# Planning Agreement

# 90 Flynn Avenue, Middleton Grange

Giovanni DeFilippis & Amelia DeFilippis (**Developer**)

Liverpool City Council (ABN 84 181 182 471) (**Council**)

Prepared by:

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# Planning Agreement

# 90 Flynn Avenue, Middleton Grange

## Parties

| | | |
|---|---|---|
| **Developer** | **Name** | Giovanni DeFilippis & Amelia DeFilippis |
| | **Address** | 90 Flynn Avenue<br>Middleton Grange NSW 2171 |
| **Council** | **Name** | Liverpool City Council |
| | **Address** | Level 2, 33 Moore Street<br>LIVERPOOL NSW 2170 |
| | **ABN** | 84 181 182 471 |

## Background

**A** The Developer is the registered proprietor of the Land.

**B** The Developer has lodged the Development Application.

**C** The Developer has offered to provide the Monetary Contribution if the Development Consent is granted.

## Operative Provisions

### 1 Agreement

The agreement of the parties is set out in the Operative Provisions of this document, in consideration of, among other things, the mutual promises contained in this document.

### 2 Definitions and interpretation

#### 2.1 Defined terms

In this document, words beginning with a capital letter that are defined in Part 1 of **Schedule 1** have the meaning ascribed to them in that schedule.

#### 2.2 Interpretation

The interpretational rules contained in Part 2 of **Schedule 1** apply in the interpretation of this document.

### 3 Application and operation of this document

#### 3.1 Planning agreement

This document is a planning agreement:

(1) within the meaning set out in section 93F of the Act; and

(2) governed by Subdivision 2 of Division 6 of Part 4 of the Act.

### 3.2 Application

This document applies to both the Land and the Development.

### 3.3 Operation

This document operates from the date it is executed by both parties.

## 4 Application of sections 94 and 94A

### 4.1 Application

This document does not exclude the application of section 94 and section 94A of the Act to the Development.

### 4.2 Consideration of benefits

Section 94(6) of the Act does not apply to the Monetary Contribution that is required to be provided pursuant to this document.

## 5 Registration of this document

### 5.1 Registration

This document must be registered on the title of the Land pursuant to section 93H of the Act.

### 5.2 Obligations of the Developer

The Developer must:

(1) do all things necessary to allow the registration of this document to occur under clause 5.1; and

(2) pay any reasonable costs incurred by Council in undertaking that registration.

## 6 Provision of Monetary Contribution

### 6.1 Obligation to make Monetary Contribution

Subject to clause 6.3, the Developer must pay the Monetary Contribution to Council prior to the issue of a Subdivision Certificate.

### 6.2 Developer's undertaking

The Developer undertakes to Council not to make an application for the issue of any Subdivision Certificate until it has made the payment required to be made to Council under clause 6.1.

### 6.3 Indexation of Amounts payable by Developer

The Monetary Contribution will be increased in accordance with the following formula:

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

where:

**A** = the indexed amount;

**B** = the Monetary Contribution as set out in this document;

**C** = the Index most recently published before the Monetary Contribution is required to be paid;

**D** = the Index most recently published before this document was entered into; and

**Index** is the Consumer Price Index (All Groups – Sydney) as published by the Australian Bureau of Statistics from time to time.

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

## 7 Developer warranties

The Developer warrants to Council that:

(1) it is able to fully comply with its obligations under this document;

(2) it has full capacity to enter into this document; and

(3) there is no legal impediment to it entering into this document, or performing the obligations imposed on it under this document.

## 8 Determination of this document

### 8.1 Determination

This document will determine upon the Developer satisfying all of its obligations under this document.

### 8.2 Effect of determination

Upon the determination of this document Council will do all things necessary to allow the Developer to remove this document from the title of the whole or any part of the Land as soon as reasonably practicably.

## 9 Assignment and security

### 9.1 Prohibition

Neither party may Assign their rights under this document without the prior written consent of the other party.

### 9.2 Assignment of the Land

The Developer must not Assign its interest in the Land unless:

(1) Council consents to the Assignment, acting reasonably;

(2) the proposed assignee enters into an document to the satisfaction of Council under which the assignee agrees to be bound by the terms of this document; and

(3) the Developer is not in breach of any terms of this document.

## 10 Review and amendment

### 10.1 Negotiation of review

If either party requests a review of the whole or any part of this document then the parties must use their best endeavours, acting in good faith, to review this document in accordance with that request.

