

Planning Agreement

Between:

Botany Bay City Council (Council)

Fitz Jersey Pty Limited (Owner)

Atlas Construction Group Pty Limited (Developer)

Gadens Lawyers
Skygarden Building
77 Castlereagh Street
SYDNEY NSW 2000

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Ref AQW/32603225

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Details

Date

Parties

Name	Botany Bay City Council
ABN	
Short form name	Council
Notice details	141 Coward Street Mascot NSW 2020

Name	Fitz Jersey Pty Ltd
ACN	139 909 792
Short form name	Owner
Notice details	C/- Atlas Construction Group Pty Ltd Unit 32, 69 O'Riordan Street Alexandria NSW 2015

Name	Atlas Construction Group Pty Ltd
ACN	086 034 700
Short form name	Developer
Notice details	Unit 32, 69 O'Riordan Street Alexandria NSW 2015

Background

- A. The Owner owns the Land.
- B. On 12 July 2010, the Developer lodged the Development Applications with the Council on behalf of the Owner seeking Development Consent for Development on the Land.
- C. The Joint Regional Planning Panel (East Region) was the consent authority for the Development Applications.
- E. On 19 April 2011 Council accepted lodgement of the amended Development Applications.
- F. The amended Development Applications were accompanied by an offer by the Developer to enter into this Agreement with Council to make various Development Contributions if Development Consent in respect of the amended Development Applications was granted by the Joint Regional Planning Panel.
- G. Development Consent in respect of both amended Development Applications was granted by the Joint Regional Planning Panel on 3 August 2011.
- H. Both Development Consents were granted subject to a condition 3(a) that this Agreement be entered into and Development Contributions be made in accordance with this Agreement, or in the event that this Agreement was not entered into, that section 94 contributions were to be paid in accordance with condition 3(b).

- I. The Developer has elected to enter into this Agreement in accordance with condition 3(a) of the Development Consents.
- J. The Parties have jointly prepared the Explanatory Note to accompany this Agreement.

Agreed terms

1. Definitions & Interpretation

1.1 In this Agreement the following definitions apply:

- (a) **Accredited Certifier** has the same meaning as in the Act.
- (b) **Act** means the *Environmental Planning and Assessment Act 1979* (NSW)
- (c) **Business Day** means:
 - (i) for receiving notice under clause 15, a day that is not a Saturday, Sunday, public holiday or bank holiday in the place where the notice is sent; and
 - (ii) for all other purposes, a day that is not a Saturday, Sunday, bank holiday or public holiday in New South Wales, Australia.
- (d) **Business hours** means from 9:00am to 5:00pm on a Business Day.
- (e) **Church Avenue Road Widening Land** means that part of the Land adjacent to Church Avenue of 82.785 m in length and 6.97 m in width with a total area of 584.9 m², as shown on the draft plan of subdivision included as Annexure 1 to this Agreement.
- (f) **Contribution Item** means any single item of the Development Contributions listed in Schedule 1.
- (g) **Dealing**, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.
- (h) **Dedication** means transfer of the relevant title to the respective parcel of land.
- (i) **Defects Liability Period** means the period that is 12 months from the date Council accepts Dedication of the land on which the Works are located (being either the Road Widening Lands or Public Park Land).
- (j) **Defects Notice** means a notice given pursuant to clause 9.
- (k) **Detailed Design** means the final design, specifications and finishes for the Development Contributions.
- (l) **Development** means development of the Land in accordance with Development Consents.
- (m) **Development Applications** means development applications 10/324 (North) and 10/325 (South) made by the Developer to the Council on behalf of the Owner under

Part 4 of the Act seeking consent to carry out the Development, including the Development Contributions, on the Land.

- (n) **Development Consents** means the development consents granted by the Joint Regional Planning Panel to the Development Applications, as modified or amended.
- (o) **Development Contributions** means the contributions identified in Schedule 1 of this Agreement.
- (p) **Explanatory Note** means the Explanatory Note prepared in accordance with clause 25E of the *Environmental Planning and Assessment Regulations 2000* attached to this Agreement at Annexure 2.
- (q) **Gardeners Road Road Widening Land** means that part of the Land adjacent to Gardeners Road of 84.385 m in length and 2.24 m in width with a splay at the end to accommodate a deceleration land, with a total area of 175.8 m², as shown on the draft plan of subdivision included as Annexure 1 to this Agreement.
- (r) **GST** has the same meaning as in the GST Law.
- (s) **GST Law** has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.
- (t) **Land** means Lot 2 in DP 224757, Lot 1 in DP 303282 and Lot 1 in DP 923787 generally known as 619-629 Gardeners Road and 12-14 Church Avenue Mascot.
- (u) **LEADR** means LEADR, Association of Dispute Resolvers located at Level 9, 15 – 17 Young Street, Sydney, NSW 2000.
- (v) **Monetary Contribution** means Contributions Items 4A and 4B, or either one of those items.
- (w) **Occupation Certificate** has the same meaning as in the Act.
- (x) **Party** means a party to this Agreement, including their successors and assigns.
- (y) **Public Park Land** means that part of the Land identified as proposed lot 2 (area 1,140 m²) on the draft plan of subdivision included as Annexure 1 to this Agreement.
- (z) **Regulations** means the *Environmental Planning and Assessment Regulation 2000*.
- (aa) **Road Widening Lands** means both the Church Avenue Road Widening Land and the Gardeners Road Road Widening Land.
- (bb) **Stage 1** means construction of Buildings A, B and C under development consent 10/324.
- (cc) **Subsisting Breach** means any failure by the Developer to comply with an obligation under this Agreement which has not been remedied by the Developer within 14 days (or such other time as may be reasonable in the circumstances and agreed between the parties) written notice of that breach being provided to the Developer by Council.
- (dd) **Works** means the works identified as Contribution Items 1A, 2A and 3A in Schedule 1.

