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# Voluntary Planning agreement

## *Environmental Planning and Assessment Act 1979*

Dahua Group Sydney Project 6 Pty Ltd (ACN 621 537 362)  
Shellharbour City Council (ABN 78 392 627 134)

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This agreement is dated:

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## Parties

- 1 **Dahua Group Sydney Project 6 Pty Ltd** of Suite 2, Level 20, 201-217 Elizabeth Street, Sydney 2000 (**Developer**)
  - 2 **Shellharbour City Council** of 76 Cygnet Ave, Shellharbour City Centre NSW 2529 (**Council**)
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## Background

- A The Developer is the registered proprietor of the Land.
- B The Developer has made an application to the Council for the Instrument Change, by way of a Planning Proposal, for the purpose of enabling it to seek Development Consent to carry out the Development on the Land.
- C The Planning Proposal was accompanied by an offer from the Developer to enter into this agreement to make the Monetary Contribution.
- D On 17 September 2020 the Department's Director, Southern Region, Local and Regional Planning, as delegate for the Minister, issued the Gateway Determination for the Planning Proposal, determining that the Instrument Change should proceed subject to conditions.
- E The Developer proposes to submit a Development Application, seeking Development Consent to carry out the Development.

The parties agree

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## 1 Defined terms and interpretation

### 1.1 Definitions in the Dictionary

A term or expression starting with a capital letter:

- (a) which is defined in the Dictionary in clause 1.1 of Schedule 1 (**Definitions and interpretation**), has the meaning given to it in the Dictionary; and
- (b) which is defined in the Act, but is not defined in the Dictionary, has the meaning given to it in the Act; and
- (c) which is defined in the GST Law, but is not defined in the Dictionary or the Corporations Act, has the meaning given to it in the GST Law.

## 1.2 Interpretation

Clause 1.2 of Schedule 1 (**Definitions and interpretation**) sets out rules of interpretation for this agreement.

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## 2 Application and operation of this agreement

### 2.1 Planning agreement

This agreement constitutes a planning agreement within the meaning of section 7.4 of the Act and the parties agree on the matters set out in Schedule 2.

### 2.2 Application

This agreement applies to:

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

### 2.3 Commencement and Operation

Subject to clause 2.4 below, this agreement commences and takes effect on and from the date it is executed by both parties.

### 2.4 Operation of clause 4

Clause 4 of the agreement does not operate until the date the Instrument Change is published on the NSW legislation website, or otherwise takes effect.

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## 3 Application of sections 7.11, 7.12 and 7.24 of the Act

### 3.1 Application

This agreement does not exclude the application of sections 7.11, 7.12 and 7.24 of the Act.

### 3.2 Consideration of benefits

- (a) Except as provided in clause 3.2(b), the benefits under this agreement are not to be taken into consideration in determining a contribution under section 7.11 of the Act to the Development.
  - (b) For the purposes of clause 3.2(a), the benefits under this agreement are only to be taken into consideration in respect of determining a contribution under section 7.11 of the Act for upgrades to Yellow Rock Road.
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## 4 Monetary contribution

### 4.1 Payment

- (a) The Developer must pay the full indexed value of the Monetary Contribution to the Council prior to the issuing of the first Subdivision Certificate for the Development.
- (b) The Monetary Contribution is to be indexed from the date of this agreement to the date of payment in the same way that monetary contributions are indexed under the Contributions Plan.

### 4.2 Application

Council must apply:

- (a) \$70,000 (as indexed) of the Monetary Contribution towards meeting the cost of the Works, and
- (b) \$3,500 (as indexed) of the Monetary Contributions towards meeting the Council's administration costs reasonably incurred in connection with the negotiation, preparation, execution and carrying into effect of this agreement.

This clause 4.2 does not merge on completion or termination of this agreement.

### 4.3 No further payment

The parties acknowledge and agree that:

- (a) the indexed value of the Monetary Contribution is a capped amount;
- (b) the indexed value of the Monetary Contribution represents the estimated value of the Works that has been agreed upon between the parties prior to entering into this agreement; and
- (c) Council cannot request that the Developer pay any amount exceeding the indexed value of the Monetary Contribution if the cost of the Works exceeds that amount.

