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Planning Agreement
4 - 12 Railway Street, Lidcombe

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

Lidcombe Property (NSW) Pty Limited (ABN 44 618 446 389) (**Developer**)

Marsdens Law Group

Level 1
49 Dumaresq Street
CAMPBELLTOWN NSW 2560

Tel: 02 4626 5077

Fax: 02 4626 4826

DX: 5107 Campbelltown

Ref: 42 2494



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Planning Agreement

4 - 12 Railway Street, Lidcombe

Parties

Council	Name	Cumberland Council
	Address	16 Memorial Avenue Merrylands NSW 2160
	ABN	22 798 563 329
Developer	Name	Lidcombe Property (NSW) Pty Limited
	Address	C/- Maxim Chartered Accountants Level 2, 59 Wentworth Avenue Kingston ACT 2604
	ABN	44 618 446 389

Background

- A The Developer owns the Land.
- B The Developer wishes to carry out the Development.
- C The Developer has applied for the Instrument Change in order to carry out the Development.
- D The Developer has agreed to make the Contributions 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.

3 Application and operation of this document

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:

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

3.3 Operation

This document operates from the date it is executed by both parties.

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

4.1 Application

- (1) This document excludes the application of section 7.11 and section 7.12 of the Act to the Development.
- (2) For the avoidance of doubt, if the Council imposes a condition of consent on a Development Consent for the Development under section 7.11 or 7.12 of the Act requiring payment of a contribution authorised by a contributions plan, any such condition is of no effect and the Developer is not required to make the contributions otherwise required to be paid under that condition.

4.2 Consideration of Benefits

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

4.3 Section 7.24

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

5 Provision of Contributions

5.1 Designated Land

- (1) The Developer must dedicate the Designated Land to Council free of any trusts, estates, interests, covenants and Encumbrances by the time specified in **Schedule 3** and,

unless Council agrees otherwise, not prior to the Completion of the Works on the Designated Land.

- (2) The Developer must meet all reasonable costs associated with the dedication of the Designated Land in accordance with paragraph (1), including any costs incurred by Council in relation to that dedication.
- (3) For the purpose of this document, Designated Land is dedicated to Council:
 - (a) if the relevant land is dedicated in a plan registered at the Land Registry Services NSW, when that plan is so registered; or
 - (b) otherwise when the Developer delivers to Council:
 - (i) a transfer of the relevant land in registrable form;
 - (ii) the original Certificate of Title for the relevant land; and
 - (iii) any document in registrable form which, when registered, will remove any Encumbrances registered on the title of that land, excluding encumbrances that would not in the Council's opinion, acting reasonably, impede the intended use of all or any part of the Designated Land to be dedicated to the Council including but not limited to easements and covenants for services and drainage.

5.2 Works

The Developer, at its cost, must:

- (1) obtain Development Consent, and any other form of consent required by a relevant Authority, for the construction and use of the Works;
- (2) carry out and complete the stages and final Works to the satisfaction of the Council by the time specified in **Schedule 4**; and
- (3) carry out and complete the stages and final Works:
 - (a) in accordance with the specifications referred to in **Schedule 4** for the relevant item of Work;
 - (b) in accordance with any relevant Development Consent;
 - (c) in accordance with any designs, plans, reports and studies deemed certified or approved by an Authority
 - (d) in accordance with the requirements of, or consents issued by, any Authority;
 - (e) ensuring that:
 - (i) all necessary measures are taken to protect people, property, and the Environment;
 - (ii) unnecessary interference with the passage of people and vehicles is avoided;
 - (iii) nuisances and unreasonable noise and disturbances are prevented; and

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- (iv) all relevant laws and regulations with respect to water, air, noise and land pollution (including 'pollution incidents') as defined under the *Protection of the Environment Operations Act 1997* (NSW);
 - (f) in accordance with any Australian Standards applicable to works of the same nature as each aspect of the Works; and
 - (g) in a proper and workmanlike manner complying with current industry practice and standards relating to each aspect of the Works.

5.3 Contribution Value

If the Developer's actual cost of carrying out the Works, including any costs incurred pursuant to this document, determined at the date on which the Works are Completed, differs from the Contribution Value, then subject to the Works having been completed in accordance with this document, neither party will be entitled to claim credit or reimbursement, as the case may be, for the difference.

5.4 Access to the Land and location of Works

- (1) The Developer is to permit the Council, its officers, employees, agents and contractors to enter the Land at any time, upon giving reasonable prior notice, in order to inspect, examine or test any of the Works.
- (2) The Developer must use reasonable endeavours to enable Council, its officers, employees, agents and contractors access to the location of the Works where this is not the Land, Council land or a public road.

5.5 Acceptance of Risk in Works

Once the Designated Land is dedicated or transferred to Council in accordance with this document, Council accepts ownership, risk, possession and control of both the Designated Land and any item of Work on that land that has been completed.

