

VOLUNTARY PLANNING AGREEMENT

THE HILLS SHIRE COUNCIL

AND

GARTH DIAMOND PTY LTD A.C.N. 603 431 072

AND

OLD DIAMOND PTY LTD A.C.N. 608 687 145



REGENCY LAWYERS
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Ref: JE:132446

**Planning Agreement
Summary Sheet**

Council

Name The Hills Shire Council
Address 3 Columbia Court
Norwest, NSW 2153
Telephone (02) 9843 0555
Facsimile (02) 9843 0258
Email council@thehills.nsw.gov.au
Representative Mr Michael Edgar – General Manager

Developer

Name GARTH DIAMOND PTY LTD A.C.N. 603
431 072 and OLD DIAMOND PTY LTD
A.C.N. 608 687 145
Address C/- Regency Lawyers 110 Harris Street,
Parramatta NSW 2150
Telephone 02 9633 9800
Facsimile 02 9633 9833
Email jack@regencylawyers.com.au
Representative Sam Kassis/ John Bouchahine

Land

6 Garthowen Crescent, Castle Hill NSW 2154 (Lot 23 in DP 222257)

8 Garthowen Crescent, Castle Hill NSW 2154 (Lot 24 in DP 222257)

10 Garthowen Crescent, Castle Hill NSW 2154 (Lot 25 in DP222257)

12A Garthowen Crescent, Castle Hill NSW 2154 (Lot 2 on SP 40627)

12 Garthowen Crescent, Castle Hill NSW 2154 (Lot 1 on SP 40627)

16 Garthowen Crescent, Castle Hill NSW 2154 (Lot 28 in DP 222257)

18 Garthowen Crescent, Castle Hill NSW 2154 (Lot 29 in DP 222257)

20 Garthowen Crescent, Castle Hill NSW 2154 (Lot 30 in DP 222257)

Development Application	Not Yet Submitted
Instrument Change	The amendment of The Hills Local Environmental Plan 2012, as it relates to the Land, generally in accordance with the Planning Proposal.
Planning Proposal	24/2016/PLP
Dedication Land	Not Applicable
Works	Not Applicable
Monetary Contributions	See Schedule 1
Security Amount	Not Applicable

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Planning Agreement

Dated xx xx 2018

Parties

The Hills Shire Council ABN 25 034 494 656 of 3 Columbia Court, Norwest, NSW 2153
(Council)

GARTH DIAMOND PTY LTD A.C.N. 603 431 072 and OLD DIAMOND PTY LTD A.C.N. 608 687 145 C)- Regency Lawyers 110 Harris Street, Parramatta NSW 2150 (Developer)

Background

- A. Council is the consent authority pursuant to the *Environmental Planning and Assessment Act 1979* (NSW) (**Act**) for the Proposed Development.
- B. The Developer will be the registered proprietor of the Land.
- C. Through lodgement of the Planning Proposal, the Developer has made an application to the Council for the Instrument Change so as to enable an application to be made to the Council for Development Consent.
- D. The Developer acknowledges that if the Development Consent is granted and the Proposed Development carried out it is likely to increase the demand for the provision of public facilities.
- E. As a consequence of the matters set out above, the Developer has offered to provide the Development Contributions on, and subject to, the terms set out in this document if the Instrument Change occurs.

Operative provisions

1. Defined meanings

Words used in this document and the rules of interpretation that apply are defined and explained in clause 18 of this document.

2. Planning agreement under the Act

The Parties agree that this document is a planning agreement within the meaning of **Section 7.4** of the Act.

3. Application of this document

This document is made in respect of the Instrument Change and applies to the Land.

4. No restriction on Council's Powers

This document or anything done under this document:

- (a) is not to be taken as approval or consent by Council as a regulatory authority; and

- (b) does not in any way inhibit, deter or prejudice Council in the proper exercise of its functions, duties or powers,

pursuant to any legislation including the Act, the *Roads Act 1993* (NSW) and the *Local Government Act 1993* (NSW).

