

Planning Agreement

Sutherland Shire Council (ABN 52 018 204 808)
(Council)

South Village Pty Ltd (ACN 164 771 224) as trustee for
South Village Trust (Developer)

gadens

77 Castlereagh Street
Sydney NSW 2000
Australia
T +61 2 9931 4999
F +61 2 9931 4888
Ref AQW/DTS:33615880

Contents

1.	Definitions & Interpretation	5
2.	Planning Agreement under the Act	7
3.	Application of this Planning Agreement	7
4.	Operation of this Planning Agreement	7
5.	Contributions to be made under this Planning Agreement	7
6.	Licence to enter land to carry out Contributions	8
7.	Payment and return of Bond	8
8.	Registration of Planning Agreement on Title	9
9.	Registration of Dealings on Title	10
10.	Application of s94 and s94A of the Act	10
11.	Review of this Planning Agreement	10
12.	Dispute Resolution	10
13.	Termination	12
14.	Joint and individual liability and benefits	12
15.	No fetter	12
16.	Representations and warranties	12
17.	Severability	12
18.	Assignment	13
19.	Notices	13
20.	Approvals and consent	14
21.	Costs	15
22.	Entire agreement	15
23.	Further acts	15
24.	Governing law and jurisdiction	15
25.	Waiver	15
26.	GST	15
27.	Force majeure	16

28. Compliance with laws	17
29. Confidentiality	17
Schedule 1 –Contributions	19
Schedule 2 – Section 93F Requirements	20
Schedule 3 –Off-site Biodiversity Offsets	22
Schedule 4 –Licence Conditions	23

Details

Date

31 July 2015

Parties

Name	Sutherland Shire Council
ABN	52 018 204 808
Short form name	Council
Notice details	4-20 Eton Street SUTHERLAND NSW 2232

Name	South Village Pty Limited as trustee for South Village Trust
ACN	164 771 224
Short form name	Developer
Notice details	Level 37, Chifley Tower 2 Chifley Square SYDNEY NSW 2000

Background

- A. The Developer owns the Land.
- B. On 15 July 2010, the Development was declared a Major Project under Part 3A of the Act.
- C. On 23 August 2012, the Planning Assessment Commission of New South Wales as delegate of the Minister for Planning issued a Concept Plan Approval for the Development.
- D. Concept Plan Approval was issued subject to certain conditions. Condition 10 of Schedule 3 of the Concept Plan Approval requires the adoption of a Biodiversity Offset Package. The relevant condition is set out below

Schedule 3, condition 10 Biodiversity Offset

*A Biodiversity Offset Package shall be adopted which is consistent with the Principles for the use of biodiversity offsets in NSW which can be found at the following website:
<http://www.environment.nsw.gov.au/biocertification/offsets.htm>*

The Biodiversity Offset Package (BOP) shall include, but not necessarily be limited to:

- *The final biodiversity offsets selected and to be secured;*
- *The management and monitoring requirements for the offsets and other ecological measures proposed to ensure the outcomes of the BOP are achieved;*
- *Timing and responsibilities for the implementation of the provisions of the Package over time.*

The BOP shall be secured by one of the following mechanisms:

- *A conservation agreement under the National Parks and Wildlife Act, 1974;*

- *A biobanking agreement under Part 7A of the Threatened Species Conservation Act, 1995;*
- *A planning agreement under the Environmental Planning & Assessment Act, 1979, where the agreement provides for the conservation and/or enhancement of the biodiversity values of an area of land to which the agreement relates;*
- *A trust agreement with the Nature Conservation Trust; or*
- *A legally binding agreement that provides for the conservation and/or enhancement of the biodiversity values of an area of land.*

The Sydney Turpentine Ironbark Forest (STIF) off-site biodiversity offset, proposed under the Biodiversity Management Plan, prepared by Cumberland Ecology, dated November 2011, shall be included as part of any Voluntary Planning Agreement and be amended to:

- *Provide replacement plantings at a ratio of 2:1 equating to a minimum of 5,300m²;*
- *Establish the new plantings with vegetation of the same type as that in the STIF, preferably on a site/s within 10km of the brickpit site that is/are acceptable to Council and subject to the agreement of the NSW Office of Environment and Heritage;*
- *Formulate a suitable legal mechanism for securing the offset; and*
- *Adopt a schedule of works for the implementation of the offset over a period of a minimum of five (5) years.*

The biodiversity offsets as identified in the approved BOP shall be secured by the Proponent prior to the clearing of any of the Sydney Turpentine Ironbark Forest.

