

DATED 31 January 2014

BETWEEN:

**THE COUNCIL OF THE CITY OF
BOTANY BAY**

("the Council")

AND:

PETER KOSTAS & CHRISTINE KOSTAS

("the Owners")

DEED OF AGREEMENT

HOUSTON DEARN O'CONNOR

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THIS DEED made the 31st day of January 2014

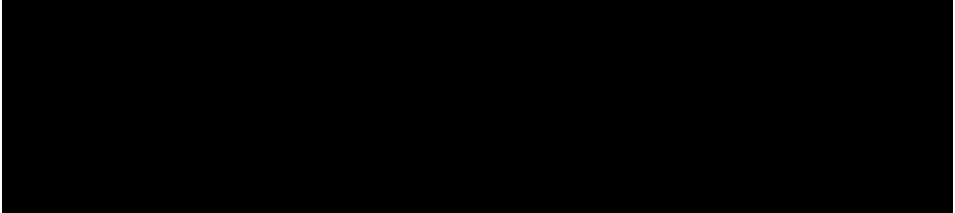
BETWEEN: THE COUNCIL OF THE CITY OF BOTANY BAY of 141 Coward Street, Mascot in the State of New South Wales ("the Council") of the first part

AND: PETER KOSTAS and CHRISTINE KOSTAS both of 1161 Botany Road, Mascot in the said State ("the Owners") of the other part

WHEREAS:

- A. The Owners are the current registered proprietors of the land known as 1153-1155 Botany Road, Mascot ("the Development Site") being the whole of the land contained in Folio Identifier A/29906.
- B. The rear boundary of the Development Site adjoins the public laneway known as Botany Lane, Mascot.
- C. By notification published in the Government Gazette of 31 October 1969 ("the Realignment Notice") pursuant to Section 262 of Part IX of the Local Government Act 1919 the Minister for Lands gave notice of the realignment of the boundaries of Botany Lane as shown on approved realignment plan M5-2626 deposited in the Department of Lands Sydney.
- D. The effect of the publication of the Realignment Notice was to extend the western boundary of Botany Lane a distance of 3.66 metres inside the Development Site across the whole of the rear portion of that site ("the realignment strip").
- E. Part IX of the Local Government Act 1919 was repealed as from 1 July 1993 and from that date provisions concerning the widening of public roads have been contained in Division 2 of Part 3 of the Roads Act 1993 ("the Roads Act").
- F. By virtue of the provisions of Division 2 of Part 3 and clause 16 of Schedule 2 of the roads Act the realignment strip ~~became vested in~~ the Council as road without need for

further dedication as from 1 July 1993 and the Owners became entitled to compensation from Council in respect of Council's acquisition of the realignment strip.

- G. On 1 November 2007 the Owners lodged with Council Development Application 08/115 seeking development consent for alterations/additions to the existing building on the Development Site ("the Development Application").
- H. On 28 February 2008 the Council received a letter dated 26 February 2008 from solicitors acting on behalf of the Owners, advising of the Owners preparedness to enter into a Planning Agreement with the Council in connection with the Development Application to provide for:
- (i) dedication by the Owners to the Council as road that part of the Development Site comprising the realignment strip;
 - (ii) waiver by Council of a Section 94 Contribution in respect of the development the subject of the Development Application in lieu of payment of compensation in respect of the acquisition of the realignment strip; and
 - (iii) Council permitting the Owners to continue to use the realignment strip until notification by the Council of its requirement to use it for road purposes, subject to the Owners maintaining the land comprising the realignment strip at their cost during such period of occupation.
- I. By Notice of Determination dated 12 March 2008 the Council advised the Owners of its consent to the Development Application subject to conditions set out therein ("the Development Consent"). Condition 2 of the Development Consent provides:
- "2. The applicant must, as per the Voluntary Planning Agreement at no cost or expense to Council dedicate the area designated for road widening at the rear of the site to a width of 3.66 metres."
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- J. At the time of lodgement of the Development Application, and receipt by the Council of the letter specified in recital H hereof, issue of the Notice of Determination specified in recital I hereof, the parties hereto were unaware that the realignment strip had already vested in Council as specified in recital F hereof and were acting under the impression that a formal dedication by the Owners to the Council of the land comprising the realignment strip was required.
- K. In light of the subsequent knowledge that the realignment strip vested in the Council on 1 July 1993 as specified in recital F hereof the Owners have modified their offer to enter into a Planning Agreement with the Council as hereinafter set forth.
- L. Pursuant to Section 93F of the Act, the parties hereto now enter into this Planning Agreement.
- M. 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 does not take effect until the Owners have taken up and acted upon the Development Consent.
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 Owners and the Council acknowledge, covenant and agree:

