

Voluntary Planning Agreement

Reference: HEA954-00001

Draft

28 November 2022

Newcastle City Council

ABN 25 242 068 129

Healthe Care Lingard Pty Ltd

ACN 117 484 438

Northwest Healthcare Australian Property Limited

ACN 083 065 034

Newcastle

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Agreement

Date

Parties

First party

Name Newcastle
City Council (**Council**)
ABN 25 242 068 129
Contact [TBA]
Telephone [TBA]

Second party

Name Healthe Care Lingard Pty Ltd (**Developer**)
ACN 117 484 438
Contact [TBA]
Telephone [TBA]

Second party

Name Northwest Healthcare Australian Property Limited
(**Landowner**)
ACN 083 065 034
Contact [TBA]
Telephone [TBA]

Background

- A. The Landowner is the registered proprietor of the Land.
- B. The Developer made an application to the Council for the Instrument Change for the purpose of making a Development Application to the Council for Development Consent to carry out the Development on the Land.
- C. The Instrument Change application was accompanied by an offer by the Developer to enter into this agreement to make contributions for public purposes in connection with the Instrument Change and the Development.

Operative part

1 Definitions

In this agreement, unless the context indicates a contrary intention:

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

Address means a party's address set out in the Notices clause of this agreement;

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

Authority means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person, agency or entity and includes a certifier accredited under the *Building Professionals Act 2005* (NSW);

Bond means an insurance bond from an AAA credit rated party or a cash bond;

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

Certificate means a Construction Certificate or an Occupation Certificate;

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

Compliance Certificate means a compliance certificate as defined under section 6.4 of the Act;

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

Construction Terms means the terms set out in Schedule 2;

Contribution Item means an item listed in the Contributions Schedule;

Contributions Schedule means table in Schedule 1 setting out the contributions to be made under this agreement;

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

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

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

Development means:

- (a) proposed development of the Lingard Precinct to add an additional storey to the building on that land; and
- (b) proposed development of the Kingsland Precinct to add an additional storey to the building on that land.

Development Application has the same meaning as in the Act;

Development Consent has the same meaning as in the Act;

GST has the same meaning as in the GST Law;

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

Instrument Change means an amendment to the *Newcastle Local Environmental Plan 2012* in accordance with Planning Proposal PP2022-395 to:

- (a) rezone the land from R3 Medium Density Residential and B5 Business Development to SP2 Infrastructure (Health Services Facility);

- (b) amend the maximum building height applying to the Land from 10m to 18m; and
- (c) amend the floor space ratio control for the Land from 0.9:1 to no FSR control;

Kingsland Precinct means Lot 100 DP 1251777, known as 8 Lingard Street, Merewether.

Land means the Lingard Precinct and the Kingsland Precinct;

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);

Lingard Precinct means Lot 100 DP 1168197, known as 23 Merewether Street, Merewether on which the Lingard Private Hospital is currently located;

Merewether and Lingard Street Intersection Works means the construction of a roundabout at the intersection of Merewether and Lingard Streets including pedestrian facilities at each leg, priority pedestrian crossing in Merewether Street, associated realignment of verges, kerb and gutter, drainage and street lighting upgrades, to be carried out by Council;

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

Monetary Contribution means Contribution Item No. 1 in the Contributions Schedule;

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

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

Regulation means the *Environmental Planning and Assessment Regulation 2021*;

Regulation (Certification) means the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021*

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

Works means any development contribution involving the carrying out of works on the Land or other land required under this agreement.

2 Interpretation

In this agreement, unless the context indicates a contrary intention:

- (a) **(documents)** a reference to this agreement or another document includes any document which varies, supplements, replaces, assigns or novates this agreement or that other document;
- (b) **(references)** a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this agreement;
- (c) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this agreement;

- (d) **(person)** a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns;
- (e) **(party)** a reference to a party to a document includes that party's personal representatives, executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) **(president, CEO or managing director)** the president, CEO or managing director of a body or Authority means any person acting in that capacity;
- (g) **(requirements)** 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;
- (h) **(including)** including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind;
- (i) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (j) **(singular)** the singular includes the plural and vice-versa;
- (k) **(gender)** words importing one gender include all other genders;
- (l) **(parts)** a reference to one or more things includes each part and all parts of that thing or group of things but nothing in this clause implies that part performance of an obligation constitutes performance of that obligation;
- (m) **(rules of construction)** neither this agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting;
- (n) **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (o) **(time and date)** a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in New South Wales, Australia, even if the obligation is to be performed elsewhere;
- (p) **(joint and several)** an agreement, representation, covenant, right or obligation:
 - (i) in favour of two or more persons is for the benefit of them jointly and severally; and
 - (ii) on the part of two or more persons binds them jointly and severally;
- (q) **(writing)** a reference to a notice, consent, request, approval or other communication under this agreement or an agreement between the parties means a written notice, request, consent, approval or agreement;
- (r) **(replacement bodies)** a reference to a body (including an institute, association or Authority) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions;
- (s) **(Australian currency)** a reference to dollars or \$ is to Australian currency;

- (t) **(month)** a reference to a month is a reference to a calendar month; and
- (u) **(year)** a reference to a year is a reference to twelve consecutive calendar months.

