DATED 3RD MARCH ~~2009~~ 2010

BETWEEN:

BOTANY BAY CITY COUNCIL
("the Council")

AND:

FRANCESCO FORMICA
and **LILIANA FORMICA**
("the Owners")

DEED OF AGREEMENT

HOUSTON DEARN O'CONNOR
Solicitors
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12 Railway Parade
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Tel: 9744 9247
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REF: AJH:AS:B5038

THIS DEED made the 3RD day of MARCH 2010 ~~2009~~

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

AND: **FRANCESCO FORMICA** and **LILIANA FORMICA** both of in the said State ("the Owners") of the second part

WHEREAS:

A. The Owners are the registered proprietors of the land known as 1623-1625 Botany Road, Banksmeadow ("the Development Site") being the whole of the land comprised in Certificate of Title Folio Identifier 1/996067 and Lots 8 and 9 in Deposited Plan 468 comprised in Certificate of Title Auto Consol 8664-10.

B. On 15 December 2004 development application 05/245 was lodged in respect of the subject premises on behalf of and with the consent of the Owners seeking development consent for demolition of buildings to the rear and construction of a three storey multi unit residential building comprising of 14 residential units (10 x 2 bed, 4 x 3 bed) involving a refurbishment of existing retail shops and creation of a new retail residential building to Botany Road, parking for 37 vehicles in a semi basement with access from Rancom Street and associated landscaping ("the First Development Application").

C. By notice of determination dated 3 June 2005 the Council granted development consent to the First Development Application upon the conditions set out in that notice ("the First Development Consent").

D. On 9 August 2006 development application no. 07/049 ("the Second Development Application") was lodged with the Council on behalf of the owners seeking consent for construction of an additional floor level containing four (4) residential units to the three storey residential flat building approved for the Development Site as part of the First Development Consent.

E. By notice of determination dated 22 December 2006 the Council granted development approval for the development the subject of the Second Development Application ("the Second Development Consent").

F. On 9 August 2006 the Owners lodged with the Council an application pursuant to Section 96 of the Environmental Planning & Assessment Act 1979 ("the Act") seeking to amend certain specified conditions contained in the First Development Consent ("the First Modification Application").

G. By notice of determination dated 22 December 2006 the Council notified the Owners of its approval of the First Modification Application.

H. Condition 3(c) of the First Development Consent provided:

"(c) The applicant, at no cost to Council shall dedicate the small strip of land for road widening purposes adjoining the length of the site frontage to Rancom Street as identified by architectural plans.
The minor road widening to Rancom Street to facilitate turning vehicles shall be completed prior to the issue of an Occupation Certificate."

I. Condition 5 of the First Development Consent required payment of a contribution pursuant to Section 94 of the Act in the total amount of sixty thousand and three dollars and two cents ($60,003.02) in accordance with the provisions of City of Botany Bay Section 94 Contributions Plans 1-3.

J. Condition 9 of the Second Development Consent provided:

"9. The payment of the following monetary contributions in accordance with Council's Section 94 Contributions Plan 2005-2010:

Community Facilities	$10,136.00
Open Space and Recreation	$78,192.00
Administration	$384.00
Transport Management Botany	$11,404.00

This result is a total contribution of one hundred thousand one and sixteen dollars ($100,116.00), to be paid to Council prior to the issue of the Construction Certificate. The Section 94 Contribution fees are subject to annual review and the current rates are applicable for the financial year in which your consent is granted. If you pay the contribution in a later financial year you will be required to pay the fee applicable at that time."

J. The Section 94 Contributions required by condition 9 of the Second Development Consent are in addition to the Section 94 Contribution of sixty thousand and three dollars and two cents ($60,003.02) required by condition 5 of the First Development Consent.

K. On 21 May 2007 the Owners lodged with the Council an application pursuant to Section 96 of the Act seeking to amend the First Development Consent to provide for a reduction of thirty five thousand dollars ($35,000.00) in the Section 94 Contribution required by condition 5 of the First Development Consent as consideration for the dedication of land for the widening of Rancom Street as required by condition 3(c) of the First Development Consent ("the Second Modification Application") which remains undetermined.