### 10.2 Amendment to be in writing

If the parties agree to amend this document as a result of a review conducted under clause 10.1 then any such amendment must be made:

(1) in writing signed by both parties;

(2) in accordance with the Act, or any Regulations in force under the Act.

## 11 Dispute resolution

### 11.1 Notice of Dispute

If a party believes that there is a dispute in respect of this document (**Dispute**) then:

(1) that party must give notice (**Dispute Notice**) in writing to the other party stating that there is a Dispute; and

(2) the Dispute Notice must outline:

(a) what the party believes the dispute to be;

(b) what the party wants to achieve;

(c) what the party believes will settle the Dispute; and

(d) who will be the party's representatives to negotiate the dispute.

### 11.2 Consultation between the Representatives

Within fifteen (15) Business Days of a notice served in accordance with clause 11.1(1) the representatives (**Representatives**) of each of the parties must meet in order to resolve the Dispute.

### 11.3 Exclusivity of dispute resolution procedure

(1) Both parties must adhere to the dispute resolution procedure set out in this document.

(2) The only time that either party may depart from the dispute resolution procedure set out in this clause is when urgent interlocutory relief is required to restrain a breach or threatened breach of this document.

### 11.4 Settlement of Dispute

If the parties cannot resolve the Dispute after adhering to the dispute resolution procedure set out in this document then either party may seek any other avenues available to it in order to resolve the Dispute.

## 12 Position of Council

### 12.1 Consent authority

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

### 12.2 Document does not fetter discretion

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

(1) the power of Council to make any Law; or

(2) the exercise by Council of any statutory power or discretion,

(**Discretion**).

### 12.3 Severance of provisions

(1) No provision of this document is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this document is held by a court of competent jurisdiction to constitute an unlawful fetter on any Discretion, the parties agree:

(a) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause 12 is substantially satisfied;

(b) in the event that paragraph (1)(a) cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this document has full force and effect; and

(c) to endeavour to satisfy the common objectives of the parties on relation to the provision of this document which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.

(2) Where the Law permits Council to contract out of a provision of that Law or gives Council power to exercise a Discretion, then if Council has in this document contracted out of a provision or exercised a Discretion under this document, then to the extent of this document is not to be taken to be inconsistent with the Law.

### 12.4 No obligations

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

## 13 Confidentiality

### 13.1 Document not Confidential

The terms of this document are not confidential and this document may be treated as a public document and exhibited or reported without restriction by any party.

### 13.2 Other Confidential Information

(1) The parties acknowledge that:

(a) Confidential Information may have been supplied to some or all of the parties in the negotiations leading up to the making of this document; and

(b) The parties may disclose to each other further Confidential Information in connection with the subject matter of this document.

(c) Subject to paragraphs (2) and (3), each party agrees:

(i) not to disclose any Confidential Information received before or after the making of this document to any person without the prior written consent of the party who supplied the Confidential Information; or

(ii) to take all reasonable steps to ensure all Confidential Information received before or after the making of this document is kept confidential and protected against unauthorised use and access.

(2) A party may disclose Confidential Information in the following circumstances:

(a) in order to comply with the Law, or the requirements of any Authority; or

(b) to any of their employees, consultants, advisers, financiers or contractors to whom it is considered necessary to disclose the information, if the employees, consultants, advisers, financiers or contractors undertake to keep the information confidential.

(3) The obligations of confidentiality under this clause do not extend to information which is public knowledge other than as a result of a breach of this clause.

## 14 GST

### 14.1 Defined GST terms

Defined terms used in this clause 14 have the meaning ascribed to them in the GST Law.

### 14.2 GST to be added to amounts payable

(1) If GST is payable on a Taxable Supply made under, by reference to or in connection with this document, the party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.

(2) This clause does not apply to the extent that the Consideration for the Taxable Supply is expressly agreed to be GST inclusive.

(3) Unless otherwise expressly stated, prices or other sums payable or Consideration to be provided under or in accordance with this document are exclusive of GST.

### 14.3 GST obligations to survive termination

This clause 14 will continue to apply after the expiration or earlier termination of this document.

## 15 Default in performance

### 15.1 Events of Default

The Developer commits an **Event of Default** if:

(1) it breaches a term of this document; or

(2) fails to comply with the terms and conditions of the Development Consent.

### 15.2 Consequences of Events of Default

Where the Developer commits an Event of Default, Council may serve a notice on the Developer requiring the relevant breach to be rectified within ten (10) business days of the date of that notice.

