

Parties

Hornsby Shire Council of 296 Pacific Highway, Hornsby, New South Wales (**Council**);

Hua Chang Pty Ltd of 2/558 Princes Highway, Rockdale, New South Wales (**Developer**); and

Henlong Property Group Pty Ltd of 2/558 Princes Highway, Rockdale, New South Wales (**Owner**).

Background

- A** The Developer has made an application for Development Consent to carry out the Development on the Land.
- B** The Developer has offered to dedicate the Designated Land to Council if the Development Consent is granted.

Operative provisions

1 Definitions and interpretation

1.1 Definitions

In this Agreement the following definitions apply:

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

Authority means (as appropriate) any:

- (1) federal, state or local government;
- (2) department of any federal, state or local government;
- (3) any court or administrative tribunal; or

statutory corporation or regulatory body.

Construction Certificate means a certificate referred to in s109C(1)(b) of the Act.

Dealing, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.

Designated Land means that part of the Land identified as proposed Lot 6 in the plan attached as **Annexure 1** to this agreement.

Development means the subdivision of the Land so as to create six (6) separate lots generally in accordance with the plan attached as **Annexure 1** to this agreement.

Development Application has the same meaning as in the Act.

Development Consent means a consent issued under the Act for the Development.

Development Contribution means the dedication of the Designated Land free of cost.

GST has the same meaning as in the GST Law.

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

Land means Lot 2 in DP 847605 at 79-87 Malton Road, Beecroft.

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

Regulation means the *Environmental Planning and Assessment Regulation 2000* (NSW).

1.2 Interpretation

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

- (1) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (2) 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.
- (3) 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.
- (4) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (5) 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.
- (6) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (7) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (8) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (9) 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.
- (10) 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.
- (11) References to the word 'include' or 'including' are to be construed without limitation.
- (12) A reference to this Agreement includes the agreement recorded in this Agreement.
- (13) 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.

- (14) Any schedules and attachments form part of this Agreement.

2 Planning agreement under the Act

This agreement is a planning agreement:

- (1) within the meaning set out in section 93F of the Act; and
- (2) governed by Subdivision 2 of Division 6 of Part 4 of the Act.

3 Application of this Agreement

This agreement applies to both the Land and the Development.

4 Operation of this Agreement

- (1) Subject to paragraph (2), this agreement operates from the date it is executed by both parties.
- (2) The following clauses of this agreement will only operate if and when Council grants the Development Consent:
 - (a) clause 5;
 - (b) clause 6;
 - (c) clause 7; and
 - (d) clause 8.

5 Development Contribution to be made under this Agreement

- (1) The Developer must dedicate the Designated Land to Council free of any trusts, estates, interests, covenants and encumbrances upon the registration at the Land and Property Information Office of NSW of the first plan of subdivision registered pursuant to the Development Consent for the Development.
- (2) The Developer must meet all 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.

6 Application of s94 and s94A of the Act to the Development

6.1 Application

This agreement excludes the application of section 94 or section 94A of the Act to the Development.

6.2 Consideration of benefits

Section 94(6) of the Act does not apply to the Development Contribution to be provided pursuant to this agreement.

7 Registration of this agreement

7.1 Registration

This agreement must be registered on the title of the Land pursuant to section 93H of the Act.

7.2 Obligations of the Developer

The Developer must:

- (1) procure that this agreement is registered on the Land within thirty (30) days of the date of this agreement;
- (2) do all things necessary to allow the registration of this agreement to occur under clause 7.1; and
- (3) pay any reasonable costs incurred by Council in undertaking that registration.

8 Security

8.1 Delivery to Council of Bank Guarantee

Prior to the release of a Subdivision Certificate in respect of the Development, the Developer must deliver to Council an unconditional bank guarantee in a form acceptable to the Council for the amount of \$20,000.00 (**Bank Guarantee**).

8.2 Council may call on Bank Guarantee

If the Developer fails to comply with any term of this agreement, Council may, without limiting any other avenues available to it, call on the relevant Bank Guarantee without notice to the Developer to the extent necessary to meet any liability incurred by Council as a result of that failure.

8.3 Return of Bank Guarantee

Council must return the Bank Guarantee (if any) within one (1) month after:

- (1) the Developer has dedicated the Designated Land to Council in accordance with this agreement; or
- (2) the determination of this agreement.

8.4 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 8.4.

- (2) Council may only acquire the Designated Land compulsorily in accordance with the Acquisition Act if the Developer has failed to dedicate that land to Council in accordance with this agreement.
- (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 8.4 are an agreement with respect to the compulsory acquisition of the Designated Land for the purpose of s30 of the Acquisition Act.

9 Position of Council

9.1 Consent authority

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

9.2 Document does not fetter discretion

This agreement 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).

9.3 Severance of provisions

- (1) No provision of this agreement is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this agreement 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 9 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 agreement has full force and effect; and
 - (c) to endeavour to satisfy the common objectives of the parties on relation to the provision of this agreement 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 agreement contracted out of a provision or exercised a Discretion under this agreement, then to the extent of this deed is not to be taken to be inconsistent with the Law.

9.4 No obligations

Nothing in this deed 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.