3 Planning Agreement under the Act

- (a) The parties agree that this agreement is a planning agreement within the meaning of section 7.4 of the Act.
- (b) Schedule 3 of this agreement summarises the requirements for planning agreements under section 7.4 of the Act and the way this agreement addresses those requirements.

4 Application of this agreement

This agreement applies to:

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

5 Operation of this agreement

- (a) This agreement commences on and from the date it is executed by all parties.
- (b) Until the planning agreement operates, this document constitutes:
 - (i) the Developer and Landowner's offer in connection with the Instrument Change sought by the Developer and Landowner for the purposes of making Development Applications in respect of the Land; and
 - (ii) the Developer and Landowner's offer to enter into this agreement if the Instrument Change is made.

6 Contributions to be made under this agreement

6.1 Contributions

- (a) The Developer must deliver the Contribution Items to Council at the time and in the manner set out in the Contributions Schedule.
- (b) The parties acknowledge and agree that the Contributions serve the public purposes set out in the Contributions Schedule.

6.2 Monetary Contribution

- (a) The Monetary Contribution must be paid to Council by way of bank cheque in favour of Council or by deposit by means of electronic funds transfer into an account specified by Council.
- (b) The Monetary Contribution is to be indexed in accordance with increases in the CPI from the date of this agreement to the date of payment. The Monetary Contribution payable will be adjusted to in the following manner:

$$\$CPY = \$CDC \times CPIPY / CPIDC$$

Where:

\$CPY is the amount of the contribution at the date of payment

\$CDC is the amount of the Monetary Contribution as set out in this agreement (prior to indexation)

CPIPY is the latest release of the Consumer Price Index (Sydney – All Groups) at the date of payment as published by the ABS.

CPIDC is the Consumer Price Index (Sydney – All Groups) for the financial quarter at the date of entering into this agreement.

- (c) The Monetary Contribution will be taken to have been made when the Council, acting reasonably, notifies the Developer that the bank cheque has been received and cleared funds or electronic funds have been deposited in the Council's bank account.
- (d) The parties agree and acknowledge that the Monetary Contribution will be used towards the carrying out of the Merewether and Lingard Street Intersection Works.
- (e) Council acknowledges and agrees that:
 - (i) the Developer has notified Council that it intends to submit a Development Application or Development Applications for the Development or part of the Development within 20 Business Days after the Instrument Change is published on the NSW Legislation Website;
 - (ii) Council will commence the design for the Merewether and Lingard Street Intersection Works when the first Development Application for the Development is being assessed by Council; and
 - (iii) Council will construct the Merewether and Lingard Street Intersection Works as soon as practicable after the completion of the design and will use its best endeavours to complete the Merewether and Lingard Street Intersection Works in a timely manner.
- (f) Notwithstanding any other provision of this agreement, the Developer will not be required to pay the Monetary Contribution if, prior to that payment becoming due, a condition is imposed on any Development Consent requiring the Developer (or any other entity with the benefit of the Development Consent) to carry out the Merewether and Lingard Street Intersection Works.
- (g) Notwithstanding any other provision of this agreement, if, prior to the Monetary Contribution becoming due, a condition is imposed on any Development Consent requiring the Developer (or any other entity with the benefit of the Development Consent) to carry out a part of the Merewether and Lingard Street Intersection Works, the Monetary Contribution will be reduced by an amount equivalent to the value of the works required under the Development Consent, as determined by a qualified quantity surveyor appointed by the Developer with the Council's approval (acting reasonably).

6.3 Works

- (a) The Developer will carry out the Works in accordance with this agreement, including the Construction Terms and any Development Consent granted for the Works.

- (b) The Works or any part of the Works required under this agreement will be taken to have been completed and delivered to Council for the purposes of this agreement when a Compliance Certificate has been issued for those Works.

6.4 *Access to Council owned land*

The Council agrees to permit the Developer, upon receiving at least 10 Business Days' prior notice, to enter, pass through or occupy any Council owned or controlled land in order to enable the Developer to properly perform its obligations under this agreement. Nothing in this clause creates or gives the Developer any estate or interest in any part of the Council owned or controlled land.

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

- (a) This agreement does not exclude the application of section 7.11 of the Act to the Development.
- (b) This agreement does not exclude the application of section 7.12 of the Act to the Development.
- (c) This agreement does not exclude the application of section 7.24 of the Act to the Development.
- (d) The benefits under this agreement are not to be taken into consideration in determining a development contribution under section 7.11 of the Act.

