

Voluntary Planning Agreement

7 City View Road, Pennant Hills

Section 7.4 of the *Environmental Planning and Assessment Act 1979*

[Date]

Hornsby Shire Council (**ABN 20 706 996 972**) of 296
Pacific Highway, Hornsby NSW (**Council**)

and

EG Funds Management Pty Ltd **ACN 108 198 492** ATF EG
Unit Trust in its capacity as Investment Manager of the
Yield Plus Infrastructure Property Fund No.2, Level 21,
Governor Phillip Tower, 1 Farrer Place Sydney , NSW
(**Developer**)

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Agreement

Date

Parties

First party

Name	Hornsby Shire Council (Council)
ABN	20 706 996 972
Contact	Steven Head
Telephone	(02) 9847 6666

Second party

Name	EG Funds Management Pty Ltd ACN 108 198 492 ATF EG Unit Trust in its capacity as Investment Manager of the Yield Plus Infrastructure Property Fund No.2 (Developer)
Contact	David Workman
Telephone	(02) 9220 7045

Background

- A. On 4th April 2022, the Developer made an application to the Council for the Instrument Change for the purpose of making a planning proposal to facilitate the Development of the Land.
- B. The Developer has agreed to make Development Contributions in connection with the carrying out of the Development enabled by the Instrument Change, in accordance with the terms of this Agreement.

Operative provisions

1. Planning agreement under the Act

The Parties agree that this Agreement is a planning agreement within the meaning set out in s7.4 of the Act and governed by Subdivision 2 of Division 7.1 of Part 7 of the Act

2. Application of this Agreement

This Agreement is made in respect of the Development and applies to the Land, the Instrument Change and the Development.

3. Operation of this Agreement

This Agreement operates as a planning agreement for the purpose of the Act from the last to occur of the following:

- (1) the Instrument Change being published in the NSW Government Gazette; and

- (2) the date that this Agreement is executed by both parties.

4. Definitions and interpretation

4.1 In this Agreement the following definitions apply:

Acquisition Act means the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

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

Affordable Housing has the same meaning as in the Act.

Affordable Housing Units means the units described in Schedules 1 and Schedule 2 of this Agreement.

Affordable Housing Units Works means all works in connection with the construction of the Affordable Housing Units as specified or described in **Schedule 2** of this Agreement.

Assign means, as the context requires, any assignment, sale, transfer, disposition, declaration of trust over or other assignment of a legal and/or beneficial interest.

Authority means (as appropriate) any:

- (1) federal, state or local government;
- (2) department of any federal, state or local government;
- (3) any court or administrative tribunal; or
- (4) statutory corporation or regulatory body.

Bank Guarantee means an irrevocable and unconditional undertaking without any expiry or end date by one of the following trading banks:

- (1) Australia and New Zealand Banking Group Limited.
- (2) Commonwealth Bank of Australia.
- (3) Macquarie Bank.
- (4) National Australia Bank Limited.
- (5) St George Bank Limited.
- (6) Westpac Banking Corporation.
- (7) Any other financial institution approved by the Council, in its absolute discretion, in response to a request from the Developer.

Claim means, against any person, any allegation, action, demand, cause of action, suit, proceeding, judgement, debt, damage, loss, cost, expense or liability howsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at law, in equity, under statute or otherwise.

Completed means completed in accordance with the requirements of this Agreement.

Completion Notice has the meaning ascribed in clause 7.2.

Construction Certificate has the same meaning as in section 6.4(a) of the Act.

Contribution Value means the amount specified in **Schedule 1** in the column headed "contribution value" for each item of the Development Contributions.

Defect has the meaning ascribed to it in clause 10.1.

Defect Notice has the meaning ascribed to it in clause 10.1.

Defects Liability Period means a period of nine (9) months commencing from Completion of the relevant Affordable Housing Units Works.

Defects Security has the meaning ascribed to it in clause 15.5.

Development means the proposed future development of the Land for a mixed-use development comprising residential, commercial and community facilities.

Development Application has the same meaning as in the Act.

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

Development Contribution means the contributions being provided by the Developer pursuant to **Schedule 1**, **Schedule 2** and **Schedule 3** of this Agreement, consisting of the Monetary Contribution, grant of the Easement, the Affordable Housing Units Works and the transfer of the Affordable Housing Units to Council free of cost.

Dispute has the meaning ascribed to it in clause 13.

Easement means the easement for public access as described:

- (1) in **Schedule 1**; and
- (2) on the terms outlined in **Schedule 3**.

Encumbrance means an interest or power:

- (1) reserved in or over an interest in any asset;
- (2) arising under, or with respect to, a Bio-Banking Agreement;
- (3) created or otherwise arising in or over any interest in any asset under any mortgage, charge (whether fixed or floating), pledge, lien, hypothecation, title retention, conditional sale agreement, hire or hire purchase agreement, option, restriction as to transfer, use or possession, easement, covenant, lease, subordination to any right of any other person and any other encumbrance or security interest, trust or bill of sale; or
- (4) by way of security for the payment of a debt or other monetary obligation or the performance of any obligation.

Encumber means to grant an Encumbrance.

GST has the same meaning as in the GST Law.

GST Law means *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.

