

[VPA (adopted by Council on 19 May'21)]

## **Planning Agreement**

### **Cardinal Gilroy Village - 45 Barcom Street, Merrylands West**

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Cumberland City Council (ABN 22 798 563 329) (**Council**)

Southern Cross Care (NSW & ACT) Limited (ABN 76 131 082 374) (**Developer**)

#### **Marsdens Law Group**

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**Planning Agreement**  
**Cardinal Gilroy Village**  
**45 Barcom Street, Merrylands West**

**Parties**

<b>Council</b>	<b>Name</b>	Cumberland City Council
	<b>Address</b>	16 Memorial Avenue Merrylands NSW 2160
	<b>ABN</b>	22 798 563 329
<b>Developer/Owner</b>	<b>Name</b>	Southern Cross Care (NSW & ACT) Limited
	<b>Address</b>	16-18 Bridge Street Epping NSW 2121
	<b>ABN</b>	76 131 082 374

**Background**

- A The Developer owns the Land.
- B The Developer wishes to carry out the Development on the Land.
- C The Developer has sought the Instrument Change in order to allow the Development to be carried out.
- D The Developer has agreed to make the Contribution on, and subject to, the terms of this document.

**Operative Provisions**

**1 Agreement**

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

**2 Definitions**

**2.1 Defined Terms**

In this document, words beginning with a capital letter that are defined in Part 1 of **Schedule 2** have the meaning ascribed to them in that schedule.

**2.2 Interpretation**

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

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### **3 Application and operation of this document**

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#### **3.1 Planning Agreement**

This document is a planning agreement:

- (1) within the meaning set out in s7.4 of the Act; and
- (2) governed by Subdivision 2 of Division 7 of the Act.

#### **3.2 Application**

This document applies to the:

- (1) Land;
- (2) Instrument Change; and
- (3) Development.

#### **3.3 Operation**

This document operates from the last to occur of:

- (1) the date the document is executed by all parties; and
- (2) the date that the Instrument Change enters into force.

### **4 Application of s7.11, s7.12 and s7.24 of the Act**

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#### **4.1 Section 7.11**

This document does not exclude the application of s7.11 of the Act to the Development.

#### **4.2 Section 7.12**

This document does not exclude the application of s7.12 of the Act to the Development.

#### **4.3 Consideration of Benefits**

Section 7.11(6) of the Act does not apply to the Contributions that are provided in accordance with this document.

#### **4.4 Section 7.24**

This document does not exclude the application of s7.24 to the Development.

### **5 Monetary Contributions**

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#### **5.1 Payment**

- (1) The Developer must pay:
  - (a) the Monetary Contribution; and
  - (b) if applicable, the Additional Monetary Contribution,to Council in accordance with this document, and in particular in accordance with **Schedule 3**.
- (2) **Schedule 3** has effect as an operative provision of this document.
- (3) The Developer must pay the full amount of the Monetary Contribution and any Additional Monetary Contribution in cash, or by unendorsed bank cheque, or by deposit by means of electronic funds transfer of cleared funds, into a bank account nominated by Council.

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## 5.2 Indexation

The amount of the Monetary Contribution will be indexed in the same way that contributions required to be paid under s7.11 of the Act for the Development would be indexed in accordance with the *Cumberland Local Infrastructure Contributions Plan 2020* from the date of this document until the date that they are paid to Council.

## 5.3 Payment by Instalments

Council acknowledges that the Developer will pay the Monetary Contributions in column 1 of **Schedule 3** in the Instalments.

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## 6 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 document;
- (3) it has full capacity to enter into this document; and
- (4) there is no legal impediment to it entering into this document, or performing the obligations imposed under it.

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## 7 Security

### 7.1 General Bank Guarantee

- (1) Prior to the execution of this document, the Developer must deliver to Council a Bank Guarantee in an amount equal to ten percent (10%) of the sum (as indexed in accordance with clause 5.2 this document) of the Monetary Contribution in column 1 of **Schedule 3** to secure the obligations of the Developer under this document.
- (2) If the Developer is in breach of any obligation under this document, Council may, without limiting any other avenues available to it, call on the Bank Guarantee provided under paragraph (1) to rectify that breach and to meet any costs incurred by Council in rectifying the relevant breach.

### 7.2 Council may withhold Subdivision Certificate

- (1) The Developer may only make, or cause, suffer or permit the making of, an application for a Subdivision Certificate in respect of the Development if, at the date of the application, the Developer is not in breach of any obligation to make a Contribution under clause 5.1 of this document.
- (2) Council may withhold the issue of a Subdivision Certificate if, at the relevant time, the Developer is in breach of any obligation to make a Contribution under clause 5.1 of this document until such time as the breach is rectified.

### 7.3 Construction Certificate must be withheld

- (1) Every application for a Construction Certificate for the carrying out of the Development within either of the Precincts that is made after the Instrument Change comes into effect must be accompanied by a notice from the Developer which includes the following information:
  - (a) for each Precinct within which the relevant Development that is the subject of that Construction Certificate is to be undertaken, the amount of the new Gross Floor Area proposed to be constructed within that Precinct under that Construction Certificate;
  - (b) the Approved Gross Floor Area within whichever of the Precincts the relevant Development that is the subject of that Construction Certificate is to be undertaken, assuming that the Construction Certificate is issued; and

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- (c) a list of all of the Construction Certificates issued for the Development of the Precincts after the Instrument Change came into effect, and prior to the relevant application being made.
  - (2) Other than with the express written consent of Council, a Construction Certificate in respect of the Development must not be issued if:
    - (a) a notice under paragraph (1) with respect to the relevant Construction Certificate is not provided; and/or
    - (b) the Developer is in breach of any obligation to make a Contribution under clause 5.1 of this document.