5. Operation of this document

5.1 Subject to clause 5.2, this document operates from the date it is executed by both Parties.

5.2 The Parties acknowledge that the Developer is not bound to provide the Development Contributions unless, and until, Council grants the Development Consent.

6. Monetary Contributions

6.1 Payment

The Developer must pay the Monetary Contributions by the times specified in **Schedule 1**. Payment of the Monetary Contributions may be made by cheque or bank transfer to Council's nominated bank account.

6.2 Annual Increases

On each anniversary of the date of this document the Monetary Contributions applicable immediately prior to that anniversary will be increased by the same percentage as the annual percentage increase, if any, in the ABS Producer Price Index (Non-Residential Building Construction for NSW) #3020 most recently published prior to the relevant anniversary. The increased Monetary Contributions will be the Monetary Contributions in the subsequent 12 months.

6.3 Public Purpose

The Council will use reasonable endeavours to apply the Monetary Contributions towards the public purposes specified in **Schedule 2**.

7. Application of Section 7.11 and Section 7.12 of the EPAA

7.1 Section 7.11 of the Act applies to the first ninety-six (96) Dwellings in respect of the Proposed Development.

7.2 This document excludes the application of s.7.11 and s.7.12 of the Act to any Additional Dwellings forming part of the Proposed Development.

8. Termination

8.1 Instrument Change

This document will terminate in the event that the Instrument Change does not occur.

8.2 Bankruptcy & Insolvency

Council may terminate this document by notice in writing to that effect to the Developer if:

- (a) Any company officer of the Developer becomes subject of bankruptcy proceedings or becomes a bankrupt.
- (b) The Developer becomes subject of external administration or insolvency proceedings.

9. Consequences

- 9.1 On the date of termination or rescission of this document, subject to the following subparagraphs each party releases each other from any obligation to perform any term, or any liability arising out of, this document after the date termination.
- 9.2 Termination or rescission of this document does not release either party from any obligation or liability arising under this document before termination or rescission.

10. Private Certifiers

Where Council is not the certifying authority for any aspect of the Proposed Development the Developer must on the appointment of a private certifier provide a copy of this document to the private certifier.

11. Notices

- 11.1 Any notice to or by a party under this document must be in writing and signed by the sender or, if a corporate party, an authorised officer of the sender.
- 11.2 Any notice may be served by delivery in person or by post or transmission by facsimile to the address or number of the recipient specified in the Summary Sheet or most recently notified by the recipient to the sender.
- 11.3 Any notice is effective for the purposes of this document upon delivery to the recipient or production to the sender of a facsimile transmittal confirmation report before 4.00pm local time on a day in the place in or to which the written notice is delivered or sent or otherwise at 9.00am on the next day following delivery or receipt.

12. Breach Notice and Rectification

- 12.1 If the Developer is, in the opinion of Council, in breach of a material obligation under this document, Council may provide written notice of the breach to the Developer and require rectification of that breach within a reasonable period of time (**Breach Notice**).
- 12.2 Unless there are compelling reasons to extend or abridge the period of time permitted for rectification, a reasonable period of time is taken to be fourteen days from receipt of written notification of the breach.
- 12.3 If the breach is not rectified within the time specified in the Breach Notice, or otherwise agreed between the Parties, Council may rectify the breach as the agent of the Developer and at the risk of the Developer. The Developer must pay all reasonable costs incurred by the Council in remedying the breach.

13. Dispute resolution

13.1 Disputes

If there is any dispute, difference of opinion or failure to agree relating to or arising from this document that dispute must be referred for determination under this clause.

13.2 No legal proceedings

The Parties must not bring or maintain any action on any Dispute (except for urgent injunctive relief to keep a particular position) until it has been referred and determined as provided in this clause.

13.3 Notice of disputes (Dispute Notice)

A Party referring a Dispute for determination must do so by written notice to the other parties which must specify the nature of the Dispute and a nominated officer of the referring party with sufficient authority to determine the Dispute.

