

**BETWEEN:**

**BOTANY BAY CITY COUNCIL**

**AND:**

---

**AND:**

**J&B ELIAS PTY LTD**

**AND**

**ORIBE PTY LTD**

**AND**

**B-1ST CHOICE ROOFING PTY LTD**

**AND**

**BRADLEY ELIAS**

---

**DEED**

---

**HOUSTON DEARN O'CONNOR**

Solicitors

Suites 3 & 4, 1st Floor, 127-133 Burwood Road  
BURWOOD NSW 2134  
DX 8565 BURWOOD

Tel:

(02) 9744 9247

THIS DEED made the 30 day of May 2007,

BETWEEN **BOTANY BAY CITY COUNCIL** of 141 Coward Street, Mascot ("Council") and **J & B ELIAS PTY LTD (ACN 059 743 181)** of 58 Bareena Street, Strathfield, **ORIBE PTY LTD (ACN 104 026 431)** of 124B Dean Street, South Strathfield, **B-1<sup>ST</sup> CHOICE ROOFING PTY LTD (ACN 071 522 873)** of 30 Ada Avenue, Strathfield, **Damjet Pty Ltd (ACN 115715109)** of 6 Renshaw Avenue Auburn & **CW Building Pty Ltd (ACN 051812125)** of 53 Murray Street, Merrylands. ("the Land Owner") & **J & B Elias Pty Ltd** ("Applicant")

WHEREAS:

- A. The Land Owner is the registered proprietor of the land known as 1 – 5 Bourke Street, and 29 – 33 Church Avenue, Mascot ("the Developed Land") being the whole of the land contained in folio identifiers 1/220989, 2/220989, 3/220989 (J & B Elias Pty Ltd, Damjet Pty Ltd & CW Building Pty Ltd ), D/370926 (B-1st Choice Roofing Pty Ltd, Damjet Pty Ltd and CW Building Pty Ltd ), Auto Consol 7973-77 (Oribe Pty Ltd, Damjet Pty Ltd and CW Building Pty Ltd) and Part Lot 4 in DP 506923.
- B. The Applicant proposes redeveloping the Developed Land by demolishing the existing buildings on the Developed Land and constructing thereon a new multiunit residential development incorporating a retail/commercial use, parking amenities and land dedication for road widening of Church Avenue and Station Square East ("Proposed Development").
- C. On 12 August 2003 Krikis Taylor Architects on behalf of the Applicant lodged a development application for the redevelopment of the Developed Land (Development Application No. 04/71).
- D. On 11 August 2004 Council issued a Notice of Determination granting development consent to the Proposed Development ("the Development Consent") and on 23 May 2006 the Development Consent was modified at the Applicant's request.

E. The Development Consent as modified includes conditions 6(b) and (c) namely:

*“6(b) (i) The applicant, at no cost to Council shall dedicate a the strip of land for road widening purposes adjoining and for the full length of the site frontage to Church Avenue.*

*The required road widening and associated landscaping to Church Avenue shall form the subject of a further development application to Council. This development application is to be submitted to and approved by Council prior to the issue of a Construction Certificate.*

*All road widening and associated landscaped works shall be carried out prior to the issue of an Occupation Certificate.*

*(ii) The applicant shall enter into a Deed of Agreement with Council, prepared by it's Solicitors, the terms of which will require the dedication and construction of the road, the existing above ground electricity and telecommunication cables in Church Avenue adjoining the site to be replaced, at the applicant's expense, by underground cables, together with the provisions of appropriate street light standards, drainage (if any), kerb and gutter, footway, bicycle paths, landscaping, traffic signs, to the relevant Australian Standards and Codes of Practice.*

*(c) (i) The applicant, at no cost to Council shall dedicate the land identified as Mascot Station East open space in drawing DA-03 Revision E dated 24 April 2003.*

*The required open space and associated landscaping shall form the subject of a further development application to Council. This development application is to be submitted to and approved by Council prior to the issue of a Construction Certificate. All paving and associated landscaped works shall be carried out prior to the issue of an Occupation Certificate.*

*(ii) The applicant shall enter into a Deed of Agreement with Council, prepared by it's Solicitors, the terms of which will require the dedication and construction of the open space, at the applicant's*

*expense, together with the provision of appropriate street light standards, drainage (if any), kerb and gutter, footway, paving, landscaping, to the relevant Australian Standards and Codes of Practice.*