#### **7.4 Occupation Certificate must be withheld**

Other than with the express written consent of Council, an Occupation Certificate in respect of the Development must not be issued if the Developer is in breach of any obligation to make a Contribution under clause 5.1 of this document.

## **8 Registration of this document**

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### **8.1 Registration of this document**

The Developer must register this document on the title to the Land pursuant to section 7.6 of the Act.

### **8.2 Obligations of Developer**

- (1) The Developer, at its own expense, will promptly after this document comes into operation, take all practical steps, and otherwise do anything that the Council reasonably requires, to procure:
  - (a) the execution of any documents; and
  - (b) the production of the relevant duplicate certificates of title,and to otherwise undertake the registration of this document in accordance with clause 9.1.
- (2) The Developer, at its own expense, will take all practical steps, and otherwise do anything that the Council reasonably requires:
  - (a) to allow the lodgement of this document with the Registrar-General as soon as reasonably practicable after this document comes into operation but in any event, no later than fifteen (15) business days after that date; and
  - (b) to allow the registration of this document by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this document is lodged for registration.

### **8.3 Discharge from the Register**

Council will execute any form required by the Registrar General, and prepared by the Developer, to allow this document to be removed from the folios of the Register for the Land (or any part of it such that the document is discharged in respect of only the relevant part of the Land) when:

- (1) the obligations under this document referable to the Land from which this document is proposed to be removed from title have been satisfied; or
- (2) if this document is terminated or rescinded.

### **8.4 Caveat**

- (1) The Developer acknowledges and agrees that this document creates a caveatable interest in the Land in favour of Council.

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- (2) The Developer consents to Council lodging a caveat on the title of the Land at any time prior to the registration of this document on the title of the Land under this clause 8.
  - (3) Council will withdraw any caveat lodged under this clause 8 as soon as practicable after the first to occur of:
    - (a) the registration of this document on the title of the Land; and
    - (b) this document ending.

## **9 Assignment**

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### **9.1 Restriction on Assignment**

Other than in accordance with this clause 9:

- (1) the Developer may not Assign their rights or obligations under this document; and
- (2) the Developer may not Assign any part of the Land.

### **9.2 Procedure for Assignment**

- (1) If the:
  - (a) Developer wishes to Assign any part of the Land; and/or
  - (b) Developer wishes to Assign its rights or obligations under this document,then the Developer must:
  - (c) provide a written request to Council for the consent of Council to the relevant Assignment;
  - (d) provide Council with any evidence required by Council, acting reasonably, to satisfy Council that the third party in whose favour the Assignment is to be made (**Assignee**) is reasonably capable of performing the obligations under this document that are to be Assigned to it;
  - (e) obtain written consent of Council to the relevant Assignment, which cannot be unreasonably withheld if the Developer complies with the requirements of this clause 9.2(1);
  - (f) at no cost to Council, procure the execution by the Assignee of an appropriate deed where the Assignee agrees to be bound by the terms of this document; and
  - (g) procure that any Bank Guarantee held by Council under this document is replaced by an identical Bank Guarantee provided by the Assignee.
- (2) Council is under no obligation to consider granting its consent to any request made by the Developer under paragraph (1) if, at the time the request is made, the Developer is in breach of this document, unless that breach is waived by Council.

## **10 Dispute Resolution**

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### **10.1 Notice of dispute**

- (1) If a dispute or lack of certainty between the parties arises in connection with this document or its subject matter (**Dispute**), then either party (**First Party**) must give to the other (**Second Party**) a notice which:
  - (a) is in writing;
  - (b) adequately identifies and provides details of the Dispute;
  - (c) stipulates what the First Party believes will resolve the Dispute; and
  - (d) designates its representative (**Representative**) to negotiate the Dispute.

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- (2) The Second Party must, within five (5) Business Days of service of the notice of dispute, provide a notice to the First Party designating as its representative a person to negotiate the Dispute (the representatives designated by the parties being together, the **Representatives**).

## **10.2 Conduct pending resolution**

The parties must continue to perform their respective obligations under this document if there is a Dispute but will not be required to complete the matter the subject of the Dispute, unless the appropriate party indemnifies the other parties against costs, damages and all losses suffered in completing the disputed matter if the Dispute is not resolved in favour of the indemnifying party.

## **10.3 Further steps required before proceedings**

Subject to clauses 10.14 and 10.15 and except as otherwise expressly provided in this document, any Dispute must, as a condition precedent to the commencement of litigation, mediation under clause 10.5 or determination by an expert under clause 10.6, first be referred to the Representatives. The Representatives must endeavour to resolve the dispute within five (5) Business Days of the date a notice under clause 10.1(2) is served.

## **10.4 Disputes for mediation or expert determination**

If the Representatives have not been able to resolve the Dispute, then the parties must agree within five (5) Business Days to either refer the matter to mediation under clause 10.5 or expert resolution under clause 10.6

## **10.5 Disputes for mediation**

- (1) If the parties agree in accordance with clause 10.4 to refer the Dispute to mediation, the mediation must be conducted by a mediator agreed by the parties and, if the parties cannot agree within five (5) Business Days, then by a mediator appointed by the President of the Law Society of New South Wales for the time being.
- (2) Unless otherwise agreed by the parties, each party must pay their own costs incurred with respect to any mediation of the Dispute.
- (3) If the mediation referred to in paragraph (1) has not resulted in settlement of the Dispute and has been terminated, the parties may agree to have the matter determined by expert determination under clause 10.6.

