

THIS DEED made the 18th day of March 2016.

BETWEEN: COUNCIL OF THE CITY OF BOTANY BAY of 141 Coward Street, Mascot in the State of New South Wales ("the Council") of the first part

AND: CENTRAL ELEMENT PTY LTD (ACN 151 022 203) of registered office Goodwin Chivas & Co Level 4, 401/29-31 Solent Circuit Baulkham Hills NSW 2153 ("Developer") of the second part.

AND: C E CONCEPTS PTY LTD (ACN 149 323 857) of registered office Goodwin Chivas and & Co, Level 4, 401/29-31 Solent Circuit Baulkham Hills NSW 2153 ("Owner") of the third part.

WHEREAS:

- A. C E Concepts Pty Ltd is the registered proprietor of 5 Haran Street, Mascot, legally known as Lot 1 in DP1189157 ("the Site").
- B. Central Element is the developer of the Site. Central Element is a "developer" as defined pursuant to Section 93F(1) of the Environmental Planning and Assessment Act 1979 ("the Act").
- C. The Council is a consent authority legally entitled to determine development applications within the Botany Bay Local Government Area and legally entitled to enter into Planning Agreements.
- D. Development Application No.12/86 ("the DA") was refused by Council on 27 February 2013. The Developer appealed the decision to the Land and Environment Court ("the LEC"), and the matter was subsequently resolved following agreement between the Developer and the Council pursuant to Section 34 of the Act (case number 10142 of 2013).
- E. The Court made orders on 5 June 2013 approving DA-12/86 for the demolition of the existing structures and the erection of a nine storey residential flat building containing 30 apartments and two levels of basement parking at 5 Haran Street, Mascot, subject to conditions of consent ("the Consent").
- F. Condition 66 of the Consent required the parties to enter into a voluntary planning agreement pursuant to section 93F of the Act. Condition 66 provided as follows:

Voluntary Planning Agreement – A Voluntary Planning Agreement shall be entered into and executed between the owner/s of the site and Council to undertake works detailed hereunder and which shall be undertaken in addition to the Section 94 Contributions payable under the Mascot Station Precinct Section 94 Contributions Plan (as provided in Condition No.67 of this consent). The Voluntary Planning Agreement shall ensure that the following works are undertaken:



- a) *Embellishment to the roadway and verge that comprises both sides of Haran Street immediately adjacent to the allotment width of the subject site,*
- b) *Landscape embellishment to the end of Haran Street (and including that portion of land owned by Sydney Water and which comprises part of the Sydney Water Main Divisions Sewer) generally in accordance with the concept plan prepared by A Total Concept Drawing No. L/03 dated 12/4/13 and to the satisfaction of Council,*
- c) *Vehicular access to the future Linear Park shall be maintained via a 3m wide accessway at the head of Haran Street.*
- d) *Design and reconstruct kerb and gutter along the entire Haran Street cul-de-sac. The works shall include removal of any redundant crossings.*
- e) *Design and construct footpath paving and street landscaping of Haran Street cul-de-sac in accordance with the requirements of Council's Landscape Architect.*
- f) *Design and construct proposed vehicular crossing on Haran Street. The crossing shall be minimum 6m wide at the property boundary and at 90o to the property boundary line in plain concrete. All adjustments to the nature strip, footpath and/or public utilities' mains and services as a consequence of the development and any associated construction works shall be carried out at the full cost to the Applicant.*
- g) *Design and construct road pavement on Haran Street cul-de-sac. The pavement design and associated geotechnical report shall provide details of the strength of the existing sub-grade, structural design of the road pavement and pavement construction requirements. The road pavements shall be designed based upon soil tests performed by a registered N.A.T.A Soils Laboratory and to the traffic loading 3 x 105 ESA in accordance with AUS-SPEC standards and specifications and the pavement construction shall be flexible pavement with minimum 50mm asphaltic concrete wearing course. The minimum pavement thickness, excluding the thickness of surfacing shall be 300mm.*
- h) *Resurface the road pavement on Haran Street cul-de-sac with 50mm AC10 hotmix. The area of construction shall cover the entire Haran Street cul-de-sac in front of the site (both sides of the roadway).*
- i) *Design and provide line marking and all necessary signage on Haran Street cul-de-sac to RMS's requirements. The details of line marking and signage shall be approved by Council's Local Traffic Committee.*