8 *Registration of this agreement*

8.1 *Landowner Interest*

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

8.2 *Registration of this agreement*

- (a) The Developer agrees to procure the registration of this agreement under the *Real Property Act 1900* (NSW) in the relevant folios of the Register of the Land in accordance with section 7.6 of the Act.
- (b) The Developer at its own expense will, promptly after the execution of this agreement, take all practical steps, and otherwise do anything that the Council reasonably requires to procure:
 - (i) The consent of each person who:
 - (A) has an estate or interest in the Land registered under the *Real Property Act 1900* (NSW); or
 - (B) is seized or possessed of an estate or interest in the Land, and
 - (ii) the execution of any documents,
 to enable the registration of this agreement in accordance with clause 8.2.
- (c) The Landowner consents to the registration of the agreement in accordance with this clause 8.2.

- (d) The Developer, at its own expense, will take all practical steps, and otherwise do anything that the Council reasonably requires:
 - (i) to procure the lodgement of this agreement with the Registrar-General as soon as reasonably practicable after this agreement comes into operation, but in any event, no later than 20 Business Days after that date; and
 - (ii) to procure the registration of this agreement by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this agreement is lodged for registration.

8.3 *Removal from Register*

The Council will provide a release and discharge of this agreement so that it may be removed from the folios of the Register for the Land (or any part of it) provided the Council is satisfied the Developer has duly fulfilled its obligations under this agreement, and is not otherwise in default of any of the obligations under this agreement.

9 *Review of this agreement*

- (a) This agreement may be reviewed or modified. Any review or modification of this agreement will be conducted in the circumstances and in the manner determined by the parties.
- (b) 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.
- (c) A party is not in breach of this agreement if it does not agree to an amendment to this agreement requested by a party in, or as a consequence of, a review.

10 *Dispute Resolution*

10.1 *Reference to Dispute*

If a dispute arises between the parties in relation to this agreement, the parties must not commence any court proceedings relating to the dispute unless the parties have complied with this clause, except where a party seeks urgent interlocutory relief.

10.2 *Notice of Dispute*

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

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

10.3 *Representatives of Parties to Meet*

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

10.4 *Further Notice if Not Settled*

If the dispute is not resolved within 20 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 *Mediation*

If a party gives a Determination Notice calling for the dispute to be mediated:

- (a) The parties must agree to the terms of reference of the mediation within 10 Business Days of the receipt of the Determination Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply;
- (b) The mediator will be agreed between the parties, or failing agreement within 10 Business Days of receipt of the Determination Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (c) The mediator appointed pursuant to this clause 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 10 Business Days of receipt of the Determination Notice notify each other of their representatives who will be involved in the mediation;
- (f) The parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement; and
- (g) In relation to costs and expenses:
 - (i) Each party will bear its own professional and expert costs incurred in connection with the mediation; and
 - (ii) The costs of the mediator will be shared equally by the parties unless the mediator determines that a party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that party.

10.6 *Expert determination*

If the dispute is not resolved under clause 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 the parties; and
 - (ii) In the event that no agreement is reached or no appointment is made within 15 Business Days of the agreement to refer the dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales;
- (b) The expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) The determination of the dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (d) The expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (e) Each party will bear its own costs in connection with the process and the determination by the expert and will share equally the expert's fees and costs; and
- (f) Any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
 - (i) Within 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 *Litigation*

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 *No suspension of contractual obligations*

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

11 **Enforcement**

11.1 *Default*

- (a) In the event a party considers another party has failed to perform and fulfil an obligation under this agreement, it may give notice in writing to the other party (**Default Notice**) giving all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than 21 days.

- (b) In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (c) If a party disputes the Default Notice it may refer the dispute to dispute resolution under clause 10 of this agreement.

11.2 *Restriction on the issue of Certificates*

- (a) Subject to clause 11.2(b), if the Contributions Schedule specifies that a Contribution Item must be delivered prior to the issue of a Certificate, in accordance with provisions of the Act and Regulation (Certification), the relevant Certificate must not be issued unless that Contribution Item has been delivered.
- (b) Clause 11.2(a) will not apply if:
 - (i) the Developer is unable to complete the Contribution Item due to circumstances beyond its control;
 - (ii) Council has accepted a Bond; and
 - (iii) Council has agreed to defer delivery of the Contribution Item for a reasonable period to allow the relevant circumstances to be resolved and the Certificate to be issued.

11.3 *General Enforcement*

- (a) Without limiting any other remedies available to the parties, this agreement may be enforced by any party in any Court of competent jurisdiction.
- (b) Nothing in this agreement prevents:
 - (i) a party from bringing proceedings in the Land and Environment Court to enforce any aspect of this agreement or any matter to which this agreement relates; and
 - (ii) the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this agreement or any matter to which this agreement relates.

