) a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (o) (time and date) a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in Australia, even if the obligation is to be performed elsewhere;
- (p) (joint and several) an agreement, representation, covenant, right or obligation:
 - (i) in favour of two or more persons is for the benefit of them jointly and severally; and
 - (ii) on the part of two or more persons binds them jointly and severally;
- (q) (writing) a reference to a notice, consent, request, approval or other communication under this agreement or an agreement between the parties means a written notice, request, consent, approval or agreement;
- (r) (replacement bodies) a reference to a body (including an institute, association or Authority) 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;
- (s) (Australian currency) a reference to dollars or \$ is to Australian currency;
- (t) (month) a reference to a month is a reference to a calendar month; and
- (u) (year) a reference to a year is a reference to twelve consecutive calendar months.

3 Planning Agreement under the Act

- (a) The parties agree that this agreement is a planning agreement within the meaning of section 7.4 of the Act.
- (b) Schedule 14 of this agreement summarises the requirements for planning agreements under s 7.4 of the Act and the way this agreement addresses those requirements.

4 Application of this agreement

This agreement applies to:

- (a) the Instrument Change, and
- (b) the Development Land.

5 Operation of this agreement

This agreement commences on and from the date it is executed by all parties.

6 Contributions to be made under this agreement

6.1 Monetary Contribution

- (a) Subject to clause 6.1(c), the Landowner will, as soon as practicable after the Payment Date, pay to Council a monetary contribution calculated in accordance with the following formula:

$$\begin{array}{rcl} \text{Gross Floor} & & \text{Housing Contribution per m}^2 \text{ at time of payment.} \\ \text{Area of} & & \\ \text{Residential} & \times & \\ \text{Development} & & \end{array}$$

- (b) In order to secure payment of the Monetary Contribution, the Landowner is to provide to Council prior to the issue of a Stage 1 Subdivision Certificate a Bank Guarantee in the sum of \$329,000.
- (c) As soon as practicable after the Payment Date:
- (i) where the Gross Floor Area is equal to or less than 1000m² – the Council shall return the Bank Guarantee to the Landowner;
 - (ii) where the Gross Floor Area is more than 1000m² and the Monetary Contribution payable is less than \$329,000 – the Council shall call upon the Bank Guarantee up to an amount equal to \$329,000 and return to the Landowner the balance of the Bank Guarantee;
 - (iii) where the Gross Floor Area is more than 1000m² and the Monetary Contribution payable is greater than \$329,000 – the Council shall call upon the Bank Guarantee in full and the Landowner shall pay to Council an amount equivalent to the outstanding balance.
- (d) The parties agree and acknowledge that any Monetary Contribution paid to Council will be used by the Council towards the provision of affordable housing within the Canterbury Bankstown LGA.

6.2 Public Works and Dedication

- (a) Prior to the issue of the first Occupation Certificate for R2 Development on the Development Land, the Landowner will:
- (i) construct the Public Works to a proper and workmanlike standard in accordance with designs and specifications prepared by the Landowner and agreed to by Council, acting reasonably; and
 - (ii) dedicate the Dedication Land to Council.
- (b) Prior to the dedication referenced in clause 6.2(a)(iii), the Landowner must provide to Council:
- (i) written evidence to Council's reasonable satisfaction that the Public Works have reached Practical Completion; and
 - (ii) the Site Audit Statement.
- (c) The Landowner will repair any defects in the Public Works that prevent the Public Works from complying with the terms of this agreement, that are identified by

Council and notified to the Landowner during the Defects Liability Period within a reasonable period of the notification.

6.3 *Escalation of Housing Contribution*

- (a) In this clause 6.3:
 - (i) 'Anniversary Date' means the anniversary of the date that this agreement was executed by all parties; and
 - (ii) 'CPI' means the CPI (All Groups – Sydney) index as published by the Australian Bureau of Statistics from time to time.
- (b) On each Anniversary Date, the Housing Contribution must be calculated as follows:

$$\text{Housing Contribution} = \text{HC}_1 + \text{HC}_1 \left(\frac{\text{CPI}_x - \text{CPI}_1}{\text{CPI}_1} \right)$$

where:

- HC_1 = \$329 per m²;
- CPI_x = the CPI last published by the Australian Bureau of Statistics on the Anniversary Date; and
- CPI_1 = the CPI last published by the Australian Bureau of Statistics at the date that this agreement was executed by all parties.