1.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) A reference in this Agreement to a Business Day means a day other than a Saturday or a Sunday on which banks are open for business generally in Sydney.
- (c) If the day on which the any act, matter or thing is to be done under this Agreement is not a Business Day, the act, matter or thing must be done on the next Business Day.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars
- (e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- (k) References to the word 'include' or 'including' are to be construed without limitation.
- (l) A reference to this Agreement includes the agreement recorded in this Agreement.
- (m) A reference to a party to this Agreement includes a reference to the servants, agents, and contractors of the party, and the party's successors and assigns.
- (n) Any schedules and attachments form part of this Agreement.

2. Planning agreement under the Act

The Parties agree that this Agreement is a planning agreement within the meaning of section 93F of the Act and is governed by Subdivision 2 of Division 6 of Part 4 of the Act.

3. Application of this Agreement

This Agreement is made in respect of the Development Applications and applies to the Land.

4. Operation of this Agreement

- 4.1 This Agreement is made the day it is executed by all parties and it will take effect from that date.

5. Development Contributions to be made under this Agreement

- 5.1 The Developer and Owner will carry out and deliver the Development Contributions by the time or times and in the manner set out in Schedule 1, subject to extensions of time under this Agreement by agreement in writing between the Parties.
- 5.2 Subject to clause 7 of this Agreement, the Developer agrees to pay the cost of materials and the construction costs incurred in connection with carrying out and delivering the Development Contributions.

6. Detailed Design

The parties acknowledge and agree that:

- (a) prior to any public domain works being carried out, including Contribution Items 1A, 2A and 3A, Council must approve the Detailed Design of the proposed works;
- (b) Council will not unreasonably withhold its approval of the Detailed Design of the Development Contributions; and
- (c) separate development consent may be required for some or all of the public domain works.

7. Costs of Public Domain Works

The parties agree that:

- (a) the Developer in carrying out construction of the embellishment works of the Public Park Land (Contribution Item 3A) will pay total costs (including consultant's fees) up to a maximum of \$1,000,000 plus GST. This figure is to be subject to annual indexation to account for changes to the *Consumer Price Index*, with the first indexation occurring upon the first anniversary of the Commencement Date; and
- (b) Council will waive all development application and other fees associated with its assessment and approval of the Detailed Design insofar as it relates to the public domain works referred to in Contribution Items 1A, 2A and 3A.

8. Security – Public Domain Works

8.1 Provision of Security

Prior to prior to the issue of any occupation certificate for Stage 1, the Developer will provide to Council either the payment of a bond or a Bank Guarantee for \$500,000 (Works Security Amount) as security for the due, prompt and proper observance and performance by the

Developer and the Owners of their obligations under this document in relation to Contributions Items 2A and 3A.

- 8.2 The parties acknowledge that a bond of \$150,000 is already held by Roads and Maritime Services as security for Contribution Item 1A.

8.3 Form of Security

In the event of any Subsisting Breach by the Developer, the Council may, without further notice to the Developer or the Owners, call up the Bank Guarantee or apply the bond to complete any outstanding works itself or by its chosen contractors. The Developer and Owners agree that the Council and/or its contractors will be permitted access to the Land for such purpose. If at any time any money is paid under the Bank Guarantee or the bond, the Developer must at the request of the Council provide the Council with a supplementary or replacement Bank Guarantee or make further payment for the bond so that the amount of the Bank Guarantee or bond held by the Council is the amount properly required to be provided under this document.

8.4 Price Index Increases

On each anniversary of the date of this document the Security Amount applicable immediately prior to that anniversary will be increased by the same percentage as the annual percentage increase, if any, in the Price Index most recently published prior to the relevant anniversary. The increased Security Amount will be the Security Amount in the subsequent 12 months.

8.5 Progressive Release of Security

Subject to the Developer complying with the its obligations under this Agreement, Council will at the request of the Developer release 80% of the Works Security Amount to the Developer on completion of the Works, with 20% of the Works Security Amount retained until the end of the Defects Liability Period. Council is only required to release a Bank Guarantee where a replacement Bank Guarantee for the relevant reduced amount of the Works Security Amount is provided by the Developers.

