

\_\_\_ 2017

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# Planning Agreement

**Ku-ring-gai Council (ABN 86 408 856 411)**

**Fortis Development (Pymble) Pty Ltd (ACN 621 422 759)**

**1017 Pacific Highway, Pymble**

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## DETAILS

Date: \_\_\_\_\_ 2017

### (1) Ku-ring-gai Council (Council)

ABN 86 408 856 411  
Address 818 Pacific Highway  
GORDON NSW 2072  
Locked Bag 1056  
PYMBLE NSW 2073  
Phone (02) 9424 0000  
Fax Number (02) 9424 0001  
DX 8703 Gordon  
Email kmc@kmc.nsw.gov.au  
Attention Mr Jamie Taylor

### (2) Fortis Developments (Pymble) Pty Ltd (Developer)

ACN 621 422 759  
Address  
Phone  
Fax Number  
Email  
Attention

## Recitals

- A. The Developer owns the Land.
- B. The Developer proposes to carry out the Development on the Land.
- C. The Development Application was lodged to carry out the Development on the Land.
- D. A Letter of offer dated 23 September 2016 was sent to Council offering to enter into this Agreement for the provision of an easement in gross for public access, dedication of part of the Land to Council for road widening purposes and carrying out of footpath works (the **Offer**). The Offer was clarified and confirmed by the Developer in writing on 28 November 2017.
- E. The provision of public access between Pacific Highway and Post Office Lane and road widening of Post Office Lane is the Public Purpose under this Agreement.
- F. The Developer has the benefit of the Development Consent, and it is a condition of the Development Consent that the Developer enters into this Agreement in accordance with the terms of the Offer.

## Operative Parts

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### 1. Defined terms and interpretation

#### 1.1 Defined terms

The following definitions apply unless the context requires otherwise.

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

**Approval** includes approval, consent, licence, permission or the like.

**Agreement** means this planning agreement between the Parties.

**Bank Guarantee** means an irrevocable and unconditional undertaking by a trading bank approved by the Council in the sum of \$100,000 without an expiry or end date and containing terms and conditions acceptable to Council and in accordance with clause 12 of this Agreement

**Business Day** means:

- (a) for the purpose of sending or receiving a Notice, a day which is not a Saturday, Sunday, a bank holiday or a public holiday in the city where the Notice is received; and
- (b) for all other purposes, a day which is not a Saturday, Sunday, a bank holiday or a public holiday in Sydney.

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

**Construction Certificate** has the same meaning as in the Act.

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

**Details** means, in relation to a Party, the details for that Party set out in this Agreement.

**Development** means the demolition of existing buildings and construction of a mixed use development comprising two commercial tenancies, fourteen shop top housing units, basement parking and strata subdivision to be carried out generally in accordance with the Development Consent.

**Development Application** means DA 0039/16 for the Development lodged with Council by the Developer on or about 29 January 2016 including all Modification Applications and Modifications of the same.

**Development Consent** means the development consent No DA 0039/2016 dated 4 November 2016 granted to the Development Application by the Land and Environment Court in orders made on 4 November 2016.

**Development Contribution** means the granting of the Easement in Gross, dedication of Road Land and the carrying out of Works to be used for, or applied towards the Public Purpose.

**Dispute** means a dispute or difference between the Parties under or in relation to this Agreement.

**Easement in Gross** means the easement in gross for public access and is the strip of Land along the north western boundary that is shown on the plan prepared by..... dated.....which is Annexure 'A' to this Agreement and is a minimum of 3m wide including the public lift and the entry area to the public lift off Post Office Lane, incorporating terms referred to in the Developer's Offer and otherwise to the satisfaction of Council.

**Explanatory Note** has the same meaning as in clause 25E of the Regulation.

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

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

**Land** means the land being Lot 2 in Deposited Plan 526966 and known as 1017 Pacific Highway, Pymble, New South Wales.

**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) of this definition.

**LPI** means the New South Wales Land and Property Information office and its successors.

**Modification** means the approval by Council (or the Land and Environment Court) of any Modification Application lodged under section 96 of the Act.

**Modification Application** means an application to Council (or the Land and Environment Court) to modify the Development Consent under section 96 of the Act.

**Notice** has the meaning given in clause 14 of this Agreement.

**Occupation Certificate** has the same meaning as in the Act and includes an interim occupation certificate for any part of the Land or the Development.

**Party** means either Council, or the Developer, and includes their successors and assigns.

**Public Purpose** means the provision of public access between Pacific Highway and Post Office Lane and road widening of Post Office Lane.

**Register of Land** means the Torrens Title register maintained by the LPI under the *Real Property Act 1900* (NSW).

**Road Land** means the 2m wide strip of the Land along the north eastern boundary that is shown on the plan prepared by Stewart McNeill Bland dated 28 November 2017 which is Annexure 'B' to this Agreement.