- E. The Office of Environment and Heritage has identified and agreed on 18 November 2014 to the sites set out in Schedule 3 for the off-site compensatory replacement plantings.
- F. The Early Works Consent was granted by Council for the carrying out of works which include: Site Establishment, Excavation and Filling, Dewatering, Creation of a Water Body and Vegetation Clearing. These works are to be carried out in two stages.
- G. Stage 2 of the Early Works Consent relates to the delivery of the Biodiversity Offset Package.
- H. Condition 5 of the Early Works Consent establishes that Stage 2 consists of:
 - *Protection measures to STIF communities identified for retention under the approved Concept Plan Approval;*
 - *Clearing of vegetation approved for removal;*
 - *Cut and fill, including excavating for the proposed basement car park and filling of the proposed public parkland; and*
 - *Permanent shoring of excavations.*

Condition 5 of the Early Works Consent requires that "Stage 2 works will not commence until the Voluntary Planning Agreement detailing the off-site offsets for STIF vegetation has been formalised."

- I. The Developer has elected to enter into this Planning Agreement in accordance with Schedule 3, condition 10 of the Concept Plan Approval and condition 5 of the Early Works Consent.
- J. The Parties have jointly prepared the Explanatory Note to accompany this Planning Agreement.

Agreed terms

1. Definitions & Interpretation

1.1 Definitions

In this Planning Agreement the following definitions apply:

Accredited Certifier has the same meaning as in the Act.

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

AECOM Report means the Off-site Compensatory Bushland Planting Report prepared by AECOM and dated 27 November 2014, or as subsequently modified by the consent authority.

Bond means two unconditional Bank Guarantees to be lodged by the Developer with the Council in a form acceptable to Council in the amount of \$50,000 each pursuant to clause 7 of this Planning Agreement.

Biodiversity Offset Package means the retention of onsite STIF and offsite compensatory replacement plantings at a ratio of 2:1 equating to a minimum of 5,300m² of new plantings and vegetation of the same type as that in the STIF, as set out in the BMP 2011.

BMP 2011 means Biodiversity Management Plan prepared by Cumberland Ecology, November 2011, as amended in accordance with Schedule 3, condition 10 of the Concept Plan Approval, or as subsequently modified by the consent authority.

Business Day means:

- (a) for receiving notice under clause 19, a day that is not a Saturday, Sunday, public holiday or bank holiday in the place where the notice is sent; and
- (b) for all other purposes, a day that is not a Saturday, Sunday, bank holiday or public holiday in New South Wales, Australia.

Business hours means from 9:00am to 5:00pm on a Business Day.

Concept Plan Approval means the approval granted by the Department of Planning or its successor to Concept Plan Application No MP10_0076, as modified or amended.

Contributions means the contributions identified in Schedule 1 of this Planning Agreement.

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

Development means a mixed use development generally in accordance with the Concept Plan Approval.

Early Works Consent means development consent DA14/0368 granted by Council on 16 September 2014.

Explanatory Note means the Explanatory Note prepared in accordance with clause 25E of the *Environmental Planning and Assessment Regulations 2000* attached to this Planning Agreement at Annexure 1.

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 1 in DP 179075, Lot 1 in DP 589977 and Lot 2 in DP 589977 generally known as 566-594 Princes Highway, Kirrawee.

LEADR means LEADR, Association of Dispute Resolvers located at Level 9, 15 – 17 Young Street, Sydney, NSW, 2000.

Maintenance means works generally undertaken in order to assist in the establishment of compensatory planting and to protect it from natural causes of decline, and means the regular observation, weeding, and replacement planting of any dead tubestock planted via the Biodiversity Offset Package, for a period of five (5) years from the date of the provision of the compensatory planting.

Occupation Certificate has the same meaning as in the Act.

Party means a party to this Planning Agreement, including their successors and assigns.

Plan of Subdivision means a registered plan of subdivision under Division 3 of Part 23 of the *Conveyancing Act 1919* (NSW).

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

STIF means Sydney Turpentine Ironbark Forest.

Strata Certificate has the same meaning as in the Strata Schemes (Freehold Development) Act 1973 (NSW).

Strata Plan means a strata plan or strata plan of subdivision that is registered in accordance with the Strata Schemes (Freehold Development) Act 1973 or the Strata Schemes (Leasehold Development) Act 1986.

Subdivision Certificate has the same meaning as in the Act.

- (a) for Residential Accommodation, or
- (b) to be used for Commercial Premises,

but does not include a Service Lot.

1.2 Interpretation

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

- (e) A reference in this document 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 document to any document, deed or document is to that document, 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 document.
- (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 document includes the agreement recorded in this document.
- (m) A reference to a party to this document 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 document.

2. Planning Agreement under the Act

The parties agree that this document is a planning agreement within the meaning of section 93F of the Act and is governed by Subdivision 2 of Division 6 of Part 4 of the Act.

3. Application of this Planning Agreement

This Planning Agreement applies to:

- (a) The Land; and
- (b) The Development.

