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100-9 South Beach Road, Sydney NSW 2020, Australia

Deed

Pepper Tree Road

Planning Agreement

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

Port Stephens Council

BD NSW Project BD075 Pty Ltd

Date:

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Pepper Tree Road Planning Agreement

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**Pepper Tree Road Planning Agreement
Port Stephens Council
BD NSW Project BD075 Pty Ltd**



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Pepper Tree Road Planning Agreement
Port Stephens Council
BD NSW Project BD075 Pty Ltd



Pepper Tree Road Planning Agreement

Summary Sheet

Council:

Name: Port Stephens Council
Address: 116 Adelaide Street, Raymond Terrace NSW 2324
Telephone: (02) 4980 0255
Facsimile: (02) 4987 3612
Email: John.Maretich@portstephens.nsw.gov.au
Representative: John Maretich

Developer:

Name: BD NSW Project BD075 Pty Ltd
Address: PO Box 826 Newcastle NSW 2300
Telephone: (02) 4929 3299
Facsimile: (02) 4926 2766
Email: darrenwilliams@buildev.com.au
Representative: Darren Williams

Land:

See definition of *Land* in clause 1.1.

Development:

See definition of *Development* in clause 1.1.

Development Contributions:

See Clause 9.

Application of s94, s94A and s94EF of the Act:

See clause 8.



Security:

See Part 4.

Registration:

See clause 16.

Restriction on dealings:

See clause 17.

Dispute Resolution:

See Part 3.

Pepper Tree Road Planning Agreement
Port Stephens Council
BD NSW Project BD075 Pty Ltd



Pepper Tree Road Planning Agreement

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

Parties

Port Stephens Council ABN 16 744 377 876 of 116 Adelaide Street (Old Pacific Highway), Raymond Terrace NSW 2324 (**Council**)

and

BD NSW Project BD075 Pty Ltd ACN 141187948 of PO Box 826 Newcastle NSW 2300 (**Developer**)

Background

- A The Developer is the owner of the Land.
- B Development Consent No.16-2010-291-4 has been granted by the Council to the Development.
- C The Developer has lodged the Modification Application with the Council to modify condition 41 of Development Consent No.16-2010-291-4 to remove the requirement to construct a mountable roundabout at the corner of Ferodale Road and Peppertree Road.
- D The Developer proposes to provide the Development Contributions in accordance with this Deed in connection with the Modification Application.

Operative provisions

Part 1 - Preliminary

1 Interpretation

1.1 In this Deed the following definitions apply:

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

Approval includes approval, 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.

Claim includes a claim, demand, remedy, suit, injury, damage, loss, Cost, liability, action, proceeding or right of action.

Cost means a cost, charge, expense, outgoing, payment, fee and other expenditure of any nature.

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

Development means the construction of a Woolworths Supermarket on the Land, the subject of Development Consent No.16-2010-291-4 as modified in accordance with the Modification Application.

Development Consent means the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost, the carrying out of work, or the provision of any other material public benefit, or any combination of them, to be used for, or applied towards a public purpose, but does not include any Security or other benefit provided by a Party to the Council to secure the enforcement of that Party's obligations under this Deed for the purposes of s93F(3)(g) of the Act.

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

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.

Land means Lots 7, 8, 9, 10 and 11 in DP19101 otherwise known as 39, 41, 43, 45 and 47 Ferodale Road, Medowie NSW 2310.

Link Road means a road that links Peppertree Road and Medowie Road in a location to be determined by the Council.

Modification Application means the application under s96 of the Act to modify condition 41 of Development Consent No.16-2010-291-4 to remove the requirement to construct a mountable roundabout at the corner of Ferodale Road and Peppertree Road.

Occupation Certificate has the same meaning as in the Act.

Party means a party to this Deed.

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

- 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 relating to a Development Contribution 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, deed or document is to that agreement, deed 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 s93F(1) of the Act.

3 Commencement

- 3.1 This Deed takes effect on the date when all Parties have executed this Deed.
- 3.2 The Party who executes this Deed last is to insert on the front page the date they did so and provide a copy of the fully executed and dated Deed to any other person who is a Party.



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 Further agreements

- 6.1 The Parties may, at any time and from time to time, enter into agreements relating to the subject-matter of this Deed that are not inconsistent with this Deed for the purpose of implementing this Deed.

