

# Voluntary Planning Agreement

**13-19 Baker Street, Banksmeadow NSW 2019**

Bayside Council

ABN 80 690 785 443 Branch 003

Leda Holdings Pty Ltd

ACN 001 404 557

# Contents

# Agreement

Date 21<sup>st</sup> December 2018

## Parties

### First party

**Name** Bayside Council (**Council**)  
**ABN** 80 690 785 443 Branch 003  
**Contact** General Manager  
**Address** PO Box 21, Rockdale NSW 2216  
**Telephone** 1300 581 299  
**Email** council@bayside.nsw.gov.au

### Second party

**Name** Leda Holdings Pty Ltd (**Developer**)  
**ACN** 001 404 557  
**Contact** Robert Ell / Wayne Holborow  
**Address** Level 11, 5 Hunter Street, Sydney 2000  
**Telephone** (02) 8226 4400  
**Email** reception@ledaholdings.com.au

## Background

- A. The Developer owns the Land at 13-19 Baker Street, Banksmeadow.
- B. On 4 August 2017, the Developer lodged development application 2017/1126 with Council to develop the Land.
- C. The Development Application sought approval for the demolition of the existing factory building on the Land and the construction of a new two (2) level structure comprised of a 29 small warehouse unit complex together with a self-storage facility for 74 storage spaces and ancillary access loading bays, manoeuvring areas, car parking and landscaping.
- D. On 2 October 2018, the Developer made a written offer to enter into a planning agreement with the Council to provide a monetary contribution for a material public benefit being money towards the improvement of access to Wentworth Avenue, Banksmeadow.
- E. The Developer and the Council agreed to enter into a Development Consent to the Development.
- F. The Development Consent requires the Parties to enter into a planning agreement in accordance with the Developer's offer.
- G. The planning agreement requires the Developer to make a Monetary Contribution of \$70,000.00.

- H. The Council agrees to expend all of the Monetary Contribution towards improvement of access in the Banksmeadow industrial estate including for street upgrade works in the area, land acquisition for road purposes and design that improves the movement of traffic in the Banksmeadow industrial estate, parking and signage, including upgrade of the intersection at Wentworth Avenue and Baker Street.

## Operative part

### 1 Definitions

In this agreement, unless the context indicates a contrary intention:

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

**Address** means a party's address set out in the Notices clause of this agreement;

**Business Day** means a day on which banks are open for general banking business in Sydney, excluding Saturdays and Sundays;

**Development** means the demolition of the existing factory building and the construction of a new two (2) level structure on the Land in accordance with the Development Consent;

**Development Application** has the same meaning as in the Act;

**Development Consent** has the same meaning as in the Act and as ordered by the Land and Environment Court pursuant to the s34 agreement entered into in (Case Number 2017/00371046) before the Land and Environment Court;

**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 of or administration of the GST;

**Land** means Lot 471 DP752015 known as 13-19 Baker Street, Banksmeadow;

**Law** means:

- (a) any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation;
- (b) any Approval, including any condition or requirement under it; and
- (c) any fees and charges payable in connection with the things referred to in paragraphs (a) and (b);

**Monetary Contribution** means the monetary contribution payable by the Developer under clause 6 of this agreement;

**Upgrade Works** means works to improve access in the area including any street upgrade works in the area, land acquisition for road purposes and design that improves the movement of traffic in the Banksmeadow industrial estate, parking, signage and upgrade of the intersection at Wentworth Avenue.

