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ABN 59 874 202 316

Your Ref: Ian Lacy

Received by

16 DEC 2011

Archives & Records

The General Manager
Liverpool City Council
DX 5030 LIVERPOOL

15 December 2011

Dear Ian,

**Re: Draft VPA between LCC & Australian Turf Club Monday Street LLEP
2008 Amendment 18**

I refer to the above matter and to my previous correspondence to Council.

Please find **enclosed** the original executed Planning Agreement with respect to Munday Street, Warwick Farm for your records.

Should you have any queries in relation to the above matter, please do not hesitate to contact me at the Campbelltown office.

Yours faithfully
MARSDENS LAW GROUP

J R THORNTON
Partner
Accredited Specialist Business Law

Encl.

*The Partners and Staff of Marsdens Law Group wish
you a Merry Christmas and a Happy New Year.*

Our Campbelltown Office is open every day except public holidays.

*Our branch offices will be closed from 5.00pm Thursday 22 December 2011.
They will reopen on 3 January 2012 however, if you require assistance,
contact the Campbelltown office on (02) 4626 5077.*



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Planning Agreement
Munday Street, Warwick Farm (Lot 1 in DP 1162276)

Liverpool City Council (ABN 81 181 182 471) (**Council**)

Australian Turf Club Limited (ABN81 148 157 288) (**Developer**)

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Planning Agreement

Lot 1 DP 1162276 Warwick Farm

Parties

Council	Name	Liverpool City Council
	Address	33 Moore Street Liverpool NSW 2170
	ABN	84 181 182 471
	Telephone	(02) 9821 9222
	Facsimile	(02) 9821 9333
	Email	gm@liverpool.nsw.gov.au
	Representative Contact	Farooq Portelli
Developer	Name	Australian Turf Club Limited
	Address	Royal Randwick Racecourse, 77-97 Alison Road, Randwick NSW 2031
	ABN	81 148 157 288
	Telephone	(02) 9663 8400
	Facsimile	(02) 9262 6292
	Email	mflanagan@royalrandwick.com
	Representative /Contact	Mark Flanagan

Background

- A The Developer is the registered proprietor of the Developer's Land.
- B The Developer's Land is presently zoned RE2 under the Liverpool Local Environmental Plan 2008.
- C The Developer has sought the Instrument Change which will give effect to the Rezoning.
- D The Developer acknowledges that if the Development is carried out it is likely to increase the demand for the provision of public facilities.
- E As a consequence of the matters set out above, the Developer:
- (1) has offered to make the Development Contributions on the terms set out in this agreement; and

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- (2) has, prior to the date of this agreement, dedicated the Council Road Widening Land as a public road.

Operative provisions

1 Definitions and interpretation

1.1 Defined terms

In this agreement, words beginning with a capital letter that are defined in Part 1 of **Schedule 2** have the meaning ascribed to them in that schedule.

1.2 Interpretation

Unless the context otherwise requires the interpretational rules contained in Part 2 of **Schedule 2** apply in the interpretation of this agreement.

2 Application and operation of agreement

2.1 Planning agreement

The parties agree that this agreement is a planning agreement:

- (1) within the meaning set out in s93F of the Act; and
- (2) governed by Subdivision 2 of Division 6 of Part 4 of the Act.

2.2 Application

This agreement applies to both the Developer's Land and the Development.

2.3 Operation

- (1) Subject to paragraph (2), this agreement operates from the date it is executed by both parties.
- (2) The following clauses of this agreement will only operate if and from the date that is the later of the date on which Development Consent for the Subdivision Plan is granted and the date on which the Instrument Change has been made:
 - (a) clause 3;
 - (b) clause 4;
 - (c) clause 5; and
 - (d) clause 6;
 - (e) clauses 13.2 to 13.4 inclusive.

3 Provision of the Development Contributions

3.1 Dedication of Land

The parties acknowledge and agree that:

- (1) prior to the date of this agreement, the Developer has dedicated the Council Road Widening Land as a public road;
- (2) the dedication referred to in paragraph (1) was undertaken on the basis that it forms part of the Development Contributions; and
- (3) the Contribution Value of the Council Road Widening Land for the purpose of this agreement is \$540,582.00.

3.2 The Works

The Developer must procure that the Works are Completed:

- (1) in accordance with this agreement; and
- (2) by the time set out in **Schedule 3**.

3.3 Standard of construction

The Developer must construct and Complete the Works:

- (1) in accordance with the requirements of Council's advertised construction specifications advertised on its website as at 1 December 2010;
- (2) in accordance with any reasonable requirements of any consent issued by a relevant Authority with respect to the construction and use of the Works;
- (3) in accordance with any Australian Standards and Laws applicable to works of the same nature as the Works; and
- (4) in a proper and workmanlike manner complying with current industry practice and standards relating to each aspect of the Works.