6 Completion of Works

6.1 Issue of Completion Notice

If the Developer considers that any particular item or stage of the Works is complete (section 5.2), then at least seven (7) days prior to completion of those Works, it must serve a notice on Director Works and Services and Director Environment and Planning (**Responsible Officer**) of Council which:

- (1) is in writing;
- (2) identifies the particular item of the Works to which it relates; and
- (3) specifies the date on which the Developer believes the relevant item of the Works was or is to be completed,
- (4) works exclude the submission of documentation, plans, studies or reports as part of the approval or completion notice

(Completion Notice).

6.2 Inspection by Council

- (1) Council must carry out an inspection of the physical Works set out in a Completion Notice:
 - (a) within thirty (30) business days of the receipt of that notice, if the inspection includes the review of documents related to the inspection of the physical Works,
 - (b) within a timeframe as agreed between the parties, if the inspection includes testing related to the inspection of the physical Works; and
 - (c) within ten (10) business days of the receipt of that notice, if the inspection of the physical Works does not include the review of documents or the undertaking of testing related to the inspection of the physical Works as referred to in paragraphs (1)(a) and (1)(b).
- (2) If Council fails to carry out an inspection in accordance with paragraph (1) the Works referred to in the relevant Completion Notice will be deemed to be Complete.

6.3 Rectification Notice

- (1) Within twenty (20) business days of inspecting the Works set out in a Completion Notice Council must provide notice in writing (**Rectification Notice**) to the Developer that the Works set out in the Completion Notice:
 - (a) have been Completed; or
 - (b) have not been Completed, in which case the notice must also detail:
 - (i) those aspects of the Works which have not been Completed; and
 - (ii) the work Council requires the Developer to carry out in order to rectify the deficiencies in those Works.
- (2) If Council does not provide the Developer with a Rectification Notice in accordance with paragraph (1), and the development consent provide no alternate completion process then the Works set out in the Completion Notice will be deemed to have been Completed
- (3) The Rectification Works are not deemed Complete until the Works within the Rectification Notice are inspected and approved by Council and written notice is issued to that effect to the Developer.
- (4) Council may issue a further Rectification Notice on the Developer if the works are unsatisfactory. Where Council serves a Rectification Notice on the Developer, the Developer must:
 - (a) rectify the Works in accordance with that notice; or
 - (b) serve a notice on the Council that it disputes the matters set out in the notice.
- (5) Where the Developer:
 - (a) serves notice on Council in accordance with paragraph (4)(b), the dispute resolution provisions of this document apply; or

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- (b) rectifies the Works in accordance with paragraph (4)(a), then within ten (10) business days of rectification, it must serve upon the Council a new Completion Notice for the Works it has rectified.

7 Defects Liability

7.1 Defects Notice

- (1) Where any part of the Works has been Completed but those Works contain a material defect which:
 - (a) adversely affects the ordinary use and/or enjoyment of the relevant Works; or
 - (b) will require maintenance or rectification works to be performed on them at some time in the future as a result of the existence of the defect;

(Defect) Council may issue a defects notice (**Defects Notice**) concerning those Works but only within the Defects Liability Period.
- (2) A Defects Notice must contain the following information:
 - (a) the nature and extent of the Defect;
 - (b) the work Council requires the Developer to carry out in order to rectify the Defect; and
 - (c) the time within which the Defect must be rectified (which must be a reasonable time and not less than ten (10) business days).

7.2 Developer to Rectify Defects

- (1) The Developer must rectify the Defects contained within a Defects Notice as soon as practicable after receipt of the Defects Notice.
- (2) The Developer must follow the procedure set out in clause 6 in respect of the satisfaction of the Defects Notice.

7.3 Right of Council to Step-In

Council, at its absolute discretion may rectify a defect set out in the Defects Notice where the Developer has failed to comply with a Defects Notice but only after giving the Developer five (5) business days written notice to the Developer of its intention to do so.

7.4 Consequence of Step-In

If Council elects to exercise the step-in rights granted to it under clause 7.3 then:

- (1) Council may:
 - (a) only enter upon parts of the Land that it requires access to in order to satisfy the obligations of the Developer in accordance with the Defects Notice; and
 - (b) rectify the relevant Defects in accordance with the Defects Notice; and
- (2) the Developer must not impede or interfere with Council in undertaking that work.

7.5 Costs of Council

Where Council exercises its step-in rights, the Developer must pay to Council all reasonable costs incurred by Council in rectifying the relevant Defects may call upon the Defects Security provided by the Developer pursuant to clause 10 and recover as a debt due in a court of competent jurisdiction any difference between the amount of the Defects Security and the costs incurred by the Council in rectifying the Defects;

8 Developer Warranties and Indemnities

8.1 Warranties

The Developer warrants to Council that it is:

- (1) legally and beneficially entitled to the Land;
- (2) 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.

