

Dated

2010

**Penrith City Council**  
ABN 43 794 422 563

**AND Jim Aitken, Marlene Aitken, James Aitken, David Reeves**

## **Planning Agreement**

Environmental Planning and Assessment Act 1979

73 Great Western Highway, Emu Plains

THIS Deed is dated

2010

**PARTIES:**

**PENRITH CITY COUNCIL** (ABN 43 794 422 563) of 601 High Street, Penrith NSW 2750  
(Council)

**Jim Aitken, Marlene Aitken, James Aitken, David Reeves** of 30 Mulgoa Road, Glenmore Park 2745, NSW (Developer)

**INTRODUCTION: A** The Developer proposes to carry out Development at 2/91 Great Western Highway, Emu Plains.

**B** The Council and the Developer have agreed to enter into a voluntary planning agreement under section 93F of the Act in respect of the loss of eight (8) car parking spaces as a result of the development.

**C** The Developer will pay the Council the sum of twelve thousand dollars (\$12,000) prior to the issuing of a construction certificate as defined under the Environmental Planning & Assessment Act 1979, to construct eight car parking spaces on land within the existing car park area (refer to Schedule 2)

**D** The Council will expand the car park adjoining the site by constructing eight additional car parking spaces within twelve (12) months of payment of the contribution.

**E** The Parties have agreed to enter into this Deed to give effect to the above arrangements.

**F** For the avoidance of doubt, the parties intend this Deed to constitute the entire agreement and understanding between them in relation to the subject matter of this Deed and have agreed that any prior arrangements between them relating to the subject matter of this Deed are rescinded and have no further force or effect.

**IT IS AGREED:**

**1 DEFINITIONS AND INTERPRETATION**

**1.1 Definitions** In this Deed, unless the context clearly indicates otherwise: **Act** means the *Environmental Planning and Assessment Act 1979* (NSW); **Address for Service** means the address of each party appearing in Schedule 6 or any new address notified by any party to all other parties as its new Address for Service; **Authority** means any Federal, State or local government or semi-governmental, statutory, judicial or public person, instrumentality or department; **Approval** means any approvals, consents, certificates, permits, endorsements, licences, conditions or requirements (and any modifications or variations to them) which may be required for the commencement and carrying out of the works the subject of this Deed or the Development generally; **Business Day** means any day that is not a Saturday, Sunday, gazetted public holiday or bank holiday in Sydney, and concludes at 5 pm on that day; **Consent Authority** means the Authority having the function to determine an application for Approval;

**Construction Contract** means a contract between the Developer and a third party, meeting the requirements of clause 4.2, for the carrying out of the Road Work by that third party; **Department** means the NSW Department of Planning; **Development** means any development the subject of Development Consents granted to the Developer within the Growth Centres before or after the date of this Deed; **Development Consent** has the same meaning as in the Act; **Director-General** means the Director-General of the Department of Planning; **Explanatory Note** means the explanatory note required by the Regulation; **GST** means any form of goods and services tax payable under the GST Legislation; **GST Legislation** means the A New Tax System (Goods and Services Tax) Act 1999 (Cth); **Land** means the land described in of Schedule 2; **Regulation** means the *Environmental Planning and Assessment Regulation 2000* (NSW); **Road** has the same meaning as in the *Roads Act 1993*; **Roads Authority** has the same meaning as in the *Roads Act 1993*; **Road Work** means those works described in Schedule 5 to be transferred to the relevant Roads Authority in accordance with clause 4.6; **Road Work Land** means the land on which the Road Work is to be constructed; **The Site** is the land containing 2/91 Great Western Highway, Emu Plains

## 1.2 Interpretation

In this Deed unless the context clearly indicates otherwise:

