

ATTACHMENT D

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VOLUNTARY PLANNING AGREEMENT
2 DOWLING STREET WOOLLOOMOOLOO

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PLANNING AGREEMENT

PARTIES

1. **THE COUNCIL OF THE CITY OF SYDNEY** of 456 Kent Street, Sydney, New South Wales (**the 'Council'**); and
2. Sevenex Pty Limited (**the 'Developer'**) of Level 7, 275 Alfred Street, North Sydney

BACKGROUND

- A. The Developer is the owner of the Land.
- B. On 11 October 2008 the Developer lodged (or authorised to be lodged, as the case may be) the Development Application with the Council to carry out the Development on the Land.

OPERATIVE PROVISIONS

1 PLANNING AGREEMENT UNDER THE ACT

The parties agree that this Agreement is a Planning Agreement governed by subdivision 2 of Division 6 of Part 4 of the Act.

2 SCOPE AND APPLICATION OF THIS AGREEMENT

This Agreement binds the parties and applies to the Land on which the Development is to be carried out by the Developer. This Agreement **does** include mechanisms for the payment of, and **does not** in any way reduce, offset or negate, the Developer's obligations to pay monies under:

- (a) s. 94 of the Act;
- (b) s. 61 of the City of Sydney Act;
- (c) Affordable Housing Levy
- (d) any other statute or instrument that may apply to the land or to the development application.

For the purposes of section 93F(5) of the Act, the parties expressly agree that this Planning Agreement does not exclude the operation of section 94 of the Act, and conditions may be imposed in respect of the contributions identified in (a) to (d) (inclusive).

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3 OPERATION OF THIS AGREEMENT

This Agreement takes effect on execution of this Agreement.

4 DEFINITIONS AND INTERPRETATION

4.1 Definitions

In this Agreement the following definitions apply:

Act means the *Environmental Planning and Assessment Act 1979* (NSW) (as amended) and includes any regulations made under that Act.

Construction Costs means the construction cost of the Developers Works determined by the Council.

Council's Representative means the person specified in Item 2 of Schedule 1 who is duly authorised to give approval under this Agreement.

Council Works means the works of the general nature described in Schedule 2 to be completed by the Council and includes any application fees, design development costs, other consultancy costs (such as expert heritage, planning, traffic or other advice), land acquisition costs, survey costs, construction costs, relating to the design, implementation, and (where relevant) dedication of the Council Works.

Dealing means selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.

Development means the proposal of the general nature set out in Item 4 of Schedule 1 to be completed by the Developer in accordance with the Development Consent.

Development Application means the development application identified in Item 4 of Schedule 1 including all modifications made under section 96 of the Act and includes all plans, reports models, photomontages, material boards (as amended supplemented) submitted to the consent authority prior to the determination of that Development Application.

Development Consent means the consent granted by the Council to the Development Application for the Development identified in Item 4 of Schedule 1 including all modifications made under section 96 of the Act **(NB: modifications which impact on the Developer's Works may need to be either addressed in the scope or may result in an amendment to this Agreement. This will require renotification – see the Act).**

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Developer's Contribution means the sum of the Monetary Contribution, identified in this Agreement.

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.

Guarantee means an unconditional bank guarantee, unlimited in time, issued by a bank licensed to carry on business in Australia that:

- (a) is in favour of the Council;
- (b) for the Guarantee Amount; and
- (c) on such other terms and conditions the Council may approve from time to time.

Guarantee Amount means the amount specified in Item 9 of Schedule 1 as varied from time to time in accordance with this Agreement.

Land means the land identified in Item 3 of Schedule 1, comprising the land the subject of the Development Application.

Monetary Contribution means the amount set out in Item 5 of Schedule 1 to be paid by the Developer to the Council in accordance with this Agreement.

Occupation Certificate has the same meaning as in the Act.

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

Public Benefits means the public benefits identified in Item 8 of Schedule 1 which are to be provided as a result of the Council's Works.

4.2 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.

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- (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) a reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (d) 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.
- (e) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (f) a word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular.
- (g) references to the word 'include' or 'including are to be construed without limitation.
- (h) 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.
- (i) Any schedules and attachments form part of this Agreement.
- (j) A word defined in the Act has the same meaning in this Agreement.

5 PAYMENT OF MONETARY CONTRIBUTION

5.1 Payment

- (a) The Developer agrees to pay the Monetary Contribution to the Council prior to the occupation of the development the subject of the Development Consent
- (b) The Monetary Contribution will be paid in cash or by unendorsed bank cheque.

5.2 Application

The Council will, in its discretion, expend the Monetary Contribution on the Council Works.

6 SECURITY

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6.1 Provision of Security

The Developer must, provide a Guarantee equal to 100% of the agreed Monetary Contribution to the Council upon execution of this Agreement.

