

Deed of Variation of Planning Agreement

The Council of the City of Ryde
ABN 81 621 292 610

UT 65 Pty Ltd
ABN 43 602 245 483

Newcastle

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Deed

Date

Parties

First party

Name	The Council of the City of Ryde (Council)
ABN	81 621 292 610
Contact	General Manager
Telephone	02 9952 8222

Second party

Name	UT 65 Pty Ltd (Developer)
ABN	43 602 245 483
Contact	Tony Leung
Telephone	02 9188 3498

Background

- A. On 24 November 2020, the parties entered into the Planning Agreement.
- B. At the request of the Developer, the parties have agreed to vary the security provisions under the Planning Agreement.

Operative part

1 Definitions

1.1 In this deed, unless the context indicates a contrary intention:

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

Planning Agreement means the planning agreement relating to 63-71 Waterloo Road, Macquarie Park between Council and the Developer dated 24 November 2020.

EP&A Regulation 2021 means the *Environmental Planning and Assessment Regulation 2021*.

1.2 Except as provided in clause 1.1, all capitalised words used in this deed that are defined in clause 1.1 of the Planning Agreement have the same meaning as in the Planning Agreement.

2 Interpretation

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

- (a) **(documents)** a reference to a document is to the document as varied, amended, supplemented, novated or replaced from time to time;

- (b) **(references)** a reference to a party, clause, paragraph, schedule or annexure is to a party, clause, paragraph, schedule or annexure to or of this deed;
- (c) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect the interpretation of this deed;
- (d) **(Background)** the Background forms part of this deed;
- (e) **(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 permitted novatees, permitted assignees, personal representatives and successors;
- (f) **(including)** including and includes (and any other similar expressions) are not words of limitation and a list of examples is not limited to those items or to items of a similar kind;
- (g) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (h) **(singular and plural)** the singular includes the plural and the plural includes the singular;
- (i) **(gender)** words importing one gender include all other genders;
- (j) **(legislation)** a reference to legislation or any legislative provision includes:
 - (i) any modification or substitution of that legislative provision; and
 - (ii) any subordinate legislation issued under that legislation or legislative provision including under that legislation or legislative provision as modified or substituted;
- (k) **(time and date)** a reference to a time or date is to the time and date in Sydney, Australia;
- (l) **(joint and several)** an agreement, representation, covenant, warranty, 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;
- (m) **(replacement bodies)** a reference to a body that ceases to exist or whose powers or functions are transferred to another body is to the body that replaces it or that substantially succeeds to its powers or functions; and
- (n) **(Australian currency)** a reference to dollars or \$ is to Australian currency.

3 Construction

Neither this deed 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.

4 Timing of acts or things

- 4.1 If the time for doing any act or thing required to be done under this deed or a notice period specified in this deed 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.
- 4.2 If any act or thing done under this deed is done after 5 pm on a day, it is taken to have been done on the following Business Day.

5 Status of this Deed

- 5.1 This deed is an amendment to the Planning Agreement within the meaning of clause 203 of the EP&A Regulation 2021.

5.2 This deed is not a Planning Agreement within the meaning of section 7.4(1) of the EP&A Act.

6 Commencement

6.1 This deed commences and has force and effect on the date when the parties have executed the same copy of this deed.

6.2 The party who executes this deed last is to insert on the front page the date it did so and provide a copy of the fully executed and dated deed to any other person who is a party.

7 Amendment to Planning Agreement

7.1 On and from the date of this deed, the Planning Agreement is amended as follows:

(a) Clause 1 (Bank Guarantees), including subclauses 1.1 to 1.9, of Schedule 10 (Security) is deleted and replaced with the clauses at Schedule 1 of this deed.

(b) Annexure A of the Planning Agreement, showing the Road Land is deleted and replaced with Annexure A to this deed, showing the Road Land and Staging Plan.

8 Registration and Release from Title

The parties agree that the provisions of clause 5 and clause 6 and Schedules 8 and 9 of the Planning Agreement concerning registration of the Planning Agreement on title apply to this deed as if those provisions were set out in full.

