



**CUMBERLAND
COUNCIL**

Planning Agreement

42-44 Dunmore Street, Wentworthville (Wentworthville Mall)

Cumberland Council (ABN 22 798 563 329) (Council)

Austino Wentworthville Pty Ltd (Developer)

Marsdens Law Group

Level 1
49 Dumaresq Street
CAMPBELLTOWN NSW 2560

Tel: 02 4626 5077

Fax: 02 4626 4826

DX: 5107 Campbelltown



Wentworthville Mall

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Planning Agreement
42-44 Dunmore Street, Wentworthville (Wentworthville Mall)

Parties

Council	Name	Cumberland Council
	Address	16 Memorial Avenue, Merrylands NSW 2160
	ABN	22 798 563 329
Developer	Name	Austino Wentworthville Pty Ltd
	Address	Suite 603, 377 Sussex Street, Sydney NSW 2000
	ACN	146 623 421

Background

- A** The Developer owns the Land
- B** The Developer has lodged with the Council a planning proposal for the making of an Instrument Change.
- C** The Developer is prepared to make the Development Contributions in connection with the planning proposal in accordance with this document.

Operative Provisions

1 Agreement

The agreement of the parties is set out in the Operative Provisions of this document, in consideration of, among other things, the mutual promises contained in this document.

2 Definitions

2.1 Defined Terms

In this document, words beginning with a capital letter that are defined in Part 1 of **Schedule 2** have the meaning ascribed to them in that schedule.

2.2 Interpretation

The interpretational rules contained in Part 2 of **Schedule 2** apply in the interpretation of this document

3 Application and Operation of Document

3.1 Planning Agreement

This document is a planning agreement:

- (1) within the meaning set out in s93F of the Act; and
- (2) governed by Subdivision 2 of Division 6 of Part 4 of the Act.

3.2 Application

This document applies to both the Land and to any future Development.

3.3 Operation of this Agreement

- (1) Until the Instrument Change is granted and a Development Consent is granted, this document constitutes the Developer's offer to enter into a planning agreement with respect to the Instrument Change and Development Consent.
- (2) This document becomes a planning agreement for the purpose of the Act when:
 - (a) the Development Consent is granted;
 - (b) a Development Consent contains a condition imposed under section 93I(3) of the Act requiring this planning agreement to be entered into; and
 - (c) the planning agreement is entered in accordance with clause 25C(1) of the Regulation.

4 Application of s94 & s94A

4.1 Application

- (1) This document excludes the application of section 94A of the Act to the Development.
- (2) This document excludes the application of section 94 of the Act to the Development in the following manner:
 - (a) With respect to the contribution that would otherwise be required on account of embellishment of dedicated land to the extent of \$416,300.00.
 - (b) With respect to the contribution that would otherwise be required on account of embellishment of Dunmore Street footpath to the extent of \$158,425.00.
 - (c) With respect to the contribution that would otherwise be required on account of embellishment of Pritchard Street footpath to the extent of \$153,090.00.
 - (d) With respect to the contribution that would otherwise be required on account of public art to the extent of \$50,000.00.
 - (e) With respect to the contribution that would otherwise be required on account of legal, registration and transfer costs to the extent of \$2,000.00.
- (3) The values set out in clause 4.1(2) are to be increased by the same indexation arrangements applied to the Contribution Values as set out in clause 5.4.

4.2 Consideration of Benefits

Section 94(6) of the Act does not apply to the Contributions that are to be carried out or provided pursuant to this document.

4.3 Section 94EF

This document does not exclude the application of s94EF to the Development.

5 Provision of Contributions

5.1 Designated Land

- (1) The Developer must dedicate the Designated Land to Council free of any trusts, estates, interests, covenants and encumbrances by the time specified in **Schedule 3**.
- (2) The Developer must meet all reasonable costs associated with the dedication of the Designated Land in accordance with paragraph (1), including any costs incurred by Council in relation to that dedication.
- (3) For the purpose of this document, Designated Land is dedicated to Council:
 - (a) if the relevant land is dedicated in a plan registered at the Land & Property Information Office of NSW, when that plan is so registered; or
 - (b) otherwise when the Developer delivers to Council:
 - (i) a transfer of the relevant land in registrable form;
 - (ii) the original Certificate of Title for the relevant land; and
 - (iii) any document in registrable form which, when registered, will remove any Encumbrances registered on the title of that land.

5.2 Works

The Developer, at its cost, must:

- (1) obtain any consent or approval from an Authority required for the construction and use of the Works;
- (2) carry out and complete the Works to the satisfaction of the Council (acting reasonably) by the time specified in **Schedule 4**;
- (3) carry out and complete the Works:
 - (a) in accordance with the specification referred to in **Schedule 4** for the relevant item of Work;
 - (b) in accordance with the requirements of, or consents issued by, any Authority;
 - (c) ensuring that:
 - (i) all necessary measures are taken to protect people, property, and the environment;
 - (ii) unnecessary interference with the passage of people and vehicles is minimised;
 - (iii) nuisances and unreasonable noise and disturbances are minimised; and
 - (iv) all relevant laws and regulations with respect to water, air, noise and land pollution (including 'pollution incidents') as defined under the *Protection of the Environment Operations Act 1997* (NSW);
 - (d) in accordance with any Australian Standards applicable to works of the same nature as each aspect of the Works; and
 - (e) in a proper and workmanlike manner complying with current industry practice and standards relating to each aspect of the Works.

5.3 Access to the Land and location of Works

The Developer is to permit Council, its officers, employees, agents and contractors to enter the Land at any time, upon giving reasonable prior notice (and in any event not less than two (2) business days except in the case of emergencies), in order to inspect, examine or test any of the Works.

5.4 Indexation of Contribution Values

The Contribution Values are to be increased (with the calculation to be made as from the date any such amount is due to be paid under this document) in accordance with the following formula:

$$A = B \times \frac{C}{D}$$

where:

A = the indexed amount;

B = the relevant amount as set out in this document;

C = the Index most recently published before the date that the relevant payment or the calculation with respect to the relevant amount is to be made; and

D = the Index most recently published before the commencement date of this document.

If **A** is less than **B**, then the amount of the relevant Contribution Value will not change.

6 Design and specification of Works

6.1 Developer must submit design

- (1) Before commencing construction of an item of Work, the Developer must submit to Council for its approval, the detailed design and specification for the relevant item of Work.
- (2) The design and specification for the item of Work must be prepared by the Developer having specific regard to the description of the item of Work contained in this document.

6.2 Council to respond to design and specification

- (1) If, within twenty (20) business days of the date of submission referred to in clause 6.1:
 - (a) Council notifies the Developer in writing of its approval of the design and specification, the Developer is to carry out and complete the relevant item of Work in accordance with that design and specification;
 - (b) Council fails to notify the Developer in writing that it approves or does not approve of the design and specification, Council is taken to have approved the design and specification of the item of Work and the Developer may carry out and complete the item of Work in accordance with that design and specification; or
 - (c) Council notifies the Developer in writing that it does not approve of the design and specification, the Developer may:
 - (i) elect to amend the design and specification and submit to Council the amended design and specification in which case the approval process set out in this clause 6 applies to that amendment; or
 - (ii) if the Developer does not agree with the modifications requested by Council, refer the matter for dispute resolution under clause 13.

-
- (2) For the purposes of this clause 6, except with the agreement of the Developer, Council cannot require the Developer to:
- (a) comply with the design approved under this clause if it is inconsistent with the relevant Development Consent; and
 - (b) make modifications to the design and specification of an item of Work that results in a change to the nature and scope of that item of Work as set out in this document.

7 Deferral and Completion of Works

7.1 Deferral of Works

- (1) Notwithstanding any other provision of this document, if the Developer forms the view at any time, that it is unable to make all or part of a Development Contribution comprising an item or items of Works (**Deferred Works**) by the time required under this document, then the Developer may seek Council's approval to defer the relevant Works by providing written notice to the Council:
- (a) identifying the relevant Work that the Developer proposes to defer; and
 - (b) identifying the anticipated time for Completion of the relevant Work.
- (2) The Council, acting reasonably, must give the Developer a written notice within fourteen (14) business days of the date upon which the Developer serves written notice upon Council in accordance with clause 7.1(1) above stating:
- (a) whether or not it consents to the deferral of the Deferred Works;
 - (b) the revised date for Completion required by Council; and
 - (c) any conditions Council requires with respect to the deferral, including any requirement for additional Security on account of that deferral.
- (3) If the Council consents to the deferral of the Deferred Works, then the following applies:
- (i) the Developer must comply with any conditions required by Council under paragraph (2) above;
 - (ii) provided the Developer satisfies those conditions, the Developer will not be considered to be in breach of this document as a result of a failure to achieve Completion of the relevant Deferred Works by the time for Completion specified in this document; and
 - (iii) the time for completion of the Deferred Works under this document is the revised date for Completion approved by Council.