9. Defects Liability Period

9.1 Rectification in the Defects Liability Period

If Council notifies the Developers of a defect in the Works within the Defects Liability Period, the Developer must promptly remedy that defect to the satisfaction of Council.

9.2 No Limitation

This clause does not limit any other right, power or privilege of Council with or arising under this document or any other document or otherwise at law in respect of any defect in the Works.

10. Dedication

- 10.1 The Developer and Owners must at their cost Dedicate to Council the Public Park Land and Road Widening Lands in accordance with the times listed in Schedule 1.

- 10.2 The Dedication will be effected when:
- (a) a plan of subdivision is registered dedicating the Public Park Land and Road Widening Lands to Council; or
 - (b) Council becomes the registered proprietor of an existing lot comprising the Public Park Land and/or Road Widening Lands as a result of the registration of a transfer of land.
- 10.3 Where an existing lot forming part of the Public Park Land and Road Widening Lands is to be transferred to Council,
- (a) the Developer will deliver to Council the following:
 - (i) transfer in registrable form signed by the registered proprietor of the lot;
 - (ii) the Certificate of Title for the lot; and
 - (iii) a discharge of mortgage, surrender of lease or other document to release the lot from any encumbrance.
 - (b) Council will on receipt of these documents arrange for the following:
 - (i) stamping of the transfer; and
 - (ii) lodgement of the transfer and other documents at the office of Land and Property Information for registration.
- 10.4 Council must provide the Developer with a tax invoice for its reasonable expenses incurred in relation to the Dedication of the Public Park Land and Road Widening Lands including its legal costs and disbursements (including any registration fees).
- 10.5 The Developer will be entitled to the benefit of any special or discounted rates charged to Council by its consultants and legal advisers and will be entitled to seek assessment of any legal costs, as a third party payer under s 350(2) of the *Legal Profession Act 2004*.
- 10.6 The Developers must pay to Council the amount invoiced for expenses under sub-clause 4 within 28 days of receipt of the invoice.
- 10.7 The Developer must pay Council on reasonable notice the stamp duty (if any) on the Dedication of the Dedication Land. The Parties acknowledge that Section 227 *Duties Act 1997* provides generally that duty under that Act is not chargeable on dutiable transactions where Council is liable to pay the duty.
- 10.8 After the Public Park Land and Road Widening Lands are transferred to Council, Council will use the land for public purposes being the provision of public open space and roads and such other public purposes in the future as Council may consider appropriate.

11. Security for Dedication

- 11.1 In the event that there is a breach of this Agreement in relation to the dedication of either the Public Park Land and/or Road Widening Lands, the Developer and Owner agree that:
- (a) the relevant parcel of land may be compulsorily acquired by Council for \$1.00; and
 - (b) the Developer and Owner will be jointly and severally liable for Council's reasonable costs associated with the compulsory acquisition of land referred under this clause and must pay to Council the amount invoiced for such costs under within 28 days of receipt of an invoice for those costs.

12. Assignment and Dealings

The Owner must not sell, transfer, assign or novate or similarly deal with its rights, title or interest in the Land (if any) and the Owner and Developer must not sell, transfer, assign or novate or similarly deal with its rights or obligations under this Agreement unless, prior to any such sale, transfer, assignment, charge, encumbrance or novation, that party (either the Owner or Developer, as the case may be):

- (a) gives the Council no less than 10 Business Days notice in writing of the proposed Dealing;
- (b) procures that the transferee, assignee or novatee executes and delivers to the Council prior to any such Dealing taking effect, a deed in favour of the Council in form and substance acceptable to the Council (acting reasonably) whereby:
 - (i) the transferee, assignee or novatee becomes contractually bound with the Council to perform all of the party's obligations (including obligations which may have arisen before the transfer, assignment or novation takes effect); and
 - (ii) the party is released from any obligations under or by virtue of this Agreement which at the time of any proposed assignment or novation contemplated by this clause are required to be performed or satisfied by the party at any time from or after the date on which that assignment or novation takes effect under this Agreement.
- (c) pays Council's reasonable costs associated with the deed referred to in subclause (b) above.

13. Registration of document on Title

13.1 Acknowledgement

The Developer acknowledges that Council intends to register this document under section 93H of the Act on the title of the Land and on registration by the Registrar-General the document will be binding on and enforceable against the owners of the Lands from time to time as if each owner for the time being had entered into this document.

13.2 Consents to Registration

This document must be registered on the title of the Land as soon as practicable after it is made. Each Party must promptly execute any document and perform any action necessary to effect the registration of this document on the title of the Land.

13.3 Release from Registration

Council will at the request of the Developer release part of the Land from registration of this document where the Development Contributions have been made including completion of the Works and no other money is owing to Council under this document. The obligations of the Council are satisfied when Council provides the Developer with a signed Request in registrable form for the release of registration of this document.