13.4 Negotiated resolution and selection of expert

- (a) On service of the Dispute Notice the receiving Parties must refer the Dispute to an officer with sufficient authority to determine the Dispute. The nominated officers of each Party must meet at least once and use reasonable endeavours to resolve the Dispute by negotiation within seven days of service of the Dispute Notice. Any resolution must be recorded in writing and signed by each nominated officer. By agreement, the nominated officers may employ the services of a mediator to assist them in resolving the Dispute.
- (b) If the nominated officers are unable to resolve the Dispute within seven days of service of the Dispute Notice they must endeavour within the following seven-day period to appoint an expert by agreement. That appointment must be recorded in writing and signed by each nominated officer.
- (c) If the nominated officers do not record the appointment of an expert within that second seven day period, the expert must be appointed, at the request of any party, by the President for the time being (or if none, the senior elected member) of the Law Society of New South Wales.

13.5 Assistance to the Expert (the Expert)

- (a) Once the Expert has been appointed (the Expert), the Parties must:
 - (i) each use their best endeavours to make available to the Expert all information the Expert requires to settle or determine the Dispute; and
 - (ii) ensure that their employees, agents or consultants are available to appear at any hearing or enquiry called by the Expert.
- (b) The Parties may give written submissions to the Expert but must provide copies to the other Parties at the same time.

13.6 Expert's decision

- (a) The decision of the Expert must:
 - (i) be in writing and give reasons; and

- (ii) be made and delivered to the parties within one month from the date of submission of the dispute to the Expert or the date of completion of the last hearing or enquiry called by the Expert, if later.
- (b) The Expert may conduct the determination of the Dispute in any way it considers appropriate but the Expert may, at its discretion, have regard to the Australian Commercial Disputes Centre's guidelines for expert determination of disputes or such other guidelines as it considers appropriate.
- (c) The Expert's decision is final and binding on the parties.
- (d) The Expert must act as an expert and not as an arbitrator.

13.7 Expert's costs

- (a) The Expert must also determine how the expenses relating to the reference of the Dispute (including the Expert's remuneration) should be apportioned between the parties and in default of a decision by the Expert those expenses must be borne by the parties equally.
- (b) In determining the apportionment of costs the Expert may have regard to what the Expert, in its reasonable opinion, considers to be a lack of good faith or a failure to use reasonable endeavours by any party in assisting the Expert or resolving the dispute between the parties' nominated officers as required by this clause.

13.8 Continual performance

Each Party must continue to perform its obligations under this document while any dispute is being determined under this clause.

14. Registration of document on Title

14.1 Acknowledgement

The Developer acknowledges that Council intends to register this document under section 7.6 of the Act on the Lands and on registration by the Registrar-General the document will be binding on and enforceable against the owners of the Lands from time to time as if each owner for the time being had entered into this document.

14.2 Consents to Registration

This document must be registered on the title of the Land by the Developer as soon as practicable after it is made. Each Party must promptly execute any document and perform any action necessary to affect the registration of this document on the title of the Land.

14.3 Release from Registration

Council will at the request of the Developer release part of the Land from registration of this document where the Development Contributions have been made and no other money is owing to Council under this document. The obligations of the Council are satisfied when Council provides the Developer with a signed Request in registrable form for the release of registration of this document.

14.4 Registration Expenses

The Developer must pay Council's reasonable expenses including registration fees, any stamp duty, legal costs and disbursements, for the registration of this document and the subsequent removal of registration, on an indemnity basis.

15. Costs

15.1 The Developer is to pay to the Council, the Council's legal and any other costs associated with the negotiation, preparation, exhibition, legal review, execution and registration of this document within 7 days of a written demand by the Council for such payment.

15.2 It is noted that this is Council's standard practice and would not be waived or varied in this instance.

16. GST

If any payment made by one party to any other party under or relating to this document constitutes consideration for a taxable supply for the purposes of GST or any similar tax, the amount to be paid for the supply will be increased so that the net amount retained by the supplier after payment of that GST is the same as if the supplier was not liable to pay GST in respect of that supply. This provision is subject to any other agreement regarding the payment of GST on specific supplies, and includes payments for supplies relating to the breach or termination of, and indemnities arising from, this document.