3.4 Acceptance of risk in Works

Subject to clause 5, after the Works are Completed Council accepts ownership, risk, possession and control of the Works.

3.5 Indexation of amounts

The Contribution Value for the Works will be increased in accordance with the following formula:

$$A = \frac{B \times C}{D}$$

where:

- A** = the indexed amount;
- B** = the relevant amount as set out in this agreement;
- C** = the Index most recently published before the date that the Works are Completed; and
- D** = the Index most recently published before the commencement date of this agreement.

If **A** is less than **B**, then the amount of the relevant Contribution Value will not change.

3.6 Effect of Indexation

Where the Contribution Value for the Works is indexed in accordance with clause 3.5, the indexed amount for those works as at the date it is Complete will be the Contribution Value of those works.

4 Completion of Works

4.1 Completion Notice

The Developer must provide a Completion Notice to Council within fourteen (14) days of completing the Works.

4.2 Council to inspect

Council must inspect the Works within fourteen (14) days of the receipt of the Completion Notice.

4.3 Notice by Council

Within the earlier of:

- (1) fourteen (14) days of inspecting the Works; or
- (2) twenty-eight (28) days from the receipt of the Completion Notice,

Council must provide notice in writing to the Developer that the Works:

- (3) have been Completed; or
- (4) have not been Completed, in which case the notice must also detail:
 - (a) those aspects of the Works which have not be Completed; and
 - (b) the work Council requires the Developer to carry out in order to rectify those deficiencies.

4.4 Deemed Completion

If Council does not provide the Developer with notice in accordance with clause 4.3, the Works will be deemed to have been Completed on the date nominated in the Completion Notice.

4.5 Effect of Council Notice

- (1) Where Council serves notice on the Developer pursuant to clause 4.3(4), the Developer must:
 - (a) rectify the deficiencies in the Works in accordance with that notice within three (3) months from the date it is issued by Council; or
 - (b) serve a notice on Council that it disputes the matters set out in the notice.
- (2) Where the Developer:
 - (a) serves notice on Council in accordance with paragraph (1)(b), the dispute resolution provisions of this agreement apply; or

- (b) rectifies the Works in accordance with paragraph (1)(a) it must serve upon Council a new Completion Notice for the Works (**New Completion Notice**).
- (3) The provisions of clauses 4.2 to 4.5 (inclusive) apply to any New Completion Notice issued by the Developer.

5 Defects liability

5.1 Defects Notice

- (1) Where the Works are Complete but any part of those Works contain a material defect which:
 - (a) adversely affects the ordinary use and/or enjoyment of that part of the Works; or
 - (b) will require maintenance or rectification works to be performed as a result of the existence of the defect,

(**Defect**) Council may issue a defects notice (**Defects Notice**) concerning that part of the Works, but only within the Defects Liability Period.
- (2) A Defects Notice must contain the following information:
 - (a) the nature and extent of the Defect;
 - (b) the work Council requires the Developer to carry out in order to rectify the Defect; and
 - (c) the time within which the Defect must be rectified (which must be a reasonable time and not less than ten (10) business days).

5.2 Developer to rectify Defects

- (1) The Developer must rectify the Defects contained in a Defects Notice as soon as practicable after receipt of the Defects Notice.
- (2) The Developer must follow the procedure set out in clause 4 in respect of the rectification of any Defect.

5.3 Right of Council to step-In

Council, at its discretion, may rectify a Defect set out in the Defects Notice where the Developer has failed to comply with a Defects Notice, but only after giving thirty (30) days written notice to the Developer of its intention to do so.

5.4 Consequence of Step-In

If Council elects to exercise the step-in rights granted to it under clause 5.3 then:

- (1) Council may:
 - (a) enter upon any part of the Developer's Land that it requires access to in order to satisfy the obligations of the Developer in accordance with the Defects Notice; and
 - (b) rectify the relevant Defects in accordance with the Defects Notice; and

-
- (2) the Developer must not impede or interfere with the Council in exercising those rights.

5.5 Costs of Council

Where Council exercises its step-in rights under clause 5.3:

- (1) all reasonable costs incurred by Council in rectifying the relevant Defects may be claimed by Council as a liquidated debt owed by the Developer; and
- (2) Council may recover such debt (or part of it) from the Bond or Bank Guarantee.

6 Licence to access

6.1 Grant of licence

The Developer grants Council a licence to enter and occupy the Developer's Land for the purpose of allowing Council to exercise any right granted to Council under this agreement.

6.2 Terms of the licences

- (1) For the purpose of this clause 6.2, **the Licence** means the licence granted under clause 6.1.
- (2) The terms of the Licence are as set out in **Schedule 4**.
- (3) When accessing the Developer's Land pursuant to the Licence, Council must:
- (a) only do so at reasonable times after having provided to the Developer with at least fourteen (14) days' written notice of that access;
- (b) only do so for so long as is reasonably necessary to complete the purpose for which it is accessing the relevant land; and
- (c) cause as little damage or disruption to the relevant land, or any surrounding land, and restore that land as far as reasonably practicable to the condition it was in at the date of this agreement.