7 Surrender of right of appeal, etc.

- 7.1 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, or an Approval relating to the Development in so far as the subject-matter of the proceedings relates to this Deed.

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

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

Part 2 – Development Contributions

9 Provision of Development Contributions

- 9.1 The Developer is to pay monetary Development Contributions in the amount of \$400,000.00 to the Council in accordance with this Deed for the purposes of the Council constructing the Link Road.
- 9.2 The monetary Development Contributions referred to in clause 9.1 are to be paid on the date this Deed takes effect.
- 9.3 The Council is to apply the monetary Development Contributions made by the Developer under this Deed towards the public purpose for which it is made and use its best endeavours to complete the Link Road as soon as practicable after the monetary Development Contributions have been paid.



10 Payment of monetary Development Contributions

- 10.1 A monetary Development Contribution is made for the purposes of this Deed when the Council receives the full amount of the contribution payable under this Deed in cash or by unendorsed bank cheque or by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by the Council.

Part 3 – Dispute Resolution

11 Dispute resolution – expert determination

- 11.1 This clause applies to a Dispute between any of the Parties to this Deed concerning a matter arising in connection with this Deed that can be determined by an appropriately qualified expert if:
- 11.1.1 the Parties to the Dispute agree that it can be so determined, or
 - 11.1.2 the Chief Executive Officer of the professional body that represents persons who appear to have the relevant expertise to determine the Dispute gives a written opinion that the Dispute can be determined by a member of that body.
- 11.2 A Dispute to which this clause applies is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 11.3 If a notice is given under clause 11.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 11.4 If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 11.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 11.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 11.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

12 Dispute Resolution - mediation

- 12.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute to which clause 11 applies.
- 12.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 12.3 If a notice is given under clause 12.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 12.4 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.
- 12.5 If the Dispute is not resolved by mediation within a further 28 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.
- 12.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 12.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

Part 4 - Enforcement

13 Security

- 13.1 Notwithstanding any other provision in this Deed, no Occupation Certificate for the Development is to be issued unless and until the monetary Development Contributions required to be paid under this Deed have been paid. However, to avoid any doubt, this clause does not apply in relation to any occupation certificate issued prior to this Deed taking effect.

14 Breach of obligations

- 14.1 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:
- 14.1.1 specifying the nature and extent of the breach,
- 14.1.2 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,
- 14.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 14.2 If the Developer fails to fully comply with a notice referred to in clause 14.1, the Council may, without further notice to the Developer, remedy the Developer's breach.
- 14.3 Any costs incurred by the Council in remedying a breach in accordance with clause 14.2 may be recovered by the Council as a debt due in a court of competent jurisdiction.
- 14.4 For the purpose of clause 14.3, the Council's costs of remedying a breach the subject of a notice given under clause 14.1 include, but are not limited to:



- 14.4.1 the costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
 - 14.4.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
 - 14.4.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- 14.5 Nothing in this clause 14 prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Deed by the Developer, including but not limited to seeking relief in an appropriate court.

15 Enforcement in a court of competent jurisdiction

- 15.1 Without limiting any other provision of this Deed, the Parties may enforce this Deed in any court of competent jurisdiction.
- 15.2 For the avoidance of doubt, nothing in this Deed prevents:
 - 15.2.1 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
 - 15.2.2 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.

Part 5 – Registration & Restriction on Dealings

16 Registration of this Agreement

- 16.1 The Parties agree not to register this Deed for the purposes of s93H(1) of the Act.

17 Restriction on dealings

- 17.1 The Developer is not to:
 - 17.1.1 sell or transfer the Land, or
 - 17.1.2 assign the Developer's rights or obligations under this Deed, or novate this Deed,to any person unless:
 - 17.1.3 the Developer has, at no cost to the Council, first procured the execution by the person to whom the Land or part is to be sold or transferred or the Developer's rights or obligations under this Deed are to be assigned or novated, of a deed in favour of the Council on terms reasonably satisfactory to the Council, and
 - 17.1.4 the Council has given written notice to the Developer stating that it reasonably considers that the purchaser, transferee, assignee or



- novatee, is reasonably capable of performing its obligations under this Deed, and
- 17.1.5 the Developer is not in breach of this Deed, and
- 17.1.6 the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.
- 17.2 This clause does not apply if the monetary Development Contributions required to be paid under this Deed have been paid.

Part 6 – Indemnities & Insurance

18 Risk

- 18.1 The Developer performs this Deed at its own risk and its own cost.