9 Explanatory Note

9.1 Annexure B contains the Explanatory Note relating to this deed and as required by clause 205 of the EP&A Regulation 2021.

9.2 Pursuant to clause 205(5) of the EP&A Regulation 2021, the parties agree that the Explanatory Note is not to be used to assist in construing this deed.

10 Notices

Clause 16 of the Planning Agreement applies as if it forms part of this deed with any necessary changes.

11 Costs and expenses

The Developer will pay the Council's reasonable costs and expenses of drafting, negotiating and executing this deed.

12 Relationship between parties

12.1 Nothing in this deed:

(a) constitutes a partnership between the parties; or

(b) except as expressly provided, makes a party an agent of another party for any purpose.

12.2 A party cannot in any way or for any purpose:

(a) bind another party; or

(b) contract in the name of another party.

13 Invalidity

13.1 A word or provision must be read down if:

- (a) this deed is void, voidable, or unenforceable if it is not read down;
- (b) this deed will not be void, voidable or unenforceable if it is read down; and
- (c) the provision is capable of being read down.

13.2 A word or provision must be severed if:

- (a) despite the operation of clause 13.1, the provision is void, voidable or unenforceable if it is not severed; and
- (b) this deed will be void, voidable or unenforceable if it is not severed.

13.3 The remainder of this deed has full effect even if clause 13.2(a) or clause 13.2 (b) applies.

14 Warranties

14.1 The parties warrant to each other that they:

- (a) have full capacity to enter into this deed; and
- (b) are able to fully comply with their obligations under this deed and the Planning Agreement as modified by this deed.

15 Governing law and jurisdiction

15.1 The laws applicable in New South Wales govern this deed.

15.2 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 Clause 1 of Schedule 10

1 **Bank Guarantees**

1.1 **Bank Guarantees Required**

- (a) Upon the execution of the deed of variation prepared to introduce this clause 1.1(a) into Schedule 10 of this Deed, or by 12 October 2022, whichever is the earlier, the Developer must provide to Council a Bank Guarantee in the amount of \$500,000.00 as security for any Costs and Legal Costs incurred by the Council in enforcing the Developer's compliance with this Deed (**Enforcement Guarantee**).
- (b) For the avoidance of doubt, the bank guarantee that was provided on behalf of the Developer to Council on 12 October 2022 in the amount of \$500,000 satisfies the requirements of clause 1.1(a) of this Schedule.
- (c) Prior to the issue of the first Construction Certificate for Stage 2 of the Development as shown in Annexure A, the Developer must provide a Bank Guarantee in the amount of, or Bank Guarantees totalling the amount of, \$5,770,350.00 (indexed in accordance with increases in the CPI from 24 November 2020 to the date the Bank Guarantee is provided) as security against the obligation under this Deed to pay the Monetary Contribution (**Monetary Contribution Guarantee**).
- (d) For the avoidance of doubt:
 - (i) the Monetary Contribution Guarantee amount can be reduced by the amount of any part of the Monetary Contribution paid prior to the provision of the Bank Guarantee(s); and
 - (ii) if the Developer elects, the Enforcement Guarantee can form part of the Monetary Contribution Guarantee, in which case Council may treat the Enforcement Guarantee as security against the obligation under this Deed to pay the Monetary Contribution.
- (e) Prior to the issue of the first Construction Certificate for the Development, the Developer must provide a Bank Guarantee in the amount of \$1,300,000.00 (indexed in accordance with increases in the CPI from 24 November 2020 to the date the Bank Guarantee is provided) as security against the obligations under this Deed to deliver the Contribution Works and the Contribution Land, including the costs of acquisition or transfer of the Contribution Land (**Works Guarantee**).
- (f) Upon the dedication of the Contribution Land and prior to the issue of an Occupation Certificate, the Developer must provide a Bank Guarantee in an amount, determined by a registered quantity surveyor, equivalent to 10% of the construction costs of the Contribution Works calculated as at the date of the Bank Guarantee, as security against the Developer's obligation to rectify any defects in relation to the Contribution Works during the Defects Liability Period (**Defects Guarantee**).