8.2 Indemnity

The Developer indemnifies Council in respect of any Claim that may arise as a result of the conduct of the Works but only:

- (1) to the extent that any such Claim does not arise as a result of the negligent acts or omissions of Council; and
- (2) to the extent of the Contribution Value of the relevant Works.

9 Contamination

9.1 Definitions

For the purpose of this clause 9:

Contamination means any material, gas, substance, liquid, chemical or biological mineral or other physical matter which would, if present on the Land:

- (1) result in an Authority issuing a notice, direction or order under an Environmental Law; or
- (2) which would constitute a violation of any Environmental Law.

Contaminated means subject to Contamination.

Environmental Law means all planning, environmental or pollution laws and any regulations, orders, directions, ordinances or requirements, permissions, permits, licences issued under those laws or instruments.

9.2 Obligations

- (1) The Developer acknowledges and agrees:

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- (a) that it is responsible for the management and remediation of any contamination present upon or under the Designated Land;
 - (b) it will attend to any necessary remediation of the Designated Land at its own costs; and
 - (c) to the fullest extent permitted by Law indemnify and release the Council from any Claim which might arise from any contamination with respect to the Designated land on which the Works are to be carried out.
- (2) Prior to the dedication of any part of the Designated Land to Council, the Developer must provide to Council's reasonable satisfaction, certification by a qualified person, that the Designated Land is not contaminated and is suitable for the proposed use.

10 Security

10.1 Provision of Security

Prior to the issue of a Construction Certificate in respect of the Development, the Developer must deliver to Council a Bank Guarantee, bond or other form of security to the satisfaction of the Council for the amount equal to the Contribution Value of the Works to be carried out on the Designated Land in accordance with **Schedule 4** of this agreement (**Security**).

10.2 Replacement of Security

- (1) The Developer may replace any Security provided by it at any time, provided that the amount of that replacement is not less than that which is required to be provided under this document.
- (2) On receipt of a replacement Security, Council must immediately release the Security being replaced and return it to the Developer.

10.3 Council may call on Security

- (1) If the Developer commits an Event of Default Council, without limiting any other remedies available to it, may call on any Security provided by the Developer.
- (2) If Council calls on any Security, it may use the amount so paid to it in satisfaction of any costs incurred by it in remedying the relevant Event of Default.

10.4 Top up of Security

If Council calls on the Security, Council, by notice in writing to the Developer, may require the Developer to provide a further or replacement Security in an amount that, when added to any unused portion of any Security then held by Council, does not exceed the amount of the Security Council is entitled to hold at that time under this document.

10.5 Release of Security

Unless:

- (1) Council has made a demand against any Security provided by the Developer;
- (2) the Contributions on account of which that Security was provided have not been made; or
- (3) the Developer is in breach of this document at the relevant time,

Council, upon a written request being made by the Developer, must return the Primary Security within ten (10) business days of such a request being made.

10.6 Indexation of value of Contribution Value

- (1) The Contribution Values and the value of any Security will be indexed quarterly in accordance with the Index.
- (2) The Developer must ensure that the Security held by Council at all times equals the indexed amount notified to the Developer by Council.

10.7 Compulsory acquisition of the Designated Land

- (1) The Developer consents to the compulsory acquisition of the Designated Land:
 - (a) in accordance with the Acquisition Act; and
 - (b) on the terms set out in this clause 10.7.
- (2) Council may only acquire the Designated Land compulsorily in accordance with the Acquisition Act if the Developer has committed an Event of Default with respect the dedication of that land under this document.
- (3) If Council acquires the Designated Land compulsorily in accordance with the Acquisition Act:
 - (a) the Developer agrees that the compensation payable to it on account of that acquisition under the Acquisition Act is \$1.00; and
 - (b) Council must complete that acquisition within twelve (12) months of the relevant Event of Default.
- (4) The parties agree that the provisions of this clause 10.7 are an agreement with respect to the compulsory acquisition of the Designated Land for the purpose of s30 of the Acquisition Act.
- (5) If Council:
 - (a) acquires the Designated Land under paragraph (3); and
 - (b) is required to pay any compensation to a third party as a result of that acquisition,

then the Developer must pay Council the amount of that compensation as a monetary contribution:

- (c) within ten (10) business days of demand for payment being made by Council; and
- (d) prior to the issue of the then next Occupation Certificate or Subdivision Certificate with respect to the Development.

10.8 Developer must not deal with property

- (1) The Developer, or land owner, must not during the term of this document sell, transfer, mortgage, charge or grant a lease or license or any other right of occupancy to any person over the Designated Land without first obtaining Council's consent in writing.

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- (2) Council may, may acting reasonably, refuse its consent or give consent with conditions.