- (a) that the grant of approval of the Development Consent by the Council without inclusion therein of a condition requiring payment of any contribution pursuant to Section 94 of the Act, or any other monetary contribution it might otherwise have been entitled to require, is accepted by the Owners in full satisfaction of any claim for compensation they have or may have had under the Land Acquisition (Just Terms Compensation) Act 1991 or any other legislation in respect of the acquisition by the Council of the realignment strip;
- (b) that the Owners shall forthwith upon receipt from the Council or its solicitors sign all such plans or documents and do all such other things necessary on their part to enable the Council to obtain formal title to the realignment strip;
- (c)
 - (i) that the Owners shall be permitted to continue to use the realignment strip (but without erecting any building or structure thereon) until twelve (12) months after receipt from Council of notification in writing to the Owners of the Council's requirement to use the realignment strip for road purposes;
 - (ii) notwithstanding clause 5(c)(i) the Owners shall be permitted to use the realignment strip until such time as the Council commences physical work on the site.
- (d) that the Council will not give a notice of the kind specified in subclause (c) of this clause unless acting in good faith it proposes to physically carry out widening of Botany Lane to at least one cross street and such work has been listed in the Council's adopted capital works programme;
- (e) that no rent or fee shall be payable by the Owners for their use and occupation of the realignment strip as provided for in subclause (c) hereof;

- (f) that the Owners must at their expense repair, maintain and keep clean the realignment strip during the period of their aforesaid occupation thereof; and
- (g) that upon provision to the Council by the Owners of this Planning Agreement duly executed by them the Council will issue an Occupation Certificate in respect of the development the subject of the Development Consent.

6. The Owners covenant 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 Development Site pursuant to Section 93H of the Act from all persons who have an interest in the 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 Development Site;
- (c) that if this Planning Agreement is not registered on the title to the Development Site, and if the Owners should propose to sell the Development Site, then they shall:
 - (i) within seven (7) days of listing the Development 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 Development Site, and if the Owners should propose otherwise than by sale to transfer or assign their interest in the 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. The Council shall pay the Owners' reasonable legal costs and disbursements incurred in complying with this provision.

- 7. (a) The Owners covenant and agree with the Council that in the event that the consents to registration of this Planning Agreement cannot be obtained from all persons who have an interest in the Development Site as required by clause 6(a), then the Council shall be entitled to register a caveat at Land & Property Information NSW over the title to the Development Site to protect its interest therein pursuant to this Planning Agreement;
- (b) Upon completion by it of the physical widening of Botany Lane the Council shall withdraw any caveat lodged pursuant to subclause (a) hereof;
- 8. (a) The Council shall pay the Owners' costs in connection with this Planning Agreement;
- (b) Each party shall pay its own costs of:
 - (i) the consent by Council 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 Development Site; and

- (ii) the costs of preparing any substitute Planning Agreement between Council and any incoming purchaser, assignee or transferee of the Development site.

- 9. Should the Owners 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 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.
- 10. Any amendment or variation to this Planning Agreement is not effective unless it is in writing and signed by all the parties.
- 11. The explanatory note put on exhibition with this Planning Agreement is not to be used in construing the terms of this Planning Agreement.
- 12. In the event of any disagreement between the parties hereto arising out 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 are disclosed by a party during the conciliation unless such information, documents or facts would have been otherwise discoverable in judicial or arbitral proceedings.
13. (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.
14. 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.

EXECUTED as a Deed on behalf of
THE COUNCIL OF THE CITY OF
BOTANY BAY by:

[Redacted Signature]

General Manager



[Redacted Signature]

Mayor

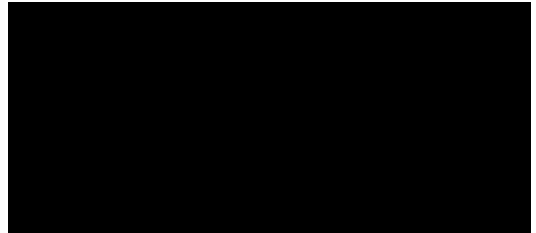
SIGNED SEALED & DELIVERED)
by the said **PETER KOSTAS**)
in the presence of:)



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[Redacted signature area]

SIGNED SEALED & DELIVERED)
by the said **CHRISTINE KOSTAS**)
in the presence of:)



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[Redacted signature area]