

Deed

Belgrave Street, Kempsey, Cinema Planning Agreement

Under s93F of the *Environmental Planning and Assessment Act 1979*

Kempsey Shire Council

Gowing Bros Limited

Date:

Belgrave Street, Kempsey, Cinema

Planning Agreement

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Belgrave Street, Kempsey, Cinema Planning Agreement

Summary Sheet

Council:

Name: Kempsey Shire Council

Address: 22 Tozer Street, West Kempsey NSW 2440

Telephone: (02) 6566 3200

Facsimile: (02) 6566 3205

Email: ksc@kempsey.nsw.gov.au

Representative: Craig Milburn, General Manager

Developer:

Name: Gowings Bros. Limited

Address: Suite 21, Jones Bay Wharf, 26-32 Pirrama Road, Pyrmont NSW 2009

Telephone: (02) 9264 6321

Facsimile: (02) 9264 6240

Email: ggrundy@gowings.com

Representative: Garth Grundy, General Manager, Company Secretary

Land:

See definition of *Land* in clause 1.1.

Development:

See definition of *Development* in clause 1.1.

Development Contributions:

See clauses 10-15, 17.

Application of s94, s94A and s94EF of the Act:

See clauses 7 and 8.

Security:

See clause 16.

Registration:

See clause 16.

Restriction on dealings:

See clause 24.

Dispute Resolution:

See clause 21.

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Belgrave Street, Kempsey, Cinema Planning Agreement

Under s93F of the *Environmental Planning and Assessment Act 1979*

Parties

Kempsey Shire Council ABN 70 705 618 663 of 22 Tozer Street, West Kempsey NSW 2440 (**Council**)

and

Gowings Bros. Limited ABN 68 000 010 471 of Suite 21, 26 – 32 Pirrama Road, Pyrmont NSW 2009 (**Developer**)

Background

- A The Developer owns the Land.
- B An existing shopping centre development is situated on the Land.
- C The Developer has obtained the Development Consent, which authorises development for the purposes of the Cinema.
- D At the date of this Deed, there is no cinema serving the recreational needs of the local community of Kempsey.
- E The Council considers the provision of the Cinema to be an essential community recreational service and needed to revitalise the CBD of Kempsey.
- F The Council requires the Developer to provide the following material public benefits in connection with the Cinema:
 - F.1 to construct and commence operating the Cinema within an agreed period of time,
 - F.2 make the Cinema and a community noticeboard in the foyer of the Cinema available for appropriate community uses, and
 - F.3 to commit to the ongoing provision of the Cinema and the associated community uses as enduring benefits to serve the recreational needs of the local community of Kempsey.
- G In return, the Council is willing to make a monetary contribution to a maximum of \$4,000,000.00 excluding GST (being, for the avoidance of doubt, \$4,400,000.00 including GST), comprised of grant funding that has been paid by the Department of Infrastructure and Regional Development on behalf of the Commonwealth of Australia under the *National Stronger Regions Fund* to the Council and contributions by the Council, towards the costs of constructing and establishing the Cinema.
- H The Council and the Developer have agreed to enter into this Deed to give effect to these arrangements.

Operative provisions

1 Interpretation

1.1 In this Deed the following definitions apply:

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

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

Authority means the Commonwealth or New South Wales government, a Minister of the Crown, a government department, a public authority established by or under any Act, a council or county council constituted under the *Local Government Act 1993*, or a person or body exercising functions under any Act including a commission, panel, court, tribunal and the like.

Cinema means the cinema approved by the Development Consent.

Commonwealth Grant Funding means an amount of up to \$2,000,000.00 exclusive of GST in grant funding that has been paid by the Department of Infrastructure and Regional Development on behalf of the Commonwealth of Australia under the *National Stronger Regions Fund* to the Council for the purpose of establishing a cinema in the Kempsey local government area.

Commonwealth Grant Funding Deed means a deed entered into between the Council and the Department of Infrastructure and Regional Development on behalf of the Commonwealth of Australia in relation to the Commonwealth Grant Funding, as varied from time to time.

Deed means this Deed and includes any schedules, annexures and appendices to this Deed.

Development means the development approved by the Development Consent.

Development Costs means the costs incurred by the Developer in connection with the Development including, without limit, consultant and development application fees incurred before the date of this Deed but excluding any costs of preparing, negotiating, executing and stamping (if relevant) this Deed, and any document related to this Deed.

Development Consent means consent under the Act to Development Application DA T6-16-293 granted by the Council on 23 December 2016 as modified from time to time.