7.2 Issue of Completion Notice

If the Developer considers that any particular item of the Works is Complete it must, within fourteen (14) days of Completion of that item, serve a notice on Council which:

- (1) is in writing;
- (2) identifies the particular item of the Works to which it relates; and
- (3) specifies the date on which, the Developer believes the relevant item of the Works was Completed,

(Completion Notice).

7.3 Inspection by Council

- (1) Council must inspect the Works set out in a Completion Notice within ten (10) business days of the receipt of that notice.
- (2) If Council fails to carry out an inspection required under paragraph (1), the Works referred to in the relevant Completion Notice will be deemed to be Complete.

7.4 Council Notice

- (1) Within twenty eight (28) days of inspecting the Works set out in a Completion Notice, Council must provide notice in writing to the Developer that the Works set out in the Completion Notice:
 - (a) have been Completed; or
 - (b) have not been Completed, in which case the notice (**Rectification Notice**) must also detail:
 - (i) those aspects of the Works which have not been Completed; and
 - (ii) the work the Council requires the Developer to carry out in order to rectify the deficiencies in those Works.
- (2) If Council does not provide the Developer with a notice in accordance with paragraph (1), the Works set out in the Completion Notice will be deemed to have been Completed.
- (3) Where Council serves a Rectification Notice on the Developer, the Developer must:
 - (a) rectify the Works in accordance with that notice; or
 - (b) serve a notice on Council that it disputes the matters set out in the notice.
- (4) Where the Developer:
 - (a) serves notice on Council in accordance with paragraph (3)(b), the dispute resolution provisions of this document apply; or
 - (b) rectifies the Works in accordance with paragraph (3)(a), it must serve upon the Council a new Completion Notice for the Works it has rectified and the process in respect of Completion of the Works in this clause 7.4 apply to the Works set out in the new Completion Notice.

7.5 Acceptance of Works

Council accepts ownership, possession and control of, and risk in, any Works carried out on Designated Land when:

- (1) those Works are Completed; and
- (2) the relevant land has been dedicated to Council.

7.6 Works-As-Executed-Plan

No later than forty (40) business days after an item of Work is Completed, the Developer must provide to the Council with:

- (1) a full Works-As-Executed-Plan in respect of the relevant item of Work that has been Completed; and
- (2) all appropriate certificates to verify that the item of Work have been carried out in accordance with relevant standards

8 Defects Liability

8.1 Defects Notice

- (1) Where any part of the Works has been Completed but those Works contain a material defect which:
 - (a) adversely affects the ordinary use and/or enjoyment of the relevant Works; or
 - (b) will require maintenance or rectification works to be performed on them at some time in the future as a result of the existence of the defect,

(Defect) Council may issue a defects notice (**Defects Notice**) concerning those Works but only within the Defects Liability Period.
- (2) A Defects Notice must contain the following information:
 - (a) the nature and extent of the Defect;
 - (b) the work Council requires the Developer to carry out in order to rectify the Defect; and
 - (c) the time within which the Defect must be rectified (which must be a reasonable time and not less than twenty-eight (28) business days).

8.2 Developer to Rectify Defects

- (1) The Developer must rectify the Defects contained within a Defects Notice as soon as practicable after receipt of the Defects Notice.
- (2) The Developer must follow the procedure set out in clause 7 in respect of the satisfaction of the Defects Notice (as if it were a Rectification Notice).

8.3 Right of Council to Step-In

Council may, at its absolute discretion, enter upon the Land for the purpose of satisfying the Defects Notice where the Developer has failed to comply with a Defects Notice but only after giving the Developer seven (7) days written notice of its intention to do so.

8.4 Consequence of Step-In

If Council elects to exercise the step-in rights granted to it under clause 8.3 then:

- (1) Council may:
 - (a) enter upon any part of the Land that it requires access to in order to satisfy the obligations of the Developer in accordance with the Defects Notice; and
 - (b) rectify the relevant Defects in accordance with the Defects Notice; and
- (2) the Developer must not impede or interfere with Council in undertaking that work.

8.5 Costs of Council

Where Council exercises its step-in rights Council, in rectifying the relevant Defects may:

- (1) call upon the Defects Security provided by the Developer pursuant to clause 10; and
- (2) recover as a debt due any difference between the amount of the Defects Security and the reasonable costs incurred by the Council in rectifying the Defects.

9 Developer Warranties and Indemnities

9.1 Warranties

The Developer warrants to Council that it is:

- (1) legally and beneficially entitled to the Land;
- (2) able to fully comply with its obligations under this document;
- (3) it has full capacity to enter into this document; and
- (4) there is no legal impediment to it entering into this document, or performing the obligations imposed under it.

9.2 Indemnity

The Developer indemnifies Council in respect of any Claim that may arise as a result of the conduct of the Works but only to the extent that any such Claim does not arise as a result of the act, negligence, default or omission of Council its agents employees or contractors.

10 Security

10.1 Provision of Security

Subject to paragraph 10.2, prior to the issue of a Construction Certificate, the Developer must deliver to Council separate irrevocable and unconditional undertakings:

- (1) for the amount equivalent to the sum of all Contribution Values (**Primary Security**); and
- (2) for an amount equivalent to fifteen (15%) of the sum of all Contribution Values for the Works (**Defects Security**),

(collectively referred to as the **Security**). The Security may contain an expiry date that is no earlier than the date that is twelve (12) months after the estimated date that the Works will be completed.

10.2 Replacement of Security

- (1) The Developer may replace any Security provided by it at any time, provided that the amount of that replacement is not less than that which is required to be provided under this document
- (2) On receipt of a replacement Security, Council must immediately release the Security being replaced and return it to the Developer.

10.3 Council may call on Security

- (1) If the Developer commits an Event of Default Council, without limiting any other remedies available to it, may call on any Security provided by the Developer.
- (2) If Council calls on any Security, it may use the amount so paid to it in satisfaction of any costs incurred by it in remedying the relevant Event of Default.

10.4 Top up of Security

If Council calls on the Security, Council, by notice in writing to the Developer, may require the Developer to provide a further or replacement Security in an amount that, when added to any unused portion of any Security then held by Council, does not exceed the amount of the Security Council is entitled to hold at that time under this document.

10.5 Release of Primary Security

Unless:

- (1) Council has made or intends to make a demand against any Security provided by the Developer;
- (2) the Development Contributions on account of which that Security was provided have not been made; or
- (3) the Developer is in breach of this document at the relevant time,

Council, upon a written request being made by the Developer, must return the Primary Security within ten (10) business days of such a request being made.

10.6 Release of Defects Security

Unless:

- (1) Council has made or intends to make a demand against any Security provided by the Developer;
- (2) the relevant Defects Liability Period has not expired; or
- (3) the Developer is in breach of this document at the relevant time,

Council, upon a written request being made by the Developer, must return the Defects Security within ten (10) business days of such a request being made.

10.7 Indexation of value of Security value

Not used

10.8 Compulsory acquisition of the Designated Land

- (1) The Developer consents to the compulsory acquisition of the Designated Land:
 - (a) in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW) (Acquisition Act)*; and
 - (b) on the terms set out in this clause 10.8.
- (2) Council may only acquire the Designated Land compulsorily in accordance with the Acquisition Act if the Developer has committed an Event of Default with respect to the dedication of that land under this document.
- (3) If Council acquires the Designated Land compulsorily in accordance with the Acquisition Act:
 - (a) the Developer agrees that the compensation payable to it on account of that acquisition under the Acquisition Act is \$1.00; and
 - (b) Council must complete that acquisition within twelve (12) months of the relevant Event of Default.
- (4) The parties agree that the provisions of this clause 10.8 are an agreement with respect to the compulsory acquisition of the Designated Land for the purpose of s30 of the Acquisition Act.

10.9 Developer must not deal with property

- (1) The Developer must not during the term of this document Assign the Designated Land without first obtaining Council's consent in writing.
- (2) Council will not unreasonably withhold its consent to any request to Assign the Designated Land issued by the Developer.

11 Registration of this document

11.1 Registration

This document will be registered on the title of the Land pursuant to s 93H of the Act.

11.2 Obligations of Developer

The Developer must:

- (1) do all things necessary to allow the registration of this document to occur under paragraph (1); and
- (2) pay any reasonable costs incurred by Council in undertaking that registration.

