

**PLANNING AGREEMENT NUMBER:VPA2022/00001**

**Section 7.4 of the *Environmental Planning and Assessment Act, 1979***

**Parties**

**NEWCASTLE CITY COUNCIL** of 12A Stewart Avenue, Newcastle NSW 2300 (**Council**)

**AND**

**DANGAR ST WICKHAM PTY LTD** (ACN 625 741 344) of , Level 12, 90 Arthur Street, North Sydney NSW 2060 (**Developer**)

**Background**

- A. The Developer has made a Development Application to the Council for Development Consent to carry out the Development on the Land.
- B. That Development Application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Purpose if that Development Consent to carry out the Development on the Land is granted.

## Operative provisions

### 1 Planning agreement under the Act

The Parties agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 7.1 of Part 7 of the Act.

### 2 Application of this Agreement

This Agreement is made in respect of the Development and applies to both the Land and the Development.

### 3 Operation of this Agreement

3.1 The parties are to execute this Agreement immediately following the grant by the Council of the Development Consent.

3.2 This Agreement shall operate from the date of execution of this Agreement.

3.3 When this Agreement operates it is a binding Contract between the parties.

### 4 Definitions and interpretation

In this Agreement the following definitions apply:

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

**Agreement** means this agreement

**Business Day** means a day that is not a Saturday, Sunday or public holiday, on which banks are open for general services in Sydney, New South Wales

**Certifying Authority** means any accredited private certifier including where appropriate, a Principal Certifying Authority (PCA) appointed or to be appointed to certify the Development or any aspect of it;

**Council** means Newcastle City Council

**Occupation Certificate** means any occupation certificate in respect of the Development Consent;

**Development** means the development the subject of the Development Application as made by the Developer and which is described in Item 4 of Schedule 2, and any conditions of the Development Consent;

**Development Application** means the development application described in Item 4 of Schedule 2;

**Development Consent** means the consent granted under the Act for all or part of the Development Application.

**Development Contribution** means a monetary contribution, as referred to in Schedule 1 but does not include any Security or other benefit provided by a Party to the Council to secure the enforcement of that Party's obligations under this Deed for the purposes of s 7.4(3)(g) of the Act.

**GST** has the same meaning as in the GST Law.

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

**Land** means Lot 1 DP1197377., known as 10 Dangar Street, Wickham NSW.

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**Party** means a party to this agreement, including their successors and assigns.

**Public Purpose** for the purpose of this Agreement means the public purpose described in Column 2 of Schedule 1.

**Regulation** means the *Environmental Planning and Assessment Regulation 2021* (NSW).

**Schedule** means any schedule to this Agreement.

## **5 Interpretation**

In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- (k) References to the word 'include' or 'including' are to be construed without limitation.
- (l) A reference to this Agreement includes the agreement recorded in this Agreement.
- (m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- (n) Any schedules and attachments form part of this Agreement.

## **6 Development Contributions to be made under this Agreement**

- 6.1 The Developer must pay the Development Contribution to the Council in accordance with Schedule 1 of this Agreement and any other provision of this Agreement relating to the making of Development Contributions.
- 6.2 Payment of the Development Contribution may be made by bank cheque in favour of Council or electronic funds bank transfer to Council's nominated bank account.
- 6.3 The development Contribution will be taken to have been made when Council notifies the Developer in writing that the bank cheque has been received or clear funds have been deposited in Council's nominated bank account.
- 6.4 The Developer covenants and agrees not to make an application for the issue of any Occupation Certificate until the Development Contribution required to be made to the Council hereunder has been paid.

## **7 Application of the Development Contributions**

7.1 Council will use the Development Contributions for the provision of public amenities and infrastructure that supports the implementation of the Wickham Masterplan 2021.

## **8 Application of s7.11 and s7.12 of the Act to the Development**

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

8.2 Benefits under the Agreement are not to be taken into account in determining a development contribution under section 7.11 or section 7.12 of the Act.