1.2 **Adjustment of Bank Guarantee Amounts**

- (a) On each Adjustment Date the Bank Guarantees required under clause 1.1 of this Schedule are to be adjusted to cover a revised amount (**Revised Bank Guarantee Amount**) as determined in accordance with the following formula:

$$RBA = \frac{(BA \times A)}{B}$$

where:

RBA is the Revised Bank Guarantee Amount applicable from the relevant Adjustment Date;

BA is the amount of the Bank Guarantee that is current on the relevant Adjustment Date;

A is the CPI published immediately before the relevant Adjustment Date;

B is the CPI published immediately before the date of this Deed and, in the case of subsequent adjustments, the immediately preceding Adjustment Date.

No increase or other change will be made to the amount of the Bank Guarantee where B is greater than A.

- (b) The Council must give the Developer written notice of the Revised Bank Guarantee Amounts to apply from the relevant Adjustment Date.
- (c) The Developer must give the Council replacement or further Bank Guarantees so that the Council holds Bank Guarantees for an amount equal to the Revised Bank Guarantee Amounts no later than 15 Business Days after receipt of a notice given under clause 1.2(b) of this Schedule.

1.3 Expiry of Bank Guarantees

- (a) If, despite the requirements of this Deed, any Bank Guarantee provided by the Developer is expressed as expiring on a certain date, the Developer must provide the Council with a replacement Bank Guarantee 20 Business Days prior to the expiry of the Bank Guarantee.
- (b) If the Developer fails to provide the Council with a replacement Bank Guarantee in accordance with clause 1.3(a) of this Schedule, the Council may call on the full amount of such Bank Guarantee after giving 10 Business Days prior written notice to the Developer.

1.4 Cash Deposit

- (a) If the Council makes a demand under any Bank Guarantee pursuant to clause 1.3 of this Schedule, the Council must hold the full amount so paid to the Council as a cash deposit (**Cash Deposit**) in a separate account opened with any body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959* in the name of the Council and with beneficial ownership vesting at all times in the Council (**Cash Deposit Account**). The Cash Deposit will operate to secure the same obligations under this Deed that the relevant Bank Guarantee secured.
- (b) As beneficial owner of the Cash Deposit, the Council may, at any time and without notice to the Developer, withdraw money (including accrued interest) from the Cash Deposit Account and retain that money absolutely to satisfy or reimburse the Council for any liability, loss, cost, charge or expense incurred by the Council because of failure by the Developer to comply with those of the Developer's obligations under this Deed that the relevant Bank Guarantee secured.
- (c) All Costs, charges, duties and Taxes payable in connection with the Cash Deposit Account or interest accruing on moneys credited to the Cash Deposit Account may be satisfied by the Council withdrawing money from the Cash Deposit Account and applying the money for that purpose.
- (d) If no moneys are, or may become, payable to the Council under this Deed in connection with the obligations under this Deed secured by the relevant Bank Guarantee and the Developer has satisfied all of its obligations under this Deed which were secured by the relevant Bank

Guarantee, the Council must pay the balance of the Cash Deposit Account, less all Costs, charges, duties and Taxes payable in connection with such payment, to the Developer.

- (e) For the avoidance of doubt, the Developer has no right to require the Council to release the Cash Deposit until the Council is reasonably satisfied that no moneys are or may become, payable to the Council under this Deed in relation to obligations secured by the relevant Bank Guarantee.

1.5 Release of Cash Deposit

The Council must release the Cash Deposit to the Developer if the Developer provides the Council with a replacement Bank Guarantee complying with the requirements of clause 1.3(a) of this Schedule.