L. On 21 May 2007 the Owners lodged with the Council an application pursuant to Section 96 of the Act ("the Third Modification Application") seeking to amend the Section 94 Contribution calculations set forth in condition 9 of the Second Development Consent. Specifically the Owners claimed that the contribution of seventy eight thousand one hundred and ninety two dollars ($78,192.00) specified in the condition for open space and recreation was incorrectly calculated and should have been instead the sum of forty eight thousand eight hundred and thirty four dollars ($48,834.00).

M. By letter of 12 November 2007 in response to the Third Modification Application the Council has advised the Owners of the methodology employed in calculating the open space and recreation contribution referred to in the preceding recital and confirmed that it has been correctly calculated at seventy eight thousand one hundred and ninety two dollars ($78,192.00) as specified in condition 9 of the Second Development Consent.

N. By letter dated 15 January 2008 the Owners have requested that Council enter into a

Voluntary Planning Agreement as provided for by Section 93F of the Act to provide for an agreed reduction in the aggregate amount of the Section 94 Contributions required by condition 5 of the First Development Consent and condition 9 of the Second Development Consent in consideration for the dedication by the Owners of part of the Development Site for widening of Rancom Street as required by condition 3(c) of the First Development Consent as provided for by Section 94(5) of the Act.

O. Pursuant to Section 93F of the Environmental Planning & Assessment Act 1979 the parties hereto now enter into this Planning Agreement.

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

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. This Planning Agreement does not take effect until the Applicant and/or the Owners have taken up and acted upon the First 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 Applicant and the Owners jointly and severally covenant and agree with the Council that prior to the issue of an Occupation Certificate for the developments provided for in either the First Development Consent or the Second Development Consent they shall at their expense prepare and effect registration by the Registrar General thereof a plan of

subdivision of the Development Site providing for the dedication to Council for road widening of that part of the Development Site coloured yellow on the plan annexed hereto and marked "A".

6. In consideration of the Applicant and the Owners effecting a dedication of part of the Development Site to the Council for road widening as provided for in clause 5 hereof the Council covenants and agrees with the Applicant and the Owners that as provided for by Section 94(5) of the Act it will accept such dedication in part satisfaction of the Section 94 Contributions totalling one hundred and sixty thousand one hundred and nineteen dollars and two cents ($160,119.02) required by condition 5 of the First Development Consent and condition 9 of the Second Development Consent and shall in that regard allow a reduction thereof in the amount of $58,000.00 and shall accept a reduced aggregate total of the Section 94 Contribution of $102,119.02 in respect of the First Development Consent and the Second Development Consent.

7. The Applicant and the Owners further covenant with the Council:

   (a) that prior to the issue of a Construction Certificate for the developments the subject of the First Development Consent and the Second Development Consent, or within such further time as the parties hereto agree, they shall do all things reasonably necessary to obtain the consent to the registration of this Planning Agreement over the titles 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.

8. The Applicant and the Owners further 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 7(a), then the Council shall be entitled to register a caveat at Land & Property Information NSW over the titles to the Development Site to protect its interest therein pursuant to this Planning Agreement.

9. Should the Applicant or the Owners be in breach of any of the 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 an order of the kind specified in Section 121B of the Act, or by 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.

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

THE COMMON SEAL of **BOTANY BAY CITY COUNCIL** was hereunto affixed pursuant to a resolution of the Council passed on the 25TH day of NOVEMBER, 2009

[redacted]

Mayor

[redacted]

General Manager

SIGNED SEALED & DELIVERED
by the said **FRANCESCO FORMICA**
in the presence of:

[redacted]

George Vlahakis
Solicitor
2 Gardeners Rd
Kingsford NSW 2032

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[redacted]

SIGNED SEALED & DELIVERED
by the said **LILIANA FORMICA**
in the presence of:

[redacted]