## **9 Registration of this Agreement**

9.1 The Developer must:

- (a) prior to the issue of any Construction Certificate for the Development, or within such further time as the parties hereto agree, do all things reasonably necessary to obtain the consent to the registration of this Agreement over the title to the Land pursuant to section 7.6 of the Act from all persons who have an interest in the Land;
- (b) forthwith after receiving the consents specified in subclause (a) cause this Agreement to be registered on the title of the Land;

9.2 The Developer agrees that pending the registration of this Agreement on the title of the Land as required by clause 8.1, the Council shall be entitled to register a caveat at Land & Property Information Authority over the title to the Land to protect its interest therein pursuant to this Agreement.

## **10 Acknowledgements**

10.1 The Developer acknowledges that the Council may include a notation on Certificates under section 10.7 of the Act in relation to this Agreement.

10.2 The parties acknowledge that the Council is a consent authority with statutory rights and obligations pursuant to the terms of the Act and other legislation.

## **11 Review of this Agreement**

11.1 The Parties agree to review this Agreement every five years, and determine if either Party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Deed.

11.2 For the purposes of this clause, the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development.

11.3 For the purposes of addressing any matter arising from a review of this Agreement, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Agreement.

11.4 If this Agreement becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Agreement is entered into.

11.5 A failure by a Party to agree to take action requested by the other Party as a consequence of a review referred to in clause 11.1 is not a dispute for the purposes of this Agreement and is not a breach of this Agreement.

## 12 Dispute Resolution

### 12.1 Reference to Dispute

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

### 12.2 Notice of Dispute

The Party wishing to commence the dispute resolution process must give written notice (**Notice of Dispute**) to the other Parties of:

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

### 12.3 Representatives of Parties to Meet

The representatives of the Parties must promptly (and in any event within 10 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.

The Parties may, without limitation:

- a) resolve the dispute during the course of that meeting;
- b) agree that further material or expert determination about a particular issue or consideration is needed to effectively resolve the dispute (in which event the Parties will, in good faith, agree to a timetable for resolution); or
- c) agree that the Parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

### 12.4 Further Notice if Not Settled

If the dispute is not resolved within 30 Business Days after the nominated representatives have met, either Party may give to the other a written notice calling for determination of the dispute (**Determination Notice**) by mediation under clause 12.5 or by expert determination under clause 12.6.

### 12.5 Mediation

If a Party gives a Determination Notice calling for the dispute to be mediated:

- a) the Parties must agree to the terms of reference of the mediation within 10 Business Days of the receipt of the Determination Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply;
- b) the mediator will be agreed between the Parties, or failing agreement within 10 Business Days of receipt of the Determination Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- c) the mediator appointed pursuant to this clause 12.5 must:
  - i) have reasonable qualifications and practical experience in the area of the dispute; and
  - ii) have no interest or duty which conflicts or may conflict with his or her function as a mediator, he or she being required to fully disclose any such interest or duty before his or her appointment;
  - iii) the mediator shall be required to undertake to keep confidential all

matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties.

- d) the Parties must within 10 Business Days of receipt of the Determination Notice notify each other of their representatives who will be involved in the mediation (except if a resolution of the Council is required to appoint a representative, the Council must advise of the representative within 10 Business Days of the resolution);
- e) the Parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement; and
- f) in relation to costs and expenses:
  - i) each Party will bear its own professional and expert costs incurred in connection with the mediation; and
  - ii) the costs of the mediator will be shared equally by the Parties unless the mediator determines that a Party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that Party.

#### **12.6 Litigation**

If the dispute is not finally resolved in accordance with this clause 12, then either Party is at liberty to litigate the dispute.

#### **12.7 No suspension of contractual obligations**

Subject to any interlocutory order obtained under clause 12.1, the referral to or undertaking of a dispute resolution process under this clause 12 does not suspend the Parties' obligations under this Agreement.