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

Force Majeure Event means an earthquake, cyclone, fire, riot or serious civil commotion, sabotage, act of a public enemy, act of God, war, revolution, radioactive contamination or flood, the effects of which cannot be prevented by taking those steps a prudent and competent person would take.

GST has the same meaning as in the GST Law.

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

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Land means Lot 1 in Deposited Plan 1129009, being 2 – 14 Belgrave Street, Kempsey.

Party means a party to this Deed.

Peak Hours means:

- (a) from 5pm to the end of ordinary approved hours of operation on Wednesdays, Thursdays and Fridays, and
- (b) Saturdays and Sundays, and
- (c) any day which is a NSW public holiday, and
- (d) any day which is within a school holiday period for NSW public schools applicable to the Council's local government area as published by the NSW Department of Education and Communities,

or otherwise agreed in writing between the Parties from time to time.

Public Positive Covenant means a public positive covenant described in clause 17

Regulation means the *Environmental Planning and Assessment Regulation 2000*.

WM Act mean the *Water Management Act 2000* (NSW)

1.2 In the interpretation of this Deed, the following provisions apply unless the context otherwise requires:

- 1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Deed.
- 1.2.2 A reference in this Deed to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- 1.2.3 If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day.
- 1.2.4 A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
- 1.2.5 A reference in this Deed to a \$ value is a reference to the value exclusive of GST.
- 1.2.6 A reference in this Deed to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- 1.2.7 A reference in this Deed to any agreement or document is a reference to that agreement or document as amended, novated, supplemented or replaced.
- 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
- 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.

- 1.2.10 Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- 1.2.11 A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.13 A reference to this Deed includes the agreement recorded in this Deed.
- 1.2.14 A reference to a Party to this Deed includes a reference to the servants, agents and contractors of the Party, the Party's successors and assigns.
- 1.2.15 A reference to 'dedicate' or 'dedication' in relation to land is a reference to dedicate or dedication free of cost.
- 1.2.16 Any schedules, appendices and attachments form part of this Deed.
- 1.2.17 Notes appearing in this Deed are operative provisions of this Deed.

2 Status of this Deed

- 2.1 This Deed is a planning agreement within the meaning of s 93F(1) of the Act.

3 Commencement and termination

- 3.1 This Deed commences and has force and effect on and from the date when the Parties have:
 - 3.1.1 both executed the same copy of this Deed, or
 - 3.1.2 each executed separate counterparts of this Deed and exchanged the counterparts.
- 3.2 The Parties are to insert the date when this Deed commences on the front page and on the execution page.
- 3.3 The operation of clauses 8 – 14 and 17 - 19 of this Deed are subject to satisfaction of all of the following conditions precedent:
 - 3.3.1 not later than 31 August 2018:
 - (a) the Developer preparing the Public Positive Covenant in registrable form including obtaining the signatures to the Public Positive Covenant from the registered proprietor of the Land and any registered lessee of the part of the Land on which the Cinema is to be constructed, and the written consent of any registered mortgagee of the Land to the registration of the Public Positive Covenant and providing them to the Council;
 - (b) the Developer obtaining the written irrevocable consent of any person required by the Registrar-General to consent to registration of the Public Positive Covenant, and providing it to the Council.

- (c) evidence that the mortgagee of the Land has produced the certificate of title to the Registrar-General's office to enable the Registrar-General to register the Public Positive Covenant,
- 3.3.2 by 31 October 2018:
 - (a) the Developer obtaining written consent of Target Australia Pty Ltd and Coles Supermarkets Australia Pty Ltd to the Development; and
 - (b) the Developer obtaining approval in writing from its financier to fund the cost of the Development (in addition to the funding offered by Council under this Deed) on terms to the satisfaction of the Developer, and
 - (c) the Developer entering into an agreement for lease with a cinema operator for the operation of the Cinema which is not inconsistent with this Deed or that may cause the Developer to be in breach of this Deed;
- 3.3.3 by 31 October 2018:
 - (a) the Council obtaining written confirmation from Land Registry Services that the Public Positive Covenant can be registered,
 - (b) the Council obtaining a written variation of the Commonwealth Grant Funding Deed such that the provisions of this Deed are not inconsistent with the Commonwealth Grant Funding Deed; and
 - (c) the Commonwealth Grant Funding Deed is in operation.
- 3.4 The conditions in clause 3.3.2 are for the benefit of the Developer and may be waived by it (in whole or in part) at any time.
- 3.5 The conditions in clauses 3.3.1 and 3.3.3 are for the benefit of the Council and may be waived by it (in whole or in part) at any time.
- 3.6 Each Party must promptly by notice inform the other Party if or when the conditions precedent in clauses 3.3 are satisfied or waived.
- 3.7 If the conditions precedent in clauses 3.3 are not wholly satisfied or waived by 31 October 2018, then either Party may by notice in writing to the other Party terminate this Deed, in which case neither Party will have a claim on the other.
- 3.8 If the Commonwealth Grant Funding Deed is terminated for any reason before the Developer commences construction of the Development, then either Party may by notice in writing to the other Party terminate this Deed, in which case neither Party will have any claim on the other.