7 Application of s94 & s94A

This agreement wholly excludes the application of section 94 and section 94A of the Act to:

- (1) the Development;
- (2) the Development Consent; and
- (3) any development consent for the Subdivision Plan.

8 Registration of this planning agreement

8.1 Obligation to Register

- (1) The Developer and Council agree that this agreement will be registered on the title of the Developer's Land pursuant to section 93H of the Act.

-
- (2) The Developer must:
- (a) do all things necessary to allow the registration of this agreement to occur under paragraph (1); and
 - (b) pay any reasonable costs incurred by Council in undertaking that registration, up to a maximum amount of \$5,000.

8.2 Discharge of agreement

- (1) Council will do all things necessary to allow the Developer to remove this agreement from the title of the Developer's Land as soon as reasonably practicable upon request by the Developer where the Developer has Completed the Works.
- (2) The Developer must pay any reasonable costs incurred by Council in undertaking that discharge up to a maximum amount of \$5,000.

9 Occupation Certificate

Council may refuse to issue an Occupation Certificate if:

- (1) the Works have not been Completed by the time specified in **Schedule 3** but only if a condition of any Development Consent provides that an Occupation Certificate is not to be issued unless the Works have been Completed; and
- (2) the Development Contribution described as the intersection upgrade of the Hume Highway and Governor Macquarie Drive in Part 1 of Schedule 3 of the Planning Agreement between Council and the Developer with respect to the adjoining lands contained in Certificates of Title Folio Identifiers 1/581034, 2/581034, 3/581034 & 1/970591 on or about the date of this agreement has not been completed in accordance with that agreement.

10 Developer warranties and indemnities

10.1 Warranty

The Developer warrants to Council that:

- (1) it is the legal and beneficial owner of the Developer's Land;
- (2) it is able to fully comply with its obligations under this agreement;
- (3) it has full capacity to enter into this agreement; and
- (4) there is no legal impediment to it entering into this agreement, or performing the obligations imposed under it.

10.2 Indemnity

The Developer indemnifies Council in respect of any Claim that may arise as a result of the negligent conduct of the Works by the Developer but only to the extent that any such Claim does not arise as a result of the negligent acts or omissions of Council.

11 Contamination

11.1 Definitions

For the purpose of this clause 11:

- (1) **Contamination** means any material, gas, substance, liquid, chemical or biological mineral or other physical matter which would, if present on land:
 - (a) result in an Authority issuing a notice, direction or order under an Environmental Law; or
 - (b) which would constitute a breach or violation of, or an offence under, any Environmental Law.
- (2) **Contaminated** means subject to Contamination.
- (3) **Environmental Law** means all planning, environmental or pollution laws and any regulations, orders, directions, ordinances or requirements, permissions, permits, licences issued under those laws or instruments.

11.2 Warranty

The Developer warrants that as far as it is aware, and other than as disclosed in writing to Council prior to its dedication, the Council Road Widening Land is not Contaminated and Council acknowledges that no investigation of Contamination has been undertaken by or on behalf of the Developer.

12 Determination of this agreement

This agreement will determine upon the Developer satisfying all of the obligations imposed on it under this agreement.

13 Security

13.1 Prohibition

Neither party may Assign their rights under this agreement without the prior written consent of the other party.

13.2 Delivery to Council of Bond or Bank Guarantee

Prior to the lodgement of an application for the first Construction Certificate in respect of the Development, the Developer must deliver to Council a Bond or a Bank Guarantee in an amount equal to the amount (as indexed under this agreement) of the Contribution Value required to be made by the Developer with respect to the Works and set out in **Schedule 3**.

13.3 Council may call on Bond or Bank Guarantee

- (1) If the Developer does not or provide any Works as required under this agreement, Council may issue the Developer with a notice requiring the Developer to rectify the relevant default within sixty (60) days.
- (2) If the Developer fails to comply with a notice issued under paragraph (1) to the reasonable satisfaction of Council, Council may, without limiting any other avenues available to it, call on the relevant Bond or Bank Guarantee to the

extent necessary to reimburse Council for any costs incurred by it in rectifying the relevant default of the Developer.

13.4 Return of Bank Guarantee

- (1) Subject to paragraph (2), within one (1) month after the Developer satisfies its obligations under this agreement to Complete the Works, Council must return the Bond or Bank Guarantee to the Developer referable to that Development Contribution.
- (2) Where the Development Contribution referred to in paragraph (1) forms part of the Works:
 - (a) Council must release so much of the relevant Bond or Bank Guarantee in excess of the amount that equates to the "Defects Liability Amount" identified in **Schedule 3** for that item; and
 - (b) within one (1) month after the Defects Liability Period has expired with respect to that item, Council must release and return the remaining balance of the relevant Bond or Bank Guarantee to the Developer.