1.6 Claims under Bank Guarantees

- (a) The Developer agrees that the Council may, after giving at least 10 Business Days prior written notice to the Developer, make claims (in full or in part) under the Enforcement Guarantee in the event that the Developer breaches its obligation to pay any instalment or part of the Monetary Contribution in accordance with this Deed prior to the provision of the Monetary Contribution Guarantee.
- (b) The Developer agrees that the Council may, after giving at least 10 Business Days prior written notice to the Developer, make claims (in full or in part) under the Monetary Contribution Guarantee in the event that the Developer breaches its obligation to pay any part of the Monetary Contribution in accordance with this Deed, and a notice has been issued by Council requiring the Developer to remedy the breach in accordance with the requirements of Schedule 6, and the breach remains unremedied following the expiry of the rectification period specified in that notice.
- (c) The Developer agrees that the Council may, after giving at least 10 Business Days prior written notice to the Developer, make claims (in full or in part) under the Works Guarantee, in the event that the Developer breaches its obligation to:
 - (i) carry out and complete any Item of Contribution Works in accordance with this Deed; or
 - (ii) transfer the Contribution Land in accordance with this Deed; anda notice has been issued by Council requiring the Developer to remedy the breach in accordance with the requirements of Schedule 6, and the breach remains unremedied following the expiry of the rectification period specified in that notice.
- (d) The Developer agrees that the Council may, after giving at least 10 Business Days prior written notice to the Developer, make claims (in full or in part) under the Defects Guarantee in the event that the Developer breaches its obligation to rectify defects in or maintain any Item of Contribution Works in accordance with Schedule 4, and a notice has been issued by Council requiring the Developer to remedy the breach in accordance with the requirements of Schedule 6, and the breach remains unremedied following the expiry of the rectification period specified in that notice.
- (e) The Council may retain and use as much of the money it has obtained by making a claim under this clause as is necessary:
 - (i) to compensate or reimburse the Council for Costs reasonably incurred by Council as a result of the Developer's breach of any obligations under this Deed, including by making

any payment owed to Council under this Deed or performing any of the Developer's obligations to deliver the Contributions;

- (ii) to reimburse the Council for Costs and Legal Costs reasonably incurred in connection with enforcing the Developer's compliance with this Deed; and
 - (iii) to reimburse the Council for the Costs reasonably incurred by Council in connection with the rectification of defects in the Contribution Works, in accordance with clause 1.18 of Schedule 4 of this Deed.
- (f) Council must promptly remit the balance of any amounts claimed under a Bank Guarantee to the Developer, unless the Council reasonably considers that any obligations of the Developer under this Deed remain unsatisfied.

1.7 No limitation of obligations

- (a) The provision of the Bank Guarantees does not:
- (i) relieve the Developer from any of its obligations under any other provision of this Deed; or
 - (ii) limit the right of the Council to recover from the Developer in full all money payable to the Council under this Deed, including without limitation, interest on any such amounts or damages or other losses incurred by the Council, except to the extent that Council recovers such amounts from the Developer by calling on the Bank Guarantees.

1.8 Replacement Bank Guarantee

If the Council claims under a Bank Guarantee, in accordance with clause 1.6 of this Schedule, the Developer must provide a replacement Bank Guarantee for an amount which makes whole the amount required in relation to the relevant Bank Guarantee to the Council within 10 Business Days of receiving notice from the Council that the claim has been made.

1.9 Release of the Bank Guarantees

- (a) The Enforcement Guarantee will be released by Council within 10 Business Days after the Developer has provided the Monetary Contributions Guarantee, except if the Developer elects that the Enforcement Guarantee will form part of the Monetary Contributions Guarantee.
- (b) The Monetary Contributions Guarantee will be released by Council within 10 Business Days after the Developer has fully complied with its obligations under this Deed to pay the Monetary Contributions, except if the Developer elects to provide several Bank Guarantees for the Monetary Contributions Guarantee, Council may at the request of the Developer release each Bank Guarantee separately, provided Council is satisfied (acting reasonably) that it holds sufficient Bank Guarantees to secure outstanding Monetary Contributions payable under this Deed.
- (c) The Works Guarantee will be released by Council within 20 Business Days after the Developer has:
 - (i) fully complied with its obligations under this Deed to complete the Contribution Works and dedicate the Contributions Land; and
 - (ii) provided to Council the Defects Guarantee.

- (d) The Defects Guarantee will be released by Council immediately following the expiry of the Defects Liability Period and Maintenance Period for the Contribution Works, subject to any rectification works or maintenance works required during that period being completed.

