

Deed

106-128 Woodpark Road, Smithfield

Planning Agreement

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Cumberland City Council

Snowside Pty Ltd

Date: 13 December 2021

© Lindsay Taylor Lawyers

W

RT

106-128 Woodpark Road, Smithfield
Planning Agreement

Table of Contents

Summary Sheet.....	4
Parties.....	6
Background.....	6
Operative provisions.....	6
Part 1 - Preliminary.....	6
1 Interpretation.....	6
2 Status of this Deed.....	10
3 Commencement.....	10
4 Application of this Deed.....	10
5 Warranties.....	11
6 Further agreements.....	11
7 Surrender of right of appeal, etc.....	11
8 Application of s7.11, s7.12 and s7.24 of the Act to the Development.....	11
Part 2 – Development Contributions.....	11
9 Provision of Development Contributions.....	11
10 Payment of Monetary Development Contributions.....	12
11 Carrying out of Work.....	12
12 Variation to Work.....	13
13 Access to land by Developer.....	13
14 Access to land by Council.....	14
15 Council’s obligations relating to Work.....	14
16 Protection of people, property & utilities.....	14
17 Repair of damage.....	14
18 Completion of Work.....	14
19 Rectification of defects.....	15
20 Works-As-Executed-Plan.....	15
21 Removal of Equipment.....	16
Part 3 – Dispute Resolution.....	16
22 Dispute resolution – expert determination.....	16
23 Dispute Resolution - mediation.....	16

m

RB

106-128 Woodpark Road, Smithfield
Cumberland City Council
Snowside Pty Ltd

Part 4 - Enforcement	17
24 Security for performance of obligations	17
25 Breach of obligations	18
26 Enforcement in a court of competent jurisdiction	19
Part 5 – Registration & Restriction on Dealings.....	19
27 Registration of this Deed	19
28 Restriction on dealings	19
Part 6 – Risk and Release	20
29 Risk	20
30 Release.....	20
31 Indemnity	20
Part 7 – Other Provisions	21
32 Review of Deed	21
33 Notices	21
34 Approvals and Consent	22
35 Costs.....	22
36 Entire Deed.....	22
37 Further Acts	22
38 Governing Law and Jurisdiction	22
39 Joint and Individual Liability and Benefits.....	23
40 No Fetter	23
41 Illegality	23
42 Severability	23
43 Amendment	23
44 Waiver.....	24
45 GST.....	24
46 Explanatory Note	25
47 Limitation of Liability	25
48 Trustee Warranties	26
Schedule 1	28
Schedule 2	29
Schedule 3	30
Execution.....	31
Appendix	32

106-128 Woodpark Road, Smithfield Planning Agreement

Summary Sheet

Council:

Name: Cumberland City Council
Address: PO Box 42 MERRYLANDS NSW 2160
Telephone: (02) 8757 9000
Email: council@cumberland.nsw.gov.au
Representative: The General Manager

Developer:

Name: Snowside Pty Ltd
Address: 100B Woolwich Road, Woolwich NSW 2110
Telephone: 0408 222 488
Email: tony@maurici.com.au
Representative: Tony Maurici

Land:

See definition of *Land* in clause 1.1.

Development:

See definition of *Development* in clause 1.1.

Development Contributions:

See clause 9.

Application of s7.11, s7.12 and s7.24 of the Act:

See clause 8.

Security:

See Part 4.

Registration:

See clause 27.

Restriction on dealings:

See clause 28.

Dispute Resolution:

See Part 3.

m

AA

106-128 Woodpark Road, Smithfield
Cumberland City Council
Snowside Pty Ltd

106-128 Woodpark Road, Smithfield

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Parties

Cumberland City Council ABN 22 798 563 329 of PO Box 42 MERRYLANDS
NSW 2160 (**Council**)

and

Snowside Pty Ltd ACN 003 924 025 of 100B Woolwich Road WOOLWICH NSW
2110 (**Developer**)

Background

- A The Developer owns the Land.
- B The Developer lodged a Planning Proposal request with Council to facilitate redevelopment of the Land.
- C The Council resolved to prepare the Planning Proposal for the Land and forward it to the Department for a Gateway determination.
- D The Department issued a Gateway determination, authorising for the Planning Proposal to proceed to public exhibition, subject to conditions.
- E The Developer may develop the Land if the LEP Amendment takes effect.
- F The Developer has offered to make Development Contributions in connection with the LEP Amendment in accordance with this Deed.

Operative provisions

Part 1 - Preliminary

1 Interpretation

1.1 In this Deed the following definitions apply:

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

Approval includes approval, consent, licence, permission or the like.

Authority means the Commonwealth or New South Wales government, a Minister of the Crown, a government department, a public authority established by or under any Act, a council or county council constituted under the *Local Government Act 1993*, or a person or body exercising functions under any Act including a commission, panel, court, tribunal and the like.