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## 5 Termination of this agreement

### 5.1 Termination

This agreement will terminate upon the Developer satisfying all of its obligations under this agreement.

## 5.2 Effect of termination

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

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# 6 Registration

## 6.1 Registration of agreement

This agreement will be registered on the title of the Land pursuant to section 7.6 of the Act.

## 6.2 Obligations of the Developer

- (a) Upon the commencement of this agreement, the Developer is to deliver to the Council in registrable form:
  - (i) an instrument requesting registration of this agreement on the title to the Land duly executed by the registered proprietor of the Land, and
  - (ii) the written irrevocable consent of each person referred to in s7.6(1) of the Act to that registration, and
  - (iii) the certificate of title to the Land, or evidence to the satisfaction of the Council that the certificate of title to the Land has been produced at NSW Land Registry Services for the purposes of registering this agreement.
- (b) The Developer must do all things necessary to enable registration of this agreement to occur.

## 6.3 Right to lodge a caveat

- (a) On the date of the Instrument Change until such time as this agreement is registered on the title to the Land in accordance with clause 6.1, the Developer grants to the Council a fixed and specific charge over the Developer's right, title and interest in the Land, to secure:
  - (i) the performance of the Developer's obligation to make the Monetary Contribution under this agreement, and
  - (ii) any damages that may be payable to the Council, or any costs which may be incurred by the Council in the event of a breach of this agreement by the Developer.
- (b) The Developer agrees that the Council may lodge a caveat on the title of the Land to which the charge referred to in clause 6.3(a) applies.



- (c) If the Council lodges a caveat in accordance with clause 6.3(a) , then the Council will do all things reasonably necessary to:
  - (i) ensure that the caveat does not prevent or delay the registration of this agreement; and
  - (ii) remove the caveat from the title to the Land promptly, following registration of this agreement in accordance with clause 6.1.

#### **6.4 Release and discharge of agreement**

Council agrees to do all things reasonably required by the Developer to release and discharge this agreement with respect to any part of the Land upon the Developer paying:

- (a) the Monetary Contribution in accordance with clause 4; and
- (b) Council's legal costs in accordance with clause 12.17.

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## **7 Dispute resolution**

### **7.1 Not commence**

A party must not commence any court proceedings relating to a dispute unless it complies with this clause 7.

### **7.2 Written notice of dispute**

A party claiming that a dispute has arisen under or in relation to this agreement must give written notice to the other party specifying the nature of the dispute.

### **7.3 Attempt to resolve**

On receipt of notice under clause 7.2, the parties must endeavour in good faith to resolve the dispute expeditiously using informal dispute resolution processes such as mediation, expert evaluation or other methods agreed by them.

### **7.4 Mediation**

If the parties do not agree within 21 Business Days of receipt of notice under clause 7.2 (or any further period agreed in writing by them) as to:

- (a) the dispute resolution technique and procedures to be adopted;
- (b) the timetable for all steps in those procedures; or
- (c) the selection and compensation of the independent person required for such technique,

the parties must mediate the dispute in accordance with the Mediation Program. The parties must request the president of the Law Society of NSW or the president's nominee to select the mediator and determine the mediator's remuneration.

### **7.5 Court proceedings**

If the dispute is not resolved within 60 Business Days after notice is given under clause 7.2 then any party which has complied with the provisions of this clause 7 may in writing terminate any dispute resolution process undertaken under this clause and may then commence court proceedings in relation to the dispute.

### **7.6 Not use information**

The parties acknowledge the purpose of any exchange of information or documents or the making of any offer of settlement under this clause 7 is to attempt to settle the dispute. No party may use any information or documents obtained through any dispute resolution process undertaken under this clause 7 for any purpose other than in an attempt to settle the dispute.

### **7.7 No prejudice**

This clause 7 does not prejudice the right of a party to institute court proceedings for urgent injunctive or declaratory relief in relation to any matter arising out of or relating to this agreement.