**Regulation** means the *Environmental Planning and Assessment Regulation 2000* (NSW) (as amended).

**Services** means all water, gas, electricity, television, drainage, sewerage, cable TV, data communications, telecommunications and other services which are required under the

Development Consent or an Approval and which are necessary or desirable for the construction, operation or occupation of the Development.

**Strata Subdivision Certificate** means a certificate to be endorsed by Council for the purposes of strata subdivision under the Act and Strata Schemes Development Act 2015 of the Land or any part of it.

**Works** means the footpath works to be carried out by the Developer in accordance with the Development Consent, ensuring accessibility for all persons and to the satisfaction of Council and are the temporary reinstatement in concrete or turf (in material that is safe and easily removable) for the sections of the Road Land which are not occupied by the vehicular crossing and path to the lift and stairs.

1.2 In this Agreement, except where the context otherwise requires:

- (a) the singular includes the plural and vice versa and a gender includes other genders;
- (b) other grammatical forms of a defined word or expression have a corresponding meaning;
- (c) a reference to a clause, paragraph, schedule or annexure is to a clause or paragraph of or schedule or annexure to this Agreement and a reference to this Agreement includes any schedule and annexure;
- (d) a reference to a document or agreement, includes the document or agreement as novated, altered, supplemented or replaced from time to time;
- (e) a reference to A\$, \$A, dollar or \$ is to Australian currency;
- (f) a reference to time is to Sydney Eastern Standard Time (EST);
- (g) a reference to a year (other than a financial year) or a month means a calendar year or calendar month respectively;
- (h) a reference to a Party is to a Party to this Agreement, and a reference to a Party to a document includes the Party's executors, administrators, successors and permitted assigns and substitutes;
- (i) a reference to a person includes a natural person, partnership, firm, body corporate, trust, joint venture, association, governmental or local authority or agency or other entity;
- (j) a reference to a person includes a reference to the person's executor, administrators, successors, substitutes (including, without limitation, persons taking by novation) and assigns;
- (k) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (l) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;
- (m) a reference to anything (including, without limitation, any amount) is a reference to the whole and each part of it and a reference to a group of persons is a reference to all of them collectively, to any two or more of them collectively and to each of them individually;

- (n) if a Party is required to do something, that includes a requirement to cause that thing to be done and if a Party is prohibited from doing anything, it is also prohibited from doing or omitting to do anything which allows or causes that thing to be done;
- (o) any agreement, representation, warranty or indemnity by two or more Parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- (p) a rule of construction does not apply to the disadvantage of a Party because the Party was responsible for the preparation of this Agreement or any part of it;
- (q) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day;
- (r) unless otherwise specified in this Agreement, a word defined in the Act has the same meaning in this Agreement;
- (s) headings are for ease of reference only and do not affect the interpretation of this Agreement; and
- (t) the recitals are part of this Agreement.

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## **2. Planning Agreement Under the Act**

- 2.1 The Parties agree that this Agreement is a planning agreement within the meaning of section 93F of the Act.

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## **3. Application of this Agreement**

- 3.1 This Agreement applies to:
- (a) the Land (including the Road Land); and
  - (b) the Development.

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## **4. Operation of this Agreement**

- 4.1 This Agreement takes effect on its execution by the Parties but the Parties agree that the Developer is not required to make the Development Contribution in accordance with clause 6 of this Agreement unless and until such time as each of the following conditions precedent have been satisfied:
- (a) a Construction Certificate is granted in relation to the construction of the Development; and
  - (b) the carrying out of the Development has commenced.

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## **5. Application of s94, s94A and s94EF of the Act to the Development**

- 5.1 This Agreement does not exclude the application of section 94EF of the Act to the Development.
- 5.2 This Agreement does not exclude the application of section 94 or 94A of the Act to the Development.

- 5.3 To the extent that the application of section 94 of the Act is not excluded, the dedication of the Road Land to be provided in accordance with this Agreement is not to be taken into consideration by the consent authority in determining a development contribution under section 94 of the Act in relation to the Development and section 94(6) of the Act does not apply.

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## **6. Development Contribution to be made under this Agreement**

- 6.1 The Developer is to make the Development Contribution to Council in accordance with this Agreement.
- 6.2 The Developer is to:
- (a) Provide a through site link for public access over part of the Land from Pacific Highway to Post Office Lane by way of registered Easement in Gross under s88A of the Conveyancing Act 1919 in favour of the Council and at no cost to Council; and
  - (b) dedicate the Road Land to Council at no cost to Council and free of any encumbrances (other than existing encumbrances for services and utilities which are underground) as a public road for road widening purposes,
- by the earlier of registration of a Strata Subdivision Certificate or the first Occupation Certificate for the Development.
- 6.3 The Developer will carry out the Works to the satisfaction of Council, by the earlier of registration of a Strata Subdivision Certificate or the first Occupation Certificate for the Development.