## 2 Interpretation

In this agreement, unless the context indicates a contrary intention:

- (a) **(documents)** a reference to this agreement or another document includes any document which varies, supplements, replaces, assigns or novates this agreement or that other document;
- (b) **(references)** a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this agreement;
- (c) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this agreement;
- (d) **(person)** a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns;
- (e) **(party)** a reference to a party to a document includes that party's personal representatives, executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) **(president, CEO, general manager or managing director)** the president, CEO, general manager or managing director of a body or Authority includes any person acting in that capacity;
- (g) **(requirements)** a requirement to do any thing includes a requirement to cause that thing to be done, and a requirement not to do any thing includes a requirement to prevent that thing being done;
- (h) **(including)** including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind;
- (i) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (j) **(singular)** the singular includes the plural and vice-versa;
- (k) **(gender)** words importing one gender include all other genders;
- (l) **(parts)** a reference to one or more things includes each part and all parts of that thing or group of things but nothing in this clause implies that part performance of an obligation constitutes performance of that obligation;
- (m) **(rules of construction)** neither this agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting;
- (n) **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (o) **(time and date)** a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in, Australia, even if the obligation is to be performed elsewhere;

- (p) **(joint and several)** an agreement, representation, covenant, right or obligation:
  - (i) in favour of two or more persons is for the benefit of them jointly and severally; and
  - (ii) on the part of two or more persons binds them jointly and severally;
- (q) **(writing)** a reference to a notice, consent, request, approval or other communication under this agreement or an agreement between the parties means a written notice, request, consent, approval or agreement;
- (r) **(replacement bodies)** a reference to a body (including an institute, association or Authority) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions;
- (s) **(Australian currency)** a reference to dollars or \$ is to Australian currency;
- (t) **(month)** a reference to a month is a reference to a calendar month; and
- (u) **(year)** a reference to a year is a reference to twelve consecutive calendar months.

### 3 Planning Agreement under the Act

- (a) The parties agree that this agreement is a planning agreement within the meaning of section 7.4 of the Act.
- (b) Schedule 2 of this agreement summarises the requirements for planning agreements under section 7.4 of the Act and the way this agreement addresses those requirements.
- (c) This agreement applies to the Development.

## 4 Operation of this agreement

### 4.1 Operation

- (a) The Developer is to enter into a planning agreement under s7.4 of the *Act* with the Council generally in accordance with the terms of the "Offer to Enter into a Voluntary Planning Agreement" from the Developer dated 2 October 2018 which constitutes the Developer's offer for the purposes of s7.4(3) of the Act.
- (b) The executed planning agreement must be provided to Council in accordance with the terms of the Development Consent.

### 4.2 Termination

This agreement will remain in force until all obligations are performed or satisfied and the agreement is executed by the parties.

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

- (a) This agreement does not exclude the application of section 7.11 of the Act to the Development.
- (b) This agreement does not exclude the application of section 7.12 of the Act to the Development.

- (c) This agreement does not exclude the application of section 7.24 of the Act to the Development.
- (d) The benefits under this agreement are not to be taken into consideration in determining a development contribution under section 7.11 of the Act.

## 6 Contributions to be made under this agreement

### 6.1 Monetary Contribution for Upgrade Works

- (a) The Developer will pay to Council a Monetary Contribution of \$70,000.00 being the whole material public benefit provided for under this agreement.
- (b) The Monetary Contribution must be provided to Council on exchange of copies of the planning agreement executed by both parties when the agreements are exchanged and the \$70,000 paid, Council must notify the developer of the satisfaction of the deferred commencement condition.

## 7 Review of this agreement

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

## 8 Enforcement

### 8.1 General Enforcement

- (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 the Land and Environment Court to enforce any aspect of this agreement or any matter to which this agreement relates; and
  - (ii) the Council 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.

## 9 Approvals and consents

- (a) 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 obligated by this agreement to give its reasons for giving or withholding consent or for giving consent subject to conditions.
- (b) This agreement is not intended to operate to fetter, in any manner, the exercise of any statutory power or discretion of the Council.

