

# Voluntary Planning Agreement

## Draft 4

**September 2021**

**Penrith City Council**

*ABN 43 794 422 563*

By The Park Pty Ltd

ACN [606359344](#)

### **Sydney**

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# Agreement

## Date

## Parties

### First party

<b>Name</b>	Penrith City Council ( <b>Council</b> )
<b>ACN</b>	43 794 422 563
<b>Contact</b>	The General Manager
<b>Telephone</b>	02 4732 7777

### Second party

<b>Name</b>	By The Park Pty Ltd ( <b>Developer</b> )
<b>ACN</b>	ACN 606359344
<b>Contact</b>	Adam Harb
<b>Telephone</b>	0410747148

## Background

- A. In August 2016, the Developer made an application to the Council for the Instrument Change for the purpose of making a Development Application to the Council for development consent to carry out the Development on the Land.
- B. The Instrument Change application was accompanied by an offer by the Developer to enter into this agreement to make contributions for public purposes associated with the Instrument Change and the Development.

## 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;

**Approval** means any certificate, licence, consent, permit, approval or other requirement of any Authority having jurisdiction in connection with the activities contemplated by this agreement;

**Authority** means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person;

**Bank Guarantee** means an irrevocable and unconditional undertaking that is not limited in time and does not expire by one of the following trading banks:

- (a) Australia and New Zealand Banking Group Limited,
- (b) Commonwealth Bank of Australia,

- (c) Macquarie Bank,
- (d) National Australia Bank,
- (e) St George Bank Limited,
- (f) Westpac Banking Corporation, or
- (g) Other financial institution approved by the Council,

to pay an amount or amounts of money to the Council on demand and containing terms and conditions reasonably acceptable to the Council;

**Bond** means a documentary performance bond which must be denominated in Australian dollars and be an unconditional undertaking issued by an Australian Prudential Regulation Authority (APRA) regulated authorised deposit taking institution or an insurer authorised by APRA to conduct new or renewal insurance business in Australia that has at all times an investment grade security rating from an industry recognised rating agency;

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

**Certificate of Practical Completion** means the written certificate confirming the Works, or part of the Works, have been completed to the Council's satisfaction issued under clause 8.1(d) of **Error! Reference source not found.**;

**Claim** means any claim, loss, liability, damage, proceeding, order, judgment or expense arising out of the operation of this agreement;

**Complying Development Certificate** has the same meaning as in the Act;

**Construction Certificate** means a construction certificate as defined under section 6.4 of the Act;

**Construction Terms** means the terms set out in **Error! Reference source not found.**;

**Contributions** means the dedication of land, the payment of money or the carrying out of Works required under this agreement.

**Contributions Plan** has the same meaning as under the Act;

**Cost of Works** means the monetary value or cost of the Works, as calculated by a qualified quantity surveyor who is appointed by agreement between the parties;

**CPI** means the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics;

**Damages** means all liabilities, losses, damages, costs and expenses, including legal fees and disbursements and costs of investigation, litigation, settlement, judgment, interest and penalties;

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

**Dedication Land** means that part of the Land to be dedicated to Council in accordance with this agreement, as shown on the plan at Annexure B;

**Developer** means By The Park Pty Ltd;

**Development** means a Development Consent, or cumulative Development Consents, that authorise the development of a mixed-use building on the Land as described in the

Planning Proposal (or such other development proposed by the Developer on the Land for the purposes of giving effect to the Instrument Change);

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

**Development Commencement Date** is the date on which the Developer commences any construction works under any Development Consent for the Development;

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

**Development Contributions** means the Contributions referred to in Clause 6 and Schedules 1 and 2 of this Agreement.

**Fax Number** means a party's facsimile number set out in the Notices clause of this agreement;

**GST** has the same meaning as in the GST Law;

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

**Heritage Lot** means that part of the Land consisting only of Lot 1 in DP724160 which contains Local Heritage Item No.177.

**Handover** means, with respect to any Works, the time Council takes possession of and assumes responsibility for the work in accordance with the Construction Terms;

**Interim Roadworks** means the works outlined as 'Interim Roadworks' in Schedule 2;

**Insolvent** means, in relation to a party:

- (a) that party makes an arrangement, compromise or composition with, or assignment for, the benefit of its creditors or a class of them;
- (b) a receiver, receiver and manager, administrator, provisional liquidator, trustee, controller, inspector or analogous person is appointed in relation to, or over, all or any part of that party's business, assets or securities;
- (c) a presumption of insolvency has arisen under legislation because of the party's failure to comply with a statutory demand or analogous process;
- (d) an application for the winding up of, or for the appointment of a receiver to, that party, other than winding up for the purpose of solvent reconstruction or re amalgamation, is presented and not withdrawn or dismissed within [21] days (or such longer period agreed to by the parties), or an order is made or an effective resolution is passed for the winding up of, or for the appointment of a receiver to, that party, or any analogous application is made or proceedings initiated;
- (e) any shareholder or director of that party convenes a meeting for the purpose of considering or passing any resolution for the winding up or administration of that party;
- (f) that is an individual, a creditor's petition or a debtor's petition is presented to the Official Receiver or analogous authority in relation to that party;
- (g) an execution or analogous process is levied or enforced against the property of that party;

- (h) that party ceases or suspends, or threatens to cease or suspend, the conduct of all or a substantial part of its business;
- (i) that party disposes of, or threatens to dispose of, a substantial part of its assets;
- (j) that party stops or suspends, or threatens to stop or suspend, payment of all or a class of its debts; or
- (k) that party is unable to pay the party's debts as and when they become due and payable.

**Instrument Change** means an amendment to the LEP by way of Planning Proposal of PP\_2018\_PENRI\_002\_00 to:

- a) Nominate the Land as a Key Site (12).
- b) Amend Clause 8.7 (Community infrastructure on certain key sites), sub-clause (4), to allow a 6.5:1 Floor Space Ratio (FSR) to be developed on the Land if community infrastructure is provided in accordance with the requirements of the clause.
- c) Allow for additional permitted uses of residential flat buildings and shop top housing to occur on the Land if the development includes a minimum floor space ratio of 0.75:1 for non-residential uses and if a development application is lodged within 5 years of the date of gazettal of the Instrument Change.

**Land** means No. 57 Henry Street Penrith, legally described as Lot 1 in DP103609, Lot A and Lot B in DP159402, Lot 1 in DP724160, Lot 1 in DP795083, Lot 1 in DP905016, and Lot 1 in DP1122794;

**Landowner** means By The Park Pty Ltd;

**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);

**Maintain** means works to bring an item to or keep an item in a state of reasonable condition and in accordance with relevant standards applicable at the time of construction of the item, including repairing any defects due to use of poor materials or due to poor workmanship, but does not include repairing normal wear and tear, removing graffiti or repairing any item damaged as a consequence of vandalism.

**Maintained** and **Maintenance** have corresponding meanings.

**Modification Application** means any application to modify the Development Consent under section 4.55 of the Act;

**Occupation Certificate** means an occupation certificate as defined under section 6.4 the Act;

**Public Access Land** means that part of the Land to be made accessible to the public set out in Annexure C;

**Public Reserve** has the same meaning as in the *Local Government Act 1993*;

**Public Road** has the same meaning as in the *Roads Act 1993*;



**Register** means the Torrens title register maintained under the *Real Property Act 1900* (NSW);

**Regulation** means the *Environmental Planning and Assessment Regulation 2000*;

**Related Body Corporate** has the meaning given to that term in s 9 of the *Corporations Act 2001* (Cth);

**Subdivision Certificate** means a subdivision certificate defined under section 6.4 of the Act;

**Subdivision Works Certificate** means a subdivision works certificate defined under section 6.4 of the Act;

**Ultimate Roadworks** means the 'Ultimate Roadworks' outlined in Schedule 2;

**Works** means the works set out in Schedule 2.

**Works Commencement Date** means the date on which the Works are physically commenced and must take place in accordance with Clause 6.1(c) of this agreement.