11.3 Release by Council

The Council agrees to provide the Developer with a release and discharge of this document from any part of the Land with respect to which the Developer has complied with its obligations under this document (**Release Land**).

12 Review & Amendment

12.1 Negotiation of review

If either party requests a review of the whole or any part of this document then the parties must use their best endeavours, acting in good faith, to review this document in accordance with that request.

12.2 Amendment to be in writing

If the parties agree to amend this document as a result of a review conducted under clause 12.1 then any such amendment must be made in writing signed by both parties.

13 Dispute Resolution

13.1 Notice of dispute

- (1) If a dispute or lack of certainty between the parties arises in connection with this document or its subject matter (**Dispute**), then either party (**First Party**) must give to the other (**Second Party**) a notice which:
 - (a) is in writing;
 - (b) adequately identifies and provides details of the Dispute;
 - (c) stipulates what the First Party believes will resolve the Dispute; and
 - (d) designates its representative (**Representative**) to negotiate the Dispute.
- (2) The Second Party must, within five (5) Business Days of service of the notice of dispute, provide a notice to the First Party designating as its representative a person to negotiate the Dispute (the representatives designated by the parties being together, the **Representatives**).

13.2 Conduct pending resolution

The parties must continue to perform their respective obligations under this document if there is a Dispute but will not be required to complete the matter the subject of the Dispute, unless the

appropriate party indemnifies the other parties against costs, damages and all losses suffered in completing the disputed matter if the Dispute is not resolved in favour of the indemnifying party.

13.3 Further steps required before proceedings

Subject to clauses 13.14 and 13.15 and except as otherwise expressly provided in this document, any Dispute must, as a condition precedent to the commencement of litigation, mediation under clause 13.5 or determination by an expert under clause 13.6, first be referred to the Representatives. The Representatives must endeavour to resolve the dispute within five (5) Business Days of the date a notice under clause 13.1(2) is served.

13.4 Disputes for mediation or expert determination

If the Representatives have not been able to resolve the Dispute, then the parties must agree within five (5) Business Days to either refer the matter to mediation under clause 13.5 or expert resolution under clause 13.6.

13.5 Disputes for mediation

- (1) If the parties agree in accordance with clause 13.4 to refer the Dispute to mediation, the mediation must be conducted by a mediator agreed by the parties and, if the parties cannot agree within five (5) Business Days, then by a mediator appointed by the President of the Law Society of New South Wales for the time being.
- (2) If the mediation referred to in paragraph (1) has not resulted in settlement of the Dispute and has been terminated, the parties may agree to have the matter determined by expert determination under clause 13.6.

13.6 Choice of expert

- (1) If the Dispute is to be determined by expert determination, this clause 13.6 applies.
- (2) The Dispute must be determined by an independent expert in the relevant field:
 - (a) agreed between and appointed jointly by the parties; or
 - (b) in the absence of document within five (5) Business Days after the date that the matter is required to be determined by expert determination, appointed by the President of the Law Society of New South Wales for the time being.
- (3) If the parties fail to agree as to the relevant field within five (5) Business Days after the date that the matter is required to be determined by expert determination, either party may refer the matter to the President of the Law Society of New South Wales for the time being whose decision as to the relevant field is final and binding on the parties.
- (4) The expert appointed to determine a Dispute:
 - (a) must have a technical understanding of the issues in dispute;
 - (b) must not have a significantly greater understanding of one party's business, functions or operations which might allow the other side to construe this greater understanding as a bias; and
 - (c) must inform the parties before being appointed of the extent of the expert's understanding of each party's business or operations and, if that information indicates a possible bias, then that expert must not be appointed except with the written approval of the parties.
- (5) The parties must promptly enter into and document with the expert appointed under this clause 13.6 setting out the terms of the expert's determination and the fees payable to the expert.

13.7 Directions to expert

- (1) In reaching a determination in respect of a dispute under clause 13.6, the independent expert must give effect to the intent of the parties entering into this document and the purposes of this document.
- (2) The expert must:
 - (a) act as an expert and not as an arbitrator;
 - (b) proceed in any manner as the expert thinks fit without being bound to observe the rules of natural justice or the rules of evidence;
 - (c) not accept verbal submissions unless both parties are present;
 - (d) on receipt of a written submission from one party, ensure that a copy of that submission is given promptly to the other party;
 - (e) take into consideration all documents, information and other material which the parties give the expert which the expert in its absolute discretion considers relevant to the determination of the Dispute;
 - (f) not be expected or required to obtain or refer to any other documents, information or material (but may do so if the expert so wishes);
 - (g) issue a draft certificate stating the expert's intended determination (together with written reasons), giving each party ten (10) Business Days to make further submissions;
 - (h) issue a final certificate stating the expert's determination (together with written reasons); and
 - (i) act with expedition with a view to issuing the final certificate as soon as practicable.
- (3) The parties must comply with all directions given by the expert in relation to the resolution of the Dispute and must within the time period specified by the expert, give the expert:
 - (a) a short statement of facts;
 - (b) a description of the Dispute; and
 - (c) any other documents, records or information which the expert requests.

13.8 Expert may commission reports

- (1) Subject to paragraph (2):
 - (a) the expert may commission the expert's own advisers or consultants (including lawyers, accountants, bankers, engineers, surveyors or other technical consultants) to provide information to assist the expert in making a determination; and
 - (b) the parties must indemnify the expert for the cost of those advisers or consultants in accordance with clause 13.6(5) of this deed.
- (2) The parties must approve the costs of those advisers or consultants in writing prior to the expert engaging those advisers or consultants.

13.9 Expert may convene meetings

- (1) The expert must hold a meeting with all of the parties present to discuss the Dispute. The meeting must be conducted in a manner which the expert considers appropriate. The meeting may be adjourned to, and resumed at, a later time in the expert's discretion.

-
- (2) The parties agree that a meeting under paragraph (1) is not a hearing and is not an arbitration.

13.10 Other courses of action

If:

- (1) the parties cannot agree in accordance with clause 13.4 to refer the matter to mediation or determination by an expert; or
- (2) the mediation referred to in clause 13.5 has not resulted in settlement of the dispute, the mediation has been terminated and the parties have not agreed to refer the matter to expert determination within five (5) Business Days after termination of the mediation,

then either party may take whatever course of action it deems appropriate for the purpose of resolving the Dispute.

13.11 Confidentiality of information provided in dispute resolution process

- (1) The parties agree, and must procure that the mediator and the expert agree as a condition of his or her appointment:
- (a) subject to paragraph (2), to keep confidential all documents, information and other material disclosed to them during or in relation to the mediation or expert determination;
 - (b) not to disclose any confidential documents, information and other material except:
 - (i) to a party or adviser or consultant who has signed a confidentiality undertaking; or
 - (ii) if required by Law or any Authority to do so; and
 - (c) not to use confidential documents, information or other material disclosed to them during or in relation to the mediation or expert determination for a purpose other than the mediation or expert determination.
- (2) The parties must keep confidential and must not disclose or rely upon or make the subject of a subpoena to give evidence or produce documents in any arbitral, judicial or other proceedings:
- (a) views expressed or proposals or suggestions made by a party or the mediator or the expert during the expert determination or mediation relating to a possible settlement of the Dispute;
 - (b) admissions or concessions made by a party during the mediation or expert determination in relation to the Dispute; and
 - (c) information, documents or other material concerning the dispute which are disclosed by a party during the mediation or expert determination unless such information, documents or facts would be discoverable in judicial or arbitral proceedings.

13.12 Final determination of expert

The parties agree that the final determination by an expert will be final and binding upon them except in the case of fraud or misfeasance by the expert.

13.13 Costs

If any independent expert does not award costs, each party must contribute equally to the expert's costs in making the determination.

13.14 Remedies available under the Act

This clause 13 does not operate to limit the availability of any remedies available to Council under the Act.

13.15 Urgent relief

This clause 13 does not prevent a party from seeking urgent injunctive or declaratory relief concerning any matter arising out of this document.

14 Breach of this document

14.1 Breach Notice

If the Developer breaches this document, Council may serve a notice on the Developer (**Breach Notice**) specifying:

- (1) the nature and extent of the alleged breach;
- (2) if:
 - (a) the breach is capable of being rectified other than by the payment of compensation, what Council requires the Developer to do in order to rectify the breach; or
 - (b) the breach is not capable of being rectified other than by payment of compensation, the amount of compensation Council requires the Developer to pay in order to rectify the breach, and
- (3) the time within which Council requires the breach to be rectified, which must be a reasonable time of not less than sixty (60) business days.

14.2 Events of Default

The Developer commits an "Event of Default" if it:

- (1) fails to comply with a Breach Notice; or
- (2) becomes subject to an Insolvency Event.