Executed as a deed

Executed for and on behalf of the)
Council of the City of Ryde ABN 81 621)
292 610 by its authorised delegate)
pursuant to section 377 of the *Local*)
Government Act 1993 in the presence of:)

.....

Signature of Witness

.....

Signature of Authorised Representative

.....

Print name of Witness

.....

Name and Position

Executed by **UT 65 Pty Ltd** ABN 43 602)
245 483 in accordance with section 127 of)
the *Corporations Act 2001* (Cth) by:)
)

.....

Signature of Director

.....

Signature of Director/Secretary

.....

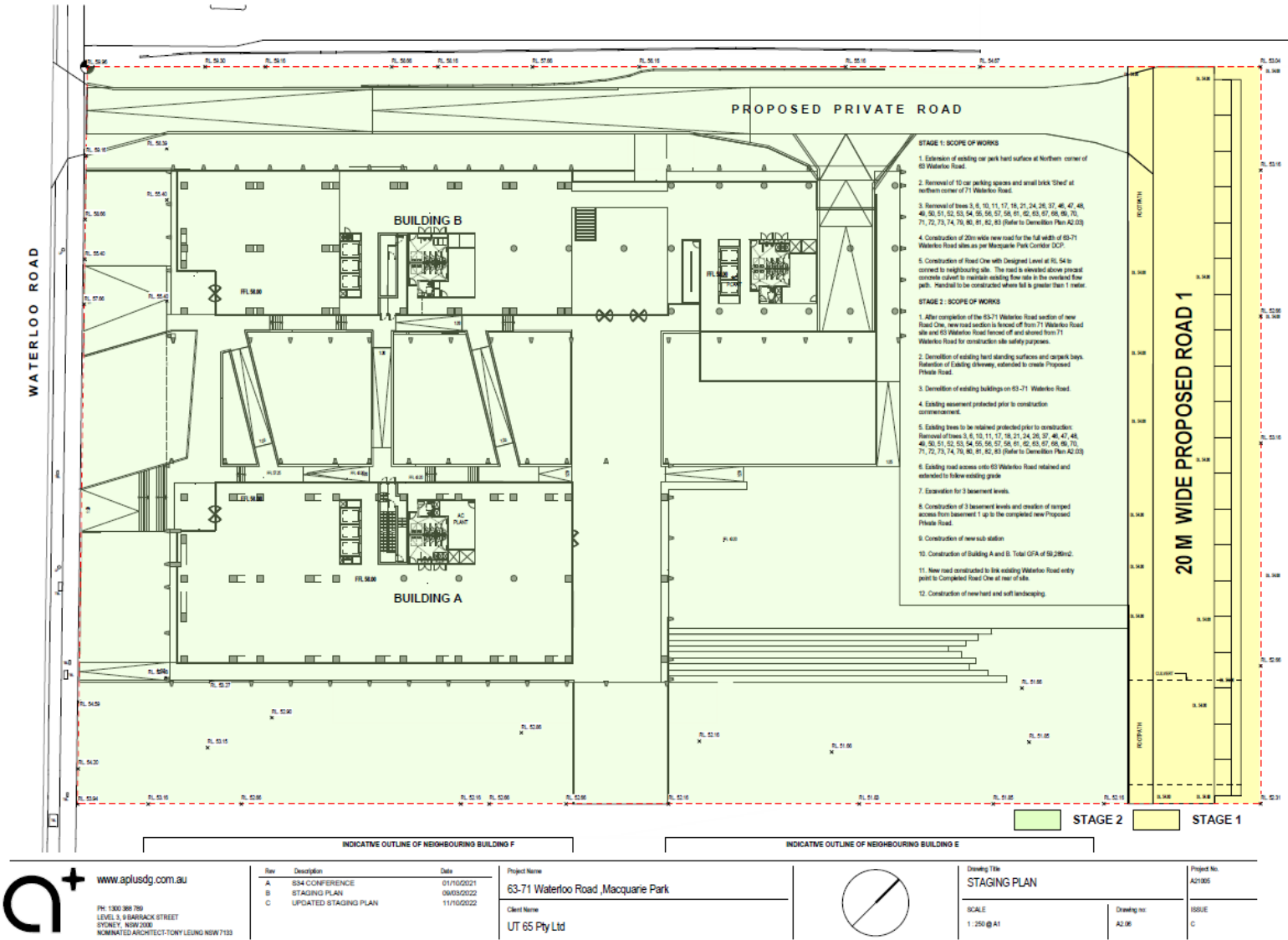
Print name of Director

.....