## 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) **(General Manager, CEO or managing director)** the, General Manager, CEO or managing director of a body or Authority means any person acting in that capacity;
- (g) **(requirements)** a requirement to do anything includes a requirement to cause that thing to be done, and a requirement not to do anything 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 City or State, 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 4 of this agreement summarises the requirements for planning agreements under s 7.4 of the Act and the way this agreement addresses those requirements.

### 4 Application of this agreement

This agreement applies to:

- (a) the Instrument Change;
- (b) the Development; and
- (c) the Land.

## 5 Operation of this agreement

Except as provided by clause 4 this agreement commences on and from the date it is executed by all parties.

This agreement will cease to have effect on the date that the Instrument of Change is repealed and if a development application for the Development is not submitted to Penrith City Council prior to that day. If such a development application is not submitted within five years from the date of finalisation of the Instrument Change, the Developer will not be liable to carry out any obligations under this Agreement.

## 6 Contributions to be made under this agreement

### 6.1 *Monetary Contribution*

- (a) The Developer must make the Developer Contributions in the manner and at the times set out in **Error! Reference source not found.** and in accordance with this clause 0.

### 6.2 *Works*

- (a) If the Instrument Change is made, and the Developer obtains Development Consent for the Development, then the Developer will carry out the Works in accordance with this agreement, including the Construction Terms, and any Development Consent or other Approval granted for the Works, including any required approval under the Roads Act 1993 (NSW).
- (b) Prior to the issue of a Construction Certificate for the Development, the Developer is required to obtain any approvals required under the Roads Act 1993 (NSW) for the Works.
- (c) The Developer must physically commence the Works within 12 months of the Development Commencement Date.
- (d) The Works must be completed prior to the issue of an Occupation Certificate for the Development.

### 6.3 *Interim and Ultimate Works*

- (a) The works to be carried out under this Agreement are to comprise the:
  - (i) Interim Roadworks; or
  - (ii) Ultimate Roadworks.
- (b) If at the time the Developer seeks to prepare a Detailed Design in accordance with Schedule 2 of this agreement, it is identified by the parties that roadworks on Henry Street at the north-eastern corner of the Henry Street / Evan Street intersection have commenced, or have been completed, such that it would enable delivery of functional road improvements along the Henry St frontage to the Land as identified on the 'Ultimate roadworks concept plan' in Annexure B, and would not materially delay the Developer obtaining an Occupation Certificate for the Development, then the Developer will deliver the Ultimate roadworks.
- (c) If at the time the Developer seeks to prepare a Detailed Design in accordance with Schedule 2 of this agreement, it is identified by the parties that roadworks on Henry Street at the north-eastern corner of the Henry Street / Evan Street intersection have not commenced, or have not been completed, such that it

would not enable delivery of functional road improvements along the Henry St frontage to the Land as identified on the 'Ultimate roadworks concept plan' in Annexure B, then the Developer will deliver the Interim roadworks as identified on the 'Interim roadworks concept plan'.

- (d) If the Developer delivers the Interim roadworks and not the Ultimate Roadworks:
  - (i) The Developer will provide a monetary contribution to Council to reflect the value of the Ultimate Roadworks (**Ultimate Roadworks Contribution**);
  - (ii) The Developer will pay the Ultimate Roadworks Contribution to Council prior to the issue of any Occupation Certificate for the Development;
  - (iii) The Developer will submit to Council a report prepared by a suitably qualified quantity surveyor, engaged by the Developer (and agreed by Council), which estimates the cost of carrying out the Ultimate Roadworks and provide Council with a copy of the report for approval. Council (acting reasonably) must notify the Developer in writing of its approval of the Developer's submitted report. The Ultimate Roadworks Contribution amount is taken to be the estimated value of the Ultimate Roadworks identified in the report.
  - (iv) The Ultimate Roadworks Contribution is to be used by Council to deliver the Ultimate roadworks at a future time when the roadworks on Henry Street at the north-eastern corner of the Henry Street / Evan Street intersection have commenced, or have been completed.
- (e) The Developer will carry out the Works in accordance with this agreement, including the Construction Terms, and any Development Consent or other Approval granted for the Works. Council acknowledges that the Works are not yet approved by Transport for NSW (**TFNSW**) and that TFNSW may require the Works to be varied and in such a case, the varied Works will become the Works.
- (f) The Works or any part of the Works required under this agreement will be taken to have been completed for the purposes of this agreement when a Certificate of Practical Completion has been issued for those Works.
- (g) The Works or any part of the Works required under this agreement will be taken to have been delivered to Council on Handover in accordance with the Construction Terms.
- (h) The Works must be delivered to the Council prior to the issue of any Occupation Certificate for the Development or any part of the Development.
- (i) The parties agree and acknowledge that the Works serve the following public purposes:
  - i. Improve general traffic conditions in the Penrith CBD to address existing capacity restrictions at the Henry Street/Evan Street Intersection.

#### 6.4 *Dedication of Land*

- (a) The Developer must dedicate or cause to be transferred to the Council, at no cost to the Council, the Dedication Land freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, easements, rights,

charges, rates and contracts in, over or in connection with the land, including but not limited to, municipal rates and charges, water rates and land tax.

- (b) The Developer must take all steps, prepare all documents and meet all costs required to dedicate the Dedication land including, but not limited to:
  - (i) removing any encumbrances on the title to the land;
  - (ii) creating an interest in land in favour of Council if required;
  - (iii) subdividing the Land to create a separate lot for the Dedication Land;
  - (iv) preparing and lodging documents for registration;
  - (v) obtaining the consent of any other parties to the registration of the relevant documents; and
  - (vi) attending to any requisition relating to any dealing or document lodged for registration.
- (c) The obligation to dedicate the Dedication Land will be taken to have been satisfied when the Public Road is dedicated to Council by operation of the registration of a plan of subdivision in accordance with section 9 of the *Roads Act 1993*.
- (d) For the avoidance of doubt, all Works required by this agreement on the land to be dedicated under this clause 6.3 must be completed in accordance with clause 6.2 prior to Council accepting the dedication.
- (e) The Dedication Land must be dedicated or transferred to Council prior to the issue of any Occupation Certificate for the Development or any part of the Development.
- (f) The parties agree and acknowledge that the dedication of the Dedication Land serve the public purpose of improving general traffic conditions in the Penrith CBD to address existing capacity restrictions at the Henry Street/Evan Street Intersection

#### 6.5 Access to Council owned land

- (a) The Council agrees to permit the Developer, upon receiving at least 10 Business Days' prior notice, to enter, pass through or occupy any Council owned or controlled land in order to enable the Developer to properly perform its obligations under this agreement. Nothing in this clause creates or gives the Developer any estate or interest in any part of the Council owned or controlled land.
- (b) The Developer indemnifies the Council, its employees, officers, agents and contractors from and against all Claims in connection with the entry or access by the Developer to, or any presence of the Developer on, Council owned or controlled land for the purposes of performing their obligations under this agreement, except to the extent such Claim arises either directly or indirectly as a result of the Council or its employees, officers, agents, contractors or workmen's negligence, default, act or omission.

## 6.6 *Maintenance and Rectification of Defects*

The Developer must Maintain the Works and rectify any defects after Handover of the Works in accordance with the Construction Terms.

## 7 *Application of s 7.11, s 7.12 and s 7.24 of the Act*

- (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 or section 7.12 of the Act for a development application lodged for the Development.

## 8 *Registration of this agreement*

### 8.1 *Developer Interest*

The Developer represents and warrants to the Council that on the date of this agreement it is the registered proprietor of the Land.