Index means the Consumer Price Index (All Groups - Sydney) as provided by the Australian Bureau of Statistics.

Insolvency Event means the happening of any of the following events:

- (1) An application which is not withdrawn or dismissed within fourteen (14) days is made to a court for an order or an order is made that a body corporate be wound up.
- (2) An application which is not withdrawn or dismissed within fourteen (14) days is made to a court for an order appointing a liquidator or provisional liquidator

in respect of a body corporate or one of them is appointed, whether or not under an order.

- (3) Except to reconstruct or amalgamate while solvent, a body corporate enters into, or resolves to enter into, a scheme of arrangement, agreement of company arrangement or composition with, or assignment for the benefit of, all or any class of its creditors, or it proposes a reorganisation, moratorium or other administration involving any of them.
- (4) A body corporate resolves to wind itself up, or otherwise dissolve itself, or gives notice of intention to do so, except to reconstruct or amalgamate while solvent or is otherwise wound up or dissolved.
- (5) A body corporate is or states that it is insolvent.
- (6) As a result of the operation of section 459F(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**), a body corporate is taken to have failed to comply with a statutory demand;
- (7) A body corporate is or makes a statement from which it may be reasonably deduced that the body corporate is, the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act.
- (8) A body corporate takes any step to obtain protection or is granted protection from its creditors, under any applicable legislation or an administrator is appointed to a body corporate.
- (9) A person becomes an insolvent under administration as defined in section 9 of the Corporations Act or action is taken which could result in that event.
- (10) A receiver, manager or receiver and manager is appointed to the Company.
- (11) A claim is filed in a court against a person that is not defended, released or otherwise settled within twenty eight (28) days of the date of its filing at the court.
- (12) Anything analogous or having a substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction.

Instrument Change means a change to *Hornsby Local Environmental Plan 2013* to include a local provision which would:

- (1) permit residential flat buildings and seniors housing on the Land;
- (2) allow for an increased FSR on the Land consistent with the renewal concept submitted with the Planning Proposal; and
- (3) subject to development consent, allow development on the land which would achieve floor space of at least 0.5:1 for commercial use.

Land means Lot 3 DP 732565, known as 7 City View Rd, Pennant Hills.

Law means all legislation, regulations, by-laws, common law and other binding order made by any Authority.

Monetary Contribution means the monetary contributions specified or described in Schedule 1 (as indexed in accordance with this Agreement).

Occupation Certificate means an occupation certificate as defined under section 6.4(c) of the Act.

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

Planning Legislation means the Act, the *Local Government Act 1993* (NSW) and the *Roads Act 1993* (NSW).

Primary Security has the meaning ascribed to it in clause 15.5.

Rectification Notice has the meaning ascribed to it in clause 7.2.

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

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

Security means collectively the Primary Security and the Defects Security.

Subdivision Certificate has the same meaning as in section 6.4(d) of the Act.

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

- (1) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (2) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (3) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- (4) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (5) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (6) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (7) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (8) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (9) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (10) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- (11) References to the word 'include' or 'including' are to be construed without limitation.
- (12) A reference to this Agreement includes the agreement recorded in this Agreement.
- (13) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- (14) Any schedules and attachments form part of this Agreement.

5. Development Contributions to be made under this Agreement

The Developer must make the Development Contributions in the manner and at the times as set out in Schedule 1 of this Agreement.

6. Monetary Contribution

- (1) The Developer must pay the Monetary Contribution in accordance with **Schedule 1**.
- (2) The Monetary Contribution is made for the purpose of this Agreement when Council receives the full amount of the Monetary Contribution payable under this Agreement:
 - (a) in cash; or
 - (b) by unendorsed bank cheque; or
 - (c) by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by Council.

7. Affordable Housing Units

7.1 Design of Affordable Housing Units

- (1) The Developer must consult with Council with respect to the development of the detailed design and specification with respect to each of the Affordable Housing Units.
- (2) Before commencing construction of any of the Affordable Housing Units, the Developer will provide council with details of the design and specification for each Affordable Housing Unit.

7.2 Completion of Affordable Housing Units Works

- (1) If the Developer considers that any particular item of the Affordable Housing Units Works is complete it must serve a notice on Council which:
 - (a) is in writing;
 - (b) identifies the particular Affordable Housing Units Works to which it relates; and
 - (c) specifies the date on which the Developer believes the relevant Affordable Housing Units Works was completed,

(Completion Notice).

- (2) Council must inspect the Affordable Housing Units Works set out in a Completion Notice within ten (10) business days of the receipt of that notice. If Council fails to carry out this inspection, the Affordable Housing Units Works referred to in the relevant Completion Notice will be deemed to be Complete.
- (3) Within fifteen (15) business days of inspecting the Affordable Housing Units Works set out in a Completion Notice Council must provide notice in writing (**Rectification Notice**) to the Developer that the Affordable Housing Units Works set out in the Completion Notice:
 - (a) have been Completed; or
 - (b) have not been Completed, in which case the notice must also detail:
 - (i) those aspects of the Affordable Housing Units Works which have not been Completed; and
 - (ii) the work Council requires the Developer to carry out in order to rectify the deficiencies in those Affordable Housing Units Works.