14 Force majeure

14.1 Definition

In this clause14, **Force Majeure Event**, means any physical or material restraint beyond the reasonable control of a party claiming the Force Majeure Event and includes, without limitation, fire, the discovery of threatened species on the Developer's Land or industrial disputes.

14.2 Consequences of Force Majeure Event

- (1) If a party is unable by reason of Force Majeure Event to carry out wholly or in part its obligations under this agreement, it must:
 - (a) give to the other party prompt notice of the Force Majeure Event with reasonable detailed particulars; and
 - (b) suggest an alternative method, if any, of satisfying its obligations under this agreement.
- (2) If a party is unable to satisfy its obligations under this agreement by an alternative method, the obligations of the parties so far as they are affected by the Force Majeure Event are then suspended during continuance of the Force Majeure Event and any further period as may be reasonable in the circumstances.

14.3 Inability to complete Works

- (1) The party giving such notice under this clause must use all reasonable effort and diligence to remove the Force Majeure Event or ameliorate its effects as quickly as practicable.
- (2) If the Developer is unable to Complete any Work due to a Force Majeure Event, the Developer must pay to Council the amount specified in **Schedule 3** with respect to that Work.

-
- (3) Council may, at its absolute discretion, call on the Bond or Bank Guarantees (or any part of them) pursuant to clause 13.4 in order to satisfy any amount payable by the Developer under paragraph (2).

14.4 Exclusion of operation

The parties agree that this clause 14 does not apply to an obligation of a party to transfer land or to pay money.

14.5 Dispute

If the parties are unable to agree on the existence of a Force Majeure Event or the period during which the obligations of the parties are suspended during the continuance of the Force Majeure Event, that dispute must be referred for determination under clause 16.

15 Review & amendment

15.1 Review

If either party requests a review of the whole or any part of this agreement then the parties must use their reasonable endeavours, acting in good faith, to review the agreement in accordance with that request.

15.2 Amendment

If the parties agree to amend this agreement as a result of a review conducted under clause 15.1 then any such amendment must be made:

- (1) in writing signed by both parties; and
- (2) subject to the provisions of the Act.

16 Dispute resolution

16.1 Notice of dispute

- (1) If a dispute or lack of certainty between the parties arises in connection with this agreement or its subject matter (a **dispute**), then either party (the **First Party**) must give to the other (the **Second Party**) a notice of dispute in writing which:
 - (a) adequately identifies and provides details of the dispute; and
 - (b) designates the representative of the First Party to negotiate the dispute.
- (2) The Second Party must, within five (5) business days of service of the notice of the dispute, provide a notice to the First Party designating as its representative a person to negotiate the dispute (the representatives designated by the parties being together, the **Representatives**).

16.2 Conduct pending resolution

The parties must continue to perform their respective obligations under this agreement if there is a dispute but will not be required to complete the matter the subject of the dispute, unless the appropriate party indemnifies the other relevant parties against costs, damages and all losses suffered in completing the disputed matter if the dispute is not resolved in favour of the indemnifying party.

16.3 Further steps required before proceedings

Subject to clauses 16.14 and 16.15 and except as otherwise expressly provided in this agreement, any dispute between the parties arising in connection with this agreement or its subject matter must, as a condition precedent to the commencement of litigation, mediation under clause 16.5 or determination by an expert under clause 16.6, first be referred to the Representatives. The Representatives must endeavour to resolve the dispute within five (5) business days.

16.4 Disputes for mediation or expert determination

If the Representatives have not been able to resolve the dispute, then the parties must agree within five (5) business days to either refer the matter to mediation under clause 16.5 or expert determination under clause 16.6.

16.5 Disputes for mediation

- (1) If the parties agree in accordance with clause 16.4 to refer the dispute to mediation, the mediation must be conducted by a mediator agreed by the parties and, if the parties cannot agree within five (5) business days, then by a mediator appointed by LEADR.
- (2) If the mediation referred to in paragraph (1) has not resulted in settlement of the dispute and has been terminated, the parties may agree to have the matter determined by expert determination under clause 16.6.

16.6 Choice of expert

- (1) If the parties agree to have the matter determined by expert determination, this clause 16.6 applies.
- (2) The dispute must be determined by an independent expert in the relevant field:
 - (a) agreed between and appointed jointly by the parties; or
 - (b) in the absence of agreement within five (5) business days after the date that the parties agree to have the matter determined by expert determination, appointed by the President or other senior officer for the time being of the body administering or expert in the relevant field.
- (3) If the parties fail to agree as to the relevant field within five (5) business days after the parties agree to have the matter determined by expert determination, either party may at any time refer the matter to the President of the New South Wales Bar Association (or the President's nominee) whose decision as to the relevant field is final and binding on the parties.
- (4) The expert appointed to determine a dispute must:
 - (a) have a technical understanding of the issues in dispute;
 - (b) not have a significantly greater understanding of one party's business, functions or operations which might allow the other side to construe this greater understanding as a bias; and
 - (c) inform the parties before being appointed of the extent of the expert's understanding of each party's business or operations and, if that

information indicates a possible bias, then that expert must not be appointed except with the written approval of the parties.