4 Application of this Deed

- 4.1 This Deed applies to the Land and to the Development.

5 Warranties

- 5.1 The Parties warrant to each other that they:

- 5.1.1 have full capacity to enter into this Deed, and
- 5.1.2 are able to fully comply with their obligations under this Deed.

6 Bar to Proceedings

- 6.1 The Developer is not to commence or maintain, or to cause or procure the commencement or maintenance, of any proceedings in any court or tribunal or similar body appealing against, or questioning the validity of this Deed.

7 Application of s94, s94A and s94EF of the Act to the Development

- 7.1 This Deed does not exclude the application of s94, s94A or s94EF of the Act to the Development.

8 Satisfaction of Obligations under s94 of the Act

- 8.1 For the purposes of s94(5)(b) of the Act, the provision made by the Developer under this Deed is accepted by the Council in full satisfaction of the Developer's obligations under the Development Consent to make contributions to the Council pursuant to s94 of the Act.

9 Certificate of Compliance under the WM Act

- 9.1 In consideration of the provision made by the Developer under this Deed, the Council has determined that no preconditions apply to the granting of a certificate of compliance by the Council for the Development under s306 of the WM Act.

10 Cinema Development

- 10.1 Subject to this Deed, the Developer is to carry out and complete the construction of the Development at its cost.
- 10.2 The Developer is to ensure that the Cinema commences operation by not later than 31 July 2019, or such later date as agreed by the Commonwealth of Australia subject to Force Majeure Events beyond the control of the Developer, acting promptly and reasonably.
- 10.3 For the avoidance of doubt, clause 10.2 applies whether the Cinema is operated by a cinema operator or the Developer.
- 10.4 The Developer is to effect and maintain the insurances required to be effected and maintained under the Commonwealth Grant Funding Deed.
- 10.5 The Developer is to provide to the Council written evidence of the insurances referred to in clause 10.4 on request by the Council, not less frequently than on an annual basis or upon each policy renewal.

11 Community Noticeboard in Cinema

- 11.1 The Developer, at its cost, is to:
 - 11.1.1 install a community noticeboard in the foyer of the Cinema in a prominent and easily accessible location before the Cinema commences operating,
 - 11.1.2 make the community noticeboard continuously available to the Council and the local community for the purposes of displaying notices and information regarding matters of community interest, and
 - 11.1.3 keep the community noticeboard in a clean and tidy state and in a reasonable state of repair, including by removing any graffiti, old notices or notices which contain objectionable or unsuitable content.
- 11.2 The community noticeboard is to be of a size and style as agreed between the Council and the Developer and, failing such agreement, as reasonably required by the Council.
- 11.3 The noticeboard shall be managed and operated by the Developer to the reasonable satisfaction of the Council.

12 Community Use of Cinema

- 12.1 The Developer is to make the Cinema, including Cinema facilities and equipment, available for use by the Council upon request for the purposes of civic and community events and for any other reasonable purpose.
- 12.2 No fee is payable by the Council where the use referred to in clause 12.1 is outside of Peak Hours.
- 12.3 The Council may not make more 10 requests under clause 12.1 in any calendar year.
- 12.4 The Council is to make any request under clause 12.1 not less than 21 days before it requires the use of the Cinema.
- 12.5 The use of the Cinema by the Council under clause 12.1 may involve facilitating the use of the Cinema for or on behalf of community groups.