- (4) If Council does not provide the Developer with a Rectification Notice in accordance with paragraph (3), the Works set out in the Completion Notice will be deemed to have been Completed.
- (5) Where Council serves a Rectification Notice on the Developer, the Developer must:
 - (a) rectify the Works in accordance with that notice; or
 - (b) serve a notice on the Council that it disputes the matters set out in the notice.
- (6) Where the Developer:
 - (a) serves notice on Council in accordance with paragraph (5)(b), the dispute resolution provisions of this Agreement apply; or
 - (b) rectifies the Works in accordance with paragraph (5)(a), it must serve upon the Council a new Completion Notice for the Affordable Housing Units Works it has rectified.

7.3 Developer Access to Affordable Housing Units

If the Developer is required to Complete, maintain or rectify any Defects in the Affordable Housing Units Works after the Affordable Housing Units have been transferred or dedicated to the Council pursuant to clause 7.4, Council will take all necessary steps to provide the Developer with reasonable access to the Affordable Housing Units in order to enable the Developer to satisfy its obligations under this Agreement, provided that, at all times, the Developer complies with:

- (1) Council's reasonable written directions; and
- (2) Council's policies and procedures from time to time,

as they relate to this right of access,

7.4 Dedication free of Encumbrances

The Developer must dedicate or transfer the Affordable Housing Units to Council free of any trusts, estates, interests, covenants and Encumbrances in accordance with **Schedule 2**.

7.5 Costs

The Developer must meet all costs (including legal and registration costs) associated with the dedication or transfer of the Affordable Housing Units in accordance with clause 7.4 including any costs incurred by Council in relation to that dedication or transfer.

7.6 Process for dedication

For the purpose of this Agreement, the Affordable Housing Units are dedicated to Council:

- (1) **(Deposited Plan)** if the relevant allotments in respect of the Affordable Housing Units are dedicated in a deposited plan registered at NSW Land Registry Services, when that plan is so registered; or
- (2) **(Instrument of Transfer)** otherwise when the Developer delivers to Council:
 - (a) a transfer of the relevant allotments in respect of the Affordable Housing Units in registrable form;
 - (b) any consent required by an interested party in the relevant allotments in respect of the Affordable Housing Units; and
 - (c) any document in registrable form which, when registered, will remove any Encumbrances registered on the title of those allotments in respect of the Affordable Housing Units, excluding encumbrances that would not in the Council's opinion, acting reasonably, impede the intended use of all or any part of the Affordable Housing Units to be dedicated to the

Council including but not limited to easements and covenants for services and drainage and encumbrances with respect to the common property of the Development.

8. Easement

8.1 *Dedication of Easement*

The Developer must register the Easement on the title to the Land.

8.2 *Costs for grant of Easement*

The Developer must meet all costs (including legal and registration costs) associated with the grant of the Easement in accordance with paragraph 8.1.

8.3 *Process for grant of Easement*

For the purpose of this Agreement, the Easement is granted to Council:

- (1) **(Deposited Plan)** if the relevant Easement is granted to Council in a deposited plan of easement (incorporating the easement terms set out in **Schedule 3** in an accompanying section 88B instrument) registered at NSW Land Registry Services, when that plan is so registered; or
- (2) **(Instrument of Transfer)** otherwise when the Developer delivers to Council:
 - (a) a transfer granting Easement in registrable form, which incorporates the easement terms in **Schedule 3**; and
 - (b) any consent required by an interested party to the grant of Easement.

9. Indexation of Contribution Values

The Contribution Values for the Monetary Contribution will increase (with the calculation to be made as from the date the relevant Development Contribution is required to be provided to Council under this Agreement) in accordance with the following formula.

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

where:

- A** = the indexed amount;
- B** = the relevant amount as set out in this Agreement;
- C** = the Index most recently published before the date that the relevant payment or the calculation with respect to the relevant amount is to be made; and
- D** = the Index most recently published before the commencement date of this Agreement.

If **A** is less than **B**, then the amount of the relevant Contribution Value will not change.

10. Defects

10.1 *Defects Notice*

- (1) Where any part of the Affordable Housing Units Works has been Completed but those Affordable Housing Units Works contain a material defect which:
 - (a) adversely affects the ordinary use and/or enjoyment of the relevant Affordable Housing Units Works; and/or

- (b) will require rectification works to be performed on them as a result of the existence of the defect;

(**Defect**) Council may issue a defects notice (**Defects Notice**) concerning those Affordable Housing Units Works but only within the Defects Liability Period.

- (2) A Defects Notice must contain the following information:
 - (a) the nature and extent of the Defect;
 - (b) the work Council requires the Developer to carry out in order to rectify the Defect; and
 - (c) the time within which the Defect must be rectified (which must be a reasonable time and not less than ten (10) business days).

10.2 Developer to Rectify Defects

- (1) The Developer must rectify the Defects contained within a Defects Notice as soon as practicable after receipt of the Defects Notice.
- (2) The Developer must follow the procedure set out in clause 7.2 in respect of the satisfaction of the Defects Notice.

10.3 Right of Council to Step-In

Council, at its absolute discretion, may enter the Affordable Housing Units (and the Land upon which the Affordable Housing Units are situated) for the purpose of satisfying the Defects Notice where the Developer has failed to comply with a Defects Notice but only after giving the Developer five (5) business days written notice of its intention to do so.