### 8.2 *Registration of this agreement*

- (a) The Developer agrees to procure the registration of this agreement under the *Real Property Act 1900* (NSW) in the relevant folios of the Register of the Land in accordance with section 7.6 of the Act.
- (b) The Developer, at its own expense, must:
  - (i) procure the lodgement of this agreement with the Registrar-General as soon as reasonably practicable after this agreement comes into operation, but in any event, no later than 10 Business Days after that date;
  - (ii) procure the registration of this agreement by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this agreement is lodged for registration; and
  - (iii) provide documentary evidence that the registration of this agreement has been completed to Council within 5 Business Days of receiving confirmation that the registration has occurred.
- (c) The Developer warrants that, as at the date of this agreement, it has obtained the consent of each person who has an estate or interest in the Land registered under the *Real Property Act 1900* (NSW) or is seized or possessed of an estate or interest in the Land to the registration of this agreement on title.
- (d) The Developer, at its own expense will, promptly after the execution of this agreement, take all practical steps, and otherwise do anything that the Council reasonably requires to procure:
  - (i) An acceptance of the terms of this agreement and an acknowledgement in writing from any existing mortgagee in relation to the Land that the mortgagee will adhere to the provisions of this agreement if it takes possession of the Land as mortgagee in possession,

- (ii) The execution of any documents; and
- (iii) The production of the relevant duplicate certificates of title, to enable the registration of this agreement in accordance with clause 8.2.

### 8.3 *Removal from Register*

The Council will, at the Developer's cost, promptly provide a release and discharge of this agreement so that it may be removed from the folios of the Register for the Land (or any part of it) provided:

- (i) Council is satisfied that the Developer has duly fulfilled its obligations under this agreement; or
- (ii) The Developer has not submitted a development application relying upon the Instrument Change within 5 years from the date this agreement is executed.

### 8.4 *Caveat*

- (a) The Developer acknowledges and agrees that:
  - (i) when this agreement is executed, the Council is deemed to have acquired and the Developer is deemed to have granted, an equitable estate and interest in the Land (limited by the terms of this agreement) for the purposes of section 74F(1) of the *Real Property Act 1900* (NSW) and consequently the Council will have a sufficient interest in the Land in respect of which to lodge a caveat over the Land notifying that interest;
  - (ii) it will not object to the Council lodging a caveat in the relevant folios of the Register for the Land nor will it seek to remove any caveat lodged by the Council provided the caveat does not prevent registration of any dealing or plan other than a transfer.
- (b) The Council must, at Developer's cost, register a withdrawal of any caveat in respect of the Land within five Business Days after the Developer complies with clause 8.2.
- (c) The Developer must notify the Council within 5 Business Days after the registration of any subdivision plan that creates a separate lot for the Dedication Land or any part of the Dedication Land.
- (d) The Developer acknowledges and agrees that, in the event a separate lot is created for the Dedication Land or any part of the Dedication Land, it will not object to Council lodging a caveat in the relevant folios of the Register for that land, nor will it seek to remove any such caveat lodged by Council, until the relevant part of the Land is dedicated to Council in accordance with this agreement.

## 9 *Review of this agreement*

### 9.1 *Review generally*

- (a) This agreement may be reviewed or modified.
- (b) Any review or modification of this agreement will be conducted in the circumstances and in the manner determined by the parties;

- (c) 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; and
- (d) A party is not in breach of this agreement if it does not agree to an amendment to this agreement requested by a party in, or as a consequence of, a review.

## 10 Dispute Resolution

### 10.1 *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 clause, except where a party seeks urgent interlocutory relief.

### 10.2 *Notice of Dispute*

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

- (a) The nature of the dispute,
- (b) The alleged basis of the dispute, and
- (c) The position which the party issuing the Notice of Dispute believes is correct.

### 10.3 *Representatives of Parties to Meet*

- (a) The representatives of the parties must promptly (and in any event within 10 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.
- (b) The parties may, without limitation:
  - (i) resolve the dispute during the course of that meeting,
  - (ii) agree that further material or expert determination in accordance with clause 0 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
  - (iii) agree that the parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

### 10.4 *Further Notice if Not Settled*

If the dispute is not resolved within 30 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 under clause 0 or by expert determination under clause 0.

### 10.5 *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 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 10 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 clause 0 must:
  - (i) Have reasonable qualifications and practical experience in the area of the dispute; and
  - (ii) 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;
- (d) 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;
- (e) The parties must within 10 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 10 Business Days of the resolution);
- (f) 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
- (g) In relation to costs and expenses:
  - (i) Each party will bear its own professional and expert costs incurred in connection with the mediation; and
  - (ii) 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.

#### 10.6 *Expert determination*

If the dispute is not resolved under clause 0 or clause 0, 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; and
  - (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 10 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.

### 10.7 *Litigation*

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

### 10.8 *No suspension of contractual obligations*

Subject to any interlocutory order obtained under clause 10.1, the referral to or undertaking of a dispute resolution process under this clause (a) does not suspend the parties' obligations under this agreement.

## 11 **Enforcement and Security**

### 11.1 *Default*

- (a) In the event a party considers another party has failed to perform and fulfil an obligation under this agreement, it may give notice in writing to the other party (**Default Notice**) giving all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than 21 days.
- (b) In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (c) If a party disputes the Default Notice it may refer the dispute to dispute resolution under clause (a) of this agreement.

### 11.2 *Security*

- (a) In this clause 11.2, **Security** means a Bank Guarantee, Bond or cash deposit to be held by Council.
- (b) Prior to the issue of a Construction Certificate for the Development, the Developer must provide to the Council:
  - (i) A report prepared by a suitably qualified quantity surveyor (to be agreed by Council) which estimates the cost of carrying out the Works (**Cost of Works**); and
  - (ii) Security in an amount equivalent to 125% of the Cost of Works.

- (c) The Council may call on a Security provided under this clause if:
- (i) the Developer is in material or substantial breach of this agreement and has failed to rectify the breach within a reasonable period of time after having been given reasonable notice (which must not be less than 21 Business Days) in writing to do so in accordance with clause 11.1 of this agreement; or
  - (ii) the Developer becomes insolvent;
  - (iii) the Developer has failed to complete the Works within 5 years of the Works Commencement Date.

- (d) Within 20 Business Days of each anniversary of a Security provided under clause (a), the Developer must provide Council with one or more replacement Securities (**Replacement Security**) in an amount calculated in accordance with the following:

$$A = \frac{B \times D}{C}$$

Where:

A is the amount of the Replacement Security,

B is the amount of the Security to be replaced,

C is the CPI for the quarter ending immediately before the date of the Security to be replaced,

D is the CPI for the quarter ending immediately before the date of the Replacement Security,

provided A is greater than B.

- (e) On receipt of a replacement Security provided under clause 11.2(d), the Council must release and return to the Developer, as directed, the Security that has been replaced as soon as reasonably practicable.
- (f) At any time following the provision of a Security under this clause, the Developer may provide the Council with one or more replacement Securities totalling the amount of all Securities required to be provided under this clause for the time being. On receipt of such replacement Security, the Council must release and return to the Developer, as directed, the Securities which it holds that have been replaced as soon as reasonably practicable.
- (g) Subject to this clause and the provisions of this agreement, the Council may apply the proceeds of a Security to satisfy:
  - (i) any obligation of the Developer under this agreement to deliver Works, and
  - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this agreement.
- (h) The Council must promptly return a Security provided under this clause if requested by the Developer and:
  - (i) Handover has occurred for an item of Works to which the Security relates; and

- (ii) the Developer has provided a Bond or Bank Guarantee required under the Construction Terms for defects liability and maintenance of the item of Works; and
  - (iii) if the Security relates to other items of Works for which a Certificate of Practical Completion has not been issued, a replacement Security is provided by the Developer in an amount determined in accordance with clause 11.2(c).
- (i) For the avoidance of doubt, Council may retain a component of the Security it holds for an item of Works that is equivalent to 25% of the value of the Works, in satisfaction of the requirement to submit a Bank Guarantee or Bond under the Construction Terms for defects liability and maintenance.
  - (j) Nothing in this clause 11.2 prevents or restricts the Council from taking any enforcement action in relation to:
    - (i) any obligation of the Developer under this agreement; or
    - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this agreement, that is not or cannot be satisfied by calling on a Security.