13 Enduring Public Benefits

- 13.1 The Developer is to use its best endeavours to ensure that the Cinema and the associated community uses provided for in this Deed are provided as enduring benefits to serve the recreational needs of the local community of Kempsey.
- 13.2 Without limiting clause 13.1, the Developer is to use its best endeavours to ensure that any successor in title of the Developer, and any assignee of the Developer's rights, interests and obligations under this Deed, and any operator of the Cinema under a contract with the Developer or a successor in title or an assignee, is bound by the obligation in clause 13.1.
- 13.3 The Developer is not to make a request to the Council to amend clause 13.1 or 13.2 or both:
 - 13.3.1 sooner than the end of the '*Operational Period*' as defined in the Commonwealth Grant Funding Deed, or

- 13.3.2 if the Developer is or has been in breach of this Deed and the breach has not been waived by the Council or remedied to the satisfaction of the Council at the time the request is made.

14 Commercial arrangements between the Developer and Cinema operator

- 14.1 The Developer is to ensure that:
- 14.1.1 a copy of this Deed is annexed to management contract and/or lease entered into with an operator of the Cinema, and
 - 14.1.2 in respect of the contract and/or lease entered into with the first operator of the Cinema, the contract imposes on the operator or the Developer an obligation to expend not less than \$150,000 (ex GST) on fit-out of the Cinema and Cinema operating equipment,
 - 14.1.3 the contract imposes on the operator an obligation not to do anything that is inconsistent with this Deed or that may cause the Developer to be in breach of this Deed.
- 14.2 The Developer is to produce a copy of a proposed contract between the Developer and an operator of the Cinema to the Council not less than 14 days before the contract is entered into.

15 Avoidance of Obligations

- 15.1 The Developer is not to modify, surrender or substitute the Development Consent so as to avoid the obligations imposed by this Deed in relation to the Cinema without the prior written approval of the Council.

16 Registration of Caveat and this Deed

- 16.1 The Developer agrees that this Deed:
- 16.1.1 is a planning agreement in accordance with s 93F of the Act;
 - 16.1.2 grants Council an interest in the Land.
- 16.2 The Developer consents to Council lodging a caveat on the title to the Land to safeguard its interest pursuant to the terms of this Deed. The caveat must not prevent registration of any dealing other than a transfer of the Land.
- 16.3 If the caveat complies with the requirements of clause 16.2, the Developer must not take action to lapse the caveat or to otherwise have the caveat withdrawn.
- 16.4 The Developer must use reasonable endeavours to procure consent to this Deed by all persons with a registered interest in the Land. If the Developer procures those consents:
- 16.4.1 it must register this Deed on the title to the Land; and
 - 16.4.2 Council must withdraw any caveat it has registered pursuant to this clause.

17 Public Positive Covenant

- 17.1 The Developer is to do all things necessary, including, without limitation, signing all documents, procuring all necessary Approvals from third parties and assisting the Council to respond to requisitions to enable the Council, as the prescribed authority, to register on the title to the Land a Public Positive Covenant within the meaning of s88E of the *Conveyancing Act 1919* on materially similar terms to clauses 10-15, and 20 of this Deed.
- 17.2 Each Party is to bear its own costs and expenses in relation to the preparation, execution and registration of the Public Positive Covenant, including without limitation, responding to any requisitions.
- 17.3 The Council is to bear the registration fees of the Public Positive Covenant.

18 Access to Council land by Developer

- 18.1 The Council may not unreasonably refuse a request made by the Developer to enter, occupy and use land vested in or under the control of the Council free of charge where the entry, use and occupation of the land is reasonably necessary to enable the Developer to construct the Cinema.
- 18.2 The Developer is to obtain all Approvals necessary for the occupation and use of Council owned and controlled land pursuant to this clause.
- 18.3 Nothing in this Deed:
- 18.3.1 creates or gives the Developer any estate or interest in any part of the land referred to in clause 18.1 while the Developer is in occupation or use of that land or otherwise;
- 18.3.2 permits the Developer to enter, occupy and use Council owned or controlled land in contravention of any law.

19 Monetary Contributions by the Council

- 19.1 This clause 19 applies on and from the date that:
- 19.1.1 the Developer delivers to Council a certificate from its building superintendent stating that:
- (a) the Developer has expended at least \$2,000,000.00 exclusive of GST in Development Costs; and
- (b) those costs were properly incurred by the Developer in connection with the Development,
- (including, without limit, costs incurred prior to the date of this Deed), and
- (c) the Council has notified the Developer in writing that it does not intend to appoint an independent quantity surveyor under clause 19.11 to review the building superintendent's certificate; or
- (d) the independent quantity surveyor's report under clause 19.11 states that the amount of expenditure on the Development Costs is at least \$2,000,000.00.