10.4 Consequence of Step-In

If Council elects to exercise the step-in rights granted to it under clause 10.3 then:

- (1) Council may:
 - (a) enter upon any part of the Affordable Housing Units (and the Land upon which the Affordable Housing Units are situated) that it requires access to in order to satisfy the obligations of the Developer in accordance with the Defects Notice; and
 - (b) rectify the relevant Defects in accordance with the Defects Notice; and
- (2) the Developer must not impede or interfere with Council in undertaking that work.

10.5 Costs of Council

Where Council exercises its step-in rights and incurs costs in rectifying the relevant Defects, it may call upon the Defects Security provided by the Developer pursuant to clause 15.5 and recover as a debt due in a court of competent jurisdiction any difference between the amount of the Defects Security and the costs incurred by the Council in rectifying the Defects.

11. Application of s7.11, s7.12 or s7.24 of the Act to the Development

This Agreement does not exclude the application of section 7.11, section 7.12 or section 7.24 of the Act to the Development.

12. Registration of Agreement

12.1 Registration

The Developer acknowledges and agrees that:

- (1) this Agreement must be registered on the title to the Land pursuant to section 7.6 of the Act; and
- (2) the Developer will pay or reimburse Council for all its legal and registration costs associated with registration in accordance with paragraph (1)

12.2 Obligations on Developer

- (1) The Developer, at its own expense, will promptly after this Agreement comes into operation, and before the issue of any Construction Certificate or Subdivision Certificate for the Development, take all necessary and practical steps, and otherwise do anything that Council reasonably requires, to procure:
 - (a) the consent of each person who:
 - (i) has an estate or interest in the Land; or
 - (ii) is seized or possessed of an estate or interest in the Land;
 - (b) the execution of any Agreements; and
 - (c) the production of the relevant title documentation,

to enable the registration of this Agreement in accordance with clause 12.1.

- (2) The Developer, at its own expense, will take all necessary and practical steps, and otherwise do anything that the Council reasonably requires:
 - (a) to allow 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 thirty (30) business days after that date; and
 - (b) to allow 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

12.3 Discharge from the Register

The Council will provide its consent to the 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) when:

- (1) the Developer's obligations under this Agreement have been satisfied; or
- (2) if this Agreement is terminated or rescinded.

13. Dispute Resolution

13.1 Notice of Dispute

- (1) If a dispute or lack of certainty between the parties arises in connection with this Agreement or its subject matter (**Dispute**), then either party (**First Party**) must give to the other (Second Party) a notice which:
 - a) is in writing;
 - b) adequately identifies and provides details of the Dispute;
 - c) stipulates what the First Party believes will resolve the Dispute; and
 - d) designates its representative (**Representative**) to negotiate the Dispute.
- (2) The Second Party must, within five (5) Business Days of service of the notice of dispute, provide a notice to the First Party designating as its representative a person to negotiate the Dispute (the representatives designated by the parties being together, the Representatives).

13.2 Conduct pending resolution

The parties must continue to perform their respective obligations under this Agreement if there is a Dispute but will not be required to complete the matter the subject of the Dispute, unless the appropriate party indemnifies the other parties against costs, damages and all losses suffered in completing the disputed matter if the Dispute is not resolved in favour of the indemnifying party.

13.3 Further steps required before proceedings

Subject to 13.14 and 13.15 and except as otherwise expressly provided in this Agreement, any Dispute must, as a condition precedent to the commencement of litigation, mediation under clause 13.5 or determination by an expert under clause 13.6, first be referred to the Representatives. The Representatives must endeavour to resolve the dispute within five (5) Business Days of the date a notice under clause 13.1 is served.

13.4 Disputes for mediation or expert determination

If the Representatives have not been able to resolve the Dispute, then the parties must agree within five (5) Business Days to either refer the matter to mediation under clause 13.5 or expert resolution under clause 13.6.

13.5 Disputes for mediation

- (1) If the parties agree in accordance with clause 13.4 to refer the Dispute to mediation, the mediation must be conducted by a mediator agreed by the parties and, if the parties cannot agree within five (5) Business Days, then by a mediator appointed by the President of the Law Society of New South Wales for the time being.
- (2) If the mediation has not resulted in settlement of the Dispute and has been terminated, the parties may agree to have the matter determined by expert determination under clause 13.6.

13.6 Choice of expert

- (1) If the Dispute is to be determined by expert determination, this clause (2) applies.
- (2) The Dispute must be determined by an independent expert in the relevant field:
 - (a) agreed between and appointed jointly by the parties; or
 - (b) in the absence of Agreement within five (5) Business Days after the date that the matter is required to be determined by expert determination, appointed by the President of the Law Society of New South Wales for the time being.
- (3) If the parties fail to agree as to the relevant field within five (5) Business Days after the date that the matter is required to be determined by expert determination, either party may refer the matter to the President of the Law Society of New South Wales for the time being whose decision as to the relevant field is final and binding on the parties.
- (4) The expert appointed to determine a Dispute:
 - (a) must have a technical understanding of the issues in dispute;
 - (b) must not have a significantly greater understanding of one party's business, functions or operations which might allow the other side to construe this greater understanding as a bias; and
 - (c) must inform the parties before being appointed of the extent of the expert's understanding of each party's business or operations and, if that information indicates a possible bias, then that expert must not be appointed except with the written approval of the parties.