- (5) The parties must promptly enter into an agreement with the expert appointed under this clause 16.6 setting out the terms of the expert's determination and the fees payable to the expert.

16.7 Directions to expert

- (1) In reaching a determination in respect of a dispute under clause 16.6, the independent expert must give effect to the intent of the parties entering into this agreement and the purposes of this agreement.
- (2) The expert must:
- (a) act as an expert and not as an arbitrator;
 - (b) proceed in any manner as the expert thinks fit without being bound to observe the rules of natural justice or the rules of evidence;
 - (c) not accept verbal submissions unless both parties are present;
 - (d) on receipt of a written submission from one party, ensure that a copy of that submission is given promptly to the other party;
 - (e) take into consideration all documents, information and other material which the parties give the expert which the expert in its absolute discretion considers relevant to the determination of the dispute;
 - (f) not be expected or required to obtain or refer to any other documents, information or material (but may do so if the expert so wishes);
 - (g) issue a draft certificate stating the expert's intended determination (together with written reasons), giving each party ten (10) business days to make further submissions;
 - (h) issue a final certificate stating the expert's determination (together with written reasons); and
 - (i) act with expedition with a view to issuing the final certificate as soon as practicable.
- (3) The parties must comply with all directions given by the expert in relation to the resolution of the dispute and must within the time period specified by the expert, give the expert:
- (a) a short statement of facts;
 - (b) a description of the dispute; and
 - (c) any other documents, records or information which the expert requests.

16.8 Expert may commission reports

- (1) Subject to paragraph (2):
- (a) the expert may commission the expert's own advisers or consultants (including lawyers, accountants, bankers, engineers, surveyors or

other technical consultants) to provide information to assist the expert in making a determination; and

- (b) the parties must indemnify the expert for the cost of those advisers or consultants in accordance with clause 16.6(5) of this agreement.
- (2) The parties must approve the costs of those advisers or consultants in writing prior to the expert engaging those advisers or consultants.

16.9 Expert may convene meetings

- (1) The expert must hold a meeting with all of the parties present to discuss the dispute. The meeting must be conducted in a manner which the expert considers appropriate. The meeting may be adjourned to, and resumed at, a later time in the expert's discretion.
- (2) The parties agree that a meeting under paragraph (1) is not a hearing and is not an arbitration.

16.10 Other courses of action

If:

- (1) the parties cannot agree in accordance with clause 16.4 to refer the matter to mediation or determination by an expert; or
- (2) the mediation referred to in clause 16.5 has not resulted in settlement of the dispute and has been terminated and the parties have not agreed to refer the matter to expert determination within five (5) business days after termination of the mediation,

then either party may take whatever course of action it deems appropriate for the purpose of resolving the dispute.

16.11 Confidentiality of information provided in dispute resolution process

- (1) The parties agree, and must procure that the mediator and the expert agrees as a condition of his or her appointment:
 - (a) subject to paragraph (b), to keep confidential all documents, information and other material disclosed to them during or in relation to the mediation or expert determination;
 - (b) not to disclose any confidential documents, information and other material except:
 - (i) to a party or adviser or consultant who has signed a confidentiality undertaking; or
 - (ii) if required by Law to do so or State Government policy or local government policy or any listing rule; and
 - (c) not to use confidential documents, information or other material disclosed to them during or in relation to the mediation or expert determination for a purpose other than the mediation or expert determination.

- (2) The parties must keep confidential and must not 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 or the mediator or the expert during the expert determination or mediation relating to a possible settlement of the dispute;
- (b) admissions or concessions made by a party during the mediation or expert determination in relation to the dispute; and
- (c) information, documents or other material concerning the dispute which are disclosed by a party during the mediation or expert determination unless such information, documents or facts would be discoverable in judicial or arbitral proceedings.

16.12 Final determination of expert

The parties agree that the final determination by an expert will be final and binding upon them except in the case of fraud or misfeasance by the expert.

16.13 Costs

If any independent expert does not award costs, the unsuccessful party to the dispute must pay the expert's costs in making the determination.

16.14 Remedies available under the Act

This clause 16 does not operate to limit the availability of any remedies available to Council under sections 123, 124 and 125 of the Act.

16.15 Urgent relief

This clause 16 does not prevent a party from seeking urgent injunctive or declaratory relief.

17 Position of council

17.1 Consent authority

The parties acknowledge that Council is a consent authority with statutory rights and obligations pursuant to the terms of the Legislation.

17.2 Agreement does not fetter discretion

This agreement is not intended to operate to fetter, in any unlawful manner:

- (1) the power of the Council to make any Law; or
- (2) the exercise by Council of any statutory power or discretion,
(Discretion).