10 Review of this Agreement

This agreement may be reviewed or modified by agreement of the parties using their best endeavours and acting in good faith.

11 Dispute Resolution

- (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.
- (2) A party claiming that a dispute has arisen must serve a written notice to the other party specifying the nature of the dispute.
- (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.
- (4) If the parties do not agree within seven (7) days of service of the notice, or any further period agreed in writing by them, as to:
 - (a) the dispute resolution technique and procedures to be adopted;
 - (b) the timetable for all steps in those procedures; and
 - (c) the selection and compensation of the independent person required for that technique,
- (5) 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. The cost of remuneration is to be determined by the mediator, failing this, everybody pays own costs and the costs of the mediator are shared equally.

12 Notices

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

Council

Attention:

Address: The Administration Centre, 296 Pacific Highway, Hornsby NSW 2077

Fax Number: (02) 9847 6666

Email: hsc@hornsby.nsw.gov.au

Developer

Attention: John Zhou

Address: 2/558 Princes Highway, ROCKDALE NSW 2216

Fax Number:

Email: Zhouyu1113@hotmail.com

- (2) If a party gives the other party three (3) business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other party if it is delivered, posted or faxed to the latest address or fax number.
- (3) Any notice, consent, information, application or request is to be treated as given or made at the following time:
 - (a) If it is delivered, when it is left at the relevant address.
 - (b) If it is sent by post, two (2) business days after it is posted.
 - (c) If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.
- (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 Assignment and Dealings

The Developer must not sell, transfer, assign, mortgage, lease or otherwise deal with its right, title and interest in the Land (if any) or its rights and obligations under this agreement, or allow any interest in them to arise or be varied, in each case, without Council's consent and unless, before any such sale, transfer, assignment, charge, encumbrance or novation, the Developer:

- (1) gives Council not less than ten (10) business days notice of the proposed Dealing; and
- (2) procures that the transferee, assignee or novatee signs and delivers to Council prior to any such Dealing taking effect, a deed in favour of the Developer in form and substance acceptable to Council whereby:
 - (a) the incoming party becomes contractually bound to perform all of the Developer's obligations (including obligations which may have arisen before

the transfer, assignment or novation takes effect) and have the benefit of all the Developer's rights under this agreement; and

- (b) the Developer agrees to pay the legal costs and expenses incurred by Council in connection with the negotiation, preparation and signature of such deed.

15 Costs

15.1 Legal Costs

The Developer agrees to:

- (1) pay or reimburse the reasonable legal costs and disbursements of Council of the negotiation, preparation and execution of this agreement;
- (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 agreement including any breach or default by the Developer of its obligations under this agreement.

15.2 Stamp Duty

Each party bear their own costs but for the stamp duty for the transfer of the land and the Land Property Information's registration fees are to be paid by the Developer.

16 Entire agreement

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

17 Further acts

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

18 Governing law and jurisdiction

This agreement is governed by the law of New South Wales. The parties submit to the nonexclusive jurisdiction of its courts and courts of appeal from them. The parties will not object to the exercise of jurisdiction by those courts on any basis.

19 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.

20 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.

21 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.

22 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.

23 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, then recipient of the supply must pay an additional amount equal to the GST on that supply.

Schedule 1:**Requirements under section 93F of the Act**

Requirement under the Act	This Planning Agreement
Planning instrument and/or development application – (Section 93F(1) of the Act) The Developer has: (a) sought a change to an environmental planning instrument. (b) made, or proposes to make, a Development Application. (c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.	 (a) No (b) Yes (c) No
Description of land to which this agreement applies – (Section 93F(3)(a) of the Act)	Lot 2 in Deposited Plan 847605 at 79-87 Malton Road, Beecroft.
Description of change to the environmental planning instrument to which this agreement applies – (Section 93F(3)(b) of the Act)	Not applicable.
Application of section 94 of the Act – (Section 93F(3)(d) of the Act)	Refer to clause 6 of the Planning Agreement.
Applicability of section 94A of the Act – (Section 93F(3)(d) of the Act)	Refer to clause 6 of the Planning Agreement.
Consideration of benefits under this agreement if section 94 applies – (Section 93F(3)(e) of the Act)	Refer to clause 6 of the Planning Agreement.
Mechanism for Dispute resolution – (Section 93F(3)(f) of the Act)	Refer to clause 11 of the Planning Agreement.
Enforcement of this agreement (Section 93F(3)(g))	Refer to clauses 5, 7 and 8 of the Planning Agreement.
No obligation to grant consent or exercise functions – (Section 93F(3)(9))	Refer to clause 9 of the Planning Agreement.

Execution of Planning Agreement No.

of 2014

Dated:

Executed as an Agreement:

Executed by the Developer in accordance with section 127(1) of the Corporations Act by authority of its directors.

Director/Secretary (Signature)

Director (Signature)

Name of Director/ Secretary (Print Name)

Name of Director (Print Name)

Executed by Hornsby Shire Council by its General Manager and Mayor by the affixing of the Common Seal of Council in accordance with resolution dated

General Manager (Signature)

Mayor (Signature)

Name of General Manager (Print Name)

Name of Mayor (Print Name)