- (iii) *The applicant shall enter into a Planning Agreement prepared by it's Solicitors, the terms of which will require the construction of public improvement works/open space being known as "Mascot Station Ease open space", at the applicant's expense, together with the provisions of appropriate street light standards, drainage (if any), kerb and gutter, footway, paving, landscaping, to the relevant Australian Standards and Codes of Practice".*

- F. The proposed development is the demolition of existing buildings and construction of a new multiunit residential development incorporating a retail/commercial use, parking amenities and land dedication for road widening of Church Avenue and Station Square East as shown in the approved plans being Drawing Numbers DA01 Issue C, DA02 Issue E, DA03 Issue E, DA04 Issue E, DA05 Issue F, DA06 Issue E, DA07 Issue E, DA08 Issue E, DA09 Issue E, DA10 Issue E, DA11 Issue E, DA12 Issue E, DA13 Issue E; DA14 Issue E, DA15 Issue E, DA16 Issue E, DA17 Issue E, DA18 Issue E, DA19 Issue E dated 24 April 2003 prepared by Krikis Taylor Architects as amended by DA-01 Issue D, DA-02 Issue F, DA-03 Issue G, DA-04 Issue H, DA-05 Issue H, DA-06 Issue G, DA-07 Issue G, DA-08 Issue G, DA-09 Issue G, DA-10 Issue G, DA-11 Issue J, DA-12 Issue G, DA-13 Issue F, DA-14 Issue F, DA-15 Issue F, DA-16 Issue F, DA-17 Issue G, DA-18 Issue G, DA-19 Issue F and prepared by Krikis Taylor Architects and received by Council on 14 February and 9 May 2006.
- G. The land proposed to be dedicated as open space described as Mascot Station East ("Public Open Space") is that land shown in drawing DA03 Revision E dated 24 April 2003 marked ("Open Space Plan").
- H. The Section 96 Modification Application to increase the number of residential units in the development, delete the rooftop restaurant and revise the ground floor

to allow for further retail space was also accompanied by a proposal to enter into this agreement whereby the public improvement works to Mascot Station East is to be made without offsetting any Section 94 contributions.

- I. Pursuant to Section 93F of the EP& A Act the parties now enter into this agreement ("Planning Agreement")

NOW THIS DEED WITNESSETH AS FOLLOWS:

1. This agreement shall be binding upon the heirs, executors, transferees and assigns of each of the parties.
2. The Applicant and the Land Owner acknowledge and agree that:
  - (i) the Proposed Development enjoys the benefits of an additional 14 residential units as a result of the deletion of the rooftop restaurant and internal charges to the development with such changes not complying with the requirement of the Mascot Station DCP requirements as to the maximum number of 1 bedroom apartments as ("development incentives").
  - (ii) The requirements of conditions 6(b) and (c) represent a reasonable and appropriate consideration for the development incentives.
  - (iii) The requirements of the proposed conditions specified in subclause (ii) hereof are solely in consideration for the development incentives and shall not be taken into account when determining the contributions required by the development consent pursuant to Section 94 of the Environmental Planning and Assessment Act 1979.
  - (iv) The Council in supporting the Proposed Development as modified did so in reliance upon the development including the public benefits encompassed by the provisions of conditions 6(b) and (c) of the Proposed Development as modified and that the Council would not otherwise have supported approval of the Proposed Development modification.

- (v) S94(6) of the EP&A Act does not apply with respect of proposed conditions 6(b) and (c) to the development consent granted for the Proposed Development.
3. The Applicant and the Land Owner covenant and agree with the Council that if the Development Consent and is taken up they will comply fully with the requirements of conditions 6(b) and (c) and will not seek any variation, modification or deletion of any of those conditions nor will they seek any reduction of the S94 contribution payment required by S94 of the EP&A Act on account of the public benefits provided in condition 6(b) and (c).
  4. The rights of the Council expressly provided for herein are cumulative and in addition to and not exclusive of any rights of Council existing at law for which Council would otherwise have available to it.
  5. In any case any one or more of the provisions contained in this Deed shall be invalid, legal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions contained therein shall not thereby be affected.
  6. The Applicant shall do all things reasonably necessary to ensure that the Land Owner complies with its obligations hereunder.
  7. Prior to the issue of an Occupation Certificate in relation to the proposed multiunit residential commercial development on the Developed Land the Land Owner shall:
    - (a) consolidate the existing allotments comprising the Developed Land into one title and dedicate the Public Open Space as public reserve such that the Public Open Space will vest in the Council;
    - (b) Council agrees to accept and will do all things reasonably necessary to allow that dedication to occur;
    - (c) Construct the benches, paving, landscaping, lighting, kerb and gutter and all other works as approved by Council and as shown in the Open Space Plan for the Public Open Space.