## **10.6 Choice of expert**

- (1) If the Dispute is to be determined by expert determination, this clause 10.6 applies.
- (2) The Dispute must be determined by an independent expert in the relevant field:
  - (a) agreed between and appointed jointly by the parties; or
  - (b) in the absence of document within five (5) Business Days after the date that the matter is required to be determined by expert determination, appointed by the President of the Law Society of New South Wales for the time being.
- (3) If the parties fail to agree as to the relevant field within five (5) Business Days after the date that the matter is required to be determined by expert determination, either party may refer the matter to the President of the Law Society of New South Wales for the time being whose decision as to the relevant field is final and binding on the parties.
- (4) The expert appointed to determine a Dispute:
  - (a) must have a technical understanding of the issues in dispute;
  - (b) must not have a significantly greater understanding of one party's business, functions or operations which might allow the other side to construe this greater understanding as a bias; and

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- (c) must inform the parties before being appointed of the extent of the expert's understanding of each party's business or operations and, if that information indicates a possible bias, then that expert must not be appointed except with the written approval of the parties.
  - (5) The parties must promptly enter into a document with the expert appointed under this clause 10.6 setting out the terms of the expert's determination and the fees payable to the expert.

#### **10.7 Directions to expert**

- (1) In reaching a determination in respect of a dispute under clause 10.6, the independent expert must give effect to the intent of the parties entering into this document and the purposes of this document.
- (2) The expert must:
  - (a) act as an expert and not as an arbitrator;
  - (b) proceed in any manner as the expert thinks fit without being bound to observe the rules of natural justice or the rules of evidence;
  - (c) not accept verbal submissions unless both parties are present;
  - (d) on receipt of a written submission from one party, ensure that a copy of that submission is given promptly to the other party;
  - (e) take into consideration all documents, information and other material which the parties give the expert which the expert in its absolute discretion considers relevant to the determination of the Dispute;
  - (f) not be expected or required to obtain or refer to any other documents, information or material (but may do so if the expert so wishes);
  - (g) issue a draft certificate stating the expert's intended determination (together with written reasons), giving each party ten (10) Business Days to make further submissions;
  - (h) issue a final certificate stating the expert's determination (together with written reasons); and
  - (i) act with expedition with a view to issuing the final certificate as soon as practicable.
- (3) The parties must comply with all directions given by the expert in relation to the resolution of the Dispute and must within the time period specified by the expert, give the expert:
  - (a) a short statement of facts;
  - (b) a description of the Dispute; and
  - (c) any other documents, records or information which the expert requests.

#### **10.8 Expert may commission reports**

- (1) Subject to paragraph (2):
  - (a) the expert may commission the expert's own advisers or consultants (including lawyers, accountants, bankers, engineers, surveyors or other technical consultants) to provide information to assist the expert in making a determination; and
  - (b) the parties must indemnify the expert for the cost of those advisers or consultants in accordance with clause 10.6(5) of this deed.
- (2) The parties must approve the costs of those advisers or consultants in writing prior to the expert engaging those advisers or consultants.

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**10.9 Expert may convene meetings**

- (1) The expert must hold a meeting with all of the parties present to discuss the Dispute. The meeting must be conducted in a manner which the expert considers appropriate. The meeting may be adjourned to, and resumed at, a later time in the expert's discretion.
- (2) The parties agree that a meeting under paragraph (1) is not a hearing and is not an arbitration.

**10.10 Other courses of action**

If:

- (1) the parties cannot agree in accordance with clause 10.4 to refer the matter to mediation or determination by an expert; or
- (2) the mediation referred to in clause 10.5 has not resulted in settlement of the dispute, the mediation has been terminated and the parties have not agreed to refer the matter to expert determination within five (5) Business Days after termination of the mediation,

then either party may take whatever course of action it deems appropriate for the purpose of resolving the Dispute.

**10.11 Confidentiality of information provided in dispute resolution process**

- (1) The parties agree, and must procure that the mediator and the expert agree as a condition of his or her appointment:
  - (a) subject to paragraph (2), to keep confidential all documents, information and other material disclosed to them during or in relation to the mediation or expert determination;
  - (b) not to disclose any confidential documents, information and other material except:
    - (i) to a party or adviser or consultant who has signed a confidentiality undertaking; or
    - (ii) if required by Law or any Authority to do so; and
  - (c) not to use confidential documents, information or other material disclosed to them during or in relation to the mediation or expert determination for a purpose other than the mediation or expert determination.
- (2) The parties must keep confidential and must not disclose or rely upon or make the subject of a subpoena to give evidence or produce documents in any arbitral, judicial or other proceedings:
  - (a) views expressed or proposals or suggestions made by a party or the mediator or the expert during the expert determination or mediation relating to a possible settlement of the Dispute;
  - (b) admissions or concessions made by a party during the mediation or expert determination in relation to the Dispute; and
  - (c) information, documents or other material concerning the dispute which are disclosed by a party during the mediation or expert determination unless such information, documents or facts would be discoverable in judicial or arbitral proceedings.

**10.12 Final determination of expert**

The parties agree that the final determination by an expert will be final and binding upon them except in the case of fraud or misfeasance by the expert.

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### **10.13 Costs**

If any independent expert does not award costs, each party must contribute equally to the expert's costs in making the determination.

### **10.14 Remedies available under the Act**

This clause 10 does not operate to limit the availability of any remedies available to Council under the Act.