- (a) a reference to **this Deed** or another document means this Deed or that other document and any document which varies, supplements, replaces, assigns or novates this Deed or that other document;
- (b) a reference to **legislation** or a **legislative provision** includes any statutory modification, or substitution of that legislation or legislative provision and any subordinate legislation issued under that legislation or legislative provision;
- (c) a reference to a **body** or **authority** which ceases to exist is a reference to either a body or authority that the parties agree to substitute for the named body or authority or, failing agreement, to a body or authority having substantially the same objects as the named body or authority;
- (d) a reference to the **introduction**, a **clause**, **schedule** or **annexure** is a reference to the introduction, a clause, a schedule or an annexure to or of this Deed;
- (e) **clause headings**, the **introduction** and the **table of contents** are inserted for convenience only and do not form part of this Deed;
- (f) the **schedules** form part of this Deed;
- (g) a reference to a **person** includes a natural person, corporation, statutory corporation, partnership, the Crown or any other organisation or legal entity;
- (h) a reference to a **natural person** includes their personal representatives, successors and permitted assigns;
- (i) a reference to a **corporation** includes its successors and permitted assigns;
- (j) a reference to a right or obligation of a party is a reference to a right or obligation of that party under this Deed;
- (k) an **obligation** or **warranty** on the part of 2 or more persons binds them jointly and severally and an obligation or warranty in favour of 2 or more persons benefits them jointly and severally;
- (l) a requirement to do any thing includes a requirement to cause that thing to be done and a requirement not to do any thing includes a requirement to prevent that thing being done;
- (m) **including** and **includes** are not words of limitation;
- (n) a word that is derived from a defined word has a corresponding meaning;
- (o) **monetary amounts** are expressed in Australian dollars;
- (p) the singular includes the plural and vice-versa;
- (q) words importing one gender include all other genders;
- (r) a reference to a thing includes each part of that thing; and
- (s) neither this Deed nor any part of it is to be construed against a party on
- (t) the basis that the party or its lawyers were responsible for its drafting.

## **2 OPERATION AND APPLICATION OF THIS DEED**

### **2.1 Operation**

The parties agree that:

- (a) this Deed constitutes a planning agreement within the meaning of section 93F of the Act;
- (a) this Deed will commence from the date this Deed is signed by all the parties.

### **2.2 Application**

This Deed applies to:

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

## **3 APPLICATION OF SECTION 94, SECTION 94A, SECTION 94EF OF THE ACT**

The application of sections 94, 94A and 94EF of the Act are excluded to the extent stated in **Schedule 1**.

## **4 AGREEMENT BETWEEN THE PARTIES**

### **4.1 The Works**

It is acknowledged that:

- (a) The Developer is required to pay to Penrith City Council the sum of \$12,000 to be paid by bank cheque and prior to the issue of the Construction Certificate as defined in the Environmental Planning and Assessment Act 1979.
- (b) The Council will construct eight (8) car parking spaces on land containing the car park adjoining the site within 12 months of receiving payment from the Developer.
- (c) The Council will construct the car parking spaces to the standard set out in its Engineering Works Development Control Plan and accompanying Guidelines for Engineering Works for Subdivisions and Developments Part 2-Construction, and AS/NZS 2890.1:2004 Parking Facilities – Off-Street Car Parking.

## **5 LAND OWNERSHIP**

### **5.1 Land ownership**

- (a) The parties acknowledge that as at the date of this Deed, the Developer does not own the Road Work Land.
- (b) The Developer nevertheless warrants that it has a legally enforceable right to complete the Road Work to enable it to comply with all of its obligations under this Deed as and when they arise.
- (c) The developer acknowledges that the title to the car spaces to be constructed by Council, vests in the Council. The developer has no right or entitlement over the car spaces on the land.

## **6 DISPUTE RESOLUTION**

### **6.1 Not commence**

A party must not commence any court proceedings relating to a dispute unless it complies with this clause 6.

### **6.2 Written notice of dispute**

A party claiming that a dispute has arisen under or in relation to this Deed must give written notice to the other party specifying the nature of the dispute.

**6.3 Attempt to resolve** On receipt of notice under clause 6.2, the parties must endeavour in good faith to resolve the dispute expeditiously using informal dispute resolution techniques such as mediation, expert evaluation or other techniques agreed by them.

**6.4 Mediation** If the parties do not agree within 21 days of receipt of notice under clause 6.2 (or any further period agreed in writing by them) as to:

- (a) the dispute resolution technique and procedures to be adopted;
- (b) the timetable for all steps in those procedures; or
- (c) the selection and compensation of the independent person required for such technique, the parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of NSW. The parties must request the president of the Law Society of NSW or the president's nominee to select the mediator and determine the mediator's remuneration.

**6.5 Court proceedings** If the dispute is not resolved within 60 days after notice is given under clause 6.2 then any party which has complied with the provisions of this clause 6 may in writing terminate any dispute resolution process undertaken under this clause and may then commence court proceedings in relation to the dispute.

