

Planning Agreement No.

between

Waverley Council
ABN 12 502 583 608
(**Council**)

and

Clutch 625 Old South Head Road Pty Ltd ATF 625 Old South Trust
ACN 632 361 856
(**Developer**)

between **Waverley Council** ABN 12 502 583 608 of Corner of Paul Street and Bondi Road, Bondi Junction NSW 2022 (**Council**)

and **Clutch 625 Old South Head Road Pty Ltd ATF 625 Old South Trust** ACN 632 361 856 of O Suite 11, 4A Meridian Place, Bella Vista 2153 (**Developer**)

Recitals

- A The Developer will be the owner of the Land at the time of entering into this Agreement with the benefit of the Development Consent.
- 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 23 February 2018 the Previous Developer lodged the Development Application for the Development Consent to carry out the Development on the Land.
- D On 4 February 2019 the Previous Developer offered to enter into this Agreement to make the Development Contribution to be applied by the Council towards the Public Purpose if the Development Consent was granted. This offer was confirmed by the Developer on 10 April 2019.
- E The Development Consent was granted by the Land and Environment Court on 1 March 2019.
- F This Agreement is consistent with the Developer's offer referred to in Recital D.

Now it is agreed as follows:

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 owner's consent, noting Council as caveator, in a form registrable at NSW Land Registry Services and otherwise acceptable to Council or such other form of owner's consent as may be required by 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 Land is located within;

“Construction Certificate” means any construction certificate as referred to in section 6.4 of the Act 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 time the Development Contribution is to 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;

“Development Application” means the application referred to in Item 4 of the Schedule;

“Development Consent” means Council’s approval of the Development Application;

“Occupation Certificate” means any occupation certificate as referred to in section 6.4 (previous section 109C) of the Act in respect of the Development Consent;

“Party” means a party to this Agreement including their successors and assigns;

“Previous Developer” means the developer that lodged the Development Application and obtained the Development Consent;

“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 7.6 (previous 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 7.1 of Part 7 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 shall take effect on and from the date of this Agreement. If they have not already done so the Parties must execute this Agreement as soon as possible after the Development Consent is granted and prior to any Construction Certificate issuing. **Development Contribution**
- 5.1 The Developer agrees to make, and the Council agrees to accept, the Development Contribution to be applied for the Public Purpose.
- 5.2 The Developer must pay the Development Contribution to the Council by bank cheque on or before 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 7.11 And 7.12 of the Act to the Development

- 7.1 This Agreement does not exclude the application of Sections 7.11, 7.12 or 7.24 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 7.11 or 7.12 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 7.6 of the Act.
- 8.2 The Developer warrants that it has done everything necessary to enable this Agreement to be registered under section 7.6 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 7.6 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 any Construction Certificate, the Developer will at its cost arrange and effect registration of this Agreement under 7.6 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 NSW Land Registry Services and advise Council of the production number;
 - (c) provide the Council with a cheque in favour of NSW Land Registry Services for the registration fees for registration of this Agreement;
 - (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; and
 - (e) take any other necessary action so as to ensure this Agreement is registered on the title to the Land prior to the issue of any 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 and prior to issue of a Construction Certificate, 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 Agreement 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 Development Contribution set out in item 5 of the Schedule;
 - (v) drafted to cover all of the Developer's obligations under this Agreement; 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 Agreement, including without limitation the delivery of the Development Contribution to Council in accordance with this Agreement.

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 Development Contribution in accordance with this Agreement or any other amount payable under this Agreement by its due date for payment; or
 - (ii) breaches any other term or condition of this Agreement, 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 Agreement, 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 or any other amount payable under this Agreement, the Council will return the Bank Guarantee to the Developer.

10 Review of the Agreement

- 10.1 The Parties agree that, subject to section 7.5 of the Act, this Agreement may be reviewed and amended at any time by mutual agreement.

11 Dispute Resolution

11.1 Notice of dispute

If a Party claims that a dispute has arisen under this Agreement ("Claimant"), it must give written notice to the other Party ("Respondent") stating the matters in dispute and designating as its representative a person to negotiate the dispute ("Claim Notice").

No Party may start Court proceedings (except for proceedings seeking interlocutory relief) in respect of a dispute unless it has first complied with this clause.

11.2 Response to notice

Within ten business days of receiving the Claim Notice, the Respondent must notify the Claimant of its representative to negotiate the dispute.

11.3 The nominated representative must:

- (i) Meet to discuss the matter in good faith within five business days after services by the Respondent of notice of its representatives;
- (ii) Use reasonable endeavours to settle or resolve the dispute within 15 business days after they have met.

11.4 Further notice if not settled

If the dispute is not resolved within 15 business days after the nominated representatives have met, either Party may give to the other a written notice calling for determination of the dispute ("Dispute Notice") by mediation under clause 11.5 or by expert determination under clause 11.6.