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- 19.2 Not sooner than one month after the date referred to in clause 19.1 and thereafter not sooner than at monthly intervals, the Developer may make a payment claim to the Council.
- 19.3 A payment claim is to specify costs incurred by the Developer in constructing the Development in excess of the sum of \$2,000,000.00 referred to in clause 19.1.1 and be supported by way of written evidence to the satisfaction of the Council including a certificate from the building superintendent in respect of the costs claimed.
- 19.4 The second and subsequent payment claims made by the Developer may only specify costs incurred by the Developer in the period since the previous payment claim.
- 19.5 Subject to clause 19.9, the Council is to pay to the Developer the amount of costs specified in a payment claim to the extent it is reasonably satisfied that:
- 19.5.1 those costs are properly verified by written evidence accompanying the payment claim, and
 - 19.5.2 those costs were properly incurred by the Developer in connection with the Development, and
 - 19.5.3 the Developer is not in material breach of this Deed at the time the payment claim is made.
- 19.6 If the Council is not reasonably satisfied that a component of a payment claim was properly incurred in accordance with clause 19.5.2 it:
- 19.6.1 may quarantine that component from the payment; and
 - 19.6.2 must promptly engage with the Developer as to the reason for withholding payment;
 - 19.6.3 must promptly attempt to resolve the issue with the Developer. If not resolved within 5 Business Days, clause 20 applies; and
 - 19.6.4 must pay so much of the claim as is not disputed in accordance with clause 19.7.
- 19.7 Subject to clause 19.5 and 19.9, Council must pay a payment claim within 20 Business Days of receipt of the claim.
- 19.8 The Developer is to apply all the amounts paid by the Council under clause 19.7 towards Development Costs specified in the relevant payment claim.
- 19.9 The Council is not required to make a payment under clause 19.7 if the costs specified in the payment claim when added to all other payments made by Council to the Developer in accordance with this clause would exceed:
- 19.9.1 \$3,400,000.00 excluding GST - if the Cinema has not yet commenced operation or the total Development Costs are less than \$6,150,000 ex GST, and
 - 19.9.2 \$4,000,000.00 excluding GST - in any other circumstances.
- 19.10 For the avoidance of doubt the below table represents the funding requirements of each party and the point in time that they become applicable.

Costs incurred by the Developer in relation to the Development	Party responsible for Payment under the Deed
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Development Costs of up to and including the first \$2,000,000 ex GST	Developer
Development Costs from \$2,000,001 ex GST up to \$5,400,000 ex GST	Council
All Development Costs from \$5,400,001 ex GST to the time when the Cinema commences operation including \$150,000 ex GST to be expended for fit-out of Cinema and Cinema operating equipment	Developer
Reimbursement of final \$600,000 ex GST of Development Costs to the Developer if the Cinema has commenced operation and the total Development Costs equals or exceeds \$6,150,000 ex GST	Council

- 19.11 If requested by the Council, the Developer must provide the Council with copies of the invoices on which any building superintendent's certificate was based including, without limit, copies of invoices issued by consultants engaged in connection with the Development.
- 19.12 Council may appoint an independent quantity surveyor to review any of the building superintendent's certificate(s) and prepare a report on the expenditure incurred by the Developer in connection with the Development, addressed to both the Council and the Developer.
- 19.13 If the independent quantity surveyor's report states that the amount in the building superintendent's certificate exceeds the actual Development Costs properly incurred by the Developer then:
- 19.13.1 the amount certified by the independent quantity surveyor will replace the amount certified by the building superintendent; and
- 19.13.2 the Developer must pay the costs of the independent quantity surveyor;
- 19.14 If the independent quantity surveyor's report states that the amount in the building superintendent's certificate does not exceed the actual Development Costs properly incurred by the Developer then:
- 19.14.1 the amount certified by the building superintendent will stand; and
- 19.14.2 Council must pay the costs of the independent quantity surveyor.
- 19.15 The Developer must procure that the Cinema operator expends at least \$150,000.00 plus GST on equipment, plant and fitout in setting up and fitting out the Cinema for business.
- 19.16 Nothing in this Deed requires the Council to pay the Developer an amount exceeding \$2,000,000.00 ex GST except to the extent the Council holds that amount pursuant to the Commonwealth Grant Funding Deed and it is

available for Council to pay to the Developer under the Commonwealth Grant Funding Deed.