### 11.3 Compulsory Acquisition

- (a) Except as otherwise provided for in this agreement if the Developer does not dedicate the Dedication Land to Council as required by this agreement, the Council may compulsorily acquire the relevant land, in which case the Developer consents to the Council compulsorily acquiring that land for compensation in the amount of \$1.00 without having to follow the pre-acquisition procedures in the *Land Acquisition (Just Terms Compensation) Act 1991* and may recover any costs, including legal costs, incurred by the Council on acquisition of the land from the Developer.
- (b) Except as otherwise provided for in this agreement clause 11.3(a) constitutes an agreement for the purposes of section 30 of the *Land Acquisition (Just Terms Compensation) Act 1991*.
- (c) Except as otherwise provided for in this agreement and as otherwise agreed between the Developer and Council, the Developer must ensure the Dedication Land is freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, rights, charges, rates, strata levies and contracts, except as may be permitted by this agreement on the date that the Council will acquire the land in accordance with clause 11.3(a).
- (d) The Developer indemnifies and keeps indemnified the Council against all Claims made against the Council as a result of any acquisition by the Council of the whole or any part of the relevant land under clause 11.3(a).
- (e) The Developer must pay the Council, promptly on demand, an amount equivalent to all costs, including legal costs, incurred by the Council acquiring the whole or any part of the relevant land under clause 11.3(a) that are not or cannot be recovered by calling on a Security.

#### 11.4 *Restriction on the issue of Certificates*

- (a) In accordance with section 6.8 of the Act and clause 146A of the Regulation the following obligations under this agreement must be satisfied before a Construction Certificate is issued for the Development or any part of the Development:
  - (i) Registration of the covenant required under clause 6.5(a)(i); and
  - (ii) Provision of Securities required under clause 11.2.
- (b) In accordance with section 6.10 of the Act and clause 154E of the Regulation, the following obligations under this agreement must be satisfied before an Occupation Certificate is issued for the Development or any part of the Development:
  - (i) Delivery of the Works in accordance with clause 6.2;
  - (ii) Dedication of the Dedication Land in accordance with clause 6.3;
  - (iii) Provision of a Bank Guarantee or Bond for any item of the Works for defects liability and maintenance under the Construction Terms.

#### 11.5 *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.

### 12 *Assignment and Dealings*

#### 12.1 *Assignment*

- (a) A party must not assign or deal with any right under this agreement without the prior written consent of the other parties.
- (b) Any change of ownership or control (as defined in section 50AA of the *Commonwealth Corporations Act 2001*) of a party (excluding the Council) shall be deemed to be an assignment of this agreement for the purposes of this clause.
- (c) Any purported dealing in breach of this clause is of no effect.

#### 12.2 *Transfer of Land*

- (a) The Developer may not transfer, assign or dispose of the whole or any part of its right, title or interest in the Land (present or future) or in the Development to another person (**Transferee**) unless before it sells, transfers or disposes of that right, title or interest:
  - (i) the Developer satisfies the Council that the proposed Transferee is financially capable of complying with the Developer's obligations under this agreement;

- (ii) the Developer satisfies the Council that the rights of the Council will not be diminished or fettered in any way;
- (iii) the Transferee delivers to the Council a novation deed signed by the Transferee in a form and of such substance as is acceptable to the Council containing provisions under which the Transferee agrees to comply with all the outstanding obligations of the Developer under this agreement;
- (iv) any default under any provisions of this agreement has been remedied or waived by the Council, on such conditions as the Council may determine, and
- (v) the Developer and the Transferee pay the Council's reasonable costs in relation to the assignment.

## 13 Approvals and consents

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 to give its reasons for giving or withholding consent or for giving consent subject to conditions.

## 14 No fetter

### 14.1 Discretion

- (a) This agreement is not intended to operate to fetter, in any manner, the exercise of any statutory power or discretion of the Council, including, but not limited to, any statutory power or discretion of the Council relating to the Development Application or any other application for Development Consent (all referred to in this agreement as a "**Discretion**").
- (b) For the avoidance of doubt, nothing in this agreement is to be construed or taken to satisfy clause 8.7 of Penrith Local Environmental Plan 2010.

### 14.2 No fetter

No provision of this agreement is intended to constitute any fetter on the exercise of 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 a 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 is substantially satisfied,
- (b) In the event that (a) cannot be achieved without giving rise to a fetter on the exercise of 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 in relation to the provision of this agreement which is to be held to be a fetter on the extent that is possible having regard to the relevant court judgment.

## 15 Notices

Any notice given under or in connection with this agreement (**Notice**):

- (a) must be in writing and signed by a person duly authorised by the sender;

- (b) must be addressed as follows and delivered to the intended recipient by hand, by prepaid post or by email at the address below, or at the address last notified by the intended recipient to the sender after the date of this agreement:
  - (i) to Penrith City Council: PO Box 60, Penrith, NSW 2751  
Fax: (02) 4732 7958  
Email: [council@penrith.city](mailto:council@penrith.city)  
Attention: The General Manager
  - (ii) to By The Park Pty Ltd: 85 Victoria Street, Ashfield  
Fax: N/A  
Email: [adam.harb@trioproperty.com.au](mailto:adam.harb@trioproperty.com.au)  
Attention: Adam Harb
- (c) is taken to be given or made:
  - (i) in the case of hand delivery, when delivered;
  - (ii) in the case of delivery by post, three Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country); and
  - (iii) in the case of an email, when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above; and
- (d) if under clause (c) a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it is taken to have been given or made at the start of business on the next Business Day in that place.

## 16 General

### 16.1 *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.

### 16.2 *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.

#### **16.3 Further assurances**

Each party must promptly execute all documents and do all other things reasonably necessary or desirable to give effect to the arrangements recorded in this agreement.

#### **16.4 Variation**

A provision of this agreement can only be varied by agreement between the parties, which will not be unreasonably withheld, to be distilled into a later written document executed by or on behalf of all parties and in accordance with the provisions of the Act.

#### **16.5 No assignment**

A party cannot assign or otherwise transfer its rights under this agreement without the prior written consent of the other party.

#### **16.6 Counterparts**

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

#### **16.7 Legal expenses, stamp duty and administration fees**

- (a) The Developer must pay on demand Council's reasonable legal costs and disbursements in connection with the negotiation, preparation, execution, stamping, and release and discharge of this agreement, including the reasonable costs incurred by the Council in obtaining any advice about this agreement or the value of land or works to be delivered under this agreement.
- (b) On execution of this agreement, the Developer must pay an administration, monitoring and enforcement fee to the Council in the amount of 1% of the Cost of the Works.

#### **16.8 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.

#### **16.9 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.

#### **16.10 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.



### 16.11 *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 16.11(b) applies.

### 16.12 *Waiver*

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.

### 16.13 *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.

### 16.14 *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.

## 17 *Reporting*

On or before 31 July in each calendar year after the execution of this agreement and until the Developer's obligations under this agreement are satisfied, the Developer must provide a written report to Council detailing the progress of the provision of Contributions under this agreement and the progress of the Development.



## Schedule 1

## Contributions Table

<b>Item/ Contribution</b>	<b>Public Purpose</b>	<b>Timing</b>
Construction of civil works to deliver slip lane and intersection upgrade	To improve local traffic conditions	Prior to issue of any Occupation Certificate
Dedication of slip land to Council	To improve local traffic conditions	Prior to issue of any Occupation Certificate

## Schedule 2      Scope of Works

For the purpose of this agreement, the Scope of works comprises the 'Interim Roadworks' set out below at paragraph (1), and the 'Ultimate Roadworks' set out at paragraph (2) below.