- (5) The parties must promptly enter into an Agreement with the expert appointed under this clause (2) setting out the terms of the expert's determination and the fees payable to the expert.

13.7 Directions to expert

- (1) In reaching a determination in respect of a dispute under clause (2) the independent expert must give effect to the intent of the parties entering into this Agreement and the purposes of this Agreement.
- (2) The expert must:
 - (a) act as an expert and not as an arbitrator;
 - (b) proceed in any manner as the expert thinks fit without being bound to observe the rules of natural justice or the rules of evidence;
 - (c) not accept verbal submissions unless both parties are present;
 - (d) on receipt of a written submission from one party, ensure that a copy of that submission is given promptly to the other party;
 - (e) take into consideration all documents, information and other material which the parties give the expert which the expert in its absolute discretion considers relevant to the determination of the Dispute;
 - (f) not be expected or required to obtain or refer to any other documents, information or material (but may do so if the expert so wishes);
 - (g) issue a draft certificate stating the expert's intended determination (together with written reasons), giving each party ten (10) Business Days to make further submissions;
 - (h) issue a final certificate stating the expert's determination (together with written reasons); and
 - (i) act with expedition with a view to issuing the final certificate as soon as practicable.
- (3) The parties must comply with all directions given by the expert in relation to the resolution of the Dispute and must within the time period specified by the expert, give the expert:
 - (a) a short statement of facts;
 - (b) a description of the Dispute; and
 - (c) any other documents, records or information which the expert requests.

13.8 Expert may commission reports

- (1) Subject to paragraph (2):
 - (a) the expert may commission the expert's own advisers or consultants (including lawyers, accountants, bankers, engineers, surveyors or other technical consultants) to provide information to assist the expert in making a determination; and
- (2) The parties must approve the costs of those advisers or consultants in writing prior to the expert engaging those advisers or consultants.

13.9 Expert may convene meetings

- (1) The expert must hold a meeting with all of the parties present to discuss the Dispute. The meeting must be conducted in a manner which the expert considers appropriate. The meeting may be adjourned to, and resumed at, a later time in the expert's discretion.
- (2) The parties agree that this meeting is not a hearing and is not an arbitration.

13.10 Other courses of action

If:

- (1) the parties cannot agree in accordance with clause 13.4 to refer the matter to mediation or determination by an expert; or
- (2) the mediation referred to in clause 13.5 has not resulted in settlement of the dispute, the mediation has been terminated and the parties have not agreed to refer the matter to expert determination within five (5) Business Days after termination of the mediation,
- (3) then either party may take whatever course of action it deems appropriate for the purpose of resolving the Dispute.

13.11 Confidentiality of information provided in dispute resolution process

- (1) The parties agree, and must procure that the mediator and the expert agree as a condition of his or her appointment:
 - (a) subject to paragraph (2), to keep confidential all documents, information and other material disclosed to them during or in relation to the mediation or expert determination;
 - (b) not to disclose any confidential Agreements, information and other material except:
 - (i) to a party or adviser or consultant who has signed a confidentiality undertaking; or
 - (ii) if required by Law or any Authority to do so; and
 - (c) not to use confidential Agreements, information or other material disclosed to them during or in relation to the mediation or expert determination for a purpose other than the mediation or expert determination.
- (2) The parties must keep confidential and must not disclose or rely upon or make the subject of a subpoena to give evidence or produce Agreements in any arbitral, judicial or other proceedings:
 - (a) views expressed or proposals or suggestions made by a party or the mediator or the expert during the expert determination or mediation relating to a possible settlement of the Dispute;
 - (b) admissions or concessions made by a party during the mediation or expert determination in relation to the Dispute; and
 - (c) information, Agreements or other material concerning the dispute which are disclosed by a party during the mediation or expert determination unless such information, Agreements or facts would be discoverable in judicial or arbitral proceedings.

13.12 Final determination of expert

The parties agree that the final determination by an expert will be final and binding upon them except in the case of fraud or misfeasance by the expert.

13.13 Costs

If any independent expert does not award costs, each party must contribute equally to the expert's costs in making the determination.

13.14 Remedies available under the Act

This clause 13 does not operate to limit the availability of any remedies available to Council under the Act.

13.15 Urgent relief

This clause 13 does not prevent a party from seeking urgent injunctive or declaratory relief concerning any matter arising out of this Agreement.

14. Review of Agreement

- (1) This agreement may be reviewed or modified as agreed by the parties. Any review or modification of this Agreement will be conducted in the circumstances and in the manner determined by the parties.
- (2) 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.
- (3) 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.

15. Breach and Enforcement

15.1 Default

The Developer commits a default under this Agreement if it:

- (1) fails to comply with a Default Notice under clause 15.2; or
- (2) becomes subject to an Insolvency Event.

(Default).

