

PLANNING AGREEMENT

This Deed of Planning Agreement made on 26th day of August, 2009

BETWEEN

COUNCIL OF THE CITY OF LAKE MACQUARIE (ABN 81 065 027 686) of Administrative Centre, 126 -138 Main Road, Speers Point, NSW 2284 ("Council") of the one part

AND

THE DEVELOPER described in Item 1 of the Schedule (Developer) of the other part

RECITALS

- A The Developer has made a Development Application to the Council for Development Consent to carry out the Development on the Land.
- B The Development Application is accompanied by an offer by the Developer to enter into this Agreement and make a Development Contribution.

OPERATIVE PROVISIONS

1 Definitions and Interpretation:

- 1.1 In this Agreement the following definitions apply, unless the context admits otherwise:

"Act" means the Environmental Planning & Assessment Act 1979 (NSW).

"Bank Guarantee" means an unconditional and irrevocable undertaking issued by a major Australian trading bank in favour of the Council and which does not have an expiry date and is otherwise in form and substance acceptable to the Council, to pay on demand to the Council in Australian dollars the Guarantee Amount.

"Commencement Date" is the date this agreement is made.

"Construction Certificate" means a certificate under Part 4A of the Act.

"Dealing" in relation to the Land or any part of the Land, means, without limitation, a sale, transfer, assignment, mortgage, charge, encumbrance or other dealing with the Land or that part of the Land.

"Dedicate" means to dedicate as public reserve without cost to the Council.

"Development" is that described in Item 3.

"Development Application" has the same meaning in the Act and refers to the Development Application in Item 4.

"Development Consent" has the same meaning as in the Act and is related to the Development.

"Development Contribution" means the total of the three amounts referred to in Item 6 of this Agreement.

"GST" has the same meaning as in the GST Law.

"GST Law" has the meaning given to that term in *A New Tax System (Goods & Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

"Guarantee Amount" is the amount stated in Item 7 of this Agreement.

"Land" means the land described in Item 2 of this Agreement

"LPI" is the Land and Property Information section of the Department of Lands.

"Party" means a party to this Agreement, including its successors and assigns.

"Public Facilities" means public car parking and transportation facilities.

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

- 1.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:
- a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
 - b) A reference in the Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
 - c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
 - d) A reference in the Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
 - e) A reference in this Agreement to any law, legislation or legislative provision included any statutory modification, amended or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
 - f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, notated, supplemented or replaced.
 - g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
 - h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
 - i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.

- j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- k) References to the word 'include' or 'including' are to be construed without limitation.
- l) A reference to this Agreement includes the agreement recorded in this Agreement.
- m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and they party's successors and assigns.
- n) Any Schedule and attachments form part of this Agreement.
- o) In the interpretation of this agreement no rule of construction shall apply to disadvantage one party on the basis that the party put forward the particular covenant, term or provision.
- p) A reference to an Item is a reference to the particular Item in the Schedule.

2 *Planning agreement under the Act*

This Agreement is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

3 *Application of this Agreement*

The Land to which the Agreement applies is described in Item 2.

4 *Development to which this Agreement applies*

The Development to which this Agreement applies is described in Items 3 and 4.

5 *Operation of this Agreement*

- 5.1 This Agreement takes effect on the Commencement Date.
- 5.2 If Development Consent is not granted to the Development Application within 18 months of the date hereof, either party may rescind this Agreement by giving notice to the other party.
- 5.3 If a rescission occurs under clause 5.2, the Developer is taken to have irrevocably notified the consent authority under the Act that the Developer does not want the consent authority to determine the Development Application.

6 Nature, Extent, Timing and Manner of Provision to be made by Developer

Should Development Consent issue for the Development,

6.1 The Nature and Extent of the provision to be made by the Developer.

The Developer will pay to the Council the Development Contribution to enable the Council to provide Public Facilities at the place referred to in Item 5 of the Schedule. The Development Contribution comprises the total of the three amounts referred to in Item 6.

6.2 The Time by which the provision is to be made.

The Development Contribution is to be paid to the Council by the Developer before the issue of the first Construction Certificate for the Development.

6.3 The Manner by which the provision is to be made.

The Development Contribution shall be made by delivery by the Developer to the Council of a bank cheque in Australian dollars issued by an Australian bank.

6.4 The Development Contribution is to include the amount for paragraph 3 of Item 6 calculated in accordance with the following formula:

A means the dollar (\$) amount being the total of paragraphs 1 and 2 in Item 6 in the Schedule payable prior to indexation by CPI.

CPI means the published Consumer Price Index (Sydney – All Groups), or if that index is no longer published, then any of the index which, in the reasonable opinion of the Council, is a similar index.

CPIA means the amount determined in accordance with the following formula (which may be a negative amount where D is greater than C):

$$\text{CPIA} = \frac{A \times C}{D} - A$$

where:

C = the most recent CPI prior to the date that payment is due to be made; and

D = the most recent CPI before the Commencement Date.

7 Application of s94, s94A and 94EF of the Act

7.1 This Agreement excludes the Application of sections 94 and 94A of the Act to the Development.

7.2 This Agreement does not wholly or partly exclude section 94EF of the Act in respect of the Development.

8 Registration of this Agreement

The Parties shall do all things reasonably necessary after the grant Development Consent to the Development to enable the Council to obtain registration of this Agreement under section 93H of the Act by the Registrar-General such that on registration of this Agreement, the Registrar-General will have made an entry in the relevant Folio(s) of the Register kept under the Real Property Act 1900 in relation to the Land. To that end, the Developer will deliver to the Council on the Commencement Date all requisite documents including those that have to be registered at LPI in registrable form, and all necessary consents from persons having an estate or interest in the Land, to enable the Council to obtain registration of this Agreement immediately following the grant of Development Consent (should that occur). If a rescission of this agreement under clause 5.2 occurs, the Council shall return those documents to the Developer.

9 Review of this Agreement

The Parties agree that from time to time it may become necessary to review this Agreement, but any amendment to this Agreement shall only be effective if in writing and signed by all Parties and registered under Section 93H of the Act.

10 Dispute Resolution

- 10.1 If a dispute arises out of or relates to this agreement, including any dispute as to breach or termination of this agreement or as to any claim in tort, in equity or under any legislation, a party cannot commence any court proceedings relating to the dispute unless that party has complied with the following clauses except where that party seeks urgent interlocutory relief.
- 10.2 A Party claiming that a dispute has arisen must serve a notice specifying the nature of the dispute.
- 10.3 On receipt of that notice by that other party, the parties must endeavour in good faith to resolve the dispute expeditiously using informal dispute resolution techniques such as mediation, expert evaluation or similar techniques agreed by them.
- 10.4 If the parties do not agree within 7 days of service of the notice, or any further period agreed in writing by them, as to:
- 10.4.1 The dispute resolution technique and procedures to be adopted;
 - 10.4.2 The timeline for all steps in those procedures; and
 - 10.4.3 The selection and compensation of the independent person requires for that technique,

the parties must mediate the dispute in accordance with the mediation Rules of the Law Society of New South Wales and must request the President of the Law Society of New South Wales or the President's nominee to select the mediator and determine the mediator's remuneration.

- 10.5 If informal dispute resolution is unsuccessful after 30 days, either party will be entitled to proceed to litigation.
- 10.6 Each party shall bear their own costs in relation to any informal dispute resolution technique adopted. The cost of the mediator, arbitrator or other similar person engaged by the parties shall be shared equally between the parties.

11 Enforcement

- 11.1 Until the Development Contribution has been paid to the Council by the Developer, and the funds paid have been cleared by the bank on which the bank cheque has been drawn, the Developer shall not require, permit or cause the issue of any Construction Certificate associated with the Development.
- 11.2 On the Commencement Date the Developer will deliver to the Council a Bank Guarantee in an amount equivalent to the amount specified in Item 7. The Bank Guarantee shall be irrevocable up until payment to Council of the Development Contribution.
- 11.3 In the event of any failure by the Developer to perform and/or observe a term or condition of this Agreement, the Council shall be entitled, without further notice to the Developer, to immediately call upon such Bank Guarantee to satisfy the cost incurred by the Council in doing anything under this Agreement which the Developer was required to do but did not do. If the Council uses the whole or part of the amount that is the subject of the Bank Guarantee, the Developer, upon being notified by the Council of the extent of such use, shall provide the Council with a further Bank Guarantee to restore the Council to the position in which it was prior to its calling upon the Bank Guarantee earlier lodged with it.
- 11.4 If a rescission of this Agreement occurs then provided there has not been a prior breach of this Agreement by the Developer and there are no monies owing to the Council by the Developer, the Council shall return the Bank Guarantee to the Developer.
- 11.5 Notwithstanding anything else contained in this planning agreement, the Developer shall not deal with the Land or any part of it
 - 11.5.1 until this planning agreement has been registered on the title to the Land under section 93H of the Act;
 - 11.5.2 so as to make any document given to the Council under clause 8 unacceptable to LPI or make that document or any other document associated with the land obsolete or not capable of registration at LPI by the Registrar-General in Sydney; and
 - 11.5.3 until the Development Contribution has been paid to the Council.

12 Notices

- 12.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:
- 12.1.1 Delivered or posted to the party at its address set out below.
 - 12.1.2 Faxed to that Party at its fax number set out below
 - 12.1.3 Emailed to that Party at its email address set out below

Council

Attention: Developer Contributions Coordinator,
Administrative Centre
Address: 126-138 Main Road, Speers Point NSW 2284
Fax Number: (02) 49 587 257
E-mail: council@lakemac.nsw.gov.au

Developer See Item 8.

- 12.2 If a Party gives the other Party three business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.
- 12.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:
- 12.3.1 If it is delivered, when it is left at the relevant address.
 - 12.3.2 If it is sent by post, two business days after it is posted.
 - 12.3.3 If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.
- 12.4 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.

13 Approvals and consent

Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in that party's absolute discretion and subject to any conditions determined by the party. A party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

14 *Costs*

The Developer shall bear its own costs and those of the Council incidental to the preparation, execution and stamping of this Agreement. The Developer will bear the cost of registration of this Agreement. The Developer is to pay any duty payable to the Office of State Revenue as a consequence of this Agreement.

15 *Entire Agreement*

This Agreement contains everything to which the parties have agreed in relation to the matters it deals with. No Party can rely on an earlier document or anything said or done by another Party or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.

16 *Further acts*

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

17 *Governing law and jurisdiction*

This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

18 *Joint and individual liability and benefits*

Except as otherwise set out in this Agreement any agreement, covenant, representation or warranty under this Agreement by two or more persons binds them jointly and each of them individually, and any benefit in favour of two or more persons is for the benefit of them jointly and each of them individually.

19 *No fetter*

Nothing in this Agreement 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.

20 Representations and warranties

The Parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under the Agreement and that entry into this Agreement will not result in the breach of any law.

21 Severability

If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

22 Modification

No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

23 Waiver

The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party. A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waive of that obligation or breach in relation to any other occasion.

24 GST

24.1 Construction

In this clause 24:

- (a) words and expressions which are not defined in this document but which have a defined meaning in GST Law have the same meaning as in the GST Law; and
- (b) GST Law has the same meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999*.

24.2 Consideration GST exclusive

Unless expressly stated, all prices or other sums payable or consideration to be provided under this document are exclusive of GST.

24.3 Payment of GST

If GST is payable on any supply made under this document, the recipient will pay to the supplier an amount equal to the GST payable on the supply.

24.4 Timing of GST payment

The recipient will pay the amount referred to in clause 24.3 in addition to and at the same time that the consideration for the supply is to be provided under this document.

24.5 Tax Invoice

The supplier must deliver a tax invoice or an adjustment note to the recipient before the supplier is entitled to payment of an amount under clause 24.3. The recipient can withhold payment of the amount until the supplier provides a tax invoice or adjustment note as appropriate.

24.6 Adjustment event

If an adjustment event arises in respect of a taxable supply made by a supplier under this document, the amount payable by the recipient under clause 24.3 will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the supplier or by the supplier to the recipient as the case requires.

24.7 Reimbursements

Where a party is required under this document to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:

- (a) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party, or to which the representative member for a GST group of which the other party is a member, is entitled; and
- (b) if the payment or reimbursement is subject to GST, an amount equal to that GST.

If any Party reasonably decides that it is liable to pay GST on a supply made to the other Party under this Agreement and the supply was not priced to include GST, the recipient of the supply must pay an additional amount equal to the GST on that supply.

25 *No Partnerships*

Nothing in this Agreement shall be taken to create a partnership joint venture or other such relationship between the Developer and the Council.

26 *Counterparts*

This document may consist of a number of counterparts. The counterparts taken together constitute one deed.

27 *Key Considerations*

27.1 The parties acknowledge that the following matters have been considered by each of them prior to entering into this agreement:

27.1.1 whether the public infrastructure that is proposed to be funded by the Development Contribution will be provided within a reasonable time;

27.1.2 the impact of the proposed Development Contribution on the affordability of the proposed Development;

27.1.3 the extent to which the proposed Development Contribution is based on a reasonable apportionment between existing demand and new demand for public infrastructure to be created by the proposed Development to which the Development Contribution relates;

27.1.4 whether the proposed Development Contribution is based on a reasonable estimate of the cost of proposed public infrastructure,

27.1.5 whether the estimates of demand for the item of public infrastructure to which the proposed Development Contribution relates is reasonable,

and that they consider that each of these matters has been properly and adequately taken into account under this agreement.

27.2 The parties acknowledge that the Public Facilities to be provided pursuant to this Agreement will directly serve the needs of the locality referred to in Item 5 in which the proposed Development will be situated.

28 *Lapse or surrender of Development Consent*

If a Construction Certificate has not issued for the Development and

28.1 the Development Consent lapses, or

28.2 the Development Consent is surrendered

then either party may rescind this agreement by giving notice to the other.

29 *Principal Certifying Authority*

The Developer will appoint the Council as the principal certifying authority under the Act for the Development.

The Schedule hereinbefore referred to

SCHEDULE

- Item 1:** TRILOGY ELD PTY LIMITED (ACN 129 939 680) a company duly incorporated and having its registered office at 94 Burwood Rd, Whitebridge, NSW, 2290
- Item 2:** Lot 1 DP 405436 and Lot A DP 369184 known as Nos.24C and 24D Macquarie St Belmont.
- Item 3:** The construction of commercial premises/offices with associated works on the Land.
- Item 4:** DA/618/2009 in the Council's records.
- Item 5:** Belmont.
- Item 6:**
- 1 an amount of \$59,113.30 to be used for the provision of public facilities being for public car parking and transportation facilities, and
 - 2 an amount of \$886.70 for administration costs, and
 - 3 a further amount derived from the application of clause 6.4.
- Item 7:** \$30,000.00.
- Item 8**
- Attention: Mr Paul Harragon
C/- Trilogy ELD Pty Ltd
Address: 94 Burwood Rd, Whitebridge, NSW 2290
Fax Number: (02) 49 426147
E-mail: pwh123@bigpond.com

Execution by the parties is on the next page

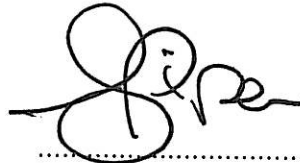
Executed as a Deed

Signed sealed and delivered by the parties

The Common Seal of Council of the)
City of Lake Macquarie was affixed)
pursuant to a resolution made on the)
24th day of August 2009)



General Manager



Mayor

Signed for and on behalf of Trilogy ELD Pty Limited
pursuant to section 127 Corporations Act 2001 (Cwth)



Sole Director and Sole Company Secretary

PAUL HARRAGON.

Print Name