George Vlahakis
Solicitor
2 Gardeners Rd
Kingsford NSW 2032

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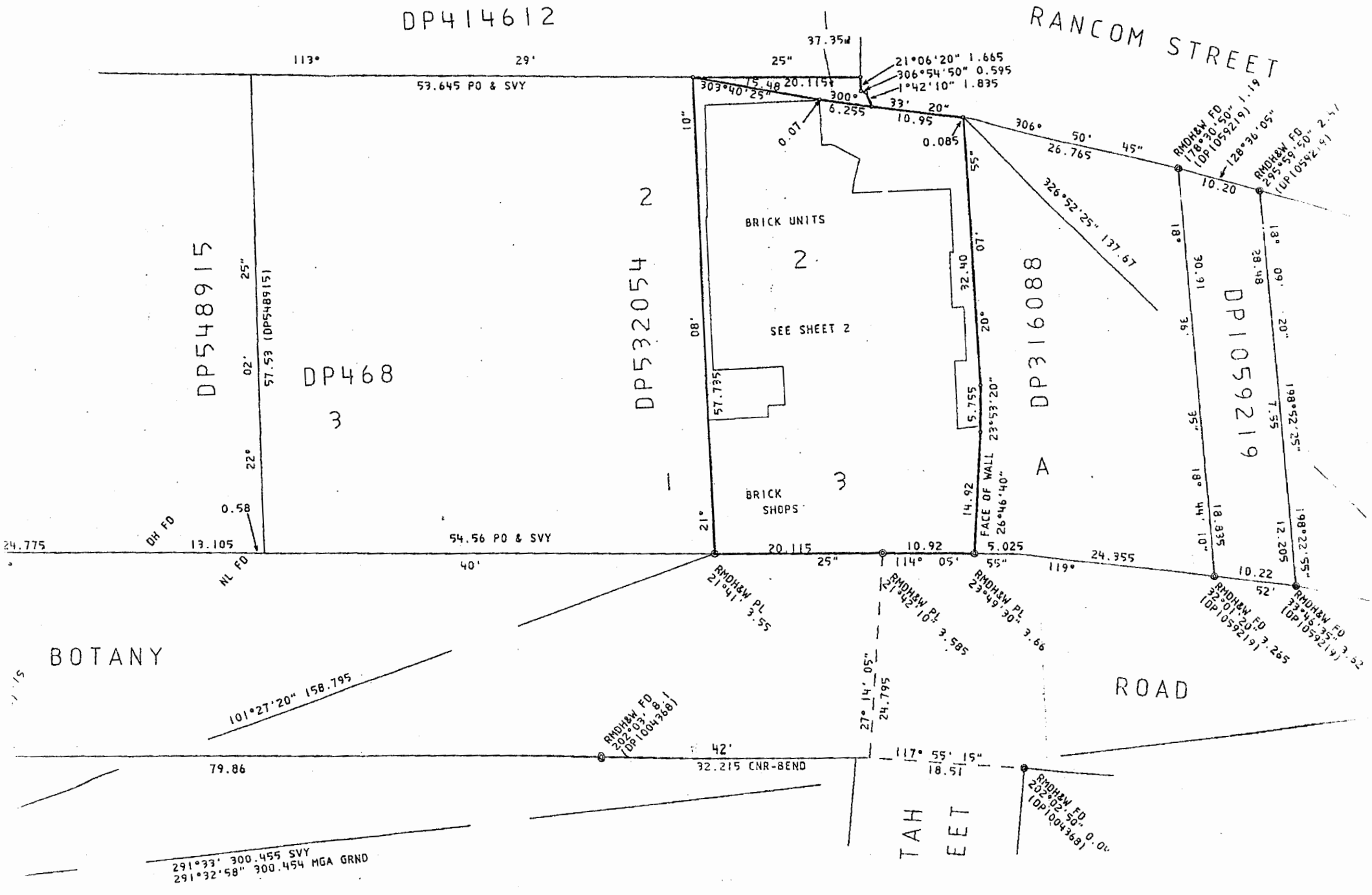
[redacted]

"A"

BEARINGS AND DIMENSIONS SUBJECT TO FINAL SURVEY