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North Sydney Council

Legal Document

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Voluntary Planning Agreement

North Sydney Council

and

Austino St Leonards Pty Limited

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Voluntary Planning Agreement

Date	27 MAY 2014
Parties	<p>North Sydney Council ABN 32 353 260 317 of 200 Miller Street, North Sydney NSW 2060 (Council)</p> <p>Austino St Leonards Pty Limited ACN 161 651 510 of Suite 107, 4 -10 Goulburn Street Sydney NSW 2000 (Developer)</p>
Recitals	<p>A. The Developer owns the Land.</p> <p>B. The Developer proposes to carry out the Development which will include a slender tower element on the eastern side of the Land and retain the views and solar access enjoyed by nearby residents. To this extent the Developer proposes to make a development application to Council for the Development.</p> <p>C. Clause 4.3(2) of North Sydney Local Environmental Plan 2013 (LEP 2013) provides that a building must not be erected in the mixed use zone in excess of the height shown on the map. The map relating to clause 4.3(2) provides a maximum building height of 26 metres for the Land, which is located within a mixed use zone.</p> <p>D. The Developer has sought a change to clause 4.3(2) of LEP 2013 to allow a maximum building height of 40 metres for the Land as defined in LEP 2013, and to change clause 4.4(2) of LEP 2013 to allow a floor space ratio of 5.6:1.</p> <p>E. The Developer has made an offer to enter into a planning agreement with Council and the Council has accepted the offer. The Parties wish to formalise that arrangement by entering into this Agreement in accordance with section 93F of the Act.</p>

The parties agree, in consideration of, among other things, the mutual promises contained in this Agreement as follows:

1. Definitions and interpretation

1.1 Definitions

Terms used in this planning agreement which are defined in Schedule 1 (**Interpretation**) shall have the same meaning as ascribed to them by that Schedule and such meanings apply unless the contrary intention appears.

1.2 General

In this Agreement the following definitions apply:

- (a) a reference to this Agreement or another instrument includes any variation or replacement of any of them;
- (b) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (c) the singular includes the plural and vice versa;
- (d) the word "person" includes a firm, a body corporate, an unincorporated association or an authority;
- (e) A reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including, without limitation, persons taking by novation) and assigns;
- (f) a reference to anything (including, without limitation, any amount) is a reference to the whole and each part of it and a reference to a group of persons is a reference to all of them collectively, to any two or more of them collectively and to each of them individually;
- (g) "include" or "including" when introducing a list of items does not limit the meaning of the words to which the list relates to those items or to items of a similar kind;
- (h) if a party is required to do something, that includes a requirement to cause that thing to be done. If a party is prohibited from doing anything, it is also prohibited from doing or omitting to do anything which allows or causes that thing to be done;
- (i) a reference to a statute, ordinance, code or law includes a state ordinance code or law of the Commonwealth of Australia;
- (j) a reference to a body, whether statutory or not which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
- (k) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this Agreement;
- (l) any capitalized term used, but not defining in this Agreement, will have the meaning ascribed to it under, and by virtue of, the Act;
- (m) headings are inserted for convenience only and do not affect the interpretation of this Agreement;
- (n) a reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney;
- (o) if the day on which 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;
- (p) a reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars;
- (q) a reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced;
- (r) a reference to a clause, part schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement;

- (s) a reference to this Agreement includes the agreement recorded in this Agreement; and
- (t) 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.

3. Application of this Agreement

This Agreement applies to:

- (a) the Land,
- (b) the Instrument Change, and
- (c) the Development,

4. Operation of this Agreement

The parties each agree that this Agreement operates on and from the date of this Agreement.