### **6.6 Not use information**

The parties acknowledge the purpose of any exchange of information or documents or the making of any offer of settlement under this clause 6 is to attempt to settle the dispute. No party may use any information or documents obtained through any dispute resolution process undertaken under this clause 6 for any purpose other than in an attempt to settle the dispute.

**6.7 No prejudice** This clause 6 does not prejudice the right of a party to institute court proceedings for urgent injunctive or declaratory relief in relation to any matter arising out of or relating to this Deed.

## **7 GST**

### **7.1 Definitions**

Words used in this clause that are defined in the GST Legislation have the meaning given in that legislation.

### **7.2 Intention of the parties**

The parties intend that:

- (a) Divisions 81 and 82 of the GST Legislation apply to the supplies made under and in respect of this Deed; and
- (b) no additional amounts will be payable on account of GST and no tax invoices will be exchanged between the parties.

### **7.3 Reimbursement**

Any payment or reimbursement required to be made under this Deed that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which any entity is entitled for the acquisition to which the cost, expense or amount relates.

#### **7.4 Consideration GST exclusive**

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Deed are GST Exclusive. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purposes of this **clause 7**.

**7.5 Assumptions** The Developer acknowledges and agrees that in calculating any amounts payable under **clause**

**7.5** the Developer will assume the Council is not entitled to any input tax credit.

#### **7.6 No merger**

This clause will not merge on completion or termination of this Deed.

### **8 ASSIGNMENT**

#### **8.1 Consent**

This Deed is personal to each party and no party may assign the rights or benefits of this Deed to any person except:

(a) to a related body corporate, after obtaining the consent of the other parties, which the other parties must not withhold if it is reasonably satisfied that the related body corporate has sufficient assets, resources and expertise to perform all of the assigning party's obligations under this Deed; or

(b) to any other person, with the prior consent of the other parties, which the other parties may give, give conditionally or withhold in its absolute discretion.

### **9 WARRANTIES OF CAPACITY**

#### **9.1 General warranties**

Each party warrants to each other party that:

(a) this Deed creates legal, valid and binding obligations, enforceable against the relevant party in accordance with its terms; and

(b) unless otherwise stated, it has not entered into this Deed in the capacity of trustee of any trust.

## **9.2 Power of attorney**

If an attorney executes this Deed on behalf of any party, the attorney declares that it has no notice of the revocation of that power of attorney.

## **10 GENERAL PROVISIONS**

### **10.1 Entire Deed**

This Deed constitutes the entire agreement between the parties regarding the matters set out in it and supersedes any prior representations, understandings or arrangements made between the parties, whether orally or in writing.

### **10.2 Variation**

This Deed must not be varied except by a later written document executed by all parties.

### **10.3 Waiver**

A right created by this Deed cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right does not constitute a waiver of that right, nor will 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.

### **10.4 Further assurances**

Each party must promptly execute all documents and do every thing necessary or desirable to give full effect to the arrangements contained in this Deed.

### **10.5 Time for doing acts**

(a) If:

(i) the time for doing any act or thing required to be done; or

(ii) a notice period specified in this Deed,

(a) 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 pm on the specified day, it is taken to have been done on the following Business Day.

### **10.6 Governing law and jurisdiction**

(a) The laws applicable in New South Wales govern this Deed.

(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.

### **10.7 Severance**

If any clause or part of any clause is in any way unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid and legal. If this is not possible, the clause (or where possible, the offending part) is to be severed from this Deed without affecting the enforceability, validity or legality of the remaining clauses (or parts of those clauses) which will continue in full force and effect.

### **10.8 Preservation of existing rights**

The expiration or termination of this Deed does not affect any right that has accrued to a party before the expiration or termination date.

**10.9 No merger**

Any right or obligation of any party that is expressed to operate or have effect on or after the completion, expiration or termination of this Deed for any reason, will not merge on the occurrence of that event but will remain in full force and effect.

**10.10 Counterparts**

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

**10.11 Relationship of parties**

Unless otherwise stated:

- (a) nothing in this Deed creates a joint venture, partnership, or the relationship of principal and agent, or employee and employer between the parties; and
- (b) no party has the authority to bind any other party by any representation, declaration or admission, or to make any contract or commitment on behalf of any other party or to pledge any other party's credit.