14.3 Consequences of Events of default

Where the Developer commits an Event of Default, Council may, in addition to any rights it has at Law or under this document, call on the Security to the extent of any compensation claimed in a Breach Notice and not paid by the Developer.

15 Termination

15.1 Termination

This document terminates in the following events:

- (1) The parties agree in writing to terminate the operation of this document at any time.
- (2) Council serves notice on the Developer terminating this document where the Developer has failed to comply with a notice issued in accordance with 14.1.

15.2 Consequence of termination

Upon termination of this document:

- (1) all future rights and obligations of the parties are discharged; and

-
- (2) all pre-existing rights and obligations of the parties continue to subsist.

16 Position of Council

16.1 Consent authority

The parties acknowledge that Council is a consent authority with statutory rights and obligations pursuant to the terms of the Planning Legislation.

16.2 Document does not fetter discretion

This document is not intended to operate to fetter, in any unlawful manner:

- (1) the power of Council to make any Law; or
- (2) the exercise by Council of any statutory power or discretion,

(Discretion).

16.3 Severance of provisions

- (1) No provision of this document is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this document is held by a court of competent jurisdiction to constitute an unlawful fetter on any Discretion, the parties agree:
 - (a) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause 16 is substantially satisfied;
 - (b) in the event that paragraph (1)(a) cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this document has full force and effect; and
 - (c) to endeavour to satisfy the common objectives of the parties on relation to the provision of this document which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.
- (2) Where the Law permits Council to contract out of a provision of that Law or gives Council power to exercise a Discretion, then if Council has in this document contracted out of a provision or exercised a Discretion under this document, then to the extent of this document is not to be taken to be inconsistent with the Law.

16.4 No Obligations

Nothing in this document will be deemed to impose any obligation on Council to exercise any of its functions under the Act in relation to the Development Consent, the Land or the Development in a certain manner.

17 Confidentiality

17.1 Document not Confidential

The terms of this document are not confidential and this document may be treated as a public document and exhibited or reported without restriction by any party.

17.2 Other Confidential Information

- (1) The parties acknowledge that:
 - (a) Confidential Information may have been supplied to some or all of the parties in the negotiations leading up to the making of this document.

-
- (b) The parties may disclose to each other further Confidential Information in connection with the subject matter of this document.
 - (c) Subject to paragraphs (2) and (3), each party agrees:
 - (i) not to disclose any Confidential document received before or after the making of this document to any person without the prior written consent of the party who supplied the Confidential Information; or
 - (ii) to take all reasonable steps to ensure all Confidential Information received before or after the making of this document is kept confidential and protected against unauthorised use and access.
- (2) A party may disclose Confidential Information in the following circumstances:
- (a) in order to comply with the Law, or the requirements of any Authority; or
 - (b) to any of their employees, consultants, advisers, financiers or contractors to whom it is considered necessary to disclose the information, if the employees, consultants, advisers, financiers or contractors undertake to keep the information confidential.
- (3) The obligations of confidentiality under this clause do not extend to information which is public knowledge other than as a result of a breach of this clause.

18 GST

18.1 Defined GST Terms

Defined terms used in this clause 18 have the meaning ascribed to them in the GST Law.

18.2 GST to be Added to Amounts Payable

- (1) If GST is payable on a Taxable Supply made under, by reference to or in connection with this document, the party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- (2) This clause does not apply to the extent that the Consideration for the Taxable Supply is expressly agreed to be GST inclusive.
- (3) Unless otherwise expressly stated, prices or other sums payable or Consideration to be provided under or in accordance with this document are exclusive of GST.

18.3 GST Obligations to Survive Termination

This clause 18 will continue to apply after expiration of termination of this document.

19 Miscellaneous

19.1 Obligation to act in good faith

The parties must at all times:

- (1) cooperate and use their best endeavours to profitably and professionally give effect to their rights and obligations set out in this document;
- (2) not unreasonably delay any action, approval, direction, determination or decision which is required of them;
- (3) make approvals or decisions that are required of them in good faith and in a manner consistent with the completion of the transactions set out in this document; and
- (4) be just and faithful in their activities and dealings with the other parties.

19.2 Legal costs

The Developer agrees to:

- (1) pay or reimburse the reasonable legal costs and disbursements of Council of the negotiation, preparation, execution, and stamping of this document;
- (2) pay the reasonable legal costs and disbursements referred to in paragraph (1) within fourteen (14) days of receipt of a Tax Invoice from Council; and
- (3) pay or reimburse the legal costs and disbursements of Council arising from the ongoing administration and enforcement of this document including any breach or default by the Developer of its obligations under this document.

20 Administrative Provisions

20.1 Notices

- (1) Any notice, consent or other communication under this document must be in writing and signed by or on behalf of the person giving it, addressed to the person to whom it is to be given and:
 - (a) delivered to that person's address;
 - (b) sent by pre-paid mail to that person's address; or
 - (c) transmitted by facsimile to that person's address.
- (2) A notice given to a person in accordance with this clause is treated as having been given and received:
 - (a) if delivered to a person's address, on the day of delivery if a Business Day, otherwise on the next Business Day;
 - (b) if sent by pre-paid mail, on the third Business Day after posting; and
 - (c) if transmitted by facsimile to a person's address and a correct and complete transmission report is received, on the day of transmission if a Business Day, otherwise on the next Business Day.
- (3) For the purpose of this clause the address of a person is the address set out in this document or another address of which that person may from time to time give notice to each other person.

20.2 Entire Document

This document is the entire agreement of the parties on the subject matter. All representations, communications and prior agreements in relation to the subject matter are merged in and superseded by this document.

20.3 Waiver

The non-exercise of or delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the parties to be bound by the waiver.

20.4 Cooperation

Each party must sign, execute and deliver all agreements, documents, instruments and act reasonably and effectively to carry out and give full effect to this document and the rights and obligations of the parties under it.

20.5 Counterparts

This document may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

20.6 Amendment

This document may only be amended or supplemented in writing signed by the parties.

20.7 Unenforceability

Any provision of this document which is invalid or unenforceable in any jurisdiction is to be read down for the purposes of that jurisdiction, if possible, so as to be valid or enforceable, and is otherwise capable of being severed to the extent of the invalidity or enforceability, without affecting the remaining provisions of this document or affecting the validity or enforceability of that provision in any other jurisdiction.

20.8 Power of Attorney

Each attorney who executes this document on behalf of a party declares that the attorney has no notice of:

- (1) the revocation or suspension of the power of attorney by the grantor; or
- (2) the death of the grantor.

20.9 Governing law

The law in force in the State of New South Wales governs this document. The parties:

- (1) submit to the exclusive jurisdiction of the courts of New South Wales and any courts that may hear appeal from those courts in respect of any proceedings in connection with this document; and
- (2) may not seek to have any proceedings removed from the jurisdiction of New South Wales on the grounds of *forum non conveniens*.

Schedule 1– Requirements Under Section 93f

REQUIREMENT UNDER THE ACT	THIS PLANNING AGREEMENT
<p>Planning instrument and/or development application – (Section 93F(1))</p> <p>The Developer has:</p> <p>(c) sought a change to an environmental planning instrument.</p> <p>(d) made, or proposes to make, a Development Application.</p> <p>(e) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.</p>	<p>(a) Yes</p> <p>(b) Yes</p> <p>(c) No</p>
<p>Description of land to which this agreement applies – (Section 93F(3)(a))</p>	<p>Wentworthville Mall</p> <p>42-44 Dunmore Street, and 9 Pritchard Street, Wentworthville contained in the following folio identifier:</p> <p>Lot 11 DP 746514</p>
<p>Description of change to the environmental planning instrument to which this agreement applies – (Section 93F(3)(b))</p>	<p>a) Maximum building height of 62m (approx. 18 storeys) fronting Dunmore Street and 30m (approx. 8 storeys) fronting Pritchard Street East.</p> <p>b) A maximum floor space ratio of 4:1 across the site.</p> <p>c) A provision that enables a floor space bonus of 1:1 for the construction of a full line supermarket of minimum 4,000sqm GLFA on the subject site.</p> <p>d) A provision that enables a floor space bonus of 0.5:1 for the provision of a minimum 4,400sqm NLFA commercial floor space above ground floor.</p> <p>e) A provision that requires a 'design excellence' process as stated in the Cumberland Design Excellence Guidelines, for buildings over 30m (approx. 8 storeys) and a floor space bonus of 0.5:1 and height bonus of 10% (increase of approx. 2 storeys) fronting Dunmore Street, if Council is satisfied that design excellence is achieved.</p> <p>f) Zoning of the Designated Land on the map shown in Annexure 2 as SP2 Infrastructure.</p> <p>Refer to Annexure 1 for LEP maps.</p>
<p>Application of section 94 of the Act – (Section 93F(3)(d))</p>	<p>Applies to the extent that it is not excluded under clause 4.1(2) of the Planning Agreement.</p>
<p>Applicability of section 94A of the Act – (Section 93F(3)(d))</p>	<p>Does not apply</p>

Consideration of benefits under this agreement if section 94 applies – (Section 93F(3)(e))	Refer to clause 4.2 of the Planning Agreement.
Mechanism for Dispute resolution – (Section 93F(3)(f))	See clause 13.
Enforcement of this agreement (Section 93F(3)(g))	See clause 10 and 13.
No obligation to grant consent or exercise functions – (Section 93F(3)(9))	See clause 16.