15.2 Default Notice

If the Developer breaches this Agreement, Council may serve a notice on the Developer (**Default Notice**) specifying:

- (1) the nature and extent of the alleged breach;
- (2) if:
 - (a) the breach is capable of being rectified other than by the payment of compensation, what Council requires the Developer to do in order to rectify the breach; or
 - (b) the breach is not capable of being rectified other than by payment of compensation, the amount of compensation Council requires the Developer to pay in order to rectify the breach, and
- (3) the time within which Council requires the breach to be rectified, which must be a reasonable time of not less than twenty-one (21) days.

15.3 Consequences of Default

Where the Developer commits a Default, Council may, in addition to any rights it has at Law call on the Security to the extent of any compensation claimed in a Default Notice and not paid by the Developer.

15.4 General Enforcement

Without limiting any other remedies available to the parties, this Agreement may be enforced by any party in any Court of competent jurisdiction.

Nothing in this Agreement prevents:

- (1) 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

- (2) 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

15.5 Provision of Securities

- (1) Subject to paragraph (2), prior to the issue of a Construction Certificate in respect of the Development, the Developer must deliver to Council separate Bank Guarantees, bonds or other forms of security to the satisfaction of the Council:
 - (a) for the amount equivalent to the sum of the Monetary Contribution (**Primary Security**).
- (2) The Developer may satisfy its obligations under paragraph (1) (either in whole or in part), by directing Council to retain any Security held by Council which is required to be released by Council under this Agreement.
- (3) Prior to the issue of an Occupation Certificate in respect of the Development, the Developer must deliver to Council a Bank Guarantee, bond or other form of security to the satisfaction of Council for an amount equivalent to 10% of the Contribution Value of the Affordable Housing Units (**Defects Security**).

15.6 Replacement of Security

- (1) The Developer may replace any Security provided by it at any time, provided that the amount of that replacement is not less than that which is required to be provided under this Agreement.
- (2) On receipt of a replacement Security, Council must immediately release the Security being replaced and return it to the Developer.

15.7 Council may call on Security

- (1) If the Developer commits a Default under this Agreement, Council, without limiting any other remedies available to it, may call on any Security provided by the Developer.
- (2) If Council calls on any Security, it may use the amount so paid to it in satisfaction of any costs incurred by it in remedying the relevant Default.

15.8 Top up of Security

If Council calls on the Security, Council, by notice in writing to the Developer, may require the Developer to provide a further or replacement Security in an amount that, when added to any unused portion of any Security then held by Council, does not exceed the amount of the Security Council is entitled to hold at that time under this Agreement.

15.9 Release of Primary Security

Unless:

- (1) Council has made a demand against any Security provided by the Developer;
- (2) the Development Contributions on account of which that Security was provided have not been made; or
- (3) the Developer is in breach of this Agreement at the relevant time,

Council, upon a written request being made by the Developer, must return the Primary Security within ten (10) business days of such a request being made.

15.10 Release of Defects Security

Unless:

- (1) Council has made a demand against any Security provided by the Developer for that Stage;
- (2) the relevant Defects Liability Period has not expired; or

(3) the Developer is in breach of this Agreement at the relevant time, Council, upon a written request being made by the Developer, must return the Defects Security within ten (10) business days of such a request being made.

15.11 Indexation of value of Contribution Value

The Developer must ensure that the Security held by Council at all times equals the indexed amount notified to the Developer by Council and calculated in accordance with clause 9.

15.12 Compulsory acquisition

- (1) The Developer consents to the compulsory acquisition of the Affordable Housing Units
 - (a) in accordance with the Acquisition Act; and
 - (b) on the terms set out in this clause 15.12.
- (2) Council may only acquire the Affordable Housing Units in accordance with the Acquisition Act if the Developer has committed a default under this Agreement under this Agreement in respect of the dedication of the Affordable Housing Units.
- (3) If Council acquires the Affordable Housing Units compulsorily in accordance with the Acquisition Act:
 - (a) the Developer agrees that the compensation payable to it on account of an acquisition of the Affordable Housing Units under the Acquisition Act is \$1.00; and
 - (b) Council must complete that acquisition within twelve (12) months of the relevant Default.
- (4) The parties agree that the provisions of this clause 15.12 are an agreement with respect to the compulsory acquisition of the Affordable Housing Units for the purpose of s30 of the Acquisition Act.
- (5) If Council:
 - (a) acquires the Affordable Housing Units under paragraph (3); and
 - (b) is required to pay any compensation to a third party as a result of that acquisition,
then the Developer must pay Council the amount of that compensation as a Monetary Contribution:
 - (c) within ten (10) business days of demand for payment being made by Council; and
 - (d) prior to the issue of the then next Occupation Certificate or Subdivision Certificate with respect to the Development.

15.13 Council may withhold Subdivision Certificate

- (1) The Developer may only make, or cause, suffer or permit the making of, an application for a Subdivision Certificate in respect of the Development if, at the date of the application, the Developer is not in breach of its obligation to make any Development Contributions under this Agreement.
- (2) Council may withhold the issue of a Subdivision Certificate if, at the relevant time, the Developer is in breach of any obligation to make any Development Contributions under this Agreement until such time as:
 - (a) the breach is rectified; or
 - (b) Council calls upon the Security provided by the Developer in respect of the Contribution to which the breach relates.