Bank Guarantee means an irrevocable and unconditional undertaking without any expiry or end date in favour of the Council to pay an amount or amounts of money to the Council on demand issued by:

- (a) one of the following trading banks:
 - (i) Australia and New Zealand Banking Group Limited,
 - (ii) Commonwealth Bank of Australia,
 - (iii) Macquarie Bank Limited,
 - (iv) National Australia Bank Limited,
 - (iv) St George Bank Limited,
 - (v) Westpac Banking Corporation, or
- (b) any other financial institution approved by the Council in its absolute discretion.

Claim includes a claim, demand, remedy, suit, injury, damage, loss, Cost, liability, action, proceeding or right of action.

Construction Certificate has the same meaning as in the Act.

Contribution Value means the \$ amount agreed between the Parties as the value of a Development Contribution made under this Deed as specified in Column 1 of Schedule 1 corresponding to that Development Contribution Item indexed quarterly in accordance with the CPI from the date on which this Deed is executed until the Development Contribution is provided to Council in accordance with Schedule 1.

Cost means a cost, charge, expense, outgoing, payment, fee and other expenditure of any nature.

CPI means the *Consumer Price Index (All Groups – Sydney)* published by the Australian Bureau of Statistics.

Deed means this Deed and includes any schedules, annexures and appendices to this Deed.

Defect means anything that adversely affects, or is likely to adversely affect, the appearance, structural integrity, functionality or use or enjoyment of a Work or any part of a Work and which is not damage caused by matters beyond the control of the Developer including weather or damage caused by members of the public using the Pedestrian Link.

Defects Liability Period means the period of 1 year commencing on the day immediately after a Work is completed for the purposes of this Deed.

Department means the Department of Planning, Industry and Environment.

Development means the development on part of the Land, being Lot 10 in DP1007432, known as Stage 3 to be carried out in Stages involving the construction and use of that part of the Land for the purpose of a mix of retail, specialised retail, food and drink, fast food and office uses.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost, the carrying out of work, or the provision of any other material public benefit, or any combination of them, to be used for, or applied towards a public purpose, but does not include any Security or other benefit provided by a Party to the Council to secure the enforcement of that Party's obligations under this Deed for the purposes of s7.4(3)(g) of the Act.

Dispute means a dispute or difference between the Parties under or in relation to this Deed.

Equipment means any equipment, apparatus, vehicle or other equipment or thing to be used by or on behalf of the Developer in connection with the performance of its obligations under this Deed.

GST has the same meaning as in the GST Law.

GST Law has the same meaning as 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.

Item means an item specified in Column 1 of Schedule 1.

Land means the land comprised in Lot 11 and Lot 10 in DP 1007432 and otherwise known as 106-128 Woodpark Road, Smithfield NSW 2164 as shown in the Map at Schedule 2.

LEP means the *Holroyd Local Environmental Plan 2013*.

LEP Amendment means the amendment of the LEP as a result of the Planning Proposal.

LEP Amendment Commencement Date means the date on which the LEP Amendment is published on the NSW legislation website.

Maintain, in relation to a Work, means keep in a good state of repair and working order, and includes repair of any damage to the Work.

Monetary Contribution means the total \$ amount specified in Column 1, Item A of Schedule 1 indexed quarterly in accordance with the CPI from the date on which this Deed is executed until the Monetary Contribution is provided to Council in accordance with Schedule 1.

Pedestrian Link means a proposed pedestrian link between the Land and the Warren T-Way Stop as generally shown in Schedule 3, the design of which is to be developed and approved by Council under this Deed.

Party means a party to this Deed.

Planning Proposal means the document proposing amendments to the LEP prepared by the Council in response to a request by the Developer submitted to the Council on 12 September 2019, the subject of a gateway determination dated 15 February 2021 (as altered from time to time) under s3.34 of the Act and as varied pursuant to s3.35 of the Act, proposing to:

- (a) amend the maximum height of buildings for the southern portion of the Land (Stage 3 redevelopment area as shown on the map in Schedule 2) from 20m to 29m;

- (b) amend Schedule 1 of the LEP to permit the additional permissible uses of 'neighbourhood shop' on the Land and 'office premises' on the Land.

Rectification Notice means a notice in writing:

- (a) identifying the nature and extent of a Defect,
(b) specifying the works or actions that are required to Rectify the Defect,
(c) specifying a reasonable date by which or the period within which the Defect is to be rectified.

Rectify means rectify, remedy or correct.

Regulation means the *Environmental Planning and Assessment Regulation 2000*.

Security means a Bank Guarantee, or a bond or other form of security to the satisfaction of the Council indexed in accordance with increases in the CPI from the date of this Deed.

Stage means a part of the Development approved by a Development Consent or a part of the Development identified as a stage of the Development within a Development Consent.

Subdivision Certificate has the same meaning as in the Act.

Warren T-Way Stop means the Warren T-Way bus junction located on land identified as Lots 37 and 38 in DP 1038086 in Woodpark NSW 2164.

Work means building, engineering or construction works required to construct the Pedestrian Link

- 1.2 In the interpretation of this Deed, the following provisions apply unless the context otherwise requires:
- 1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Deed.
- 1.2.2 A reference in this Deed to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- 1.2.3 If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day.
- 1.2.4 A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
- 1.2.5 A reference in this Deed to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
- 1.2.6 A reference in this Deed 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.
- 1.2.7 A reference in this Deed to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.