Schedule 2 – Defined Terms and Interpretation

Part 1 – Definitions

Act	means the <i>Environmental Planning and Assessment Act 1979</i> (NSW).
Assign	as the context requires refers to any assignment, sale, transfer, disposition, declaration of trust over or other assignment of a legal and/or beneficial interest.
Authority	means (as appropriate) any: <ol style="list-style-type: none">(1) federal, state or local government;(2) department of any federal, state or local government;(3) any court or administrative tribunal; or(4) statutory corporation or regulatory body.
Claim	against any person any allegation, action, demand, cause of action, suit, proceeding, judgement, debt, damage, loss, cost, expense or liability howsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at law, in equity, under statute or otherwise.
Completed	means completed in accordance with the requirements of this document.
Completion Notice	has the meaning ascribed in clause 7.2.
Confidential Information	means any information and all other knowledge at any time disclosed (whether in writing and orally) by the parties to each other, or acquired by the parties in relation to the other's activities or services which is not already in the public domain and which: <ol style="list-style-type: none">(1) is by its nature confidential;(2) is designated, or marked, or stipulated by either party as confidential (whether in writing or otherwise);(3) any party knows or ought to know is confidential; and(4) is information which may be reasonably considered to be of a confidential nature.
Construction Certificate	has the meaning ascribed to that term in the Act.
Contributions	means the Works and the Designated Land
Contribution Values	means the contribution amounts specified in Schedule 4 .
Defect	has the meaning ascribed to it in clause 8.
Defects Notice	has the meaning ascribed to it in clause 8.1

Defects Liability Period	means 12 Months
Defects Security	has the meaning ascribed to it in clause 10.
Designated Land	means that part of the Land outlined in red on the plan attached as Annexure 2 .
Development	Has the meaning ascribed to it under the Act
Development Application	means an application for the Development Consent.
Development Consent	means the consent issued under the Act for the Development.
Development Cost	means, in relation to an item of Work: <ul style="list-style-type: none"> (1) the construction cost of the relevant item of Work; (2) any costs incurred under a building contract in relation to the relevant item of Work; (3) the costs of any consultants engaged in relation to the relevant item of Work; or (4) any costs or expenses payable to any Authority in relation to the relevant item of Work.
Dispute	has the meaning ascribed to it in clause 13.1.
Encumbrance	means an interest or power: <ul style="list-style-type: none"> (1) reserved in or over an interest in any asset; (2) created or otherwise arising in or over any interest in any asset under any mortgage, charge (whether fixed or floating), pledge, lien, hypothecation, title retention, conditional sale agreement, hire or hire purchase agreement, option, restriction as to transfer, use or possession, easement, subordination to any right of any other person and any other encumbrance or security interest, trust or bill of sale; or (3) by way of security for the payment of a debt or other monetary obligation or the performance of any obligation. <p>Encumber means to grant an Encumbrance.</p>
Event of Default	has the meaning ascribed to it in clause 14.2.
GST Law	means <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth) and any other Act or regulation relating to the imposition or administration of the GST.
Index	means the Consumer Price Index (All Groups - Sydney) as provided by the Australian Bureau of Statistics
Instrument Change	refer to Schedule 7 .
Land	means 42-44 Dunmore St, Wentworthville Lot 11 DP 746514

Law	means all legislation, regulations, by-laws, common law and other binding order made by any Authority.
Location Plan	means the plan attached as Annexure 2 .
Planning Legislation	means the Act, the <i>Roads Act 1993</i> (NSW) and the <i>Local Government Act 1993</i> (NSW).
Primary Security	has the meaning ascribed to it in clause 10.
Quantity Surveyor	means a person who: <ul style="list-style-type: none"> (1) is a member of their respective professional organisation and has been for at least five (5) years; (2) practises as a quantity surveyor for works of the same nature as the relevant Works; (3) is active as a quantity surveyor at the time of his appointment; (4) has at least three (3) years experience in valuing works of the same nature as the relevant Works; and (5) undertakes to act fairly and promptly in accordance with the requirements of this agreement.
Rectification Notice	has the meaning ascribed to it in clause 7.4.
Security	means collectively the Primary Security and the Defects Security
Works	means the works specified or described in Schedule 4 .
Part 2 - Interpretational Rules	
clauses, annexures and schedules	a clause, annexure or schedule is a reference to a clause in or annexure or schedule to this agreement.
reference to statutes	a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them.
singular includes plural	the singular includes the plural and vice versa.
person	the word "person" includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association or any government agency.
executors, administrators, successors	a particular person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns
dollars	Australian dollars, dollars, \$ or A\$ is a reference to the lawful currency of Australia.
calculation of time	if a period of time dates from a given day or the day of an act or event, it is to be calculated exclusive of that day.

reference to a day	a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later.
accounting terms	an accounting term is a reference to that term as it is used in accounting standards under the Corporations Act or, if not inconsistent with those standards, in accounting principles and practices generally accepted in Australia.
reference to a group of persons	a group of persons or things is a reference to any two or more of them jointly and to each of them individually.
meaning not limited	the words "include", "including", "for example" or "such as" are not used as, nor are they to be interpreted as, words of limitation, and, when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind.
next day	if an act under this agreement to be done by a party on or by a given day is done after 4.30pm on that day, it is taken to be done on the next day.
next Business Day	if an event must occur on a stipulated day which is not a Business Day then the stipulated day will be taken to be the next Business Day.
time of day	time is a reference to Sydney time.
headings	headings (including those in brackets at the beginning of paragraphs) are for convenience only and do not affect the interpretation of this agreement.
agreement	a reference to any agreement, Agreement or instrument includes the same as varied, supplemented, novated or replaced from time to time.
Gender	a reference to one gender extends and applies to the other and neuter gender.

Schedule 3 – Designated Land

Item	Time for Completion	Public Purpose
<p>The land identified as <i>land dedication area (hatched pink)</i> on the plan in Annexure 2.</p> <p>The designated land will be subject to a stratum arrangement as described in Schedule 6.</p>	<p>Prior to the issue of any Occupation Certificate in respect of the Development.</p>	<p>Public plaza at street level.</p>

Schedule 4- Works

Item of Works	Specification	Time for Completion	Contribution Value
1. Embellishment of the area identified as designated land on the drawing in Annexure 3.	To a standard and specification and finish to be agreed with Council including some or all of lighting, security, street furniture and landscaping.	Prior to the issue of any Occupation Certificate in respect of the Development.	\$832,000
2. The embellishment of the Council footpath/verge land along the frontage of Dunmore Street up to but not including the kerb and gutter, abutting the area identified as the dedicated land on the plan shown in Annexure 3.	To a standard and specification and finish to be agreed with Council including some or all of lighting, security, street furniture and landscaping.	Prior to the issue of any occupation certificate in respect of the Development.	\$316,000
3. The embellishment of Council land along Pritchard Street up to but not including the kerb and gutter as shown of plan in Annexure 3,	To a standard and specification and finish to be agreed with Council including some or all of lighting, security, street furniture and landscaping.	Prior to the issue of any occupation certificate in respect of the Development.	\$306,000
4. The provision of Public Art.	In consultation with Council's Cultural Officer.	Prior to the end of the defects liability period.	\$50,000

Schedule 5 – Public Right of Footway and Plaza

Item	Time for Completion
<p>A public right of footway of variable width is to be created and contained within the area shown in blue (walk through site) and pink (privately owned public plaza) in Annexure 4.</p> <p>The terms of the right of footway and plaza are:</p> <ol style="list-style-type: none"> 1. Public pedestrian access to go, pass and repass at all times without motorised road vehicles. 2. Permission for push bicycles, prams and domestic animals to pass and repass at all times. 3. Access by emergency services without vehicles. 4. Permit use of private open space for outdoor dining, markets or similar without the need for Council as a party to the agreement. 5. The obligation for the repair and maintenance of the private land is to be the responsibility of the land owner or its nominated representative 	<p>The issuing of any occupation certificate in respect of any development to be carried out on the Land.</p>