### (1) Interim roadworks

- Delivery of minimum 45m (measured along centreline of new lane) of eastbound left turn treatment from Henry Street to Evan Street
- Delivery of new pedestrian crossing at new left turn treatment slip lane
- Delivery of a new 3.5m wide footpath along Henry Street to Evan Street from the existing driveway location at the Henry Street frontage of the property and dedication of any land along Henry Street and Evan Street.
- Delivery of a retaining wall or batter within the subject site to deliver the road and verge widening/dedication
- Delivery of a new median island at the north-west corner of Henry and Evan Streets to facilitate the new left turn treatment
- Reconstruction of existing retaining wall, pedestrian fence and footpath to Evan Street to allow for new road geometry
- Relocation/modification to existing safety barrier to Evan Street to allow for new road geometry
- Relocation/modification to existing utilities as required
- Relocation/modification of stormwater infrastructure as required
- Relocation of existing power poles as required
- Relocation/modification of Traffic Signals as required.
- Relocation/modification of existing streetlighting to meet TfNSW standard for the intersection
- Removal and provision of street trees
- All proposed new verge widths shall be a minimum of 3.5m
- All ancillary works required to implement the Works.

### (2) Ultimate roadworks

- Delivery of a new median island to the western side of Henry Street at the intersection with Evan Street
- Linemarking in accordance with TfNSW standards and the "Ultimate Roadworks Concept Plan"
- Relocation/modification of Traffic Signals as required.
- All ancillary works required to implement the Works.

### Survey of Land to be dedicated

Prior to the issue of any Construction Certificate, an accurate plan of road to be dedicated to Council is to be produced by a Registered Surveyor. This plan shall be submitted to Council for review. Council is either to confirm that it accepts the plan or provide comments on the plan within 3 weeks of receiving the plan.

### Archaeological Impact Assessment

Prior to any Works commencing or the issue of any Construction Certificate, whichever occurs first, an Archaeological Impact Assessment is to be prepared by a suitably qualified archaeologist,

in accordance with the recommendations of the non-aboriginal archaeological assessment prepared by Artefact dated June 2022 and submitted to Council for review.

## Schedule 3

## Construction Terms

### 1 Interpretation

For the purposes of this 3, the defined terms in clause 1 of this agreement and the Interpretation principles in clause 0 of this agreement will apply and, unless context indicates a contrary intention:

**Builder** means any entity contracted under the Construction Contract to carry out the Works.

**Construction Contract** means the contract to carry out the Works (whether or not that is a contract for the Works only or forms part of a contract for the building of other components of the Development).

**Defects Liability and Maintenance Period** means in respect of each item of building works which together comprise the Works the period of 12 months from the date on which Handover of the Works occurs.

**Detailed Design** means the final specifications and finishes for the Works prepared in accordance with clause 5.2 of this **Error! Reference source not found.** and will include the design of the Works, the location for the Works, installation specifications and estimated costs of construction and/or installation.

**Services** means all water, gas, electricity, television, drainage, sewerage, cable TV, data communications, telecommunications and other services which are required under a development consent within the meaning of the Act or an Approval and which are necessary or desirable for the construction or operation of the Development.

**Superintendent** means the Superintendent appointed under any Construction Contract.

### 2 Requirements of Authorities and Approvals

2.1 These Construction Terms must be read and construed subject to:

- (a) any requirements or conditions of any Development Consent;
- (b) the requirements of and conditions imposed by all relevant Authorities and all Laws relating to the Development and the construction of the Development.

2.2 If the Developer requires any Approvals in order to carry out the obligations under this agreement, then the Developer will acquire all Approvals necessary to carry out the Works at its own cost.

2.3 The Developer must ensure that the Works carried out under this agreement are carried out:

- (a) in accordance with the relevant Development Consent for the Works and all Approvals and the requirements of all Laws, including without limitation, work health and safety legislation; and
- (b) in a good and workmanlike manner and so that they are diligently progressed until completion;

AND it is acknowledged that to the extent that there is any inconsistency between this agreement and any Approval the terms of the Approval shall take precedence.

- 2.4 The delivery of road widening and intersection works will be in accordance with Transport for NSW design guidelines for signalised intersections or equivalent document release by Transport for NSW.

### **3 Costs of Works**

All costs of the Works must be borne by the Developer.

### **4 Project Management and Contractor Engagement**

- 4.1 The Developer will be responsible for managing the Works.
- 4.2 The Developer will ensure that any contractor it engages to carry out the Works agrees to:
- (a) carry out the Developer's obligations in these Construction Terms as part of any Construction Contract; and
  - (b) request a Council representative to be present at each on-site meeting attended by the Superintendent and to ensure the Council representative is present at the meeting.

### **5 Design Development**

#### **5.1 Concept Design**

Council and the Developer have worked in consultation with each other to prepare and agree the concept plans for the Works at Annexure C and Annexure D.

#### **5.2 Detailed Design**

- (a) Prior to Works commencing the Developer must provide a copy of the draft Detailed Design to the Council for review.
- (b) Within 15 Business Days of receiving the Detailed Design, Council will respond to the Developer with any suggested amendments to the Detailed Design.
- (c) Council and the Developer must work in consultation with each other to prepare and agree on the Detailed Design and must both act reasonably and with due expedition in their consultations with each other.
- (d) If the Detailed Design is not completed and agreed within 15 Business Days of Council providing its suggested amendments in accordance with clause 5.2(b) of this Schedule, to avoid possible delays to the issue of a Certificate of Practical Completion, the Council will, in its sole discretion, be entitled to decide on any outstanding or undecided matter or item relating to areas that are to be accessible to the public, provided that any decision made by Council under this clause:
  - (i) is consistent with the obligation to carry out the Works and dedicate the Dedication Land under this agreement; and
  - (ii) is consistent with the Development Consent; and
  - (iii) does not materially and adversely affect the Development; and
  - (iv) is not unreasonable.

- 5.3 Any acceptance by the Council of the Detailed Design under this clause 5 is not to be taken as approval of or to any Construction Certificate for the Works.

#### 5.4 **Good faith**

The parties must act promptly and in good faith to consult in relation to the Detailed Design.

### 6 **Carrying out of Works**

#### 6.1 **Communication**

The Developer must notify Council on the commencement of the Works and keep Council reasonably informed of progress of the Works and provide to Council such information about the Works as Council reasonably requests.

#### 6.2 **Standard of Works**

- (a) Unless otherwise provided, the Developer shall, and must cause the Builder to, use suitable new materials and proper and tradesman-like workmanship when carrying out the Works.
- (b) The qualitative standard of the design and finishes for the Works must be no less than those described in the following documents:
  - (i) Any relevant Australian Standard;
  - (ii) Any relevant design standards or guidelines and any other requirements or policies applied by the Council from time to time in assessing the adequacy of any works or improvements proposed for the public domain or to be accessible to the public in accordance with this agreement.
- (c) The Developer will obtain any relevant standards (including design standards), specifications, or guidelines and any other requirements or policies referred to in clause 6.2(b)(ii) of this Schedule from Council if the Council fails to deliver them to the Developer.
- (d) The Works are to be undertaken in accordance with Council's Design Guidelines for Engineering works for subdivisions and Developments and Engineering Construction Specification for Civil works.
- (e) The Developer may but is not obliged to reinstate any Works where damage or destruction is as a result of:
  - (i) Any act or omission of the Council or its employees, consultants or agents relating to any part of the Works under this agreement; or
  - (ii) The use or occupation by the Council or its employees, consultants or agents, Council's representatives or other contractor of the Council of any part of the Works.

#### 6.3 **Damage to people, property & utilities**

- (a) The Developer is to ensure to the fullest extent reasonably practicable that, in performing its obligations under this agreement:
  - (i) all necessary measures are taken to protect people and property;
  - (ii) unnecessary interference with the passage of people and vehicles is avoided; and
  - (iii) nuisances and unreasonable noise and disturbances are prevented.



- (b) Without limiting clause 6.3(a) of this Schedule, the Developer is not to obstruct, interfere with, impair or damage any public road, public footpath, public cycleway or other public thoroughfare, or any pipe, conduit, drain, watercourse or other public utility or service on any land except as authorised in writing by the Council or any relevant Authority.