14. Application of s94 and s94A of the Act

This Agreement does not exclude the operation of sections 94 and 94A of the Act in relation to the Development and none of the Dedications or Works to be provided under this Agreement are to be taken into consideration in determining a development contribution under those sections of the Act in respect of the Development Consents.

15. Review of this Agreement

The Agreement may be varied or amended only by the express written approval of each Party using their best endeavours and acting in good faith and in compliance with the Act.

16. Dispute Resolution

16.1 No arbitration or court proceedings

If a dispute arises out of this Agreement (**Dispute**), a Party must comply with this clause 16 before starting arbitration or court proceedings (except proceedings for interlocutory relief).

16.2 Notification

A Party claiming a Dispute has arisen must give the other Party to the Dispute written notice setting out details of the Dispute and designating as its representative a person to negotiate the Dispute.

16.3 Response to Notice

Within 5 Business Days of receiving written notice of the Dispute, the other Party must notify in writing to the notifying Party of its representative to negotiate the Dispute. Such representative must have the authority to commit the Party it is representing to any agreement of a Dispute.

16.4 Parties to resolve dispute

The nominated representatives must:

- (a) call a meeting to discuss the Dispute within 10 Business Days after service by the other Parties of notice of its representatives; and
- (b) use reasonable efforts to settle or resolve the Dispute within 10 Business Days after they have met.

16.5 Referral of dispute to mediator

If the Parties cannot resolve the Dispute in accordance with clause 16.4, any Party may give to the other Parties a written notice referring the Dispute to a mediator.

16.6 Appointment of mediator

If the Parties to the Dispute cannot agree on a mediator within 5 Business Days after written notice has been given under clause 16.5, the chairman of LEADR or the chairman's nominee will appoint a mediator.

16.7 Role of mediator

The role of a mediator is to assist in negotiating a resolution of the Dispute. A mediator may not make a binding decision on a Party to the Dispute except if the Party agrees in writing.

16.8 Confidentiality

Any information or documents disclosed by a Party under this clause 16:

- (a) must be kept confidential; and
- (b) may only be used to attempt to resolve the Dispute whether by mutual agreement, mediation, arbitration or litigation.

16.9 Costs

Each Party to a dispute must pay its own costs of complying with this clause 16. The parties to the Dispute must equally pay the costs of any mediator.

16.10 Termination of process

A Party to a Dispute may terminate the dispute resolution process by giving notice to the other Parties after it has complied with clauses 16.1 to 16.4. Clauses 16.8 and 16.9 survive termination of the dispute resolution process.

16.11 Breach of this clause

If a Party to a Dispute breaches clauses 16.1 to 16.10, the other Party to the Dispute does not have to comply with those clauses in relation to the Dispute.

17. Termination

17.1 This Agreement terminates:

- (a) on the lapse of the Development Consents; or

- (b) on the declaration by a Court of competent jurisdiction that the Development Consents are invalid.

17.2 Consequences

- (a) On the date of termination or rescission of this document, subject to the following sub-paragraphs each party releases each other from any obligation to perform any term, or any liability arising out of, this document after the date termination.
- (b) Any unapplied Monetary Contribution, bond or Bank Guarantee that has been provided to Council will be refunded to the Developer as soon as practicable after the date of termination.
- (c) Termination or rescission of this document does not release either party from any obligation or liability arising under this document before termination or rescission.

18. Joint and individual liability and benefits

Except as otherwise set out in this document, any agreement, covenant, representation or warranty under this document by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

19. No fetter

Nothing in this document shall be construed as requiring the Council to do anything that would cause it to be in breach of their respective obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

20. Representations and warranties

The Parties represent and warrant that they have power to enter into this document and comply with their obligations under the document and that entry into this document will not result in the breach of any law.

21. Severability

If a clause or part of a clause of this document can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this document, but the rest of this document is not affected.

22. Notices

22.1 Service of notices

Any notice, demand, consent, approval or communication under this Agreement (Notice) that must or may be given or made to a Party this Agreement must be:

- (a) in writing, in English and signed by a person duly authorised by the sender; and
- (b) hand delivered or sent by post, electronic notification or facsimile to that Party at its contact details as set out below

Council

Attention: General Manager

Address: Botany Bay City Council
141 Coward Street, Mascot NSW 2020

Fax Number: (02) 9366 3777

Email: council@botanybay.nsw.gov.au

Owner

Attention: Fitz Jersey Pty Ltd

Address: C/- Atlas Construction Group Pty Ltd
Unit 32, 69 O'Riordan Street Alexandria NSW 2015

Fax Number: (02) 9318 3088

Email: scott@atlasac.com.au

Developer

Attention: Scott Sweeney

Address: Atlas Construction Group Pty Ltd
Unit 32, 69 O'Riordan Street Alexandria NSW 2015

Fax number: (02) 9318 3088

Email: scott@atlasac.com.au

If a Party gives the other Parties 3 Business Days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by those other Parties if it is delivered, posted or faxed to the latest address or fax number.