**10.12 Good faith**

Each party must act in good faith towards all other parties and use its best endeavours to comply with the spirit and intention of this Deed.

**10.13 No fetter**

Nothing in this Deed shall be construed as requiring the Council to do anything that would cause the Council to breach any of the Council's obligations at law and without limitation, nothing in this Deed shall be construed as limiting or fettering in any way the discretion of the Council in exercising any of the Council's statutory functions, powers, authorities or duties.

**10.14 Explanatory note**

The Explanatory Note must not be used to assist in construing this Deed.

**10.15 Expenses and stamp duty**

- (a) The Developer must pay all stamp duty assessed on or in respect of this Deed and any instrument or transaction required by or necessary to give effect to this Deed.

**10.16 Notices**

Any notice, demand, consent, approval, request or other communication (notice) to be given under this Deed must be in writing and must be given to the recipient at its Address for Service by being:

- (a) hand delivered; or
- (b) sent by facsimile transmission.

A notice is given if:

- (a) hand delivered, on the date of delivery; or
- (b) sent by facsimile transmission during any Business Day, on the date that the sending party's facsimile machine records that the facsimile has been successfully transmitted.



**EXECUTED** as a Deed **Signed sealed and delivered** for and on behalf of the **Penrith City Council**, in the presence of: ..... Signature of Witness

*[Handwritten Signature]*

... Signature of the Penrith City Council - Alan Stoneham General Manager

*[Handwritten Signature]*

... Name of Witness in full

Stephen Brilken - Group Manager - legal and Governance.

**Signed sealed and delivered by Jim Aitken, Marlene Aitken, James Aitken, David Reeves** in accordance with section 127 of the Corporations Act:

Signature

*[Handwritten Signature]*  
.....  
Name Jim Aitken

Signature of Witness

*[Handwritten Signature]*  
.....

... Name of Witness in full

TROY MEREDITH

Signature

*[Handwritten Signature]*  
.....

... Name Marlene Aitken

Signature of Witness

*[Handwritten Signature]*  
.....

... Name of Witness in full

TROY MEREDITH

Signature

*[Handwritten Signature]*  
.....  
Name James Aitken

Signature of Witness

*[Handwritten Signature]*  
.....

... Name of Witness in full

TROY MEREDITH

Signature

*D. Reeves*

.....  
... Name **David Reeves**

Signature of Witness

*T. Meredith*

.....  
... Name of Witness in full

*TROY MEREDITH*

.....

**Explanatory Note – Prepared in accordance with Clause 25E Environmental Planning and Assessment Regulation 2000**

Clause 25E(1) - A planning authority proposing to enter into a planning agreement, or an agreement that revokes or amends a planning agreement, must prepare a written statement.

It is proposed to construct alfresco dining on the area of pavement directly north of the existing Jimmy's Steakhouse. The outdoor dining will be on an area of the site currently containing eight car parking spaces.

There is no opportunity to place the car parking spaces elsewhere on the site. The existing car parking spaces are accessed directly from a Council owned car park, which has a high vacancy rate.

**SCHEDULE 1 Requirements under section 93F**

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

**REQUIREMENT UNDER THE ACT THIS DEED Planning instrument and/or development application – (section 93F(1)) The Developer has:**

- (a) sought a change to an environmental planning instrument.
  - (b) made, or proposes to make, a Development Application.
  - (c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.
- (a) N/A  
(b) Yes  
(c) N/A

**Description of land to which this Deed applies – (section 93F(3)(a))** See definition in clause 1.1.

**Description of the development to which this Deed applies – (section 93F(3)(b))** See definition in clause 1.1.

**The scope, timing and manner of delivery of contribution required by this Deed – (section 93F(3)(c))** See clause 4.

**Applicability of section 94 of the Act – (section 93F(3)(d))** S94 does not apply.

**Consideration of benefits under this Deed if section 94 applies – (section 93F(3)(e))** S94 does not apply to this agreement.

**Mechanism for Dispute Resolution – (section 93F(3)(f))** See clause 6.

**Enforcement of this Deed – (section 93F(3)(g))** See clause 4.1(a) and clause 6.

**No obligation to grant consent or exercise functions – (section 93F(9))** See clause 10.13.

No Section 94 Contribution Plan exists which covers the site and therefore no opportunity exists for Council to require provision of cash in lieu of car parking provision as a condition of consent. Both parties are in agreement that is of community benefit and public interest to allow the development of commercial facilities in the area, and to ensure that there is no net loss of car parking spaces as a result of the proposed development.