15.14 Council may withhold Occupation Certificate

- (1) The Developer may only make, or cause, suffer or permit the making of, an application for an Occupation Certificate in respect of the Development if, at the date of the application, the Developer is not in breach of its obligation to make any Development Contributions under this Agreement.
- (2) Council may withhold the issue of an Occupation Certificate if, at the relevant time, the Developer is in breach of any obligation to make any Development Contributions under this Agreement until such time as:
 - (a) the breach is rectified; or
 - (b) Council calls upon the Security provided by the Developer in respect of the Development Contributions to which the breach relates.

16. Termination, Rescission or Determination

- (1) This Agreement terminates in the following events:
 - (a) if the parties agree in writing to terminate the operation of the Agreement at any time.
 - (b) Council serves notice on the Developer terminating this Agreement where the Developer has failed to comply with a Default Notice issued in accordance with clause 15.2.
 - (c) Any Development Consent in respect of the Development lapses.
 - (d) The Instrument Change is not implemented.
- (2) Upon termination of this Agreement:
 - (a) all future rights and obligations of the parties are discharged; and
 - (b) all pre-existing rights and obligations of the parties continue to subsist.

17. Developer Warranties and Indemnities

17.1 Warranties

The Developer warrants to Council that it is:

- (1) legally and beneficially entitled to the Land;
- (2) able to fully comply with its obligations under this Agreement;
- (3) it has full capacity to enter into this Agreement; and
- (4) there is no legal impediment to it entering into this Agreement, or performing the obligations imposed under it.

17.2 Indemnity

The Developer indemnifies Council in respect of any Claim that may arise as a result of the Developer's obligations under this Agreement but only to the extent that any such Claim does not arise as a result of the negligent acts or omissions of Council.

18. Notices

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

- (c) Emailed to that Party at its email address set out below.

Council

Attention Hornsby Shire Council
Address 296 Peats Ferry Road
 Hornsby NSW 2077
Fax Number (02) 9847 6999
Email hsc@hornsby.gov.au

Developer

Attention David Workman
Address Level 21, Governor Phillip Tower, 1 Farrer Place, Sydney
 NSW 2000
Fax Number N/A
Email dworkman@eg.com.au

- (2) If a Party gives the other Party three (3) business days notice of a change of its address, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, or posted to the latest address.
- (3) Any notice, consent, information, application or request is to be treated as given or made at the following time:
- (a) If it is delivered, when it is left at the relevant address.
- (b) If it is sent by post, two (2) business days after it is posted
- (4) If any notice, consent, information, application or request is delivered, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

19. Assignment and Dealings

19.1 *Restriction on Assignment*

Other than in accordance with this clause 19, the Developer may not:

- (1) Assign any part of the Land; and/or
- (2) Assign their rights or obligations under this Agreement.

19.2 *Procedure for Assignment*

- (1) If the Developer:
- (a) wishes to Assign any part of the Land; and/or
- (b) wishes to Assign its rights or obligations under this Agreement,
- then the Developer must:
- (c) at no cost to Council, and only with the written consent of Council, procure:

- (i) the execution by the Assignee of an appropriate deed where the Assignee agrees to be bound by the terms of this Agreement; and
 - (ii) the provision of all Securities to Council by the Assignee that the Developer is required to provide under this Agreement (and any additional securities if required by Council acting reasonably) at the same time as, or prior to, entering into that deed.
- (2) Council is under no obligation to grant its consent to the Developer under clause (1) if the Developer is in breach of this Agreement and/or does not provide Council with any evidence requested by Council, acting reasonably, required for Council to grant that consent.

20. Costs

The Developer agrees to pay or reimburse the reasonable legal costs and disbursements of Council for:

- (1) the negotiation, preparation, execution, stamping, administration and enforcement of this Agreement;
- (2) the registration or removal of this Agreement on the title to the Land in accordance with clause 12; and
- (3) any breach or default by the Developer of its obligations under this Agreement,

within ten (10) business days of receipt of a tax invoice from Council.

21. Entire agreement

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

22. Further acts

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

23. Governing law and jurisdiction

This Agreement is governed by the law of New South Wales. The Parties submit to the 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.

24. Joint and individual liability and benefits

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

25. No fetter

25.1 *Consent authority*

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

25.2 *Agreement does not fetter discretion*

This Agreement is not intended to operate to fetter, in any unlawful manner:

- (1) the power of Council to make any Law; or
- (2) the exercise by Council of any statutory power or discretion,

(Discretion).

25.3 *Severance of provisions*

- (1) No provision of this Agreement is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this Agreement is held by a court of competent jurisdiction to constitute an unlawful fetter on any Discretion, the parties agree:
 - (a) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause 25.3 is substantially satisfied; and
 - (b) in the event that paragraph (1)(a) cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this Agreement has full force and effect; and
 - (c) to endeavour to satisfy the common objectives of the parties on relation to the provision of this Agreement which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.
- (2) Where the Law permits Council to contract out of a provision of that Law or gives Council power to exercise a Discretion, then if Council has in this Agreement contracted out of a provision or exercised a Discretion under this Agreement, then to the extent of this Agreement is not to be taken to be inconsistent with the Law.