5. Contributions to be made under this Agreement

- (a) The Developer will for the purpose of increasing the amount of Public Open Space in the North Sydney Local Government Area provide a monetary contribution in an amount calculated in accordance with clause 5(b), by way of a bank cheque in favour of North Sydney Council prior to the issue of any Construction Certificate for any future building or development on the Land.
- (b) The monetary contribution referred to in clause 5(a) will be \$700,000 or an amount determined in accordance with the following formula, whichever is the greater:

$$\$700,000 \times \frac{\text{The Consumer Price Index at the time of payment}}{\text{The Consumer Price Index that applied at the date of this Agreement}}$$

- (c) The Developer agrees and acknowledges that:
 - (i) any future building on the Land will be set back three metres from the Oxley Street frontage of the Land;
 - (ii) any future Development Consent for, or Modification relating to, a building on the Land may require development of the Setback Area so that it is consistent with the public domain and it is at grade flush with the adjacent public footpath;
 - (iii) it will design and construct the development of the Setback Area in accordance with the technical requirements for footpaths in North Sydney Development Control Plan 2013 and Council's Public Domain Style Manual and Design Code;
 - (iv) an easement in gross in favour of the Council permitting public access to the Setback Area will be registered against the title to the Land at no cost to the Council prior to the issue of an Occupation Certificate for any building on the Land; and

- (v) the easement in gross referred to in clause 5 (c)(iv) will require the owner of the Setback Area to:
 - (A) maintain and repair the land to the satisfaction of the Council;
 - (B) maintain sufficient public liability insurance
 - (C) ensure that no buildings or structures are erected on the Setback Area other than structures approved by the Council for the purposes of enhancing public domain areas; and
 - (D) ensure that any rules made by an Owner's Corporation relating to the Setback Area are approved by the Council.
- (d) The Developer agrees and acknowledges that:
 - (i) any future Development Application or Modification Application for a building on the Land will not include any building or development above RL 100.370 on the hatched portion of the Land shown in Appendix A (other than landscaping, fencing, lift overruns, skylights or non-habitable common room areas forming part of the common property, provided that any lift overrun or skylight does not exceed RL103.62 and any common room structure does not exceed RL103.00, is less than 60 square metres in area and is offset on the podium towards the western boundary so as not to obstruct views across the eastern part of the podium); and
 - (ii) prior to the issue of a Construction Certificate for any work on the Land, a covenant will be registered against the title to the Land prohibiting any building or development above RL100.370 on the hatched portion of the Land shown in Appendix A (other than landscaping, fencing lift overruns, skylights or non-habitable common room areas forming part of the common property, provided that any lift overrun or skylight does not exceed RL103.62 and any common room structure does not exceed RL103.00, is less than 60 square metres in area and is offset on the podium towards the western boundary so as not to obstruct views across the eastern part of the podium). .
- (e) The Developer agrees and acknowledges that the obligations under this Agreement at clause 5 (c) and clause 5(d) are relevant considerations for the Council or any other consent authority when determining any future Development Application or Modification Application and that a failure to comply with those obligations or any inconsistency with the requirements in those clauses may constitute a reason for refusal of any such application.

6. Application of s94, s94A and s94EF of the Act to the Developer

- (a) Sections 94, 94A and 94EF of the Act will apply to any future development of the Land.
- (b) Benefits under this planning agreement are excluded from being taken into consideration under s94(6) of the Act and its application to any future development of the Land.

7. Application of the Contributions

- (a) The Council must upon receipt of the Monetary Contribution paid by the Developer in accordance with clause 5 of this Agreement and within a reasonable time after the date of this Agreement use that contribution as it sees fit to:
 - (i) acquire land for the provision of Public Open Space;

- (ii) attend to the embellishment of the land so acquired for open space; or
 - (iii) care for and maintain the said open space.
- (b) In the event the Council determines not to acquire land for the purposes of establishing new open space areas, the Council agrees that the contributions made under this Agreement will be applied towards the embellishment and maintenance of other land for the purposes of public open space and recreation with the North Sydney Local Government Area.
- (c) For the avoidance of doubt, nothing in this Agreement requires the Council to:
- (i) spend the contributions made under this Agreement by a particular date; or
 - (ii) refund to the Developer any contributions made under this Agreement.
- (d) The parties acknowledge and agree that the setback of buildings referred to in clause 5(c) will provide more space for pedestrian use and increase the amenity of that area for pedestrians.

