

DATED

15 MARCH 2016 7

**BETWEEN:**

**BAYSIDE COUNCIL**

("the Council")

**AND:**

**BOTANY BAY GP PTY LIMITED (ACN 605 001 143)**

("Developer")

**PLANNING AGREEMENT**

**HOUSTON DEARN O'CONNOR**

Solicitors

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12 Railway Parade

BURWOOD NSW 2134

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REF: TOC:113139-5858

**THIS DEED** made the 15<sup>th</sup> day of MARCH 2016 7

**BETWEEN:** **BAYSIDE COUNCIL** of 141 Coward Street Mascot in the State of New South Wales ("the Council") of the first part

**AND:** **BOTANY BAY GP PTY LIMITED** ABN 605 001 143 of Level 14 Australia Square 264-278 George Street Sydney in the said State ("Developer") of the other part.

**WHEREAS:**

- A. Development consent for the staged subdivision of land known as 20 Beauchamp Road Banksmeadow ("Development Site") being the whole of the land contained in Lot DP1016112, Part Lot 10 and Part Lot 11 DP1039919, part Lot 9 DP1016112 ("Development Site") being development consent number 10/486 was approved by the Land and Environment Court of NSW pursuant to Section 34(3)(a) and (b) of the Land and Environment Court Act 1979 on 31<sup>st</sup> August 2012 ("Development Consent").
- B. The Developer is the current registered proprietor of part of the Development Site being part of the land known as 20 Beauchamp Road ("Stage1 Development Site") being the whole of the land contained in Lot 105 and Lot 111 in DP1204999
- C. On or about 4 May 2016 the Developer lodged with the Land and Environment Court the Section 96(8) Modification Application seeking modifications to the Development Consent.
- D. The Stage 1 Development Site equates to the land which forms part of Stage 1 of the staged Development Consent for the subdivision and the Developer proposes to carry out Stage 1 of the Development Consent.
- E. As part of the negotiations in respect of the modification the Developer has made an offer to enter into a voluntary planning agreement with the Council in relation to the proposed modifications to the Development Consent where it agrees to:

- (i) Construction of a car park upon Lot 26 by the Developer for and on behalf of the Council at the Developer's cost and otherwise in accordance with the other approved plans depicting the car park (being Jocelyn Ramsay and Associates, architects landscape plan dated 25 October 2016 Revision H) and otherwise in accordance with the Development Consent conditions relating to the construction of the public car park.
  - (ii) The transfer of the ownership from the Developer to Council of Lot 26 as shown in the Plan S1511-A-DA01 A and the proposed subdivision plan being survey plan by Rygate Surveyors dated 25<sup>th</sup> October 2016 reference 77436 ("Lot 26"), both plans annexed hereto in **Annexure A**.
  - (iii) pay to the Council a monetary contribution in the amount of \$600,000 ("Monetary Contribution").
- F. Council agrees to accept the transfer of ownership of Lot 26 and the obligation to use Lot 26 as a public car park and the Monetary Contribution for the Stage 1 Development Site.
- G. Pursuant to Section 93F of the Act, the parties hereto now enter into this Planning Agreement.
- H. This Planning Agreement has been publicly notified in accordance with Section 93G of the Environmental Planning & Assessment Act 1979 ("the Act") and clause 25D of the Environmental Planning & Assessment Regulation ("the Regulation").

**NOW THIS DEED WITNESSES** as follows:

1. This Planning Agreement shall be binding upon the parties hereto and upon their respective heirs, executors, transferees and assigns.
2. This Planning Agreement shall commence and become operative on the date the Planning Agreement has been executed by both parties.
3. The rights of the Council expressly provided for herein are cumulative and in addition to and not exclusive of any rights of the Council existing at law or which the Council would otherwise have available to it.