## 7 Inspection

- (a) On completion of the Detailed Design, the Council will provide a schedule of inspections to be undertaken by Council (**Inspection Schedule**) to occur at specified stages of the construction of the Works (**Inspection Stage**). If the Council does not provide the Inspection Schedule, the Developer must request the Inspection Schedule from the Council prior to the Works commencing.
- (b) Five Business Days prior to reaching an Inspection Stage as set out in the Inspection Schedule, the Developer must notify the Council of the proposed inspection date (**Inspection Date**).
- (c) On the Inspection Date, or other agreed date, the Developer must ensure that any employees, contractors, agents or representatives of Council have access to and may enter the Land to inspect the Works.
- (d) In addition to carrying out inspections in accordance with the Inspection Schedule, the Council and its employees, contractors, agents or representatives may enter the Land or any part of the Land on which the Works are located to inspect the progress of the Works, subject to:
  - (i) the terms of the Construction Contract (save for any clause of the Construction Contract which prevents the Council from accessing the Land);
  - (ii) giving reasonable notice to the Developer;
  - (iii) complying with all reasonable directions of the Developer; and
  - (iv) being accompanied by the Developer or a nominee, or as otherwise agreed.
- (e) The Council may, acting reasonably, within 5 Business Days of carrying out an inspection (either under clause 6.3(a)(c) or 6.3(a)(d) of Schedule), notify the Developer of any defect or non-compliance in the Works and direct the Developer to carry out work to rectify that defect or non-compliance within a reasonable period of time. Such work may include, but is not limited to:
  - (i) removal of defective or non-complying material;
  - (ii) demolishing defective or non-complying work;
  - (iii) reconstructing, replacing or correcting any defective or non-complying work; and
  - (iv) not delivering any defective or non-complying material to the site of the Works.
- (f) If the Developer is issued a direction to carry out further work under clause 6.3(a)(e) of this Schedule, the Developer must, at its cost, rectify the defect or non-compliance specified in the Notice within the time period specified

in the Notice, provided that it is reasonable having regard to the nature of the works.

- (g) If the Developer fails to comply with a direction to carry out work given under clause 6.3(a)(e) of this Schedule, the Council will be entitled to refuse to accept that the Works (or the relevant part of the Works) meet the Council's standards and specifications and may refuse to issue a Certificate of Practical Completion, until the required Works have been completed to the Council's satisfaction, acting reasonably.
- (h) For the avoidance of doubt, any acceptance by the Council that the Developer has rectified a defect or non-compliance identified in a notice issued under clause 6.3(a)(e) of this Schedule does not constitute:
  - (i) acceptance by the Council that the Works comply with all Approvals and Laws; or
  - (ii) an Approval by the Council in respect of the Works; or
  - (iii) an agreement or acknowledgment by the Council that the Works or the relevant part of the Works are complete and may be delivered to the Council in accordance with this agreement.

## **8 Completion**

### **8.1 Practical Completion**

- (a) When the Developer considers that the Works, or any part of the Works, are complete, the Developer must send a Notice to the Council accompanied by complete works as executed plans, any relevant certificates or consents of any public utility authority and a request for written certification from the Council that the Works are complete.
- (b) Within 10 Business Days of receipt of the notice under clause 8.1(a) of this **Error! Reference source not found.**, the Council will carry out an inspection of the Works and will, acting reasonably, either:
  - (i) provide written certification to the Developer that the Works have been completed; or
  - (ii) notify the Developer of any additional information required or matters which must be addressed by the Developer prior to the certification being issued.
- (c) If the Developer is required to provide additional information or address any matters under clause 8.1(b)(ii) of this Schedule, the Developer will provide that information to Council or address those matters within 10 Business Days of receiving the notice or within a reasonable period of time and make a further request under clause 8.1(a) of this **Error! Reference source not found.** for written certification that the Works have been completed.
- (d) Practical completion will be achieved in relation to the Works or any part of the Works when a Certificate of Practical Completion has been issued for those Works by Council.

### **8.2 Handover**

- (a) The Developer is responsible for the delivery and care of the Works at all times prior to Handover of the Works.

- (b) Handover will occur and Council will assume responsibility for the Works:
  - (i) following dedication to Council of the land on which Works are located; or
  - (ii) if Works are carried out on land already owned by Council, on the issue of a Certificate of Practical Completion for those Works.

### 8.3 **Delivery of documents**

- (a) If it has not already done so, the Developer must as soon as practicable, and no later than 20 Business Days after the date on which the Certificate of Practical Completion is issued in respect of the Works or any part of the Works deliver to the Council, complete and legible copies of:
  - (i) all "as built" full-sized drawings, specifications and relevant operation and service manuals;
  - (ii) all necessary certificates including the certificates of any consultants of the Developer that the Council may reasonably require, and Approvals of any public utility authority (where relevant); and
  - (iii) copies of all Approvals required for use of the land subject to the Works.
- (b) The Developer must as soon as practicable, and no later than 20 Business Days after the date on which the Certificate of Practical Completion is issued in respect of the Works or any part of the Works, provide the Council with a tour of the land subject to the Works and provide reasonable instructions on the operation and use of the Services on that land.

### 8.4 **Assignment of Warranties and Causes of Action**

- (a) The Developer must assign (as beneficial owner) or cause to be assigned to Council the benefit of any warranties and guarantees obtained by the Developer and the Builder (and capable of assignment) with respect to any material or goods incorporated in or forming part of the Works.
- (b) To the extent that any such warranties or guarantees cannot be assigned, the Developer must at the request of Council do anything reasonably required by Council to enforce such warranties or guarantees for the benefit of Council.

## 9 **Defects Liability and Maintenance**

### 9.1 **Maintenance**

- (a) Prior to the issue of a Certificate of Practical Completion for any part of the Works, the Developer must provide to the Council a Maintenance Schedule setting out the proposed maintenance works for the relevant part of the Works over the Maintenance Period.
- (b) Within 10 Business Days of receiving the Maintenance Schedule, Council must issue a written notice to the Development advising of any changes it requires to the Maintenance Schedule, which changes must be reasonable and in accordance with Council's usual practice for maintaining works of the same type.
- (c) Within 5 Business Days of receiving the Council's notice under clause 9.1(b) of this Schedule, the Developer must provide to Council a final Maintenance Schedule incorporating the Council's changes.

- (d) The Works or any part of those works, must be Maintained by the Developer in accordance with the Maintenance Schedule for the Maintenance Period.
- (e) The Developer must follow relevant Council policies and obtain all Approvals necessary to carry out the Maintenance required under this clause.
- (f) The Council must give the Developer and its contractors any access required to carry out Maintenance in accordance with the Maintenance Schedule.

## 9.2 Defects Liability and Maintenance Period

- (a) During the Defects Liability and Maintenance Period, the Council (acting reasonably) may give to the Developer a notice (**Rectification Notice**) in writing that identifies a defect in the Works or any Maintenance requirement that has not been complied with.
- (b) The Rectification Notice must specify:
  - (i) action required to be undertaken by the Developer to rectify the defect or Maintain the Works (**Rectification Works**); and
  - (ii) the date on which the defect must be rectified, or the Maintenance work completed (**Rectification Date**).
- (c) The Developer must comply with the Rectification Notice by:
  - (i) procuring the performance of the Rectification Works by the Rectification Date, or such other date as agreed between the parties;
  - (ii) keeping the Council reasonably informed of the action to be taken to rectify the defect or Maintain the Works; and
  - (iii) carrying out the Rectification Works.
- (d) The Council must give the Developer and its contractors any access required to carry out the Rectification Works.
- (e) When the Developer considers that the Rectification Works are complete, either the Developer must notify the Council and provide documentation, plans or invoices which establish that the Rectification Works were carried out.
- (f) The Council may inspect the Rectification Works within 15 Business Days of receiving a Notice from the Developer under clause 9.2(e) of this **Error! Reference source not found.** and, acting reasonably:
  - (i) issue a further Rectification Notice if it is not reasonably satisfied that the Rectification Works are complete; or
  - (ii) notify the Developer in writing that it is satisfied the Rectification Works are complete.
- (g) The Developer must meet all costs of and incidental to rectification of defects or Maintenance of Works under this clause 9.2.
- (h) If the Developer fails to comply with a Rectification Notice, then the Council may do such things or take such action as is necessary to carry out the Rectification Works, including accessing and occupying any part of the Land without further notice to the Developer, and may:

- (i) call upon any Bond or Bank Guarantee provided to the Council under clause (a) of this Schedule to meet its costs of carrying out Rectification Works; and
  - (ii) recover as a debt due to the Council by the Developer in a court of competent jurisdiction, any difference between the amount of the Bond or Bank Guarantee and the costs incurred by the Council in carrying out Rectification Works.
- (i) The Developer must request that Council inspect the Works 28 days prior to the end of the Defects Liability and Maintenance Period. The Council must inspect the Works at any time after receiving the request from the Developer and before to the end of the Defects Liability and Maintenance Period.
- (j) If, prior to the end of the Defects Liability and Maintenance Period:
- (i) the Developer fails to request the inspection, or
  - (ii) the Council does not carry out the inspection,
- the Council may extend the Defects Liability and Maintenance Period so that the inspection may be carried out.