- 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
- 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- 1.2.10 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.
- 1.2.11 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.
- 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.13 A reference to this Deed includes the agreement recorded in this Deed.
- 1.2.14 A reference to a Party to this Deed includes a reference to the employees, agents and contractors of the Party, the Party's successors and assigns.
- 1.2.15 A reference to 'dedicate' or 'dedication' in relation to land is a reference to dedicate or dedication free of cost.
- 1.2.16 Any schedules, appendices and attachments form part of this Deed.
- 1.2.17 Notes appearing in this Deed are operative provisions of this Deed.

2 Status of this Deed

- 2.1 This Deed is a planning agreement within the meaning of s7.4(1) of the Act.

3 Commencement

- 3.1 This Deed commences and has force and effect on and from the date when the Parties have:
 - 3.1.1 both executed the same copy of this Deed, or
 - 3.1.2 each executed separate counterparts of this Deed and exchanged the counterparts.
- 3.2 The Parties are to insert the date when this Deed commences on the front page and on the execution page.

4 Application of this Deed

- 4.1 This Deed applies to the Land, the LEP Amendment and to the Development.

5 Warranties

- 5.1 The Parties warrant to each other that they:
- 5.1.1 have full capacity to enter into this Deed, and
 - 5.1.2 are able to fully comply with their obligations under this Deed.

6 Further agreements

- 6.1 The Parties may, at any time and from time to time, enter into agreements relating to the subject-matter of this Deed that are not inconsistent with this Deed for the purpose of implementing this Deed.

7 Surrender of right of appeal, etc.

- 7.1 The Developer is not to commence or maintain, or to cause or procure the commencement or maintenance, of any proceedings in any court or tribunal or similar body appealing against, or questioning the validity of this Deed, or an Approval relating to the Development in so far as the subject-matter of the proceedings relates to this Deed.

8 Application of s7.11, s7.12 and s7.24 of the Act to the Development

- 8.1 This Deed does not exclude the application of ss7.11, 7.12 or 7.24 to the Development.

Part 2 – Development Contributions

9 Provision of Development Contributions

- 9.1 The Developer is to make Development Contributions to the Council in accordance with Schedule 1, any other provision of this Deed relating to the making of Development Contributions and otherwise to the satisfaction of the Council.
- 9.2 Any Contribution Value specified in this Deed in relation to a Development Contribution does not serve to define the extent of the Developer's obligation to make the Development Contribution.
- 9.3 The Council is to apply each Development Contribution made by the Developer under this Deed towards the public purpose for which it is made and otherwise in accordance with this Deed.
- 9.4 Despite clause 9.3 the Council may apply the Monetary Contribution made under this Deed towards a public purpose other than the public purpose

specified in this Deed if the Council reasonably considers that the public interest would be better served by applying the Monetary Contribution towards that other purpose rather than the purpose so specified. In this event, prior to applying the Monetary Contribution to another public purpose, the Council will give the Developer notice of its intention to do so and take into account any submission received from the Developer within 14 days of that notice.

10 Payment of Monetary Development Contributions

- 10.1 A Monetary Contribution is made for the purposes of this Deed when the Council receives the full amount of the contribution payable under this Deed in cash or by unendorsed bank cheque or by deposit by means of electronic funds transfer of cleared funds into a bank account nominated by the Council.

11 Carrying out of Work

- 11.1 If a Development Consent is granted for the Development and the Developer notifies the Council in writing at least three months prior to the issue of a Construction Certificate for the Development that it wishes to construct the Pedestrian Link, the Developer must obtain a Development Consent, if one is required, for the construction of the Pedestrian Link and construct the Pedestrian Link to the design, detail and in the location approved by the Development Consent. If no Development Consent is required for the construction of the Pedestrian Link, the Developer must construct the Pedestrian Link to the design and detail and in the location approved by the Council. The Pedestrian Link must be completed by the time specified in Column 4 of Item B of Schedule 1.
- 11.2 If the Developer wishes to modify the Development Consent to substantially change the location, design and details of the Pedestrian Link it must obtain formal consent from Council via a Section 4.55 application under the *Environmental Planning and Assessment Act 1979*.
- 11.3 Despite clause 11.1, if:
- 11.3.1 a construction certificate for any Stage of the Development is not issued within 5 years of the date of this Deed;
 - 11.3.2 the Developer has not elected to construct the Pedestrian Link in accordance with clause 11.1; or
 - 11.3.3 the Developer has elected to construct the Pedestrian Link but has not commenced construction of the Pedestrian Link within 5 years of the date of the Deed,
- the Developer must pay the Monetary Contribution set out in Item A of Schedule 1.
- 11.4 Without limiting any other provision of this Deed, any Work including the Pedestrian Link that is required to be carried out by the Developer under this Deed is to be carried out in accordance with any design or specification

specified or approved by the Council, any relevant Approval and any other applicable law.