17. General

17.1 Assignment

- (a) A party must not transfer any right or liability under this document without the prior consent of each other party, except where this document provides otherwise.
- (b) In the event that the Developer enters into a contract for the sale of the Land, the Developer (as vendor) shall disclose to the purchaser the existence of this document.

17.2 Governing law and jurisdiction

- (a) This document is governed by and construed under the law in the State of New South Wales.
- (b) Any legal action in relation to this document against any party or its property may be brought in any court of competent jurisdiction in the State of New South Wales.
- (c) Each party by execution of this document irrevocably, generally and unconditionally submits to the non-exclusive jurisdiction of any court specified in this provision in relation to both itself and its property.

17.3 Amendments

Any amendment to this document has no force or effect, unless effected by a document executed by the parties.

17.4 **Third parties**

This document confers rights only upon a person expressed to be a party, and not upon any other person.

17.5 **Pre-contractual negotiation**

This document:

- (a) expresses and incorporates the entire agreement between the parties in relation to its subject matter, and all the terms of that agreement; and
- (b) supersedes and excludes any prior or collateral negotiation, understanding, communication or agreement by or between the parties in relation to that subject matter or any term of that agreement.

17.6 **Further assurance**

Each party must execute any document and perform any action necessary to give full effect to this document, whether before or after performance of this document.

17.7 **Continuing performance**

- (a) The provisions of this document do not merge with any action performed or document executed by any party for the purposes of performance of this document.
- (b) Any representation in this document survives the execution of any document for the purposes of, and continues after, performance of this document.
- (c) Any indemnity agreed by any party under this document:
 - (i) constitutes a liability of that party separate and independent from any other liability of that party under this document or any other agreement; and
 - (ii) survives and continues after performance of this document.

17.8 **Waivers**

Any failure by any party to exercise any right under this document does not operate as a waiver and the single or partial exercise of any right by that party does not preclude any other or further exercise of that or any other right by that party.

17.9 **Remedies**

The rights of a party under this document are cumulative and not exclusive of any rights provided by law.

17.10 **Counterparts**

This document may be executed in any number of counterparts, all of which taken together are deemed to constitute one and the same document.

17.11 **Party acting as trustee**

If a party enters into this document as trustee of a trust, that party and its successors as trustee of the trust will be liable under this document in its own right

and as trustee of the trust. Nothing releases the party from any liability in its personal capacity. The party warrants that at the date of this document:

- (a) all the powers and discretions conferred by the deed establishing the trust are capable of being validly exercised by the party as trustee and have not been varied or revoked and the trust is a valid and subsisting trust;
- (b) the party is the sole trustee of the trust and has full and unfettered power under the terms of the deed establishing the trust to enter into and be bound by this document on behalf of the trust and that this document is being executed and entered into as part of the due and proper administration of the trust and for the benefit of the beneficiaries of the trust;
- (c) no restriction on the party's right of indemnity out of or lien over the trust's assets exists or will be created or permitted to exist and that right will have priority over the right of the beneficiaries to the trust's assets.

17.12 Representations and warranties

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

17.13 Severability

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

18. Definitions and interpretation

In this document unless the context otherwise requires:

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

Additional Dwellings means the number of Dwellings approved under any Development Consent for the Proposed Development in excess of ninety-six (96) Dwellings.

Business Day means a day that is not a Saturday, Sunday, public holiday or bank holiday in New South Wales;

Construction Certificate has the same meaning as in the Act;

Development Consent means a development consent for the Proposed Development..

Development Contributions means payment of the Monetary Contributions in accordance with this document.

Dispute Notice means written notice provided by a Party referring a dispute for determination, specifying the nature of the dispute and a nominated officer of the referring party with sufficient authority to determine the dispute.