8. The Land Owner covenants with the Council on behalf of itself its successors in title and assigns that in respect of the Public Open Space:
  - (a) If the Planning Agreement is not registered on the title to the Developed Land and, if it should propose to sell the Developed Land then it shall;
    - (i) within seven (7) days of listing the Developed Land 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 the Council a like agreement to this present 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 21 days of receipt from the Council of a replacement agreement between the Council and the purchaser substantially in the same form as this agreement have it executed by the Purchaser and return it to the Council;
  - (b) If the Planning Agreement is not registered on the title to the Developed Land and, if it should propose otherwise than by sale to transfer or assign its interest in the Developed land or any part thereof to a transferee or assignee then it shall before effecting any such assignment or transfer, have the incoming assignee or transferee enter into an agreement with the Council substantially in the form of this present agreement in so far as concerns the interest of the Land Owner assigned or transferred and provide same to the Council.
9. The Land Owner shall do all things reasonably necessary to obtain the consent to the registration of this Planning Agreement over the title to the Developed Land pursuant to S93H, prior to the issuing of the Construction Certificate or such further time frame as agreed to in writing between the parties, from all persons who have an interest in the Developed Land.
10. (a) The Land Owner agrees that, in the event that the agreement from all persons who have an interest in the Developed Land cannot be obtained as required by

clause 9, that the Council shall be entitled to register a Caveat at the Land and Property Information NSW over the title to the Developed Land.

- (b) Once the land is dedicated for open space and road widening Council will remove any caveat it has registered over the title to the Developed Land.
11. The Land Owner shall pay the Council's reasonable Solicitor/Client costs in preparing this Planning Agreement and the cost of Council registering the Planning Agreement or Caveat over the title to the Developed Land. Further, 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 title to the Developed Land and the Land Owner shall pay the Council's reasonable solicitor/client costs of obtaining Council's consent to such registration. The Land Owner shall also pay Council's reasonable costs of preparing any substitute Planning Agreement with any incoming purchaser, assignee or transferee of the Developed Land..
12. Should the Land Owner be in breach of any terms of this Planning Agreement, and without any prior warning being given, Council shall be entitled, at its option, to enforce by way of injunctive relief in the Supreme Court any provisions of this agreement which have been breached, or to seek damages or seek to enforce the provisions of any development consent which relate to the Developed Land whether by way of order under Section 121B of the Environmental Planning and Assessment Act, Class 4 proceedings in the Land and Environment Court or otherwise.
13. Any amendment or variation to this agreement is not effective unless it is in writing and signed by all the parties.
14. In the event of any disagreement arising between the parties hereto arising out of the provisions of this Planning Agreement which they are unable within a reasonable time to settle 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.




15. It is acknowledged by the parties that the Land Owner is the developer for the purposes of this proposed development and is the relevant party for the purposes of this Planning Agreement.
16. Any goods and services tax (GST) payable in connection with any taxable supply made by either party under this agreement or pursuant to any of the conditions that the development consent referred to herein shall be the sole responsibility of the Land Owner.

THE COMMON SEAL of Botany Bay )  
City Council was hereunto duly affixed )  
Pursuant to a resolution carried at a )  
Duly convened meeting on       day of )  
                                2005                     )  
In the presence of:                             )



Executed by J & B ELIAS Pty Ltd )  
ACN 059 743 181 )  
BY: )

Executed by \_\_\_\_\_ )  
ORIBE PTY LTD (ACN 104 026 431)  
By: \_\_\_\_\_ )

Executed by DAMJET PTY LTD (ACN  
115715109) by:

  
.....  
Sole Director/Secretary  
Elias Elias

Executed by CW BUILDING  
PTY LTD (ACN 051812125) by:

 .....	 .....
Director	Secretary
Miledy Elias	Nasr Elias