6.2 Release of the Guarantee

- (a) The Council must by written notice to the Developer consent to the release of the Guarantee upon receiving payment of the Monetary Contribution.

6.3 Rights and Remedies of the Council

- (a) The Developer expressly acknowledges and agrees that the Council may make a claim from the Guarantee in the event Clause 5.1 is not complied with by the Developer.

6.4 Right to Claim Not Affected

The Developer acknowledges and agrees that:

- (a) the Council may claim, and the bank will be entitled, to make payment under the Guarantee without reference to the Developer and notwithstanding any objection, claim or direction by the Developer to the contrary; and
- (b) the rights of the Council under this Agreement are without derogation from the other rights and remedies available to the Council under this Agreement, at law and in equity in relation to any default of the Developer.

7 REGISTRATION OF THIS AGREEMENT

The Developer must promptly:

- (a) obtain such consents to the registration of this Agreement as are necessary to the registration of this Agreement pursuant to section 93H of the Act;
- (b) lodge the Agreement for registration with the Land & Property Information Office and take all steps to procure registration of the Agreement pursuant to section 93H of the Act;
- (c) produce to the Council within 35 days of execution of this Agreement details of lodgement of the Agreement with the Land & Property Information Office; and

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- (d) following registration of the Agreement, notify the Council of registration by enclosing a title search of the Land confirming the registration.

8 DISPUTE RESOLUTION

8.1 Reference to Dispute

If a dispute arises between the parties in relation to this Agreement, then either party may seek to resolve in accordance with this clause.

8.2 Notice of Dispute

The party wishing to commence dispute resolution processes must notify the other in writing of:

- (a) the nature, or subject matter, of the dispute, including a summary of any efforts made to resolve latter than by way of this clause 8;
- (b) the intent to involve this clause 8;
- (c) (if practicable) the outcomes which the notifying party wishes to achieve;
- (d) any material impact which the dispute has upon the completion of the Developer's Works (and in particular the completion of Mandatory Elements/or the remainder of the Development).

The contents of a notice issued under this clause are deemed to be confidential. The party issuing the notice may (but is not obliged) to assert legal professional privilege in respect of the contents.

8.3 Principals of Parties to Meet

The principals of the parties (and in the case of the Council, the principal may include the person acting the role of General Manager as defined in the Local Government Act, or such person as is nominated by the General Manager in writing) must promptly (and in any event within 14 days of written notice) 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, expert opinion, or consideration is needed to effectively resolve the dispute (in which event the parties will in good faith agree to a timetable for resolution);

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- (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.

8.4 Neither Party May Constrain

If:

- (a) at least one meeting has been held in accordance with clause 8.3; and
- (b) the parties have been unable to reach an outcome identified in 8.2(a) to (c); and
- (c) either of the parties (acting in good faith) forms the view that the dispute is reasonably unlikely to be resolved in accordance with a process agreed under clause 8.3;

then that party may, by 14 day's notice in writing to the other, terminate the dispute resolution process in respect of that dispute. The termination of the process set out in this clause 14 does not of itself amount to a breach of the Agreement.

9 NOTICES

9.1 Service of Notice

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 in Item 11 of Schedule 1.
- (b) faxed to that Party at its fax number set out in Item 11 of Schedule 1.

9.2 Change of Address

If a Party gives the other Party 10 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.

9.3 Time of Service of Notice

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.

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- (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.

9.4 Service After Hours, on Weekends and Holidays

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.

10 APPROVALS AND CONSENT

Except as otherwise set out in this Agreement, 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.

11 ASSIGNMENT AND DEALINGS

11.1 Dealings with Land

- (a) Subject to clause 11.1(b), the Developer must not have any Dealings with the Land unless the Developer first informs the proposed assignee, purchaser or other party (the "**Incoming Party**") of this Agreement and provides the Incoming Party with a copy of this Agreement and transfers the obligations of this Agreement to that party.
- (b) If the Incoming Party is acquiring an interest in the Land as a purchaser of one or more lots in a strata scheme, (whether or not the plan has, at the date of exchange, been registered at Land and Property Information NSW), then the Developer may create that interest without requiring that party to enter into a Agreement with the Council and the interest so created will not be in breach of this Agreement.

11.2 Substitution of Security

As soon as is practicable after the Developer has any Dealings with the Land and the Incoming Party executes a Agreement in similar form to this Agreement and provides a Guarantee in terms acceptable to the Council in accordance with this Agreement, the Council will, if so directed by the Developer, release the Guarantee held at that time.

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11.3 Claim if No Substitution

If the Developer omits to comply with its obligations under clause 19.1, then the Council may make an appropriation from the Guarantee in such amount as the Council thinks fit.