22.2 Effective on receipt

A notice given in accordance with clause 21.1 takes effect when taken to be received (or at a later time specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by prepaid post, on the second Business Day after the date of posting (or on the seventh Business Day after the date of posting if posted to or from a place outside Australia);
- (c) if sent by facsimile, when the sender's facsimile system generates a message confirming successful transmission of the entire Notice unless, within eight Business Hours after the transmission, the recipient informs the sender that it has not received the entire Notice;
- (d) if sent by electronic notification, by properly addressing the electronic notification and transmitting it,

but if the delivery, receipt or transmission is not on a Business Day or is after 5.00pm on a Business Day, the Notice is taken to be received at 9.00am on the next Business Day.

23. Approvals and consent

The Parties acknowledge that:

- (a) except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in that Party's absolute discretion and subject to any conditions determined by the Party;
- (b) a Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions;
- (c) this Agreement does not impose any obligation on the Council to grant an approval under the Act.

24. Costs

Each party will pay its own costs in negotiating, preparing and executing this Agreement.

25. Entire agreement

This Agreement, including its schedule:

- (a) constitutes the entire agreement between the Parties as to its subject matter; and
- (b) in relation that subject matter, supersedes any prior understanding or agreement between the Parties and any prior condition, warranty, indemnity or representation imposed, given or made by a Party.

26. Further acts

Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.

27. Governing law and jurisdiction

This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

28. Waiver

The failure of a Party at any time to require performance of any obligation under this Agreement is not a waiver of that Party's right:

- (a) to claim damages for breach of that obligation; and
- (b) at any other time to require performance of that or any other obligation under this agreement,

unless written notice to that effect is given in accordance with clause 22.

29. GST

- 29.1 The parties reasonably believe that any supply pursuant to this Agreement is exempt from GST.
- 29.2 If the parties agree that no GST is payable in respect of a supply made under the Agreement and it is later determined that a supply was made that was subject to GST, the recipient of the supply agrees to pay to the supplier an additional amount equal to the GST on the supply plus any administrative penalties and general interest charges incurred by the supplier from the Commissioner of Taxation in respect of the supply.

30. Force majeure

30.1 Definition

Force Majeure Event affecting a person means anything outside that party's reasonable control including, but not limited to, fire, storm, flood, earthquake, explosion, war, invasion, rebellion, sabotage, epidemic, labour dispute, labour shortage, failure or delay in transportation, act or omission (including laws, regulations, disapprovals or failures to approve) of any third person (including, but not limited to, subcontractors, customers, governments or government agencies).

30.2 Occurrence of Force Majeure Event

If a Force Majeure Event affecting a Party precludes that Party (**Precluded Party**) partially or wholly from complying with its obligations under this Agreement then:

- (a) as soon as reasonably practicable after that Force Majeure Event arises, the Precluded Party must notify the other Party to this Agreement of:
 - (i) the Force Majeure Event;
 - (ii) which obligations the Precluded Party is precluded from performing (**Affected Obligations**);
 - (iii) the extent to which the Force Majeure Event precludes the Precluded Party from performing the Affected Obligations (**Precluded Extent**);
 - (iv) the expected duration of the delay arising directly out of the Force Majeure Event; and
 - (v) suggest an alternative method, if any, of satisfying its obligation under this Agreement;
- (b) the Precluded Party's obligation to perform the Affected Obligations will, to the Precluded Extent, be suspended for the duration of the actual delay arising directly out of the Force Majeure Event (**Actual Delay**); and
- (c) The obligations of the other Party to this Agreement to perform any obligations dependent on the Affected Obligations will be suspended until the Precluded Party resumes performance.

30.3 Procedure

- (a) The Precluded Party must use all reasonable efforts and diligence to remove the force majeure or ameliorate its effects as quickly as practicable.
- (b) The Parties agree that any costs associated in ameliorating a force majeure event will be apportioned out as follows:
- (c) The Parties agree that this force majeure provision does not apply to an obligation of a Party to transfer land or to pay money.
- (d) If the Parties are unable to agree on the existence of an event of force majeure or the period during which the obligations of the Parties, and any time periods, are suspended during the continuance of the force majeure, that dispute must be referred for determination under clause 16 of this Agreement.
- (e) The Parties agree that a force majeure includes the actual commencement of any legal proceedings by any person challenging the validity of either of the Development Consents for the Development or any provision of this Agreement.
- (f) If a force majeure event cannot be resolved to the mutual satisfaction of the Council and the Developer, and as a result of a force majeure event the Developer, in its sole discretion, determines that it is unable to undertake the development, the Developer may terminate this agreement by notice to the other Parties in which event none of the Parties will have any claim against each other under this Agreement.

31. Compliance with laws

If a Law is changed or a new Law comes into force (both referred to as New Law) and the Developer is obliged by the New Law to do something or pay an amount which it is already contractually obliged to do or pay under this Agreement then, to the extent only that the relevant obligation is required under both the New Law and this Agreement, compliance with this Agreement will constitute compliance with the New Law.