4. In case one or more of the provisions contained in this Planning Agreement shall be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining conditions contained therein shall not thereby be affected.
5. The parties agree that this Deed is a Planning Agreement within the meaning of Section 93F of the Act.
6. This Planning Agreement applies to the Stage 1 Development Site.
7. This Planning Agreement in part excludes the application of Section 94, 94A and 94EF of the Act to the development the subject of the Development Consent as modified namely it excludes the application of S94 and 94A of the Act to Stage 1 of the Development being the Stage 1 Development Site
8. This Planning Agreement excludes the benefits under this Planning Agreement from being taken into consideration in determining the developer contribution under Section 94 and 94A of the Act with respect to Stage 2 and Stage 3 of the Development.
9. (a) The Developer covenants with the Council that they shall before the issue of a subdivision certificate for the Stage 1 Development Site:
  - (i) construct a car park on proposed Lot 26 at no cost to Council and such car park to be constructed in accordance with the Development Consent and in accordance with the plans approved for that car park pursuant to that consent and in accordance with any conditions of that consent; and
  - (ii) on completion of the construction of the car park do all things necessary to enable Council to lodge for registration a transfer from the Developer to the Council transferring the ownership in Lot 26 to the Council ("Transfer") including the signing of such Transfer, provision of all documents and authorities as required by LPI NSW for the lodgement for registration of the Transfer and issue of the certificate of title to Lot 26 to Council upon registration of the Stage 1 Subdivision Plan free of any cost, payment or compensation.

- (iii) pay to the Council a Monetary Contribution in the amount of \$600,000 in lieu of a S94, 94A or 94EF Contribution for Stage 1 of the Development.
  - (b) The Developer covenants and agrees with the Council to do all things necessary to have the Transfer registered including inter alia, answering any requisition from LPI NSW and signing any further documents, returning to the Council or to LPI NSW the title document for Lot 26 if it is mistakenly sent to it or amending the Transfer as may be necessary.
10. The Council covenants with the Developer that on the transfer of Lot 26 to it pursuant to Clause 9 that it will thereafter use Lot 26 as a public car park.
11. It is acknowledged by the parties to this Planning Agreement that:
- (a) the construction of the car park and transfer of Lot 26 to the Council at no cost to the Council is a material public benefit to be used for and applied towards a public purpose being the use as a public car park.
  - (b) The payment of the Monetary Contribution to the Council is a material public benefit and is to be applied towards the provision of community facilities and/or capital works.
12. The Developer covenants with the Council:
- (a) that they shall do all things reasonably necessary to obtain the consent to the registration of this Planning Agreement over the title to the Stage 1 Development Site pursuant to Section 93H of the Act from all persons who have an interest in the Stage 1 Development Site.
  - (b) that forthwith after receiving the consents specified in subclause (a) hereof they shall cause this Planning Agreement to be registered on the title of the Stage 1 Development Site and such registration shall be within 20 business days of the execution of this Planning Agreement.
  - (c) that if this Planning Agreement is not registered on the title to the Stage 1 Development Site, and if the Developer should propose to sell the Stage 1 Development Site or any part thereof, then they shall:

- (i) within seven (7) days of listing the Stage 1 Development Site or any part thereof for sale, either through an agent or privately, notify the Council of such intention;
- (ii) as a condition of any sale, require that the incoming purchaser enter into with Council a like Planning Agreement to this present Planning Agreement in which the same covenants as set out herein shall apply;
- (iii) within seven (7) days of exchange of contracts, notify the Council of the sale and provide the Council with a copy of the contract;
- (iv) within twenty one (21) days of receipt from the Council of a replacement Planning Agreement between the Council and the purchaser substantially in the form of this Planning Agreement, have it executed by the purchaser and return it to the Council;
- (v) that if this Planning Agreement is not registered on the title to the Stage 1 Development Site, and if the Current Owner or Developer should propose otherwise than by sale to transfer or assign their interest in the Stage 1 Development Site or any part thereof to a transferee or assignee, then they shall before effecting such assignment or transfer have the incoming transferee or assignee enter into an agreement with the Council substantially in the form of this Planning Agreement insofar as concerns the interest assigned or transferred and shall provide same to the Council.

13. The Developer covenants and agrees with the Council that pending registration of this Planning Agreement over the title to the Stage 1 Development Site the Council shall be entitled to register a caveat at Land and Property Information NSW over the title to the Stage 1 Development Site to protect its interest herein pursuant to this Planning Agreement.

14. Each party shall pay their own costs in connection with this Planning Agreement.

15. If a caveat is registered on the title of the Stage 1 Development Site then Council is to do all things necessary to ensure that such caveat is to be removed immediately upon the Planning Agreement being registered on the title to the Stage 1 Development Site.