12 Assignment and Dealings

12.1 *Assignment*

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

12.2 *Transfer of Land*

- (a) The Landowner may not transfer, assign or dispose of the whole or any part of its right, title or interest in the Land (present or future) or in the Development to another person (**Transferee**) unless before it sells, transfers or disposes of that right, title or interest:

- (i) the Transferee delivers to the Council a novation deed signed by the Transferee in a form and of such substance as is acceptable to the Council containing provisions under which the Transferee agrees to comply with all the outstanding obligations of the Landowner under this agreement;
- (ii) any default under any provisions of this agreement has been remedied or waived by the Council, on such conditions as the Council may determine, and
- (iii) the Landowner and the Transferee pay the Council's reasonable costs in relation to the assignment.

13 Approvals and consents

Except as otherwise set out in this agreement, and subject to any statutory obligations, a party may give or withhold an approval or consent to be given under this agreement in that party's absolute discretion and subject to any conditions determined by the party. A party is not obligated to give its reasons for giving or withholding consent or for giving consent subject to conditions.

14 No fetter

14.1 Discretion

This agreement is not intended to operate to fetter, in any manner, the exercise of any statutory power or discretion of the Council, including, but not limited to, any statutory power or discretion of the Council relating to the Instrument Change, the Development Application or any other application for Development Consent (all referred to in this agreement as a ("**Discretion**").

14.2 No fetter

No provision of this agreement is intended to constitute any fetter on the exercise of any Discretion. If, contrary to the operation of this clause, any provision of this agreement is held by a court of competent jurisdiction to constitute a fetter on any Discretion, the parties agree:

- (a) They will take all practical steps, including the execution of any further documents, to ensure the objective of this clause is substantially satisfied,
- (b) In the event that (a) cannot be achieved without giving rise to a fetter on the exercise of a Discretion, the relevant provision is to be severed and the remainder of this agreement has full force and effect, and
- (c) To endeavour to satisfy the common objectives of the parties in relation to the provision of this agreement which is to be held to be a fetter on the extent that is possible having regard to the relevant court judgment.

15 Notices

15.1 Notices

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

- (a) must be in writing and signed by a person duly authorised by the sender;
- (b) must be addressed as follows and delivered to the intended recipient by hand, by prepaid post or by email at the address, or at the address last notified by the intended recipient to the sender after the date of this agreement:

- (i) to Newcastle City Council: [TBA]
Email: [TBA]
Attention: [TBA]
 - (ii) to Healthe Care Lingard Pty Ltd: [TBA]
Email: [TBA]
Attention: [TBA]
 - (iii) to Northwest Australian Property Limited: [TBA]
Email: [TBA]
Attention: [TBA]
- (c) is taken to be given or made:
- (i) in the case of hand delivery, when delivered; and
 - (ii) in the case of delivery by post, three Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country); and
 - (iii) in the case of email, when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above or when the Notice is first opened or read by the recipient whichever occurs first; and
- (d) if under clause (c) a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it is taken to have been given or made at the start of business on the next Business Day in that place.

16 General

16.1 *Relationship between parties*

- (a) Nothing in this agreement:
 - (i) constitutes a partnership between the parties; or
 - (ii) except as expressly provided, makes a party an agent of another party for any purpose.
- (b) A party cannot in any way or for any purpose:
 - (i) bind another party; or
 - (ii) contract in the name of another party.
- (c) If a party must fulfil an obligation and that party is dependent on another party, then that other party must do each thing reasonably within its power to assist the other in the performance of that obligation.

16.2 *Time for doing acts*

- (a) If the time for doing any act or thing required to be done or a notice period specified in this agreement expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.

- (b) If any act or thing required to be done is done after 5.00 pm on the specified day, it is taken to have been done on the following Business Day.

16.3 *Further assurances*

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

16.4 *Variation*

A provision of this agreement can only be varied by a later written document executed by or on behalf of all parties and in accordance with the provisions of the Act.

16.5 *Counterparts*

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

16.6 *Legal expenses and stamp duty*

The Developer must pay the Council's reasonable legal costs and disbursements in connection with the negotiation, preparation and execution of this agreement.

16.7 *Entire agreement*

The contents of this agreement constitute the entire agreement between the parties and supersede any prior negotiations, representations, understandings or arrangements made between the parties regarding the subject matter of this agreement, whether orally or in writing.

16.8 *Representations and warranties*

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

16.9 *Severability*

If a clause or part of a clause of this agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this agreement, but the rest of this agreement is not affected.

16.10 *Invalidity*

- (a) A word or provision must be read down if:
 - (i) this agreement is void, voidable, or unenforceable if it is not read down;
 - (ii) this agreement will not be void, voidable or unenforceable if it is read down; and
 - (iii) the provision is capable of being read down.
- (b) A word or provision must be severed if:
 - (i) despite the operation of clause (a), the provision is void, voidable or unenforceable if it is not severed; and
 - (ii) this agreement will be void, voidable or unenforceable if it is not severed.
- (c) The remainder of this agreement has full effect even if clause 16.10(b) applies.