### **13 Enforcement**

#### **13.1 Restriction on the issue of Certificates**

The obligation to pay the Development Contribution under this Agreement must be satisfied prior to the issue of any Occupation Certificate for the Development.

#### **13.2 General Enforcement**

- (a) This Agreement may be otherwise enforced by either Party in any court of competent jurisdiction.
- (b) For the avoidance of doubt, nothing in this Agreement prevents:
  - i. a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates; and
  - ii. the Council from exercising any function under the Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

### **14 Notices**

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

- (a) delivered or posted to that Party at its address set out below;
- (b) faxed to that Party at its fax number set out below;
- (c) emailed to that Party at its email address set out below.

**Council**

**Attention:**

**Address:**

**Fax Number:**

**Email:**

**Developer**

**Attention:**

**Matt**

**Zappia**

**Address: Suite 107, 1 Cassins Lane, North Sydney, NSW, 2060,**

**Fax Number: NA**

**Email: matt@multipartproperty.com.au**

14.2 If a Party gives the other Party 3 Business Days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.

14.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:

- (a) if it is delivered, when it is left at the relevant address.
- (b) if it is sent by post, 2 Business Days after it is posted.
- (c) if it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.
- (d) If it is sent by email, at the time it is sent.

14.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

**15 Approvals and consent**

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

**16 Release and Indemnity**

Each Party releases the other Party from any Claim it may have against the other Party arising in connection with the performance of their obligations under this Deed except if, and to the extent that, the Claim arises because of the other Party's negligence or default.

Each Party indemnifies the other Party from and against all Claims that may be sustained, suffered, recovered or made against the other Party arising in connection with the performance of their obligations under this Deed except if, and to the extent that, the Claim arises because of the other Party's negligence or default.

**17 Assignment and Dealings**

17.1 If this Agreement is not registered on the title to the Land, and if the Developer should propose to sell the Land or any part thereof then it shall:

- (i) within seven (7) days of listing the Land or any part thereof for sale, either through an agent or privately, notify the Council of such intention;
- (ii) as a condition of any sale, require that the incoming purchaser enter into with Council a like agreement to this present Agreement in which substantially the same covenants as set out herein shall apply;
- (iii) within seven (7) days of exchange of contracts for the sale, notify the Council of the sale and provide the Council with a copy of the contract;
- (iv) within twenty one (21) days of receipt from the Council of a replacement agreement between the Council and the purchaser substantially in the form of this Agreement, have it executed by the purchaser and return it to the Council;
- (v) that if this Agreement is not registered on the title to the Land, and if the Developer should propose otherwise than by sale to transfer or assign its interest in the Land or any part thereof to a transferee or assignee, then it shall before effecting such assignment or transfer have the incoming transferee or assignee enter into an agreement with the Council substantially in the form of this Agreement insofar as concerns the interest assigned or transferred and shall provide same to the Council.

17.2 If the Agreement is registered on title:

- (i) Should the Developer intend to sell, transfer, assign, novate, charge, encumber or otherwise deal with the Land, the Developer must notify Council 10 business days prior to the assignment or dealing;
- (ii) If the Land is sold or transferred, the Developer must assign or novate the obligations under this Agreement in the same terms as this Agreement.

17.4 In the event the Developer enters into a contract for the sale of the Land, the Developer (as vendor) shall disclose to the Purchaser the existence of this Agreement.

## **18 Entire agreement**

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

## **19 Further acts**

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

## **20 Governing law and jurisdiction**

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

## **21 Joint and individual liability and benefits**

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

## **22 No fetter**

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

## **23 Representations and warranties**

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

## **24 Severability**

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

## **25 Modification**

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

## **26 Waiver**

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

## **27 GST**

If any Party reasonably decides that it is liable to pay GST on a supply made to the other Party under this Agreement and the supply was not priced to include GST, then recipient of the supply must pay an additional amount equal to the GST on that supply.