4. Operation of this Planning Agreement

This Planning Agreement is made and will take effect from the day it is executed by all parties.

5. Contributions to be made under this Planning Agreement

- (a) The Developer will carry out and deliver the Biodiversity Offset Package by the time or times set out in Schedule 1, subject to extensions of time under this Planning Agreement by agreement in writing between the Parties.

- (b) The Developer will provide the Biodiversity Offset Package in the manner set out in the BMP 2011 and the AECOM Report.
- (c) If, for any reason, any of the sites set out in Schedule 3 cannot be used, then Council will nominate alternative sites to achieve a minimum of 5,300m². Any such nomination for alternative sites shall be at Council's sole discretion and shall be subject to approval from the Office of Environment and Heritage.
- (d) Council will direct the Developer to plant the alternative sites it chooses. Council will advise the agreed sites in Schedule 3 and then nominate alternative sites to ensure a minimum area of 5,300m².
- (e) The Developer agrees to pay the costs incurred in connection with carrying out, delivering and maintaining for five (5) years the Biodiversity Offset Package.
- (f) Upon completion of the maintenance period and receipt of certification by a suitably qualified Ecologist:-
 - (i) that the Biodiversity Offset Package has been provided on site and at the locations set out in Schedule 3;
 - (ii) that the Biodiversity Offset Package has been provided at the density required by the BMP 2011 and the AECOM Report and in accordance with the requirements of the BMP 2011 and the AECOM Report; and
 - (iii) the maintenance period of five (5) years is complete and the Biodiversity Offset Package has been maintained by the Developer at the locations and densities as required by the BMP 2011 and the AECOM Report,

the Council agrees to assume responsibility for the ongoing maintenance of the offsite compensatory STIF replacement plantings at the locations set out in Schedule 3 to this Planning Agreement.
- (g) The Developer, and any subsequent owner of the Land, agrees to maintain in perpetuity the STIF on the Land in accordance with the Biodiversity Offset Package.

6. Licence to enter land to carry out Contributions

- (a) The Council grants a licence to the Developer to enter the sites listed in Schedule 3 for the purpose of delivering the Biodiversity Offset Package until such time as the Biodiversity Offset Package is delivered and maintained in accordance with clause 5 above.
- (b) The licence will terminate upon handover of responsibility to Council of the Biodiversity Offset Package in accordance with Clause 5(f) above. No fee is payable to the Council in relation to the licence to enter the sites listed in Schedule 3 to deliver and maintain the Biodiversity Offset Package.
- (c) The licence is subject to the terms and conditions in Schedule 4.

7. Payment and return of Bond

- (a) Pursuant to section 93F(3)(g) of the Act, the Developer will upon commencement of this Planning Agreement provide security to the Council as follows:

- i. bank guarantee in favour of Council in the amount of \$50,000 (Returnable Security); and
 - ii. bank guarantee in favour of Council in the amount of \$50,000 (Maintenance Security).
- (b) The bank guarantees must provide security for the required time periods in clause 5 above.
- (c) Council may call on the Returnable Security or Maintenance Security if:
 - i. The Developer does not provide the Biodiversity Offset Package in accordance with this Planning Agreement and Council has given notice requiring the provision of the Biodiversity Offset Package within a reasonable period and the Developer fails to comply with such notice; or
 - ii. The Developer does not maintain the Biodiversity Offset Package in accordance with this Planning Agreement and Council has given notice requiring the maintenance of the Biodiversity Offset Package within a reasonable period and the Developer fails to comply with such notice; or
- (d) The Returnable Security will be returned to the Developer when Council advises that it is satisfied that the Biodiversity Offset Package has been provided by the Developer in accordance with this Planning Agreement.
- (e) The Maintenance Security will be returned to the Developer upon completion of the five (5) year maintenance period and receipt of certification from a suitably qualified Ecologist that the Biodiversity Offset Package has been maintained on the Land and the off-site lands as required by the BMP 2011.

8. Registration of Planning Agreement on Title

8.1 Acknowledgement

The Developer agrees this Planning Agreement will be registered on the title of the Land under section 93H of the Act and on registration by the Registrar-General the Planning Agreement will be binding on and enforceable against the owners of the Land from time to time as if each owner for the time being had entered into this Planning Agreement.

8.2 Consents to Registration

This Planning Agreement must be registered on the title of the Land as soon as practicable after it is made. Each Party must promptly execute any document and perform any action necessary to affect the registration of this Planning Agreement on the title of the Land.

8.3 Release from Registration

Council will release the Land from registration of this Planning Agreement after:-

- a) certification from a suitably qualified Ecologist that the required five (5) year maintenance period of the Biodiversity Offset Package by the Developer has been provided and maintained in accordance with clause this Planning Agreement; and

- b) certification from a suitably qualified Ecologist that the on-site STIF nominated to be retained and conserved and/or enhanced has been maintained and conserved and/or enhanced in accordance with this Planning Agreement; and
- c) transfer of the south western portion of the Land to Council for a parkland.