### 9.3 Security for Defects Liability

- (a) Prior to the issue of a Certificate of Practical Completion for each item of the Works the Developer must deliver to the Council Bonds or Bank Guarantees in an amount equivalent to 25% of the construction costs for the particular item of Works.
- (b) The Developer discloses and the Council acknowledges that the Bonds or Bank Guarantees may be supplied by the Builder and form a part of the security held by the Developer from the Builder under the terms of the Construction Contract, provided that:
  - (i) any Bond or Bank Guarantee provided by the Builder benefits the Council and satisfies the requirements of this agreement; and
  - (ii) the Developer procures an agreement from the Builder that the Council will be entitled to call on any Bond or Bank Guarantee provided by the Builder, in accordance with the terms of this agreement and the terms of any Construction Contract.
- (c) Within 10 Business Days after the Defects Liability and Maintenance Period for a particular item of Works has expired Council must (if it has not called on it) return the Bond or Bank Guarantee referred to in clause 9.2(a)(a) of this Schedule for that item of Works (or any remaining balance of it) to the Developer.
- (d) Notwithstanding clause 9.2(c) of this Schedule, if during the Defects Liability and Maintenance Period for a particular item of Works, the Council issues a Rectification Notice, then the Council need not deliver the balance of any Bonds or Bank Guarantees provided to it until the Rectification Notice has been complied with.

## 10 Risk

The Developer undertakes the Works entirely at its own risk.

## 11 Insurance

- (a) Prior to the commencement of the construction of any of the Works, the Developer must ensure the Builder effects and the Developer must produce evidence to the Council of the following insurances issued by an insurer approved by the Council (acting reasonably) in a form approved by the Council (acting reasonably):
  - (i) construction works insurance for the value of the Works;
  - (ii) public risk insurance for at least \$20 million;
  - (iii) workers compensation insurance as required by Law.
- (b) The Developer must provide evidence of currency of insurance required by clause 11(a) of this **Error! Reference source not found.** upon request by the Council, acting reasonably, throughout the term of this agreement.

## **12 Indemnities**

The Developer indemnifies the Council, its employees, officers, agents and contractors from and against all Claims in connection with the carrying out by the Developer of the Works except to the extent such Claim arises either directly or indirectly as a result of the Council or its employees, officers, agents, contractors or workmen's negligence, default, act or omission.

## **13 Intellectual Property Rights**

The Council acknowledges that the Developer or its contractors hold all rights to copyright and any intellectual property which may exist in the Works. To the extent the Developer have or receive intellectual property rights for the Works, the Developer shall assign those intellectual property rights to Council or permit use thereof.

## **14 Risk of contamination**

The Developer acknowledges and agrees:

- (a) that it is responsible for the management and remediation of any contamination present upon or under the land on which the Works are to be carried out;
- (b) it will attend to any necessary remediation at their own costs; and
- (c) to the fullest extent permitted by Law indemnify and release the Council from any Claim which might arise from any contamination with respect to the land on which the Works are to be carried out.

## **15 Plans**

The parties acknowledge and agree that further detail and refinement of plans and documents in connection with this agreement may be necessary having regard to the following matters:

- (a) matters affecting Works not capable of identification on or before the date of this agreement; or
- (b) by agreement between the parties.

## Schedule 4      Summary of requirements (section 7.4)

Subject and subsection of the Act	Planning Agreement
<p><b>Planning instrument and/or Development Application – Section 7.4(1)</b></p> <p>The Landowners have:</p> <p>(a)      Sought a change to an environmental planning instrument</p> <p>(b)      Made, or propose to make a Development Application</p> <p>(c)      Entered into an agreement with, or are otherwise associated with, a person to whom paragraph (a) or (b) applies</p>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p>
<p><b>Description of the land to which the planning Agreement applies – Section 7.4(3)(a)</b></p>	<p>57 Henry Street Penrith –legally described as Lot 1 in DP103609, Lot A and Lot B in DP159402, Lot 1 in DP724160, Lot 1 in DP795083, Lot 1 in DP905016, and Lot 1 in DP1122794</p>
<p><b>Description of the change to the environmental planning instrument or development to which the Planning Agreement applies - Section 7.4(3)(b)</b></p>	<ul style="list-style-type: none"> <li>▪ Nominate the Land as a Key Site (12).</li> <li>▪ Amend Clause 8.7 (Community infrastructure on certain key sites), sub-clause (4), to allow a 6.5:1 Floor Space Ratio (FSR) to be developed on the Land if community infrastructure is provided in accordance with the requirements of the clause.</li> <li>▪ Allow for additional permitted uses in Schedule 1 (residential flat buildings, and shop top housing) to occur on the Land if the development includes a minimum floor space ratio of 0.75:1 for non-residential uses. This provision (for the additional uses) would have a five year Sunset Clause from date of gazettal – i.e., a development application must be lodged within that five year period.</li> </ul>
<p><b>The scope, timing and manner of delivery of contributions required by the Planning Agreement – Section 7.4(3)(c)</b></p>	<p>Dedication of land and undertaking of intersection upgrade at the frontage of 57 Henry Street (corner Henry and Evan Street) prior to any Occupation Certificate for the Development.</p>

<b>Applicability of section 7.11 of the Act –</b> Section 7.4(3)(d)	See clause 7 - Section 7.11 applies and as provided for under section 7(d) of this agreement benefits under this agreement are not to be taken into consideration in determining a development contribution under section 7.11.
<b>Applicability of section 7.12 of the Act –</b> Section 7.4(3)(d)	See clause 7 - Section 7.12 applies and as provided for under section 7(d) of this agreement benefits under this agreement are not to be taken into consideration in determining a development contribution under section 7.12.
<b>Applicability of section 7.24 of the Act –</b> Section 7.4(3)(d)	See clause 7 - Operation is not excluded.
<b>Whether the benefits are or are not to be taken into consideration in determining a development contribution under section 7.11 –</b> Section 7.4(3)(e)	No, as provide for under section 7 (d) of this agreement.
<b>Mechanism for dispute resolution –</b> Section 7.4(3)(f)	See clause 10 of this agreement
<b>Enforcement of the Planning Agreement by a suitable means –</b> Section 7.4(3)(g)	See clause 11 of this agreement
<b>Registration of the Planning Agreement –</b> Section 7.6	See clause 8 of this agreement
<b>No obligation to grant consent or exercise functions –</b> Section 7.4(9)	See clause 0 (no fetter)



Executed as an agreement

<b>Executed</b> for and on behalf of <b>Penrith</b>	)	<b>Executed</b> for and on behalf of – please
<b>City Council</b> by its authorised delegate in	)	insert company name
accordance with a resolution of the	)	
Council dated [insert date]:	)	

.....	.....
Signature of witness	Signature of Authorised Delegate
	Print position:

