

DATED *22ND DECEMBER* 2009

BETWEEN:

BOTANY BAY CITY COUNCIL
("the Council")

AND:

COMPAC PTY LTD
(ABN 69 002 230 766)
("the Applicant")

AND:

CARFOS PTY LTD
(ABN 82 001 243 429)
("Carfos")

DEED OF AGREEMENT

HOUSTON DEARN O'CONNOR

Solicitors
Suite 33, 5th Floor
12 Railway Parade
BURWOOD NSW 2134

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Tel: 9744 9247
Fax: 9744 6739
REF: AJH:AS:B5207

THIS DEED made the 22nd day of DECEMBER 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: **CAMPAC PTY LTD (ABN 69 002 230 766)** of Unit 1, 8 Carthona Avenue, Darling Point in the said State ("the Applicant") of the second part

AND: **CARFOS PTY LTD (ABN 82 001 243 429)** of Unit 1, 8 Carthona Avenue, Darling Point in the said state ("Carfos") of the third part

WHEREAS:

- A. The Applicant and Carfos are the registered proprietors of the land known as 3-9 Church Avenue and 4 John Street ("the Development Site") being the whole of the land comprised in Certificate of Title Folio Identifier Lot 100 DP 1126046 ("the land")
- B. On 23 June, 2003 the Applicant lodged with the Council development application no. 03/659 ("the first Development Application") in respect of the Development Site seeking development approval for a master plan proposal for 3 six storey residential buildings comprising 40 units in each building, 235 parking spaces, landscaping and open space.
- C. By notice of determination dated 16 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 29 April 2005 the Applicant lodged with the Council development application no. 05/394 ("the Second Development Application") in respect of the Development Site seeking development consent for 3 residential towers comprising 120 units, 237 parking spaces, landscaping and loading facilities.
- E. By notice of determination dated 15 December 2005 the Council granted development

consent to the Second Development Application upon the conditions set out in that notice ("the Second Development Consent").

- F. The Second Development Consent was modified by application numbered 05/394/01, 05/394/02 and 05/394/03 made pursuant to Section 96 of the Environmental Planning and Assessment Act 1979 ("the Act") and approved respectively by the Council on 14 November 2006, 23 July 2008 and 4 March 2009 ("the Modification Approvals").
- G. On 21 May 2008 the Applicant lodged with the Council development application no. 08/292 ("DA08/292") seeking development consent for the construction of an additional two storeys for each of the 3 buildings approved pursuant to the Second Development Consent and comprising an additional 32 units.
- H. By notice of determination dated 18 December 2008 the Council granted development consent to DA08/292 upon the conditions set out in that notice ("the DA08/292 Consent").
- I. The Applicant and Carfos acknowledge that the grant by the Council of the DA08/292 Consent has conferred on the proposed development the benefit of an increase of 09:1 in the maximum floor space ratio otherwise permitted by Botany LEP1995 and an increase in height of two storeys above that otherwise allowed by the Council's Mascot Station DCP ("the Additional Floor Space & Height Benefits").
- J. Condition 126 of the Second Development Consent (as modified by the Modification Approvals) required payment of a contribution pursuant to Section 94 of the Act in the total amount of nine hundred and twenty seven thousand four hundred and fifty four dollars (\$927,454.87) ("the First Section 94 Contribution").
- K. Condition 4 of the DA08/292 Consent required payment of contributions pursuant to Section 94 of the Act in the total amount of three hundred and sixty five thousand five hundred and seventy nine dollars (\$365,579.00) ("the Second Section 94 Contribution").

- L. Condition 5 of the Second Development Consent required the Applicant, at no cost or expense to Council, to:
- (i) dedicate the portion of land for the Church Avenue widening, the dimensions of which extend for the full width of the site and to a depth, which is determined by measuring from the centreline of the road of Church Avenue, Mascot a horizontal distance of 12.0m (“the Road Dedication”);
 - (ii) replace the existing above ground electricity and telecommunications cables in Church Avenue adjoining the Development Site by underground cables and provide 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 (“the Works in Kind”) and
 - (iii) complete the Road Dedications and Works in Kind prior to the issue of an Occupation Certificate for the development.
- M. On 30 July 2008 the Applicant lodged with the Council development application no. 09/040 (“the Road Widening Development Application”) seeking development consent for the road widening and associated landscape works required for 3-9 Church Avenue and 4 John Street Mascot by the Second Development Consent.
- N. By notice of determination dated 3 February 2009 the Council granted development consent to the Road Widening Development Application upon the conditions set out in that notice (“the Road Widening Development Consent”).
- O. By letter addressed to the Council and dated 2 March 2009 the solicitors for the Applicant and Carfos have requested that Council enter into a Voluntary Planning Agreement with the Applicant and Carfos as provided for by Section 93F of the Act to provide for an agreed reduction in the aggregate amount of the First Section 94 Contribution and the Second Section 94 Contribution as a set off against the Road

Dedication and the Works in Kind required of the Applicant by the Second Development Consent.