8. Registration of this Agreement

- (a) The Developer represents and warrants that it is the registered proprietor of the Land.
- (b) The Developer agrees that it will procure the registration of this Agreement, under the *Real Property Act 1900* (NSW) in the relevant folios of the Register for the Land in accordance with s93H of the Act.
- (c) The Developer at its own expense will, promptly after this Agreement comes into operation, take all practical steps, and otherwise do anything that the Council reasonably requires, to procure:
- (i) the consent of each person who:
 - (A) has an estate or interest in the Land; or
 - (B) is seized or possessed of an estate or interest in the Land; and
 - (ii) the execution of any documents; and
 - (iii) the production of the relevant duplicate certificates of title,
- to enable the registration of this Agreement in accordance with clause 8(b).
- (d) The Developer at its own expense, will take all practical steps, and otherwise do anything that the Council reasonably requires:
- (i) to procure the lodgement of this Agreement with the Registrar-General as soon as reasonably practicable after this Agreement comes into operation but in any event, no later than 90 Business Days after that date; and
 - (ii) to procure the registration of this Agreement by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this Agreement is lodged for registration.
- (e) The Council will provide a release and discharge of this Agreement so that it may be removed from the folios of the Register for the Land (or any part of it) provided the Council is satisfied the Developer has duly fulfilled its obligations under this

Agreement and is not otherwise in default of any of the obligations under this Agreement.

9. Review of this Agreement

This Agreement may be reviewed or modified by the agreement of the parties using their best endeavours and acting in good faith.

10. Dispute Resolution

10.1 Dispute

If any dispute arises out of this Agreement (**Dispute**) a party to the agreement must not commence any court or arbitration proceedings unless the parties to the Dispute have complied with the following paragraphs of this clause except where a party seeks urgent interlocutory relief,

10.2 Notice of Dispute

A party to this Agreement claiming that a dispute has arisen out of or in relation to this Agreement must give written notice (**Notice**) to the other party to this Agreement specifying the nature of the dispute,

10.3 Dispute Resolution

If the parties do not agree within seven days of receipt of the Notice (or such further period as agreed in writing by them) as to:

- (a) the dispute resolution technique (eg expert determination) and procedures to be adopted;
- (b) the timetable for all steps in those procedures; and
- (c) the selection and compensation of the independent person required for such technique,

The parties must mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales as published by the Law Society of New South Wales from time to time, and, the President of the Law Society of New South Wales or the President's nominee will select the mediator and determine the mediator's remuneration.

11. Enforcement and Security

11.1 Bank Guarantee

- (a) Prior to the Instrument Change, the Developer is to provide to the Council a Bank Guarantee in the amount of \$700,000.
- (b) The Council may call on a Bank Guarantee provided under this clause if:
 - (i) the Developer is in material or substantial breach of this Agreement and has failed to rectify the breach after having been given reasonable notice (which must not be less than 20 Business Days) in writing to do so; or
 - (ii) the Developer becomes insolvent.
- (c) At any time following the provision of a Bank Guarantee, the Developer may provide the Council with one or more replacement Bank Guarantees totalling the amount of all

Bank Guarantees required to be provided under this clause for the time being. On receipt of such replacement Bank Guarantee, the Council must release and return to the Developer, as directed, the Bank Guarantees which it holds that have been replaced.

- (d) Subject to this clause, the Council may apply the proceeds of a Bank Guarantee in satisfaction of:
 - (i) any obligation of the Developer under this Agreement to pay the Monetary Contribution, and
 - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this Agreement.
- (e) When an obligation of the Developer under this Agreement to which a Bank Guarantee relates has been fulfilled, the Council must return the Bank Guarantee if requested by the Developer.
- (f) Nothing in this clause 11.1 prevents or restricts the Council from taking any enforcement action in relation to:
 - (i) any obligation of the Developer under this Agreement; or
 - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this Agreement,

that is not nor cannot be satisfied by calling on a Bank Guarantee.