16.11 Waiver

- (a) A right or remedy created by this agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.
- (b) 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.

16.12 GST

- (a) Words and expressions which are not defined in this agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this agreement are exclusive of GST.
- (c) If GST is imposed on any supply made under or in accordance with this agreement, the consideration payable or to be provided for that supply under this agreement but for the application of this clause is increased by, and the recipient of the supply must also pay to the supplier, an amount equal to the GST payable by the supplier on that supply.

16.13 Governing law and jurisdiction

- (a) The laws applicable in New South Wales govern this agreement.
- (b) The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

Schedule 1 Contributions Schedule

Item No.	Contribution Item	Public Purpose	Nature and Extent	Timing	Manner of Delivery	Indicative Value*
1.	Monetary Contribution – Merewether and Lingard Street Intersection	Merewether and Lingard Street Intersection Works	Monetary Contribution in the amount of \$1,000,000.	The Monetary Contribution must be paid to Council prior to the issue of any Occupation Certificate for the Development on the Kingsland Precinct, subject to clause 6.2(f).	Payment in accordance with clause 6.2.	\$1,000,000.00
2.	Works – Tye Road Streetscape	Public Domain Upgrades Pedestrian Amenity and Access	Reconstruction of the street and streetscape elements along both sides of Tye Road, including construction of pedestrian footways, kerb and gutter and road pavement, generally in the location shown in Annexure C.	The Tye Road Streetscape Works must be completed prior to the issue of any Occupation Certificate for the Development on the Lingard Precinct, or otherwise in accordance with clause 11.2(b).	Works are to be designed, carried out and delivered in accordance with the Construction Terms.	\$850,000.00

Item No.	Contribution Item	Public Purpose	Nature and Extent	Timing	Manner of Delivery	Indicative Value*
3,	Works – Merewether Street Streetscape	Public Domain Upgrades Pedestrian Amenity and Access	Reconstruction of the street and streetscape elements along both sides of Merewether Street between Union Street and Lingard Street, including management of on-street parking, road and safety works and pedestrian management facilities, excluding road surfaces, kerbing and guttering, and civil drainage, generally in the location shown in Annexure D.	The Merewether Street Streetscape Works must be completed prior to the issue of any Occupation Certificate for the Development on the Lingard Precinct, or otherwise in accordance with clause 11.2(b).	Works are to be designed, carried out and delivered in accordance with the Construction Terms.	\$1,380,000.00
4.	Works – Lingard Street Streetscape	Public Domain Upgrades Pedestrian Amenity and Access	Construction of footway connections and streetscape elements along western side of Lingard Street between Merewether Street and Mitchell Street, including pedestrian ramps on both sides of Mitchell St intersection and associated footway kerbing and guttering, generally in the location shown in Annexure E 1.	The Lingard Street Streetscape Works must be completed prior to the issue of any Occupation Certificate for the Development on the Lingard Precinct, or otherwise in accordance with clause 11.2(b).	Works are to be designed, carried out and delivered in accordance with the Construction Terms.	\$100,000.00

Item No.	Contribution Item	Public Purpose	Nature and Extent	Timing	Manner of Delivery	Indicative Value*
5.	Works – Union Street Footpath	Public Domain Upgrades Pedestrian Amenity and Access	Construction of a new concrete footpath between existing crossovers approximately 260m in length linking the southern side of Merewether Street to Union Street, continuing along the western side of Union Street to Mitchell Street, as shown generally in Annexure E.	The Union Street Footpath must be completed prior to the issue of any Occupation Certificate for the Development on the Lingard Precinct, or otherwise in accordance with clause 11.2(b).	Works are to be designed, carried out and delivered in accordance with the Construction Terms.	\$250,000.00
6.	Works – Public Park	Open space and recreation, improvement of public parks	<p>Prior to the lodgement of a Development Application for Development on the Kingsland Precinct, the Developer will provide a proposal to Council for works to enhance Townson Oval. The works subject to the proposal may include installation of park furniture, signage and lighting, up to a maximum value of \$50,000 (Public Park Works).</p> <p>The Developer will design and construct the Public Park Works in accordance with the approved proposal.</p>	The Public Park Works must be completed prior to the issue of any Occupation Certificate for the Development on the Lingard Precinct, or otherwise in accordance with clause 11.2(b).	Works are to be designed, carried out and delivered in accordance with the Construction Terms.	\$50,000.00

Item No.	Contribution Item	Public Purpose	Nature and Extent	Timing	Manner of Delivery	Indicative Value*
7.	Works – Public Roads	Improvement and upgrade to public roads and intersections	<p>Prior to lodgement of the each Development Application for the Development, the Developer will prepare a detailed traffic study identifying works to be undertaken to improve the local road network as a consequence of the development subject to the Development Application. The traffic study will address, but will not be limited to, the following potential works to address capacity and queuing distance issues:</p> <ul style="list-style-type: none"> • Potential upgrades at Glebe Road / Lingard Street intersection • Works to the Lingard Street / Railway Street roundabout • Works to the Glebe Road / Union Street intersection • Potential upgrades to Merewether Street / Lingard Street intersection <p>The Developer will carry out and complete the works required by the traffic study (Road Works).</p>	The Road Works are to be completed at the time or times specified in the relevant traffic study, or as otherwise agreed between the parties.	Works are to be designed, carried out and delivered in accordance with the Construction Terms and the relevant traffic study.	To be determined under traffic studies prepared for the Development.