P. The parties hereto agree that:

- (i) the value of land comprising the Road Dedication is \$1,193,920.00; and
- (ii) the value of the Works in Kind is \$300,000.00.

Q. After taking account of the Additional Floor Space & Height Benefits, the Applicant and Carfos have agreed to accept a deduction of ^{of \$210,000.00} ~~\$150,000.00~~ from the aggregate amount payable in respect of the First Section 94 Contribution and the Second Section 94 Contribution (hereafter collectively referred to as "the Section 94 Contributions") as a set off against the Road Dedication and Works in Kind to be provided by the Applicant in connection with the development the subject of the Second Development Consent the DA08/292 Consent ("the Development").

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

S. 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 takes effect upon execution of this Agreement.
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 Carfos jointly and severally covenant and agree with the Council that prior to the issue of an Occupation Certificate for the development the subject of the Second Development Consent and the DA08/292 Consent they shall at their expense prepare and effect registration by the Registrar General of a plan of subdivision of the Development Site providing for the dedication to Council for road widening of that part of the Development Site comprising the Road Dedication and complete to the satisfaction of the Council the Works in Kind.
6. In consideration of the Applicant and Carfos completing the Road Dedication and the Works in Kind as provided for in clause 5 hereof the Council covenants and agrees with the Applicant and Carfos that as provided for by Section 94(5) of the Act it will accept the Road Dedication and the Works in Kind in part satisfaction of the Section 94 Contributions and allow in respect thereof a deduction of ^{of two} ~~one~~ hundred and ^{ten} ~~five~~ thousand dollars ^{of \$210,000.00} ~~(\$150,000.00)~~ against the amount of the Section 94 Contributions.
7. The Applicant and Carfos further covenant with the Council:
 - (a) that prior to the issue of a Construction Certificate for the Development, 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 Applicant and Carfos 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 Applicant and Carfos 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 Carfos 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. The Applicant and Carfos shall pay Council's reasonable solicitor/client costs of preparing this Planning Agreement and any cost to Council of registering the Planning Agreement or a 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 Applicant and Carfos shall pay the Council's reasonable solicitor/client costs of providing Council's consent to such registration. The Applicant and Carfos 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 Applicant and Carfos a tax invoice for any amount payable by them under this clause.
10. Should either the Applicant or Carfos 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.
11. Any amendment or variation to this Planning Agreement is not effective unless it is in writing and signed by all the parties.
12. The explanatory note put on exhibition with this Planning Agreement is not to be used in construing the terms of this Planning Agreement.

13. 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:

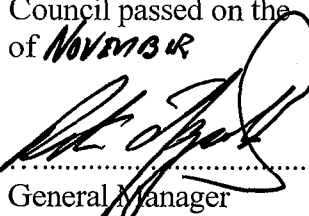
- (a) views expressed or proposals or suggestions made by a party, an expert or the conciliator during the conciliation relating to a possible settlement of the dispute;
- (b) admissions or concessions made by a party during the conciliation in relation to the dispute; and
- (c) information, documents 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.

14. (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

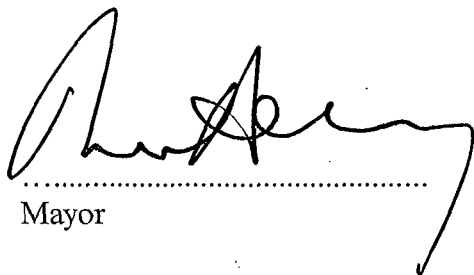
payable for the supply and when paying the consideration for the supply, also pay to the maker of the supply an amount equal to the GST payable in respect of that supply. The recipient of a supply must also pay the GST payable in respect of a supply for which no monetary consideration is payable when 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)


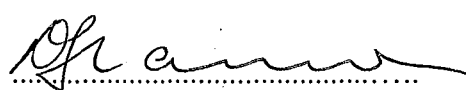
 General Manager



 Mayor

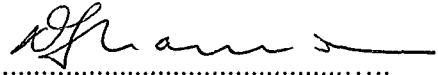
EXECUTED by CAMPAC PTY LTD)
 (ABN 06 002 230 766) by:)

 Secretary



 Director
 DANIELA SHANNON

EXECUTED by CARFOS PTY LTD)
(ABN 82 001 243 429) by:)



.....
Director

DANIELA SHANNON

.....
Secretary