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## **7. Registration of this Agreement**

- 7.1 The Developer represents and warrants that it is the registered proprietor of the Land.
- 7.2 The Developer will procure the registration of this Agreement on the relevant folios of the Register of Land in accordance with section 93H of the Act.
- 7.3 The Developer, at its expense, will promptly, after this Agreement comes into operation, in accordance with clause 4.1, take all 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; and
  - (b) the execution of any documents; and
  - (c) the production of the relevant duplicate certificates of title,
- to enable the registration of this Agreement in accordance with this clause 7.
- 7.4 The Developer at its own expense, will take all practical steps, and otherwise do anything that Council reasonably requires:



- (a) to procure the lodgement of this Agreement with the Registrar-General as soon as reasonably practicable after this Agreement is executed but in any event, no later than **30 Business Days** after that date; and
- (b) to procure the registration of this Agreement by the Registrar-General in the relevant folios of the Register of Land as soon as reasonably practicable after this Agreement is lodged for registration.

7.5 This Agreement is to be removed from the Register of Land in accordance with clause 9 of this Agreement.

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## **8. Manner of Delivery**

- 8.1 A requirement to register any instrument, including this Agreement, on the Register of Land will be satisfied when the Developer provides to Council a copy of the relevant title showing the registration of the instrument or this Agreement.
- 8.2 The dedication of the Road Land will be taken to have been delivered for the purposes of this Agreement, when written notice of the registration on the Register of Land of a plan of subdivision bearing the statement of intention to dedicate the Road Land as a public road, is received by Council.

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## **9. Removal from Register of Land**

- 9.1 The Parties agree that this Agreement must be removed from the Register of Land (or any part of it) when the Development Contribution has been made/delivered, in accordance with this Agreement.
- 9.2 Council agrees to do all things reasonably necessary to remove this Agreement from the Register of Land under the terms of this Agreement within **20 Business Days** of receipt of a written notice from the Developer requesting removal of this Agreement from the Register of Land.
- 9.3 For avoidance of doubt, the removal of this Agreement from the Register of Land under clause 9.1 does not constitute a release or discharge of the Parties from the obligations under this Agreement.
- 9.4 For the avoidance of doubt, this Agreement is to otherwise remain registered on the Register of Land for the community title scheme or the strata title scheme as the case may be, until clause 9.1 has been satisfied.

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## **10. Dispute Resolution**

- 10.1 If a Dispute arises between the Parties in relation to this Agreement, the Parties must not commence any Court or arbitration proceedings unless the Parties to the Dispute have complied with this clause 10, except where a Party seeks urgent interlocutory relief.
- 10.2 The Party wishing to commence the dispute resolution processes must give written notice (Notice of Dispute) to the other Party 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

- (a) The representatives of the Parties must promptly (and in any event within **15 Business Days** of the Notice of Dispute) meet in good faith in an 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 10.6 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 (subject to clause 10.4) to a form of alternative dispute resolution (including expert determination or mediation) which is appropriate for the resolution of the relevant Dispute.
- 10.4 If the Dispute is not resolved within 28 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 10.5 or by expert determination under clause 10.6.
- 10.5 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 **5 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 **5 Business Days** of receipt of the Determination Notice, either Party may request that the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) appoint a mediator;
  - (c) The mediator appointed pursuant to this clause 10.5 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 **5 Business Days** of receipt of the Determination Notice notify each other of their representatives that will be involved in the mediation (except if a resolution of Council is required to appoint a representative, Council must advise of the representative within **5 Business Days** of the resolution);
  - (f) The Parties agree to be bound by a mediation settlement, and unless waived by the Parties, 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 unreasonable behaviour in which case the mediator may require the full costs of the mediation to be borne by that Party.

10.6 If the Dispute is not resolved under clause 10.3 or clause 10.5, 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 Council and the Developer; and
  - (ii) in the event that no agreement is reached or no appointment is made within **30 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 10.6;
- (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 procedural fairness;
- (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 10.6 is final and binding upon the Parties except unless:
  - (i) within **20 Business Days** of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and commences litigation; or
  - (ii) the determination is in respect of, or relates to, termination or purported termination of this Agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal.

10.7 If the Dispute is not finally resolved in accordance with this clause 10, then either Party is at liberty to litigate the Dispute.

10.8 Subject to any interlocutory order obtained under clause 10.1, the referral to or undertaking of a dispute resolution process under this clause 10 does not suspend the Parties' obligations under this Agreement.