7 Application of s 7.11, s 7.12 and s 7.24 of the Act to the Development

- (a) This agreement does not exclude the application of section 7.11 of the Act to the Development.
- (b) This agreement does not exclude the application of section 7.12 of the Act to the Development.
- (c) This agreement does not exclude the application of section 7.24 of the Act to the Development.
- (d) The benefits under this agreement are not to be taken into consideration in determining a development contribution under section 7.11 of the Act.

8 Registration of this agreement

8.1 *Landowner Interest*

The Landowner represents and warrants to the Council that on the date of this agreement it is the registered proprietor of the Development Land.

8.2 *Registration of this agreement*

- (a) The Landowner agrees to procure the registration of this agreement under the *Real Property Act 1900* (NSW) in the relevant folios of the Register of:
 - (i) the Land, if the Stage 1 Subdivision has not been completed; or

- (ii) otherwise, the Development Land,
in accordance with section 7.6 of the Act.
- (b) **The Landowner**, at its own expense and with such reasonable assistance from the Council as is necessary, must:
 - (i) procure the lodgement of this agreement with the Registrar-General as soon as reasonably practicable after this agreement comes into operation, but in any event, no later than 10 Business Days after that date;
 - (ii) procure the registration of this agreement by the Registrar-General in the relevant folios of the Register for the land to which this agreement is required to be registered under clause 8.2(a), as soon as reasonably practicable after this agreement is lodged for registration; and
 - (iii) provide documentary evidence that the registration of this agreement has been completed to Council within 5 Business Days of receiving confirmation that the registration has occurred.
- (c) **The Landowner**, at its own expense, will take all practical steps and otherwise do anything that the Council reasonably requires to procure, in relation to the land to which this agreement is required to be registered under clause 8.2(a):
 - (i) the consent of each person who:
 - (A) has an estate or interest in the land under the *Real Property Act 1900* (NSW); or
 - (B) is seized or possessed of an estate or interest in that land,
 - (ii) an acceptance of the terms of this agreement and an acknowledgement in writing from any existing mortgagee in relation to the land that the mortgagee will adhere to the provisions of this agreement if it takes possession of the land as mortgagee in possession,
 - (iii) the execution of any documents; and
 - (iv) the production of the relevant duplicate certificates of title,
to enable the registration of this agreement in accordance with this clause 8.2.
- (d) The Landowner consents to the registration of the agreement in accordance with this clause 8.2.

8.3 *Removal from Register*

The Council will provide a release and discharge of this agreement, and otherwise promptly do all things reasonably required, so that this agreement may be removed:

- (a) from the folios of the Register for the balance of the Land excluding the Development Land, if the Stage 1 Subdivision has been completed;
- (b) from the folios of the Register for all of the Land (including the Development Land):
 - (i) provided the Council is satisfied the Landowner has duly fulfilled its obligations under this agreement, and is not otherwise in default of any of its obligations under this agreement; or
 - (ii) if the Minister determines that the Instrument Change will not proceed; and

- (c) from the folios of the Register of any lot resulting from the Development, upon the sale of such lot by the Landowner to a third party, provided that this agreement remains registered on:

- (i) the Dedication Land; and
- (ii) one or more other lots within the Development Land resulting from the Development,

and each of the lots referred to in paragraphs (i) and (ii) remains owned by the Landowner.

9 Review of this agreement

- (a) This agreement may be reviewed or modified. Any review or modification of this agreement will be conducted in the circumstances and in the manner determined by the parties.
- (b) No modification or review of this agreement will be of any force or effect unless it is in writing and signed by the parties to this agreement.
- (c) A party is not in breach of this agreement if it does not agree to an amendment to this agreement requested by a party in, or as a consequence of, a review.

10 Dispute Resolution

10.1 *Reference to Dispute*

If a dispute arises between the parties in relation to this agreement, the parties must not commence any court proceedings relating to the dispute unless the parties have complied with this clause, except where a party seeks urgent interlocutory relief.