17.3 Severance of provisions

- (1) No provision of this agreement is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this agreement is held by a court of competent jurisdiction to constitute an unlawful fetter on any Discretion, the parties agree:

- (a) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause 17 is substantially satisfied; and
 - (b) in the event that paragraph (a) cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this agreement has full force and effect.
- (2) Where the Law permits the Council to contract out of a provision of that Law or gives the Council power to exercise a Discretion, then if the Council has in this agreement contracted out of a provision or exercised a Discretion under this agreement, then to that extent this agreement is not to be taken to be inconsistent with the Law.

17.4 No obligations

Nothing in this agreement will be deemed to impose any obligation on the Council to exercise any of its functions under the Legislation in relation to the Draft LEP, the Developer's Land, the Development or the Development Consent.

18 Confidentiality

18.1 Agreement not confidential

The terms of this agreement are not confidential and this agreement may be treated as a public document and exhibited or reported without restriction by any party.

18.2 Other Confidential Information

- (1) The parties acknowledge that:
 - (a) Confidential Information may have been supplied to some or all of the parties in the negotiations leading up to the making of this agreement;
 - (b) the parties may disclose to each other further Confidential Information in connection with the subject matter of this agreement; and
 - (c) subject to paragraphs (2) and (3), each party agrees:
 - (i) not to disclose any confidential agreement received before or after the making of this agreement to any person without the prior written consent of the party who supplied the Confidential Information; or
 - (ii) to take all reasonable steps to ensure all Confidential Information received before or after the making of this agreement is kept confidential and protected against unauthorised use and access.
- (2) A party may disclose Confidential Information in the following circumstances:
 - (a) in order to comply with the Law, state government policy, local government policy or any listing rule; or
 - (b) to any of their employees, consultants, advisers, financiers or contractors to whom it is considered necessary to disclose the information, if the employees, consultants, advisers, financiers or contractors undertake to keep the information confidential.

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- (3) The obligations of confidentiality under this clause do not extend to information which is public knowledge other than as a result of a breach of this clause.

19 GST

19.1 Defined GST terms

Defined terms used in this clause 19 have the meaning ascribed to them in the GST Law.

19.2 GST to be added to amounts payable

Subject to clause 19.3, if GST is payable on a Taxable Supply made under, by reference to or in connection with this agreement, the party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration upon receipt of a valid tax invoice. This clause does not apply to the extent that the Consideration for the Taxable Supply is expressly agreed to be GST inclusive. Unless otherwise expressly stated, prices or other sums payable or Consideration to be provided under or in accordance with this agreement are exclusive of GST.

19.3 No GST payable – Division 82

The parties acknowledge and agree that no GST is payable on supplies made by the Developer under this agreement on the basis that Division 82 of *A New Tax System (Goods and Services Tax) Act 1999* (Cth) applies to such supplies. However, if contrary to the parties understanding, the Commissioner of Taxation determines that GST is payable on such supplies, clause 19.2 will apply.

19.4 Reimbursements (net down)

If a payment to a party under this agreement is a reimbursement or indemnification, calculated by reference to a loss, cost or expense incurred by that party, then the payment will be reduced by the amount of any input tax credit to which that party is entitled for that loss, cost or expense.

19.5 Continuing obligations

This clause 19 will continue to apply after this agreement ends.

20 Miscellaneous

20.1 Obligation to act in good faith

The parties must at all times:

- (1) cooperate and use their best endeavours to profitably and professionally give effect to the rights and obligations of the parties set out in this agreement;
- (2) not unreasonably delay any action, approval, direction, determination or decision which is required of it;
- (3) make decisions that are required of it in good faith and in a manner consistent with the completion of the transactions set out in this agreement; and
- (4) be just and faithful in its activities and dealings with the other parties.

20.2 Legal costs

- (1) The Developer agrees to:
 - (a) pay or reimburse the reasonable legal costs and disbursements of Council of the negotiation, preparation, execution, and stamping of this agreement to a maximum amount of \$5,000; and
 - (b) pay the reasonable legal costs and disbursements referred to in paragraph (a) within fourteen (14) days of receipt of a Tax Invoice from Council.
- (2) Subject to paragraph (3), in addition to the amount required to be paid to Council under paragraph (1), the Developer agrees to pay or reimburse the reasonable legal costs and disbursements of Council arising from the enforcement of this agreement including any legal costs incurred by Council as a result of a breach or default by the Developer of its obligations under this agreement.
- (3) The Developer is not required to pay any costs referred to in paragraph (2):
 - (a) which exceed \$30,000 with respect to:
 - (i) any single breach of this agreement; or
 - (ii) any single enforcement action by Council, or
 - (b) where a Court of competent jurisdiction orders that the Developer is not required to pay those costs.