- 11.5 The Developer, at its own cost, is to comply with any reasonable direction given to it by the Council to prepare or modify a design or specification relating to a Work that the Developer is required to carry out under this Deed but only if the direction does not result in:
- (a) material changes to the design or construction of the Work; or
 - (b) material additional costs associated with construction of the Work.

12 Variation to Work

- 12.1 The design or specification of any Work that is required to be carried out by the Developer under this Deed may be varied by agreement in writing between the Parties, acting reasonably, without the necessity for an amendment to this Deed.
- 12.2 Without limiting clause 12.1, the Developer may make a written request to the Council to approve a variation to the design or specification of a Work in order to enable it to comply with the requirements of any Authority imposed in connection with any Approval relating to the carrying out of the Work.
- 12.3 The Council is not to unreasonably delay or withhold its approval to a request made by the Developer under clause 12.2.
- 12.4 The Council, acting reasonably, may from time to time give a written direction to the Developer requiring it to vary the design or specification of a Work before the Work is carried out in a specified manner and submit the variation to the Council for approval.
- 12.5 The Developer is to comply promptly with a direction referred to in clause 12.4 at its own cost but only if the direction does not result in:
- (a) material changes to the design or construction of the Work; or
 - (b) material additional costs associated with construction of the Work.

13 Access to land by Developer

- 13.1 Subject to clause 11, the Council authorises the Developer to enter, occupy and use any Council owned or controlled land for the purpose of performing its obligations under this Deed.
- 13.2 The Council is to permit the Developer, upon receiving reasonable prior notice from the Developer, to enter any other Council owned or controlled land in order to enable the Developer to properly perform its obligations under this Deed.
- 13.3 Nothing in this Deed creates or gives the Developer any estate or interest in any part of the land referred to in clause 13.1 or 13.2.

14 Access to land by Council

- 14.1 The Council may enter any land on which Work is being carried out by the Developer under this Deed in order to inspect, examine or test the Work, or to remedy any breach by the Developer of its obligations under this Deed relating to the Work.
- 14.2 The Council is to give the Developer prior reasonable notice before it enters land under clause 14.1.

15 Council's obligations relating to Work

- 15.1 The Council is not to unreasonably delay, hinder or otherwise interfere with the performance by the Developer of its obligations to undertake Work under this Deed, and is to use its reasonable endeavours to ensure third parties unrelated to the Developer do not unreasonably delay, hinder or otherwise interfere with the performance of those obligations.

16 Protection of people, property & utilities

- 16.1 The Developer is to ensure to the fullest extent reasonably practicable in relation to the performance of its obligations under this Deed that:
- 16.1.1 all necessary measures are taken to protect people and property,
- 16.1.2 unnecessary interference with the passage of people and vehicles is avoided, and
- 16.1.3 nuisances and unreasonable noise and disturbances are prevented.
- 16.2 Without limiting clause 16.1, the Developer is not to obstruct, interfere with, impair or damage any public road, public footpath, public cycleway or other public thoroughfare, or any pipe, conduit, drain, watercourse or other public utility or service on any land except as authorised in writing by the Council or any relevant Authority.

17 Repair of damage

- 17.1 The Developer is to maintain any Work required to be carried out by the Developer under this Deed until the Work is completed for the purposes of this Deed or such later time as agreed between the Parties.
- 17.2 The Developer is to carry out its obligation under clause 17.1 at its own cost and to the satisfaction of the Council acting reasonably.

18 Completion of Work

- 18.1 The Developer is to give the Council written notice of the date on which it will complete Work required to be carried out under this Deed.

- 18.2 The Council is to inspect the Work the subject of the notice referred to in clause 18.1 within 14 days of the date specified in the notice for completion of the Work.
- 18.3 Work required to be carried out by the Developer under this Deed, is completed for the purposes of this Deed when the Council, acting reasonably, gives a written notice to the Developer to that effect.
- 18.4 If the Council is the owner of the land on which Work the subject of a notice referred to in clause 18.3 is issued, the Council assumes responsibility for the Work upon the issuing of the notice, but if it is not the owner at that time, it assumes that responsibility when it later becomes the owner.
- 18.5 Before the Council gives the Developer a notice referred to in clause 18.3, it may give the Developer a written direction to complete, rectify or repair any specified part of the Work to the reasonable satisfaction of the Council.
- 18.6 For the avoidance of doubt, the Council may give more than one written notice under clause 18.5 if the Council reasonably considers that it is necessary to do so.
- 18.7 The Developer, at its own cost, is to promptly comply with a direction referred to in clause 18.5.
- 18.8 If the works to be rectified pursuant to a notice issued by Council under clause 18.5 are rectified to the satisfaction of Council, Council is to issue a written notice pursuant to clause 18.3 within 14 days of receipt of any notice to the effect that the rectification works have been carried out.

19 Rectification of defects

- 19.1 The Council may give the Developer a Rectification Notice during the Defects Liability Period.
- 19.2 The Developer, at its own cost, is to comply with a Rectification Notice according to its terms and to the reasonable satisfaction of the Council.
- 19.3 The Council is to do such things as are reasonably necessary to enable the Developer to comply with a Rectification Notice that has been given to it under clause 19.1.