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## 11. Enforcement

11.1 If Council reasonably considers that the Developer is in breach of any obligation under this Agreement, it may give a written notice to the Developer:

- (a) specifying the nature and extent of the breach;
- (b) requiring the Developer to rectify the breach if Council reasonably considers it is capable of rectification; or
- (c) specifying the period within which the breach is to be rectified being a period that is reasonable in the circumstances.

#### 11.2

- (a) Without limiting any other provision of this Agreement, and subject to the dispute resolution provisions set out at clause 10 of this Agreement, the Parties may enforce this Agreement in a Court of competent jurisdiction.
- (b) For avoidance of doubt, nothing in this Agreement prevents:
  - (i) a party from bringing proceedings in the Land and Environment Court of New South Wales to enforce any aspect of this Agreement or any matter to which this Agreement relates; or
  - (ii) Council from exercising any function under the Act or any other applicable Law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

11.3 Notwithstanding any other provision of the Agreement, the parties acknowledge and agree that in the event that the Easement in Gross is not registered and Road Land is not dedicated in accordance with the terms of this Agreement, the Council can acquire either for \$1 under s 30 of the Land Acquisition (Just Terms Compensation) Act 1991. This provision does not derogate from Council's rights to seek enforcement of all other terms and conditions of this Agreement including clause 12 as to Bank Guarantee.

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## 12. Security

12.1 The Road Land is to be dedicated to Council, Easement in Gross to be registered and Works completed under clauses 6 and 8 before the issue of the first Occupation Certificate for the Development or release of Strata Lots. Council will not sign off on any Strata Subdivision Certificate associated with the development unless the Road Land is dedicated and Easement in Gross are incorporated in the strata subdivision and Works completed.

### 12.2 Provision of a Bank Guarantee

- (a) Prior to the issue of any Construction Certificate, the Developer must deliver to the Council a Bank Guarantee, which must be:
  - (i) in a form and from an institution approved by the Council;
  - (ii) irrevocable and unconditional;
  - (iii) with no expiry date;
  - (iv) issued in favour of the Council;
  - (v) for an amount prescribed by Council;
  - (vi) drafted to cover all of the Developer's obligations under this Agreement; and
  - (vii) on the terms otherwise satisfactory to the Council.

- (b) The Developer acknowledges that the Council enters into this Agreement on the proviso of the Developer providing the Bank Guarantee as a security for the performance of all of the Developer's obligations under this Agreement, including without limitation the delivery of the Development Contribution to the Council in accordance with this Agreement.

### 12.3 Calling on Bank Guarantee

- (a) Notwithstanding any other provision herein, the Council may call on the Bank Guarantee in the event that the Developer:
  - (i) fails to make the Development Contribution in accordance with this Agreement; or
  - (ii) breaches any other term or condition of this Agreement and fails to remedy the relevant failure or breach within 7 days after the Council's notice.
- (b) If the Council calls on the Bank Guarantee as a result of the Developer's failure to comply with its obligations herein at no cost to Council under this Agreement, then the Council will apply the amount received pursuant to its claim on the Bank Guarantee towards the Developer's obligations herein including to pay any relevant amount and will deduct that amount from the amount payable. In those circumstances, the Developer will be required to pay to the Council any outstanding balance in respect of the Development Contributions and other amounts payable under this Agreement.

### 12.4 Return of Bank Guarantee

Subject to clause 12.3, provided that the Developer has complied with all of its obligations under this Agreement, including provision of the Development Contribution, the Council will return the Bank Guarantee to the Developer.

### 12.5 The Parties acknowledge and agree that the following provide sufficient security for the performance of the Developer's obligations under this Agreement:

- (a) the Bank Guarantee provided under this clause 12;
- (b) the requirements under clause 7 for registration of this Agreement on the relevant folios of the Register for Land; and
- (c) the restrictions on assignment of this Agreement under clause 13.

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## 13. Assignment and Dealings

- 13.1 If the Developer enters into an agreement with a third party (**Incoming Party**) to sell, transfer, assign or novate, encumber or similarly deal with its right, title or interest in the Land (if any) or rights or obligations under the terms of this Agreement (**Transaction**), the Developer may not complete that Transaction, unless before completion of the Transaction, the Developer:
  - (a) at no cost to Council, has first procured the execution by the Incoming Party of an agreement in favour of Council on the same terms as this Agreement as if the Incoming Party were a Party to this Agreement; and
  - (b) satisfies Council that the Developer is not in breach of its obligations under this Agreement at the time of completion of the Transaction.