32. Confidentiality

The Parties agree that the terms of this Agreement are not confidential and this Agreement may be treated as a public document and exhibited or reported without restriction by any Party. This clause does not apply to any information or documents produced under Clause 16 of the Agreement, the contents of which must remain confidential in accordance with Clause 16.8 of the Agreement.

Signing Page

Executed as an agreement

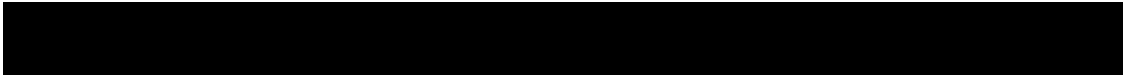
Dated

2013

The Common Seal of **Botany Bay Council**
was hereunto affixed pursuant to a resolution
of the Council passed on the twenty second
day of May 2013


witness

Mayor


witness

General Manager

Signed on behalf of **Fitz Jersey Pty
Limited**

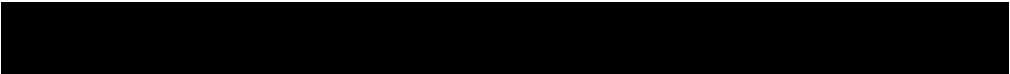

Secretary / Director

Director

Kie Chie Wong
Print name

Ann Pin Lim
Print name

Signed on behalf of **Atlas Construction
Group Pty Limited**


Secretary / Director

Director

ROBERT YAZBEK
Print name

SCOTT SWEENEY
Print name

Schedule 1 – Development Contributions

The following contributions will be provided in accordance with the Table below

Column 1	Column 2	Column 3	Column 4
Public purpose	Contribution	By whom	Timing
Item 1A Gardeners Road Works	Construction of a deceleration lane and raised concrete median, kerb and guttering, reconstruction of nature strips, landscaping and adjustment/relocation of any public utility works necessitated by those works, in accordance with the requirements of RMS, to be documented in a Works Authorisation Deed between the Developer and RMS..	The Developer	Prior to the issue of the any Occupation Certificate for any residential component of the Development.
Item 1B Dedication of Gardeners Road Road Widening Land	Dedication of the Gardeners Road Road Widening Land to the Council free of cost.	The Owner	Upon registration of plan of subdivision and Prior to the issue of any Occupation Certificate for any residential component of the Development.
Item 2A Church Avenue Works	Construction of widening of Church Avenue at frontage of Land including kerb and guttering, reconstruction of nature strips, landscaping and adjustment/relocation of any public utility works necessitated by those works	The Developer	Prior to the issue of the final Occupation Certificate for any residential component of the Development.
Item 2B Dedication of Church Avenue Road Widening Land	Dedication of the Church Avenue Road Widening Land to the Council free of cost.	The Owner	Upon registration of plan of subdivision and Prior to the issue of the final Occupation Certificate for any residential component of the Development.
Item 3A Embellishment of Public Park Land.	Construction and embellishment of the Public Park, in accordance with the Detailed Design to be approved by separate Development Consent.	The Developer	Prior to the issue of any Subdivision Certificate

Public purpose	Contribution	By whom	Timing
Item 3B Dedication of Public Park Land	Dedication of the Public Park Land to the Council free of cost.	The Owner	Upon registration of plan of subdivision and Prior to the issue of the final Occupation Certificate for any residential component of the Development.
Item 4A Monetary Contribution for Northern portion of Development	Payment of a Monetary Contribution in connection with development consent number 10/324 (North) in the amount of \$5,682,597.90.	The Developer	Prior to the issue of any Subdivision Certificate or any Occupation Certificate relating to development consent number 10/324 (North)
Item 4B Monetary Contribution for Southern portion of Development	Payment of a Monetary Contribution in connection with development consent number 10/325 (South) in the amount of \$3,781,686.60.	Developer	Prior to the issue of any Subdivision Certificate or a final Occupation Certificate relating to development consent number 10/325 (South)