10.2 *Notice of Dispute*

The party wishing to commence the dispute resolution process must give written notice (Notice of Dispute) to the other parties of:

- (a) The nature of the dispute,
- (b) The alleged basis of the dispute, and
- (c) The position which the party issuing the Notice of Dispute believes is correct.

10.3 *Representatives of Parties to Meet*

- (a) The representatives of the parties must promptly (and in any event within 20 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.
- (b) The parties may, without limitation:
 - (i) resolve the dispute during the course of that meeting,
 - (ii) agree that further material or expert determination in accordance with clause 10.6 about a particular issue or consideration is needed to effectively resolve the dispute (in which event the parties will, in good faith, agree to a timetable for resolution); or
 - (iii) agree that the parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert

determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

10.4 Further Notice if Not Settled

If the dispute is not resolved within 10 Business Days after the nominated representatives have met, or the nominated representatives have not met within 20 Business Days of the Notice of Dispute, either party may give to the other a written notice calling for determination of the dispute (Determination Notice) by expert determination under clause 10.6.

10.5 Not Used

10.6 Expert determination

If a Determination Notice is issued under clause 10.4 or the parties otherwise agree that the dispute may be resolved by expert determination, the parties may refer the dispute to an expert, in which event:

- (a) the dispute must be determined by an independent expert in the relevant field:
 - (i) agreed upon and appointed jointly by the parties; and
 - (ii) in the event that no agreement is reached or no appointment is made within 20 Business Days of the agreement to refer the dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales;
- (b) the expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) the determination of the dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (d) 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;
- (e) each party will bear its own costs in connection with the process and the determination by the expert and will share equally the expert's fees and costs; and
- (f) any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
 - (i) within 20 Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and commences litigation; or
 - (ii) 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.

10.7 Litigation

If the dispute is not *finally* resolved in accordance with this clause 10, a Determination Notice has not been issued within 30 Business Days after a party was entitled to issue such notice in respect of the dispute, or an expert determination has been made that is not final and binding pursuant to clause 10.6(f), then either party is at liberty to litigate the dispute.

10.8 *No suspension of contractual obligations*

Subject to any interlocutory order obtained under clause 10.1, the referral to or undertaking of a dispute resolution process under this clause 10 does not suspend the parties' obligations under this agreement.

11 Enforcement

11.1 *Default*

- (a) In the event a party considers another party has failed to perform and fulfil an obligation under this agreement, it may give notice in writing to the other party (Default Notice) giving all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than 21 days.
- (b) In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (c) If a party disputes the Default Notice it may refer the dispute to dispute resolution under clause 10 of this agreement.

11.2 *Bank Guarantee*

- (a) The Council may reject any Bank Guarantee provided to it that contains errors, or if it has received the Bank Guarantee, require at any time the Landowner to obtain a replacement Bank Guarantee that rectifies any such errors or otherwise obtain rectification of the errors. The Landowner must provide the replacement Bank Guarantee, or otherwise obtain rectification of the errors, within 5 Business Days of receiving the Council's request.
- (b) Within 20 Business Days of each anniversary of a Bank Guarantee provided under clause 6.1(b), the Landowner must provide Council with one or more replacement Bank Guarantees (Replacement Bank Guarantee) in an amount calculated in accordance with the following:

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

Where:

A is the amount of the Replacement Bank Guarantee,

B is the amount of the Bank Guarantee to be replaced,

C is the CPI for the quarter ending immediately before the date of the Bank Guarantee to be replaced,

D is the CPI for the quarter ending immediately before the date of the Replacement Bank Guarantee,

provided A is greater than B.

- (c) On receipt of a Replacement Bank Guarantee provided under clause 11.2(b), the Council must release and return to the Landowner, as directed by the Landowner, the Bank Guarantee that has been replaced as soon as reasonably practicable.

