



North Sydney Council

Legal Document

LD 6873

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VOLUNTARY PLANNING AGREEMENT

PARTIES

North Sydney Council

ABN 32 353 260 317

(Council)

AND

Ralan St Leonards Pty Ltd

ACN 147 661 345

(Developer)

February
January 2013

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Ref : CCG:TE:120313



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VOLUNTARY PLANNING AGREEMENT No. of 2013

Planning Agreement made at *North Sydney 12 March 2013*

Parties: **North Sydney Council ABN 32 353 260 317** of 200 Miller Street, North Sydney NSW 2060
("Council")

Ralan St Leonards Pty Limited ACN 147 661 345 of 545-553 Pacific Highway, St Leonards NSW 2065. _____
("Developer")

BACKGROUND

- A. The Developer owns the Land.
- B. The Developer proposes to carry out the Development on the Land. To this extent the Developer proposed to make a development application to Council for the Development.
- C. Clause 29(2) of North Sydney Local Environmental Plan 2001 ("LEP 2001") 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 29(2) provides a height limit of 26 metres for the Land, which is located within a mixed use zone.
- D. Council has adopted the St Leonards / Crows Nest Planning Study - Precinct 1 which makes provision for an increase in building height to 50m. The Land is located within the area the subject of the Planning Study.
- E. The Developer has sought a change to clause 29(2) of LEP 2011 to allow a height limit of 50 metres for the Land.
- F. 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.

OPERATIVE PROVISIONS

1. Planning agreement under the Act

The Parties agree that this Agreement is a planning agreement within the meaning of section 93F of the Act.

2. Application of this Agreement

This Agreement applies to:

- (a) the Land, and
 - (b) the Development.
-

3. Operation of this Agreement

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

4. Definitions and interpretation

4.1 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.

4.2 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.
-

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 the amount of \$1,527,500.00 by way of a bank cheque in favour of North Sydney Council prior to the issue of any Construction Certificate that applies to or with respect to the Development.
- (b) The Developer agrees and acknowledges that:
 - (i) any future building on the Land will be set back 3 metres from both the Pacific Highway and Oxley Street frontages of the Land;
 - (ii) any future Development Consent for, or Modification relating to, a building on the Land may require development of the Setback Areas so that they are consistent with the public domain and they are at grade flush with the adjacent public footpath;
 - (iii) any development of the Setback Areas will be designed and constructed in accordance with the technical requirements for footpaths in *North Sydney Development Control Plan 2002* and Council's Infrastructure Specifications Manual;
 - (iv) an easement in gross in favour of the Council permitting public access to the Setback Areas will be registered against the title to the Land at no cost to the Council; and
 - (v) the easement in gross referred to in clause 5(b)(iv) will require the owner of the Setback Areas to maintain and repair the land to the

satisfaction of the Council, to maintain sufficient public liability insurance and to ensure that any rules made by an Owner's Corporation relating to the Setback Areas are approved by the Council.

- (c) 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 (other than landscaping or fencing) above RL 105.06 on the hatched portion of the Land shown in Appendix A, consistent with the limitation expressed in condition C41 of Development Consent DA153/10 granted on 29 September 2010; and
 - (ii) a covenant will be registered against the title to the Land prohibiting any building or development (other than landscaping or fencing) above RL 105.06 on the hatched portion of the Land shown in Appendix A.

- (d) The Developer agrees and acknowledges that the obligations under this Agreement at clause 5(b) and clause 5(c) 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 Development

- (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(b) will provide more space for pedestrian use and increase the amenity of that area for pedestrian users.

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 lodgment 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 endeavors 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 7 days of receipt of the Notice (or such further period as agreed in writing by them) as to:

10.3.1 the dispute resolution technique (eg expert determination) and procedures to be adopted.

10.3.2 the timetable for all steps in those procedures; and

10.3.3 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 \$1,527,500.00.
- (b) Except as expressly permitted by this Agreement, the Council is not to call on a Bank Guarantee provided under this clause unless:
 - (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 totaling 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 a Construction Certificate

In accordance with clause 146A of the Regulation the obligations to provide the Monetary Contribution must be satisfied prior to the issue of any future Construction Certificate that applies to the Development

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 **Ralan St Leonards Pty Limited ACN 147 661 345**
Attention: Robert Severino
Address: c/- Steve Nolan Constructions Pty Limited
 PO Box 435, South Hurstville, NSW 2221
Ph: 0421 865 830

12.2 If a party gives the other party 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 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, 2 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 5pm 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 consents and unless, prior to any such sale, transfer, assignment, charge, encumbrance or novation, the Developer:

- (i) 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
 - (ii) 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 3 business days after receipt of a tax invoice from Council.
-

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 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.

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

If any Party reasonably decides that it is liable to pay GST on a supply made to the other Party under this Agreement and the supply was not priced to include GST, then recipient of the supply must pay an additional amount equal to the GST on that supply.

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. The performance of this Agreement has been frustrated by an event or events beyond the reasonable control of the Parties; or
 - c. The Developer has fully and completely assigned the Developer's interest under this Agreement in accordance with its terms; or
 - d. 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.