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## **8 Confidentiality**

### **8.1 Agreement not Confidential**

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

### **8.2 Other Confidential Information**

- (a) The parties acknowledge that:
  - (i) Confidential Information may have been supplied to some or all of the parties in the negotiations leading up to the making of this agreement; and
  - (ii) The parties may disclose to each other further Confidential Information in connection with the subject matter of this agreement.
  - (iii) Subject to paragraphs (a) and (b), each party agrees:
    - (A) not to disclose any Confidential Information received before or after the making of this agreement to any person without the prior written consent of the party who supplied the Confidential Information; or

- (B) to take all reasonable steps to ensure all Confidential Information received before or after the making of this agreement is kept confidential and protected against unauthorised use and access.
  - (b) A party may disclose Confidential Information in the following circumstances:
    - (i) in order to comply with the Law, or the requirements of any Authority; or
    - (ii) to any of their employees, consultants, advisers, financiers or contractors to whom it is considered necessary to disclose the information, if the employees, consultants, advisers, financiers or contractors undertake to keep the information confidential.
  - (c) The obligations of confidentiality under this clause do not extend to information, which is public knowledge other than as a result of a breach of this clause.
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## 9 GST

### 9.1 Acknowledge and agreement of the parties

The parties acknowledge and agree that Division 81 of the GST Act applies to the supplies made under and in respect of this Agreement such that clause 9.4 does not apply to the Monetary Contribution.

### 9.2 Reimbursement

Any payment or reimbursement required to be made under this Agreement that is calculated by reference to a cost, expense, or other amount paid or incurred must be limited to the total cost, expense or amount less the amount of any input tax credit to which any entity is entitled for the acquisition to which the cost, expense or amount relates.

### 9.3 Consideration GST exclusive

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST.

### 9.4 Additional Amounts for GST

Subject to clause 9.1, to the extent an amount of GST is payable on a supply made by a party (Supplier) under or in connection with this Agreement (GST Amount), subject to the receipt of a tax invoice, the recipient must pay to the Supplier the GST Amount.

### 9.5 Non-monetary consideration

Clause 9.4 applies to taxable supplies made for either monetary or non-monetary consideration.

## 9.6 No merger

This clause does not merge on completion or termination of this agreement.

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# 10 Assignment and transfer

## 10.1 Right to transfer Land or assign or novate agreement

The Developer must not:

- (a) sell or transfer the Land or any part of the Land, or
  - (b) assign its rights or obligations under this agreement, or novate this agreement, to any person unless:
    - (c) Council consents to the transfer, assignment or novation, acting reasonably; or
    - (d) the Developer has, at no cost to the Council, first procured the proposed transferee's, assignee's or novatee's entry into a deed with the Council on terms reasonably satisfactory to the Council under which the transferee, assignee or novatee agrees to be bound by the terms of this agreement, and
    - (e) the Developer is not in breach of any terms of this agreement.
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# 11 Capacity

## 11.1 General warranties

Each party warrants to each other party that:

- (a) this agreement creates legal, valid and binding obligations, enforceable against the relevant party in accordance with its terms;
- (b) unless otherwise stated, it has not entered into this agreement in the capacity of trustee of any trust; and
- (c) they have full capacity to enter into this agreement and are able to fully comply with their obligations under this agreement.

## 11.2 Power of attorney

If an attorney executes this agreement on behalf of any party, the attorney declares that it has no notice of the revocation of that power of attorney.

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## 12 Administrative provisions

### 12.1 Entire agreement

This agreement constitutes the entire agreement between the parties regarding the matters set out in it and supersedes any prior representations, understandings or arrangements made between the parties, whether orally or in writing.

### 12.2 Variation

This agreement must not be varied except by a later written document executed by all parties.

### 12.3 Waiver

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

### 12.4 Further assurances

Each party must promptly execute all documents and do everything necessary or desirable to give full effect to the arrangements contained in this agreement.

