
WAVERLEY COUNCIL

(Council)

AND

637 OSH PTY LTD A.B.N. 45 587 076 374
(Developer)

PLANNING AGREEMENT
(Development Contribution)

WAVERLEY COUNCIL
Council Chambers
Cnr Bondi Road & Paul Street
BONDI JUNCTION NSW 2022
DX 12006 BONDI JUNCTION
Phone: 02 9369 8000
Facsimile: 02 9387 1820

Section 93F of the Environmental Planning and Assessment Act, 1979

THIS AGREEMENT is made on

2016

PARTIES

WAVERLEY COUNCIL of Cnr Paul Street and Bondi Road, Bondi Junction NSW 2022
(**Council**)

637 OSH PTY LTD A.B.N. 455 8707 6374 of 7A Onslow Place, Rose Bay, NSW, 2029.
(**Developer**)

BACKGROUND/RECITAL

- A.** The Developer is the registered proprietor of the Land.
- B.** The Council is the local authority constituted under the *Local Government Act 1993* and the planning and consent authority constituted under the Act.
- C.** On 14 December 2015 the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.
- D.** That Development Application was subsequently accompanied by an offer by the Developer to enter into this Agreement to make a Development Contribution towards the Public Purpose if Development Consent was granted (dated 18 March 2016).
- E.** The Development Consent was granted by Waverley Council on 20 April 2016.

OPERATIVE PROVISIONS:

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement unless the context otherwise requires:

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

“Agreement” means this agreement;

“Bank Guarantee” means an irrevocable and unconditional undertaking by a trading bank approved by the Council to pay the Development Contribution amount on demand without an expiry or end date and containing terms and conditions acceptable to Council

and in accordance with clause 9 of 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;

“Caveat Form” means a completed form of caveat in respect to the Land that is properly endorsed with the Developer’s consent as the owner of the Land, noting Council as a caveator, in a form registrable at Land and Property Information NSW and otherwise acceptable to Council;

“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 Waverley Council and herein includes any local government authority with which that Waverley Council may merge or any other local government authority responsible for a local government area that the Lot Burdened is located within;

“Construction Certificate” has the same meaning as in the Act and means any construction certificate in respect of the Development Consent;

“Development” means the development the subject of the Development Application and which is described in Item 4 of the Schedule;

“Development Application” means the development application described in Item 3 of the Schedule;

“Development Consent” has the same meaning as in the Act and means Council’s approval of the Development Application described in Item 3 of the Schedule;

“Development Contribution” means the amount of money referred to in Item 5 of the Schedule;

“Development Contribution Date” means the date by which the Development Contribution must be paid as specified in Item 7 of the Schedule;

“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 the land described in Item 2 of the Schedule;

“Occupation Certificate” has the same meaning as in the Act and means any occupation certificate in respect of the Development Consent;

“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 Item 6 of the Schedule;

“Registration Application” means an application for registration of this Agreement as a planning agreement on the title of the Land pursuant to Section 93H of the Act in a form approved by the Registrar General;

“Schedule” means the schedule to this Agreement.

1.2 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;
- (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, New South Wales;
- (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, Agreement or document is to that agreement, Agreement 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; and
- (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.

2 PLANNING AGREEMENT UNDER THE ACT

The Parties to this Agreement agree that it is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

3 APPLICATION OF THIS AGREEMENT

This Agreement applies to the Land and the Development.

4 OPERATION OF THIS AGREEMENT

- 4.1 This Agreement is to be entered into as soon as possible following completion of the notification of the Planning Agreement in accordance with the requirements of Section 93G of the Environmental Planning & Assessment Act 1979 and Clause 25D of the Environmental Planning and Assessment Regulation 2000 and in any event must be executed and entered into prior to the issue of any Construction Certificate for the Development the subject of the Development Consent.
- 4.2 This Development Contribution is to be paid prior to the issue of any Occupation Certificate.

5 DEVELOPMENT CONTRIBUTION

- 5.1 The Developer agrees to make, and the Council agrees to accept, the Development Contribution to be applied towards the Public Purpose.
- 5.2 The Developer must pay the Development Contribution to the Council by bank cheque by the Development Contribution Date and time is essential in this respect.

6. APPLICATION OF DEVELOPMENT CONTRIBUTION

- 6.1 The Council will apply the Development Contribution towards the Public Purpose as soon as practicable.

7. APPLICATION OF SECTIONS 94 AND 94A OF THE ACT TO THE DEVELOPMENT

- 7.1 This Agreement does not exclude the application of Sections 94, 94A or 94EF of the Act to the Development.
- 7.2 The Development Contribution provided by the Developer will not be taken into consideration in determining any development contribution under Section 94 of the Act.