## 10 Notices

### 10.1 Notices to be sent by post or email:

- (a) Any notice given under or in connection with this agreement (**Notice**):
  - (i) must be in writing and signed and dated by a person duly authorised by the sender;
  - (ii) must be addressed and delivered by post or email, at the address provided on page 3 of this agreement.
- (b) Any Notice by email must:
  - (i) include a signature block specifying:
    - (A) the name of the person sending the Notice; and
    - (B) the sender's position within the relevant party;
  - (ii) state in the body of the message or the subject field that it is sent as a Notice under this agreement;
  - (iii) contain an express statement that the person sending the Notice has the authority to serve a Notice under this agreement;
  - (iv) be sent to the email address on page 3 of this agreement or the email address last notified by the intended recipient to the sender.
- (b) The recipient of a Notice served under this clause must:
  - (i) promptly acknowledge receipt of the Notice; and
  - (ii) keep an electronic copy of the Notice,
- (c) Failure to comply with clause does not invalidate service of a Notice under this clause.

## 11 General

### 11.1 Relationship between parties

- (a) Nothing in this agreement:
  - (i) constitutes a partnership between the parties; or
  - (ii) except as expressly provided, makes a party an agent of another party for any purpose.
- (b) A party cannot in any way or for any purpose:
  - (i) bind another party; or
  - (ii) contract in the name of another party.
- (c) If a party must fulfil an obligation and that party is dependent on another party, then that other party must do each thing reasonably within its power to assist the other in the performance of that obligation.

### 11.2 Time for doing acts

- (a) If the time for doing any act or thing required to be done or a notice period specified in this agreement expires on a day other than a Business Day, the time



for doing that act or thing or the expiration of that notice period is extended until the following Business Day.

- (b) If any act or thing required to be done is done after 5.00 pm on the specified day, it is taken to have been done on the following Business Day.

#### 11.3 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.

#### 11.4 Counterparts

This agreement may be executed in any number of counterparts. All counterparts taken together constitute one instrument.

#### 11.5 Entire agreement

The contents of this agreement constitute the entire agreement between the parties and supersede any prior negotiations, representations, understandings or arrangements made between the parties regarding the subject matter of this agreement, whether orally or in writing.

#### 11.6 Representations and warranties

The parties represent and warrant that they have the power and authority 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.

#### 11.7 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.

#### 11.8 Invalidity

- (a) A word or provision must be read down if:
  - (i) this agreement is void, voidable, or unenforceable if it is not read down;
  - (ii) this agreement will not be void, voidable or unenforceable if it is read down; and
  - (iii) the provision is capable of being read down.
- (b) A word or provision must be severed if:
  - (i) despite the operation of clause (a), the provision is void, voidable or unenforceable if it is not severed; and
  - (ii) this agreement will be void, voidable or unenforceable if it is not severed.
- (c) The remainder of this agreement has full effect even if clause 11.8(b) applies.

## 11.9 Waiver

- (a) A right or remedy created by this agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.
- (b) 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.

## 11.10 GST

- (a) Words and expressions which are not defined in this agreement, but which have a defined meaning in GST Law have the same meaning as in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this agreement are exclusive of GST.
- (c) If GST is imposed on any supply made under or in accordance with this agreement, the Developer must pay the GST or pay to the Council an amount equal to the GST payable on or for the taxable supply, whichever is appropriate in the circumstances. [?]
- (d) If the Council is obliged to pay any GST on any supply made under or in accordance with this agreement, the Developer indemnifies the Council for the amount of any such payment is required to make.

## 11.11 Governing law and jurisdiction

- (a) The laws applicable in New South Wales govern this agreement.
- (b) The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

## 12 Costs

- 12.1 The Developer must pay to the Council *within seven (7) days of a written demand*, the Council's reasonable legal costs (assessed on an indemnity basis) *and out of pocket disbursements* in relation to of negotiating, executing and stamping of this Agreement.
- 12.2 The Developer must pay to the Council within 7 days of written demand, a contribution of \$500 towards administration costs incurred by the Council in relation to negotiation and execution of the Agreement.

## Schedule 1            Dispute Resolution

### 1.        Reference to Dispute

If a dispute arises between the parties in relation to this agreement, the parties must not commence any court proceedings relating to the dispute unless the parties have complied with this Schedule, except where a party seeks urgent interlocutory relief.