* Values in this table are indicative only. Actual cost of the works will depend on the final design for the works.

Schedule 2 Construction terms

1 Interpretation

For the purposes of this Schedule 2, the defined terms in clause 1 of this agreement and the Interpretation principles in clause 2 of this agreement will apply and, unless context indicates a contrary intention:

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

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

Defects Liability Period means in respect of each item of building works which together comprise the Works the period of 12 months from the date on which the Certificate of Compliance is issued for the Works.

Detailed Design means the final specifications and finishes for the Works prepared in accordance with clause 5.1 of this Schedule 2 and will include the design of the Works, the location for the Works, installation specifications and costs of construction and/or installation.

2 Requirements of Authorities and Approvals

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

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

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

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

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

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

3 Costs of Works

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

4 Project Management and Contractor Engagement

4.1 The Developer will be responsible for managing the Works.

- 4.2 The Developer will ensure that any contractor it engages to carry out the Works agrees to carry out the Developer's obligations in these Construction Terms as part of any Construction Contract.

5 Design Development and Approvals

5.1 Detailed Design

- (a) Prior to Works commencing the Developer must provide a copy of the draft Detailed Design to the Council for approval.
- (b) Within 15 Business Days of receiving the Detailed Design, Council will respond to the Developer with any suggested amendments to the Detailed Design.
- (c) Council and the Developer must work in consultation with each other to prepare and agree the Detailed Design and must both act reasonably and with due expedition in their consultations with each other.
- (d) If the Detailed Design is not completed and agreed within 15 Business Days of Council providing its suggested amendments in accordance with clause 5.1(b) of this Schedule 2, to avoid possible delays to the issue of a Compliance Certificate, the Council will, in its sole discretion, be entitled to decide on any outstanding or undecided matter or item relating to the Detailed Design, provided that any decision made by Council under this clause:
 - (i) is consistent with the obligation to carry out the Works under this agreement, including any limitation on the maximum value of those Works; and
 - (ii) is consistent with the Development Consent; and
 - (iii) does not materially and adversely affect the Development; and
 - (iv) is not unreasonable.

- 5.2 Any acceptance by the Council of the Detailed Design under this clause 5 of Schedule 2 is not to be taken as approval of or to any Construction Certificate for the Works.

5.3 Good faith

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

6 Carrying out of Works

6.1 Communication

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

6.2 Standard of Works

- (a) Unless otherwise provided, the Developer shall, and must cause the Builder to, use suitable new materials and proper and tradesman-like workmanship when carrying out the Works.
- (b) The qualitative standard of the design and finishes for the Works must be no less than those described in the following documents:
 - (i) Any relevant Australian Standard;

- (ii) Any relevant design standards or guidelines and any other requirements or policies applied by the Council from time to time in assessing the adequacy of any works or improvements proposed for the public domain or to be accessible to the public in accordance with this agreement.
- (c) The Developer will obtain any relevant standards (including design standards), specifications, or guidelines and any other requirements or policies referred to in clause 6.2(b)(ii) of this Schedule 2 from Council if the Council fails to deliver them to the Developer.
- (d) The Developer may but is not obliged to reinstate any Works where damage or destruction is as a result of:
 - (i) Any act or omission of the Council or its employees, consultants or agents relating to any part of the Works under this agreement; or
 - (ii) The use or occupation by the Council or its employees, consultants or agents, Council's representatives or other contractor of the Council of any part of the Works.

6.3 Defects Liability Period

- (a) During the Defects Liability Period, the Council (acting reasonably) may give to the Developer a notice (**Rectification Notice**) in writing that identifies a defect in the Works and specifies:
 - (i) action required to be undertaken by the Developer to rectify that defect (**Rectification Works**); and
 - (ii) the date on which the defect must be rectified (**Rectification Date**).
- (b) The Developer must comply with the Rectification Notice by:
 - (i) procuring the performance of the Rectification Works by the Rectification Date, or such other date as agreed between the parties;
 - (ii) keeping the Council reasonably informed of the action to be taken to rectify the defect; and
 - (iii) carrying out the Rectification Works.
- (c) The Council must give the Developer and its contractors any access required to carry out the Rectification Works.
- (d) When the Developer considers that the Rectification Works are complete, either the Developer must notify the Council and provide documentation, plans or invoices which establish that the Rectification Works were carried out.
- (e) The Council may inspect the Rectification Works within 15 Business Days of receiving a Notice from the Developer under clause 6.3(d) and, acting reasonably:
 - (i) issue a further Rectification Notice if it is not reasonably satisfied that the Rectification Works are complete; or
 - (ii) notify the Developer in writing that it is satisfied the Rectification Works are complete.
- (f) The Developer must meet all costs of and incidental to rectification of defects under this clause 6.3.