10.9 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 its obligation to make any Contribution under 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 any Contribution under this document until such time as:
- (a) the breach is rectified; or
 - (b) Council calls upon the Security provided by the Developer in respect of the Contribution to which the breach relates.

10.10 Developer must not apply for an Occupation Certificate

The Developer must not apply or other request or procure that an Occupation Certificate be issued with respect to the Development if:

- (1) the Developer is required to make a Contribution under this document prior to the issue of that Occupation Certificate; and
- (2) the Developer has not made that Contribution at the relevant time.

11 Registration of this document

11.1 Registration of this document

The Developer acknowledges and agrees that:

- (1) this document must be registered on the title to the Land pursuant to section 7.6 of the Act; and
- (2) subject to clause 11.2, Council will undertake that registration and the Developer must pay Council's reasonable costs of procuring the registration.

11.2 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 consent of each person who:
 - (i) has an estate or interest in the Land; or
 - (ii) is seized or possessed of an estate or interest in the Land;
 - (b) the execution of any documents; and
 - (c) the production of the relevant duplicate certificates of title,
- to enable the registration of this document in accordance with clause 11.1.

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- (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 sixty (60) 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.

11.3 Discharge from the Register

The Council will provide a release and discharge of this document so that it may be removed from the folios of the Register for the Land (or any part of it) when:

- (1) the obligations under this document have been satisfied; or
- (2) if this document is terminated or rescinded.

12 Assignment

12.1 Prohibition

Other than in accordance with this clause 12, the Developer may Assign its rights under this document without the prior written consent of the Council.

12.2 Restriction on Assignment

Other than in accordance with this clause 12 the Developer must not:

- (1) Assign any part of the Land; and/or
- (2) Assign their rights or obligations under this document.

12.3 Procedure for Assignment

- (1) If the Developer:
 - (a) wishes to Assign any part of the Land; and/or
 - (b) 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) obtain written consent of Council to the relevant Assignment; and
 - (e) at no cost to Council, procure:
 - (i) the execution by the third party in whose favour the Assignment is to be made (**Assignee**) of an appropriate deed where the Assignee agrees to be bound by the terms of this document; and
 - (ii) the provision of all Securities to Council by the Assignee that the Developer is required to provide under this document (and any

additional securities if required by Council acting reasonably) at the same time as, or prior to, entering into that deed.

- (2) Council may only refuse its consent to any request made by the Developer under paragraph (1)(c) if, at the time the request is made, the Developer is in breach of this document.

13 Dispute Resolution

13.1 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.
- (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**).

13.2 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.

13.3 Further steps required before proceedings

Subject to clauses 13.14 and 13.15 and except as otherwise expressly provided in this document, any Dispute must, as a condition precedent to the commencement of litigation, mediation under clause 13.5 or determination by an expert under clause 13.6, 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 13.1(2) is served.

13.4 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 13.5 or expert resolution under clause 13.6.

13.5 Disputes for mediation

- (1) If the parties agree in accordance with clause 13.4 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.

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- (2) 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 13.6.

13.6 Choice of expert

- (1) If the Dispute is to be determined by expert determination, this clause 13.6 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
 - (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 an document with the expert appointed under this clause 13.6 setting out the terms of the expert's determination and the fees payable to the expert.

13.7 Directions to expert

- (1) In reaching a determination in respect of a dispute under clause 13.6, 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;

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- (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.

13.8 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 13.6(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.

13.9 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.

13.10 Other courses of action

If:

- (1) the parties cannot agree in accordance with clause 13.4 to refer the matter to mediation or determination by an expert; or

-
- (2) the mediation referred to in clause 13.5 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.

13.11 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.

13.12 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.

13.13 Costs

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

13.14 Remedies available under the Act

This clause 13 does not operate to limit the availability of any remedies available to Council under the Act.

13.15 Urgent relief

This clause 13 does not prevent a party from seeking urgent injunctive or declaratory relief concerning any matter arising out of this document.

14 Force Majeure

14.1 Definition

In this clause 14, force majeure (**Force Majeure**), means any physical or material restraint beyond the reasonable control of a party claiming the Force Majeure and includes, without limitation, fire, the discovery of threatened species on the Land or industrial disputes.

14.2 Consequences of Force Majeure Event

If a party is unable by reason of Force Majeure to carry out wholly or in part its obligations under this document, it must:

- (1) give to the other party prompt notice of the Force Majeure with reasonably full particulars; and
- (2) suggest an alternative method, if any, of satisfying its obligations under this document.
- (3) If a party is unable to satisfy its obligations under this document by an alternative method, the obligations of the parties so far as they are affected by the Force Majeure are then suspended during continuance of the Force Majeure and any further period as may be reasonable in the circumstances.