11.2 Restriction on the issue of Certificates

- (a) In accordance with clause 146A of the Regulation the following obligations must be satisfied prior to the issue of a Construction Certificate for any future building or development on the Land:
 - (i) provision of the Monetary Contribution in accordance with clause 5(a); and
 - (ii) registration of the covenant required under clause 5(c)(ii).
- (b) In accordance with section 109H(2) the obligation to register the easement in gross under clause 5(c)(iv) must be satisfied prior to the issue of any Occupation Certificate for a building on the Land.

11.3 General Enforcement

- (a) Without limiting any other remedies available to the Parties, this Agreement may be enforced by any party in any Court of competent jurisdiction.
- (b) Nothing in this Agreement prevents:
 - (i) a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates; and
 - (ii) the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

11.4 Acknowledgement regarding Security

The parties acknowledge and agree that the security provided under this clause 11 together with the timing of requirements to pay contributions, the agreements and acknowledgements under clause 5, the requirements under clause 7 for registration of this Agreement and the restrictions on assignment of this Agreement under clause 14 will provide sufficient security for the performance of the Developer's obligations under this Agreement.

12. Notices

12.1 Any notice, consent, Information, application or request that must or may be given or made to a party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

- (a) delivered or posted to that party at its address set out below
- (b) faxed to that party at its fax number set out below,
- (c) emailed to that party at its email address set out below:

Council **North Sydney Council**
Attention: General Manager
Address: 200 Miller Street, Sydney NSW 2060
Phone 02 9936 8100
Fax Number. 02 9936 8177
Email: council@northsydney.nsw.gov.au

Developer **Austino St Leonards Pty Limited**
Attention: Hemming Quan
Address: c/- Mersonn Pty Limited
 6/20 Wylde Street Potts Point NSW 2011
Phone 02 9326 9962

12.2 If a party gives the other party three 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 that party if it is delivered, posted or faxed to the latest address or fax number.

12.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:

- (a) if it is delivered, when it is left at the relevant address;
- (b) if it is sent by post, two business days after it is posted;
- (c) if it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.

12.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5:00 pm on that day in the place of the party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

13. 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 a Consent Authority to:
 - (i) grant development consent; or
 - (ii) exercise any function under the Act in relation to a change in an environmental planning instrument.

14. Assignment and Dealings

The Developer may not sell, transfer, assign or novate or similarly deal with its right, title or interest in the Land (if any) or rights or obligations under the terms of this agreement, or allow any interest in them to arise or be varied, in each case, without Council's consent and unless, prior to any such sale, transfer, assignment, charge, encumbrance or novation, the Developer:

- (a) at no cost to Council, first procures the execution by that person of all necessary documents in favour of Council by which that person agrees to be bound by the Agreement as if they were a party to the original Agreement; and
- (b) satisfies the Council that the Developer is not in breach of this Agreement.

15. Costs

The Developer agrees to pay or reimburse Council all costs incurred in connection with:

- (a) the negotiation, preparation and execution of this Agreement; and
- (b) advertising and exhibition of this Agreement in accordance with the Act,

within three business days after receipt a notice from the Council as to the amount of those costs.

16. Entire Agreement

This Agreement constitutes the entire agreement of the parties about its subject matter and supersedes all previous agreements, understandings and negotiations on that subject matter.

17. 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.

18. Governing Law and Jurisdiction

This Agreement is governed by the law of New South Wales, The Parties submit to the nonexclusive 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.

Without preventing any other method of service, any document in an action may be served on a party by being delivered or left at that party's address in the Details.

19. Joint and individual liability and benefits

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

20. No fetter

Nothing in this Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its 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.