- (d) At any time following the provision of a Bank Guarantee under this clause, the Landowner may provide the Council with one or more replacement Bank Guarantees totalling the amount of all Bank Guarantees then held by Council. On receipt of such replacement Bank Guarantee, the Council must release and return to the Landowner, as directed, the Bank Guarantee(s) which it holds that have been replaced as soon as reasonably practicable.
- (e) Subject to this agreement, the Council may apply the proceeds of a Bank Guarantee in satisfaction of any obligation that the Landowner has failed to comply with under this agreement that is secured by the Bank Guarantee.
- (f) Nothing in this clause 11.2 prevents or restricts the Council from taking any enforcement action in relation to:
 - (i) any obligation of the Landowner under this agreement; or
 - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Landowner to comply with this agreement,
 that is not or cannot be satisfied by calling on a Bank Guarantee.

11.3 *Not used*

11.4 *General Enforcement*

- (a) Without limiting any other remedies available to the parties, this agreement may be enforced by any party in any Court of competent jurisdiction.
- (b) Nothing in this agreement prevents:
 - (i) a party from bringing proceedings in the Land and Environment Court to enforce any aspect of this agreement or any matter to which this agreement relates; and
 - (ii) the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this agreement or any matter to which this agreement relates.

12 *Assignment and Dealings*

12.1 *Assignment*

- (a) Subject to clause 12.3, the Landowner must not assign or deal with its right under this agreement without the prior written consent of the Council.
- (b) Any change of ownership or control (as defined in section 50AA of the *Commonwealth Corporations Act 2001*) of the Landowner shall be deemed to be an assignment of this agreement for the purposes of this clause.
- (c) Any purported dealing in breach of this clause is of no effect.

12.2 *Arrangements with Mortgagee*

- (a) The Landowner agrees with the Council that if the Landowner mortgages the Development Land after this agreement is entered into and before this agreement has been registered on the title to the Development Land:
 - (i) it must use all reasonable efforts at that time to arrange a multiple party deed of agreement between the Council and the mortgagee so that the

mortgagee accepts that the responsibilities set out in this agreement are binding upon the mortgagee in the event that the Landowner defaults on the mortgage and the mortgagee takes possession of the Development Land; and

- (ii) the terms of the adoption of the obligations of the Landowner by the mortgagee shall be as reasonably required by the Council. The agreement shall be prepared at the cost of the Landowner.

12.3 *Transfer of Land*

Despite clause 12.1:

- (a) the Landowner may transfer, assign or dispose of the whole of its right, title and interest in the Development Land (present or future) to another person (Transferee) provided that before it sells, transfers or disposes of that right, title or interest:
 - (i) the Landowner satisfies the Council, acting reasonably, that the rights of the Council will not be diminished or fettered in any way;
 - (ii) if this agreement has not been registered on the title to the Development Land, the Transferee delivers to the Council a novation deed signed by the Transferee in a form and of such substance as is acceptable to the Council, acting reasonably, containing provisions under which the Transferee agrees to comply with all the outstanding obligations of the Landowner under this agreement;
 - (iii) the Transferee delivers to the Council replacement Bank Guarantees as required by this agreement;
 - (iv) any default under any provisions of this agreement has been remedied or waived by the Council, on such conditions as the Council may determine, and
 - (v) the Landowner and the Transferee pay the Council's reasonable costs in relation to the transfer; and
- (b) the Landowner may transfer, assign or dispose of part of its right, title and interest in the Development Land (present or future) to another person without consent, provided that the Landowner remains the owner of part of the Development Land following the transfer, disposal or assignment.

13 Approvals and consents

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

14 No fetter

14.1 *Discretion*

This agreement is not intended to operate to fetter, in any manner, the exercise of any statutory power or discretion of the Council, including, but not limited to, any statutory

power or discretion of the Council relating to the Development Application or any other application for Development Consent (all referred to in this agreement as a "Discretion").

14.2 *No fetter*

No provision of this agreement is intended to constitute any fetter on the exercise of 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 a 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 is substantially satisfied,
- (b) In the event that (a) cannot be achieved without giving rise to a fetter on the exercise of 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 in relation to the provision of this agreement which is to be held to be a fetter on the extent that is possible having regard to the relevant court judgment.