- (g) If the Developer fails to comply with a Rectification Notice, then the Council may do such things or take such action as is necessary to carry out the Rectification Works, including accessing and occupying any part of the Land without further notice to the Developer, and may:
 - (i) require the Developer to call upon any defect liability security provided by the Builder under the Construction Contract; and
 - (ii) recover as a debt due to the Council by the Developer in a court of competent jurisdiction, any difference between the amount of the security deposit and the costs incurred by the Council in carrying out Rectification Works.
- (h) The Developer must request that Council inspect the Works 28 days prior to the end of the Defects Liability Period. The Council must inspect the Works at any time after receiving the request from the Developer and before the end of the Defects Liability Period.
- (i) If, prior to the end of the Defects Liability Period:
 - (i) the Developer fails to request the inspection, or
 - (ii) the Council does not carry out the inspection,
 the Council may extend the Defects Liability Period so that the inspection may be carried out.

7 Risk

The Developer undertakes the Works entirely at its own risk.

8 Indemnities

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

9 Intellectual Property Rights

The Council acknowledges that the Developer or its contractors hold all rights to copyright and any intellectual property which may exist in the Works. To the extent the Developer has or receives intellectual property rights for the Works, the Developer shall permit the use of intellectual property rights by Council.

10 Plans

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

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

Schedule 3 Summary of requirements (section 7.4)

Subject and subsection of the Act	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 propose to make a Development Application</p> <p>(c) Entered into an agreement with, or are otherwise associated with, a person to whom paragraph (a) or (b) applies</p>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>
<p>Description of the land to which the Planning Agreement applies – Section 7.4(3)(a)</p>	<p>See the definition of Land, the Lingard Precinct and the Kingsland Precinct in clause 1.</p>
<p>Description of the change to the planning instrument or development to which the Planning Agreement applies – Section 7.4(3)(b)</p>	<p>See the definitions of Development and Instrument Change in clause 1.</p>
<p>The scope, timing and manner of delivery of contribution required by the Planning Agreement – Section 7.4(3)(c)</p>	<p>See clause 6 and the Contributions Schedule (Schedule 1).</p>
<p>Applicability of section 7.11 of the Act – Section 7.4(3)(d)</p>	<p>Not excluded – see clause 7.</p>
<p>Applicability of section 7.12 of the Act – Section 7.4(3)(d)</p>	<p>Not excluded – see clause 7.</p>
<p>Applicability of section 7.24 of the Act – Section 7.4(3)(d)</p>	<p>Not excluded – see clause 7.</p>
<p>Mechanism for dispute resolution – Section 7.4(3)(f)</p>	<p>See clause 10.</p>
<p>Enforcement of the Planning Agreement – Section 7.4(3)(g)</p>	<p>See clause 11.</p>
<p>Registration of the Planning Agreement – Section 7.4(3)(g)</p>	<p>See clause 8.</p>
<p>No obligation to grant consent or exercise functions – Section 7.4(9)</p>	<p>See clause 14 (no fetter).</p>

Executed as an agreement

[Insert Execution clauses]

Annexure A Plan showing Land



Annexure B Pedestrian Crossing



Annexure C

Tye Road Streetscape Works



Annexure D

Merewether Street Streetscape Works



Annexure E Union Street Footpath



Annexure E 1 Lingard Street Footpath



Annexure F Draft Explanatory note

Explanatory Note

Exhibition of draft Voluntary Planning Agreement

**Lot 100 DP 1168137, known as 23 Merewether Street, Merewether
(Kingsland Precinct)**

**Lot 100 DP 1251777, known as 8 Lingard Street, Merewether
(Lingard Precinct)**

Environmental Planning & Assessment Regulation 2021 (clause 205)

Explanatory Note

The purpose of this Explanatory Note is to provide a plain English summary to support the notification of a draft voluntary Planning Agreement (**the Planning Agreement**) under Section 7.4 of the *Environmental Planning and Assessment Act 1979* (**the Act**).

This Explanatory Note has been prepared jointly between the parties as required by clause 205 of the *Environmental Planning and Assessment Regulation 2021* (**the Regulations**). The Explanatory Note must address the requirements of section 205(1)(a)-(b) of the Regulation. This Explanatory Note has been prepared to address these requirements.