11.5 Mediation

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

- (a) The Parties must agree to the terms of reference of the mediation within five business days of the receipt of the Dispute Notice (the terms shall include a requirement that the mediation rules and the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);
- (b) The mediator will be agreed between the Parties, or failing agreement within five business days of receipt of the Dispute 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 11.5 must:
 - (i) Have reasonable qualifications and practical experience in the area of disputes; and
 - (ii) Have no interest or duty which conflicts or may conflict with his function as mediator, he being required to fully disclose any such interest or duty before his appointment;
- (d) The mediator shall be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and performance of his duties;
- (e) The Parties must within five business days of receipt of the Dispute Notice notify each other of their representatives who will be involved in the mediation.
- (f) 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.

(g) In relation to costs and expenses

- (i) Each Party will bear their own professional and expert costs incurred in connection with the mediation; and
- (ii) The cost for the mediator will be shared equally by the Parties unless the mediator determines a Party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full cost of the mediation to be borne by that Party.

11.6 Expert Determination

If the dispute is not resolved under clause 11.3 or 11.5 the dispute may, by agreement between the Parties, both acting reasonably having regard to the nature of the dispute, be resolved by expert determination, in which event:

- (a) The dispute must be determined by an independent expert in the relevant field:
 - (i) Agreed upon and appointed jointly by the Council and the Developer; or
 - (ii) In the event that no agreement is reached or appointment made within 30 business days, appointed on application of a Party by the then current President of the Law Society of New South Wales;
- (b) The expert must be appointed in writing and terms of the appointment must not be inconsistent with this clause;
- (c) The determination of the dispute by such expert will be made as an expert and not as an arbitrator and will be in writing and containing reasons for the determination;
- (d) The expert will determine the rules of the conduct for the process, but must conduct the process in accordance with the rules of natural justice;
- (e) Each Party will bear its own costs in connection with the process and the determination by the expert together with an equal proportion of the expert's fees and costs; and
- (f) Any determination made by an expert pursuant to this clause is final and binding upon the Parties except where the determination is in respect of, or relates to, termination or purported termination of this Agreement by any Party, in which event the expert is deemed to be giving a non-binding appraisal and any Party may commence litigation in relation to the dispute if it has not been resolved within 20 business days of the expert giving his or her decision.

11.7 Litigation

If the dispute is not finally resolved in accordance with this clause 11, either Party is at liberty to litigate the dispute.

11.8 Continue to Perform Obligations

Each Party must continue to perform its obligations under this Agreement, notwithstanding the existence of a dispute.

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;
- (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; and
- (d) not rely on any Occupation Certificate in respect to the Development.

12.3 The Developer acknowledges and agrees that:

- (a) The Land is charged with the payment 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 later of the date of the Development Consent and this Agreement until the Development Contribution is paid in full to Council;
- (c) Council has the right to lodge and maintain a caveat on the title to the Land notifying of Council's interest created by this Agreement (including the charge in (a)), until the Development Contribution is paid in full to Council; and
- (d) Unless the Development Contribution is paid to Council by the Developer upon entering into this Agreement, the Developer shall provide Council with the Caveat Form.

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 and 9 of the Schedule;
 - (b) faxed to that Party at its fax number set out in Item 8 and 9 of the Schedule; or
 - (c) emailed to that Party at its email address set out in Item 8 and 9 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 nonexclusive 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 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.

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 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.

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 acknowledge and agree, 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 25.2 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.

26 Costs

The Council's costs of an incidental to the preparation and execution of this Agreement and any related documents (including in relation to the Previous Developer) and registration of same must be borne by the Developer. The Developer shall be responsible to pay its own costs and any stamp duty arising from this Agreement or its preparation.

27 Execution in Duplicate

The Parties shall execute this Agreement in duplicate so as to provide one original signed by both parties. This Agreement will be dated on the day of execution by all Parties.

Schedule

Item Number	Particulars/Description
1 Developer	Clutch 625 Old South Head Road Pty Ltd ATF for 625 Old South Trust ACN 632 361 856
2 Land	Lot C in Deposited Plan 317695 and Auto-Consol 14672-99 (Incorporating Lot 7 and 8 in Deposited Plan 75445) known as 625-627 Old South Head Road, Rose Bay
3 Development Application	DA46/2018
4 Development (description)	Demolition of existing dwellings and construction of a new three storey residential flat building with one level of basement car parking
5 Development Contribution	\$349,500.00
6 Public Purpose	Towards improvement and regeneration of parks and reserves in the Rose Bay / Dover Heights area and Waverley's Affordable Housing Program
7 Development Contribution Date (Payment date for the Development Contribution)	Prior to the issue of any Occupation Certificate for the Development
8 Developer Address	Suite 11, 4A Meridian Place, Bella Vista 2153
Developer Fax	N/A
Developer Email	tristan@rossgroupau.com.au
9 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 as an agreement

Executed by **Waverley Council** with the Common Seal of Waverley Council affixed pursuant to a resolution of Waverley Council on

General Manager

Mayor

Executed by **Clutch 625 Old South Head Road Pty Ltd ATF 625 Old South Trust** ACN 632 361 856 in accordance with section 127 of the *Corporations Act 2001* (Cth):

Director

Director

Name of Director
BLOCK LETTERS

Name of Director
BLOCK LETTERS