13.2 The Parties agree that clause 13.1 of this Agreement does not operate in the following circumstances:

- (a) where the Easement in Gross has been registered, Road Land has been dedicated to Council and Works undertaken under clauses 6 and 8 of this Agreement;
- (b) the Transaction is by way of a mortgage or charge; and
- (c) if the Incoming Party (as that term is defined in clause 13.1 above) is acquiring an interest in the Land or part of the Land as a purchaser of one of more lots in a community scheme or a strata scheme (whether or not the community or strata scheme as the case may be, has been registered on the Register of Land) in which case the Developer may create and transfer that interest without requiring the Incoming Party to enter into an agreement with Council, and the interest so created and transferred will not be in breach of this Agreement.

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## 14. Notices

14.1 Subject to clause 14.2, 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 fax at the address or fax number below, or at the address or fax number last notified by the intended recipient to the sender after the date of this Agreement:
  - (i) to Council:  
**Attention:** Mr Jamie Taylor  
**Address:** 818 Pacific Highway, Gordon, NSW 2072; or  
Locked Bag 1056, Pymble, NSW, 2073  
**Fax Number:** (02) 9424 0880
  - (ii) to the Developer:  
**Attention:**  
**Address:** Suite 903, 53 Walker Street, North Sydney  
**Fax Number:**
- (c) is taken to be given and made:
  - (i) in the case of hand delivery, when delivered;
  - (ii) in the case of delivery by post, **3 Business Days** after the date of posting (if posted to an address in the same country) or **7 Business Days** after the date of posting (if posted to an address in another country); and
  - (iii) in the case of a fax, on production of a transmission report by the machine from which the fax was sent that indicates the fax was sent in its entirety to the recipient's fax number; and

- (d) if under clause 14.1(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 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.

#### 14.2 Notices sent by email

- (a) A party may serve a Notice by email if the Notice:
- (i) includes a signature block specifying:
    - (A) the name of the person sending the Notice; and
    - (B) the sender's position within the relevant party;
  - (ii) states in the body of the message or the subject field that it is sent as a Notice under this Agreement;
  - (iii) contains an express statement that the person sending the Notice has the authority to serve a Notice under this Agreement;
  - (iv) is sent to the email address below or the email address last notified by the intended recipient to the sender:
    - (A) to Council  
**Attention:** Mr Jamie Taylor  
**Email:** kmc@kmc.nsw.gov.au
    - (B) to the Developer  
**Attention:** Henry Lee  
**Email:** henry.lee@fortisland.com.au
- (b) The recipient of a Notice served under clause 15.2(a) must:
- (i) promptly acknowledge receipt of the Notice; and
  - (ii) keep an electronic copy of the Notice.
- (c) Failure to comply with clause 15.2(b) does not invalidate service of a Notice under this clause.

#### 14.3 Receipt of Notices sent by email

- (a) A Notice sent under clause 14.2 is taken to be given or made:
- (i) 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;
  - (ii) when the Notice enters an information system controlled by the recipient;  
or
  - (iii) when the Notice is first opened or read by the recipient,

whichever occurs first.

- (b) If under clause 15.3(a) 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 pm (local time), it will be taken to have been given or made at the start of business on the next Business Day in that place.

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## **15. Explanatory Note**

- 15.1 The Explanatory Note must not be used to assist in construing this Agreement.

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## **16. Review and modification**

- 16.1 This Agreement may be reviewed or modified and any review or modification of this Agreement will be conducted in the circumstances and in the manner determined by the Parties.
- 16.2 No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.
- 16.3 A party will not be 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 the Review.

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## **17. GST**

- 17.1 The terms used in this clause 17 have the same meaning as provided for in the GST Law.
- 17.2 If a Supply under this Agreement is subject to GST, then:
- (a) the Recipient of the Supply must pay, in addition to the other consideration payable or to be provided for the Supply, an additional amount equal to the GST; and
- (b) the Recipient must pay the additional amount to the Supplier at the same time as the other consideration is paid.
- 17.3 The Recipient need not pay the additional amount under this clause 17 until the Supplier provides the Recipient a Tax Invoice.

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## **18. General Provisions**

### **18.1 Approvals and consents**

Except where this Agreement expressly states otherwise, a Party may, in its discretion, give conditionally or unconditionally or withhold any approval or consent under this Agreement.

### **18.2 Counterparts**

This Agreement may be executed in counterparts. All executed counterparts constitute one document. This Agreement may be executed by either of the Parties by duly executing a counterpart and forwarding a copy of the signed counterpart to the other Party. The last Party to sign its counterpart is to date the Agreement on page 1 in the space provided.

### **18.3 Costs**



Council's reasonable costs of and incidental to the preparation and execution of this Agreement and any related documents and registration of same shall be borne by the Developer. The Developer shall be responsible to pay its own costs and any stamp duty arising from this Agreement or its preparation. .