Notwithstanding the underutilisation of the existing car park, there is currently land available to increase the size of the car park to cater for the spaces lost by the proposed development. As such, the Developer and Council have agreed that the Developer will pay Council to construct the eight car parking spaces within the existing car park.

Clause 25E(2)(a) - identify how the agreement, amendment or revocation promotes the public interest and one or more of the objects of the Act.

This Planning Agreement promotes the following Objects of the Act:

(a) to encourage:

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

**Comment:** by allowing the development of an alfresco eating area which develops the commercial centre of Emu Plains, and also converts private parking to public parking facilities. Both provide for the social and economic welfare of the community.

(ii) the promotion and co-ordination of the orderly and economic use and development of land,

**Comment:** the Planning agreement allows for the increased utilisation of public land for public parking at no cost to the public.

Clause 25E(c) - if the planning authority is a public authority constituted by or under an Act, identify how the planning agreement, amendment or revocation promotes one or more of the objects (if any) of the Act by or under which it is constituted.

This Planning Agreement allows Council to achieve the following objects of the Local Government Act:

d) to give councils:

- the ability to provide goods, services and facilities, and to carry out activities, appropriate to the current and future needs of local communities and of the wider public

**Comment:** This Planning Agreement allows the provision of adequate parking facilities, consistent with the potential demand created by the proposed development

Clause 25E(d) - if the planning authority is a council, identify how the agreement, amendment or revocation promotes one or more of the elements of the council's charter under section 8 of the Local Government Act 1993.

This Planning Agreement allows Council to exercise the following elements of its charter: as set out in Clause 8 of the Local Government Act 1993:

- to provide directly or on behalf of other levels of government, after due consultation, adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively

**Comment:** This Planning Agreement allows the provision of adequate parking facilities, consistent with the potential demand created by the proposed development.

- to have regard to the long term and cumulative effects of its decisions

**Comment:** This Planning Agreement ensures there will be no future shortfall in parking space numbers as a direct result of the proposed development.

- to bear in mind that it is the custodian and trustee of public assets and to effectively plan for, account for and manage the assets for which it is responsible

**Comment:** This Planning Agreement demonstrates good custodianship over the public parking facility.

- to engage in long-term strategic planning on behalf of the local community

**Comment:** The Planning Agreement demonstrates that the long term planning for the area includes the sustainable provision of parking spaces for the needs of the users of the commercial area.

Clause 25E(2)(e) - identify a planning purpose or purposes served by the agreement, amendment or revocation, and contain an assessment of whether the agreement, amendment or revocation provides for a reasonable means of achieving that purpose.

The outdoor dining will be on an area of the site currently containing eight car parking spaces. There is no opportunity to place the car parking spaces elsewhere on the site. The existing car parking spaces are accessed directly from a Council owned car park, which has a high vacancy rate. The development would otherwise be either:

- 1 approved without the provision of any car parking resulting in a net loss of car parking spaces
- 2 refused on the grounds that there is a reduction in car parking spaces and that no Section 94 contribution plan in place to recoup costs of the parking space loss.

As no Section 94 Contribution Plan exists which covers the site there is no opportunity for Council to require provision of cash in lieu of car parking provision as a condition of consent. Both parties are in agreement that is of community benefit and public interest to allow the development of commercial facilities in the area, and to ensure that there is no net loss of car parking spaces as a result of the proposed development.

Therefore a Planning Agreement that allows the Developer to pay Council to construct the eight car parking spaces within the existing car park is a reasonable means of achieving the planning purpose of allowing development with no net decrease in car parking.

**SCHEDULE 2**

The Land Those parts of the land comprised in:

(a) Lot 3 in Deposited Plan 234477 being known as 73 Great Western Highway, Emu Plains  
2750;

**SCHEDULE 3**

**Address for Service (clause 10.16) Penrith City Council Contact: The General Manager**  
**Address:** P.O. Box 60,  
Penrith NSW 2751 **Facsimile No:** (02) 4732 7958

**Jim Aitken, Marlene Aitken, James Aitken, David Reeves Contact: Jim Aitken Address:30**  
Mulgoa Rd  
Regentville NSW 2745 **Facsimile No:** 02 4733 1666