Schedule 6 – Stratum beneath Designated Land

Item	Time for Completion
<p>A stratum below the final finished ground level is to be established directly below the area of designated land. This is to allow for basement parking in the development. The Developer will retain ownership of the stratum.</p> <p>The stratum is to be of sufficient depth to accommodate any services and provide a buffer in the event of any future need for excavation.</p> <p>The detail of the stratum is to be finalised in the development consent.</p>	<p>The issuing of a construction certificate in respect of any development to be carried out on the Land.</p>

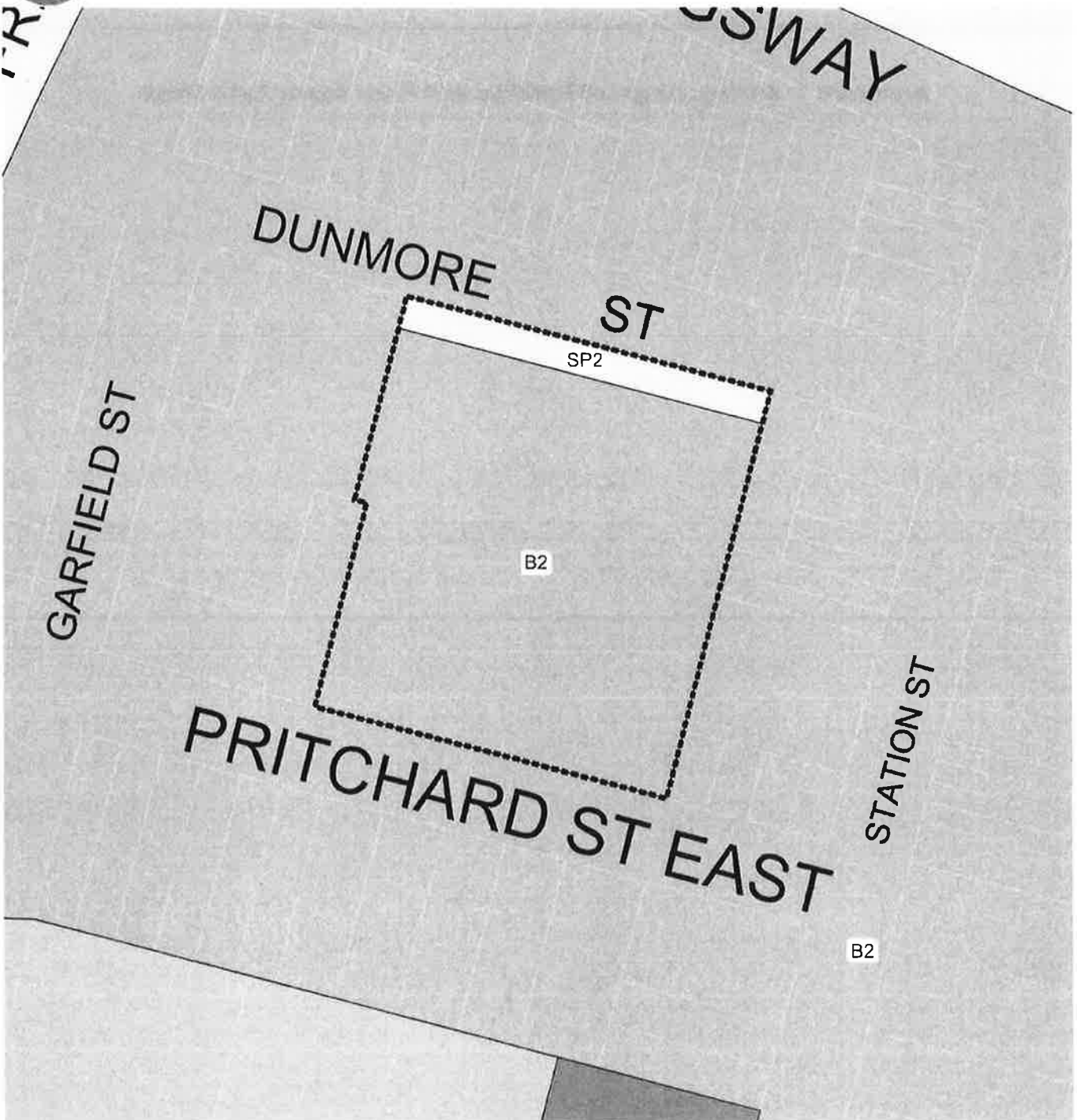
Schedule 7 – Description of Instrument Change

The instrument change is as described below and shown on the attached Zoning, Height of Buildings and Floor Space Ratio maps in Annexure 1.

1. Building height of 62 meters fronting Dunmore Street and 30 meters fronting Pritchard Street.
2. Floor space ratio of 4:1 across the site, including the Designated Land on the map shown in Annexure 2.
3. A provision that enables a floor space bonus of 1:1 for the construction of a full-line supermarket of minimum 4,000sqm GLFA on the subject site.
4. A provision that enables a floor space bonus of 0.5:1 for the provision of a minimum 4,400sqm NLFA commercial floor space above ground floor.
5. A provision that requires a 'design excellence' process as stated in the Cumberland Design Excellence Guidelines, for buildings over 30m (approx. 8 storeys) and a floor space bonus of 0.5:1 and height bonus of 10% (increase of approx. 2 storeys) fronting Dunmore Street, if Council is satisfied that design excellence is achieved.
6. Zoning of the Designated Land on the map shown in Annexure 2 as SP2 Infrastructure.

Annexure 1- Zoning, Height of Building and Floor Space Ratio Maps

Draft LEP 2013 Amendment
42-44 Dunmore St, Wentworthville
Land Zoning



LAND ZONING

B1	Neighbourhood Centre	R2	Low Density Residential
B2	Local Centre	R3	Medium Density Residential
B4	Mixed Use	R4	High Density Residential
B5	Business Development	RE1	Public Recreation
B6	Enterprise Corridor	RE2	Private Recreation
B7	Business Park	SP2	Infrastructure
E2	Environmental Conservation	UL	Unzoned Land
IN1	General Industrial	MD	SEPP (Major Development) 2005
IN2	Light Industrial	WSE	SEPP (Western Sydney Employment Area) 2009