21. Representations and warranties

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

22. Severability

- (a) The parties acknowledge that under and by virtue of Section 93F(4) of the Act, any provision of this Agreement is not invalid by reason only that there is no connection between the Development the object of the expenditure of any money required to be paid by that provision.
- (b) The parties agree that to the extent permitted by Law, this Agreement prevails to the extent of its inconsistency with any Law.
- (c) If a clause or part of a clause of this Agreement 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.
- (d) 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 Agreement, but the rest of this Agreement is not affected.

23. Modification

No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement and is in accordance with the provisions of the Act.

24. Waiver

- (a) The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- (b) A waiver by a Party is only effective if it is in writing.
- (c) A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given it is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

25. Goods and Services Tax

- (a) Words and expressions which are not defined in this Agreement but which have a defined meaning in the GST Law have the same meaning as in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST.
- (c) If GST is imposed on any supply made under or in accordance with this Agreement, the Developer must pay the GST or pay to the Council an amount equal to the GST payable on or for the taxable supply, whichever is appropriate in the circumstances.

26. Discharge of Developers Obligations

The Developer's obligations under this Agreement shall be discharged on the occurrence of any of the following:

- (a) The Developer's obligations have been fully carried out in accordance with this Agreement; or
- (b) Council and the Developer otherwise agree to the modification or discharge of this Agreement.

27. Counterparts

This Agreement may be executed in any number of counterparts. All counterparts taken together constitute one instrument.

Schedule 1 - Interpretation (clause 4)

Act means the *Environmental Planning and Assessment Act 1979* (NSW).

Bank Guarantee means an irrevocable and unconditional undertaking by one of the following trading banks:

1. Australia and New Zealand Banking Group Limited;
2. Commonwealth Bank of Australia;
3. Macquarie Bank;
4. National Australia Bank Limited;
5. St George Bank Limited;
6. Westpac Banking Corporation; or
7. other financial institution approved by the Council,

to pay an amount or amounts of money to the Council on demand and containing terms and conditions reasonably acceptable to the Council.

Construction Certificate means a construction certificate as defined under s109C of the Act.

Consumer Price Index means the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics.

Dealing, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.

Development means the mixed use development upon the Land at 7-19 Albany Street, St Leonards to create a building having a height up to 40 metres, adopting the definition of 'height' contained in LEP 2013 which will include a slender tower element on the eastern side of the Land which retains the views and solar access enjoyed by nearby residents.

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act

GST has the same meaning as in the GST Law

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.

Insolvent means the occurrence of any of the following:

1. a Party is liquidated, whether compulsorily or voluntarily (other than for the purpose of amalgamation or reconstruction whilst solvent);
2. a Party becomes unable to pay its debts as they fall due;
3. a Party enters into any arrangement with creditors;
4. a Party becomes subject to external administration within the meaning of Chapter 5 of the *Corporations Act 2001* (Cth), including having a receiver or administrator appointed over all or any part of its assets; or

5. anything analogous (such as analogous bankruptcy processes) or having a substantially similar effect to the events specified in clauses 1 to 4 above occurs in relation to a party, including the court appointment of a receiver.

Instrument Change means a change to LEP 2013 to provide a maximum building height of 40m and a floor space ratio of 5.6:1 for the Land.

Land means the property located at 7-19 Albany Street, St Leonards (being all lots and common property within Strata Plan 4521 and Strata Plan 44485)

Modification means the grant of any Modification Application under s96 of the Act.

Modification Application means an application to modify a Development Consent under s96 of the Act.

Monetary Contribution means the monetary contribution to be paid by the Developer to the Council in accordance with clause 5(a) of this Agreement.

Occupation Certificate means an occupation certificate as defined under s 109C of the Act, including an interim Occupation Certificate or a final Occupation Certificate.

Party means a party to this agreement, including their successors and assigns.

Regulation means the Environmental Planning and Assessment Regulation 2000.