Council will release the Land from this Planning Agreement if it is terminated pursuant to clause 13.

8.4 Release and discharge of Planning Agreement

Upon the satisfaction of clause 8.3, Council agrees to do all things reasonably required by the Developer to release and discharge this Planning Agreement from the title of the Land.

9. Registration of Dealings on Title

- (a) A positive covenant must be registered on the Land as soon as practicable after this Planning Agreement is made requiring the owner of the Land to maintain the STIF on the Land in accordance with the BMP 2011.
- (b) Council agrees to act promptly and do all things reasonably required by the Developer to enable registration of the above covenant.

10. Application of s94 and s94A of the Act

The parties agree that:-

- (a) There are no monetary contributions payable pursuant to this Planning Agreement;
- (b) This Planning Agreement does not exclude the operation of sections 94, 94A and 94EF of the Act to the Development;
- (c) Future Development Consents in relation to the Development may require the payment of section 94 contributions in accordance with the Act.

11. Review of this Planning Agreement

The Planning Agreement may be varied or amended in accordance with the Act.

12. Dispute Resolution

12.1 No arbitration or court proceedings

If a dispute arises out of this Planning Agreement (**Dispute**), a Party must comply with this clause 12 before starting arbitration or court proceedings (except proceedings for interlocutory relief).

12.2 Notification

A Party claiming a Dispute has arisen must give the other Party to the Dispute written notice setting out details of the Dispute and designating as its representative a person to negotiate the Dispute.

12.3 Response to Notice

Within 10 Business Days of receiving written notice of the Dispute, the other Party must notify in writing to the notifying Party of its representative to negotiate the Dispute. Such representative must have the authority to commit the Party it is representing to any agreement of a Dispute.

12.4 Parties to resolve dispute

The nominated representatives must:

- (a) call a meeting to discuss the Dispute within 10 Business Days after service by the other Parties of notice of its representatives; and
- (b) use reasonable efforts to settle or resolve the Dispute within 10 Business Days after they have met.

12.5 Referral of dispute to mediator

If the Parties cannot resolve the Dispute in accordance with clause 12.4, any Party may give to the other Parties a written notice referring the Dispute to a mediator.

12.6 Appointment of mediator

If the Parties to the Dispute cannot agree on a mediator within 5 Business Days after written notice has been given under clause 12.5, the chairman of LEADR or the chairman's nominee will appoint a mediator.

12.7 Role of mediator

The role of a mediator is to assist in negotiating a resolution of the Dispute. A mediator may not make a binding decision on a Party to the Dispute except if the Party agrees in writing.

12.8 Confidentiality

Any information or documents disclosed by a Party under this clause:

- (a) must be kept confidential; and
- (b) may only be used to attempt to resolve the Dispute whether by mutual agreement, mediation, arbitration or litigation.

12.9 Costs

Each Party to a dispute must pay its own costs of complying with this clause. The parties to the Dispute must equally pay the costs of any mediator.

12.10 Termination of process

A Party to a Dispute may terminate the dispute resolution process by giving notice to the other Parties after it has complied with clauses 12.1 to 12.4. Clauses 12.8 and 12.9 survive termination of the dispute resolution process.

12.11 Breach of this clause

If a Party to a Dispute breaches clauses 12.1 to 12.10, the other Party to the Dispute does not have to comply with those clauses in relation to the Dispute.

13. Termination

13.1 This Planning Agreement terminates:

- (a) on the lapse of the Concept Approval; or
- (b) on the declaration by a Court of competent jurisdiction that the Concept Approval issued for the Development is invalid.

13.2 Consequences

- (a) On the date of termination or rescission of this Planning Agreement, subject to the following sub-paragraphs each party releases each other from any obligation to perform any term, or any liability arising out of, this Planning Agreement after the date termination.
- (b) Termination or rescission of this Planning Agreement does not release either party from any obligation or liability arising under this Planning Agreement before termination or rescission.
- (c) If the STIF has been removed from the Land and this Planning Agreement is terminated and the Development does not proceed, clause 7 survives this Planning Agreement to ensure the provision of the Biodiversity Offset Package.

14. Joint and individual liability and benefits

Except as otherwise set out in this Planning Agreement, any agreement, covenant, representation or warranty under this Planning Agreement by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

15. No fetter

Nothing in this Planning Agreement shall be construed as requiring the Council to do anything that would cause it to be in breach 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.

16. Representations and warranties

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

17. Severability

If a clause or part of a clause of this Planning 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 Planning Agreement, but the rest of this document is not affected.