**18.4 No merger**

Except where this Agreement expressly states otherwise, the rights and obligations of the Parties under this Agreement do not merge on completion of any transaction contemplated by this Agreement.

**18.5 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.

**18.6 No fetter**

Nothing in this Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at Law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

**18.7 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.

**18.8 Severability**

If the whole or any part of a provision of this Agreement is invalid or unenforceable in a jurisdiction it must, if possible, be read down for the purposes of that jurisdiction so as to be valid and enforceable. If however, the whole or any part of a provision of this Agreement is not capable of being read down, it is to be severed to the extent of the invalidity or unenforceability, without affecting the remaining provisions of this Agreement or affecting the validity or enforceability of that provision in any other jurisdiction.

**18.9 Waiver**

A Party does not waive a right, power or remedy if it fails to exercise or delays in exercising the right, power or remedy. A single or partial exercise by a Party of a right, power or remedy does not prevent another or further exercise of that or another right, power or remedy. A waiver of a right, power or remedy must be in writing and signed by the Party giving the waiver.

**18.10 Relationship**

This Agreement does not create a relationship of employment, trust, agency or partnership between the Parties.

**18.11 Governing Law**

This Agreement will be governed by and construed in accordance with the Law for the time being in force in New South Wales and the Parties, by entering into this Agreement, are deemed to have submitted to the non-exclusive jurisdiction of the Courts of that State.

18.12 **Exercise of rights**

A Party may exercise a right, at its discretion and separately or concurrently with another right.

**Executed** as an agreement:

The **Common Seal of Ku-ring-gai Council** )  
was affixed on the \_\_\_ day of \_\_\_ 2017 )  
pursuant to the resolution of the Council made )  
on the \_\_\_ day of \_\_\_ 2017 in the presence of : )

\_\_\_\_\_  
Signature of General Manager

\_\_\_\_\_  
Name  
(BLOCK LETTERS)

\_\_\_\_\_  
Signature of Mayor

\_\_\_\_\_  
Name  
(BLOCK LETTERS)

**Executed by Fortis Development (Pymble)** )  
**Pty Ltd** ACN 621 422 759 )  
in accordance with Section 127 of the )  
*Corporations Act 2001 (Cth)* )

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Office held

\_\_\_\_\_  
Office held

\_\_\_\_\_  
Name of authorised person  
(BLOCK LETTERS)

\_\_\_\_\_  
Name of authorised person  
(BLOCK LETTERS)

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**Annexure A – Easement in Gross Plan**

DRAFT

# Annexure B – Road Land Plan

Sheet 1 of 1 Sheets

WARNING: CREASING OR FOLDING WILL LEAD TO REJECTION

PLAN FORM 2 (A2)