19 Release

- 19.1 The Developer releases the Council from any Claim it may have against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

20 Indemnity

- 20.1 The Developer indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

Part 7 – Other Provisions

21 Review of Deed

- 21.1 The Parties agree to review this Deed if either party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Deed.
- 21.2 For the purposes of clause 21.1, the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development.



- 21.3 For the purposes of addressing any matter arising from a review of this Deed referred to in clause 21.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Deed.
- 21.4 If this Deed becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.
- 21.5 A failure by a Party to agree to take action requested by the other Party as a consequence of a review referred to in clause 21.1 (but not 21.4) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.

22 Notices

- 22.1 Any notice, consent, information, application or request that is to or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:
- 22.1.1 delivered or posted to that Party at its address set out in the Summary Sheet,
 - 22.1.2 faxed to that Party at its fax number set out in the Summary Sheet, or
 - 22.1.3 emailed to that Party at its email address set out in the Summary Sheet.
- 22.2 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.
- 22.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 22.3.1 delivered, when it is left at the relevant address,
 - 22.3.2 sent by post, 2 business days after it is posted,
 - 22.3.3 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
 - 22.3.4 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.
- 22.4 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.

23 Approvals and Consent

- 23.1 Except as otherwise set out in this Deed, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Deed in that Party's absolute discretion and subject to any conditions determined by the Party.



- 23.2 A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

24 Costs

- 24.1 The Developer is to pay the Council's costs of preparing, negotiating, executing and stamping this Deed, and any document related to this Deed within 7 days of a written demand by the Council for such payment.
- 24.2 The Developer is also 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.

25 Entire Deed

- 25.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with.
- 25.2 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.

26 Further Acts

- 26.1 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.

27 Governing Law and Jurisdiction

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

28 Joint and Individual Liability and Benefits

- 28.1 Except as otherwise set out in this Deed:
- 28.1.1 any agreement, covenant, representation or warranty under this Deed by 2 or more persons binds them jointly and each of them individually, and
- 28.1.2 any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.



29 No Fetter

- 29.1 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.

30 Illegality

- 30.1 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.

31 Severability

- 31.1 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.
- 31.2 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, but the rest of this Deed is not affected.

32 Amendment

- 32.1 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 in accordance with clause 25D of the Regulation.

33 Waiver

- 33.1 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.
- 33.2 A waiver by a Party is only effective if it is in writing.
- 33.3 A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It 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 GST

- 34.1 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.

- 34.2 Subject to clause 34.4, 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.
- 34.3 Clause 34.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.
- 34.4 No additional amount shall be payable by the Council under clause 34.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.
- 34.5 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:
- 34.5.1 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;
- 34.5.2 that any amounts payable by the Parties in accordance with clause 34.2 (as limited by clause 34.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 34.6 No payment of any amount pursuant to this clause 34, 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.
- 34.7 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.
- 34.8 This clause continues to apply after expiration or termination of this Deed.

35 Explanatory Note

- 35.1 The Appendix contains the Explanatory Note relating to this Deed required by clause 25E of the Regulation.

**Pepper Tree Road Planning Agreement
Port Stephens Council
BD NSW Project BD075 Pty Ltd**



35.2 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 Planning Deed.

Pepper Tree Road Planning Agreement
Port Stephens Council
BD NSW Project BD075 Pty Ltd

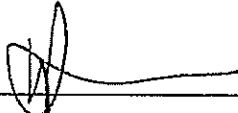


Execution


Executed as a Deed

Dated: 23 May 2014

Executed on behalf of the Council



Acting General Manager



Witness

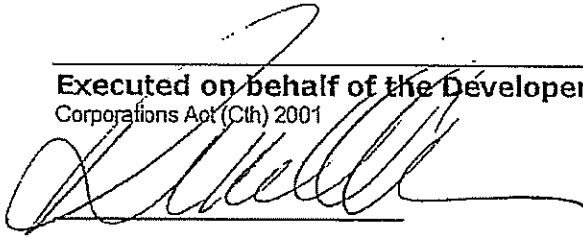
Wayne Wallis

~~Signature~~ Signature

Lisa Marshall

~~Witness~~ Signature

Executed on behalf of the Developer in accordance with s127(1) of the
Corporations Act (Cth) 2001



Name/Position Signature

DARREN WILLIAMS - DIRECTOR

Name/Position