20 Works-As-Executed-Plan

- 20.1 No later than 60 days after Work is completed for the purposes of this Deed, the Developer is to submit to the Council a full works-as-executed-plan in respect of the Work.
- 20.2 The Developer, being the copyright owner in the plan referred to in clause 20.1, gives the Council a non-exclusive licence to use the copyright in the plans for the purposes of this Deed.

21 Removal of Equipment

- 21.1 When Work on any Council owned or controlled land is completed for the purposes of this Deed, the Developer, without delay, is to:
- 21.1.1 remove any Equipment from Land and make good any damage or disturbance to the land as a result of that removal, and
 - 21.1.2 leave the land in a neat and tidy state, clean and free of rubbish.

Part 3 – Dispute Resolution

22 Dispute resolution – expert determination

- 22.1 This clause applies to a Dispute between any of the Parties to this Deed concerning a matter arising in connection with this Deed that can be determined by an appropriately qualified expert if:
- 22.1.1 the Parties to the Dispute agree that it can be so determined, or
 - 22.1.2 the Chief Executive Officer of the professional body that represents persons who appear to have the relevant expertise to determine the Dispute gives a written opinion that the Dispute can be determined by a member of that body.
- 22.2 A Dispute to which this clause applies is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 22.3 If a notice is given under clause 22.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 22.4 If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 22.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 22.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 22.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

23 Dispute Resolution - mediation

- 23.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute to which clause 22 applies.
- 23.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 23.3 If a notice is given under clause 23.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.

- 23.4 If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.
- 23.5 If the Dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the Dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.
- 23.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 23.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

Part 4 - Enforcement

24 Security for performance of obligations

- 24.1 The Parties acknowledge that pursuant to cl 146A of the Regulation, the timing of the provision of the Development Contributions set out in column 4 of Schedule 1 operates as a restriction on the issuing of the first Construction Certificate for the Development.
- 24.2 The Developer is to provide Security to the Council in the amount of 20% of the Monetary Contribution in relation to the performance of its obligations under this Deed.
- 24.3 The amount of the Security required to be held under this clause is to be indexed annually in accordance with the CPI and the Developer is to ensure that the Security held by the Council at all times equals the indexed amount notified to the Developer by Council.
- 24.4 The Developer is to provide the Security to the Council within 7 days of the LEP Amendment Commencement Date.
- 24.5 The Council may call-up and apply the Security in accordance with clause 25 to remedy any breach of this Deed notwithstanding any other remedy it may have under this Deed, under any Act or otherwise at law or in equity.
- 24.6 The Council is to release and return the Security or any unused part of it to the Developer within 14 days of completion of its obligations under this Deed.
- 24.7 The Developer may at any time provide the Council with a replacement Security.
- 24.8 On receipt of a replacement Security, the Council is to release and return the Security that has been replaced to the Developer.
- 24.9 If the Council calls-up the Security or any portion of it, it may, by written notice to the Developer, require the Developer to provide a further or

replacement Security to ensure that the amount of Security held by the Council equals the amount it is entitled to hold under this Deed.

25 Breach of obligations

- 25.1 Subject to clause 25.2, if the Council reasonably considers that the Developer is in breach of any obligation under this Deed, it may give a written notice to the Developer:
- 25.1.1 specifying the nature and extent of the breach,
 - 25.1.2 requiring the Developer to:
 - (a) rectify the breach if it reasonably considers it is capable of rectification, or
 - (b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification,
 - 25.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 25.2 For the avoidance of doubt, if the Developer fails to pay the Monetary Contribution by the time specified in Column 4 of Item 1 and in the absence of an election to construct the Pedestrian Link under clause 11.2, the Council may call upon the Security without giving a written notice under clause 25.1.
- 25.3 If the Developer fails to fully comply with a notice referred to in clause 25.1, the Council may, without further notice to the Developer, call-up the Security provided by the Developer under this Deed and apply it to remedy the Developer's breach.
- 25.4 Any costs incurred by the Council in remedying a breach in accordance with clause 25.2 may be recovered by the Council by either or a combination of the following means:
- 25.4.1 by calling-up and applying the Security provided by the Developer under this Deed, or
 - 25.4.2 as a debt due in a court of competent jurisdiction.
- 25.5 For the purpose of clause 25.4, the Council's costs of remedying a breach the subject of a notice given under clause 25.1 include, but are not limited to:
- 25.5.1 the costs of the Council's employees, agents and contractors reasonably incurred for that purpose,
 - 25.5.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
 - 25.5.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- 25.6 Nothing in this clause 25 prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Deed by the

Developer, including but not limited to seeking relief in an appropriate court.

26 Enforcement in a court of competent jurisdiction

- 26.1 Without limiting any other provision of this Deed, the Parties may enforce this Deed in any court of competent jurisdiction.
- 26.2 For the avoidance of doubt, nothing in this Deed prevents:
 - 26.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Deed or any matter to which this Deed relates, or
 - 26.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Deed or any matter to which this Deed relates.