### 12.5 Time for doing acts

- (a) If:
  - (i) the time for doing any act or thing required to be done; or
  - (ii) a notice period specified in this agreement,expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.
- (b) If any act or thing required to be done is done after 5 pm on the specified day, it is taken to have been done on the following Business Day.

### 12.6 Governing law and jurisdiction

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

## **12.7 Severance**

If any clause or part of any clause is in any way unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid and legal. If this is not possible, the clause (or where possible, the offending part) is to be severed from this agreement without affecting the enforceability, validity or legality of the remaining clauses (or parts of those clauses) which will continue in full force and effect.

## **12.8 Preservation of existing rights**

The expiration or termination of this agreement does not affect any right that has accrued to a party before the expiration or termination date.

## **12.9 No merger**

Any right or obligation of any party that is expressed to operate or have effect on or after the completion, expiration or termination of this agreement for any reason, does not merge on the occurrence of that event but remains in full force and effect.

## **12.10 Counterparts**

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

## **12.11 Relationship of parties**

Unless otherwise stated:

- (a) nothing in this agreement creates a joint venture, partnership, or the relationship of principal and agent, or employee and employer between the parties; and
- (b) no party has the authority to bind any other party by any representation, declaration or admission, or to make any contract or commitment on behalf of any other party or to pledge any other party's credit.

## **12.12 Cooperation**

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

## **12.13 Good faith**

Each party must act in good faith towards all other parties and use its best endeavours to comply with the spirit and intention of this agreement.

## **12.14 No fetter**

Nothing in this agreement is to be construed as requiring the Council to do anything that would cause the Council to breach any of its obligations at law and without limitation,

nothing in this agreement shall be construed as limiting or fettering in any way the discretion of the Council in exercising any of the its statutory functions, powers, authorities or duties.

### 12.15 Notices

- (a) Any notice, demand, consent, approval, request or other communication (Notice) to be given under this agreement must be in writing and must be given to the recipient at its Address for Service by being:
    - (i) hand delivered; or
    - (ii) sent by prepaid ordinary mail within Australia; or
    - (iii) sent by email.
  - (b) A Notice is given if:
    - (i) hand delivered, on the date of delivery but if delivery occurs after 5pm New South Wales time or a day that is not a Business Day, is taken to be given on the next Business Day;
    - (ii) sent by prepaid ordinary mail within Australia, on the date that is 2 Business Days after the date of posting; or
    - (iii) sent by email :
      - (A) before 5 pm on a Business Day, on that Day;
      - (B) after 5 pm on a Business Day, on the next Business Day after it is sent; or
      - (C) on a day that it is not a Business Day, on the next Business Day after it is sent,
- and the sender does not receive a delivery failure notice.

### 12.16 Explanatory note

The Explanatory Note must not be used to assist in construing this agreement.

### 12.17 Costs

The Developer must pay to Council the Council's costs not exceeding \$5,000 reasonably incurred in connection with the negotiation, preparation, execution and carrying into effect of this agreement, within 30 days of a written demand by the Council for such payment.

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## Schedule 1 Definitions and interpretation

### 1.1 Definitions

In this agreement, unless the context clearly indicates otherwise:

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

**Address for Service** means the address of each party appearing in Schedule 3 or any new address notified by any party to all other parties as its new Address for Service.

**Authority** means any Federal, State or local government or semi-governmental, statutory, judicial or public person, instrumentality or department.

**Business Day** means any day that is not a Saturday, Sunday, public holiday or bank holiday in Sydney, and concludes at 5 pm on that day.

**Confidential information** means any information and all other knowledge at any time disclosed (whether in writing and orally) by the parties to each other, or acquired by the parties in relation to the other's activities or services which is not already in the public domain and which: (1) is by its nature confidential; (2) is designated, or marked, or stipulated by either party as confidential (whether in writing or otherwise); (3) any party knows or ought to know is confidential; or (4) is information which may be reasonably considered to be of a confidential nature.

**Contributions Plan** means the Shellharbour City Council Local Infrastructure Contributions Plan 2019 approved under s7.19 of the Act as amended from time to time or such contributions plan as replaces that document.