### 2.        Notice of Dispute

The party wishing to commence the dispute resolution process must give written notice (**Notice of Dispute**) to the other parties of:

The nature of the dispute,

The alleged basis of the dispute, and

The position which the party issuing the Notice of Dispute believes is correct.

### 3.        Representatives of Parties to Meet

The representatives of the parties must promptly (and in any event within 20 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.

The parties may, without limitation:

(a)        resolve the dispute during the course of that meeting,

(b)        agree that further material or expert determination in accordance with this Schedule about a particular issue or consideration is needed to effectively resolve the dispute (in which event the parties will, in good faith, agree to a timetable for resolution); or

(c)        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.

### 4.        Further Notice if Not Settled

If the dispute is not resolved within 10 Business Days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (**Determination Notice**) by mediation or expert determination under this Schedule.

### 5.        Mediation

If a party gives a Determination Notice calling for the dispute to be mediated:

(a)        The parties must agree to the terms of reference of the mediation within 15 Business Days of the receipt of the Determination Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);

(b)        The mediator will be agreed between the parties, or failing agreement within 15 Business Days of receipt of the Determination Notice, either Party may

request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;

- (c) The mediator appointed pursuant to this Schedule must:
- Have reasonable qualifications and practical experience in the area of the dispute; and
  - Have no interest or duty which conflicts or may conflict with his or her function as a mediator he or she being required to fully disclose any such interest or duty before his or her appointment;
  - The mediator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties;
- (d) The parties must within 15 Business Days of receipt of the Determination Notice notify each other of their representatives who will be involved in the mediation (except if a resolution of the Council is required to appoint a representative, the Council must advise of the representative within 5 Business Days of the resolution);
- (e) The parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement; and
- (f) In relation to costs and expenses:
- Each party will bear its own professional and expert costs incurred in connection with the mediation; and
  - The costs of the mediator will be shared equally by the parties unless the mediator determines that a party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that party.

## 6. Expert determination

If the dispute is not resolved under clauses 3 or 5 of this Schedule, or the parties otherwise agree that the dispute may be resolved by expert determination, the parties may refer the dispute to an expert, in which event:

- (a) The dispute must be determined by an independent expert in the relevant field:
- (i) Agreed upon and appointed jointly by the parties;
  - (ii) In the event that no agreement is reached, or no appointment is made within 20 Business Days of the agreement to refer the dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales;
- (b) The expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) The determination of the dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;

- (d) The expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (e) Each party will bear its own costs in connection with the process and the determination by the expert and will share equally the expert's fees and costs; and
- (f) Any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
  - (i) Within 20 Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and commences litigation; or
  - (ii) The determination is in respect of, or relates to, termination or purported termination of this agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal.

## 7. Litigation

If the dispute is not *finally* resolved in accordance with this Schedule, then either party is at liberty to litigate the dispute.

## 8. No suspension of contractual obligations

Subject to any interlocutory order obtained under clause 1 of this Schedule, the referral to or undertaking of a dispute resolution process under this Schedule does not suspend the parties' obligations under this agreement.

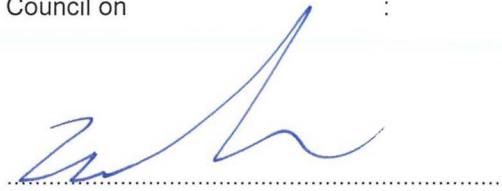
If a dispute arises between the parties in relation to this agreement, the parties must not commence any court proceedings relating to the dispute unless the parties have complied with this clause, except where a party seeks urgent interlocutory relief.