18. Assignment

- (a) The Developer must not assign or novate to any person its rights or obligations under this Planning Agreement and must not transfer the whole or any part of the Land or its interest in the Land unless the prior written consent of Council is obtained. Council must not unreasonably withhold its consent in circumstances where the following matters have been satisfied:
 - (i) the Developer has, at no cost to the Council, first procured the execution by the person to whom the Developer's rights or obligations under this Planning Agreement are to be assigned or novated (**incoming party**), of a deed poll in favour of the Council, by which the incoming party covenants that it:
 - (A) will perform the obligations of the Developer under this Planning Agreement; and
 - (B) is bound by the terms and conditions of this Planning Agreement (relevant to the Developer as if the incoming party had executed this Planning Agreement);
 - (ii) the Developer demonstrates to the reasonable satisfaction of the Council that the incoming party is solvent;
 - (iii) the Developer is not in breach of this Planning Agreement with respect to the relevant part of the Land in case of an assignment or novation of the Developer's interest in part of the Land only, unless the breach is waived by the Council.
- (b) This clause does not apply to the transfer of a single lot in a strata plan (irrespective of whether the strata plan has been registered).
- (c) Council must act promptly in dealing with any application made by the Developer in respect of any proposed assignment or dealing.

19. Notices

19.1 Service of notices

Any notice, demand, consent, approval or communication under this Planning Agreement (Notice) that must or may be given or made to a Party this document must be:

- (a) in writing, in English and signed by a person duly authorised by the sender; and
- (b) hand delivered or sent by post, electronic notification or facsimile to that Party at its contact details as set out below

Council

Attention: Manager Environmental Science

Address: Sutherland Shire Council
4-20 Eton Street
Sutherland NSW 2232

Fax Number: (02) 9710 0265

Email: ssc@ssc.nsw.gov.au

Developer

Attention: Dominic Sullivan
South Village Pty Ltd as trustee for South Village Trust

Address: Level 37, Chifley Tower
2 Chifley Square
SYDNEY NSW 2000

Fax Number: (02) 8080 2399

Email: dominic@payce.com.au

If a Party gives the other Party 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 the other Party if it is delivered, posted or faxed to the latest address or fax number.

19.2 Effective on receipt

A notice given in accordance with clause 19 takes effect when taken to be received (or at a later time specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by prepaid post, on the second Business Day after the date of posting (or on the seventh Business Day after the date of posting if posted to or from a place outside Australia);
- (c) if sent by facsimile, when the sender's facsimile system generates a message confirming successful transmission of the entire Notice unless, within eight Business Hours after the transmission, the recipient informs the sender that it has not received the entire Notice;
- (d) if sent by electronic notification, by properly addressing the electronic notification and transmitting it,

but if the delivery, receipt or transmission is not on a Business Day or is after 5.00pm on a Business Day, the Notice is taken to be received at 9.00am on the next Business Day.

20. Approvals and consent

The Parties acknowledge that:

- (a) except as otherwise set out in this Planning Agreement, and subject to any statutory obligations, a Party must act reasonably in giving or withholding an approval or consent to be given under this Planning Agreement;
- (b) this Planning Agreement does not impose any obligation on the Council to grant an approval under the Act.

21. Costs

Each Party will pay its own costs in negotiating, preparing and executing this Planning Agreement.

22. Entire agreement

This Planning Agreement, including its schedules and annexures:

- (a) constitutes the entire agreement between the Parties as to its subject matter; and
- (b) in relation that subject matter, supersedes any prior understanding or agreement between the Parties and any prior condition, warranty, indemnity or representation imposed, given or made by a Party.

23. 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 Planning Agreement and all transactions incidental to it.

24. Governing law and jurisdiction

This document 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.

25. Waiver

The failure of a Party at any time to require performance of any obligation under this document is not a waiver of that Party's right:

- (a) to claim damages for breach of that obligation; and
- (b) at any other time to require performance of that or any other obligation under this document,

unless written notice to that effect is given.

26. GST

- (a) The Parties reasonably believe that any supply pursuant to this document is exempt from GST.
- (b) If the Parties agree that no GST is payable in respect of a supply made under the Agreement and it is later determined that a supply was made that was subject to GST, the recipient of the supply agrees to pay to the supplier an additional amount equal to the GST on the supply plus any administrative penalties and general interest charges incurred by the supplier from the Commissioner of Taxation in respect of the supply.

27. Force majeure

27.1 Definition

Force Majeure Event affecting a person means anything outside that party's reasonable control including, but not limited to, fire, storm, flood, earthquake, explosion, war, invasion, rebellion, sabotage, epidemic, labour dispute, labour shortage, failure or delay in transportation, act or omission (including laws, regulations, disapprovals or failures to approve) of any third person (including, but not limited to, subcontractors, customers, governments or government agencies).