25.4 *No Obligations*

Nothing in this Agreement will be deemed to impose any obligation on Council to exercise any of its functions under the Act in relation to the Instrument Change, the Land or the Development in a certain manner.

26. Representations and warranties

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

27. 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.

28. Modification

No modification or variation of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

29. Waiver

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

30. GST

- (1) If GST is payable on a taxable supply (as that term is defined under the GST Law) made under, by reference to or in connection with this Agreement, the party providing the consideration for that taxable supply must also pay the GST Amount as additional consideration.
- (2) This clause does not apply to the extent that the consideration for the taxable supply is expressly agreed to be GST inclusive.
- (3) Unless otherwise expressly stated, prices or other sums payable or consideration to be provided under or in accordance with this Agreement are exclusive of GST.
- (4) This clause will continue to apply after expiration or termination of this Agreement.

Schedule 1 - Development Contributions

Contribution	Public Purpose	Timing	Contribution Value
Monetary contribution of \$450,000 in total (excluding GST)	Contribution to the provision of open space, community facilities and civic improvements within the Pennant Hills Town Centre	Prior to the issue of an Occupation Certificate for the Development	\$450,000, subject to indexation.
Construction and Transfer to Council of four Affordable Housing units, in accordance with Schedule 2	Provision of affordable housing	Within 15 business days of the issue of an Occupation Certificate for the Development	Estimated Value: \$3,700,000. This is based on an estimated market value for the studio, 1 and 2 bedroom units.
Grant of an Easement to provide public access to a walkway through the pocket park on the Land, in accordance with Schedule 3	To facilitate access between City View Rd and Boundary Rd	Within 15 business days of the issue of an Occupation Certificate for the Development	\$837,700 This is based on an estimated land value of \$2,393/m ² .

Schedule 2 to Planning Agreement No ##### - Works

Item of Works	Specification
Construction and Transfer of Affordable Housing Units	<ul style="list-style-type: none"> • The Developer will design, construct and complete the Affordable Housing units. • The Developer will dedicate to Council in perpetuity by way of transfer, free of cost, a total of 4 Affordable Housing Units consisting of either studio or 1 bedroom units in addition to a 2 bedroom unit. Specific units to be dedicated to be determined by the Developer at the DA stage and agreed with Council. The minimum internal apartment and balcony areas should be consistent with or exceed that of the 'Apartment Design Guide' (NSW Department of Planning & Environment, 2015, as amended). The Affordable Housing Units will be fit out with the standard inclusions provided for in other similar studio, 1 bedroom or 2 bedroom units within the development but will not include any furniture. The units would be provided with at least 1 parking space unless there was no demonstrated need. • The units to be transferred to Council as affordable housing will be of the same standard as other units in the Development in terms of solar access.

Schedule 3 – Terms of Grant of Easement

The Developer, at its own expense, must register the Easement on the title to the Land.

The Easement will:

- (1) Be a public access Easement;
- (2) Provide pedestrian access from City View Rd to Boundary Rd
- (3) Be over a land area of approximately maximum of 350m².

The exact location, design and area of the Easement will be determined at the time that a development application is submitted for the Development and will form part of the conditions of development consent.

Indicative maps below - (Easement Terms/mapping to be confirmed)



Schedule 4 – Requirements under s7.4

REQUIREMENT UNDER THE ACT	THIS PLANNING AGREEMENT
<p>Planning instrument and/or development application – (Section 7.4(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) Yes</p> <p>(b) Yes</p> <p>(c) Not applicable</p>
<p>Description of land to which this agreement applies – (Section 7.4(3)(a))</p>	<p>Lot 3 DP732565</p>
<p>Description of change to the environmental planning instrument to which this agreement applies – (Section 7.4(3)(b))</p>	<p>Yes. See definition of “Instrument Change at clause 4.1.</p>
<p>Application of section 7.11 of the Act – (Section 7.4(3)(d))</p>	<p>Does apply</p>
<p>Applicability of section 7.12 of the Act – (Section 7.4(3)(d))</p>	<p>Does apply</p>
<p>Consideration of benefits under this agreement if section 7.11 applies – (Section 7.4(3)(e))</p>	<p>See clause 11.</p>
<p>Mechanism for Dispute resolution – (Section 7.4(3)(f))</p>	<p>See clause 13.</p>
<p>Enforcement of this agreement (Section 7.4(3)(g))</p>	<p>See clause 15.</p>
<p>No obligation to grant consent or exercise functions – (Section 7.4(3)(9))</p>	<p>See clause 25</p>

Execution of Planning Agreement No. XXXX of 200X

Dated: xxx

Signed, sealed and delivered by **Hornsby Shire Council** by its General Manager and Mayor by the affixing of the Common Seal of Council in accordance with resolution dated

General Manager (Signature)

Mayor (Signature)

Name of General Manager (Print Name)

Name of Mayor (Print Name)

Signed, sealed and delivered by EG Funds Pty Ltd ACN 108 198 492 ATF EG Unit Trust in accordance with section 127(1) of the *Corporations Act 2001* (Cth) by authority of its directors.

Director/Secretary (Signature)

Director (Signature)

Name of Director/Secretary (Print Name)

Name of Director (Print Name)