Part 5 – Registration & Restriction on Dealings

27 Registration of this Deed

- 27.1 The Parties agree to register this Deed for the purposes of s7.6(1) of the Act.
- 27.2 Not later than 10 business days after the commencement of this Deed, the Developer is to deliver to the Council in registrable form:
 - 27.2.1 an instrument requesting registration of this Deed on the title to the Land duly executed by the Developer, and
 - 27.2.2 the written irrevocable consent of each person referred to in s7.6(1) of the Act to that registration.
- 27.3 This Deed is to be lodged for registration prior to the LEP Amendment Commencement Date. The Developer is to do such other things as are reasonably necessary to enable registration of this Deed to occur.
- 27.4 The Parties are to do such things as are reasonably necessary to remove any notation relating to this Deed from the title to the Land once the Developer has completed its obligations under this Deed to the reasonable satisfaction of the Council or this Deed is terminated or otherwise comes to an end for any other reason.

28 Restriction on dealings

- 28.1 The Developer is not to:
 - 28.1.1 sell or transfer the Land, or
 - 28.1.2 assign the Developer's rights or obligations under this Deed, or novate this Deed,

M

DA

to any person unless:

- 28.1.3 the Developer has, at no cost to the Council, first procured the execution by the person to whom the Land or part is to be sold or transferred or the Developer's rights or obligations under this Deed are to be assigned or novated, of a deed in favour of the Council on terms reasonably satisfactory to the Council, and
 - 28.1.4 the Council has given written notice to the Developer stating that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this Deed, and
 - 28.1.5 the Developer is not in breach of this Deed, and
 - 28.1.6 the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.
- 28.2 Subject to clause 28.3, the Developer acknowledges and agrees that it remains liable to fully perform its obligations under this Deed unless and until it has complied with its obligations under clause 28.1.
- 28.3 Clause 28.1 does not apply in relation to any sale or transfer of the Land if this Deed is registered on the title to the Land at the time of the sale.

Part 6 – Risk and Release

29 Risk

- 29.1 The Developer performs this Deed at its own risk and its own cost.

30 Release

- 30.1 The Developer releases the Council from any Claim it may have against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

31 Indemnity

- 31.1 The Developer indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

M

DB

Part 7 – Other Provisions

32 Review of Deed

- 32.1 The Parties agree to review this Deed every year, and otherwise if either party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Deed, or if an environmental planning instruments permitting a supermarket of at least 4,000m² has not commenced operation four (4) years after the date of this Deed.
- 32.2 For the purposes of clause 32.1, the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables the Council or any other planning Authority to restrict or prohibit any aspect of the Development.
- 32.3 For the purposes of addressing any matter arising from a review of this Deed referred to in clause 32.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Deed.
- 32.4 If this Deed becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.
- 32.5 A failure by a Party to agree to take action requested by the other Party as a consequence of a review referred to in clause 32.1 (but not 32.4) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.

33 Notices

- 33.1 Any notice, consent, information, application or request that is to or may be given or made to a Party under this Deed is only given or made if it is in writing and sent in one of the following ways:
- 33.1.1 delivered or posted to that Party at its address set out in the Summary Sheet, or
- 33.1.2 emailed to that Party at its email address set out in the Summary Sheet.
- 33.2 If a Party gives the other Party 3 business days' notice of a change of its address or email, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or emailed to the latest address.
- 33.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 33.3.1 delivered, when it is left at the relevant address,
- 33.3.2 sent by post, 2 business days after it is posted, or

33.3.3 sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.

33.4 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 whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

34 Approvals and Consent

34.1 Except as otherwise set out in this Deed, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Deed in that Party's absolute discretion and subject to any conditions determined by the Party.

34.2 A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

35 Costs

35.1 The Developer is to pay to the Council the Council's costs of preparing, negotiating, executing and stamping this Deed, and any document related to this Deed within 7 days of a written demand by the Council for such payment.

35.2 The Developer is also to pay to the Council the Council's reasonable costs of enforcing this Deed within 7 days of a written demand by the Council for such payment.

36 Entire Deed

36.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with.

36.2 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 Deed was executed, except as permitted by law.

37 Further Acts

37.1 Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to effect, perfect or complete this Deed and all transactions incidental to it.

38 Governing Law and Jurisdiction

38.1 This Deed is governed by the law of New South Wales.

m

AA

- 38.2 The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.
- 38.3 The Parties are not to object to the exercise of jurisdiction by those courts on any basis.

39 Joint and Individual Liability and Benefits

- 39.1 Except as otherwise set out in this Deed:
- 39.1.1 any agreement, covenant, representation or warranty under this Deed by 2 or more persons binds them jointly and each of them individually, and
- 39.1.2 any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

40 No Fetter

- 40.1 Nothing in this Deed shall 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.

41 Illegality

- 41.1 If this Deed or any part of it becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties are to co-operate and do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.

42 Severability

- 42.1 If a clause or part of a clause of this Deed 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.
- 42.2 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 Deed, but the rest of this Deed is not affected.