27.2 Occurrence of Force Majeure Event

If a Force Majeure Event affecting a Party precludes that Party (**Precluded Party**) partially or wholly from complying with its obligations under this document then:

- (a) as soon as reasonably practicable after that Force Majeure Event arises, the Precluded Party must notify the other Party to this document of:
 - (i) the Force Majeure Event;
 - (ii) which obligations the Precluded Party is precluded from performing (**Affected Obligations**);
 - (iii) the extent to which the Force Majeure Event precludes the Precluded Party from performing the Affected Obligations (**Precluded Extent**);
 - (iv) the expected duration of the delay arising directly out of the Force Majeure Event; and
 - (v) suggest an alternative method, if any, of satisfying its obligation under this document;
- (b) the Precluded Party's obligation to perform the Affected Obligations will, to the Precluded Extent, be suspended for the duration of the actual delay arising directly out of the Force Majeure Event (**Actual Delay**); and
- (c) The obligations of the other Party to this document to perform any obligations dependent on the Affected Obligations will be suspended until the Precluded Party resumes performance.

27.3 Procedure

- (a) The Precluded Party must use all reasonable efforts and diligence to remove the force majeure or ameliorate its effects as quickly as practicable.
- (b) The Parties agree that this force majeure provision does not apply to an obligation of a Party to transfer land or to pay money.
- (c) If the Parties are unable to agree on the existence of an event of force majeure or the period during which the obligations of the Parties, and any time periods, are suspended during the continuance of the force majeure, that dispute must be referred for determination under clause 12 of this document.
- (d) The Parties agree that a force majeure includes the actual commencement of any legal proceedings by any person challenging the validity of either the Concept Plan Approval or any related development consents for the Development or any provision of this document.

- (e) If a force majeure event cannot be resolved to the mutual satisfaction of the Council and the Developer, and as a result of a force majeure event the Developer, in its sole discretion, determines that it is unable to undertake the Development, the Developer may terminate this document by notice to the Council in which event none of the Parties will have any claim against each other under this document.

28. Compliance with laws

If a Law is changed or a new Law comes into force (both referred to as **New Law**) and the Developer is obliged by the New Law to do something or pay an amount which it is already contractually obliged to do or pay under this document then, to the extent only that the relevant obligation is required under both the New Law and this document, compliance with this document will constitute compliance with the New Law.

29. Confidentiality

The Parties agree that the terms of this document are not confidential and this document may be treated as a public document and exhibited or reported without restriction by any Party. This clause does not apply to any information or documents produced for the purpose of the dispute resolution provisions of Clause 12 of the document, the contents of which must remain confidential in accordance with Clause 12.8 of the document.


Signing page

Executed as an agreement.

Dated: 31 July 2015

The common seal of the Council of
Sutherland Shire was affixed to this
Planning Agreement on 31st
July 2015
in accordance with a resolution of Council
passed on 11 May
2015





Signature of Mayor




Signature of General Manager

THERESA THURAISINGAM

Name of witness (print)

Executed by **South Village Pty Ltd (ACN 164 771 224)** **atf South Village Trust** in accordance with
s127 of the Corporations Act



Secretary/Director

BRIAN BAILISON

Print name



Director

DOMINIC SULLIVAN

Print name

Schedule 1 –Contributions

The following contributions will be provided in accordance with the Table below:

Public purpose	Contribution	By whom	Timing
Biodiversity Offset Package - Offsite STIF replacement planting	Provision of the STIF compensatory replacement plantings at some or all of the locations identified in Schedule 3 in the amount of 5,300m ² .	The Developer	Within two (2) years from the date of this Planning Agreement.
Biodiversity Offset Package - Offsite STIF replacement planting	Maintenance of STIF compensatory replacement plantings in accordance with Schedule 3, condition 10 of the Concept Plan Approval and section 5.11 of the BMP 2011.	The Developer	For a period of five (5) years from the certification of the provision of the STIF compensatory replacement plantings as required by clause 5(e) of this Planning Agreement.
Biodiversity Offset Package – onsite retention of STIF	Maintenance and enhancement of STIF on site in accordance with Schedule 3, condition 10 of the Concept Plan Approval and the BMP 2011.	The owner of the Land	At all times until the south western corner of the Land is transferred to Council.

Schedule 2 – Section 93F Requirements

The parties acknowledge and agree that the table set out below provides for certain terms, conditions and procedures for the purpose of the Planning Agreement complying with the EP&A Act.