14.3 Inability to complete Works

- (1) The party giving such notice under this clause must use all reasonable effort and diligence to remove the Force Majeure or ameliorate its effects as quickly as practicable.
- (2) If the Developer is unable to Complete any part of the Works due to a Force Majeure event the Developer must pay to Council the Contribution Value of the relevant works and the amount payable to Council may be apportioned, if necessary, in such manner as may be fair and reasonable.
- (3) In reference to paragraph (2), Council, at its absolute discretion, may call on the Bank Guarantees (or any part of it) pursuant to clause 10.3.

14.4 Exclusion of operation

The parties agree that this Force Majeure provision does not apply to an obligation of a party to transfer land or to pay money.

14.5 Dispute

If the parties are unable to agree on the existence of an event of Force Majeure or the period during which the obligations of the parties are suspended during the continuance of the Force Majeure, that dispute must be referred for determination under clause 13.

15 Breach of this document

15.1 Breach Notice

If the Developer breaches this document, Council may serve a notice on the Developer (**Breach Notice**) specifying:

- (1) the nature and extent of the alleged breach;
- (2) if:
 - (a) the breach is capable of being rectified other than by the payment of compensation, what Council requires the Developer to do in order to rectify the breach; or
 - (b) the breach is not capable of being rectified other than by payment of compensation, the amount of compensation Council requires the Developer to pay in order to rectify the breach, and
- (3) the time within which Council requires the breach to be rectified, which must be a reasonable time of not less than forty (40) business days.

15.2 Events of Default

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

- (1) fails to comply with a Breach Notice; or
- (2) becomes subject to an Insolvency Event.

15.3 Consequences of Events of default

Where the Developer commits an Event of Default, Council may, in addition to any rights it has at Law:

- (1) exercise the Step in Rights so as to carry out any work specified in the relevant Breach Notice; or
- (2) call on the Security to the extent of any compensation claimed in a Breach Notice and not paid by the Developer.

16 Termination, Rescission or Determination

16.1 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) Council serves notice on the Developer terminating this document where the Developer has failed to comply with a notice issued in accordance with clause 15.1.
- (3) The Instrument Change is not made.

16.2 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.

16.3 Determination

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

17 Position of Council

17.1 Consent authority

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

17.2 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).

17.3 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 17 is substantially satisfied; and
 - (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.

17.4 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.

18 Confidentiality

18.1 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.

18.2 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.

19 GST

19.1 Defined GST Terms

Defined terms used in this clause 19 have the meaning ascribed to them in the GST Law.

19.2 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.

19.3 GST Obligations to Survive Termination

This clause 19 will continue to apply after expiration of termination of this document.

20 Miscellaneous

20.1 Obligation to act in good faith

The parties must at all times:

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

20.2 Legal costs

The Developer agrees to:

- (1) pay or reimburse the reasonable legal costs and disbursements of Council of the negotiation, preparation, execution, and stamping 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 its obligations under this document.

21 Administrative Provisions

21.1 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;
 - (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.

21.2 Entire Document

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.

21.3 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.

21.4 Joint parties

If two or more parties are included within the same defined term in this document:

- (1) a liability of those parties under this document is a joint liability of all of them and a several liability of each of them;
- (2) a right given to those parties under this document is a right given severally to each of them; and
- (3) a representation, warranty or undertaking made by those parties is made by each of them.

21.5 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.

21.6 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.

21.7 Counterparts

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

21.8 Amendment

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

21.9 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.

21.10 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.

21.11 Governing law

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

- (1) submit to the exclusive jurisdiction of the courts of New South Wales and any courts that may hear appeal from those courts in respect of any proceedings in connection with this 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*.
-

Schedule 1– Requirements under s7.4 of the Act

REQUIREMENT UNDER THE ACT	THIS PLANNING AGREEMENT
<p>Planning instrument and/or development application – (Section 7.4(1))</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>Description of land to which this agreement applies – (Section 7.4(3)(a))</p>	<p>Refer to definition of 'Land' in Part 1 of Schedule 2.</p>
<p>Description of change to the environmental planning instrument to which this agreement applies – (Section 7.4(3)(b))</p>	<p>As set out in the Planning Proposal.</p>
<p>Application of section 7.11 of the Act – (Section 7.4(3)(d))</p>	<p>Applies except to the extent set out in clause 4.1.</p>
<p>Applicability of section 7.12 of the Act – (Section 7.4(3)(d))</p>	<p>Applies except to the extent set out in clause 4.1.</p>
<p>Consideration of benefits under this agreement if section 7.11 applies – (Section 7.4(3)(e))</p>	<p>Refer to clause 4.2 of the Planning Agreement.</p>
<p>Mechanism for Dispute resolution – (Section 7.4(3)(f))</p>	<p>See clause 13.</p>
<p>Enforcement of this agreement (Section 7.4(3)(g))</p>	<p>See clause 10.</p>
<p>No obligation to grant consent or exercise functions – (Section 7.4(3)(9))</p>	<p>See clause 16. See clause 9.</p>