8 REGISTRATION OF THIS AGREEMENT

- 8.1 The Parties agree this Agreement is to be registered by the Registrar General as provided for in section 93H of the Act.
- 8.2 The Developer warrants that it has done everything necessary to enable this Agreement to be registered under section 93H of the Act.
- 8.3 Without limiting clause 8.2, the Developer warrants that it has obtained the express written consent to the registration of this Agreement under section 93H of the Act from:
- (a) If this Agreement relates to land under the *Real Property Act 1900*, each person who has an estate or interest in the Land registered under that Act; or

- (b) If this Agreement relates to land not under the *Real Property Act 1900*, each person who is seized or in possession of an estate or interest in the Land.
- 8.4 Prior to the issue of a Construction Certificate, the Developer will at its cost arrange and effect registration of this Agreement under s93H upon the title to the Land and as soon as possible following execution of this Agreement:
 - (a) deliver to the Council the Registration Application in registrable form noting the Council as applicant and executed by the Developer and any other person the subject of the warranty in clause 8.3;
 - (b) lodge or cause to be lodged the title deed with LPI and advise Council of the production number;
 - (c) provide the Council with a cheque in favour of Land & Property Information, NSW for the registration fees for registration of this Agreement; and
 - (d) provide the Council with a cheque in favour of the Council for its costs, expenses and fees incurred or to be incurred in connection with the preparation of this Agreement and any documents, form or instrument created or to be created in accordance with the provisions of this Agreement.
 - (e) and take any other necessary action so as to ensure this Agreement is registered on the title to the Land prior to the issue of a Construction Certificate.
- 8.5 Upon compliance with clause 8.4 by the Developer the Council will promptly lodge the Registration Application with the Registrar General.
- 8.6 The Parties will co-operate with each other to ensure that the Agreement is registered by the Registrar General.
- 8.7 Upon payment of the Development Contribution or surrender of the Development Consent, the Developer may request the removal of the dealing created by registration of the Agreement from the title to the Land. The Council will not withhold its consent to such removal, provided that the terms of this Agreement have been complied with and the Developer pays all costs, expenses and fees of the Council relating to such removal.
- 8.8 Should payment of the Development Contribution or surrender of the Development Consent occur on or before the date of this Agreement, then there will be no obligation to register this Agreement in accordance with this clause.
- 8.9 Upon registration of this Agreement by the Registrar General, this Agreement is binding on, and is enforceable against the owner of the Land from time to time as if each owner for the time being had entered into this Agreement.

9 BANK GUARANTEE

9.1 Provision of Bank Guarantee

- (a) On the date of this Deed and before any application for any Construction Certificate the Developer must deliver to the Council a bank guarantee ("**Bank Guarantee**"), which must be:
 - (i) irrevocable and unconditional;
 - (ii) with no expiry date;
 - (iii) issued in favour of the Council;
 - (iv) for an amount equivalent to the Monetary Contribution set out in Item 5 of the Schedule;
 - (v) drafted to cover all of the Developer's obligations under this Deed; and
 - (vi) on the terms otherwise satisfactory to the Council and in a form and from an institution approved by the Council.
- (b) The Developer acknowledges that the Council enters into this Agreement in consideration of the Developer providing the Bank Guarantee as a security for the performance of all of the Developer's obligations under this Deed, including without limitation the delivery of the Development Contributions to the Council in accordance with the Schedules hereto.
- (c) The Bank Guarantee may be provided in the form of a number of separate bank guarantees, provided the separate bank guarantees total the amount of the Monetary Contribution set out in item 5 of the Schedule.

9.2 Calling on Bank Guarantee

- (a) The Council may call on the Bank Guarantee in the event that the Developer:
 - (i) fails to make a payment of any part of the Monetary Contributions in accordance with the Schedule or any other amount payable under this Deed by its due date for payment; or
 - (j) breaches any other term or condition of this Deed, and fails to remedy the relevant failure or breach within 7 days after the Council's notice.
- (b) If the Council calls on the Bank Guarantee as a result of the Developer's failure to pay any amount due under this Deed, then the Council will apply the amount received pursuant to its claim on the Bank Guarantee in satisfaction of the Developer's obligation to pay the relevant amount.

9.3 Return of Bank Guarantee

Provided that the Developer has complied with its obligations under this Agreement including payment of the Development Contribution the Council will return the Bank Guarantee to the Developer. Where the work for the Public Purpose has been partly undertaken and paid for by the Council, the Council will return a bank guarantee forming part of the Bank Guarantee, where the costs of the work undertaken are equal to or more

that a bank guarantee forming part of the Bank Guarantee.