Requirement under the EP&A Act	This Planning Agreement
<p>Planning instrument and/or development application - (Section 93F(1))</p> <p>The Developer has:</p> <p>(a) sought a change to an environmental planning instrument.</p> <p>(b) made, or proposes to make, a Development Application.</p> <p>(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.</p>	<p>(a) No</p> <p>(b) Yes</p> <p>(c) No</p>
Description of land to which this document applies - (Section 93F(3)(a))	The Land described in clause 1.
<p>Description of change to the environmental planning instrument or the development to which this document applies - (Section 93F(3)(b))</p> <p>Describe:</p> <p>(a) the proposed change to the environment plan to which this document applies; OR</p> <p>(b) the development to which this document applies.</p>	<p>(a) Not applicable.</p> <p>(b) The Development described in clause 1.</p>
The scope, timing and manner of delivery of Contribution required by this Planning Agreement - (Section 93F(3)(c))	As set out in the Contributions Schedule at Schedule 1.
Applicability of Section 94 of the EP&A Act to the Development - (Section 93F(3)(d))	The application of section 94 of the EP&A Act is excluded in respect of the Development.
Applicability of Section 94A of the EP&A Act to the Development - (Section 93F(3)(d))	The application of section 94A of the EP&A Act is excluded in respect of the Development.
Applicability of Section 94EF of the EP&A Act to the Development - (Section 93F(3)(d))	The application of section 94EF of the EP&A Act is not excluded in respect of the Development.
Consideration of benefits under this document if section 94 applies to the Development- (Section 93F(3)(e))	Not applicable.

Requirement under the EP&A Act	This Planning Agreement
Are the benefits under this document to be taken into consideration if Section 94 of the EP&A Act is not excluded?	
<p>Mechanism for Dispute resolution - (Section 93F(3)(f))</p> <p>This document provides a mechanism for the resolution of disputes under the document?</p>	Refer to clause 12.
<p>Enforcement of this document (Section 93F(3)(g))</p> <p>This document provides for enforcement by a suitable means in the event of a breach.</p>	Refer to clause 8 and Schedule 1 (which creates a restriction on the issue of an occupation certificate under s109H(2) of the Act).
<p>Registration of this document</p> <p>The parties agree that this document will be registered in accordance with clause 8.</p>	Yes.
<p>No obligation to grant consent or exercise functions - (Section 93F(9))</p> <p>The parties acknowledge that this document does not impose an obligation on a Consent Authority to grant a Development Consent, or to exercise any function under the Act in relation to a change to an environmental planning instrument.</p>	Refer to clauses 15 and 20.

Schedule 3 –Off-site Biodiversity Offsets

Site	Title details	Site Area
Willow Place, Kirrawee		475m ²
184 Oak Road, Kirrawee	Lot 29 DP 351150	595m ²
32 Kirrawee Avenue, Kirrawee	Lot 13 DP 27731	1,320m ²
Bowie Park (2R Hotham Road)	Lot 25 DP 20858	1,235m ²
459R President Avenue, Kirrawee	Part Lot 104 DP 1159806	590m ²
10R Laurel Grove, Menai	Lot 74 DP 814374	1,000m ²
2 Alison Crescent, Menai	Lot 978 DP 817633	1,200m ²
29R Alison Crescent, Menai	Lot 554 DP 841841	1,000m ²
Total Available		7,415m²

Schedule 4 –Licence Conditions

1. The Council grants the Developer a Licensee to enter and use the community land identified in Schedule 3 of the Planning Agreement (**the Land**) for the purpose of undertaking the works required in the Planning Agreement.
2. The Parties acknowledge that this Licence constitutes a personal right only, and not a lease, and that no assignment is permitted without the prior written consent of the Licensor.
3. The Developer agrees to comply with the Local Government Act 1993 (NSW) (**LGA Act**) and all other statutes and regulations regarding the works on the Land.
4. Upon completion of the works to satisfy the Planning Agreement, to which this Licence relates, the Developer must promptly advise Council.
5. Any damage to Council property must be rectified by the Developer at its own cost, in the event that the damage is not rectified by the Developer it may be rectified by the Council at the Developer's cost.
6. The Developer indemnifies Council and agrees to keep Council indemnified against all claims and liability for damage, loss or injury to person or property arising out of or in connection with this Licence including any damage to the Council's property caused or contributed to by the Developer. The obligations under this clause survive the termination of this Licence Agreement.
7. The Developer agrees to insure against public liability risks in the sum of at least \$20 million for any one event, and to maintain that insurance during the term of this licence, and to produce a Certificate of Currency to the Council in advance of the commencement of this licence and from time to time when requested by Council.
8. The Council agrees to grant access to the Land for the purpose of the Planning Agreement at no cost to the Developer.
9. The Developer covenants and acknowledges that:
 - (a) this Licence is only to undertake works to comply with the requirements of the Planning Agreement requiring the provision of the Biodiversity Offset Package, as conditioned in the Concept Plan Approval and the Early Works Consent, within the meaning of s46(1)(b) of the LGA and Clause 116(4) of the *Local Government (General) Regulation 2005* and for no other purpose or use;
 - (b) the purpose stated in clause 9(a) above is a "short term casual purpose" within the meaning of s46 (1) (b) of the LGA, and that it does not permit full time, constant or permanent , or other than occasional use of the Land;
 - (c) the Council is under no obligation to renew this Licence at any time;
 - (d) the works referred to above is the subject of a valid and operative development consent under the *Environmental Planning and Assessment Act 1979*;
 - (e) the Developer will expeditiously and diligently carry out the relevant works;
 - (f) Plant and equipment are to be operated in a safe and secure manner on the land and are the responsibility of the Developer. Plant and equipment are not to be stored on or left unattended on the Land and are done so as the risk to the Developer.
 - (g) The Land may be dangerous to the Licensee or other users as it contains potentially unstable land forms;
 - (h) The Land will be more dangerous in adverse conditions such as inclement weather;
 - (i) The Council makes no warranty or representation that the Land is suitable for pedestrian and/or vehicular access.
 - (j) The Developer acknowledges and agrees for the purpose of the *Work Health and Safety Act 2011* (NSW) ("Act") the Developer has the management and control of the Land during the works and the maintenance period. The Developer must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the

