

Deed of variation of planning agreement

The Council of the City of Sydney ABN 22 636 550 790 and

Lincon Epsom Projects Pty Ltd ACN 611 082 903 as trustee for
the Lincon Epsom Projects Unit Trust

Reference: S114277

DEED OF VARIATION

THIS DEED is made on

2022

PARTIES

- (1) **THE COUNCIL OF THE CITY OF SYDNEY** ABN 22 636 550 790 of Town Hall House, 456 Kent Street Sydney NSW 2000 (**City**); and
- (2) **Lincon Epsom Projects Pty Limited** ACN 611 082 903 as trustee for the Lincon Epsom Projects Unit Trust of c/- Livingston International, Suite 1, Level 9, Building 3, 138 O'Riordan Street, Mascot NSW 2020 (**Developer**).

BACKGROUND

- A. The City and the Developer entered into the Agreement.
- B. The City and the Developer have agreed to vary the Agreement in the manner set out in this Deed of Variation.

THE PARTIES AGREE AS FOLLOWS:

1 INTERPRETATION

- 1.1 In this Deed of Variation, unless the context otherwise requires:

Agreement means the voluntary planning agreement between City and the Developer dated 28 May 2018.

Deed of Variation means this deed of variation of planning agreement and all annexures, schedules, attachments and exhibits.

1.2 **Rules for interpreting this Deed of Variation**

Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this Deed of Variation, except where the context makes it clear that a rule is not intended to apply.

- (a) A reference to:

- (i) a legislative provision or legislation (including subordinate legislation) is to that provision or legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
- (ii) a document (including this document) or agreement, or a provision of a document (including this document) or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;
- (iii) a party to this document or to any other document or agreement includes a permitted substitute or a permitted assign of that party;
- (iv) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal

identity, and any executor, administrator or successor in law of the person; and

- (v) anything (including a right, obligation or concept) includes each part of it.
 - (b) A singular word includes the plural, and vice versa.
 - (c) A word which suggests one gender includes the other genders.
 - (d) If a word or phrase is defined, any other grammatical form of that word or phrase has a corresponding meaning.
 - (e) If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.
 - (f) The words subsidiary, holding company and related body corporate have the same meanings as in the Corporations Act.
 - (g) A reference to dollars or \$ is to an amount in Australian currency.
 - (h) A reference to this document includes the agreement recorded by this document.
 - (i) Words defined in the GST Act have the same meaning in clauses about GST.
 - (j) A reference to a month is to a calendar month.
- 1.3 A reference to a term defined in the Agreement has the same meaning when used in this Deed of Variation.
- 1.4 This Deed of Variation is not to be interpreted against the interests of a party merely because that party proposed this document or some provision in it or because that party relies on a provision of this document to protect itself.

2 VARIATION OF AGREEMENT

The Agreement is varied as follows:

- 2.1 The definition of "Dealing" in clause 4.1 is deleted and replaced with the following:
- "Dealing means selling, transferring, assigning, novating, mortgaging, charging, or encumbering and, where appearing, **Deal** has the same meaning."
- 2.2 Clause 17.1 of the Agreement is deleted and replaced with the following:
- "17.1 Dealings
- (a) The City may Deal with its interest in this document without the consent of the Developer if the Dealing is with a Government Agency. The City must give the Developer notice of the Dealing within five Business Days of the date of the Dealing.

- (b) The City may not otherwise Deal with its interest in this document without the consent of the Developer, such consent not to be unreasonably withheld or delayed.
- (c) Prior to registration of this document, the Developer must not Deal with this document or the Land without:
 - (i) the prior written consent of the City; and
 - (ii) the City, the Developer and the third party the subject of the Dealing entering into a deed of consent to the Dealing on terms acceptable to the City.
- (d) Notwithstanding clause 17.1(c), the Landowner may Deal with the Land without the consent of the City only as a result of the transfer of the whole of the Land (without subdivision) to a Related Body Corporate of the Landowner. The Landowner must give the City and the Developer notice of the Dealing within five Business Days of the date of the Dealing.
- (e) On and from registration of this document:
 - (i) the Developer may Deal with this document without the consent of the City only as a result of the sale of the whole of the Land (without subdivision) to a purchaser of the Land;
 - (ii) the Developer may register a plan of strata subdivision, and the City consents to this document remaining registered only on the certificate of title to the common property of the strata plan upon registration of the strata plan; and
 - (iii) the Developer must not otherwise Deal with this document to a third party that is not a purchaser of the whole or any part of the Land without:
 - (A) the prior written consent of the City; and
 - (B) the City, the Developer and the third party the subject of the Dealing entering into a deed of consent to the Dealing on terms acceptable to the City.
- (f) The Developer must pay the City's costs and expenses relating to any consent or documentation required due to the operation of this clause 13.2."