- j) *Design and install appropriate street lighting on Haran Street cul-de-sac in accordance with the relevant authority's requirements and all capital contributions associated with the installation of the lighting shall be borne by the applicant. Detailed street lighting design and construction plans, prepared by a suitably qualified person, shall be submitted to Ausgrid for approval. The design shall be in accordance with AS1158 and to Ausgrid's requirements. The proposal shall include details of all fixtures being proposed and underground power reticulation shall be allowed for in the design. The lighting design categories on Haran Street cul-de-sac shall be in P2 design category.*
- k) *All of the above works shall be designed and prepared by suitably qualified Civil Engineers and Landscape Architects with relevant qualification in civil engineering and landscape respectively. All costs associated with the design and construction of the public domain works shall be borne by the Applicant.*

G. By way of Modification Application 12/086/05, submitted to the Council on 11 November 2015, the Developer sought the Council's consent to amend Condition No. 66 of the Consent in the following terms (**Modification Application**):

Prior to the issue of an Occupation Certification the application shall make a monetary contribution equal to an agreed value towards the landscape works being undertaken adjacent to the site at Linear Park. The contribution is in addition to the Section 94 Contributions payable under the Mascot Station Precinct Section 94 Contributions Plan (as provided in Condition 67 of this consent). In addition, the applicant shall undertake the following works as part of the development of 5 Haran Street:

- a) Design and reconstruct footpath paving adjacent to 5 Haran Street*
- b) Design and construct proposed vehicular crossing on Haran Street. The crossing shall be a minimum 6m wide at the property boundary and at 900 to the property boundary line in plain concrete. All adjustments to the nature strip, footpath and/or public utilities mains and services as a consequence of the development and any associated construction works shall be carried out at the full cost to the Applicant.*

All of the above shall be designed and prepared by suitably qualified Civil Engineers with relevant qualifications in civil engineering. All costs associated with the design and construction of the public domain shall be borne by the applicant.

H. The Council has not agreed to any reduction in any contribution the Council may be entitled to pursuant to Section 94 of the Act.



- I. The monetary contribution to be paid was negotiated and agreed between the parties, and on 18 March 2016 the Developer irrevocably offered to enter into this planning agreement with the Council.
- J. The parties have agreed that Condition 66 of the Consent be amended as follows:

66A. Prior to the issue of any Occupation Certificate (interim or otherwise), the applicant shall undertake the following works as part of the development of 5 Haran Street:

- a) Design and construct footpath paving adjacent to 5 Haran Street*
- b) Design and construct proposed vehicular crossing on Haran Street. The crossing shall be minimum 6m wide at the property boundary and at 90° to the property boundary line in plain concrete. All adjustments to the nature strip, footpath and/or public utilities" mains and services as a consequence of the development and any associated construction works shall be carried out at the full cost to the Applicant.*

These works shall be designed and prepared by suitably qualified Civil Engineers with relevant qualification in civil engineering. All costs associated with the design and construction of the public domain works shall be borne by the Applicant.

66B. Prior to the issue of any Occupation Certificate (interim or otherwise):

- (a) the owner/s of the site, and any person entitled to act upon this consent, shall execute and enter into a Voluntary Planning Agreement with the Council (in the terms of the annexed agreement), for the payment of a monetary contribution in the amount of \$48,405.00, for the material public benefit of public open space works in respect of Linear Park, referred to in Council's Mascot Station Precinct s94 Contributions Plan; and*
- (b) pay the monetary contribution to the Council.*

K. This Planning Agreement has been publicly notified by the Council in accordance with Section 93F of the Act and clause 25D of the Environmental Planning & Assessment Regulation.

L. Pursuant to Section 93F of the Act the parties hereto now enter into this Planning Agreement.

NOW THIS DEED WITNESSES as follows:

1. This Planning Agreement shall be binding on the parties hereto and upon their respective heirs, executors, transferees and assigns.