### **10.15 Urgent relief**

This clause 10 does not prevent a party from seeking urgent injunctive or declaratory relief concerning any matter arising out of this document.

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## **11 Termination, Rescission or Determination**

### **11.1 Termination**

This document terminates in the following events:

- (1) The parties agree in writing to terminate the operation of this document at any time.
- (2) The Instrument Change is not made.

### **11.2 Consequence of termination**

Upon termination of this document:

- (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.

### **11.3 Determination**

This document will determine upon the Developer satisfying all of the obligations imposed on them in full.

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## **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 Document does not fetter discretion**

This document 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 document is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this document 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; and

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- (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 document has full force and effect; and
  - (c) to endeavour to satisfy the common objectives of the parties on relation to the provision of this document which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.
- (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 document contracted out of a provision or exercised a Discretion under this document, then to the extent of this document is not to be taken to be inconsistent with the Law.

#### **12.4 No Obligations**

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

### **13 Confidentiality**

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#### **13.1 Document not Confidential**

The terms of this document are not confidential and this document 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 document; and
  - (b) The parties may disclose to each other further Confidential Information in connection with the subject matter of this document.
  - (c) Subject to paragraphs (2) and (3), each party agrees:
    - (i) not to disclose any Confidential document received before or after the making of this document 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 document 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**

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#### **14.1 Defined GST Terms**

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

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

## 14.3 GST Obligations to Survive Termination

This clause 14 will continue to apply after expiration of termination of this document.

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## 15 Miscellaneous

### 15.1 Obligation to act in good faith

The parties must at all times:

- (1) not unreasonably delay any action, approval, direction, determination or decision which is required of them;
- (2) 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 document; and
- (3) be just and faithful in their activities and dealings with the other parties.

### 15.2 Legal costs

The Developer agrees to:

- (1) pay or reimburse all legal costs and disbursements of Council of the negotiation, preparation, execution, stamping and amending of this document;
- (2) pay the reasonable legal costs and disbursements referred to in paragraph (1) within ten (10) business days of receipt of a Tax Invoice from Council; and
- (3) pay or reimburse the reasonable legal costs and disbursements of Council arising from the ongoing administration and enforcement of this document including any breach or default by the Developer of their obligations under this document.

### 15.3 Administration fees

In addition to any fees payable under clause 15.2, the Developer must also pay any administration fees associated with this document, or anything undertaken in accordance with it, as specified in Council's adopted Fees and Charges Schedule from time to time.

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## 16 Administrative Provisions

### 16.1 Notices

- (1) Any notice, consent or other communication under this document 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 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;

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- (b) if sent by pre-paid mail, on the third Business Day after posting; and
  - (c) if transmitted by facsimile 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 document or another address of which that person may from time to time give notice to each other person.

#### **16.2 Entire agreement**

This document 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 document.

#### **16.3 Variation of agreement**

The parties may agree to vary the terms of this document. Any such variation shall be evidenced by a written variation and must comply with the provisions of section 7.5 of the Act.

#### **16.4 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.

#### **16.5 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 document and the rights and obligations of the parties under it.

#### **16.6 Counterparts**

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

#### **16.7 Amendment**

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

#### **16.8 Unenforceability**

Any provision of this document 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 document or affecting the validity or enforceability of that provision in any other jurisdiction.

#### **16.9 Power of Attorney**

Each attorney who executes this document 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.

#### **16.10 Governing law**

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

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- (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 document; and
  - (2) may not seek to have any proceedings removed from the jurisdiction of New South Wales on the grounds of *forum non conveniens*.
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## Schedule 1 – Requirements under s7.4 of the Act

REQUIREMENT UNDER THE ACT	THIS PLANNING AGREEMENT
<p><b>Planning instrument and/or development application – (Section 7.4(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; and/or</p> <p>(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.</p>	<p>(a) Yes.</p> <p>(b) Yes.</p> <p>(c) Not applicable.</p>
<p><b>Description of land to which this agreement applies – (Section 7.4(3)(a))</b></p>	<p>Refer to definition of 'Land' in Part 1 of <b>Schedule 2</b>.</p>
<p><b>Description of change to the environmental planning instrument to which this agreement applies – (Section 7.4(3)(b))</b></p>	<p>As set out in the definition for Planning Proposal in Part 1 of <b>Schedule 2</b>.</p>
<p><b>Application of section 7.11 of the Act – (Section 7.4(3)(d))</b></p>	<p>Applies (refer to clause 4).</p>
<p><b>Applicability of section 7.12 of the Act – (Section 7.4(3)(d))</b></p>	<p>Applies (refer to clause 4).</p>
<p><b>Consideration of benefits under this agreement if section 7.11 applies – (Section 7.4(3)(e))</b></p>	<p>Refer to clause 4.3.</p>
<p><b>Mechanism for Dispute resolution – (Section 7.4(3)(f))</b></p>	<p>See clause 10.</p>
<p><b>Enforcement of this agreement (Section 7.4(3)(g))</b></p>	<p>See clause 7.</p>
<p><b>No obligation to grant consent or exercise functions – (Section 7.4(3)(9))</b></p>	<p>See clause 12.</p>

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## Schedule 2 – Defined Terms and Interpretation