## Schedule 2 Summary of requirements (section 7.4)

Subject and subsection of the Act	Planning Agreement
<b>Planning instrument and/or Development Application – Section 7.4(1)</b>  The Developer has:	
(a) Sought a change to an environmental planning instrument	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
(b) Made, or propose to make a Development Application	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
(c) Entered into an agreement with, or are otherwise associated with, a person to whom paragraph (a) or (b) applies	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
<b>Description of the land to which the planning Agreement applies – Section 7.4(3)(a)</b>	See the definition of Land in Clause 1.
<b>The scope, timing and manner of delivery of contribution required by the Planning Agreement – Section 7.4(3)(c)</b>	See clause 6.
<b>Applicability of section 7.11 of the Act – Section 7.4(3)(d)</b>	Not excluded. See Clause 5.
<b>Applicability of section 7.12 of the Act – Section 7.4(3)(d)</b>	Not excluded. See Clause 5.
<b>Applicability of section 7.24 of the Act – Section 7.4(3)(d)</b>	Not excluded. See Clause 5.
<b>Mechanism for dispute resolution – Section 7.4(3)(f)</b>	See Schedule 1.
<b>Enforcement of the Planning Agreement – Section 7.4(3)(g)</b>	See clause 8.
<b>No obligation to grant consent or exercise functions – Section 7.4(9)</b>	See clause 9.

Executed as an agreement

Executed for and on behalf of **Bayside Council** by its authorised delegate in accordance with a resolution of the Council on :



Signature of Witness



Signature of Authorised Delegate

MICHAEL MCCABE

Print name

MEREDITH WALLACE

Print name

Executed by **Leda Holdings (ACN 001 404 557)** in accordance with s127 of the *Corporations Act 2001* (Cth):



Signature of Director



Signature of Director/ Secretary

ROBERT ELL

Print name

WILLIAM ELL

Print name

# Explanatory Note

## Planning Agreement

Under cl 25E of the *Environmental Planning and Assessment Regulation 2000*

### 1. Parties

**Bayside Council** (Planning Authority)

and

**Leda Holdings Pty Ltd** (ACN 001 404 557) of Level 11, 5 Hunter Street, Sydney, New South Wales 2000 (Developer)

### 2. Description of Subject Land

The land is Lot 471 DP752015 known as 13-19 Baker Street, Banksmeadow, New South Wales (Land).

### 3. Description of Development

The development of the Land is for the demolition of the existing factory buildings, construction of a new 2-storey building, comprising twenty-six (26) warehouse units in a 2-storey mixed use development.

### 4. Summary of Objectives, Nature and Effect of the Planning Agreement

#### Objectives of the Planning Agreement

To provide a proportionate monetary contribution to the upgrade of Council's road infrastructure by improving vehicular access to Wentworth Avenue.

#### Effect of the Planning Agreement

The monetary contribution of \$70,000 will be used by Council towards the upgrade of the area's access to Wentworth Avenue. The material public benefit of the access upgrade will be in terms of both safety for all road users and convenience of better traffic flows.

### 5. Assessment of the Merits of the Planning Agreement

#### The Planning Purposes Served by the Planning Agreement

The Planning Agreement protects the rights and interests of the Parties and the public by ensuring a monetary contribution to fund nearby road and other public infrastructure works.

The Planning Agreement enables the economic and orderly development of the Land to proceed, with a proportionate contribution to the upgrade of the local road infrastructure.

#### How the Planning Agreement Promotes the Public Interest

The Planning Agreement promotes the public interest by enabling the development of the Land to proceed in circumstances where any additional traffic generated by the development itself shares, with other development in the area, in the reasonable funding of the upgrade of Council's local roads infrastructure.

#### For Planning Authorities:

- (a) Development Corporations - How the Planning Agreement Promotes its Statutory Responsibilities

N/A



- (b) Other Public Authorities – How the Planning Agreement and Promotes the Objects (if any) of the Act under which it is Constituted

N/A

- (c) Councils – How the Planning Agreement Promotes the Elements of the Council's Principles

The Planning Agreement allows Council to provide the best value for residents and ratepayers in providing a targeted road infrastructure upgrade for the local community.

- (d) All Planning Authorities – Whether the Planning Agreement Conforms with the Authority's Capital Works Program

N/A

The Impact of the Planning Agreement on the Public or any Section of the Public

The upgrade of the local road infrastructure will benefit all road users in the locality. The Council will be wholly responsible for the implementation of the infrastructure works in a timely manner.

DRAFT