.....	.....
Print name	Print name

Executed for and on behalf of By the Park )  
Pty Ltd ACN 606359344 )  
)

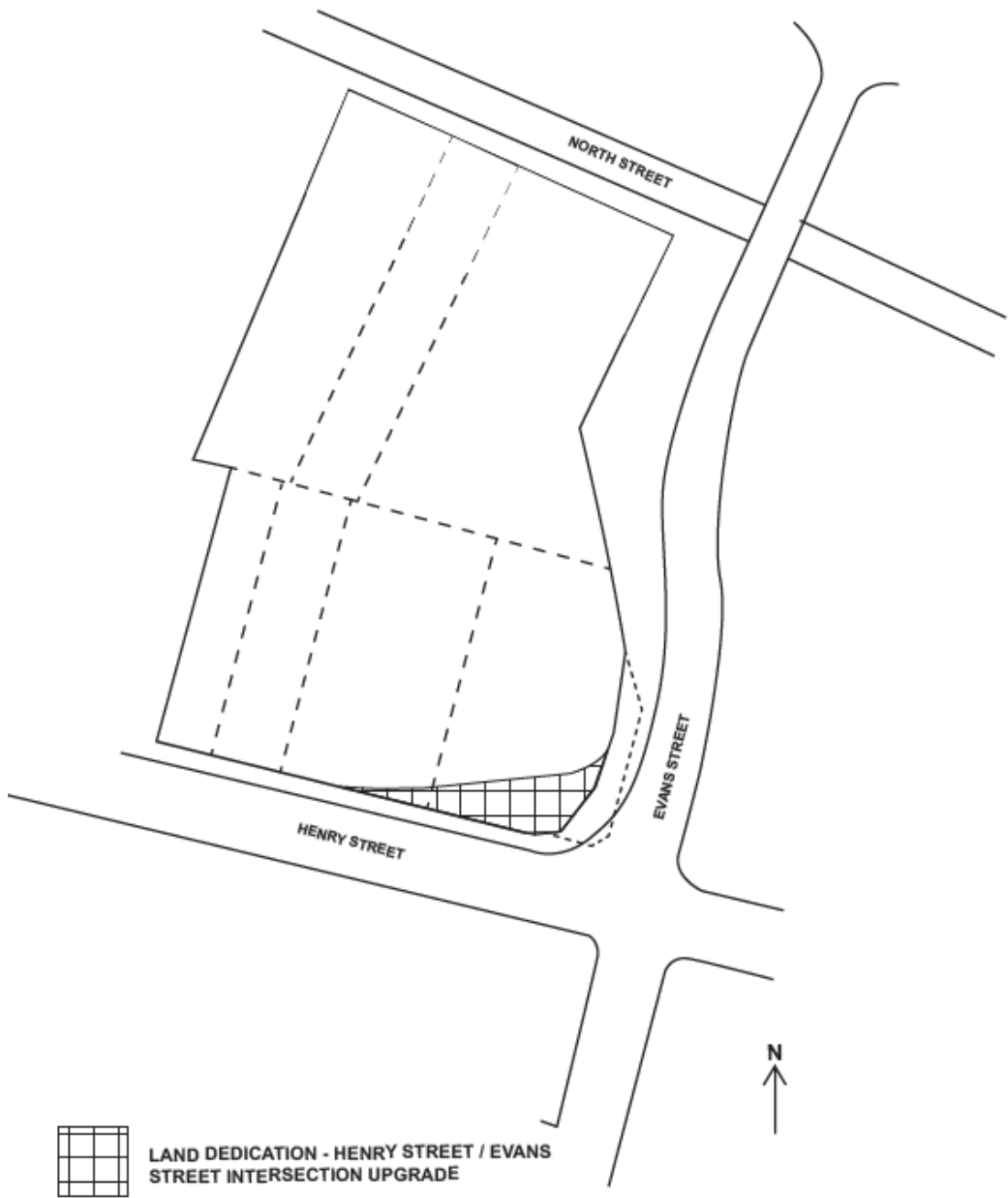
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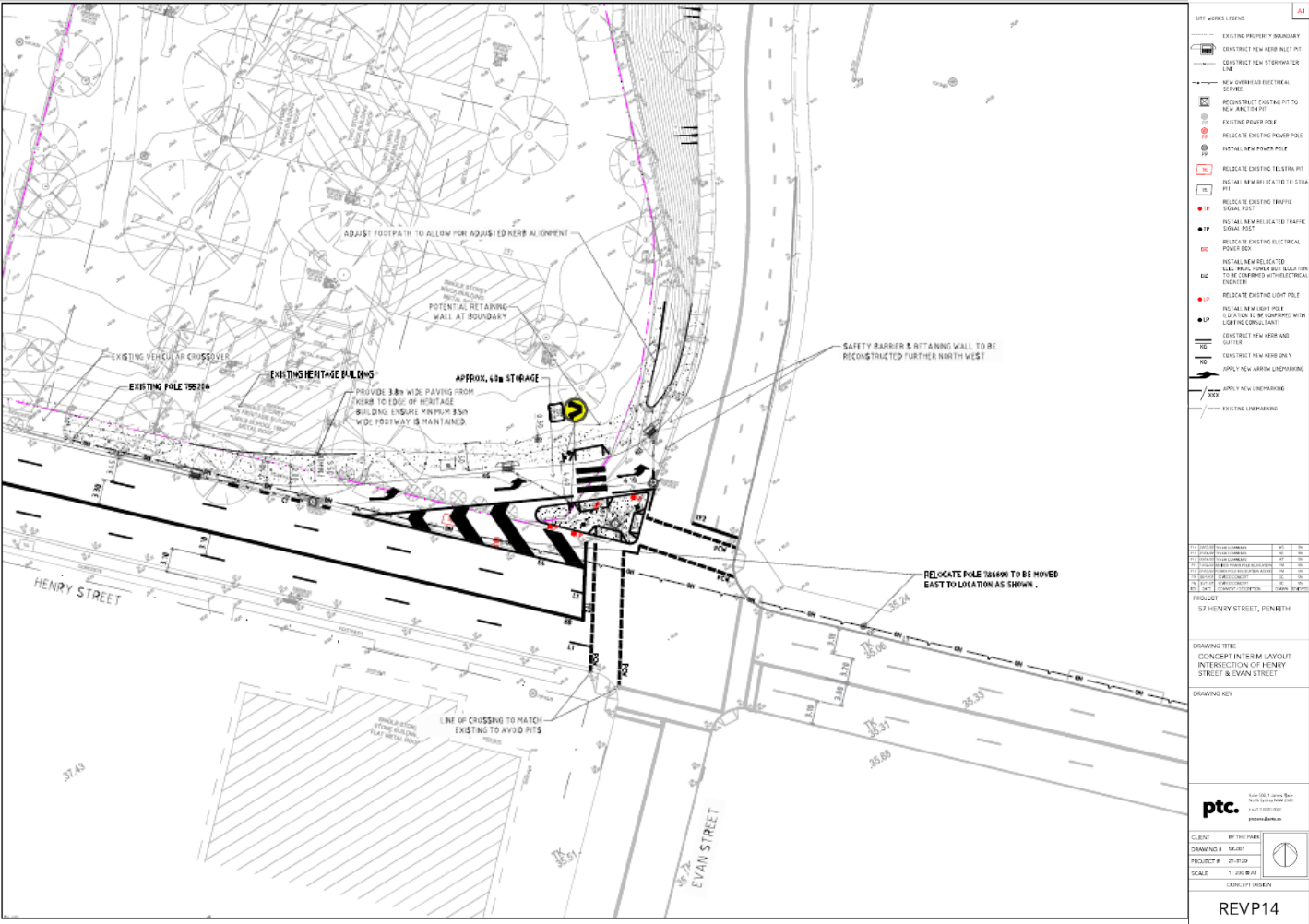
## Annexure A Plan showing Land



Annexure B      Plan showing Dedication Land



Annexure C Plan Showing Interim Works



Annexure D Plans showing Ultimate Works