2. 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.
3. 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.
4. The Developer covenants and agrees with the Council that the Developer will provide Council with a material public benefit, in the form of a monetary contribution in the amount of \$48,405.00 (**Monetary Contribution**), to be applied towards the public purpose of the provision of Linear Park public open space works, identified in Council's Mascot Station Precinct s94 Contributions Plan (**Public Benefit Works**).
5. The Developer and the Owner jointly covenant and agree with the Council that:
 - a. the Developer will provide Council with this Planning Agreement, duly executed by the Developer and the Owner, for Council to exhibit as part of its obligations under the Act, being an irrevocable offer to enter into this Planning Agreement, subject to the Modification Application being approved, together with an unconditional bank guarantee for the Monetary Contribution.
 - b. After the expiration of the period of exhibition of planning agreements required by the Act, and after consideration of any submissions received, Council will notify the Developer if Council requires any amendments to be made to the Agreement.
 - c. If any amendments are made to the Planning Agreement, the Developer and Owner covenant to provide Council with the duly executed amended Planning Agreement for Council to exhibit, being an irrevocable offer to enter into the amended Planning Agreement, subject to the Modification Application being approved.
 - d. Upon the expiration of the notification period, with no submissions received which Council considers necessary to warrant amending the Agreement, and if Council Approves the Modification Application, Council will execute the Planning Agreement and notify the Developer and Owner in writing.
6. The Developer covenants and agrees with Council to pay the Monetary Contribution within seven (7) days of the date upon which Council notifies the parties that the Council has executed the Planning Agreement.
7. If the Developer does not pay the Monetary Contribution within the period specified in Clause 6 hereof, the Developer acknowledges that the Council shall be entitled to call upon the bank



guarantee in order to satisfy the Developer's obligation to pay the Monetary Contribution to Council.

8. If the Developer pays the Monetary Contribution specified in accordance with Clause 6 hereof, the Council shall return the bank guarantee to the Developer within seven (7) days of Council receiving the Monetary Contribution.
9. The Developer and Owner jointly covenant and agree with the Council that:
 - a. Prior to the issue of any Occupation Certificate (interim or otherwise), the Owner shall do all things reasonably necessary to obtain the consent to the registration of this Planning Agreement over the title to the Site pursuant to Section 93H of the Act from all persons who have an interest in the Site and shall have the Planning Agreement registered on the title to the Site;
 - b. that forthwith after receiving the consents specified in subclause 9(a) hereof it shall cause this Planning Agreement to be registered on the title of the Development Site;
 - c. that if this Planning Agreement is not registered on the title to the Site, and if the Developer or Owner should propose to sell the Development Site, or any part thereof, then they shall:
 - i. within seven (7) days of listing the Site 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 Site, and if the Developer or Owner should propose otherwise than by sale to transfer or assign their interest in the 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.



10. The Developer acknowledges and agrees that the Monetary Contribution specified in Clause 4 hereof shall be excluded from being taken into account in the determination of contributions under Section 94 of the Act and that it shall not be entitled to any reduction in such contributions.
11. The Council acknowledges that if an incoming purchaser of the Site as a whole, or any part thereof, enters into with the Council a like Planning Agreement to this present Planning Agreement in which the same covenants as set out herein apply, the Developer will be released from any future obligation under this Planning Agreement. Such release will not release the Developer from any liability to the Council for any antecedent breaches of this Planning Agreement by the Developer.
12. The Developer and Owner further covenant and agree with the Council that pending the registration of this Planning Agreement on the title of the Site as required by Clause 9 hereof, the Council shall be entitled to register a caveat at Land & Property Information New South Wales over the title to the Site to protect its interest therein pursuant to this Planning Agreement.
13. The Developer shall pay Council's reasonable solicitor/client costs of preparing this Planning Agreement and any cost to Council of registering the Planning Agreement or caveat over the titles to the Site. Should it be necessary for Council to consent to the registration of any lease, mortgage, consolidation of title, strata plan or other document as a result of a caveat being registered on the titles to the 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 Council's reasonable costs of preparing any substitute Planning Agreement between Council and any incoming purchaser, assignee or transferee of the Site or part thereof. Council must give the Developer a tax invoice for any amount payable by the Developer under this clause.
14. 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 its option, to enforce by way of injunctive 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 121 B of the Act, or Class 4 proceedings in the Land and Environment Court, or otherwise.



15. Any amendment or variation to this Planning Agreement is not effective unless it is in writing and signed by both parties.
16. The explanatory note put on exhibition with this Planning Agreement is not to be used in construing the terms of this Planning Agreement.
17. 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 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 is disclosed by a party during the conciliation unless such information, documents or facts would have been otherwise discoverable in judicial or arbitral proceedings.
18. The parties acknowledge that:
- 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;



- 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.

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

THE COMMON SEAL of the CITY
OF BOT ANY BAY COUNCIL was
hereunto affixed pursuant to a resolution
of the Council passed on the 6 day
of April

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Mayor

.....
General Manager

EXECUTED by CENTRAL ELEMENT
PTY LIMITED (ACN 151 022203)
by:

.....
Director

.....
~~Secretary~~

Director

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Witness

EXECUTED by C E CONCEPTS
PTY LTD (ACN 149 323 857)
by:

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Director

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~~Secretary~~

Director

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Witness