2.3 Schedule 6 is deleted and replaced with the schedule at Annexure A to this Deed of Variation.

3 NO OTHER CHANGE

The parties confirm that the Agreement will continue in full force and effect as varied by this Deed of Variation. Nothing in this Deed of Variation will be read or construed as implying any form of variation or waiver other than as expressly set out in this Agreement.

4 TRUSTEE LIABILITY

- 4.1 The Developer (in this clause 4 the Trustee) enters into this agreement in its capacity as the trustee for the Lincon Epsom Projects Unit Trust (Trust) constituted by a trust deed (Trust Deed).
- 4.2 The Trustee:
- (a) warrants that:
 - (i) it is the sole trustee of the Trust and no action has been taken to remove or replace it;
 - (ii) entry into this Deed is for the benefit of the beneficiaries of the Trust and as trustee it is authorised and empowered under the Trust Deed to enter into and to perform its obligations and satisfy or discharge its liabilities under this Deed;
 - (iii) it is not in breach of the Trust Deed;
 - (iv) it is entitled under the Trust Deed to be indemnified in full in respect of the obligations and liabilities incurred by it under this Deed;
 - (v) it is not aware of any reason why the assets of the Trust might be insufficient to satisfy or discharge the obligations and liabilities incurred by it under this Deed; and
 - (vi) it has the power under the Trust Deed to execute and perform its obligations and discharge its liabilities under this Deed and all necessary action has been taken to authorise the execution and performance of this deed under the Trust Deed; and
 - (b) indemnifies the Council, and agrees to keep the Council indemnified, in respect of any loss or liability in any way connected with a breach of a warranty in clause 4.2(a).
- 4.3 Prior to the Trustee being replaced as the trustee of the Trust in accordance with the Trust Deed:
- (a) the Trustee must procure that the replacement trustee enters into a new deed with the Council on the same terms as this Deed;
 - (b) the Trustee (as outgoing trustee) must procure an agreement from the Council, under which the Council releases the Trustee from the requirement to observe and perform any future obligation under this Deed;
 - (c) the Trustee (as outgoing trustee) must release the Council, from the requirement to observe and perform any future obligation under this Deed; and
 - (d) the Trustee (as the outgoing trustee) must pay the reasonable costs and expenses of the Council in relation to entering into a new deed under this clause 4.3 and the costs and expenses of registering any new deed on the title to the Land.

- 4.4 Subject to clause 4.6, liability arising under or in connection with this Deed (except under or in connection with clause 4.2 above) is limited and can be enforced against the Trustee only to the extent to which the Trustee, having sought indemnification to the maximum extent possible, is actually indemnified in respect of that liability out of the assets of the Trust. This limitation of the Trustee's liability extends to all liabilities and obligations of the Trustee in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this Deed.
- 4.5 No party to this Deed or any person claiming through or on behalf of them will be entitled to:
- (a) claim from or commence proceedings against the Trustee in respect of any liability in any capacity other than as the trustee of the Trust;
 - (b) seek the appointment of a receiver, receiver and manager, liquidator, an administrator or any similar office-holder to the Trustee, or prove in any liquidation, administration or arrangement of or affecting the Trustee, except in relation to the assets of the Trust; or
 - (c) enforce or seek to enforce any judgment in respect of a liability under this Deed or otherwise against the Trustee in any capacity other than as Trustee of the Trust,
- except under or in connection with clause 4.2 above.
- 4.6 Notwithstanding any other provision of this deed, clauses 4.4 and 4.5 do not apply to any obligation or liability of the Trustee to the extent to which there is, in respect of that obligation or liability, whether under the Trust Deed or by operation of law, a reduction in the extent of the Trustee's indemnification, or loss of the Trustee's right of indemnification, out of the assets of the Trust as a result of Trustee's failure to properly perform its duties as trustee of the Trust.
- 4.7 Nothing in clause 4.6 will make the Trustee liable for any claim for an amount greater than the amount which the Council would have been able to claim and recover from the assets of the Trust in relation to the relevant obligation or liability if the Trustee's right of indemnification, out of the assets of the Trust had not been prejudiced by the failure of the Trustee to properly perform its duties.

5 FURTHER ASSURANCE

Subject to clause 6.2, each party must promptly at its own cost do all things (including executing all documents) necessary or desirable to give full effect to this Deed of Variation.

6 LEGAL COSTS

- 6.1 Subject to clause 6.2, each party will bear its own legal costs in relation to the preparation and execution of this Deed of Variation.
- 6.2 The Developer must pay the reasonable costs incurred by the City (including any legal costs and costs arising from the public notice and inspection process) arising from or in connection with this Deed of Variation.

