

DEED OF VARIATION OF PLANNING AGREEMENT

The Council of the City of Sydney
(ABN 22 636 550 790)

and

Surry Hills Project Pty Ltd
(ACN 606 553 477)

in its capacity as trustee of the Surry Hills Trust (ABN 59 907 568
845)

For the variation of Planning Agreement for 2-38 Baptist Street
and 397-399A Cleveland Street, Redfern

File: X095624

DEED OF VARIATION

THIS DEED is made on

2023

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) **SURRY HILLS PROJECT PTY LTD** (ACN 606 553 477) in its capacity as trustee of the Surry Hills Trust (ABN 59 907 568 845) of Level 5, 45 Jones Street, Ultimo NSW 2007 (the **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 registered planning agreement AN132353 between the City and the Developer dated 20 December 2017.

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

Schedule 1 means Schedule 1 of this Deed of Variation.

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 Deed of Variation or some provision in it or because that party relies on a provision of this Deed of Variation to protect itself.

2 VARIATION OF AGREEMENT

The Agreement is varied as follows:

- 2.1 Schedule 3, clause 1 is amended by deleting the table and replacing with the following table:

Item	Public Benefit	Attributed Value	Due date	Additional Specifications
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1.	Transfer Land	\$nil	<p>Before the issue of the first Occupation Certificate of the Development for the Pedestrian Cycle Way Land and the Marriott Street Footway Land.</p> <p>Before the issue of the final Occupation Certificate for the residential component of the Development for the Public Park Land.</p>	<p>Three separate areas of land comprise the Transfer Land:</p> <p>An area of approximately 500 square metres at the southern end of the Land (Public Park Land).</p> <p>An area of approximately 610 square metres for a 9m wide pedestrian and cycle accessway at the southern end of the Land (Pedestrian Cycle Way Land).</p> <p>An area of approximately 279 square metres for a footpath running along Marriott Street on the western side of the Land, which is to be located 3m from the back of the existing kerb on Marriott Street (Marriott Street Footway Land).</p> <p>Plans showing the indicative location of the Transfer Land are contained in Annexure A to this document.</p>
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2.	Developer's Works	<p>The parties agree the Attributed Values for the Developer's Works are to be determined by a Quantity Surveyor, as agreed by the Parties and at the cost of the Developer, at the time of the submission of the first Development Application for the site. The Developer's Works include:</p> <ol style="list-style-type: none"> 1. Public Park; 2. Pedestrian Cycle Way; and 3. Marriott Street Footway 	<p>Before the issue of the first Occupation Certificate for the Development for the Pedestrian Cycle Way Works and the Marriott Street Footway Works.</p> <p>Before the issue of the final Occupation Certificate for the residential component of the Development or unless otherwise agreed with the City acting reasonably for the Public Park Land.</p>	<p>The Developer's Works includes works on the three separate areas of the Land that are to be transferred to the City as described in Item 1 of clause 1 of Schedule 3 above:</p> <p>The embellishment of the Public Park Land to create a Public Park (Public Park Works).</p> <p>The construction of a 9m wide pedestrian and cycle accessway to provide pedestrian and cycle access only (Pedestrian Cycle Way Works).</p> <p>The construction of a public footpath on Marriott Street which is to be located 3m from the back of the existing kerb on Marriott Street (Marriott Street Footway Works).</p> <p>Plans and specifications showing the nature and extent of the required Developer's Works as at the date of this document are contained in Annexure A to this document.</p>
3.	Sustainability Measures	Not applicable	<p>For the residential component, prior to the issue of the Final Occupation Certificate for the residential Development</p> <p>For the commercial and retail component of the development, prior to the Final Occupation Certificate for the commercial and retail Development</p>	See clause 7 of Schedule 3

4.	Community Transport	The parties agree the Attributed Values for the Community Transport is to be determined by a Quantity Surveyor, as agreed by the Parties and at the cost of the Developer, at the time of the submission of the first Development Application for the site.	To commence upon closure of the existing supermarket on the Land and operating until the opening to the public of the new supermarket on the Land.	See clause 8 of Schedule 3
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2.2 The Plan in Annexure A is deleted and replaced with the plan in Schedule 1.