Additionally, in preparing the Explanatory Note, the planning authority must consider any relevant practice note prepared by the Planning Secretary under clause 203(6). The relevant practice note is *Planning agreements: Practice note – February 2021* published by the former NSW Department of Planning, Industry and Environment (now the Department of Planning and Environment).

This practice note has been considered by the parties in the course of preparing this Explanatory Note.

This Explanatory Note is not to be used to assist in construing the Planning Agreement.

Parties

Healthe Care Lingard Pty Ltd (**the Developer**) made an offer to Newcastle City Council (**the Council**) to enter into a voluntary Planning Agreement, in connection with a Planning Proposal relating to the subject land.

Northwest Healthcare Australian Property Limited (**Landowner**) is the registered proprietor of the subject land and will also be a party to the Planning Agreement.

Description of subject land

The land to which the Planning Agreement applies is described as Lot 100 DP 1168137, known as 23 Merewether Street, Merewether and Lot 100 DP 1251777, known as 8 Lingard Street, Merewether (**the Land**).

Description of the Planning Proposal to which the Planning Agreement applies

The Planning Agreement is offered in connection with Planning Proposal PP2022-395, which seeks amendments to *Newcastle Local Environmental Plan 2012* to:

- (a) rezone the land from R3 Medium Density Residential and B5 Business Development to SP2 Infrastructure (Health Services Facility);
- (b) amend the maximum building height applying to the Land from 10m to 18m; and
- (c) amend the floor space ratio control for the Land from 0.9:1 to no FSR control

Description of the Development Application to which the Planning Agreement applies

The Planning Agreement will apply to future proposals to add an additional storey to each of the buildings on the Land (**Development**).

Summary of Objectives, Nature and Effect of the Planning Agreement

The Planning Agreement requires the following works in kind:

- (a) Payment of a monetary contribution in the amount of \$1million (increased in accordance with CPI to the date of payment) towards the upgrade of the Merewether Street and Lingard Street intersection.
- (b) Reconstruction of the street and streetscape elements along both sides of Tye Road, including construction of pedestrian footways, kerb and gutter and road pavement.
- (c) Reconstruction of the street and streetscape elements along both sides of Merewether Street between Union Street and Lingard Street, including management of on-street parking, road and safety works and pedestrian management facilities.
- (d) Construction of a new footpath between existing crossovers approximately 260m in length linking the southern side of Merewether Street to Union Street and continuing along the western side of Union Street to Mitchell Street.
- (e) Construction of footway connections and streetscape elements along western side of Lingard Street between Merewether Street and Mitchell Street.
- (e) Works to embellish and improve Townson Oval.
- (f) Intersection upgrade works in accordance with detailed traffic studies to be prepared for the Development, which must address the need for upgrades to the following intersections:
 - Glebe Road / Lingard Street intersection
 - Lingard Street / Railway Street roundabout
 - Glebe Road / Union Street intersection
 - Merewether Street / Lingard Street intersection

Assessment of the Merits of the Planning Agreement

How the Planning Agreement Promotes the Objects of the Act and the public interest

The draft Planning Agreement promotes the following objectives of the *Environmental Planning and Assessment Act 1979*:

- To promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources.

- To facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment.
- To promote the orderly and economic use and development of land.

The draft Planning Agreement promotes the public interest by ensuring that the potential impacts of additional development on the Land are adequately addressed at an early stage of the development and that public facilities and services are provided to meet the needs of the community. The proposed improvements to road works, pedestrian walkways and public domain and open space areas will benefit staff, patients and visitors of the private hospital, as well as local residents and road users. The draft Planning Agreement further encourages ecologically sustainable development, by requiring works to be undertaken as part of the development that will encourage use of sustainable transport modes to access the Land.

The Planning Purposes served by the Planning Agreement

The works will be carried out for the purposes of:

- improving and upgrading pedestrian paths, public domain areas and access to the Land;
- improving and upgrading roads and intersections in the vicinity of the Land; and
- enhancing nearby public open space and recreation areas.

The proposed amendment to the local environmental plan will facilitate future development of this important site in the Newcastle and Hunter Region and will contribute to the implementation of the goals of applicable regional and metropolitan strategic plans. The continued improvement of the Lingard Private Hospital supports the health care and social welfare needs of the community and will have an important role in the growth of the region.

Whether the Planning Agreement Conforms with the Council's Capital Works Program

The contributions proposed under the Planning Agreement do not conform with the Council's capital works program. This is because the opportunity to obtain the contributions has arisen outside of the Council's capital works program. The Planning Agreement will not have an adverse effect on this capital works program. Overall, the Planning Agreement is likely to result in more capital works (to the benefit of the community) than would be the case without the Planning Agreement.

Whether the Planning Agreement specifies that certain requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued

The Planning Agreement requires that certain obligations are to be met prior to the issue of a construction certificate or an occupation certificate for the Development, unless the Council accepts a bond and agrees to defer the timing for compliance.