Schedule 2 – Section 93F Requirements

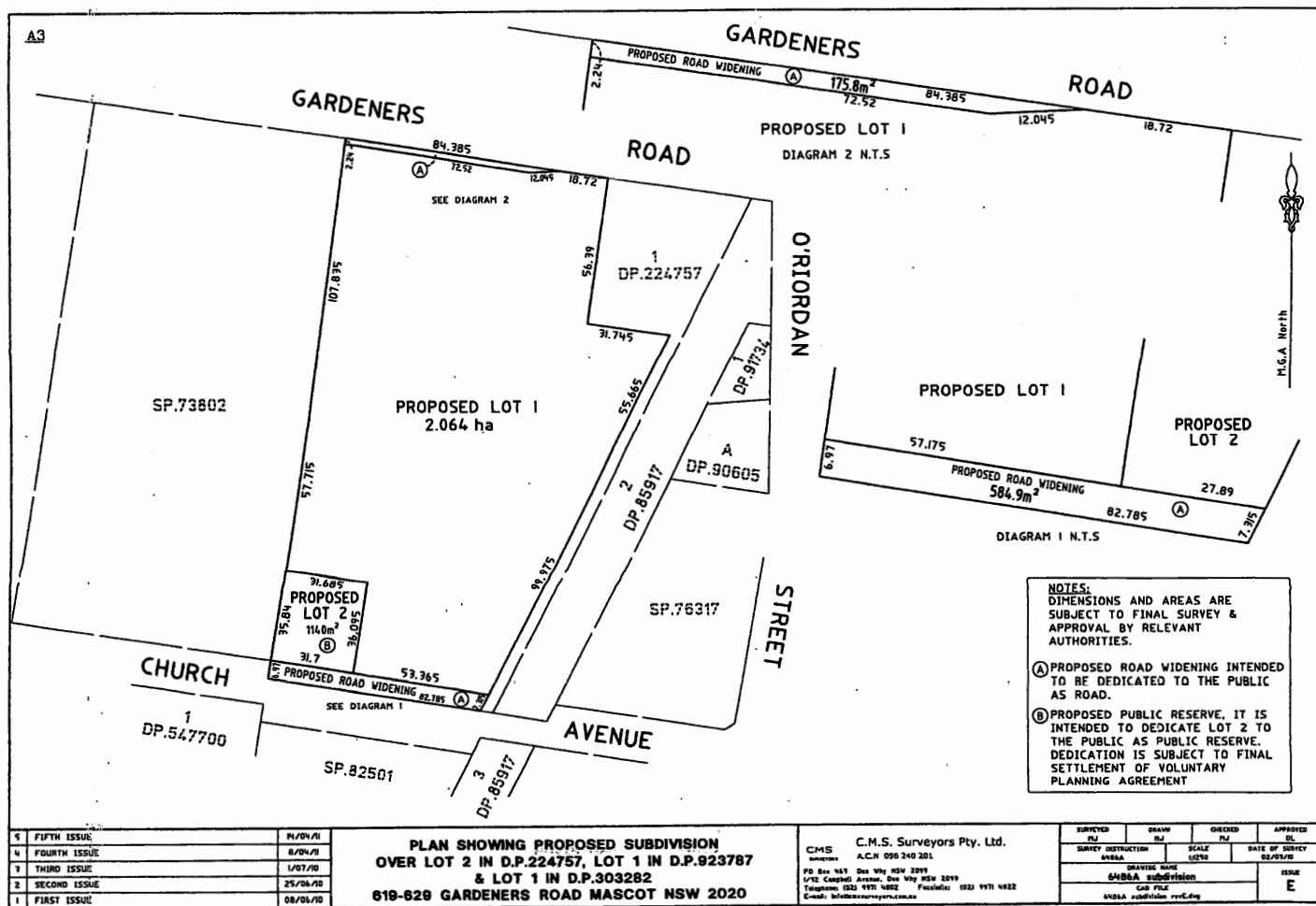
The parties acknowledge and agree that the table set out below provides for certain terms, conditions and procedures for the purpose of the Planning Agreement complying with the EP&A Act.