## **28 Costs**

The Developer will pay Council's reasonable costs in negotiating, preparing and executing this Agreement, up to an amount of \$5,000 plus GST. The Developer will pay all costs associated with stamping and registering this Agreement.

## **29 Explanatory Note**

The Appendix contains the Explanatory Note relating to this Deed required by clause 25E of the Regulation.

Under clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note in the Appendix is not to be used to assist in construing this Deed.

## Schedule 1 – Development Contributions

Column 1	Column 2	Column 3	Column 4
Item/Contribution	Public Purpose	Manner and Extent	Timing
Monetary contribution in the amount of \$1,587,976.50	The provision of local public amenities or infrastructure that supports the implementation of the Wickham Masterplan 2021.	<p>Monetary contribution which has been calculated at a rate of \$518.10 per sq m of GFA of the Development which is an additional 3,065sqm of GFA beyond the existing DA approval DA 2018/01197.02 for the Land. The rate of \$518.10 is specified in the Fees and Charges Schedule of the Newcastle Operational Plan 2021/2022 and has been applied to an additional 3,065 sq m of GFA.</p> <p><b>The monetary contribution is consistent with the Incentive Gross Floor Area (GFA) Rate contained within the draft Community Infrastructure Incentives Planning Proposal and consistent with Council's Infrastructure Incentive Policy.</b></p>	Prior to the issue of any Occupation Certificate for the Development the subject of the Development Consent

## Schedule 2 – Requirements under s7.4

Item No	REQUIREMENT UNDER THE ACT	THIS PLANNING AGREEMENT
1	<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>(a) No</p>

	<p>(b) made, or proposes to make, a Development Application.</p> <p>(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.</p>	<p>(b) Yes</p> <p>(c) Not applicable</p>
<b>2</b>	<b>Description of land to which this agreement applies – (Section 7.4(3)(a))</b>	Lot 1 DP1197377.
<b>3</b>	<b>Description of change to the environmental planning instrument to which this agreement applies – (Section 7.4(3)(b))</b>	Not applicable
<b>4</b>	<b>Description of the Development to which this agreement applies – (Section 7.4(3)(b)(ii))</b>	<p>The Development involves alterations and additions to a development which was previously approved by DA2018/01197.02, being DA 2022/00448.</p> <p>The proposed alterations and additions involve an additional three (3) storeys of residential accommodation to the approved built form.</p>
<b>5</b>	<b>Application of section 7.11 of the Act – (Section 7.4(3)(d))</b>	See clause 8.
<b>6</b>	<b>Applicability of section 7.12 of the Act – (Section 7.4(3)(d))</b>	See clause 8.
<b>7</b>	<b>Consideration of benefits under this agreement if section 7.11 applies – (Section 7.4(3)(e))</b>	See clause 8.
<b>8</b>	<b>Mechanism for Dispute resolution – (Section 7.4(3)(f))</b>	See clause 12.
<b>9</b>	<b>Enforcement of this agreement (Section 7.4(3)(g))</b>	See clause 13.
<b>10</b>	<b>No obligation to grant consent or exercise functions – (Section 7.4((9))</b>	See clause 22,

**Executed as a Deed**

Dated:

**Signed, sealed and delivered by Newcastle 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)

\_\_\_\_\_  
Name of General Manager (Print Name)

\_\_\_\_\_  
Name of Mayor (Print Name)

**Signed, sealed and delivered by Dangar St Wickham Pty Limited** )  
in accordance with )  
section 127(1) of the *Corporations Act 2001* )  
(Cth) by authority of its directors. )

\_\_\_\_\_  
Director/Secretary (Signature)

\_\_\_\_\_  
Director (Signature)

\_\_\_\_\_  
Name of Director/Secretary (Print Name)

\_\_\_\_\_  
Name of Director (Print Name)

\_\_\_\_\_