Print name of Director/Secretary

Annexure A

Road Land and Staging Plan



Annexure B Explanatory Note

Explanatory Note

Environmental Planning and Assessment Regulation 2021

(Clause 205)

Draft Deed of Variation to 63-71 Waterloo Road, Macquarie Park Planning Agreement

This is an Explanatory Note under clause 205 of the *Environmental Planning and Assessment Regulation 2021* relating to a proposed variation of the planning agreement entered into on 24 November 2020 between the parties set out below (**Planning Agreement**).

1 Parties

The parties to the Planning Agreement and the draft Deed of Variation are:

- (a) The Council of the City of Ryde (**Council**)
- (b) UT 65 Pty Ltd (**Developer**)

2 Description of the Land to which the Draft Deed Applies

The Planning Agreement and the draft Deed applies to 63-71 Waterloo Road, Macquarie Park which is contained in Lot 3 DP 1043041 (**Land**).

3 Description of Development to which the Draft Deed Applies

The Planning Agreement and the draft Deed apply to any future development of the Land proposed in accordance with the Incentive Height and Floor Space Provisions, including the construction of a building or buildings that exceed the height and floor space ratio provisions in the LEP.

4 Summary of Objectives, Nature and Effect of the Draft Deed

(a) Objectives of Draft Deed

The objective of the draft Deed is to amend the Planning Agreement.

(b) Nature of Draft Deed

The draft Deed is a deed of variation of the Planning Agreement under clause 205 of the *Environmental Planning and Assessment Regulation 2021*.

(c) Effect of the Draft Deed

The draft Deed amends the Planning Agreement to defer timing for provision of a bank guarantee to secure the obligation to pay the monetary contributions under the Planning Agreement (**monetary contribution guarantee**). Originally the Planning Agreement required the monetary contribution guarantee to be provided on the grant of development consent. Development Consent LDA2021/0184.

The deed of variation will permit the Developer to provide the monetary contribution guarantee prior to the issue of a Construction Certificate for Stage 2 of the Development. Stage 1 of the Development is the construction of a road required under the Planning Agreement and Stage 2 is the stage that involves construction of buildings. A new plan is to be inserted into the Planning Agreement at Annexure A to show the road land and proposed staging.

To mitigate the risks involved in deferring the timing for provision of the monetary contribution guarantee, the Developer will provide an additional security in the amount of \$500,000 to be used by Council if it is required to enforce the terms of the Planning Agreement if the Developer has breached its obligation to pay the monetary contribution (**enforcement guarantee**). In anticipation of the deed of variation, the Developer has now provided the enforcement guarantee.

Amendments are also proposed to enable the Developer to provide the monetary contribution guarantee in several parts, to permit partial release of the guarantee as the monetary contribution is paid over time.

5 Assessment of the Merits of the Draft Deed and Impacts on the Public

- (a) The proposed amendment to the Planning Agreement involves changes to obligations to provide security. Those amendments have been requested by the Developer due to the current economic circumstances.
- (b) While removing or delaying the provision of securities under a Planning Agreement can increase risks of default by the Developer, that risk has been mitigated by an agreement to provide (and the provision of) a further bank guarantee that can be used by Council towards costs it incurs in taking any required enforcement action.
- (c) If Council agrees to the proposed variation deed that will reduce the time and expense that would otherwise be incurred if Council were required to take action to enforce the obligation to provide the monetary contribution bank guarantee now.
- (d) The proposed variation does not change the contributions to be delivered under the Planning Agreement and will not have any negative impact on the public.