14.3 *Planning Certificates*

The Landowner acknowledges that Council may, at its discretion, include advice on any planning certificate issued under section 10.7(5) of the Act that this agreement affects the Development Land.

15 Notices

15.1 *Notices*

Any notice given under or in connection with this agreement (Notice):

- (a) must be in writing and signed by a person duly authorised by the sender;
- (b) must be addressed as follows and delivered to the intended recipient by hand, by prepaid post or, subject to clause 15.2, by email at the address below, or at the address last notified by the intended recipient to the sender after the date of this agreement:
 - (i) to Canterbury Bankstown City Council: Attn: General Manager
62-66 Rickard Road
BANKSTOWN NSW 2200
 - (ii) to Landowner: Attn: Christian Pollock, Project Manager Disposals,
Group Property
Sydney Water, Level 13, 1 Smith Street, Parramatta NSW
2150
- (c) is taken to be given or made:
 - (i) in the case of hand delivery, when delivered; and
 - (ii) in the case of delivery by post, three Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country); and

- (d) if under clause (c) a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it is taken to have been given or made at the start of business on the next Business Day in that place.

15.2 *Notices sent by email:*

- (a) A party may serve a Notice by email if the Notice:
 - (i) includes a signature block specifying:
 - (A) the name of the person sending the Notice; and
 - (B) the sender's position within the relevant party;
 - (ii) states in the body of the message or the subject field that it is sent as a Notice under this agreement;
 - (iii) contains an express statement that the person sending the Notice has the authority to serve a Notice under this agreement;
 - (iv) is sent to the email address below or the email address last notified by the intended recipient to the sender:
 - (a) to Canterbury-Bankstown Council council@cbc.city.nsw.gov.au
 - (b) to Landowner: christian.pollock@sydneywater.com.au
- (b) The recipient of a Notice served under this clause 15.2 must:
 - (i) promptly acknowledge receipt of the Notice; and
 - (ii) keep an electronic copy of the Notice,
- (c) Failure to comply with clause 15.2 does not invalidate service of a Notice under this clause.

15.3 *Receipt of Notices sent by email*

- (a) A Notice sent under clause 15.2 is taken to be given or made:
 - (i) when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above;
 - (ii) when the Notice enters an information system controlled by the recipient; or
 - (iii) when the Notice is first opened or read by the recipient,whichever occurs first.
- (b) If under clause 15.3 a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it will be taken to have been given or made at the start of business on the next Business Day in that place.

16 General

16.1 *Relationship between parties*

- (a) Nothing in this agreement:
 - (i) constitutes a partnership between the parties; or
 - (ii) except as expressly provided, makes a party an agent of another party for any purpose.
- (b) A party cannot in any way or for any purpose:
 - (i) bind another party; or
 - (ii) contract in the name of another party.
- (c) If a party must fulfil an obligation and that party is dependent on another party, then that other party must do each thing reasonably within its power to assist the other in the performance of that obligation.

16.2 *Time for doing acts*

- (a) If the time for doing any act or thing required to be done or a notice period specified in this agreement expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.
- (b) If any act or thing required to be done is done after 5.00 pm on the specified day, it is taken to have been done on the following Business Day.

16.3 *Further assurances*

Each party must promptly execute all documents and do all other things reasonably necessary or desirable to give effect to the arrangements recorded in this agreement.

16.4 *Joint and individual liability and benefits*

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

16.5 *Variations and Amendments*

A provision of this agreement can only be varied by a later written document executed by or on behalf of all parties and in accordance with the provisions of the Act.

16.6 *Counterparts*

This agreement may be executed in any number of counterparts. All counterparts taken together constitute one instrument.

16.7 *Legal expenses and stamp duty*

- (a) The Landowner must pay the Council's legal costs and disbursements in connection with the negotiation, preparation, execution, carrying into effect, enforcement and release and discharge of this agreement, including the reasonable costs of obtaining any legal advice in connection with this agreement, no later than 10 Business Days after receiving a demand from the Council to pay such costs, provided that such costs must not exceed \$15,000 (plus GST).