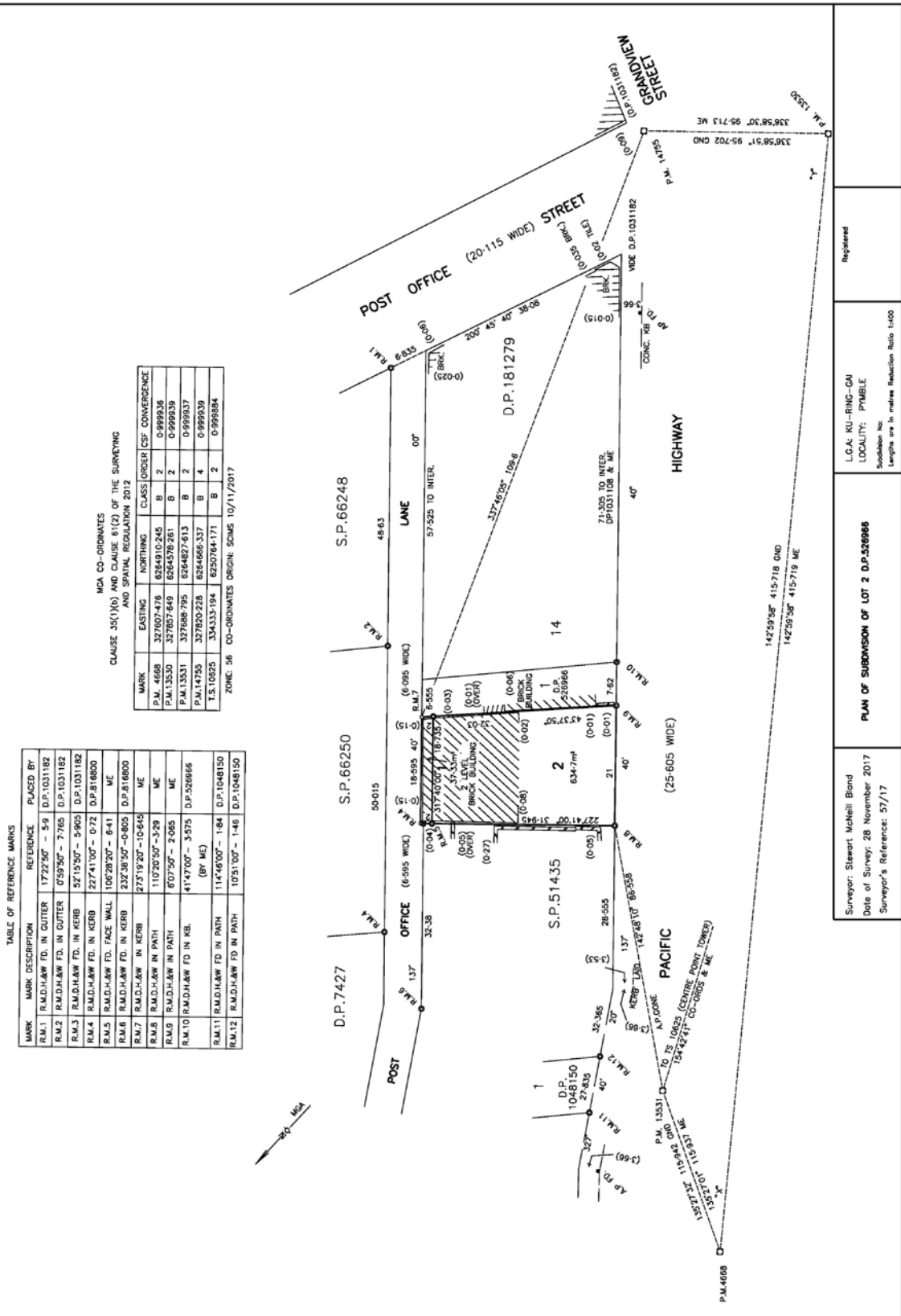


TABLE OF REFERENCE MARKS

MARK	MARK DESCRIPTION	REFERENCE	PLACED BY
R.M.1	R.M.D.H&W FD. IN GUTTER	1722'50" - 5.9	D.P. 1031182
R.M.2	R.M.D.H&W FD. IN GUTTER	0'59'50" - 7.765	D.P. 1031182
R.M.3	R.M.D.H&W FD. IN KERB	52'15'00" - 5.905	D.P. 1031182
R.M.4	R.M.D.H&W FD. IN KERB	227'41'00" - 0.72	D.P. 816800
R.M.5	R.M.D.H&W FD. FACE WALL	106'28'20" - 6.41	ME
R.M.6	R.M.D.H&W FD. IN KERB	232'38'50" - 0.805	D.P. 816800
R.M.7	R.M.D.H&W IN KERB	272'19'20" - 10.645	ME
R.M.8	R.M.D.H&W IN PATH	110'20'50" - 3.29	ME
R.M.9	R.M.D.H&W IN PATH	6'07'50" - 2.065	ME
R.M.10	R.M.D.H&W FD. IN KB.	41'47'00" - 3.575	D.P. 526866 (BY ME)
R.M.11	R.M.D.H&W FD. IN PATH	114'46'00" - 1.84	D.P. 1048150
R.M.12	R.M.D.H&W FD. IN PATH	105'1'00" - 1.46	D.P. 1048150

MCA CO-ORDINATES  
 CLAUSE 35(1)(b) AND CLAUSE 61(2) OF THE SURVEYING  
 AND SPATIAL REGULATION 2012

MARK	EASTING	NORTHING	CLASS	ORDER	CSF	CONVERGENCE
P.M. 4668	327607.476	6284910.245	B	2	0.9999346	
P.M. 13530	327857.649	6284578.261	B	2	0.9999339	
P.M. 13531	327688.795	6284827.613	B	2	0.9999337	
P.M. 14755	327820.228	6284666.337	B	4	0.9999339	
T.S. 10325	324333.194	6250764.171	B	2	0.9998894	

ZONE: 56 CO-ORDINATES ORIGIN: SCMS 10/11/2017

Registered

L.G.A. KU-RING-GAI  
 LOCALITY: PYMBLE  
 Stationed to:  
 Lengths are in metres Reduction Ratio 1:400

Surveyor: Stewart Mitchell Bond  
 Date of Survey: 28 November 2017  
 Surveyor's Reference: 57/17

**PLAN OF SUBDIVISION OF LOT 2 D.P.526866**

## Explanatory Note

### Draft Planning Agreement

The purpose of this explanatory note is to provide a summary of the proposed planning agreement (PA) prepared jointly between Ku-ring-gai Council and the Developer *under s93F of the Environmental Planning and Assessment Act 1979* (the Act).