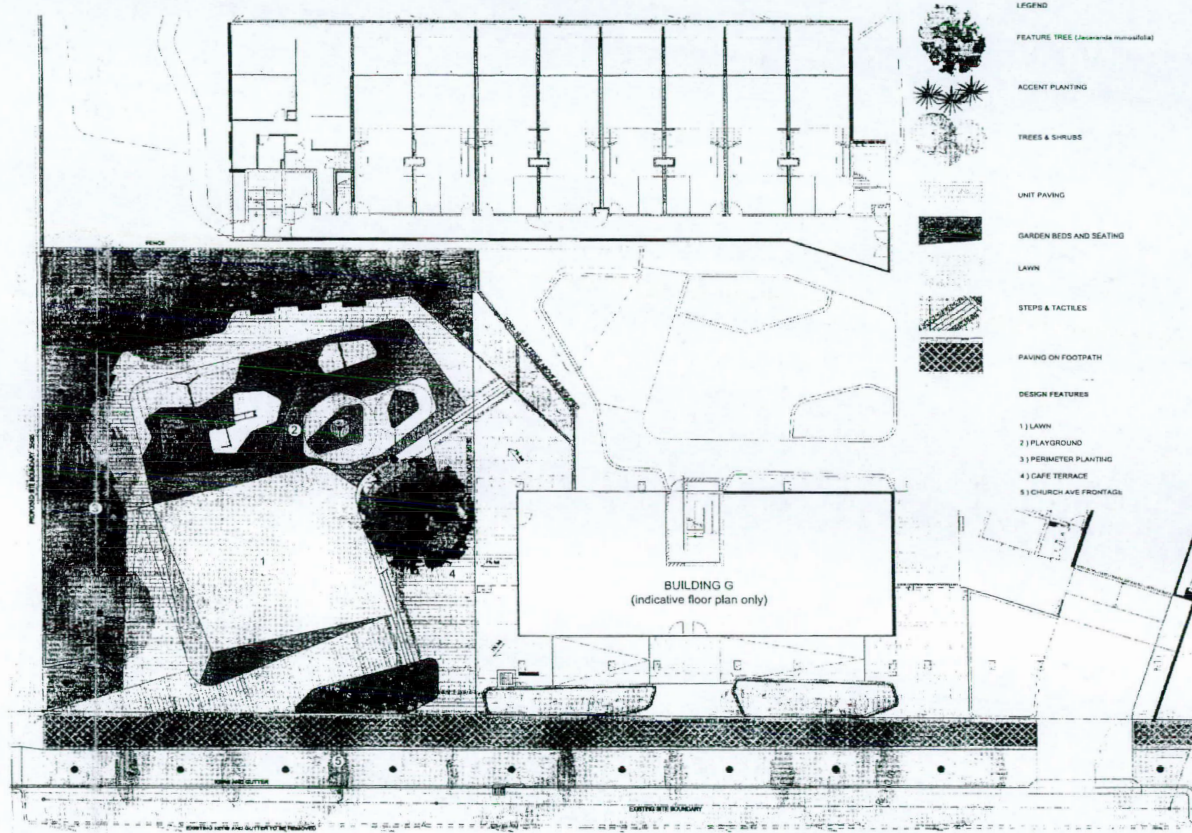
Requirement under the EP&A Act	This Planning Agreement
Planning instrument and/or development application - (Section 93F(1)) The Developer and Owner have: (a) sought a change to an environmental planning instrument. (b) made, or proposes to make, a Development Application. (c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.	(a) No (b) Yes (c) Yes
Description of land to which this Agreement applies - (Section 93F(3)(a))	The Land described in clause 1.1.
Description of change to the environmental planning instrument or the development to which this Deed applies - (Section 93F(3)(b)) Describe: (a) the proposed change to the environment plan to which this Deed applies; OR (b) the development to which this Deed applies.	(a) Not applicable. (b) The Development described in clause 1.1.
The scope, timing and manner of delivery of Contribution required by this Planning Agreement - (Section 93F(3)(c))	As set out in the Contributions Schedule at schedule 1.
Applicability of Section 94 of the EP&A Act to the Development - (Section 93F(3)(d))	The application of section 94 of the EP&A Act is not excluded in respect of the Development.

Requirement under the EP&A Act	This Planning Agreement
Applicability of Section 94A of the EP&A Act to the Development - (Section 93F(3)(d))	The application of section 94A of the EP&A Act is not excluded in respect of the Development.
Applicability of Section 94EF of the EP&A Act to the Development - (Section 93F(3)(d))	The application of section 94EF of the EP&A Act is not excluded in respect of the Development.
Consideration of benefits under this Deed if section 94 applies to the Development- (Section 93F(3)(e)) Are the benefits under this Deed to be taken into consideration if Section 94 of the EP&A Act is not excluded?	No.
Mechanism for Dispute resolution - (Section 93F(3)(f)) This Deed provides a mechanism for the resolution of disputes under the agreement?	Refer to clause 16.
Enforcement of this Deed (Section 93F(3)(g)) This Deed provides for enforcement by a suitable means in the event of a breach.	Refer to clauses 8 and 11.
Registration of this Deed The parties agree that this Deed will be registered in accordance with clause 13.	Yes.
No obligation to grant consent or exercise functions - (Section 93F(9)) The parties acknowledge that this Deed does not impose an obligation on a Consent Authority to grant a Development Consent, or to exercise any function under the EP&A Act in relation to a change to an environmental planning instrument.	Refer to clauses 19 and 23.

Annexure 1

Draft Subdivision Plan





LEGEND

FEATURE TREE (*Jacaranda mimosifolia*)

ACCENT PLANTING

TREES & SHRUBS

UNIT PAVING

GARDEN BEDS AND SEATING

LAWN

STEPS & TACTILES

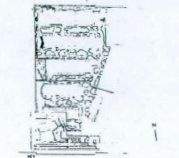
PAVING ON FOOTPATH

DESIGN FEATURES

- 1) LAWN
- 2) PLAYGROUND
- 3) PERIMETER PLANTING
- 4) CAFE TERRACE
- 5) CHURCH AVE FRONTAGE

This document is prepared and is the property of Atlas Construction Group Pty Ltd. It is to be used for the purpose of the project only and is not to be distributed or used for any other purpose without the written consent of Atlas Construction Group Pty Ltd. The information contained herein is confidential and is not to be disclosed to any third party without the written consent of Atlas Construction Group Pty Ltd. The information contained herein is not to be used for any other purpose without the written consent of Atlas Construction Group Pty Ltd.

Scale: 1:500



Item	Description	Quantity	Unit
1	Lawn	1000	m ²
2	Playground	1	unit
3	Perimeter Planting	100	m
4	Cafe Terrace	100	m ²
5	Church Ave Frontage	100	m

Atlas Construction Group Pty Ltd

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E andrew@atlas-kg.com.au

619-629 Gardeners Rd &

12-14 Church Ave, Mascot

PUBLIC DOMAIN

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