- 19.17 If the Commonwealth Grant Funding Deed is terminated for any reason after the Developer commences construction of the project the Parties must meet and in good faith negotiate the means by which completion of the Project is to be funded.
- 19.18 The Council's payments to the Developer under this clause 19 are to be paid, so far as practicable, out of any funding received by the Council under the Commonwealth Grant Funding Deed as soon as practicable after receipt and in priority to funding out of the Council's own resources.
- 19.19 The Council must not, without prior agreement of the Developer acting reasonably, agree to any amendment of the Commonwealth Grant Funding Deed which would have the effect of:
- 19.19.1 reducing the amount payable by the Commonwealth;
 - 19.19.2 deferring the date by which payment is to be made;
 - 19.19.3 varying or relieving the Commonwealth of its obligation to provide funding to Council in accordance with the Commonwealth Grant Funding Deed.
- 19.20 The Council warrants that it has \$2,000,000.00 presently available in funds to contribute to the cost of the Project in accordance with the table in clause 19.10 and that it will retain those funds in trust for the purpose of payment in accordance with this Deed.
- 19.21 Subject to the Developer performing its obligations in accordance with this Deed, the Council must do all things reasonably required to obtain funding under, and in accordance with, the Commonwealth Grant Funding Deed at the earliest possible time.

20 Commonwealth Grant Funding Deed

- 20.1 The Developer acknowledges and agrees that:
- 20.1.1 part of the money the Council pays to the Developer under clause 19 is the Commonwealth Grant Funding paid to the Council pursuant to the Commonwealth Grant Funding Deed,
 - 20.1.2 it has read the Commonwealth Grant Funding Deed.
- 20.2 The Developer is to provide the Council with such documentation and do such other things as reasonably requested by the Council from time to time to enable the Council to comply with the Commonwealth Grant Funding Deed and for the purposes of obtaining the Commonwealth Grant Funding.
- 20.3 The Developer is not to do anything that causes the Council to be in breach of the Commonwealth Grant Funding Deed.
- 20.4 Subject to anything to the contrary in the Commonwealth Grant Funding Deed, the Council is to provide to the Developer copies of notices, variations and other significant correspondence received from the Commonwealth in relation to the Commonwealth Grant Funding Deed that the Council considers is relevant to the operation of this Deed.

21 Dispute Resolution

- 21.1 This clause applies to any Dispute arising in connection with this Deed.
- 21.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 21.3 If a notice is given under clause 21.2, the Parties are to meet within 7 days of the notice in an attempt to resolve the Dispute.
- 21.4 If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.
- 21.5 If the Dispute is not resolved by mediation within a further 14 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the Dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.
- 21.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 21.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

22 Breach of obligations

- 22.1 If the Council reasonably considers that the Developer is in breach of any obligation under this Deed, it may give a written notice to the Developer:
- 22.1.1 specifying the nature and extent of the breach,
- 22.1.2 requiring the Developer to:
- (a) rectify the breach if it reasonably considers it is capable of rectification, or
 - (b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification, and
- 22.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 22.2 If the Developer fails to fully comply with a notice referred under clause 22.1, the Council may, without further notice to the Developer, take such action as it considers necessary, including but not limited to commencing proceedings in a court, to remedy the Developer's breach.

23 Enforcement in a Court of Competent Jurisdiction

- 23.1 The Parties may enforce this Deed in any court of competent jurisdiction.
- 23.2 Nothing in this Deed, except for clause 23, prevents:

- 23.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Deed or any matter to which this Deed relates, or
- 23.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Deed or any matter to which this Deed relates.

24 Restriction on dealings

- 24.1 The Developer is not to:
 - 24.1.1 sell or transfer the Land, or
 - 24.1.2 assign the Developer's rights or obligations under this Deed, or novate this Deed,to any person unless:
 - 24.1.3 the Developer has, at no cost to the Council, first procured the execution by the purchaser, transferee, assignee or novatee, of a Deed in favour of the Council on terms reasonably satisfactory to the Council, and
 - 24.1.4 the Developer has complied with any notice issued by Council under clause 21.1 which may have been issued at any time before the Council executes the assignment or novation deed.
- 24.2 Subject to clause 24.3, the Developer acknowledges and agrees that it remains liable to fully perform its obligations under this Deed unless and until it has complied with its obligations under clause 24.1.
- 24.3 Clause 24.1 does not apply in relation to any sale or transfer of the Land if this Deed is registered on the title to the Land at the time of the sale.