43 Amendment

- 43.1 No amendment of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed in accordance with clause 25C of the Regulation.

m

RA

44 Waiver

- 44.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- 44.2 A waiver by a Party is only effective if it:
- 44.2.1 is in writing,
 - 44.2.2 is addressed to the Party whose obligation or breach of obligation is the subject of the waiver,
 - 44.2.3 specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,
 - 44.2.4 is signed and dated by the Party giving the waiver.
- 44.3 Without limitation, a waiver may be expressed to be conditional on the happening of an event, including the doing of a thing by the Party to whom the waiver is given.
- 44.4 A waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given, and 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.
- 44.5 For the purposes of this Deed, an obligation or breach of obligation the subject of a waiver is taken not to have been imposed on, or required to be complied with by, the Party to whom the waiver is given.

45 GST

- 45.1 In this clause:
- Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice** have the meaning given by the GST Law.
- GST Amount** means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.
- GST Law** has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- Input Tax Credit** has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.
- Taxable Supply** has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.
- 45.2 Subject to clause 45.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.



- 45.3 Clause 45.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.
- 45.4 No additional amount shall be payable by the Council under clause 45.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.
- 45.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:
- 45.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;
- 45.5.2 that any amounts payable by the Parties in accordance with clause 45.2 (as limited by clause 45.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 45.6 No payment of any amount pursuant to this clause 45, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 45.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- 45.8 This clause continues to apply after expiration or termination of this Deed.

46 Explanatory Note

- 46.1 The Appendix contains the Explanatory Note relating to this Deed required by clause 25E of the Regulation.
- 46.2 Pursuant to clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Planning Deed.

47 Limitation of Liability

- 47.1 In this clause 47, Trustee means the Developer.
- 47.2 The Trustee enters into this Deed only in its capacity as trustee of The Snowside Trust ("**Trust**") constituted under the Trust Deed dated 12 November 1990 ("**Trust Deed**") and as subsequently varied on 30 March 2004 and 19 December 2019 and in no other capacity. A liability arising under or in connection with this Deed is limited to and can be enforced



against the Trustee only to the extent to which it can be and is in fact satisfied out of property of the Trust from which the Trustee is actually indemnified for the liability. Subject to clause 47.3, this limitation of the Trustee liability applies despite any other provision of this Deed and 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.

- 47.3 No party to this Deed may sue the Trustee in any capacity other than as the Trustee of the Trust, including seeking the appointment of a receiver (except in relation to property of the Trust), a liquidator, an administrator or any similar person to the Trustee or proving in any liquidation, administration or arrangement of or affecting the Trustee (except in relation to property of the Trust).
- 47.4 The provisions of this clause 47 shall not apply to any obligation or liability of the Trustee to the extent that it is not satisfied because, under this Deed or by operation of law, there is a reduction in the extent of the Trustee's indemnification out of the assets of the Trust as a result of the Trustee's failure to properly perform its duties as Trustee of the Trust.
- 47.5 The Trustee is not obliged to do or refrain from doing anything under this Deed (including incur any liability) unless its liability is limited in the same manner as set out in clauses 47.1 to 47.3.
- 47.6 Subject to clauses 47.1 to 47.4, the Trustee has authority under the Trust Deed to enter into this Deed.

48 Trustee Warranties

- 48.1 In this clause 48, Trustee means the Developer.
- 48.2 The Trustee warrants that, as at the date of this Deed:
- 48.2.1 the Trustee is the trustee of The Snowside Trust ("**Trust**") constituted under the Trust Deed dated 12 November 1990 ("**Trust Deed**") as varied on 30 March 2004 and 19 December 2019;
 - 48.2.2 it has not been removed as the trustee under the Trust Deed;
 - 48.2.3 no release or revocation of the Trustee's powers under the Trust Deed has occurred;
 - 48.2.4 it is the sole trustee of the Trust;
 - 48.2.5 it is not in breach of the Trust Deed;
 - 48.2.6 it has the power under the Trust Deed to execute and perform its obligations under this Deed and all necessary action has been taken under the Trust Deed to authorize the execution and performance of this Deed.
- 48.3 If the Trustee's position in respect of the matters specified in clause 48.2 changes, the parties are to negotiate, in good faith and without delay, any necessary changes to this Deed to secure the provision of the Development Contributions.
- 48.4 If the Trustee is to be replaced as trustee under the Trust Deed, then the Trustee will procure entry by the replacement trustee into a deed with the

106-128 Woodpark Road, Smithfield
Cumberland City Council
Snowside Pty Ltd

Council on terms satisfactory to the Council under which the replacement trustee agrees to:

- 48.4.1 be bound by the provisions of this Deed; and
- 48.4.2 pay the Council's costs in relation to the replacement of the trustee and the costs of registering any new planning agreement on title, if required.
- 48.5 Immediately upon the Trustee becoming aware of a proposed termination of the Trust, the Trustee is to notify the Council, and the Parties are to negotiate, in good faith and without delay, any necessary changes to this Deed, or other arrangements arising from the proposed termination of the Trust, to secure the provision of Development Contributions.

m

BA

Schedule 1

(Clause 9)

Development Contributions

Column 1	Column 2	Column 3	Column 4
Item/ Contribution	Public Purpose	Manner & Extent	Timing

A. Monetary Contributions

\$850,000 (eight hundred and fifty thousand dollars)

Public Domain and Transport Improvements

In accordance with clauses 9 and 10.