Print Date: 30/03/2017
Scale 1: 1300



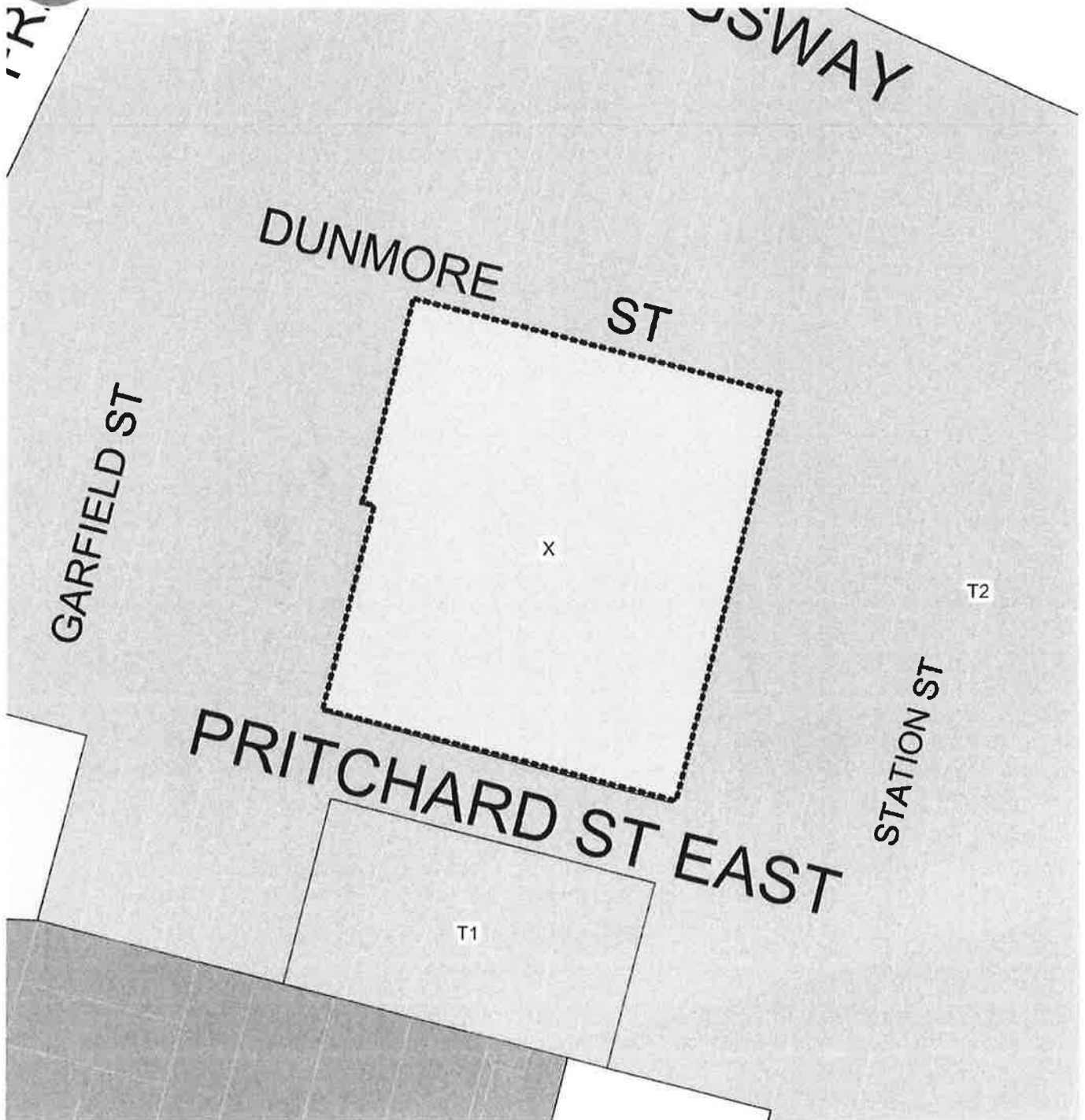
42-44 Dunmore St,
Wentworthville

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Draft LEP 2013 Amendment

42-44 Dunmore St, Wentworthville

Floor Space Ratio



Maximum Floor Space Ratio (n:1)

D	0.5
H	0.7
K	0.85
N	1
P	1.2
Q	1.3
S1	1.5
S2	1.8
S3	1.9
T1	2
T2	2.2

T3	2.4
U1	2.5
U2	2.8
V1	3
V2	3.2
W	3.5
X	4
Y	4.5
Z1	5
Z2	5.5
AA1	6

AA2	6.5
AB	7.5
AC	8.5
AD	9

Print Date: 30/03/2017
Scale 1: 1300

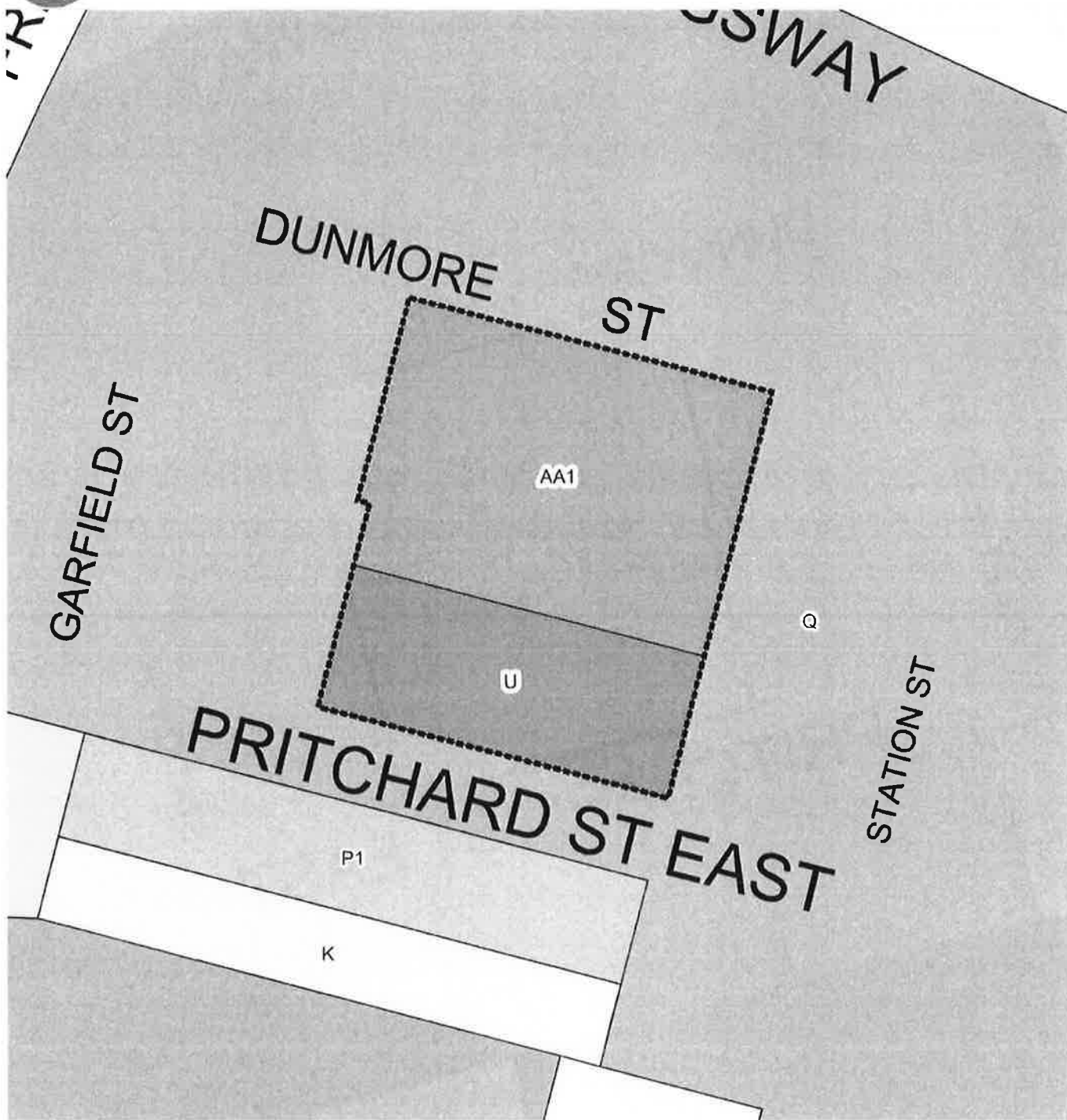


42-44 Dunmore St,
Wentworthville

Draft LEP 2013 Amendment

42-44 Dunmore St, Wentworthville

Height of Buildings



Maximum Building Height (m)

J	9	S1	23	X2	48
K	10	S2	24	Y1	53
L	11	T1	26	Y2	54
M	12.5	T2	27	AA1	62
N	14	T3	29	AA2	65
O	15	U	30		
P1	17	V1	38		
P2	18	V2	39		
Q	20	W	41		
R	21	X1	45		

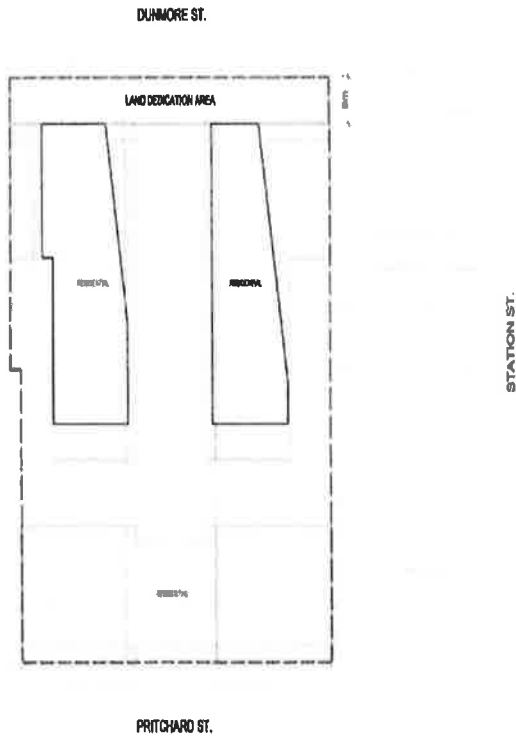
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42-44 Dunmore St,
Wentworthville

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Annexure 2- Location Plan and Designated Land