workplace and anything arising from the workplace are without risks to the health and safety of any person. The Developer will, on and from the earliest of the date of this agreement to the extent permitted by law, indemnify the Council against all claims and costs arising from or incurred in connection with a breach by the Developer of this Licence or of the obligations applicable to the Developer. The obligations under this clause survive the termination of this License Agreement.

10. The parties agree that the Licence is terminated upon termination of the Planning Agreement.
11. If any provision of this Licence is illegal or unenforceable, then it is to be severed without affecting the balance of this Licence Agreement, to the extent possible.
12. The law of New South Wales governs this Licence Agreement.
13. The parties submit to the exclusive jurisdiction of the courts of New South Wales and the Federal Court of Australia and agree that any lawsuit must be heard in those courts.

Annexure 1 - Explanatory Note

1. Summary of Objectives, Nature and Effect of the Voluntary Planning Agreement

Council and South Village Pty Limited propose to enter into a Voluntary Planning Agreement (VPA) to provide a Biodiversity Offset Package for the Sydney Turpentine Ironbark Forest which is an Endangered Ecological Community.

The VPA requires South Village, or any subsequent owner of the land at 566-594 Princes Highway, Kirrawee to provide a minimum of 5,300m² of replacement plantings to compensate for the approved loss of the Sydney Turpentine Ironbark Forest currently on the land.

On 23 August 2012, the Planning Assessment Commission issued a concept approval for the development of the land and condition of that concept approval requires this Biodiversity Offset Package.

The requirements and specifications of the Biodiversity Offset Package are established by the Biodiversity Management Plan prepared by Cumberland ecology dated November 2011 and the Off-site Compensatory Bushland Planting Report by AECOM dated 27 November 2014.

The VPA requires the retention and enhancement of some of the Sydney Turpentine Ironbark Forest on the land and it also requires compensatory planting to occur off the land on the following properties:-

Willow Place, Kirrawee	475m ²
184 Oak Road, Kirrawee	595m ²
32 Kirrawee Avenue, Kirrawee	1,320m ²
Bowie Park (2R Hotham Road)	1,235m ²
459R President Avenue, Kirrawee	590m ²
10R Laurel Grove, Menai	1,000m ²
2 Alison Crescent, Menai	1,200m ²
29R Alison Crescent, Menai	1,000m ²
Total	7,415m²

The nature of the VPA will be a deed binding Council and South Village to meet the above objectives.

2. Assessment of the Merits of the draft Deed of Works

The draft VPA serves a planning purpose in that it ensures retention of and it compensates for the loss of an endangered Ecological Community, being the Sydney Turpentine Ironbark Forest.

The draft VPA promotes the following objects of the *Environmental Planning and Assessment Act* 1979:

- (a) *the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats;*

- (b) *the proper management, development and conservation of natural and artificial resources;*
- (c) *ecologically sustainable development; and*
- (d) *the promotion and co-ordination of the orderly and economic use and development of land.*

The draft VPA promotes the public interest by providing enhanced public reserves and parklands. The draft VPA has a positive impact on the public, in that it provides for the conservation and enhancement of the natural environment and the provision of enhanced public recreation facilities for the benefit of local residents and the wider community generally.

The draft VPA promotes Council's charter by enabling the proper management and conservation of the environment, in a manner that is consistent with and promotes the principles of ecologically sustainable development. Further the draft VPA requires the Biodiversity Offset Package to be undertaken at the cost of South Village and has no impact on Council's capital works program. Prior to issue of construction, occupation or subdivision certificates for development on the land, the offsite plantings must have been established and are required to be maintained for a period of five (5) years from the initial establishment at no cost to Council.

This explanatory note is not to be used to assist in construing the draft VPA.