25 Notices

- 25.1 Any notice, consent, information, application or request that is to or may be given or made to a Party under this Deed is only given or made if it is in writing and sent in one of the following ways:
 - 25.1.1 delivered or posted to that Party at its address set out in the Summary Sheet,
 - 25.1.2 faxed to that Party at its fax number set out in the Summary Sheet, or
 - 25.1.3 emailed to that Party at its email address set out in the Summary Sheet.
- 25.2 If a Party gives the other Party 3 business days' notice of a change of its address, fax number or email, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted, faxed or emailed to the latest address or fax number.
- 25.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
 - 25.3.1 delivered, when it is left at the relevant address,
 - 25.3.2 sent by express post, 2 business days after it is posted,

25.3.3 sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number, or

25.3.4 sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.

25.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

26 Approvals and Consent

26.1 Except as otherwise set out in this Deed, and subject to any statutory obligations, a Party may give or withhold an Approval to be given under this Deed on reasonable grounds and subject to any reasonable conditions determined by the Party.

27 Costs

27.1 Except as otherwise provided in this Deed, each Party is to bear its own costs in relation to negotiation, preparation, execution, and stamping of this Deed.

27.2 The Developer is to pay to the Council the Council's reasonable costs of preparing, negotiating, executing and stamping any document related to a variation, assignment or novation of this Deed requested by the Developer, within 7 days of a written demand by the Council for such payment.

27.3 The Developer is to pay to the Council the Council's reasonable costs of enforcing this Deed within 7 days of a written demand by the Council for such payment.

28 Entire Deed

28.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with.

28.2 No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Deed was executed, except as permitted by law.

29 Further Acts

29.1 Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to effect, perfect or complete this Deed and all transactions incidental to it.

30 Governing Law and Jurisdiction

- 30.1 This Deed is governed by the law of New South Wales.
- 30.2 The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.
- 30.3 The Parties are not to object to the exercise of jurisdiction by those courts on any basis.

31 No Fetter

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

32 Illegality

- 32.1 If a clause or part of a clause of this Deed 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.
- 32.2 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 Deed unless to do so would materially change the intended effect of this Deed, but the rest of this Deed is not affected.
- 32.3 If this Deed or any part of it becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties are to co-operate and do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.

33 Amendment

- 33.1 No amendment of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed.

34 Waiver

- 34.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- 34.2 A waiver by a Party is only effective if it:
 - 34.2.1 is in writing,
 - 34.2.2 is addressed to the Party whose obligation or breach of obligation is the subject of the waiver,
 - 34.2.3 specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,

34.2.4 is signed and dated by the Party giving the waiver.

34.3 Without limitation, a waiver may be expressed to be conditional on the happening of an event, including the doing of a thing by the Party to whom the waiver is given.

34.4 A waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given, and 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.

34.5 For the purposes of this Deed, an obligation or breach of obligation the subject of a waiver is taken not to have been imposed on, or required to be complied with by, the Party to whom the waiver is given.

35 GST

35.1 In this clause:

Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice have the meaning given by the GST Law.

GST Amount means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.

GST Law has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Input Tax Credit has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.

Taxable Supply has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.

35.2 Subject to clause 35.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.

35.3 Clause 35.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.

35.4 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:

35.4.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;

35.4.2 that any amounts payable by the Parties in accordance with clause 35.2 (as limited by clause 35.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.

- 35.5 No payment of any amount pursuant to this clause 35, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 35.6 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- 35.7 This clause continues to apply after expiration or termination of this Deed.

36 Explanatory Note

- 36.1 The Appendix contains the Explanatory Note relating to this Deed required by clause 25E of the Regulation.
- 36.2 Pursuant to clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Deed.

DRAFT

Execution

Executed as a Deed

Dated:

Executed on behalf of the Council pursuant to resolution of the Council on [Insert
Council meeting date]

General Manager

Mayor

Executed on behalf of the Developer in accordance with s 127(1) of the
Corporations Act (Cth) 2001

Name/Position

Name/Position

Appendix

(Clause 36)

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Planning Agreement

Under s93F of the *Environmental Planning and Assessment Act 1979*

Parties

Kempsey Shire Council, ABN 70 705 618 663, of 22 Tozer Street, West Kempsey NSW 2440 (**Council**)

Gowings Bros Ltd, ABN 68 000 010 471, of Unit 21, 26 – 32 Pirrama Road, Pyrmont NSW 2009 (**Developer**)

Description of the Land to which the Draft Planning Agreement Applies

Lot 1 in Deposited Plan 1129009, being 2 – 14 Belgrave Street, Kempsey

Description of Proposed Development

The construction of a cinema complex on the Land, in accordance with DA T6-16-293 approved by the Council on 23 December 2016.