EXECUTED AS AN AGREEMENT

**FOR AND ON BEHALF OF NORTH SYDNEY COUNCIL
(Council)**

by its authorised delegate in accordance with a resolution passed at a duly convened meeting held on 4 February 2023 in the presence of:



Authorised Delegate Witness

Name Jilly Gibson

Position Mayor



Name Penny Holloway

Position General Manager

SIGNED by RALAN ST LEONARDS P/L ACN 147661345 -

(Developer) in the present of:



Signature of witness

Cheryl Spanner
Name of Witness



William O'Dwyer
Sales Director

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:

- (a) Australia and New Zealand Banking Group Limited;
- (b) Commonwealth Bank of Australia;
- (c) Macquarie Bank;
- (d) National Australia Bank Limited;
- (e) St George Bank Limited;
- (f) Westpac Banking Corporation; or
- (g) 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.

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

Development means the addition to a mixed use development upon the Land at 545-553 Pacific Highway, St Leonards to create a building having a height up to 50 metres, adopting the definition of 'height' contained in North Sydney Local Environmental Plan 2001.

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:

- (a) a Party is liquidated, whether compulsorily or voluntarily (other than for the purpose of amalgamation or reconstruction whilst solvent);
- (b) a Party becomes unable to pay its debts as they fall due;
- (c) a Party enters into any arrangement with creditors;

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

Instrument Change means a change to clause 29(2) of North Sydney Local Environmental Plan 2001 to provide a height limit of 50m for the Land.

Land means the property located at No. 545-553 Pacific Highway, St Leonards (Lot 1 & 2 in Deposited Plan 1081379, Part Lots 3 & 4, Section 9 in Deposited Plan 2872 and Lot 1 in Deposited Plan 432019)

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.

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

Regulation means the Environmental Planning and Assessment Regulation 2000.

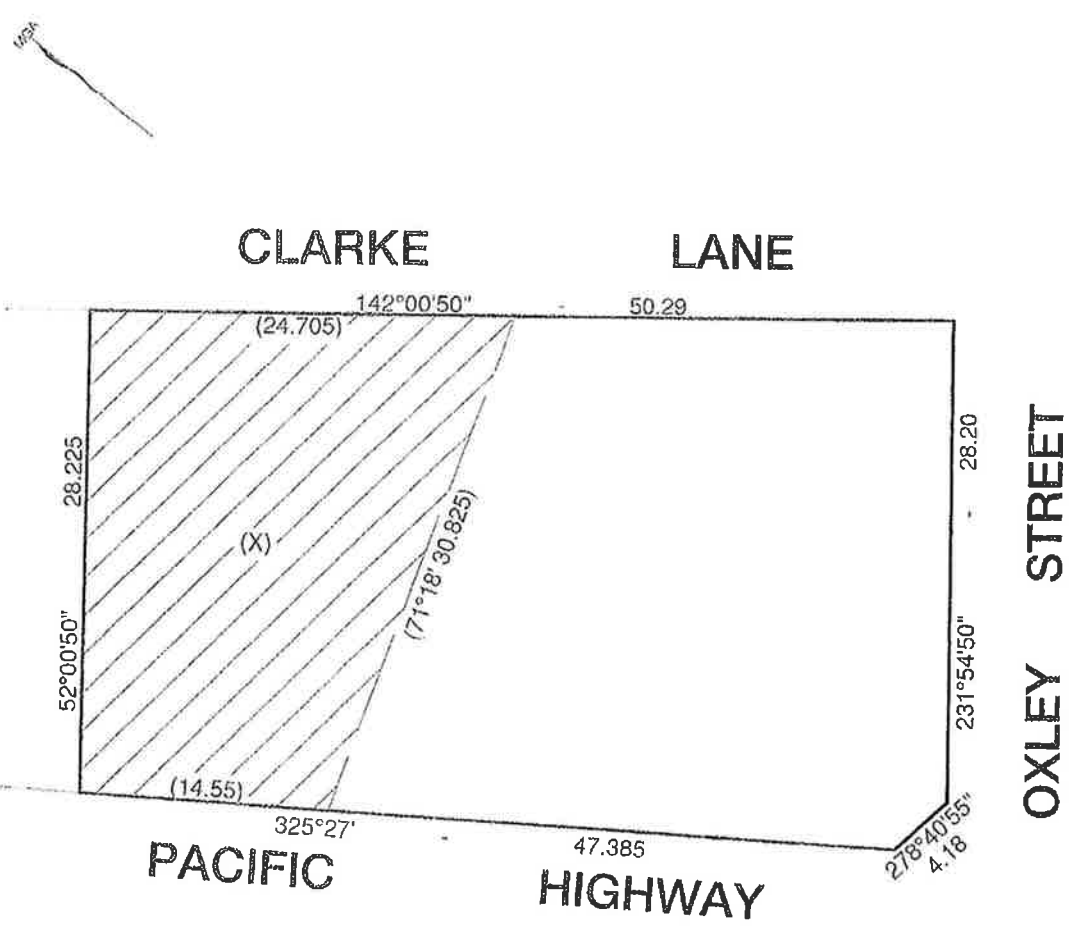
Setback Areas means the area of the Land created by the set back of any future building at least 3 metres from the Pacific Highway and Oxley Street, as required by clause 5(b)(i) of this Agreement.

Appendix A – Land subject to Height Limitation (clause 5(c))

LGA: NORTH SYDNEY
 PARISH: WILLOUGHBY

LOCALITY: ST LEONARDS
 COUNTY: CUMBERLAND

SCALE: 1:400
 DATE: 10-10-2012



(X) LAND SUBJECT TO HEIGHT LIMITATION

VICTORIA TESTER
 REGISTERED SURVEYOR

SIGNATURES AND SEALS

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