- (b) The Landowner agrees to pay or reimburse the costs and expenses incurred by Council in connection with the advertising and exhibition of this agreement in accordance with the Act.
- (c) The Landowner agrees to pay Council any administrative fees as required by Council, acting reasonably, in connection with the administration of this agreement.

16.8 Entire agreement

The contents of this agreement constitute the entire agreement between the parties and supersede any prior negotiations, representations, understandings or arrangements made between the parties regarding the subject matter of this agreement, whether orally or in writing.

16.9 Representations and warranties

The parties represent and warrant that they have the power and authority 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.

16.10 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.

16.11 Invalidity

- (a) A word or provision must be read down if:
 - (i) this agreement is void, voidable, or unenforceable if it is not read down;
 - (ii) this agreement will not be void, voidable or unenforceable if it is read down; and
 - (iii) the provision is capable of being read down.
- (b) A word or provision must be severed if:
 - (i) despite the operation of clause (a), the provision is void, voidable or unenforceable if it is not severed; and
 - (ii) this agreement will be void, voidable or unenforceable if it is not severed.
- (c) The remainder of this agreement has full effect even if clause 16.11(b) applies.

16.12 Waiver

- (a) A right or remedy created by this agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.
- (b) The fact that a party fails to do, or delays in doing, something the party is entitled to do under this agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another party. A waiver by a party is only effective if it is

in writing. A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

16.13 GST

- (a) Words and expressions which are not defined in this agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this agreement are exclusive of GST.
- (c) If GST is imposed on any supply made under or in accordance with this agreement, the Landowner must pay the GST or pay to the Council an amount equal to the GST payable on or for the taxable supply, whichever is appropriate in the circumstances.
- (d) If the Council is obliged to pay any GST on any supply made under or in accordance with this agreement, the Landowner indemnifies the Council for the amount of any such payment is required to make.

16.14 Governing law and jurisdiction

- (a) The laws applicable in New South Wales govern this agreement.
- (b) The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

Schedule 1

Summary of requirements (section 7.4)

Subject and subsection of the Act	Planning Agreement
<p>Planning instrument and/or Development Application – Section 7.4(1)</p> <p>The Landowner has:</p> <p>(a) Sought a change to an environmental planning instrument</p> <p>(b) Made, or propose to make a Development Application</p> <p>(c) Entered into an agreement with, or are otherwise associated with, a person to whom paragraph (a) or (b) applies</p>	<p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p><input type="checkbox"/> No</p>
Description of the application	<p>Proposed instrument change to:</p> <ul style="list-style-type: none"> Amend the zoning from SP2 Infrastructure to R2 Low Density Residential Amend the maximum height of buildings to 8,5m.
Description of the land to which the planning Agreement applies – Section 7.4(3)(a)	“Development Land” is defined in Clause 1.
The scope, timing and manner of delivery of contribution required by the Planning Agreement – Section 7.4 (3)(c)	Clause 6.
Applicability of section 7.11 of the Act – Section 7.4(3)(d)	Not excluded – Clause 7.
Applicability of section 7.12A of the Act – Section 7.4(3)(d)	Not excluded – Clause 7.
Applicability of section 7.4 of the Act – Section 7.4(3)(d)	Not excluded – Clause 7.
Mechanism for dispute resolution – Section 7.4(3)(f)	Clause 10.
Enforcement of the Planning Agreement – Section 7.4(3)(g)	Clause 11.
Registration of the Planning Agreement – Section 7.4(3)(g)	Clause 8
No obligation to grant consent or exercise functions – Section 7.4(9)	See clause 14 (no fetter)

DRAFT

Executed as an agreement

Executed by Canterbury Bankstown City)
Council under seal in accordance with a)
resolution of the Council on [insert date]:)

.....
Signature of [insert position]

.....
Signature of [insert position]

.....
Print name

.....
Print name

Executed by Sydney Water Corporation ABN)
49 776 225 038 pursuant to section 50(3)(a))
of the *Interpretation Act 1987* by an)
authorised delegate on [insert date]:)

.....
Signature of witness

.....
Signature of authorised delegate

.....
Print name of witness

.....
Print name of authorised delegate

.....
Address of witness

.....
Title of authorised delegate

DRAFT