21 Administrative provisions

21.1 Notices

- (1) Any notice, consent or other communication under this agreement must be in writing and signed by or on behalf of the person giving it, addressed to the person to whom it is to be given and:
 - (a) delivered to that person's address;
 - (b) sent by pre-paid mail to that person's address;
 - (c) transmitted by facsimile to that person's address; or
 - (d) sent by email to that person's address.
- (2) A notice given to a person in accordance with this clause is treated as having been given and received:
 - (a) if delivered to a person's address, on the day of delivery if a business day, otherwise on the next Business Day; and
 - (b) if sent by pre-paid mail, on the third business day after posting; and
 - (c) if transmitted by facsimile to a person's address and a correct and complete transmission report is received, on the day of transmission if a business day, otherwise on the next Business Day; and

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(d) if sent by email, on the day the email was sent if a business day, otherwise on the next Business Day.

(3) For the purpose of this clause the address of a person is the address set out in this agreement or another address of which that person may from time to time give notice to each other person.

21.2 Entire agreement

This agreement is the entire agreement of the parties on the subject matter. All representations, communications and prior agreements in relation to the subject matter are merged in and superseded by this agreement.

21.3 Waiver

The non-exercise of or delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the parties to be bound by the waiver.

21.4 Cooperation

Each party must sign, execute and deliver all agreements, documents, instruments and act reasonably and effectively to carry out and give full effect to this agreement and the rights and obligations of the parties under it.

21.5 Counterparts

This agreement may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

21.6 Amendment

This agreement may only be amended or supplemented in writing signed by the parties.

21.7 Unenforceability

Any provision of this agreement which is invalid or unenforceable in any jurisdiction is to be read down for the purposes of that jurisdiction, if possible, so as to be valid or enforceable, and is otherwise capable of being severed to the extent of the invalidity or enforceability, without affecting the remaining provisions of this agreement or affecting the validity or enforceability of that provision in any other jurisdiction.

21.8 Power of Attorney

Each attorney who executes this agreement on behalf of a party declares that the attorney has no notice of:

- (1) the revocation or suspension of the power of attorney by the grantor; or
- (2) the death of the grantor.

21.9 Governing law

The law in force in the State of New South Wales governs this agreement. The parties:

- (1) submit to the exclusive jurisdiction of the courts of New South Wales and any courts that may hear appeal from those courts in respect of any proceedings in connection with this agreement; and
 - (2) may not seek to have any proceedings removed from the jurisdiction of New South Wales on the grounds of *forum non conveniens*.
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Schedule 1

Part 1 - Commercial Terms

Developer	Name	Australian Turf Club Limited
	Address	Royal Randwick Racecourse
	ABN	81 148 157 288
	Telephone	(02) 9663 8400
	Facsimile	(02) 9662 6292
	Email	mflanagan@royalrandwick.com
	Representative/ Contact	Mark Flanagan
Council	Name	Liverpool City Council
	Address	1 Hoxton Park Road, Liverpool NSW 2170
	ABN	84 181 182 471
	Telephone	(02) 9821 8836
	Facsimile	(02) 9821 9333
	Email	gm@liverpool.nsw.gov.au
	Representative/C ontact	Farooq Portelli
Current LEP	Liverpool Local Environmental Plan 2008	
Developer's Land	The land contained in Lot 1 DP 1162276	
Draft LEP	Draft Liverpool Local Environmental Plan 2008 Amendment No. 18 or such other draft local environmental plan that has the same effect with respect to the Rezoning.	

Part 2 - Requirements Under Section 93F

REQUIREMENT UNDER THE ACT	THIS PLANNING AGREEMENT
Planning instrument and/or development application – (Section 93F(1)) The Developer has: <ul style="list-style-type: none"> (a) sought a change to an environmental planning instrument. (b) made, or proposes to make, a Development Application. (c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies. 	<ul style="list-style-type: none"> (a) Yes (b) Yes (c) Not applicable.
Description of land to which this agreement applies – (Section 93F(3)(a))	The whole of the Developer's Land.
Description of change to the environmental planning instrument to which agreement applies – (Section 93F(3)(b))	The amendments proposed to be made to the Current LEP as a result of the Draft LEP.
Application of section 94 of the Act – (Section 93F(3)(d))	The application of section 94 is wholly excluded.
Applicability of section 94A of the Act – (Section 93F(3)(d))	The application of section 94A is wholly excluded.
Mechanism for Dispute resolution – (Section 93F(3)(f))	See clause 16.
Enforcement of this agreement (Section 93F(3)(g))	See clauses 5.3, 8, 13.3 and 13.4.
No obligation to grant consent or exercise functions – (Section 93F(9))	See clause 17.