Dwellings means a separate residential dwelling constructed on the Land (and which for the purpose of clarity includes detached and attached dwellings).

GST means any tax, levy, charge or impost implemented under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**) or an Act of the Parliament of the Commonwealth of Australia substantially in the form of, or which has a similar effect to, the GST Act.

Instrument Change has the meaning ascribed to it in the Summary Sheet.

Land means the land identified in the Summary Sheet.

Monetary Contributions means the 'Monetary Contribution Payment' and the 'Dwelling Monetary Contribution Payment' required to be paid to the Council in accordance with this document and as specified in **Schedule 1**.

Party means a party to this document, including their successors and assigns.

Planning Proposal has the same meaning ascribed to it in the Summary Sheet.

Produce Price Index means the Producer Price Index for NSW published by the Australian Bureau of Statistics.

Proposed Development means the development of the Land, including the demolition of existing structures, and the construction of Dwellings, on the Land.

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

Summary Sheet means the summary sheet set out at the start of this document.

18.1 Interpretation

In this document unless the context otherwise requires:

- (a) clause and subclause headings are for reference purposes only;
- (b) the singular includes the plural and vice versa;
- (c) words denoting any gender include all genders;
- (d) reference to a person includes any other entity recognised by law and vice versa;
- (e) where a word or phrase is defined its other grammatical forms have a corresponding meaning;
- (f) any reference to a party to this document includes its successors and permitted assigns;
- (g) any reference to a provision of an Act or Regulation is a reference to that provision as at the date of this document;
- (h) any reference to any agreement or document includes that agreement or document as amended at any time;
- (i) the use of the word **includes** or **including** is not to be taken as limiting the meaning of the words preceding it;

- (j) the expression **at any time** includes reference to past, present and future time and the performance of any action from time to time;
- (k) an agreement, representation or warranty on the part of two or more persons binds them jointly and severally;
- (l) an agreement, representation or warranty on the part of two or more persons is for the benefit of them jointly and severally;
- (m) reference to an exhibit, annexure, attachment or schedule is a reference to the corresponding exhibit, annexure, attachment or schedule in this document;
- (n) reference to a provision described, prefaced or qualified by the name, heading or caption of a clause, subclause, paragraph, schedule, item, annexure, exhibit or attachment in this document means a cross reference to that clause, subclause, paragraph, schedule, item, annexure, exhibit or attachment;
- (o) when a thing is required to be done or money required to be paid under this document on a day which is not a Business Day, the thing must be done and the money paid on the immediately following Business Day; and
- (p) reference to a statute includes all regulations and amendments to that statute and any statute passed in substitution for that statute or incorporating any of its provisions to the extent that they are incorporated.

Schedule 1 – Monetary Contributions

CONTRIBUTION TYPE	Public Purpose	CONTRIBUTION VALUE \$	TIMING OF PAYMENTS
Monetary Contribution Payment	Local traffic infrastructure	\$232,500.00	Prior to the issue of a Construction Certificate in respect of the first Additional Dwelling forming part of the Proposed Development.
Dwelling Monetary Contribution Payment	Local infrastructure public	For any Additional Dwellings: \$19,819.80 for every 1 bedroom Dwelling. \$20,985.67 for every 2 bedroom Dwelling. \$29,146.77 for every 3 bedroom Dwelling. \$36,141.99 for every 4 bedroom Dwelling.	Prior to the issue of a Construction Certificate with respect to the relevant Dwelling.

Execution Page

Executed as agreement

Dated

The common seal of **The Hills Shire Council**
was affixed under a resolution passed by council
on
in the presence of:

General Manager

Mayor

Print Name

Print Name

Witness

Print Name

Executed by **Garth Diamond Pty Limited** in
accordance with s127 of the *Corporations Act*
2001 (Cth):

Secretary/Director

Director

Print name

Print name

Executed by **Old Diamond Pty Limited** in
accordance with s127 of the *Corporations Act*
2001 (Cth):

Secretary/Director

Director

Print name

Print name