### 15.3 No restriction on rights

The rights vested in Council pursuant to clause 15.2 do not prevent Council from exercising any other rights that it may possess at law.

### 15.4 Termination

This document terminates in the event Council serves notice on the Developer terminating this document where the Developer has failed to comply with a notice issued in accordance with 15.2.

### 15.5 Consequence of termination

Upon termination of this document:

(1) all future rights and obligations of the parties are discharged; and

(2) all pre-existing rights and obligations of the parties continue to subsist.

## 16 Miscellaneous

### 16.1 Obligation to act in good faith

The parties must at all times:

(1) cooperate and use their best endeavours to profitably and professionally give effect to their rights and obligations set out in this document;

(2) not unreasonably delay any action, approval, direction, determination or decision which is required of them;

(3) make approvals or decisions that are required of them in good faith and in a manner consistent with the completion of the transactions set out in this document; and

(4) be just and faithful in their activities and dealings with the other parties.

### 16.2 Legal costs

The Developer agrees to:

(1) pay or reimburse the reasonable legal costs and disbursements of Council of the negotiation, preparation and execution of this document;

(2) pay the reasonable legal costs and disbursements referred to in paragraph (1) within fourteen (14) days of receipt of a tax invoice from Council; and

(3) pay or reimburse the legal costs and disbursements of Council arising from the ongoing administration and enforcement of this document including any breach or default by the Developer of it obligations under this document.

## 17 Administrative provisions

### 17.1 Notices

(1) Any notice, consent or other communication under this document must be in writing and signed by or on behalf of the person giving it, addressed to the person to whom it is to be given and:

(a) delivered to that person's address;

(b) sent by pre-paid mail to that person's address; or

(c) transmitted by facsimile or other electronic means to that person's address.

(2) A notice given to a person in accordance with this clause is treated as having been given and received:

(a) if delivered to a person's address, on the day of delivery if a Business Day, otherwise on the next Business Day;

(b) if sent by pre-paid mail, on the third Business Day after posting; and

(c) if transmitted by facsimile or other electronic means to a person's address and a correct and complete transmission report is received, on the day of transmission if a Business Day, otherwise on the next Business Day.

(3) For the purpose of this clause the address of a person is the address set out in this document or another address of which that person may from time to time give notice to each other person.

### 17.2 Entire agreement

This document is the entire agreement of the parties on the subject matter. All representations, communications and prior agreements in relation to the subject matter are merged in and superseded by this document.

### 17.3 Waiver

The non-exercise of or delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the parties to be bound by the waiver.

### 17.4 Cooperation

Each party must sign, execute and deliver all agreements, documents, instruments and act reasonably and effectively to carry out and give full effect to this document and the rights and obligations of the parties under it.

### 17.5 Counterparts

This document may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

### 17.6 Amendment

This document may only be amended or supplemented in writing signed by the parties.

### 17.7 Unenforceability

Any provision of this document which is invalid or unenforceable in any jurisdiction is to be read down for the purposes of that jurisdiction, if possible, so as to be valid or enforceable, and is otherwise capable of being severed to the extent of the invalidity or enforceability, without affecting the remaining provisions of this document or affecting the validity or enforceability of that provision in any other jurisdiction.

### 17.8 Power of Attorney

Each attorney who executes this document on behalf of a party declares that the attorney has no notice of:

(1) the revocation or suspension of the power of attorney by the grantor; or

(2) the death of the grantor.

### 17.9 Governing law

The law in force in the State of New South Wales governs this document. The parties:

(1) submit to the exclusive jurisdiction of the courts of New South Wales and any courts that may hear appeal from those courts in respect of any proceedings in connection with this document; and

(2) may not seek to have any proceedings removed from the jurisdiction of New South Wales on the grounds of *forum non conveniens*.