**Consent Authority** has the same meaning as in the Act.

**Council** means Shellharbour City Council (ABN 621 537 362 )

**Dealing** means in relation to the Land, to sell, transfer, assign, mortgage, charge, dispose, encumber or otherwise deal with the Land in whole or part.

**Department** means the NSW Department of Planning, Industry and Environment.

**Developer** means Dahua Group Sydney Project 6 Pty Ltd (ACN 78 392 627 134)

**Development** means development, within the meaning of the Act for residential, environmental management and electricity infrastructure purposes, the subject of Development Consent (as modified from time to time) granted as a consequence of the taking effect of the Instrument Change.

**Development Application** has the same meaning as in the Act.

**Development Consent** has the same meaning as in the Act.



**Explanatory Note** means the note exhibited with a copy of this agreement when this agreement is made available for inspection by the public pursuant to the Act, as required by the Regulation.

**Gateway Determination** means the gateway determination dated 12 September 2020 issued by the Director, Southern Region, Local and Regional Planning, the Department (as delegate of the Minister for Planning and Public Spaces) under s3.34 of the Act, and as varied from time to time under s3.35 of the Act, in relation to the Planning Proposal.

**General Register of agreements** means the land register maintained under the *Conveyancing Act 1919* (NSW) and so titled.

**GST** means any form of goods and services tax payable under the GST Legislation.

**GST Legislation** means the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

**Instrument Change** means an amendment to the LEP as a result of the Planning Proposal.

**Land** means that part of the land contained in certificate of title folio identifier Lot 17 DP1168920, the subject of the Planning Proposal.

**LEP** means *Shellharbour Local Environmental Plan 2013*.

**Mediation Program** means the Mediation Program of the Law Society of New South Wales as published on its website and as varied from time to time.

**Minister** means the Minister for Planning and Public Spaces and includes the Secretary and the Secretary's nominee.

**Monetary Contribution** means the amount of \$73,500.00.

**Planning Proposal** means Council's planning proposal reference number PP0004/2018 (Department Ref: PP\_2020\_SHELL\_002) proposing amendments to the LEP prepared under s3.33 of the Act and dated 9 June 2020 the subject of the Gateway Determination to facilitate development on the Land for residential, environmental management and electricity infrastructure purposes.

**Real Property Act** means the *Real Property Act 1900* (NSW).

**Register** means the Torrens title register maintained under the Real Property Act.

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

**Secretary** means the Secretary of the Department.

**Subdivision Certificate** has the same meaning as in the Act.

**Tax** means a tax, duty (including stamp duty and any other transaction duty), levy, impost, charge, fee (including a registration fee) together with all interest, penalties, fines and costs concerning them.

**Works** means the proposed upgrade works for Yellow Rock Road from the intersection of Illawarra Highway to Wongawilli Street Tullimbar NSW 2527.

## 1.2 Interpretation

In this agreement unless the context clearly indicates otherwise:

- (a) a reference to **this agreement** or another document means this agreement or that other document and any document which varies, supplements, replaces, assigns or novates this agreement or that other document;
- (b) a reference to **legislation** or a **legislative provision** includes any statutory modification, or substitution of that legislation or legislative provision and any subordinate legislation issued under that legislation or legislative provision;
- (c) a reference to a **body** or **authority** which ceases to exist is a reference to either a body or authority that the parties agree to substitute for the named body or authority or, failing agreement, to a body or authority having substantially the same objects as the named body or authority;
- (d) a reference to the **introduction**, a **clause**, a **schedule** or an **annexure** is a reference to the introduction, a clause, a schedule or an annexure to or of this agreement;
- (e) **clause headings**, the **introduction** and the **table of contents** are inserted for convenience only and do not form part of this agreement;
- (f) the **schedules** and **annexures** form part of this agreement;
- (g) a reference to a **person** includes a natural person, corporation, statutory corporation, partnership, the Crown or any other organisation or legal entity;
- (h) a reference to a **natural person** includes their personal representatives, successors and permitted assigns;
- (i) a reference to a **corporation** includes its successors and permitted assigns;
- (j) a reference to a right or obligation of a party is a reference to a right or obligation of that party under this agreement;
- (k) an **obligation or warranty** on the part of 2 or more persons binds them jointly and severally and an obligation or warranty in favour of 2 or more persons benefits them jointly and severally;
- (l) a requirement to do any thing includes a requirement to cause that thing to be done and a requirement not to do any thing includes a requirement to prevent that thing being done;
- (m) **including** and **includes** are not words of limitation;
- (n) a word that is derived from a defined word has a corresponding meaning;