Schedule 2 – Defined Terms and Interpretation

Part 1 – Definitions

Acquisition Act	means the <i>Land Acquisition (Just Terms Compensation) Act 1991</i> (NSW).
Act	means the <i>Environmental Planning and Assessment Act 1979</i> (NSW).
Assign	as the context requires refers to any assignment, sale, transfer, disposition, declaration of trust over or other assignment of a legal and/or beneficial interest.
Authority	means (as appropriate) any: <ol style="list-style-type: none">(1) federal, state or local government;(2) department of any federal, state or local government;(3) any court or administrative tribunal; or(4) statutory corporation or regulatory body.
Bank Guarantee	means an irrevocable and unconditional undertaking without any expiry or end date by one of the following trading banks: <ol style="list-style-type: none">(1) Australia and New Zealand Banking Group Limited.(2) Commonwealth Bank of Australia.(3) Macquarie Bank.(4) National Australia Bank Limited.(5) St George Bank Limited.(6) Westpac Banking Corporation.(7) Any other financial institution approved by the Council, in its absolute discretion, in response to a request from the Developer.
Claim	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.
Completed	means completed in accordance with the requirements of this document or condition or consent if not expressed within this document.
Completion Notice	has the meaning ascribed in clause 6.1.
Confidential Information	means any information and all other knowledge at any time disclosed (whether in writing and orally) by the parties to each other, or acquired by the parties in relation to the other's activities or services which is not already in the public domain and which:

-
- (1) is by its nature confidential;
 - (2) is designated, or marked, or stipulated by either party as confidential (whether in writing or otherwise);
 - (3) any party knows or ought to know is confidential;
 - (4) is information which may be reasonably considered to be of a confidential nature.

Contributions	means the provision of the Works and the dedication of the Designated Land.
Contribution Value	means the amount specified in Schedules 3 and 4 in the column headed "contribution value" for each item of the Contributions.
Defect	has the meaning ascribed to it in clause 7.1.
Defects Notice	has the meaning ascribed to it in clause 7.1.
Defects Liability Period	means twelve (12) months.
Defects Security	has the meaning ascribed to it in clause 10.
Designated Land	means that part of the Land set out in Schedule 3 , and includes the Road Widening Land.
Development Consent	means a consent issued under the Act for the Development.
Development	the development of the Land in accordance with a Development Consent.
Dispute	has the meaning ascribed to it in clause 13.1.
Encumbrance	means an interest or power: <ol style="list-style-type: none">(1) reserved in or over an interest in any asset;(2) arising under, or with respect to, a Bio-Banking Agreement;(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(4) by way of security for the payment of a debt or other monetary obligation or the performance of any obligation. <p>Encumber means to grant an Encumbrance.</p>
Event of Default	has the meaning ascribed to it in clause 15.2.
Force Majeure	has the meaning ascribed to it in clause 14.

GST Law

means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

Index

means the Consumer Price Index (All Groups - Sydney) as provided by the Australian Bureau of Statistics.

Insolvency Event

means the happening of any of the following events:

- (1) Application which is not withdrawn or dismissed within fourteen (14) days is made to a court for an order or an order is made that a body corporate be wound up.
- (2) An application which is not withdrawn or dismissed within fourteen (14) days is made to a court for an order appointing a liquidator or provisional liquidator in respect of a body corporate or one of them is appointed, whether or not under an order.
- (3) Except to reconstruct or amalgamate while solvent, a body corporate enters into, or resolves to enter into, a scheme of arrangement, agreement of company arrangement or composition with, or assignment for the benefit of, all or any class of its creditors, or it proposes a reorganisation, moratorium or other administration involving any of them.
- (4) A body corporate resolves to wind itself up, or otherwise dissolve itself, or gives notice of intention to do so, except to reconstruct or amalgamate while solvent or is otherwise wound up or dissolved.
- (5) A body corporate is or states that it is insolvent.
- (6) As a result of the operation of section 459F(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**), a body corporate is taken to have failed to comply with a statutory demand;
- (7) A body corporate is or makes a statement from which it may be reasonably deduced that the body corporate is, the subject of an event described in section 459C(2)(b) or section 585 of the *Corporations Act*.
- (8) A body corporate takes any step to obtain protection or is granted protection from its creditors, under any applicable legislation or an administrator is appointed to a body corporate.
- (9) A person becomes an insolvent under administration as defined in section 9 of the *Corporations Act* or action is taken which could result in that event.
- (10) A receiver, manager or receiver and manager is appointed to the Company.
- (11) A claim is filed in a court against a person that is not defended, released or otherwise settled within twenty eight (28) days of the date of its filing at the court.
- (12) Anything analogous or having a substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction.