7 GENERAL

- 7.1 This Deed of Variation contains the entire agreement between the parties and any previous negotiations, agreements, representations or warranties relating to the subject matter of this Deed of Variation are of no effect.
- 7.2 A right may only be waived in writing, signed by the party giving the waiver, and:
- (a) no other conduct of a party (including a failure to exercise, or delay in exercising, the right) operates as a waiver of the right or otherwise prevents the exercise of the right;
 - (b) a waiver of a right on one or more occasions does not operate as a waiver of that right if it arises again; and
 - (c) the exercise of a right does not prevent any further exercise of that right or of any other right.
- 7.3 Nothing in this Deed of Variation in any way restricts or otherwise affects the City's unfettered discretion to exercise its statutory powers as a public authority.
- 7.4 The invalidity, illegality or unenforceability of any provisions of this Deed of Variation will not affect the validity or enforceability of any other provisions.
- 7.5 This Deed of Variation may only be varied in writing by the agreement of the parties.
- 7.6 This Deed of Variation is governed by and construed in accordance with the law of the State of New South Wales.
- 7.7 The parties submit to the non-exclusive jurisdiction of the courts of New South Wales in relation to all matters arising under, or relating to, this Deed of Variation.

EXECUTION

Executed as a deed on

2022

Signed for and on behalf of THE COUNCIL OF THE CITY OF SYDNEY
by its duly authorised officer in the presence of:

Witness:

Signature:

Name (printed):

Name of Authorised Officer:

EXECUTED by **Lincon Epsom Projects Pty Ltd ACN 611 082 903**
atf the Lincon Epsom Projects Unit Trust in accordance with s127(1) of the Corporations Act 2001 (Cth):

Signature of director

Signature of director/secretary

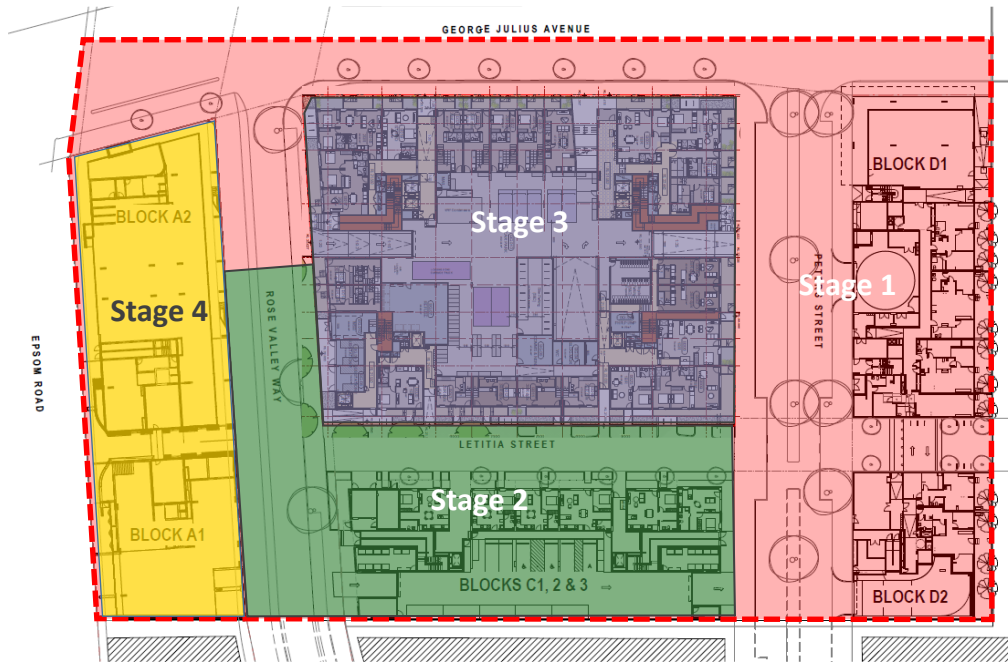
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Annexure A Schedule 6 – Stages

The development will be the subject of a single Stage 2 development consent for the entire site. The development will be constructed in Stages as defined below. The Stages will be subject to commencement dates at the election of the Developer, but will also be affected by the construction and completion of the GSSD and co-ordination with neighbours to the north, east and west.

The Stages contemplated at the date of this agreement are shown on the diagram below and are described as:



Stage 1

Demolish existing structures

Construct entire section of Green Square Stormwater Drain on the Land (including area in Stage 2)

Construct Building D

Construct George Julius Avenue from Epsom Road to northern boundary Building D

Construct Peters Street

Construct Letitia Street north of Peter Street only

Construct Rose Valley Way from George Julius Avenue to Building B car park entry (including temporary turning head at junction of Stage 2)

Stage 2

Construct Building C

Construct remaining portion of Rose Valley Way from Building B carpark entry to eastern boundary Building C (including removal of temporary turning head in Stage 1)

Construct remaining portion of Letitia Street

Stage 3

Construct Building B

Stage 4

Construct Building A

Construct Epsom Road setback