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### Part 1 – Definitions

<b>Act</b>	means the <i>Environmental Planning and Assessment Act 1979</i> (NSW).
<b>Additional Monetary Contribution</b>	means a monetary contribution over and above the Monetary Contribution, and which is calculated in accordance with <b>Schedule 3</b> .
<b>Approved Gross Floor Area</b>	means Gross Floor Area in respect of which a Construction Certificate has been issued after the Instrument Change comes into force.
<b>Assign</b>	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.
<b>Authority</b>	means (as appropriate) any: <ol style="list-style-type: none"><li>(1) federal, state or local government;</li><li>(2) department of any federal, state or local government;</li><li>(3) any court or administrative tribunal; or</li><li>(4) statutory corporation or regulatory body.</li></ol>
<b>Bank Guarantee</b>	means an irrevocable and unconditional undertaking by a financial institution satisfactory to Council.
<b>Claim</b>	against any person any allegation, action, demand, cause of action, suit, proceeding, judgement, debt, damage, loss, cost, expense or liability howsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at law, in equity, under statute or otherwise.
<b>Confidential Information</b>	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: <ol style="list-style-type: none"><li>(1) is by its nature confidential;</li><li>(2) is designated, or marked, or stipulated by either party as confidential (whether in writing or otherwise);</li><li>(3) any party knows or ought to know is confidential;</li><li>(4) is information which may be reasonably considered to be of a confidential nature.</li></ol>
<b>Construction Certificate</b>	has the meaning ascribed to that term in s6.4(a) of the Act.
<b>Contribution</b>	means the payment of the Monetary Contribution.

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<b>Contribution Value</b>	means the amount specified in <b>Schedules 3</b> in the column headed "Contribution".
<b>Development Consent</b>	means a consent issued under the Act for the Development.
<b>Development</b>	the development of the Land permitted after the Instrument Change is made.
<b>Dispute</b>	has the meaning ascribed to it in clause 10.1.
<b>Encumbrance</b>	means an interest or power: <ul style="list-style-type: none"> <li>(1) reserved in or over an interest in any asset;</li> <li>(2) arising under, or with respect to, a Bio-Banking Agreement;</li> <li>(3) created or otherwise arising in or over any interest in any asset under any mortgage, charge (whether fixed or floating), pledge, lien, hypothecation, title retention, conditional sale agreement, hire or hire purchase agreement, option, restriction as to transfer, use or possession, easement, covenant, lease, subordination to any right of any other person and any other encumbrance or security interest, trust or bill of sale; or</li> <li>(4) by way of security for the payment of a debt or other monetary obligation or the performance of any obligation.</li> </ul>
<b>Encumber</b>	means to grant an Encumbrance.
<b>First Instalment</b>	means the sum of \$750,000.
<b>Gross Floor Area</b>	has the same meaning ascribed to that term in the LEP.
<b>GST Law</b>	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.
<b>Instalments</b>	means the First Instalment and the Second Instalment of the Contribution paid according to the time for payment specified in Column 2 of <b>Schedule 3</b> .
<b>Instrument Change</b>	means the amendment of the LEP in accordance with the Planning Proposal.
<b>Land</b>	means the land contained in the following folio identifiers: <ul style="list-style-type: none"> <li>(1) 5/701151;</li> <li>(2) 8/732058; and</li> <li>(3) 11/1075418,</li> </ul> as depicted in the Plan of Land contained in <b>Annexure 1</b> .
<b>Law</b>	means all legislation, regulations, by-laws, common law and other binding order made by any Authority.
<b>LEP</b>	means Holroyd Local Environmental Plan 2013.

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<b>Monetary Contribution</b>	means monetary contribution set out in <b>Schedule 3</b> , as adjusted in accordance with this document.
<b>Northern Precinct</b>	means the northern precinct of the Development depicted in the Cardinal Gilroy Village Masterplan contained in <b>Annexure 1</b> .
<b>Occupation Certificate</b>	has the same meaning as in section 6.4(c) of the Act.
<b>Planning Legislation</b>	means the Act, the <i>Local Government Act 1993</i> (NSW) and the <i>Roads Act 1993</i> (NSW).
<b>Planning Proposal</b>	means the planning proposal number PP_2020_CUMBE_002_00 to amend the LEP to allow the following: <ul style="list-style-type: none"> <li>(1) rezone the Land from R2 Low Density Residential to R4 High Density Residential;</li> <li>(2) amend the Height of Building Control for the Land from 9m to 15m;</li> <li>(3) amend the Floor Space Ratio (FSR) control for the Land from 0.5:1 to 0.85:1; and</li> <li>(4) add a clause to Part 6 Additional Local Provisions of Holroyd LEP 2013 limiting retail/commercial uses to 1,480m<sup>2</sup> (formerly referred to as non-residential uses),</li> </ul> as described in the Gateway Determination dated 20 July 2020 issued with respect to the Land and the Planning Proposal.
<b>Precincts</b>	means the Northern Precinct and the Southern Precinct.
<b>Second Instalment</b>	means the sum of \$750,000.
<b>Southern Precinct</b>	means the southern precinct of the Development depicted in the Cardinal Gilroy Village Masterplan contained in <b>Annexure 1</b> .
<b>Subdivision Certificate</b>	has the same meaning as in section 6.4(d) of the Act.

## Part 2 - Interpretational Rules

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<b>clauses, annexures and schedules</b>	a clause, annexure or schedule is a reference to a clause in or annexure or schedule to this document.
<b>reference to statutes</b>	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.
<b>singular includes plural</b>	the singular includes the plural and vice versa.
<b>person</b>	the word "person" includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association or any government agency.
<b>executors, administrators, successors</b>	a particular person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns.
<b>dollars</b>	Australian dollars, dollars, \$ or A\$ is a reference to the lawful

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	currency of Australia.
<b>calculation of time</b>	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.
<b>reference to a day</b>	a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later.
<b>accounting terms</b>	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.
<b>reference to a group of persons</b>	a group of persons or things is a reference to any two or more of them jointly and to each of them individually.
<b>meaning not limited</b>	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.
<b>next day</b>	if an act under this document 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.
<b>next Business Day</b>	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.
<b>time of day</b>	time is a reference to Sydney time.
<b>headings</b>	headings (including those in brackets at the beginning of paragraphs) are for convenience only and do not affect the interpretation of this document.
<b>agreement</b>	a reference to any agreement, document or instrument includes the same as varied, supplemented, novated or replaced from time to time.