TOTAL SITE AREA: 8952m²
LAND DEDICATION AREA: 724m²

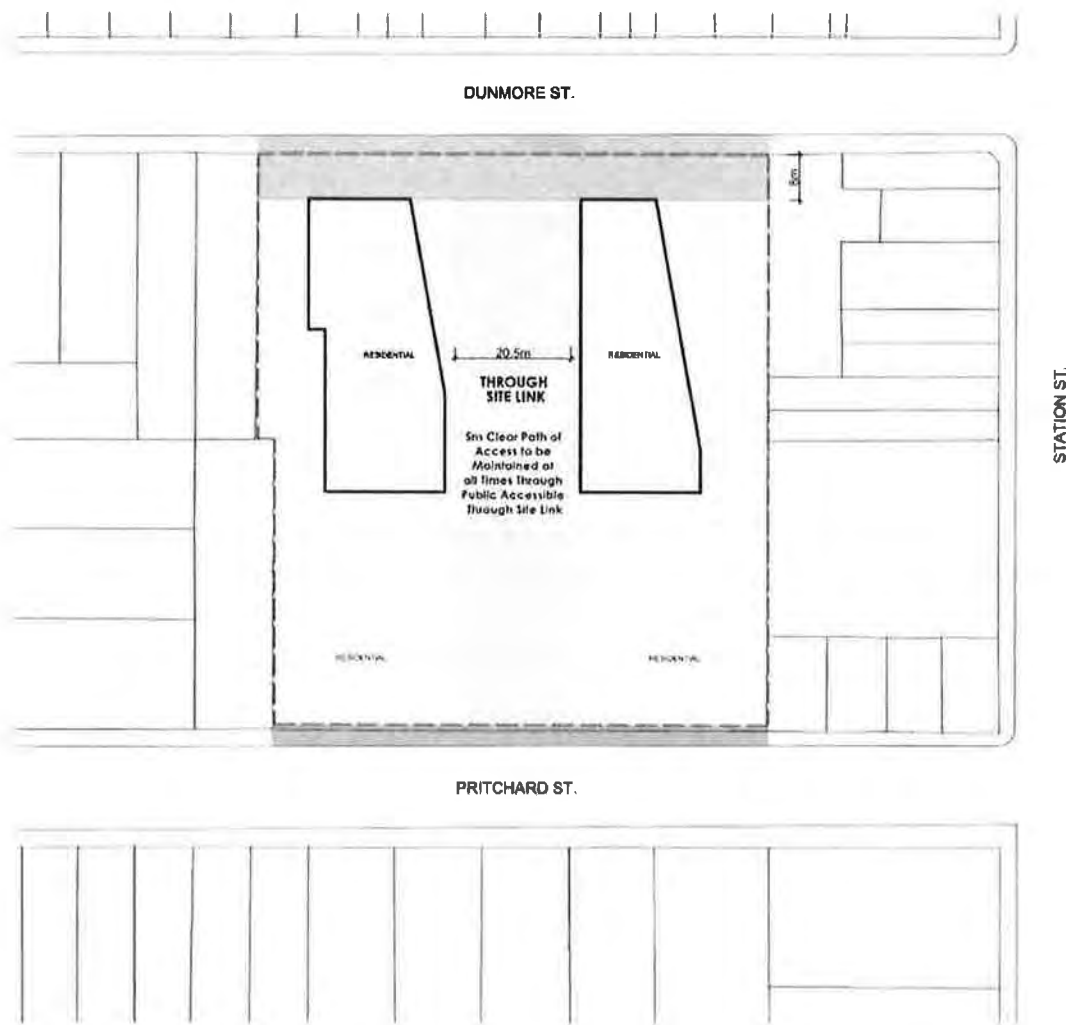
42-44 Dunmore Street, Wentworthville
Prepared For Austro Group

Preliminary Planning Studies
JUNE 2016

Wentworthville Mail Site Plan
Land Dedication

Scale 1 500 4 8 12 16 20

Annexure 3 – Location of Contribution Works



eeel, Wentworthville

Preliminary Planning Studies
JULY 2016

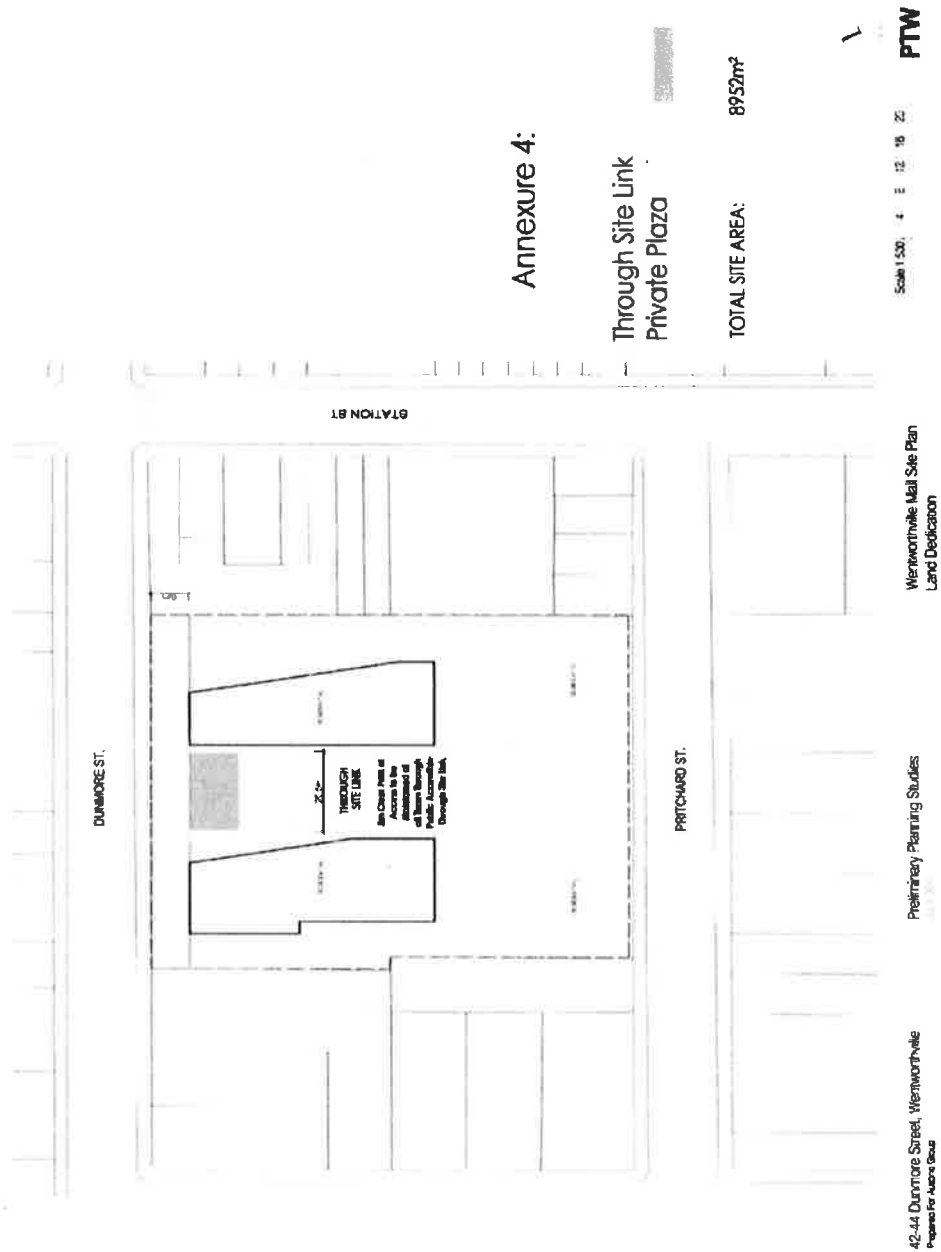
Scale 1:500, 4, 8, 12, 16, 20,

Wentworthville Mall Site Plan
Land Dedication

Annexure 3: Location of Contribution Works



Annexure 4 – Location of Right of Footway and Plaza Land



Execution page

Executed as an agreement.

Dated:

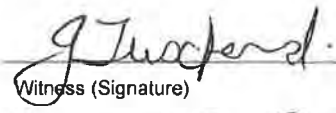
Executed by Cumber and Council by its General Manager and witness in accordance with resolution dated



General Manager (Signature)

Malcolm Ryan

Name of General Manager (Print Name)

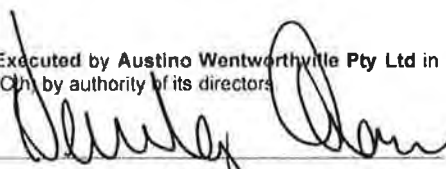


Witness (Signature)

Janice Tuxford

Name of Witness (Print Name)

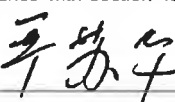
Executed by Austino Wentworthville Pty Ltd in accordance with section 127(1) of the *Corporations Act 2001* (Cth) by authority of its directors



Director/Secretary (Signature)

HEMING QUAN

Name of Director/ Secretary (Print Name)



Director (Signature)

SUHUA YAN

Name of Director (Print Name)