2.3 The Additional specifications in the Developer's Works in Annexure A are amended by:

(a) deleting the heading "Laneway Works" and replacing with "Pedestrian Cycle Way Works";

(b) deleting clause 6 and inserting a new clause 6 as follows:

"6. Provision of and delivery of a new 9m wide pedestrian and cycle accessway to connect into Baptist Lane as identified on the plans in this Annexure A including but not limited to:

- Excavation and grading of subgrade
- Supply and installation of sub-base, base course and interlock paving
- Supply, installation and connection of stormwater drainage system
- Supply and installation of subsoil drainage
- Supply and installation of pedestrian lighting"; and

(c) deleting Clause 7.

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 Deed of Variation.

4 FURTHER ASSURANCE

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.

5 LEGAL COSTS

Each party will bear its own legal costs arising from or in connection with this Deed of Variation, including preparation and execution of this Deed of Variation.

6 GENERAL

- 6.1 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.
- 6.2 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.
- 6.3 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.
- 6.4 The invalidity, illegality or unenforceability of any provisions of this Deed of Variation will not affect the validity or enforceability of any other provisions.
- 6.5 This Deed of Variation may only be varied in writing by the agreement of the parties.
- 6.6 This Deed of Variation is governed by and construed in accordance with the law of the State of New South Wales.
- 6.7 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.

7 LIMITATION OF LIABILITY

- 7.1 For the purpose of this clause 7, the following words have the following meanings:
- (i) **Trust** means the Surry Hills Trust ABN 59 907 568 845; and
 - (ii) **Trustee** means Surry Hills Project Pty Limited (ACN 606 553 477).
- 7.2 The Trustee enters into and performs this Deed of Variation and the transactions it contemplates only as trustee of the Trust. This applies in

respect of any past and future conduct (including omissions) relating to this Deed of Variation or those transactions.

7.3 Under and in connection with this Deed of Variation and those transactions and conduct:

- (i) the Trustee's liability (including for negligence) is limited to the extent it can be satisfied out of the assets of the Trust. The Trustee need not pay any such liability out of other assets;
- (ii) another party may only do the following (but any resulting liability remains subject to this clause):
 - (A) prove and participate in, and otherwise benefit from, any form of insolvency administration of the Trustee but only with respect to Trust assets;
 - (B) exercise rights and remedies with respect to Trust assets, including set-off;
 - (C) exercise contractual rights; and
 - (D) bring any other proceedings against the Trustee, seeking relief or orders that are not inconsistent with the limitations in this clause,

and may not otherwise:

- (E) bring proceedings against the Trustee;
- (F) take any steps to have the Trustee placed into any form of insolvency administration (but this does not prevent the appointment of a receiver, or a receiver and manager, in respect of Trust assets); or
- (G) seek by any means (including set-off) to have a liability of the Trustee to that party (including for negligence) satisfied out of any assets of the Trustee other than Trust assets.

7.4 Clauses 7.2 and 7.3 apply despite any other provision in this Deed of Variation but do not apply with respect to any liability of the Trustee to another party (including for negligence):

- (i) to the extent that the trustee has no right or power to have Trust assets applied towards satisfaction of that liability, or its right or power to do so is subject to a deduction, reduction, limit or requirement to make good, in any case because the Trustee has acted fraudulently, negligently, beyond power or improperly in relation to the Trust; or
- (ii) under any provision which expressly binds the Trustee other than as trustee of the Trust (whether or not it also binds it as trustee of the Trust).

7.5 The limitation in clause 7.3(i) is to be disregarded for the purposes (but only for the purposes) of the rights and remedies described in clause 7.3(ii), and interpreting this document and any security for it, including determining the following:

- (i) whether amounts are to be regarded as payable (and for this purpose damages or other amounts will be regarded as payable if they would have been owed had a suit or action barred under clause 7.3(ii) been brought);
 - (ii) the calculation of amounts owing; or
 - (iii) whether a breach or default has occurred,
- but any resulting liability will be subject to the limitations in this clause.

EXECUTION

Executed as a deed on

Signed for and on behalf of THE COUNCIL OF THE CITY OF SYDNEY (ABN 22 636 550 790) by an Authorised Delegate in accordance with section 377 of the *Local Government Act 1993* (NSW) in the presence of:

Witness:

Signature:

Name (printed):

Name of Authorised Officer:

Signed by **SURRY HILLS PROJECT PTY LTD (ACN 606 553 477)** in its capacity as trustee of the Surry Hills Trust (ABN 59 907 568 845) and in accordance with section 127 of the Corporations Act:

Signature of Director

Signature of Director/Secretary:

Full Name (printed):

Full Name (printed):

SCHEDULE 1