Instrument Change	means the amendment of the Auburn Local Environmental Plan 2010 in accordance with the Planning Proposal.
Land	means the land contained in the following folio identifiers: <ul style="list-style-type: none"> (1) 38/222712. (2) 100/793305. (3) 1/397. (4) 6/397. (5) 7/397. (6) 8/397. (7) 101/1248142.
Law	means all legislation, regulations, by-laws, common law and other binding order made by any Authority.
LEP	means Auburn Local Environmental Plan 2010.
Location Plan	means the plan that is attached as Annexure 1 .
Occupation Certificate	has the same meaning as in section 6.4(c) of the Act.
Planning Legislation	means the Act, the <i>Local Government Act 1993</i> (NSW) and the <i>Roads Act 1993</i> (NSW).
Planning Proposal	means the planning proposal number PP_2019_CUMBE_001_00 to amend the LEP to allow on the parts of the Land zoned B4 under the LEP: <ul style="list-style-type: none"> (1) a minimum non-residential floor space ratio of 0.4:1; and (2) a maximum building height of: <ul style="list-style-type: none"> (a) 45 metres; (b) 48 metres in of the south-east corner of the Land; and (c) 55 metres in the north-east corner of the Land; and (3) bonus floor space ratio of 0.3:1 if a minimum of 0.6:1 non-residential floor space ratio is provided.
Primary Security	has the meaning ascribed to it in clause 10.
Rectification Notice	has the meaning ascribed to it in clause 6.3.
Road Widening Land	means the land upon which the Road Widening Works are to be undertaken as identified in the Location Plan.
Road Widening Works	means the road widening (2.5m in width, 25m in length) of "Raphael Street" and associated intersection upgrades as shown in the Location Plan, including land to be dedicated in Schedule 3 .
Security	means collectively the Primary Security and the Defects Security.
Subdivision Certificate	has the same meaning as in section 6.4(d) of the Act.
Works	means the works specified or described in Schedule 4 .

Part 2 - Interpretational Rules

clauses, annexures and schedules	a clause, annexure or schedule is a reference to a clause in or annexure or schedule to this document.
reference to statutes	a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them.
singular includes plural	the singular includes the plural and vice versa.
person	the word "person" includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association or any government agency.
executors, administrators, successors	a particular person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns.
dollars	Australian dollars, dollars, \$ or A\$ is a reference to the lawful currency of Australia.
calculation of time	if a period of time dates from a given day or the day of an act or event, it is to be calculated exclusive of that day.
reference to a day	a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later.
accounting terms	an accounting term is a reference to that term as it is used in accounting standards under the Corporations Act or, if not inconsistent with those standards, in accounting principles and practices generally accepted in Australia.
reference to a group of persons	a group of persons or things is a reference to any two or more of them jointly and to each of them individually.
meaning not limited	the words "include", "including", "for example" or "such as" are not used as, nor are they to be interpreted as, words of limitation, and, when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind.
next day	if an act under this 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.
next Business Day	if an event must occur on a stipulated day which is not a Business Day then the stipulated day will be taken to be the next Business Day.
time of day	time is a reference to Sydney time.
headings	headings (including those in brackets at the beginning of paragraphs) are for convenience only and do not affect the interpretation of this document.

agreement

a reference to any agreement, document or instrument includes the same as varied, supplemented, novated or replaced from time to time.



Schedule 3 - Designated Land

Item	Time for Completion	Contribution Value
Lots 7 and 8 in DP 397.	Subject to clause 5.1(1), the earlier of: <ol style="list-style-type: none"> 1. the issue of the first Subdivision Certificate or Occupation Certificate issued in respect of the Development; 2. two (2) months after Completion of the Road Widening Works; and 3. 30 June 2021. 	\$5,753,800.00.
Dedication of Road Widening Land.	Subject to clause 5.1(1), the earlier of: <ol style="list-style-type: none"> 1. the issue of the first Subdivision Certificate or Occupation Certificate issued in respect of the Development; 2. two (2) months after Completion of the Road Widening Works; and 3. 30 June 2021. 	At no cost to Council.