\$850,000 is to be paid prior to:

- the issue of the first Construction Certificate for any Stage of the Development; or
- five (5) years from the LEP Amendment Commencement Date (unless otherwise agreed with Council),

whichever is the sooner.

B. Carrying out of Work (if the Developer elects to carry out Work under cl 11.3 of this Deed)

The construction of the Pedestrian Link in accordance with the design approved under clause 11, any other relevant provision of this Deed and otherwise to the satisfaction of the Council.

Public Domain and Transport Improvements

Work to be complete in accordance with clause 18 before

- the issue of the first Occupation Certificate for any Stage of the Development; or
- five years after the date of the issue of the first Construction Certificate for any Stage of the Development (unless otherwise agreed with Council),

whichever is the sooner.

m

AB

Schedule 2

(Clause 1)

Land



The area marked in blue is the Land.
T3 is that part of the Land for which the height controls are sought to be increased in the Planning Proposal and on which the Development is to occur.

nr

RA

Schedule 3

(Clause 1)

Indicative Location of the Pedestrian Link



M

AB

106-128 Woodpark Road, Smithfield
Cumberland City Council
Snowside Pty Ltd

Execution

Executed as a Deed

Dated: 13 December 2021

Executed on behalf of the Council



General Manager

Mayor



Witness



Witness



Executed on behalf of the Developer in accordance with s127(1) of the
Corporations Act (Cth) 2001

ANTHONY MAURICA SOLE DIRECTOR/SECRETARY.

Name/Position

Name/Position



Appendix

(Clause 46)

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Planning Agreement

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Parties

Cumberland Council ABN 22 798 563 329 of PO Box 42 MERRYLANDS NSW 2160
(Council)

Snowside Pty Ltd ACN 003 924 025 of 100B Woolwich Road WOOLWICH NSW 2110
(Developer)

Description of the Land to which the Draft Planning Agreement Applies

The Draft Planning Agreement applies to Lot 10 and Lot 11 in DP1007432, otherwise known as Smithfield Enterprise Park and located at 106-128 Woodpark Road, Smithfield NSW 2164 being the land marked in blue in the plan below. The additional permitted uses apply to the Land. T3 is that part of the Land for which the height controls are sought to be increased in the Planning Proposal and on which the Development is to occur.



Description of Proposed Development

The Draft Planning Agreement is in connection with Stage 3 of the redevelopment of the Land. Stage 3 will involve a mix of retail, specialised retail, food and drink, fast food and office uses.

Description of Development Contributions

Under the Draft Planning Agreement, the Developer is to pay monetary Development Contributions to the Council in the amount of \$850,000 to be applied towards the construction of a pedestrian link between the Land and the Warren T-Way Stop within the Council's local government area.

Summary of Objectives, Nature and Effect of the Draft Planning Agreement

2

AR

Objective, Nature and Effect of Draft Planning Agreement

The Draft Planning Agreement is a planning agreement under s7.4 of the EPA Act. It is a voluntary agreement, under which the Developer makes Development Contributions (as defined in clause 1.1 of the Draft Planning Agreement) for public purposes (as defined in s 7.4(2) of the EPA Act).

The objectives of the Draft Planning Agreement are to provide funding for the future provision of a pedestrian link between the Land and the Warren T-Way Stop within the Council's local government area. The Draft Planning Agreement:

- requires the Developer to make monetary development contributions,
- does not exclude the application of s 7.11, s7.12 and 7.24 of the EPA Act to the Development,
- is to be registered on the title to the Land,
- imposes restrictions on the Developer transferring the Land or part of the Land or assigning an interest under the Agreement prior to registration of the planning agreement on the title to the land,
- provides a dispute resolution method where a dispute arises under the agreement, being mediation and expert determination,
- provides that the agreement is governed by the law of New South Wales,

Assessment of the Merits of the Draft Planning Agreement

How the Draft Planning Agreement Promotes the Public Interest

The Draft Planning Agreement will provide Council with funding to be applied towards the construction of a pedestrian link between the Land and the Warren T-Way Stop within the Council's local government for the public benefit.

The Draft Planning Agreement:

- promotes the objects of the EPA Act set out in sections 1.3 (c) and (j);
- improves the accessibility, walkability and utilisation of public transport; and
- enables the funding and provision of public improvements and public pedestrian footpath for the public benefit and to address demand arising from the development of the Land.

The Draft Planning Agreement also promotes the following guiding principles for local councils as set out in s8A of the *Local Government Act 1993* by:

- providing an example of Council working with others, being the Developer, to secure appropriate services for local community needs,
- promoting active engagement with local communities by being required to be publicly notified in accordance with the *Environmental Planning and Assessment Regulation 2000*,