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### Schedule 3 - Monetary Contributions

Column 1 Contribution	Column 2 Time for payment and amount of instalment	Column 3 Public Purpose
<p><u>Monetary Contribution</u> One million five hundred thousand dollars (\$1,500,000).</p>	<p>In the Instalments as follows:</p> <ol style="list-style-type: none"> <li>The First Instalment being (\$750,000.00) prior to the first to occur of the following:               <ol style="list-style-type: none"> <li>the issue of a Construction Certificate in respect of any Development involving the construction of new Gross Floor Area within the first Precinct to be developed, resulting in the aggregate of Approved Gross Floor Area within that Precinct being greater than 10,000 m<sup>2</sup>; and</li> <li>30 November 2026.</li> </ol> </li> <li>The Second Instalment being (\$750,000.00) prior to the first to occur of the following:               <ol style="list-style-type: none"> <li>the issue of a Construction Certificate in respect of any Development involving the construction of new Gross Floor Area within the other Precinct (that is, the Precinct not referable to the First Instalment), resulting in the aggregate of Approved Gross Floor Area within that Precinct being greater than 10,000 m<sup>2</sup>; and</li> <li>30 November 2026.</li> </ol> </li> </ol>	<p>The implementation of the Duck River Masterplan.</p> <p>Contribution towards, but not limited to: upgrades for local roads and traffic infrastructure improvements in the area; open space (Central Gardens); small local centres and public domain upgrades; Holroyd Sports Ground upgrade within Merrylands West and surrounds as per Council's Capital Works.</p>
<p><u>Additional Monetary Contribution</u> An amount of \$375.50 for each square metre (or</p>	<p>Prior to the issue of the Construction Certificate for any part of the Development with respect to which the Additional Monetary Contribution will be required</p>	<p>For the provision of public benefits within the Cumberland Council local government</p>

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part thereof) of Gross Floor Area which forms part of the Development in excess of 63,240 sqm	to be paid.	area other than those set out above.
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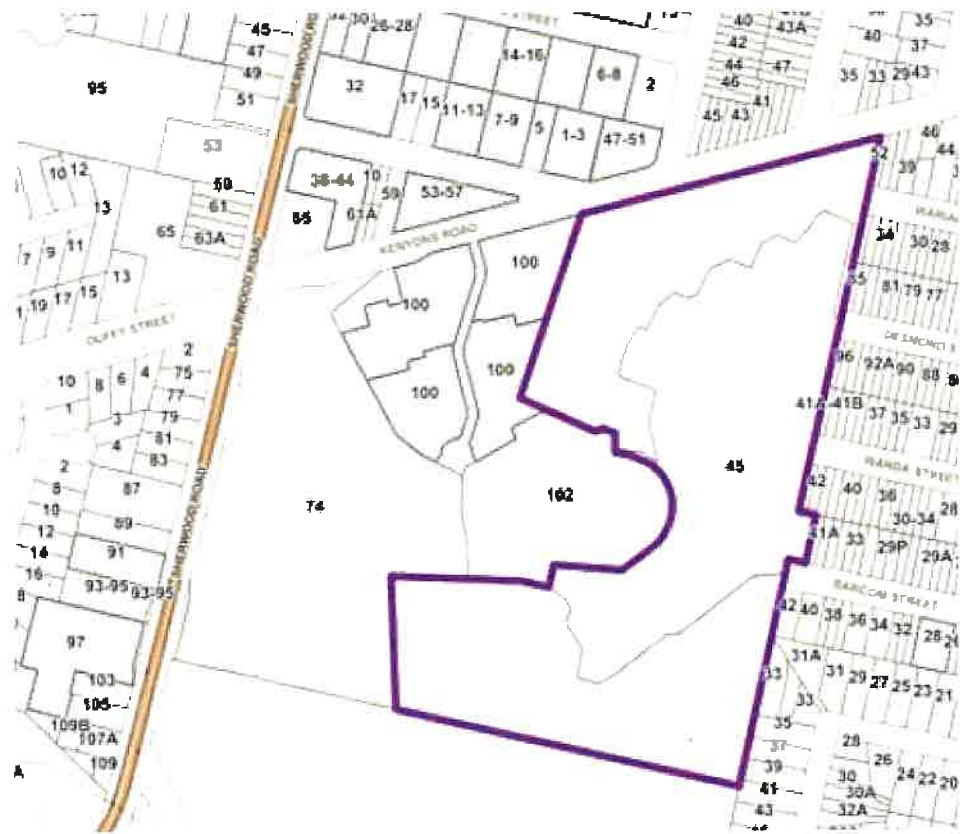
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**Annexure 1 – Plan of the Land and Cardinal Gilroy Village Masterplan**