Summary of Objectives, Nature and Effect of the Draft Planning Agreement

Objectives of Draft Planning Agreement

The object of the Draft Planning Agreement is to require the Developer's provision of the following:

- to construct and commence operating the Cinema within an agreed period of time,
- make the Cinema and a community noticeboard in the foyer of the Cinema available for appropriate community uses, and
- to commit to the ongoing provision of the Cinema and the associated community uses as enduring benefits to serve the recreational needs of the local community of Kempsey.

Nature of Draft Planning Agreement

The Draft Planning Agreement is a planning agreement under s 93F of the *Environmental Planning and Assessment Act 1979 (Act)*.

The Draft Planning Agreement is a voluntary agreement under which the Developer is to construct the Cinema and make it available to Council and the local community of Kempsey in order to confer a material public benefit on the community.

Effect of the Draft Planning Agreement

The Draft Planning Agreement:

- relates to the carrying out by the Developer of development on the Land,
- does not exclude the application of s 94 and s 94A of the Act to the Development,
- does not exclude the operation of s 94EF of the Act to the Development,
- provides that specified Developer's obligations and Council's obligations under the Draft Planning Agreement do not apply until specified conditions precedent have been satisfied;
- provides that if the Commonwealth Grant Funding Deed is terminated before the Developer commences construction of the Cinema then either party may terminate the planning agreement,
- provides that the Developer's obligations under the Draft Planning Agreement will be accepted by Council in full satisfaction of the monetary contributions required under s 94 of the Act in respect of the Development;
- provides that in consideration of the provision made by the Developer under the Draft Planning Agreement, the Council has determined that no preconditions apply to the granting of a certificate of compliance by the Council for the Development under s306 of the WM Act,
- requires the registration of the Public Positive Covenant,
- requires a cinema to be constructed by the Developer and in operation by a certain date and made available for community use,

- allows the Developer to occupy and use certain Council owned and controlled land for the construction of the cinema if it obtains all approvals necessary and provided it doesn't contravene any applicable law and pays any required fees,
- requires the Developer to commit to the ongoing provision of the Cinema and the associated community uses as enduring benefits to serve the recreational needs of the local community of Kempsey,
- is to be registered on the title to the Land if the Developer obtains the consent of the holders of all registered interests in the Land ,
- imposes restrictions on the Developer transferring the Land or part of the Land or assigning an interest under the agreement,
- requires the Developer to provide suitable enforcement mechanisms for the benefit of Council ,
- provides a dispute resolution method for a dispute under the agreement, being mediation,
- provides that the agreement is governed by the law of New South Wales, and
- provides that the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) applies to the agreement,
- requires the Council to provide monetary contributions to the Developer if the Developer has complied with its obligations under the Draft Planning Agreement. However, does not require the Council to pay the Developer an amount exceeding \$2,000,000.00 ex GST unless the Council holds that amount pursuant to the Commonwealth Grant Funding Deed and it is available for Council to pay to the Developer under the Commonwealth Grant Funding Deed.

Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

The Draft Planning Agreement:

- promotes and co-ordinates the orderly and economic use and development of the Land to which the agreement applies,
- provides and co-ordinates the provision of public infrastructure and facilities in connection with the Development,
- provides public access to land for public purposes,
- provides increased opportunity for public involvement and participation in environmental planning and assessment of the Development.

How the Draft Planning Agreement Promotes the Public Interest

The draft Planning Agreement promotes the public interest by promoting the objects of the Act as set out in ss 5(a)(ii), (iv), (v) and 5(c) of the Act

For Planning Authorities:

Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities

N/A

Other Public Authorities – How the Draft Planning Agreement Promotes the Objects (if any) of the Act under which it is Constituted

N/A

Councils – How the Draft Planning Agreement Promotes the Elements of the Council’s Charter

The Draft Planning Agreement promotes the elements of the Council’s charter by:

- ensuring that lands and other assets are managed so that current and future local community needs can be met in an affordable way,
- providing a means where Council can work with others to secure appropriate services for local community needs,
- ensuring that the Councils actively engages with the local communities, through the public notification of this Draft Planning Agreement and allowing the wider community to make submissions to the Council in relation to the Agreement.

All Planning Authorities – Whether the Draft Planning Agreement Conforms with the Authority’s Capital Works Program

The Council has allocated funds held in reserve mainly from previous property/asset sales. This is identified in the Delivery Program 2017-2021 and the Operating Plan 2017-2018

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

This Draft Planning agreement does not contain requirements that must be complied with before an occupation certificate, subdivision certificate or construction certificate is issued in respect of the Development.