- (o) **monetary amounts** are expressed in Australian dollars;
- (p) the singular includes the plural and vice-versa;
- (q) words importing one gender include all other genders;
- (r) a reference to a thing includes each part of that thing; and
- (s) neither this agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting.

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## Schedule 2 Requirements under section 7.4 of the Act

The parties acknowledge and agree that the table set out below provides for certain terms, conditions and procedures for the purpose of the agreement complying with the Act.

Requirement under the Act	This agreement
<p><b>Planning instrument and/or development application – (section 7.4(1))</b></p> <p>The Developer has:</p> <p>(a) sought a change to an environmental planning instrument.</p> <p>(b) made, or proposes to make, a Development Application.</p> <p>(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.</p>	<p>(a) Yes</p> <p>(b) No</p> <p>(c) No</p>
<p><b>Description of land to which this agreement applies – (section 7.4(3)(a))</b></p>	<p>See definition of Land in clause 1.1 of Schedule 1.</p>
<p><b>Description of development to which this agreement applies – (section 7.4 (3)(b))</b></p>	<p>See definition of Development in clause 1.1 of Schedule 1.</p>
<p><b>Description of change to the environmental planning instrument to which this agreement applies – (section 7.4 (3)(b))</b></p>	<p>See definition of Instrument Change in Schedule 1.</p>
<p><b>The scope, timing and manner of delivery of contribution required by this agreement – (section 7.4 (3)(c))</b></p>	<p>See clause 4.</p>
<p><b>Applicability of sections 7.11 and 7.12 of the Act – (section 7.4 (3)(d))</b></p>	<p>Application not to be excluded – See clause 3.</p>
<p><b>Applicability of section 7.24 of the Act – (section 7.4 (3)(d))</b></p>	<p>Application not to be excluded – See clause 3.</p>

<b>Consideration of benefits under this agreement if section 7.11 applies</b> – (section 7.4 (3)(e))	Benefits not to be considered – See clause 3.2.
<b>Mechanism for Dispute Resolution</b> – (section 7.4(3)(f))	See clause 7.
<b>Enforcement of this agreement</b> – (section 7.4(3)(g))	See clause 6
<b>No obligation to grant consent or exercise functions</b> – (section 7.4(10))	See clause 12.14

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## Schedule 3 Address for Service

### Address for Service

#### Council

Contact: The General Manager

Address: Shellharbour City Council  
Locked Bag 155  
Shellharbour City Centre NSW 2529

Email: [records@shellharbour.nsw.gov.au](mailto:records@shellharbour.nsw.gov.au)

#### Developer

Contact: The Directors

Address: Suite 2, Level 20, 201-217 Elizabeth Street, Sydney, NSW 2000

Email: [info@dahuaaustralia.com.au](mailto:info@dahuaaustralia.com.au)

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## Execution page

### Executed as a deed.

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Signed, sealed and delivered by **Dahua Group Sydney Project 6 Pty Ltd** in accordance with section 127 of the *Corporations Act 2001* (Cth) by:

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Signature of director

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Signature of director/secretary

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Name of director (print)

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Name of director/secretary (print)

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Signed, sealed and delivered by the General Manager on behalf of **Shellharbour City Council** pursuant to delegation under section 377 of the *Local Government Act 1993* (NSW) in the presence of:

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Signature of witness

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Signature of General Manager

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Name of witness (print)

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Name of General Manager (print)