16. If Council lodges a caveat then the Council must promptly do all things reasonably required to ensure that the caveat does not prevent or delay the registration of:
  - (a) this Planning Agreement; and
  - (b) any other dealing contemplated, required or permitted under this Planning Agreement.
17. This Planning Agreement is not intended to operate to fetter, in any unlawful manner the exercise of any statutory power or discretion of the Council ("Discretion").
18. No provision of this Planning Agreement is intended to, or does constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this Planning Agreement is held by a Court of competent jurisdiction to constitute an unlawful fetter on any Discretion, the parties agree:
  - (a) They will take all practical steps including the execution of any further documents to ensure the objective of this clause is substantially satisfied.
  - (b) In the event that the Discretion cannot be achieved without giving rise to unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this Planning Agreement has full force and effect, and
  - (c) To endeavour to satisfy the common objectives of the parties in relation to the provision of this Planning Agreement which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant Court judgement.
19. The parties represent and warrant that they have power to enter into this Planning Agreement and comply with its obligations under the Planning Agreement and that entry into this Planning Agreement will not result in any breach of any law.
20. Should it be necessary for the Council to consent to the registration of any lease, mortgage, consolidation of title or other document as a result of a caveat being registered on the title to the Stage 1 Development Site, the Developer shall pay the Council's reasonable solicitor/client costs of providing Council's consent to such registration. The Developer shall also pay the Council's reasonable costs in relation to the execution of any new agreement with any new owner.

21. (a) Council acknowledges that the Developer has and may enter into contracts for the sale of the proposed lots before the transfer of Lot 26 to the Council however, completion of such sales shall not occur until the transfer of Lot 26 to Council has been registered at LPI NSW. The parties acknowledge that the sale of Lot 105 and Lot 111 in DP 1204999 may occur subject to the requirements of clause 13 being met despite this clause
- (b) Council must, within 14 days of the Developer submitting the relevant documents to Council, sign such documentation as the Developer may require to remove this Deed from the Register provided always that the Developer has complied with its obligations under this Deed including inter alia its obligations under Clause 9 of this Deed.
- (c) Council agrees it will use its best endeavors to assess and determine any application made by the Developer for a subdivision certificate as expeditiously as possible and shall do so within 14 days provided that all preconditions are met and all relevant material is provided to the Council to enable it to make a determination.
22. The explanatory note put on exhibition with this Planning Agreement is not to be used in construing the terms of this Planning Agreement.
23. Should the Developer be in breach of any terms of this Planning Agreement, and not rectify the default within twenty one (21) days of receiving notice from Council to do so (except if a delay in rectification is likely to cause irremediable damage or prejudice to Council, in which case no notice is required) Council shall be entitled, at this option, to enforce by way of injunction relief in the Supreme Court any provisions of this Planning Agreement which have been breached, or to seek damages or seek to enforce the provisions of any Development Consent which relate to the Development Site whether by way of order under Section 121B of the Act, or Class 4 proceedings in the Land and Environment Court, or otherwise.
24. Any amendment or variation to this Planning Agreement is not effective unless it is in writing and signed by all the parties.



25. In the event of any disagreement between the parties hereto arising out of the provisions of this Planning Agreement, and if the parties are unable within a reasonable time to resolve such disagreement amicably, either party may serve notice on the other requiring the matter to be referred to a conciliation by a single conciliator at the Australian Commercial Disputes Centre Limited in Sydney. The parties shall thereafter in good faith seek to resolve the matter through conciliation and the parties shall equally bear the cost of such conciliation. The parties must keep a confidential and must not to disclose or rely upon or make the subject of a subpoena to give evidence or produce documents in any arbitral, judicial or other proceedings:

- (a) views expressed or proposals or suggestions made by a party, an expert or the conciliator during the conciliation relating to a possible settlement of the dispute;
- (b) admissions or concessions made by a party during the conciliation in relation to the dispute; and
- (c) information, documents or other material, including any confidential information, concerning the dispute which are disclosed by a party during the conciliation unless such information, documents or facts would have been otherwise discoverable in judicial or arbitral proceedings.

