

DATED 23 November, 2010

BETWEEN:

**THE CITY OF BOTANY BAY
COUNCIL**

("the Council")

AND:

CASTEEL PTY LTD (ACN 122 979 757)

**MONASH DEVELOPMENTS PTY
LTD (ACN 101 137 026)**

**ICAT HOLDINGS PTY LIMITED
(ACN 093 451 060)**

**DENCO PTY LTD (ACN 003 523 475)
("the Owners")**

ORIGINAL

DEED OF AGREEMENT

HOUSTON DEARN O'CONNOR

Solicitors
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12 Railway Parade
BURWOOD NSW 2134

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Tel: 9744 9247
Fax: 9744 6739
REF: AJH:AS:B5270

THIS DEED made the 23rd day of November, 2010

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

AND: **CASTEEL PTY LTD (ACN 122 979 757)** of 15 York Road, Queens Park in the said State, **MONASH DEVELOPMENTS PTY LTD (ACN 101 137 026)** of 213-217 Botany Road, Waterloo in the said State, **ICAT HOLDINGS PTY LIMITED (ACN 093 451 060)** of Unit 1, 72-74 Ramsgate Avenue, Bondi Beach in the said State and **DENCO PTY LTD (ACN 003 523 475)** of 228C Bunnerong Road, Hillsdale in the said State ("the Owners") of the second part

WHEREAS:

- A. The Owners are the registered proprietors of the land known as 21-23 Myrtle Street, Botany ("the Development Site") being the whole of the land comprised in Folio Identifier 1/858329.
- B. The Development Site is located within the Botany Bay City Council Local Government Area.
- C. On 23 October 2007 the Owners lodged with the Council development application 08/097 ("the Initial Development Application") seeking consent for the demolition of existing buildings on the Development Site and construction thereon of a medium density housing development comprising nine (9) townhouses and a residential flat building comprising thirty six (36) units with ancillary basement parking.
- D. By notification to the Council on 24 April 2008 the Owners modified the Initial Development Application so as to reduce the number of units comprised in the proposed residential flat building from thirty six (36) units to thirty four (34) units ("the Amended Development Application").

- E. The development as proposed in the Amended Development Application does not comply with a number of development standards applied to the site by relevant planning controls including but not limited to, non compliances in the areas of floor site ratio, site coverage, building height, maximum building depth, boundary setbacks, minimum balcony widths, internal corridor widths, minimum private open space area, minimum communal open space area and minimum landscaping setbacks.
- F. By letter dated 1 December 2008 the Owners offered to enter into a voluntary planning agreement with the Council by which the Owners would provide certain specified embellishment works to that part of Myrtle Street, Botany fronting the Development Site subject to the Council granting development consent to the Amended Development Application drawing nos. 010 to 017 revision C which drawings incorporate the areas of non compliance of the Amended Development Application with applicable controls referred to in the preceding recital (“the Works in Kind Offer”).
- G. The Council has agreed to enter into a voluntary planning agreement with the Owners in consideration of the Works in Kind Offer and to accept the Works in Kind Offer proposed by the Owners as consideration for concessions allowed by the Council in relation to the non compliances referred to in recital E and not in lieu of any reduction in any contribution that the Council may be entitled to require in connection with the Amended Development Application pursuant to Section 94 of the Environmental Planning & Assessment Act 1979 (“the Act”).
- H. By notice of determination dated 14 April 2009 the Council informed the Owners of the grant of consent to the Amended Development Application (“the Development Consent”) subject to conditions of consent set out therein.
- I. The Development Consent is for a two staged development, with stage 1 being for the demolition of all structures on the Development Site and stage 2 being for the

construction of a medium density housing development comprising nine (9) townhouses and a residential flat building comprising thirty four (34) units with basement car parking.