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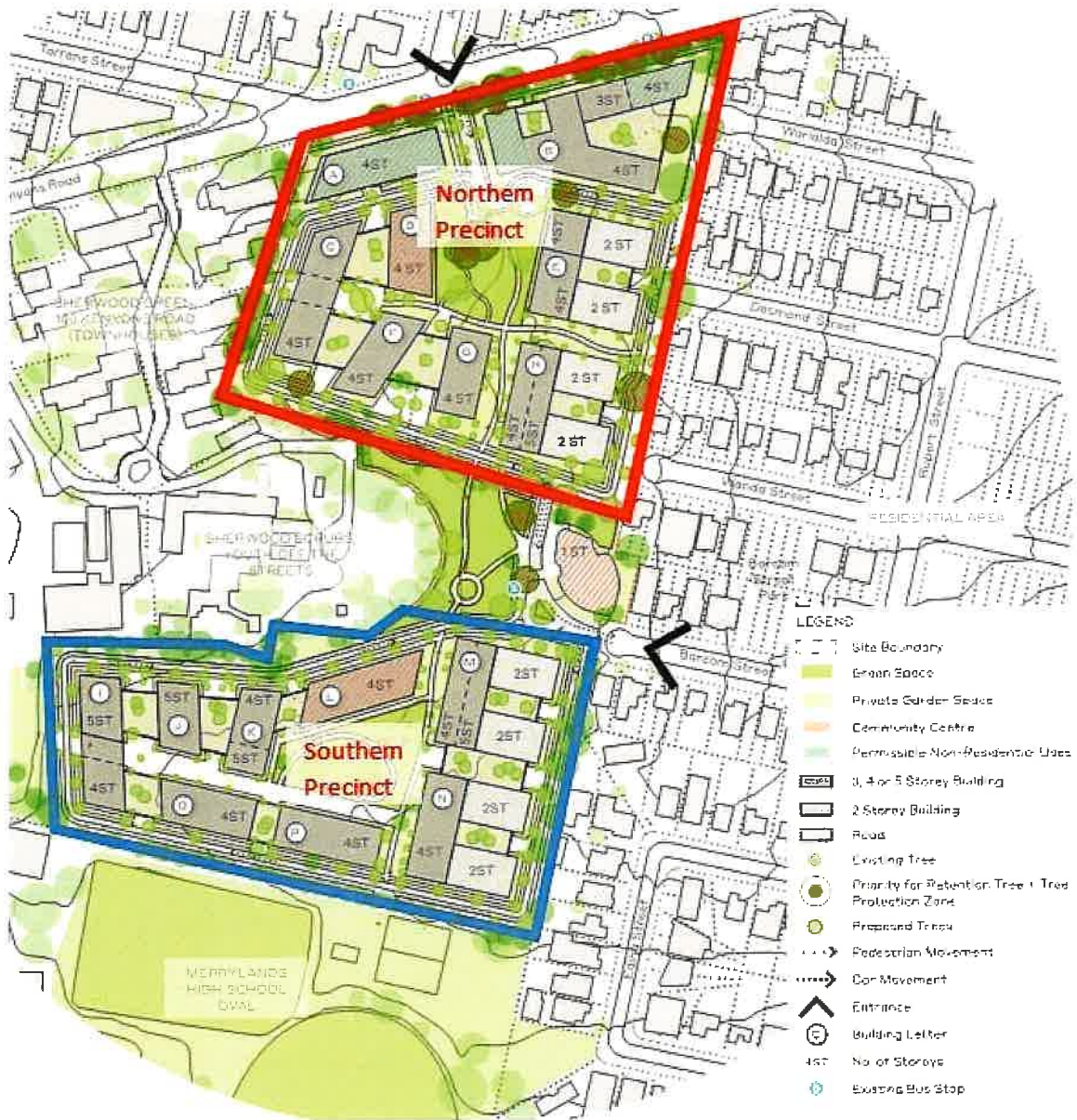


Plan of Land to which the VPA and planning proposal applies



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Cardinal Gilroy Village Masterplan (Indicative)



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## Execution page

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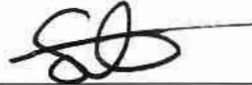
Executed as a deed.

Dated: 30 June 2021

**Signed, sealed and delivered** by Cumberland City Council by its General Manager and Mayor by the affixing of the Common Seal of Council in accordance with resolution dated



General Manager (Signature)



Mayor (Signature)

PETER J FITZGERALD

Name of General Manager (Print Name)

CLR STEVE CHRISTOU

Name of Mayor (Print Name)

**Signed, sealed and delivered** by Southern Cross Care (NSW & ACT) Limited (76 131 082 374) in accordance with section 127(1) of the *Corporations Act 2001* (Cth).



Director/Secretary (Signature)



Director (Signature)

Helen Lascelles-Hodven.

Name of ~~Director~~ Secretary (Print Name)

Patrick McGarron

Name of Director (Print Name)

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## Explanatory Note

### Planning Agreement

#### Cardinal Gilroy Village – 45 Barcom Street, Merrylands West

#### 1 Introduction

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The purpose of this Explanatory Note is to provide a plain English summary to support the notification of a draft voluntary Planning Agreement (**Planning Agreement**) under s7.4 of the *Environmental Planning and Assessment Act 1979* (NSW) (**Act**).

This Explanatory Note has been prepared jointly between the parties as required by clause 25E of the *Environmental Planning and Assessment Regulation 2000* (**Regulations**).

This Explanatory Note is not to be used to assist in construing the Planning Agreement.

#### 2 Parties to the Planning Agreement

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The parties to the Planning Agreement are

- (1) Cumberland City Council (ABN 22 798 563 329) (**Council**); and
- (2) Southern Cross Care (NSW & ACT) Limited (ABN 76 131 082 374) (**Developer**).