## Schedule 1:
## Defined terms and interpretation

### Part 1 – Definitions

| | |
|---|---|
| **Act** | means the *Environmental Planning and Assessment Act 1979* (NSW). |
| **Assign or Assignment** | as the context requires refers to any assignment, sale, transfer, disposition, declaration of trust over or other assignment of a legal and/or beneficial interest. |
| **Authority** | means (as appropriate) any:<br>(1) federal, state or local government;<br>(2) department of any federal, state or local government;<br>(3) any court or administrative tribunal; or<br>(4) statutory corporation or regulatory body. |
| **Confidential Information** | means any information and all other knowledge at any time disclosed (whether in writing and orally) by the parties to each other, or acquired by the parties in relation to the other's activities or services which is not already in the public domain and which:<br>(1) is by its nature confidential;<br>(2) is designated, or marked, or stipulated by either party as confidential (whether in writing or otherwise);<br>(3) any party knows or ought to know is confidential; or<br>(4) is information which may be reasonably considered to be of a confidential nature. |
| **Development** | means the Development proposed to be undertaken by the Developer on the Land as described in the Development Application. |
| **Development Application** | means Development Application No 235/2011 lodged with Council by the Developer, as modified from time to time. |
| **Development Consent** | means a development consent issued under the Act for the Development. |
| **GST Law** | means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST. |
| **Land** | means the land contained in certificate of title folio identifier 319/2475 and known as 90 Flynn Avenue, Middleton Grange. |
| **Law** | means all legislation, regulations, by-laws, common law and other binding order made by any Authority. |

| | |
|---|---|
| **Monetary Contribution** | means ninety seven thousand seven hundred and thirty one dollars ($97,704). |
| **Planning Legislation** | means the Act, the *Local Government Act 1993* (NSW) and the *Roads Act 1993* (NSW). |
| **Subdivision Certificate** | means any subdivision certificate for the Development issued under section 109C(1)(d) of the Act. |

**Part 2 - Interpretational Rules**

| | |
|---|---|
| **clauses, annexures and schedules** | a clause, annexure or schedule is a reference to a clause in or annexure or schedule to this document. |
| **reference to statutes** | 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. |
| **singular includes plural** | the singular includes the plural and vice versa. |
| **person** | the word "person" includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association or any government agency. |
| **executors, administrators, successors** | a particular person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns. |
| **dollars** | Australian dollars, dollars, $ or A$ is a reference to the lawful currency of Australia. |
| **calculation of time** | if a period of time dates from a given day or the day of an act or event, it is to be calculated exclusive of that day. |
| **reference to a day** | a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later. |
| **accounting terms** | an accounting term is a reference to that term as it is used in accounting standards under the Corporations Act or, if not inconsistent with those standards, in accounting principles and practices generally accepted in Australia. |
| **reference to a group of persons** | a group of persons or things is a reference to any two or more of them jointly and to each of them individually. |
| **meaning not limited** | the words "include", "including", "for example" or "such as" are not used as, nor are they to be interpreted as, words of limitation, and, when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind. |
| **next day** | if an act under this document to be done by a party on or by a given day is done after 4.30pm on that day, it is taken to be done on the next day. |
| **next Business Day** | if an event must occur on a stipulated day which is not a Business Day then the stipulated day will be taken to be the next Business Day. |

| | |
|---|---|
| **time of day** | time is a reference to Sydney time. |
| **headings** | headings (including those in brackets at the beginning of paragraphs) are for convenience only and do not affect the interpretation of this document. |
| **agreement** | a reference to any agreement, deed or instrument includes the same as varied, supplemented, novated or replaced from time to time. |

## Schedule 2:
## Requirements under section 93F of the Act

| Requirement under the Act | This Planning Agreement |
|---|---|
| **Planning instrument and/or development application** – (Section 93F(1) of the Act)<br><br>The Developer has: | |
| (a) sought a change to an environmental planning instrument. | (a) No |
| (b) made, or proposes to make, a Development Application. | (b) Yes |
| (c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies. | (c) No |
| **Description of land to which this document applies** – (Section 93F(3)(a) of the Act) | the land contained in certificate of title folio identifier 319/2475 and known as 90 Flynn Avenue, Middleton Grange. |
| **Description of change to the environmental planning instrument to which this document applies** – (Section 93F(3)(b) of the Act) | Not applicable. |
| **Application of section 94 of the Act** – (Section 93F(3)(d) of the Act) | Refer to clause 4 of the Planning Agreement. |
| **Applicability of section 94A of the Act** – (Section 93F(3)(d) of the Act) | Refer to clause 4 of the Planning Agreement. |
| **Consideration of benefits under this document if section 94 applies** – (Section 93F(3)(e) of the Act) | Refer to clause 4 of the Planning Agreement. |
| **Mechanism for Dispute resolution** – (Section 93F(3)(f) of the Act) | Refer to clause 11 of the Planning Agreement. |
| **Enforcement of this document** (Section 93F(3)(g)) | Refer to clause 5 and 9 of the Planning Agreement. |
| **No obligation to grant consent or exercise functions** – (Section 93F(3)(9)) | Refer to clause 12 of the Planning Agreement. |

## Execution page

**Executed as a deed**

Dated:

[redacted]

[redacted]