- J. Conditions 1(j), (k), (l), (m), (n), (o), (p) and (q) of the schedule of consent conditions relating to stage 2 of the Development Consent (“the Stage 2 Conditions”), provide that the development shall be carried out in accordance with, inter alia, drawing nos. 010 to 017 revision C dated 10 July 2008 prepared by Tony Owen NDM Architects being the drawings specified in the Owners’ voluntary planning agreement offer letter of 1 December 2008.
- K. Condition 3(b) of the Stage 2 Conditions requires the payment to Council of contributions for community facilities, open space and recreational, administration and transport management in the total amount of one million one hundred and seventeen thousand six hundred and seven dollars (\$1,117,607.00) pursuant to Section 94 of the Act (“the Section 94 Contributions”).
- L. The Owners have lodged with the Council an application pursuant to Section 96 of the Act registered as application 08/97/01 seeking to reduce the Section 94 contributions to eight hundred and sixty thousand dollars (\$860,000.00).
- M. The Works in Kind Offer includes but is not limited to road construction, undergrounding of power and telecommunications cables, and provision of landscaping, street lighting, kerb and guttering, of street furniture and footpath construction as detailed on the Council’s Landscape Concept Plan for DA08/97, drawing LP01 issue B dated 8 December 2009 (“the Works in Kind Plan”) a copy of which is annexed and Marked “A”.
- N. Pursuant to Section 93F the Act the parties hereto now enter into this Planning Agreement.

- O. 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 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 effected.
5. The Owners covenant and agree with the Council that they shall, at their expense and to the Council's satisfaction, complete the Works in Kind works as specified on the Works in Kind Plan prior to the issue of an Occupation Certificate for the development the subject of the Development Consent.
6. The Owners acknowledge and agree that they shall not be entitled to any reduction in the Section 94 Contributions (or in any amended amount thereof that may be approved by the Council in connection with Section 96 modification application 08/97/01 referred to in recital L hereof) on account of completion of the Works in Kind.
7. The Owners further covenant and agree with the Council that:
 - (a) the standards for Parking & Vehicle Access, Apartment Sizes & Apartment Mix specified in Sections 3.2.13 and 3.3.2 of the Council's Development Control Plan No. 35 – Multi Unit Housing & Residential Flat Buildings are the agreed

standards for development at the Development site; and

- (b) any development on the Development Site pursuant to the Development Consent (or any modification thereof approved by the Council) shall fully comply with the requirements for Parking & Vehicle Access, Apartment Sizes & Apartment Mix specified in Sections 3.2.13 and 3.3.2 of the Council's Development Control Plan No. 35 – Multi-Unit Housing & Residential Flat Buildings.
8. This Agreement binds the parties hereto and their transferees, assigns or successors in title.
9. The Owners further covenant with the Council:
- (a) that prior to the issue of a Construction Certificate for the development the subject of the 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 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.

- 10. The Owners further covenant and agree with the Council that pending the registration of this Planning Agreement on the title of the Development site as required by clause 7(a), then the Council shall be entitled to register a caveat at Land & Property Management Authority over the title to the Development Site to protect its interest therein pursuant to this Planning Agreement.
- 11. The Owners 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 Development 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 Development

Site the Owners shall pay the Council's reasonable solicitor/client costs of providing Council's consent to such registration. The Owners shall also pay Council's reasonable costs of preparing any substitute Planning Agreement between Council and any incoming purchaser, assignee or transferee of the Development Site. Council must give the Owners a tax invoice for any amount payable to the Owners under this clause.

12. 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.
13. Any amendment or variation to this Planning Agreement is not effective unless it is in writing and signed by all the parties.
14. The explanatory note put on exhibition with this Planning Agreement is not to be used in construing the terms of this Planning Agreement.
15. 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.
16. (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 THE CITY)
OF BOTANY BAY COUNCIL was)
hereunto affixed pursuant to a resolution)
of the Council passed on the 20TH day)
of OCTOBER 2010)

.....
General Manager

.....
Mayor

EXECUTED by CASTEEL PTY LTD)
(ACN 122 979 757) by:)

.....
Secretary

.....
Director

EXECUTED by MONASH)
DEVELOPMENTS PTY LTD)
(ACN 101 137 026) by:)

.....
Secretary

.....
Director

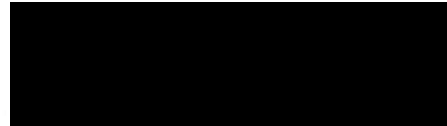
EXECUTED by **ICAT HOLDINGS PTY**)
LIMITED (ACN 093 451 060) by:)



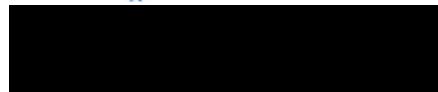
Sole Director / *Secretary*

.....
Secretary

EXECUTED by **DENCO PTY LTD**)
(ACN 003 523 475) by:)



[Signature]
Director



~~Secretary~~ *Director*