26. (a) If the Development Consent is surrendered where no construction of the roadworks on the Site have commenced and no subdivision certificate has issued, or
- (b) if full compliance has been met with the requirements of Clause 9 and the title to the ownership in Lot 26 has been transferred to Council.

Then in either circumstance Council will within 14 days of written request from the Developer have this Planning Agreement removed from the Register to the title to the Stage 1 Development Site and withdraw any caveat registered over the title to the Stage 1 Development Site.

27.

- (a) All words in this clause which are also defined in the A New tax System (Goods and Services Tax) Act 1999 (Cth) ("the GST Act") have a corresponding meaning to that in the GST Act.

- (b) The consideration for any supply under this Planning Agreement excludes GST.
- (c) Where a party to this Planning Agreement is taken to have made a supply to another party, the recipient of that supply must, in addition to the consideration payable for the supply and when paying the consideration for the supply, also pay to the maker of the supply an amount equal to the GST payable in respect of that supply. The recipient of a supply must also pay the GST payable in respect of a supply for which no monetary consideration is payable when the maker of the supply demands payment.
- (d) The maker of a supply must give the recipient a tax invoice in the form required by the GST Act at the same time it receives payment from the recipient of the GST payable for that supply.
- (e) Despite any other provision of this Agreement, any amount payable under this Agreement, which is calculated by reference to an amount paid or incurred by a party to this Planning Agreement, is reduced by the amount of any input tax credit to which that party or a member of its GST group is entitled in respect of that amount.


28. This agreement binds the parties hereto and their respective executors, administrators and assigns.

**IN WITNESS WHEREOF** the parties have set their hands and seals on the day first hereinbefore written.

**SIGNED SEALED & DELIVERED** )  
 for an on behalf of )  
 of **BAYSIDE COUNCIL ABN 80 690 785 443**)

by its General Manager pursuant to )  
 Section 683 of the Local Government Act 1993 )

  
 General Manager

  
 Witness

**EXECUTED by BOTANY BAY GP**

)

**PTY LIMITED (ACN 605 001 143)**

)

Pursuant to Power of Attorney

)

)

.....

Signature of Attorney

.....

Name of Attorney

.....

Witness

.....