10 REVIEW OF THE AGREEMENT

- 10.1 The Parties agree that, subject to section 93G of the Act, this Agreement can be reviewed and amended at any time by mutual agreement.

11 DISPUTE RESOLUTION

- 11.1 If any Dispute arises out of or in connection with this Agreement, the following procedure must be followed in order to resolve it:

- (a) either party may give written notice of the dispute to the other party. A representative nominated by each party must meet within five (5) Business Days of receipt of that notice and attempt in good faith to resolve the dispute;
- (b) if the dispute is not resolved between the nominated representatives within ten (10) Business Days of receipt of the notice referred to in clause 11.1(a), then the dispute will be notified to the relevant divisional manager (or officer holding the equivalent position) of each party who must meet and attempt in good faith to resolve the dispute within five (5) Business Days of the date of receipt of that notice; and
- (c) if the dispute remains unresolved within ten (10) Business Days of receipt of the notice referred to in clause 11.1(b), notice will be given to the Chief Executive Officers (or officer holding an equivalent position) of each party who must meet and attempt in good faith to resolve the dispute within five (5) Business Days of the receipt of that notice.
- (d) For the purposes of this clause, a meeting may take place by telephone or other means of communication.

- 11.2 If the parties fail to resolve the dispute after following the procedures set out in clause 11.1, then they must agree on the appropriate method of alternative dispute resolution (which may include expert determination or mediation) within ten (10) Business Days of the date of the final meeting held in accordance with clause 11.1(c).

- 11.3 If the parties select expert determination as the method of resolving the dispute, the expert must act as an expert and not an arbitrator, his determination will be binding upon the parties unless otherwise agreed and his costs must be shared equally between the parties.

- 11.4 If the parties fail to agree on the appropriate method of alternative dispute resolution in accordance with clause 11.2, the dispute must be referred for mediation to a mediator nominated by the then current Chairman of the Australian Commercial Disputes Centre in Sydney (ACDC), or, if ACDC no longer exists, the chairman of a reputable commercial

dispute resolution body, as agreed between the council and the Developer, or if same cannot agree, nominated by the Council. The role of the mediator is to assist in the resolution of the dispute and the mediator may not make a decision which is binding on the parties.

- 11.5 The costs associated with appointing the mediator under clause 11.4 must be shared equally between the parties.

12 ENFORCEMENT

- 12.1 Nothing in this Agreement (including Clauses 10 and 11) prevents the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement (including the breach of this Agreement by the Developer) or any matter to which this Agreement relates.

- 12.2 Until such time as the Development Contribution has been paid in full, an Occupation Certificate must not be issued and the Developer must:

- (a) notify the Council in writing of the name and contact details of any Certifying Authority to which it has applied for an Occupation Certificate at the same time that such application is made;
- (b) at the time it lodges any application for an Occupation Certificate notify the Certifying Authority in writing of the existence and terms of this Agreement; and
- (c) procure and provide to Council a written acknowledgement from the Certifying Authority addressed to Council confirming that the Certifying Authority will not issue an Occupation Certificate until Council provides written confirmation that the Development Contribution has been paid;

- 12.3 The Developer acknowledges and agrees that:

- (a) the Land is charged with the payment to Council of the Development Contribution until the Development Contribution is paid in full to Council;
- (b) Council has a caveatable interest in the Land from the date of the Development Consent until the Development Contribution is paid in full to Council;
- (c) Council has the right to lodge and maintain a caveat against the title to the Land to notify of and protect its interest created by this Agreement (including the charge in (a), until the Development Contribution is paid in full to Council; and
- (d) at the time of entering into this Agreement, the Developer shall provide Council with the Caveat Form, unless the Development Contribution is paid to Council by the Developer upon entering into this Agreement.

13 NOTICES

- 13.1 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 in Item 8 of the Schedule;
 - (b) faxed to that Party at its fax number set out in Item 8 of the Schedule; or
 - (c) emailed to that Party at its email address set out in Item 8 of the Schedule.
- 13.2 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.
- 13.3 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; and
 - (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.
- 13.4 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 who it is sent, it is to be treated as having been given or made at the beginning of the next business day.

14 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.

15 ASSIGNMENT AND DEALINGS

Until the Development Contribution is paid in full, the Developer cannot sell, transfer, assign, novate, charge, encumber or otherwise deal with the Land or attempt or purport to do so.

16 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.

17 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.

18 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.

19 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.