This explanatory note has been prepared as required by clause 25E of the *Environmental Planning and Assessment Regulation 2000*.

#### 1. Parties

- a. Ku-ring-gai Council (**Council**)
- b. Fortis Developments (Pymble) Pty Ltd (**Developer**)

#### 2. Description of Subject Land

Land being Lot 2 in Deposited Plan 526966 and known as 1017 Pacific Highway, Pymble, New South Wales.

#### 3. Description of Development

The proposed development will comprise demolition of existing buildings and construction of a mixed use development comprising two commercial tenancies, fourteen shop top housing units, basement parking and strata subdivision to be carried out generally in accordance with the Development Consent.

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

The Planning Agreement provides for registration of an easement in gross (site link) a minimum of 3m wide for public access between Pacific Highway and Post Office Lane and the dedication to the Council and at no cost to the Council of a 2m wide strip of the Land to widen Post Office Lane and associated footpath works. The Local Centres Development Control Plan (Pymble Local Centre Precinct P1 Grandview Street and Pacific Highway Commercial Area) precinct plan provides for the dedication of a two metre setback to Post Office Lane for the provision of footpaths at this site and other adjoining sites towards Post Office Street.

The easement in gross will provide additional pedestrian access from Pacific Highway and Post Office Lane to improve access to and around the local centre.

The widening of Post Office Lane will provide better access and facilitate the activation of Post Office Lane to become a street with active uses including small retail facilities, cafes or corner stores to meet the needs of employees and residents in the precinct and adjacent local areas.

The Planning Agreement requires the Developer to comply with certain requirements including registration of the Planning Agreement on the title of the Land, provision of a bank guarantee prior to any construction certificate issuing for the development and the easement in gross to be registered, the dedication to Council to be finalised and works completed prior to an occupation certificate or subdivision certificate being issued for the development.

The Agreement does not exclude the application of sections 94, 94A or 94EF of the Act to the Development and the Development Contribution under this Planning Agreement is not to be taken into consideration in determining any development contribution under s94 of the Act.

The Agreement contains a number of standard provisions including in relation to dispute resolution and enforcement.

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

### **5.1 The Planning Purposes Served by the Draft Planning Agreement**

In accordance with section 93F(2) of the *Environmental Planning and Assessment Act 1979*, the Planning Agreement facilitates the following public purposes:

- the provision of public amenities (public footpath with embellishments); and
- the provision of infrastructure relating to land.

### **5.2 How the Draft Planning Agreement Promotes the Objects of the *Environmental Planning and Assessment Act 1979***

The easement in gross, dedication of the land and associated works will encourage:

- the proper management and development of an urban precinct which will promote economic welfare of the community;
- the promotion and co-ordination of the orderly and economic use and development of land; and
- the provision of land for public purposes.

### **5.3 How the Draft Planning Agreement Promotes the Public Interest**

The easement in gross, dedication of land and associated works required under the Planning Agreement will promote the objects of the Act, in particular:

- 5(a)(ii) the promotion and co-ordination of the orderly and economic use and development of land; and
- 5(a)(iv) the provision of land for public purposes.

#### **5.4 How the Draft Planning Agreement Promotes the Council's Principles for Local Government**

The easement in gross, dedication of the land and associated works are in accordance with the Council's adopted planning policies and demonstrates effective planning and decision making which is providing the best value for residents and rate payers. Council is carrying out part of its functions to achieve desired outcomes and continuous improvement. Council is also managing land and assets so that current and future local community needs can be met in an affordable way. The dedication of the land at no cost to the Council assists with the principles of sound financial management.

#### **5.5 Whether the Draft Planning Agreement conforms with the Authority's Capital Works Program**

The easement in gross, dedication of the land and associated works are consistent with the Council's plans for providing public access between Pacific Highway and Post Office Lane and upgrading Post Office Lane which will form part of the Council's future capital works program.

#### **5.6 The Impact of the Draft Planning Agreement on the Public or Any Section of the Public**

The easement in gross, dedication of the land and associated works will have a positive impact on the members of the public and as Post Office Lane is activated there will be a positive impact for employees and residents both in the immediate urban precinct and across the Pacific Highway for residents and employees of adjoining areas accessing Pymble commercial area and railway station.

#### **5.7 Whether the Draft Planning Agreement specifies that certain requirements of the Agreement must be complied with before a construction certificate, occupation certificate or subdivision certificate are issued**

Yes, as detailed above in relation to bank guarantee, dedication of the land and delivery of associated works to Council prior to an occupation certificate or subdivision certificate issuing for the development, these matters are specified in the Agreement.

**This explanatory note is not to be used to assist in construing the Planning Agreement**