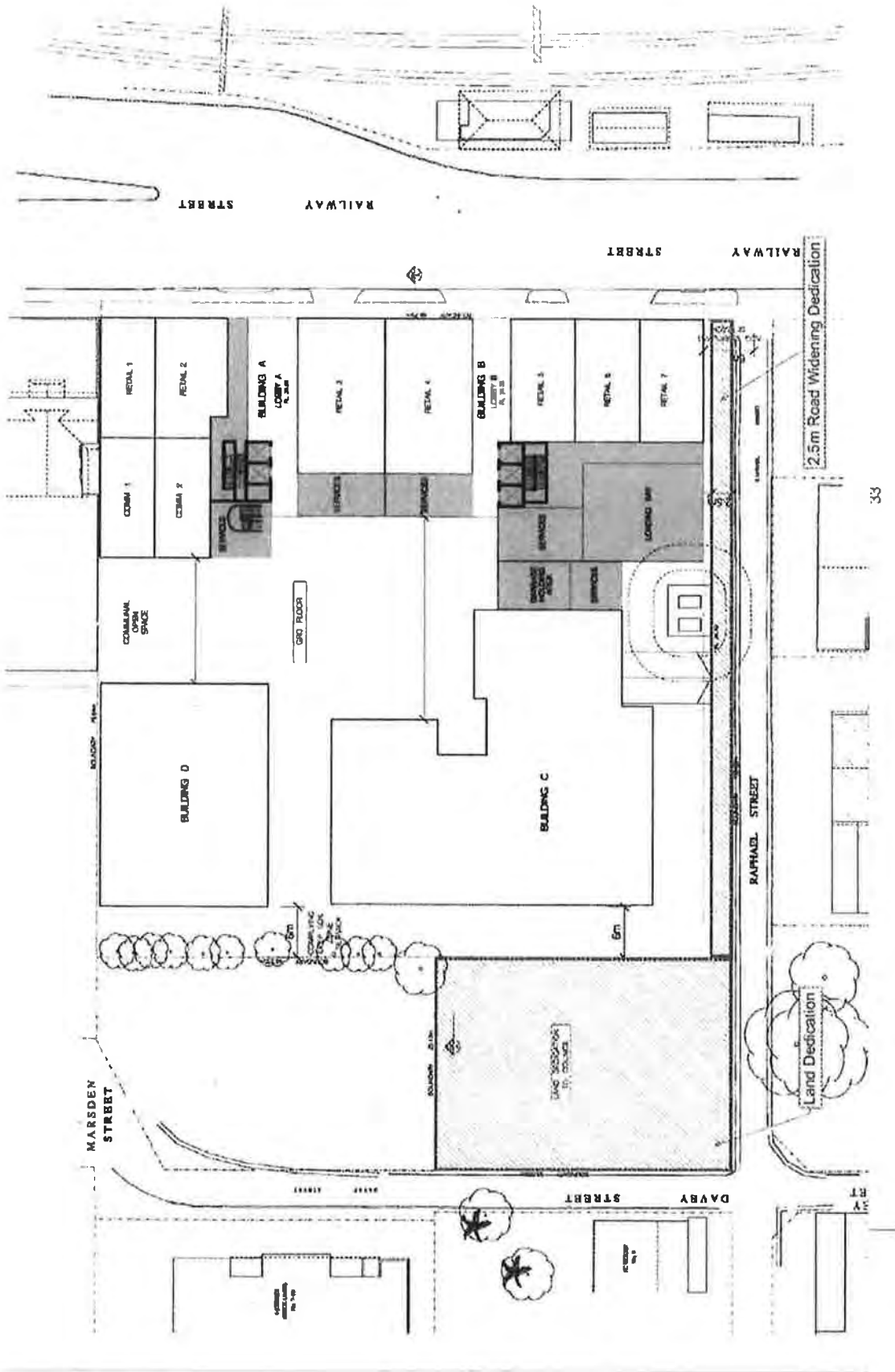
Schedule 4 - Works

Item of Works	Specification	Time for Completion	Contribution Value
Rehabilitation Works - Lots 7 and 8 in DP 397	Removal of all existing structures Importation of 80/20 soil mixture at a depth level of 300mm Land levelled to an acceptable standard Laying of turf	2 months prior to Lots 7 and 8 in DP 397 being dedicated to Council.	\$20,000
Road widening (2.5m in width, 25m in length) of "Raphael Street" and associated intersection upgrades as shown in the Location Plan, including land to be dedicated in Schedule 3	Including, but not limited, pathways, street trees, service augmentation and relocation, street lighting, road works, drainage, signage and intersection upgrades within the Designated Land, to a minimum public purpose standard or as detailed in development approval and plans.	Prior to the issue of a Subdivision Certificate or Occupation Certificate in respect of the Development.	At no cost to Council.
Maintenance Period for roads and streetscape	As conditioned in development consent	Minimum 12 months	At no cost to Council

Annexure 1 – Location Plan

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Execution page

Executed as an agreement.

Dated:

Executed by Cumberland 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)

HAMISH MCNULTY

Name of General Manager (Print Name)

CLR STEVE CHRISTOU

Name of Mayor (Print Name)

Executed by Lidcombe Property (NSW) Pty Limited in accordance with section 127(1) of the Corporations Act 2001 (Cth) by authority of its sole director and secretary



Director/Secretary (Signature)

Simon Xistouris

Name of Sole Director/ Secretary (Print Name)