Name of Witness

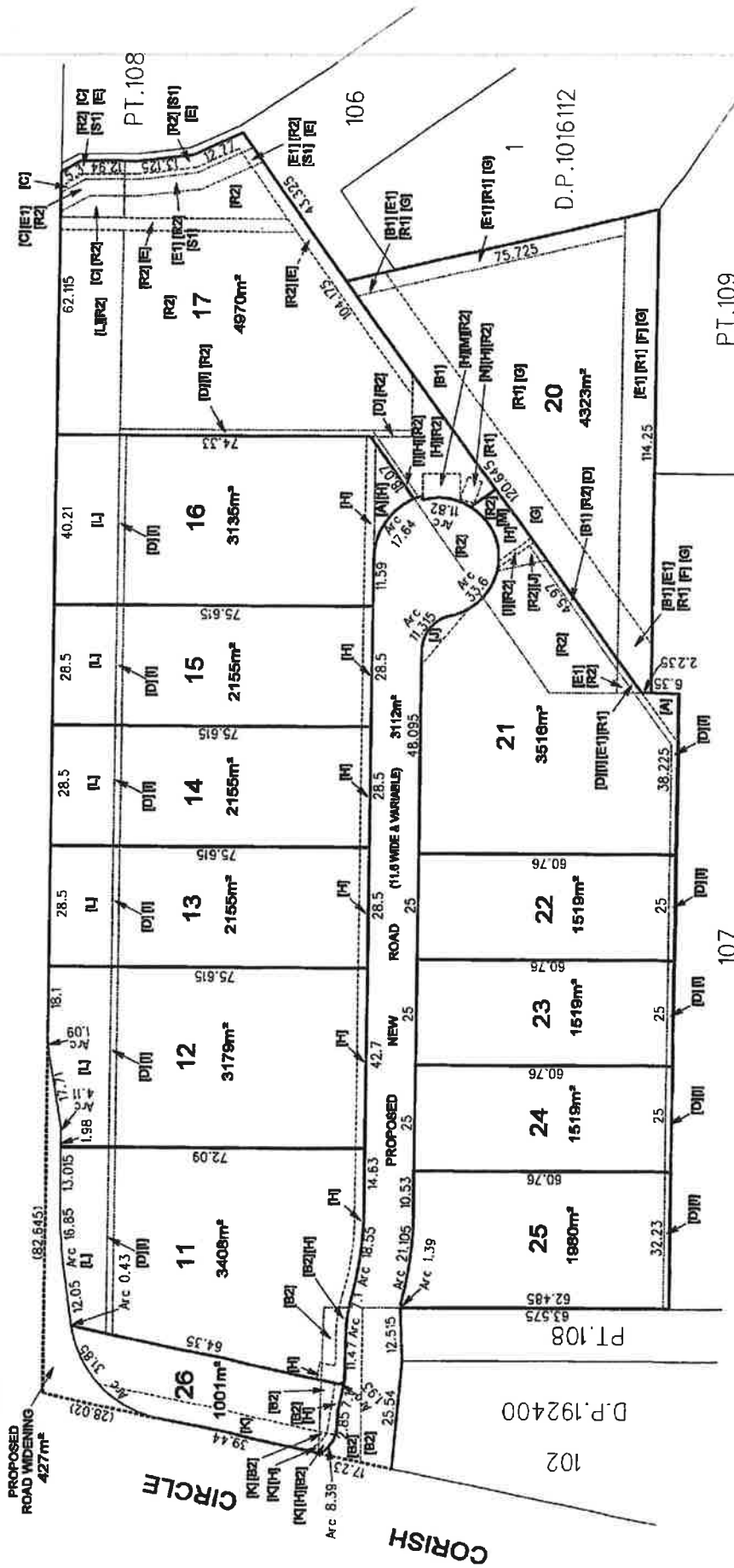
# PLAN

OF PROPOSED SUBDIVISION  
LOT 105 & LOT 111 D.P. 1204999

L.G.A.: BAYSIDE  
Loc.: BANKSMEADOW  
Pct.: BOTANY  
Co.: CUMBERLAND  
1:1000

DENISON

STREET



EXISTING EASEMENTS (D.P. 1204999):

- [B1] - RIGHT OF CARRIAGEWAY 8 WIDE & VARIABLE
- [B2] - RIGHT OF CARRIAGEWAY VARIABLE WIDTH (TO BE RELEASED ON CREATION OF NEW ROAD)
- [E1] - EASEMENT FOR SERVICES 4 WIDE, 8 WIDE & VARIABLE
- [R1] - RESTRICTION ON USE VARIABLE WIDTH
- [R2] - RESTRICTION ON USE VARIABLE WIDTH
- [S1] - EASEMENT FOR SERVICES 10 WIDE

PROPOSED EASEMENTS & RESTRICTIONS:

- [A] - RIGHT OF CARRIAGEWAY VARIABLE WIDTH
- [C] - EASEMENT FOR BORE WATER PUMP 15 WIDE & VARIABLE
- [D] - EASEMENT FOR DRAINAGE 1.5 WIDE
- [E] - EASEMENT FOR SERVICES 3 WIDE
- [F] - EASEMENT FOR LANDSCAPING 8 WIDE & VARIABLE
- [G] - EASEMENT FOR SERVICES VARIABLE WIDTH (WHOLE LOT)
- [H] - EASEMENT FOR SERVICES 2.25 WIDE & VARIABLE
- [I] - EASEMENT FOR EGRESS 1.5 WIDE
- [J] - EASEMENT FOR SERVICES VARIABLE WIDTH
- [K] - EASEMENT FOR SERVICES 6 WIDE & VARIABLE
- [L] - EASEMENT FOR PROTECTION OF TREES 15 WIDE & VARIABLE
- [M] - EASEMENT FOR CARPARKING IN FAVOUR LOTS 9, 10, 11 & 12
- [N] - EASEMENT FOR AUSROAD

LOT 26 IS TO BE DEDICATED TO COUNCIL FOR PUBLIC CARPARK

NOTE  
DIMENSION AND AREAS SHOWN HEREON ARE  
APPROXIMATE ONLY AND SUBJECT TO SURVEY.

Rygate & Company Pty Limited

P.W. Rygate & West

ABN 61 001 204 897

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REF: 77438

DATE: 28/10/2016