12 COSTS

12.1 Legal and Administrative Costs

12.2 Stamp Duty

The Developer is liable for and must pay all stamp duty (including any fine or penalty except where it arises from default by any other party) on or relating to this Agreement, any document executed under it or any dutiable transaction evidenced or effected by it.

13 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.

14 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.

15 GOVERNING LAW AND JURISDICTION

This Agreement is governed by the law of New South Wales. The Parties submit to the jurisdiction of the courts of that state.

16 JOINT AND SEVERAL LIABILITY

Any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually.

17 NO FETTER

Nothing in this Agreement will 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.

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18 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.

19 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.

20 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.

21 WAIVER

The fact that a Party does not 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.

22 GST

- 22.1** In this clause terms used have the meaning given to them by the GST Law as defined in Section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (the "GST Act").
- 22.2** If a party to this Agreement (the "Supplier") makes a supply under or in connection with this Agreement and is liable by law to pay GST on that supply, then the consideration otherwise payable by the recipient of the supply will be increased by an amount equal to the GST paid or payable by the Supplier.
- 22.3** If this Agreement requires a party to pay for, or reimburse any expense, loss or outgoing ("reimbursable expense") suffered or incurred by another party, the amount required to be paid, or reimbursed by the first party is the amount of the reimbursable expense net of any input

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tax credit or reduced input tax credit to which the other party is entitled in respect of the reimburseable expense.

- 22.4** If a party to this Agreement has the benefit of an indemnity for a cost, expense, loss or outgoing ("indemnified cost") under this Agreement, the indemnity is for the indemnified cost net of any input tax credit or reduced input tax credit to which that party is entitled in respect of the indemnified cost.
- 22.5** Each party agrees to do all things, including providing tax invoices and other documentation that may be necessary or desirable to enable or assist the other party to claim any input tax credit, set-off, rebate or refund in relation to any amount of GST paid or payable in respect of any supply under this Agreement.
- 22.6** Subject to the operation of this clause, and unless otherwise expressly stated amounts in this Agreement are GST exclusive.

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EXECUTED as an Agreement.

CITY OF SYDNEY COUNCIL by its duly)
appointed attorney)
Power of Attorney registered number)
..... book..... in the presence of:)
)

Witness:

Attorney

SEVENEX PTY LIMITED 003 964 234 in)
accordance with section 127 of)
Corporations Law:)
)
)

Signature:

Signature:

Name:

Name:

Position:

Position:

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Name

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SCHEDULE 1 REFERENCE SCHEDULE

Item	Name	Description
1	Developer's Name Developer's ACN Developer's Address	Sevenex Pty Limited 003 964 234 Level 7, 275 Alfred Street, North Sydney
2	Council Representative	
3	Land	Lot C DP 381363 known as 2 Dowling Street, Woolloomooloo
4	Development	Council Reference No D/2007/1934. Construction of a five storey commercial/retail building with basement car park.
5	Monetary Contribution <i>(note: be careful whether this includes monies payable under s.94 etc)</i>	\$270,000
6	Dedicated Land	N/A
7	Encumbered Land	N/A
8	Public Benefits	At the discretion of Council pursuant to Schedule 2.
9	Guarantee Amount	\$270,000
10	Public Liability Insurance	N/A
11	Notices Council Attention Address Fax Number Developer Attention Address Fax Number	City of Sydney Adrian Hawkes Town Hall House, 456 Kent Street, Sydney 9265 9222 Sevenex Pty Limited Lesli Berger Level 7, 275 Alfred Street, North Sydney 9954 1520

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SCHEDULE 2 COUNCIL'S WORKS

The payment of the monetary contribution will be applied for the purposes of the provision , or improvement of infrastructure in or about the area known as Woolloomooloo. The infrastructure may include costs of, or associated with, any one or more, including, but not limited to, the following:

- 1 Design and construction of new roads (including footpaths, pavements, street lighting, signage, and street trees and furniture):
- 2 Modification and enhancement of existing roads, including resurfacing, replacement of plantings and the like;
- 3 Design, construction and maintenance of stormwater management systems, including channelling and detention measures;
- 4 Design, construction and installation of public open space, including parks, verges, and plazas;
- 5 Design, commissioning, construction and installation of public art in any publicly accessible open space;
- 6 Provision of any other facilities reasonably intended or likely to enhance the public amenity of Woolloomooloo for the community, including (without limitation) general recreational facilities.

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PLANNING AGREEMENT

LOT C DP 381363

2 Dowling Street, Woolloomooloo

BETWEEN

**THE COUNCIL OF THE CITY OF SYDNEY
SEVENEX PTY LIMITED**

The Council of the City of Sydney
Legal Services - Level 10, Town Hall House
456 Kent Street
SYDNEY NSW 2000

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