20 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.

21 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 party 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.

22 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.

23 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 wavier 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.

24 NON FETTER

The Developer acknowledges and agrees that:

- (a) in addition to its obligations under this Agreement the Council is also responsible for the conduct and administration of local government in the Waverley Local Government Area;
- (b) this Agreement in no way affects Council's statutory obligations, functions or powers, including without limitation, its obligations, functions or powers in respect of the Development Application, Development Consent and any other approvals required in respect of the works to be carried out under the Development Consent;
- (c) nothing which the Council does or fails to do under this Agreement will limit or otherwise affect the Developer's obligations under the Development Consent; and
- (d) nothing which the Council does, fails to do or purports to do in performing the Council's statutory functions or powers will constitute or amount to a breach of this Agreement.

25 GOODS & SERVICES TAX REPRESENTATIONS AND WARRANTIES

- 25.1 The Parties unless otherwise indicated, all amounts payable by one party to the other party in relation to a supply under this Agreement have been calculated exclusive of any GST which may be imposed on the supply.
- 25.2 If any supply made under this Agreement is, or becomes, subject to GST, the party to whom the supply is made ("Recipient") must pay to the party making the supply ("Supplier"), as consideration, in addition to any consideration payable or to be provided elsewhere in this Agreement, subject to issuing a Valid Tax Invoice, an additional amount on account of GST, such amount to be calculated by multiplying the consideration by the applicable rate of GST.
- 25.3 Any amount in respect of GST payable under clause 24.2 must be paid to the Supplier immediately on receipt of the Valid Tax Invoice.
- 25.4 If any party is required to reimburse or indemnify the other party for a cost or expense ("Cost") incurred by the other party, the amount of that Cost for the purpose of this Agreement is the amount of the Cost incurred, less the amount of any credit for, or refund of, GST, which the party incurring the Cost is entitled to claim in respect of the Cost.
- 25.5 If GST is linked with the abolition or reduction of other taxes and charges, all amounts payable by the Recipient to the Supplier under this Agreement (excluding GST) must be

reduced by the same proportion as the actual total costs of the Supplier (excluding GST) are reduced either directly as a result of the abolition or reduction of other taxes and charges payable by the Supplier or indirectly by way of any reduction in prices (excluding GST) charged to the Supplier. Both parties must also comply with Part VB of the Trade Practices Act 1974 (Cth).

26 COSTS

The Council's costs of an incidental to the preparation and execution of this Agreement and any related documents and registration of same must be borne by the Developer.

27 EXECUTION IN TRIPLICATE

The Parties shall execute this Agreement in triplicate so as to provide one original signed by both parties and a further copy for registration of the Agreement under s93H of the *Environmental Planning and Assessment Act*. This Agreement will be dated on the day of execution by all Parties.

SCHEDULE

Item Number	Particulars/Description	
1	Developer	637 OSH PTY LTD A.B.N. 45 587 076 374.
2	Land	637-639 OLD SOUTH HEAD ROAD, ROSE BAY (LOT 1 IN DP104183 AND LOT 1 in DP175689).
3	Development Application	DA – 575/2015
4	Development (description)	DEMOLITION OF EXISTING BUILDINGS, CONSTRUCTION OF A RESIDENTIAL FLAT BUILDING WITH BASEMENT PARKING AND STRATA SUBDIVISION.
5	Development Contribution	\$195,403
6	Public Purpose	PUBLIC WORKS FOR THE IMPROVEMENT AND REGENERATION OF THE ROSE BAY/DOVER HEIGHTS AREA.
7	Development Contribution Date (Payment date for the Development Contribution)	PRIOR TO THE ISSUE OF ANY OCCUPATION CERTIFICATE FOR THE DEVELOPMENT.
8	Developer Address	7A ONSLOW PLACE, ROSE BAY, NSW, 2029.
	Developer Fax	(02) 8458 0788
	Developer Email	ronnie@nadlan.com.au
	Council Address	CORNER PAUL STREET AND BONDI ROAD, BONDI JUNCTION NSW 2022
	Council Fax	(02) 9387 1820
	Council Email	info@waverley.nsw.gov.au

**EXECUTED by WAVERLEY COUNCIL with Common Seal of Waverley Council
affixed pursuant to a resolution of Waverley Council on**

PETER BROWN

General Manager

CLR SALLY BETTS

Mayor

EXECUTED by)
637 OSH PTY LTD)
(A.B.N. 45 587 076 374))
in accordance with section 127 of the)
Corporations Act 2001)

Director / Secretary

Name of Director / Secretary:

Director

Name of Director: