
Bayside Council

Denco Pty Ltd

Monash Developments Pty Ltd

Trend Property Company Pty Ltd

Casteel Pty Ltd

The Owners-StrataPlan No 48926

Planning Agreement

Section 7.4 of the Environmental Planning
and Assessment Act, 1979 (NSW)

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Parties

Bayside Council (ABN 80 690 785 443) of 444-446 Princes Highway,
Rockdale New South Wales (**Planning Authority**)

Denco Pty Ltd (ACN 003 523 475)

Monash Developments Pty Ltd (ACN 101 137 026)

Trend Property Company (ACN 003 212 593)

Casteel Pty Ltd (ACN 122 979 757) as trustee for the Casteel Unit Trust of

The Owners-StrataPlan No 48926 of
(together, the **Land Owner**)

Background

- A On, 14 July 2021, the Land Owner requested the Planning Authority to make the Instrument Change for the purpose of making a future Development Application.
- B The Land Owner has requested that the Planning Authority support a planning proposal to increase the floor space ratio (FSR) control under the Botany Bay LEP 2013 from 3:1 to 5:2:1 in part of the B5 Business Development Zone in an area which includes the Land
- C The planning proposal stated above is to enable the development of the land in accordance with the current B5 Business Development land zoning meeting with the objectives of that zone. The landowner has prepared a concept plan for a tourist and visitor accommodation food and drink premises and health service facilities, however, this does not form part of the planning proposal and is indicative only of what might be approved with the additional FSR.
- D The Instrument Change application was accompanied by an offer by the Land Owner to enter into this Agreement to make Development Contributions if the Instrument Change is gazetted.
- E The Land Owner may decide to subdivide and sell parts of the Land before or after the Instrument Change occurs. If this occurs then any new owner or owners of the Land will provide the Development Contribution and associated Security specified in accordance with this Agreement , but only if the Development Contribution has not already been provided in accordance with this Agreement.
- F The payment of the Development Contributions in accordance with this agreement as a result of the Instrument change will facilitate the provision of material public benefits to the current and future Botany Bay community.

- G The Land Owner, The Owners-Strata Plan No 48926, is the owner of the land contained in folio identifier CP/48926 whilst the other 4 Land Owners own all the other Land in equal shares as tenants in common.
- H Pursuant to section 7.6 (3) of the Environmental Planning and Assessment Act 1979 once this planning agreement is registered under section 7.6 the obligations of the Land Owner under the planning agreement are binding upon and enforceable against the owner of the land from time to time as if each owner for the time being had entered into the planning agreement.
- I The Planning Authority also acknowledges that the dedication and renewal of the public open space land, facility assets embellishment and the community facility assets will provide material public benefits.
-

Operative provisions

1 Planning Agreement under the Act

The Parties agree that this Agreement is a planning agreement within the meaning of section 7.4 and governed by subdivision 2 of Division 7.1 of Part 7 of the Act.

2 Planning Agreement

2.1 This agreement:

2.1.1 applies to the Land

2.1.2 is a planning agreement within the meaning set out in section 7.4 of the Act

2.1.3 is to be registered on the title of the Land under section 7.6 of the Act

2.1.4 is not a confidential document and may be exhibited without restriction by either party

3 Operation of this Agreement

Clause 5 (and any related Clause to Clause 5) of this Agreement operates only if:

- (a) The Instrument Change is gazetted and comes into force; and
- (b) The Agreement is entered into as required by Clause 203 of the Regulation.

and remains operational and enforceable even if there are further planning changes gazetted with respect to the Land subsequent to the gazettal of the Instrument Change.

4 Definitions and interpretation

4.1 Definitions

In this Agreement the following definitions apply:

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

Agreement means this voluntary planning agreement including any schedules and annexures.

Amended Base Figure means such amount as determined in accordance with CI 8(b)

Bank Guarantee means an irrevocable unconditional undertaking by an Australian bank to pay the face value of that undertaking on demand with no expiry date.

Base Figure means \$12million

Bond means an insurance bond.

Business Day means a day which is not a Saturday, Sunday or bank or public holiday in Sydney.

Consumer Price Index means the All Groups Consumer Price index Sydney all groups number published by the Australian Bureau of Statistics.

Dealing means subdividing, mortgaging, charging, encumbering or otherwise dealing with the Land.

Development means the development of the Land for purposes permitted on the Land under Bayside LEP 2021.

Development Application means a development application made under the Act to the relevant Consent Authority as defined under the EP&A Act seeking consent for development.

Development consent means development consent as defined in the Environmental Planning and Assessment Act 1979.

Development Contribution means the payment of a monetary contribution of \$12 million (Base Figure) or such other amount as determined in accordance with CI 8(b)(Amended Base Figure) as varied in accordance with clause 5.1 of this deed, to the Planning Authority to be used for a public purpose as defined by s.7.4(2) of the EP & A Act.

Embellishment Works, dedication and renewal of open space and community facility assets means the acquisition of land for Open Space, and/or Community Facilities, and/or embellishment of Open Space within Catchment 5 (as delineated in the draft Social Infrastructure Strategy). Planning Authority has identified John Curtin Reserve as a potential Open space improvement site, such works carried out generally in the area shown in Annexure A.

Explanatory Note means the Explanatory Note attached at **schedule 3**.

GST has the same meaning as in the GST Law.

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

Indicative renewal or embellishment of Public Open Space Land Plan means the plan at **Annexure A** which generally identifies the location of the Public Open Space subject of proposed renewal, repair or embellishment and, as modified from time to time.

Instrument Change means an LEP which increases the Floor Space Ratio (FSR) control under Bayside LEP 2021 which applies to the Land from 3:1 to a higher FSR whether that be 5.2:1 or a lower FSR above 3:1.

Land means Lots 1-3 and 11-12 in DP9142, Lot B in DP407002 & CP and lots 1-6 in SP48926 known as 215-235 O'Riordan Street, Mascot and 1-3 Ewan Street, Mascot.

LRS means NSW Land Registry Services which create and maintain land title records on behalf of the NSW Government.

Public Purpose includes (without limitation) any of the matters specified in section 7.4(2) of the Act.

Regulation means the *Environmental Planning and Assessment Regulation 2021* (NSW).

Security means any of:

- (a) a Bank Guarantee; or
- (b) such other security as is agreed in writing between the Parties:
in favour of the Planning Authority.

Security Amount means \$12,000,000.00 or, if applicable, such other amount as determined in accordance with clause 8(b) of this deed, whichever is the lesser amount.

4.2 Interpretation

In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.

- (e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- (k) References to the word 'include' or 'including' are to be construed without limitation.
- (l) A reference to this Agreement includes the agreement recorded in this Agreement.
- (m) A reference to a Party to this Agreement includes a reference to the servants, agents and contractors of the Party, and the Party's successors and assigns.
- (n) Any schedules and attachments form part of this Agreement.
- (o) An obligation or warranty on the part of two or more persons binds them jointly and severally and an obligation or warranty in favour of two or more persons benefits them jointly and severally.

5 Development Contributions to be made under this Agreement

5.1 Provision of Development Contributions

The Land Owner covenants, agrees and undertakes to pay to the Planning Authority the Development Contribution on or before the date set out in **Schedule 2** for the payment of the Development Contribution.

Subject to this Agreement, **Schedule 2** sets out the timing for payment of the Development Contribution. On the date of payment of the Development Contribution, the Development Contribution will be the amount calculated as follows:

$$A = B \times C / D$$

Where:

A= the Development Contribution

B= Base Figure of \$12 million (or, if applicable, the Amended Base Figure being the amount determined by clause 8(b))

C= the Consumer Price index last published before the payment date of the Development Contribution

D= the consumer Price index for Sydney last published before the date of this agreement

5.2 Embellishment Works, renewal of or addition of open space and community facility assets

The Planning Authority must use the Development Contribution to carry out Embellishment Works, dedication and renewal of open space and community facility assets. The Planning Authority may apply the Development Contribution towards any other public purpose which satisfies section 7.4(2) of the Act, if the Planning Authority reasonably considers that the public interest in the locality would be better served by applying the contribution towards that other public purpose. Acknowledgement about Indicative Concept Plans

The Parties acknowledge that:

- (a) the Indicative Plan attached at Annexure A is indicative only; and
- (b) embellishment of the land is likely to occur in stages such that the embellishment of, renewal or addition of open space and community facility assets will be provided in stages.

6 Application of sections 7.11, 7.12 and 7.24 of the Act to the Development

- (a) This Agreement does not, wholly or partly, exclude the application of sections 7.11, 7.12 and 7.24 of the Act to Development of the Land.

7 Registration of this Agreement

- (a) Subject to **clause 8** the Land Owner must, at its expense, procure the registration of the Agreement on the relevant folios of the register held by the LRS pertaining to the Land as soon as reasonably practicable after execution of this Agreement but in any event, no later than 20 Business Days after that date; and
- (b) Subject to **clause 7(d)**, until such time as this Agreement is registered on the relevant folios of the register held by the LRS pertaining to the Land, the Land Owner agrees that the Planning Authority may lodge a caveat to prevent the transfer of the Land. The Land Owner shall not cause permit or allow a Lapsing Notice to be lodged with LRS in respect of such caveat.

- (c) If the Planning Authority lodges a caveat in accordance with **clause 7(b)**, then the Planning Authority will do all things reasonably necessary to remove the caveat from the title to the Land promptly, following registration of this Agreement in accordance with subclause 7(a).
- (d) Despite **clauses 7(b) and (c)**, the Planning Authority as caveator must consent to registration of a transfer of the Land or any part of the Land from the Land Owner to a third party if that third party has entered into a Planning Agreement on the same terms as this Agreement.
- (e) The Land Owner at its own expense, will take all practical steps and otherwise do anything that the Planning Authority reasonably requires to facilitate the lodgement and registration of this deed, by the Registrar General in the relevant folio of the Register, including to procure:
 - (i) the consent of each person who:
 - (A) has an estate or interest in the Land registered under the Real Property Act; or
 - (B) is seized or possessed of an estate or interest in the Land; and
 - (ii) the execution of any documents in the Pexa workspace or otherwise;
- (f) If this Planning Agreement is not registered on the title to the Land, and if the Land Owner should propose to sell the Land, then it shall:
 - (i) within seven (7) days of listing the Land for sale, either through an agent or privately, notify the Planning Authority of such intention;
 - (ii) as a condition of any sale, require that the incoming purchaser enter into with Planning Authority a like Planning Agreement to this present Planning Agreement in which the same covenants as set out herein shall apply;
 - (iii) within seven (7) days of exchange of contracts, notify the Planning Authority of the sale and provide the Planning Authority with a copy of the contract;
 - (iv) within twenty one (21) days of receipt from the Planning Authority of a replacement Planning Agreement between the Planning Authority and the purchaser substantially in the form of this Planning Agreement, have it executed by the purchaser and return it to the Planning Authority.
- (g) If this Planning Agreement is not registered on the title to the Land, and if the Land Owner should propose otherwise than by sale to transfer or assign their interest in the Land or any part thereof to a transferee or assignee, then it shall before effecting such assignment or transfer have the incoming transferee or assignee enter into an agreement with the Planning Authority substantially in the form of this Planning Agreement insofar as concerns the interest assigned or transferred and shall provide same to the Planning Authority.

- (h) A termination of the Strata scheme for strata plan 48926 pursuant to the Strata Schemes Development Act 2015 is not to be treated as a sale, transfer or assignment pursuant to subclauses (f) or (g) provided that on such termination the Land Owner (excluding The Owners-Strata Plan No 48926) remain as the registered proprietors of the new folio or folios created following the termination of the Strata scheme. Provided that such condition applies such that subclauses (f) and (g) do not apply, on such termination the remaining Land Owner (being the 4 remaining registered proprietors) are bound by and must comply with the provisions of the agreement and the obligations imposed on The Owners-Strata Plan No 48926.

8 Release and Discharge

- (a) The Land Owner and the Planning Authority will be released from their obligations under this Agreement if:
- (i) this Voluntary Planning Agreement is declared invalid;
 - (ii) the proposed amending LEP (Instrument Change) to vary the FSR Control, once made, is declared invalid;
 - (iii) the Agreement is terminated by agreement; or
 - (iv) the Instrument Change is not gazetted within 18 months from the date hereof.
- (b) The parties shall not be released from their obligations under this agreement but those obligations will be varied if the instrument change is gazetted but the variation to the FSR is less than 5.2:1. In that case the parties agree that the amount of the Base Figure shall be varied and calculated in accordance with the below formula:

$$ABF = \left[\frac{\$12,000,000}{2.2} \right] \times [VFSR - 3.0]$$

Where;

ABF is the Amended Base Figure as a result of the gazetted FSR not being 5.2:1

VFSR is the gazetted FSR ratio (for example 5.0:1 would mean the VFSR for the above calculation is 5.0)

- (c) Should the circumstances in subclause (b) apply the Security Amount shall likewise be varied such that it is equivalent to the Amended Base Figure. If sub clause 8(b) is engaged, the Amended Base Figure is to replace the Base Figure for all purposes within this deed including for the purpose of the Development Contribution definition and for the purpose of clause 5.

9 Dispute Resolution

9.1 Reference to Dispute

If a dispute arises between the Parties in relation to this Agreement, then either Party must resolve that dispute in accordance with this clause.

9.2 Notice of Dispute

The Party wishing to commence the dispute resolution processes must notify the other in writing of:

- (a) the intent to invoke this clause;
- (b) the nature or subject matter of the dispute, including a summary of any efforts made to resolve the dispute other than by way of this clause; and
- (c) the outcomes which the notifying Party wishes to achieve (if practicable).

9.3 Representatives of Parties to Meet

- (a) The representatives of the Parties must promptly (and in any event within 14 Business Days of the written notice provided in accordance with **clause 9.2**) meet in good faith to attempt to resolve the notified dispute.
- (b) The Parties may, without limitation:
 - (i) resolve the dispute during the course of that meeting;
 - (ii) agree that further material, expert opinion or consideration is needed to effectively resolve the dispute (in which event the Parties will, in good faith, agree to a timetable for resolution);
 - (iii) agree that the Parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

9.4 Neither party may constrain

If:

- (a) at least one meeting has been held in accordance with **clause 9.3**; and
- (b) the Parties have been unable to reach an outcome identified in **clause 9.3(b)(i) to (iii)**; and
- (c) either of the Parties, acting in good faith, forms the view that the dispute is reasonably unlikely to be resolved in accordance with a process agreed under **clause 9.3**,

then, that Party may, by 14 Business Days written notice to the other Party, terminate the dispute resolution process in respect of that dispute. The termination of the process set out in this clause does not of itself amount to a breach of this Agreement.

10 Enforcement and Security

10.1 Enforcement

- (a) The Land Owner covenants with the Planning Authority that the Land Owner will not rescind or terminate this Planning Agreement otherwise than in accordance with this deed or make a claim that this Planning Agreement is void, voidable, illegal or unenforceable.
- (b) The Land Owner indemnifies the Planning Authority against any liability, loss, claim, damages, costs and expenses (including legal fees, costs and disbursements on the higher of a full indemnity basis and a solicitor and own client basis, determined without taxation, assessment or similar process) arising from or incurred in connection with any breach of the Land Owner's obligations under clause 10.1(a).
- (c) This indemnity is a continuing obligation, separate and independent from the Land Owner's other obligations and survives completion, rescission or termination of this Planning Agreement.
- (d) It is not necessary for the Planning Authority to incur expense or to make any payment before enforcing this indemnity.
- (e) The Land Owner must pay on demand any amount it must pay under this indemnity.

10.2 Enforcement by any party

- (a) Without limiting any other remedies available to the Parties, this Agreement may be enforced by any Party in any court of competent jurisdiction.
- (b) Nothing in this Agreement prevents:
 - (i) A Party from bringing proceedings in any court of competent jurisdiction to enforce any aspect of this Agreement or any matter to which this Agreement relates; and
 - (ii) The Planning Authority from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

10.3 Land Owner to provide security

Within 90 Days of the Instrument Change being gazetted the Land Owner is to provide to the Planning Authority Security for the Security Amount by way of Bank Guarantee .

10.4 Release of Security to the Land Owner

In respect of the Security provided to the Planning Authority under **clause 10.3**, the Planning Authority must release the Security to the Land Owner within 15 business days of the payment of the Development Contribution (indexed from the date of this Agreement). The Planning Authority must execute any document reasonably required by the Developer to release the security.

10.5 Call on Security

- (a) The Planning Authority is entitled to call on the Security if the Development contribution is not paid as required by **Schedule 2**.

11 Notices

11.1 Delivery

Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

- (a) Delivered or posted to that Party at each and every of the below addresses set out below.
- (b) Faxed to that Party at its fax number set out below.

Planning Authority

Attention: Manager Strategic Planning (02) 9562 1607
clare.harley@bayside.nsw.gov.au
Contracts Manager (02) 9562 1667
john.furestad@bayside.nsw.gov.au
council@bayside.nsw.gov.au

Address: 444-446 Princes Highway, Rockdale NSW
PO Box 21, Rockdale NSW 2216

The Land Owner

Attention: Chris Mavrocordatos
ELDESO GROUP
0417 993 994
chris@trendlighting.com.au

Address: Suite 3, Level 3, 290-292 Coward Street,
Mascot NSW 2020

Attention: Stephen Aroney – 0417 679 227
saroney@millsoakley.com.au

Address: Level 7, 151 Clarence Street Sydney NSW
2000

11.2 Change of Details

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.

11.3 Giving of Notice

Any notice, consent, information, application or request is to be treated as given or made at the following time:

- (a) If it is delivered, when it is left at the relevant address.
- (b) If it is sent by post, two business days after it is posted.
- (c) If it is sent by fax, as soon as the sender receives from the senders fax machine a report of an error free transmission to the correct fax number.

11.4 Delivery outside of business hours

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 5.00 pm 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.

12 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.

13 Costs

The Land Owner agrees to pay the Planning Authority's reasonable costs of preparing, negotiating, drafting, executing and registration, deregistration and stamping of this Agreement and any document related to this Agreement.

14 Entire Agreement

- (a) 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.

- (b) 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 Agreement.

15 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.

16 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.

17 No fetter

Nothing in this Agreement shall be construed as requiring the Planning Authority 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.

Nothing in this Agreement imposes any obligation on the Planning Authority to:

- (a) Exercise its functions in a particular way in relation to an Instrument Change; or
- (b) Grant any development approval

18 Representations and warranties

The Parties represent and warrant that:

- (a) they have power to enter into this Agreement and comply with their obligations under this Agreement and that entry into this Agreement will not result in the breach of any law;
- (b) the provisions of this Agreement provide material public benefits for public purposes
- (c) in reliance upon the warranties contained in subclauses (a) and (b) hereof the parties have entered into this agreement

19 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.

20 Waiver

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

21 GST

21.1 Construction

In this **clause 21**, words and expressions which are not defined in this Agreement but which have a defined meaning in the GST Law have the same meaning as in the GST Law.

21.2 Intention of the Parties

Without limiting the operation of this **clause 21**, as at the date of this Agreement, the Parties acknowledge and agree that it is their intention that:

- (a) Divisions 81 and 82 of the GST Law apply to the supplies made under and in connection with this Agreement, such that the Planning Authority and the Land Owner are taken not to make any taxable supplies to each other;
- (b) no tax invoices will be exchanged between the Parties; and
- (c) no additional amount will be payable to a Supplier (as defined in **clause 21.4** below) on account of GST.

21.3 Consideration GST exclusive

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

21.4 Payment of GST – additional payment required

- (a) If an entity (**Supplier**) makes a taxable supply under or in connection with this Agreement (**Relevant Supply**), then the Party required under the other provisions of this Agreement to provide the consideration for that Relevant Supply (**Recipient**) must pay an additional amount to the Supplier (**GST Amount**).
- (b) The recipient will pay the GST Amount referred to in this **clause 21.4** in addition to and at the same time as the consideration is provided for the Relevant Supply.

21.5 Tax invoice

The Supplier must deliver a tax invoice to the Recipient before the Supplier is entitled to payment of the GST Amount under **clause 21.4**. The Recipient can withhold payment of the GST Amount until the Supplier provides a tax invoice.

21.6 Adjustment event

If an adjustment event arises in respect of a taxable supply made by a Supplier under this Agreement, the GST Amount payable by the Recipient under **clause 21.4** will be recalculated taking into account any previous adjustment under this clause 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.

21.7 Reimbursements

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

- (a) the amount of the expense, loss or outgoing less any input tax credits in respect of the expense, loss or outgoing to which the other party, or to which the representative member of a GST group of which the other party is a member, is entitled; and
- (b) any additional amount payable under **clause 21.4** in respect of that reimbursement.

21.8 No Merger

This **clause 21** does not merge in the completion, discharge, rescission or termination of this document or on the transfer of any property supplied or to be supplied under this document.

22 Effect of Schedules

The Parties agree to comply with any terms contained in Schedules to this Agreement as if those terms were included in the operative part of the Agreement.

23 Relationship of parties

This Agreement is not intended to create a partnership, joint venture or agency relationship between the parties.

24 Further steps

Each party must promptly do whatever any other party reasonably requires of it to give effect to this document and to perform its obligations under it.

25 Counterparts

This document may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

26 Rights cumulative

Except as expressly stated otherwise in this Agreement, the rights of a Party under this Agreement are cumulative and are in addition to any other rights of that Party.

Schedule 1

*Section 7.4 Requirements

Provision of the Act	This Agreement
Under section 7.4(1) the Land Owner has:	
(a) sought a change to an environmental planning instrument.	(a) Yes
(b) made, or proposes to make, a development application.	(b) Yes
(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.	(c) No
Description of the land to which this Agreement applies- (Section 7.4(3)(a))	That part of the land contained in lots 1,2,3, and 11and12 in DP9142 and CP and lots 1,2,3,4,5 and 6 in SP48926 and lot B in DP407002,collectively known as 215-235 O'Riordan Street, Mascot and 1-3 Ewan Street, Mascot.
Description of the change to the environmental planning instrument to which the agreement applies to which this Agreement applies- (Section 7.4)3)(b)(i))	Proposed increase in FSR above 3:1 for the Land
The scope, timing and manner of delivery of Development Contributions required by this Agreement - (Section 7.4(3)(c))	Clause 5
Applicability of Section 7.11 of the Act - (Section 7.4(3)(d))	This Agreement does not exclude the application of section 7.11 of the Act to any development. The Planning Authority shall be entitled to include in any development consent granted its Section 7.11 contributions without reduction. Planning Authority shall be entitled to require the payment of the Section 7.11 contribution in full

Provision of the Act	This Agreement
Applicability of Section 7.12 of the Act - (Section 7.4(3)(d))	<p>Agreement does not exclude the application of section 7.12 of the Act to any development.</p> <p>The Planning Authority shall be entitled to include in any development consent granted its Section 7.12 contributions without reduction. Planning Authority shall be entitled to require the payment of the Section 7.12 contribution in full.</p>
Applicability of Section 7.24 of the Act - (Section 7.4(3)(d))	Not excluded.
Applicability of Section 7.4 (3)(e) of the Act	Not applicable
Mechanism for Dispute resolution - (Section 7.4(3)(f))	Clause 9
Enforcement of this Agreement - (Section 7.4(3)(g))	Clause 10
Registration of this Agreement (Section 7.6)	Clause 7 + Clause 2
No obligation to grant consent or exercise functions - (Section 7.4(9))	Clause 17

Schedule 2

Development Contributions

Public Open Space Land and Embellishment Works

Item	Column 1	Column 3
Item	Public Benefit	Timing
1	<p>Payment of the Development Contribution (indexed from the date of the agreement) to the Planning Authority to be used for the acquisition of land for Open Space, and/or Community Facilities, and/or embellishment of Open Space within Catchment 5 (as delineated in the draft Social Infrastructure Strategy).</p> <p>The Planning Authority has identified John Curtin Reserve as a potential Open space improvement site, with such generally to be undertaken in the area shown in Annexure A</p> <p>The Planning Authority may apply the Development Contribution towards any other public purpose which satisfies section 7.4(2) of the Act, if the Planning Authority reasonably considers that the public interest in the locality would be better served by applying the contribution towards that other public purpose.</p>	<p>Payment, in full, of the Development Contribution, prior to the issue of the first occupation certificate for the Land or any part of the Land subsequent to the gazettal of the Instrument Change</p> <p>No occupation certificate can be issued without written acknowledgment from the Planning Authority confirming that the Development Contribution has been paid in full.</p>

Schedule 3

Explanatory Note

Environmental Planning and Assessment Regulation 2021

(Clause 205)

Explanatory Note

Draft Planning Agreement

Under section 7.4 of the *Environmental Planning and Assessment Act 1979* (NSW)

1 Parties

The parties to the Planning Agreement are:

- Bayside Council, (ABN 80 690 785 443) of 444-446 Princes Highway, Rockdale New South Wales, the Planning Authority; and
- Denco Pty Ltd (ACN 003 523 475) of _____ &
- Monash Developments Pty Ltd (ACN 101 137 026) of _____ &
- Trend Property Company (ACN 003 212 593) of _____
Casteel Pty Ltd (ACN 122 979 757) as trustee for the Casteel Unit Trust of _____
- the **Land Owner**

2 Description of Subject Land

The subject land is described as Lots 1-3 and 11-12 in DP9142, Lot B in DP407002 & CP and lots 1,2,3,4,5, and 6 in SP48926 collectively known as 215-235 O'Riordan Street, Mascot and 1-3 Ewan Street, Mascot.

Description of Proposed Change to Environmental Planning Instrument

The Planning Agreement relates to the provisions of the Bayside Local Environmental Plan (LEP) 2021 applicable to the Land

- Increases the FSR control for the Land from 3:1 to a higher FSR whether that be 5.2:1 or a lower FSR above 3:1

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

Objectives

The objectives of the Planning Agreement are:

- To provide certainty in the provision of particular public facilities and development outcomes in the development of the Land.
- To recognise that there are public benefits in the provision of the public facilities and development outcomes;
- To recognise that there is a value and cost to the Land Owner and future developer in providing the particular public facilities and development outcomes; and
- To agree that the provision of particular public facilities and development outcomes as part of the development of the subject land provides public benefits.
- Under this Planning Agreement, prior to the issue of the first Occupation Certificate for the Land, or any part of the Land, the Developer is voluntarily providing **\$12M or such other amount as determined in accordance with this planning agreement if the Instrument Change provides for a lesser FSR than 5.2:1** (indexed from the date of the Planning Agreement) to the Planning Authority to be used for the acquisition of land for Open Space, and/or Community Facilities, and/or embellishment of Open Space within Catchment 5 (as delineated in the draft Social Infrastructure Strategy).
- The Planning Authority has identified John Curtin Reserve as a potential Open space improvement site, with such works, generally to be undertaken, in the area shown in **Annexure A**.
- The Planning Authority may apply the Development Contribution towards any other public purpose which satisfies section 7.4(2) of the Act, if the Planning Authority reasonably considers that the public interest in the locality would be better served by applying the contribution towards that other public purpose.

Nature and Effect

The nature and effect of the Planning Agreement is as follows:

- Public facilities in the form of embellished open space and facilities are to be provided by the Planning Authority for public use as part of the development of land in accordance with the Development Contribution

- any additional and embellished open space, community facilities provide public benefits in the form of facilitating a high level of environmental amenity, public recreational space, community cohesion, and access and mobility.
- The development outcomes above provide public benefits in the form of, high standard of environmental amenity.
- The provision of additional and embellished open space and facilities and particular development outcomes as part of the future development of the Land provides public benefits.
- Catchment 5 of Planning Authority's draft social infrastructure strategy has half the citywide average of open space. There is a public benefit in extending and embellishing the works within this locality

4 Assessment of the Merits of the Draft Planning Agreement

4.1 For Planning Authorities:

How the Planning Agreement promotes the public interest and one or more objects of the EP&A Act

The following objects of the EP& Act are promoted by the Planning Agreement securing the inclusion of public facilities and development outcomes with public benefits in future development:

- the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment;
- the promotion and co-ordination of the orderly and economic use and development of land; and,
- the provision of land for public purposes;.

The public interest is promoted by the Planning Agreement as described in clause 5.2 below.

How the Planning Agreement promotes the elements of the Planning Authority's charter in Section 8 of the Local Government Act

The following elements of the Planning Authority's charter in Section 8 of the Local Government Act are promoted by the Planning Agreement securing the inclusion of public facilities and development outcomes with public benefits in future development:

- to provide directly or on behalf of other levels of government, after due consultation, adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively;

- to exercise community leadership;
- to promote and to provide and plan for the needs of children;
- to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development;
- to have regard to the long term and cumulative effects of its decisions;
- to bear in mind that it is the custodian and trustee of public assets and to effectively plan for, account for and manage the assets for which it is responsible;
- to engage in long-term strategic planning on behalf of the local community;
- to exercise its functions in a manner that is consistent with and promotes social justice principles of equity, access, participation and rights; and
- to keep the local community and the State government (and through it, the wider community) informed about its activities.

Identify the planning purpose served by the Planning Agreement and assess whether the Planning Agreement provides a reasonable means of achieving it.

The planning purpose served by the Planning Agreement is to provide certainty in the provision of particular public facilities and development outcomes.

The Planning Agreement provides a reasonable means of achieving its purpose by: recognising the public benefits, values and costs associated with providing the public facilities and specific development outcomes, and accepting that these public benefits are in addition to future s 7.11 monetary contributions that will apply to future development. The Planning Agreement also provides a reasonable means of achieving its purpose by including provisions for enforcement and security, dispute resolution and review of the agreement, and addressing the prescribed matters in the EP&A Act and Regulation.

Identify whether the Planning Agreement conforms with Planning Authority's Capital Works Program

It conforms with Planning Authority's capital Works program as it is within catchment 5 with the intention of increasing the amount of open space and improving the capital works within that catchment area

State whether the Planning Agreement must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued.

The development contribution of \$12 million (or amount varied by cl 8(b) as required) ,as increased by clause 5.1 , is to be paid before the first occupation certificate is issued for any part of the Land subsequent to the gazettal of the Instrument Change

4.2 The impact of the Draft Planning Agreement on the public or any section of the public

The Planning Agreement secures public benefits on the subject land in the following respects:

- Embellished and additional public open space, access and mobility for the general public;
- high standard of commercial and hotel uses in the future;
- management of traffic flows and parking on streets for the general public.

4.3 Consideration of any relevant Practice Notes

In accordance with cl 203(7) and 205(2) of the Regulations, the Planning Authority has considered the NSW Department of Planning, Industry and Environment's Planning Agreement Practice Note – February 2021.

4.3.1 Fundamental Principles

Planning Authorities and Developers that are Parties to Planning Agreements should adhere to the following fundamental principles.

- Planning Authorities should always consider a development proposal on its merits, not on the basis of a planning agreement.
- Planning agreements must be underpinned by proper strategic land use and infrastructure planning carried out on a regular basis and must address expected growth and the associated infrastructure demand.
- Strategic planning should ensure that development is supported by the infrastructure needed to meet the needs of the growing population.
- A Consent Authority cannot refuse to grant development consent on the grounds that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement.
- Planning agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls.
- Planning agreements must not include public benefits wholly unrelated to the particular development.
- Value capture should not be the primary purpose of a planning agreement.

4.3.2 Acceptability Test

Planning agreements should be assessed against the acceptability test below which is a generally applicable test for determining the acceptability of a planning agreement.

The acceptability test requires that planning agreements:

- 1) Are directed towards legitimate planning purposes, which can be identified in the statutory planning controls and other adopted planning strategies and policies applying to development.**

Outcome:

The development seeks to increase the FSR of the Lands under the Bayside LEP 2021 but not undertake a rezoning review. Therefore, the outcome will reflect current land zoning planning controls of B5 Business Development. There is no residential component in relation to this development nor is this permissible under the current controls over the Lands.

The site is located in Catchment 5 in the draft Social Infrastructure Strategy (SIS) which identifies:

Community Facilities:

The following Community Facilities are recommended as required (C5-CF):
Deliver an integrated multipurpose community facility of at least 2000-2500sqm in Mascot, within walking distance of Mascot Train Station.

Open Space:

Catchment 5 has less than half the city-wide average Ha/1000 people in open space. In addition, the average size of parks is very small (0.26 Ha), and it has the 3rd highest population per park ratio. The recommended average rate of supply could be set at 1.6 Ha/1000 for general recreation.

- 2) Provide for the delivery of infrastructure or public benefits not wholly unrelated to the development.**

Outcome:

John Curtin Reserve is in close proximity to the subject development site and therefore, a nexus exists.

- 3) Produce outcomes that meet the general values and expectations of the public and protect the overall public interest.**

Outcome:

On 13 October 2021, the Councillors resolved as per Minute 2021/253:
Resolved on the motion of Councillors Nagi and Ibrahim

1. That Council in principle endorse a Letter of Offer for a Planning Agreement 215-235 O’Riordan Street & 1-3 Ewan Street.
2. That Council endorse drafting of a Planning Agreement for consideration at a future Council Meeting.

This Planning Agreement is directed towards achieving the following broad objectives:

- Meeting the demands created by the development for new or augmented public infrastructure, amenities and services.
- Securing off-site benefits for the community so that development delivers a net community benefit.
- Compensating for the loss of or damage to a public amenity, service, resource or asset by development through replacement, substitution, repair or regeneration.

4) Provide for a reasonable means of achieving the desired outcomes and securing the benefits.

Outcome:

The timing provisions or prior to the issue of the first Occupation Certificate for the Land, or any part of the Land, subsequent to the gazettal of the Instrument Change provides a reasonable grounding for realisation to all Parties. The Development Contribution quantum of \$12m was offered on a completely voluntary basis in a letter of Offer dated 14 July 2021 to the Planning Authority.

5) Protect the community against adverse planning decisions.

Outcome:

The Planning Agreement realisation is predicated on the planning proposal being submitted and being found to have strategic and site specific merit. The Department of Planning, Industry and Environment also needs to be satisfied for a planning proposal to proceed.

[Redacted]
[Redacted]
[Redacted]

Executed by **Bayside Council** by its)

[Redacted]

Witness

Officer

..... [Redacted]
Name of witness (print)

[Redacted]
[Redacted]
Name of Officer (print)

Executed by **Denco Pty Ltd** ACN)
003523475 pursuant to section 127 of)
the Corporations Act 2001)
)

[Redacted]

Company Secretary/Director

[Redacted]

.....
Director

[Redacted]

Name of Company Secretary/Director
(print)

[Redacted]

Name of Director (print)

Executed by **Monash Developments**)
Pty Ltd ACN 101137026 pursuant to)
section 127 of the Corporations Act)
2001)
)

f

[Redacted]

Company Secretary/Director

Director

[Redacted]

Name of Company Secretary/Director (print)

Name of Director (print)

Executed by Trend Property)
Company Pty Ltd ACN 003212593)
pursuant to section 127 of the)
Corporations Act 2001)

[Redacted]

Company Secretary/Director

[Redacted]

Director

[Redacted]

Name of Company Secretary/Director (print)

[Redacted]

Name of Director (print)

Executed by Casteel Pty Ltd ACN)
122979757 pursuant to section 127 of)
the Corporations Act 2001)
)

[Redacted]

Company Secretary/Director

Director

[Redacted]

Name of Company Secretary/Director (print)

Name of Director (print)

The Common seal of The Owners -Strata Plan No 48926 was affixed in the presence of the following persons authorised by section 273 of the Strata schemes Management act 2015 to attest the affixing of the seal:



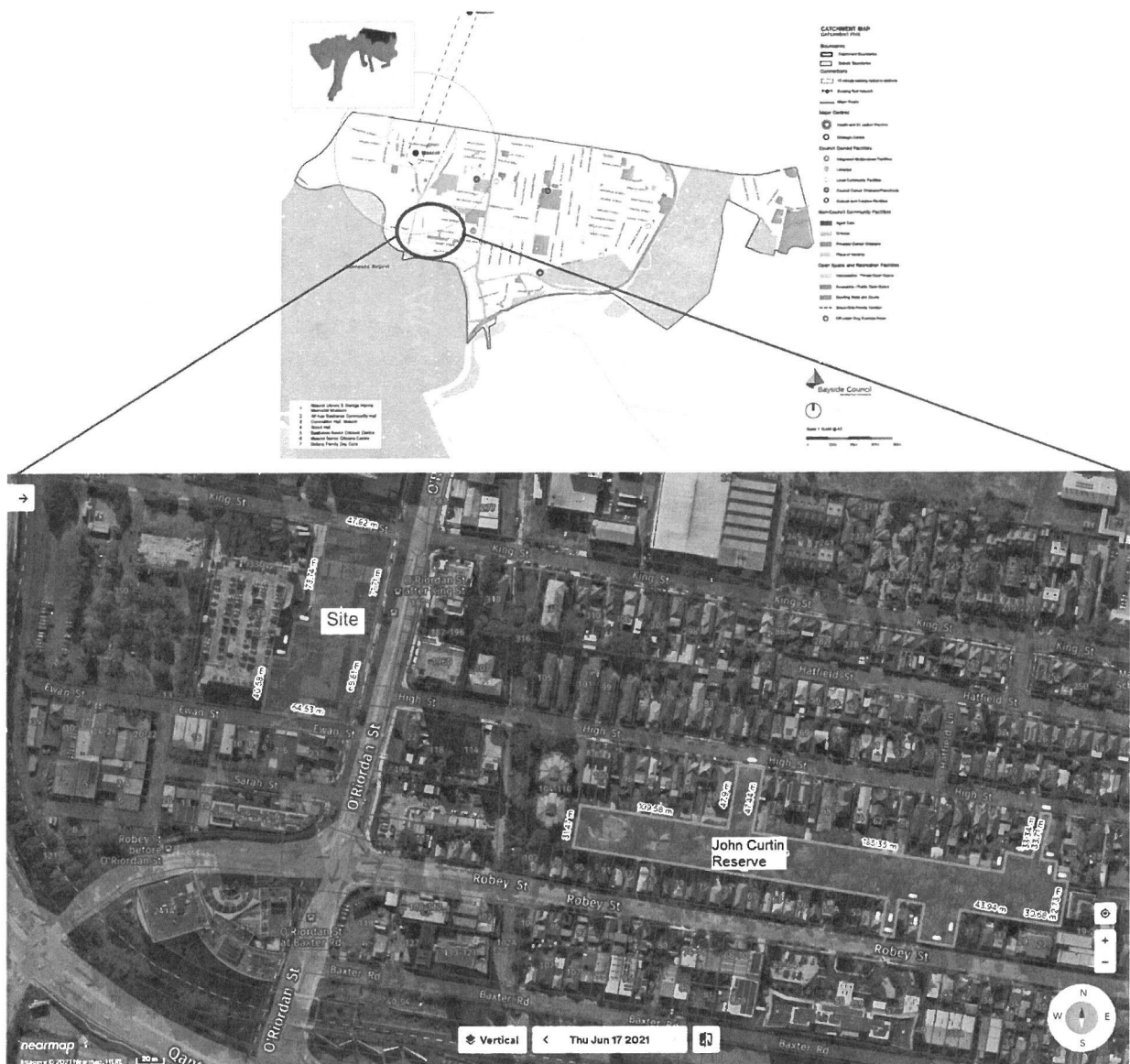
[Redacted]

[Redacted]
Signature authority [Redacted] name [Redacted]
[Redacted]
Signature authority [Redacted] name [Redacted]

Annexure A

Catchment 5 of Draft Social Infrastructure (May 2019) Map detailing location of proposed works.

Draft Social Infrastructure Strategy (SIS) Catchment 5



Annexure B

Letter of Offer dated 14 July 2021 and Land Owners consent dated 14 May 2021

14 July 2021
The General Manager
C/O John Furestad (john.furestad@bayside.nsw.gov.au)
Bayside Council
444-446 Princes Highway
ROCKDALE NSW 2216
E: council@bayside.nsw.gov.au
Attention: Ms Meredith Wallace

Dear Ms Wallace,

**RE: Letter of Offer to Enter into a Voluntary Planning Agreement (VPA)
215-235 O’Riordan St & 1-3 Ewan St, Mascot**

Introduction:

This letter of offer has been made in relation to the Planning Proposal for 215-235 O’Riordan Street & 1-3 Ewan Street, Mascot (Lot 1 DP 190883, Lots 1-3 and 11-12 DP9142, SP 48926 and Lot B DP407002) and on behalf of Eldeso Group Pty Ltd ABN 83 080 509 488 (representatives of the Landowner). The letter of offer provides a framework to prepare the future Voluntary Planning Agreement (VPA) which is to be entered into between Bayside Council and the land owner of the site. The land owners of the site to which this letter of offer applies to are outlined in the Owners Consent (**Attachment 1**) and include:

- Denco Pty Limited ACN 003 523 475;
- Monash Developments Pty Limited ACN 101 137 026;
- Trend Property Company ACN 003 212 593; and
- Casteel Pty Ltd ACN 112 979 757 as trustee for the Casteel Unit Trust.

The Planning Proposal seeks to retain the existing B5 Business Development zone and increase the Floor Space Ratio (FSR) control under the Botany Bay Local Environmental Plan 2013 from 3:1 to 5.2:1. The concept scheme for the Planning Proposal does not incorporate any residential units and includes the following:

- 11 storey commercial building including offices, health services facilities including medical consulting suites and treatment rooms, specialised retail and car parking;
- 12 storey hotel building including hotel rooms, serviced apartments, entertainment /conference facilities, a café and restaurant; and
- 3 and a half basement levels for car parking ancillary to the uses.

The concept scheme will allow for a total of 39,670m² (or 5.2:1) floor space with the following break downs into commercial and hotel accommodation:

Commercial Building		
Ground	Foyer and retail	1,959m ²
Levels 1-4	Medical Centre	6,257m ²
Levels 4-11	Commercial Offices	15,074m ²
Total Commercial		23,290m² (3.05:1)
Hotel Building		
Ground	Reception/Cafe	1,373m ²
Level 1	Restaurant	1,293m ²
Level 2	Banquet Hall	1,293m ²

Levels 3-12	Hotel rooms/ Serviced Apartments	12,419m ²
Total Hotel		16,378m² (2.15:1)

The Planning Proposal seeks an additional 16,782m² Gross Floor Area above the current controls in the Botany Bay aLEP 2013 (22,886m² or 3:1).

Valuation of site:

Atlas Urban Economics were engaged to prepare a Value Assessment (refer to **Attachment 2**) of the existing site to establish a baseline value under current controls and a valuation of the sites considering the increase in floor space proposed by the Planning Proposal.

The Value Assessment provides the uplift value to be quantifying the differences between residual land values associated with the following:

- LEP Compliant Scheme - development of the site under existing planning controls (FSR 3:1); and
- Proposed Scheme - development of the site as proposed (FSR 5.2:1).

Based on the feasibility modelling outcomes, LEP compliant scheme (FSR 3:1) values at \$40,480,600 and proposed scheme (FSR 5.2:1) values at \$64,468,000, the proposal would result in a value uplift of \$24 million (\$64.5 million minus \$40.5 million).

Requiring a development to share part of the increase in site value on a 50/50 basis with the community (through a planning agreement) is considered an equitable approach. The community would receive 50% of the planning upside resulting from changes to the environmental planning instrument, whereas the developer/ proponent would receive the other 50% as reward for its entrepreneurial effort and risk.

Applying this rationale to the site, a contribution of \$12 million (50% of \$24 million) could be contributed towards items of public benefit.

The Offer:

The increase in development potential for the site is to be offset by public benefits which are to be negotiated with Council and outlined in the VPA. This practice is consistent with the Planning Agreements Practice Note (February 2021).

From preliminary discussions with Council, the public benefits that they would like to see in the VPA include the renewal or repair of Council Open Space and/or Community Facility assets within the Bayside Local Government Area. The potential Council assets to be renewed or repaired are within 'Catchment 5' of the Draft Social Infrastructure Strategy (May 2019) and are to be further negotiated and agreed with Council prior to finalising the VPA.

As per the Valuation Assessment, a monetary contribution of \$12 million is to be allocated towards the public benefits.

The monetary contribution is to be indexed using All groups CPI; Sydney from the date of execution of the VPA to the date of payment (adjusted to previous quarter).

The monetary contribution is to be paid to Bayside Council prior to the Occupation Certificate (OC) of the development.

Registration:

The VPA is to be registered on Title of the Land(s) as soon as possible by the developer post execution of the VPA and the Title Search is to be submitted to Bayside Council for confirmation. Once the monetary contribution has been paid to Bayside Council (prior to the OC), the VPA is to be removed from the Title of Land(s). Upon payment of the monetary contribution to Bayside Council, Council will discharge the developer from VPA obligations.

Fees and Costs:

Eldeso Group Pty Ltd are to pay for all reasonable fees and Bayside Council costs for drafting, exhibition, execution, registration and deregistration of the VPA.

If you need any further assistance or have any enquiries in relation to the above please do not hesitate to get in contacting me on 0411 957 292 or icady@mecone.com.au.

Kind regards,

Ian Cady
Director from Mecone NSW Pty Ltd
(Representative from landowners)

Eldeso Group

L3, Suite 3,
290-292 Coward Street,
Mascot, NSW 2020

14 May 2021

Re: Owners consent to lodge and negotiate VPA for in relation to the Planning Proposal for 215-235 O'Riordan Street & 1-3 Ewan Street, Mascot

Denco Pty Limited ACN 003 523 475, Monash Developments Pty Limited ACN 101 137 026, Trend Property Company ACN 003 212 593 and Casteel Pty Ltd ACN 112 979 757 as trustee for the Casteel Unit Trust, all trading as Eldeso Group ABN 83 080 509 488, who are the owner(s) of 215-235 O'Riordan Street & 1-3 Ewan Street, Mascot (Lot 1 DP190883, Lots 1-3 and 11-12 DP9142, SP 48926 and Lot B DP407002) give consent for Mecone NSW Pty Ltd 148 846 806 and it's representatives Mecone NSW Pty Ltd to submit and negotiate the VPA relating to the subject site as required.

Yours sincerely,