Setback Area means the area of the Land created by the set back of any future building at least 3 metres from Oxley Street, as required by clause 5(c)(i) of this Agreement.



Executed as an Agreement

Executed for and on behalf of **North Sydney Council** by its authorised delegate in accordance with a resolution passed at a duly convened meeting held on 19 May 2014 in the presence of:


Signature of witness GENERAL MANAGER

WARWICK WINN
Full name of witness (print)

GENERAL MANAGER
Position of witness (print)


Signature of representative MAYOR

JILLY GIBSON
Full name of representative (print)

MAYOR
Position of representative (print)

Executed by Austino St Leonards Pty Limited ACN 161 651 510 in accordance with section 127 of the *Corporations Act 2001* (Cth) by:


Signature of Director

Suhua Yan
Print name of Director


Signature of Director/Secretary

HEMING QUAN
Print name of Director/Secretary

Annexure A – Land subject to Height Limitation (clause 5(d))

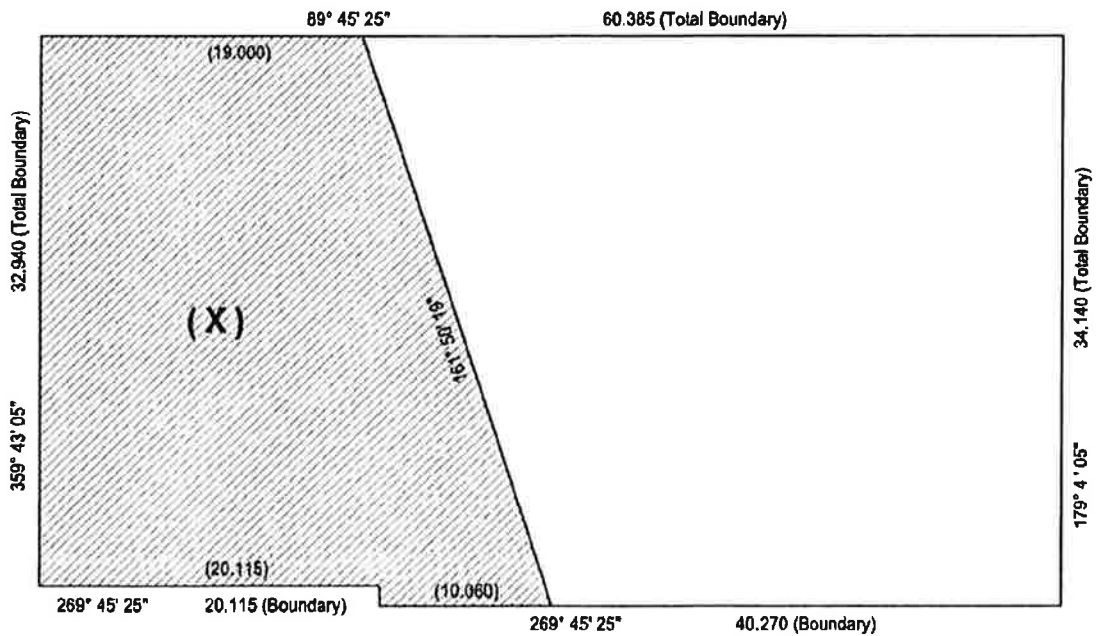
LGA : NORTH SYDNEY
PARISH : WILLOUGHBY

LOCALITY : ST. LEONARDS
COUNTY : CUMBERLAND

SCALE : 1:400
DATE : 28/10/2013

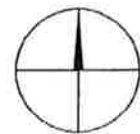


ALBANY STREET



POLE LANE

OXLEY STREET



(X) LAND SUBJECT TO HEIGHT LIMITATION

THIS IS THE PLAN MARKED 'A' REFERRED TO IN AGREEMENT DATED BETWEEN AUSTINO PTY. LTD. AND NORTH SYDNEY COUNCIL