#### 3 Description of the Land to which the Planning Agreement applies

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The Planning Agreement applies to the land contained in the following folio identifiers:

- (1) 5/701151;
- (2) 8/732058; and
- (3) 11/1075418,

known as 45 Barcom Street, Merrylands West NSW 2160 (**Land**).

#### 4 Description of the Development to which the Planning Agreement applies

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The development to which the Planning Agreement applies is the development of the Land permitted after planning proposal number PP\_2020\_CUMBE\_002\_00 (**Planning Proposal**) to amend the Holroyd Local Environmental Plan 2013 is made to allow:

- (1) rezoning of the Land from R2 Low Density Residential to R4 High Density Residential;
- (2) amendment of the Height of Building Control for the Land from 9m to 15m;

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- (3) amendment of the Floor Space Ratio (FSR) control for the Land from 0.5:1 to 0.85:1; and
  - (4) the addition of a clause to Part 6 Additional Local Provisions of Holroyd LEP 2013 limiting retail/commercial uses to 1,480m<sup>2</sup> (formerly referred to as non-residential uses),

as described in the Gateway Determination issued with respect to the Land and the Planning Proposal (referred to as the **Development**).

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

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The Planning Agreement separates the Land into two (2) *Precincts* for the purpose of the payment of the Monetary Contribution. Those Precincts are shown on the Plan attached as Annexure 1 to the Planning Agreement.

The Developer is required to provide the following monetary contribution in accordance with the Planning Agreement:

(1) Monetary Contribution

One million five hundred thousand dollars (\$1,500,000), in instalments as follows:

- (a) The First Instalment being seven hundred and fifty thousand dollars (\$750,000.00) prior to the first to occur of the following:
  - (i) the issue of a Construction Certificate in respect of any Development involving the construction of new Gross Floor Area within the first Precinct to be developed, resulting in the aggregate of Approved Gross Floor Area within that Precinct being greater than 10,000 m<sup>2</sup>; and
  - (ii) 30 November 2026.
- (b) The Second Instalment being seven hundred and fifty thousand dollars (\$750,000.00) prior to the first to occur of the following:
  - (i) the issue of a Construction Certificate in respect of any Development involving the construction of new Gross Floor Area within the other Precinct (that is, the Precinct not referable to the First Instalment), resulting in the aggregate of Approved Gross Floor Area within that Precinct being greater than 10,000 m<sup>2</sup> and
  - (ii) 30 November 2026.

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(2) Additional Monetary Contribution

An amount of \$375.50 for each square metre (or part thereof) of Gross Floor Area which forms part of the Development in excess of 63,240 sqm\*, prior to the issue of the Construction Certificate for any part of the Development with respect to which the Additional Monetary Contribution will be required to be paid,

(together the **Contribution**).

\*The anticipated GFA of the Development in the event that the Planning Proposal is made is 63,240 sqm, consisting of an additional GFA of 26,040 sqm (i.e. the “uplift”).

As security for the Developer providing the Monetary Contribution, the Developer must provide to Council a Bank Guarantee in an amount equal to ten percent (10%) of the sum (as indexed in accordance with the Planning Agreement) of the Monetary Contribution.

Council also has security under the Planning Agreement in that any Subdivision Certificate, Construction Certificate and Occupation Certificate in respect of the Development cannot be issued if at the relevant time the Developer is in breach of any obligation to make a Contribution required to be made under the Planning Agreement at that time.

The **objective** of the Planning Agreement is to provide benefits for the wider community and to facilitate the delivery of the Contribution to community infrastructure, amenities and resources.

The **nature** of the Planning Agreement is a contractual relationship between the Council and the Developer for providing the Contribution.

The **effect** of the Planning Agreement is that the Developer will provide the Contribution in the manner provided for by the Planning Agreement.

## **6 Assessment of the Merits of the Planning Agreement and Impact on the public**

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The Planning Agreement promotes:

- (1) the public interest; and
- (2) the Objects of the Act.

The Planning Agreement will:

- (1) provide certainty for the Developer and the Council as to provision of the Contribution; and

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- (2) promote the provision of public amenities and public services.

## **7 Identification of how the Planning Agreement promotes the public interest**

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The Planning Agreement supports the public interest in the following ways:

- (1) By promoting the social and economic welfare of the community and a better environment by the proper management, development and conservation of the community's natural, historical and other resources.
- (2) By facilitating ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment.
- (3) By promoting the orderly and economic use and development of land.
- (4) By providing increased opportunity for community participation in environmental planning and assessment.

## **8 How the Planning Agreement promotes the Guiding Principles for Councils**

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The Planning Agreement promotes a number of the Guiding Principles for Councils under section 8A of the *Local Government Act 1993* (NSW), as follows:

- (1) To plan strategically, using the integrated planning and reporting framework, for the provision of effective and efficient services and regulation to meet the diverse seniors housing needs of the Merrylands West and surrounding local community.
- (2) To manage land and other assets so that current and local community needs can be met in an affordable way.
- (3) To act fairly, ethically and without bias in the interests of the local community.
- (4) To have regard to the long term and cumulative effects of its decisions on future generations.
- (5) Transparent decision-making and active engagement with local communities, through the use of the integrated planning and reporting framework and other measures
- (6) Providing strong and effective representation, leadership, planning and decision-making.

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- (7) Applying the integrated planning and reporting framework in carrying out functions so as to achieve desired outcomes and continuous improvements.
  - (8) Working with others to secure appropriate seniors housing services for local community needs.

## **9 Identification of whether the Planning Agreement conforms with the Council's capital works program**

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The Planning Agreement conforms with Council's capital works program.

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