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Schedule 2

Defined terms and interpretation

Part 1 - Definitions

Accredited Certifier	has the same meaning as in section 4(1) of the Act.
Act	means the <i>Environmental Planning & Assessment Act 1979</i> (NSW).
Assign	as the context requires refers to any assignment, sale, transfer, disposition, declaration of trust over or other assignment of a legal and/or beneficial interest.
Authority	means (as appropriate) any: <ol style="list-style-type: none">(1) federal, state or local government;(2) department of any federal, state or local government;(3) any court or administrative tribunal; or(4) statutory corporation or regulatory body.
Bond or Bank Guarantee	means an irrevocable and unconditional undertaking by a financial institution to pay the amount specified in clause 13.2 to Council on demand.
Business Development Land	means the land contained in Lot 1 DP 1162276.
Claim	against any person any allegation, action, demand, cause of action, suit, proceeding, judgement, debt, damage, loss, cost, expense or liability howsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at law, in equity, under statute or otherwise.
Complete, Completed and Completion	means the completion of the Works to the standard required under this agreement.
Completion Notice	means a notice setting out the Works that the Developer believes are complete and which is: <ol style="list-style-type: none">(1) in writing;(2) states that it has been issued under this agreement;(3) issued by an Accredited Certifier; and(4) contains an acknowledgement from the Accredited Certifier that it is recognised that the Council relies upon the certification provided by that certifier.
Confidential	means any information and all other knowledge at any time disclosed (whether in writing and orally) by the parties to

Information	<p>each other, or acquired by the parties in relation to the other's activities or services which is not already in the public domain and which:</p> <ol style="list-style-type: none"> (1) is by its nature confidential; (2) is designated, or marked, or stipulated by either party as confidential (whether in writing or otherwise); (3) any party knows or ought to know is confidential; and/or (4) is information which may be reasonably considered to be of a confidential nature.
Construction Certificate	has the same meaning as in s109C(1)(b) of the Act.
Contribution Value	means the amount specified in respect of the Works in Schedule 3 as "Contribution Value", subject to any adjustment of that amount made under this agreement.
Council Road Widening Land	means the land contained in Lot 3 DP 1162276.
Defects Liability Period	means twelve (12) months after the Works are Complete.
Developer's Land	means the "Developer's Land" set out in Schedule 1 .
Development	means the future development of the Business Development Land as proposed by the Developer not exceeding 29,230m ² of land area in accordance with the Rezoning.
Development Consent	means a development consent issued under the Act for the Development.
Development Contribution	means the dedication of the Council Road Widening Land to Council and the Works.
Draft LEP	means Draft Liverpool Local Environmental Plan 2008 Amendment No. 18 or such other draft local environmental plan that has the same effect with respect to the Rezoning.
Gross Floor Area	has the same meaning as in <i>Liverpool Local Environmental Plan 2008</i> .
GST Law	means the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth) and any other act or regulation relating to the imposition or administration of the GST.
Index	means the Consumer Price Index (All Groups Index) for Sydney issued by the Australian Statistician from time to time.
Instrument Change	means the making of the Draft LEP.

Law	means all legislation, regulations, by-laws, common law and other binding order made by any Authority.
Legislation	means the Act, the <i>Roads Act 1993</i> (NSW) and the <i>Local Government Act 1993</i> (NSW).
Occupation Certificate	means either an interim or final occupation certificate defined in s109C(1)(c) of the Act with respect to any part of the Development.
Public Purpose	has the same meaning as in s93F(2) of the Act.
Rezoning	means the change in the zoning of the Developer's Land from RE2 Private Recreation and R2 Low Density Residential to B5 Business Development.
Subdivision Certificate	has the meaning as in section 109C(1)(d) the Act in relation to the Subdivision Plan.
Subdivision Plan	means a plan of subdivision of the Developer's Land whereby upon registration of such plan the Council Road Widening Land, and the Business Development Land are created as separate lots.
Works	means the works specified in Schedule 3 .

Part 2 - Interpretational Rules

clauses, annexures and schedules	a clause, annexure or schedule is a reference to a clause in or annexure or schedule to this agreement.
reference to statutes	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.
singular includes plural	the singular includes the plural and vice versa.
person	the word "person" includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association or any government agency.
executors, administrators, successors	a particular person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns.
dollars	Australian dollars, dollars, \$ or A\$ is a reference to the lawful currency of Australia.
calculation of time	if a period of time dates from a given day or the day of an act or event, it is to be calculated exclusive of that day.
reference to a day	a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later.

accounting terms	an accounting term is a reference to that term as it is used in accounting standards under the Corporations Act or, if not inconsistent with those standards, in accounting principles and practices generally accepted in Australia.
reference to a group of persons	a group of persons or things is a reference to any two or more of them jointly and to each of them individually.
meaning not limited	the words "include", "including", "for example" or "such as" are not used as, nor are they to be interpreted as, words of limitation, and, when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind.
business day	<p>(a) for receiving a notice under clause 21.1 a day that is not a Saturday, Sunday, public holiday or bank holiday in the place where the notice is received; and</p> <p>(b) for all other purposes, a day that is not a Saturday, Sunday, bank holiday or public holiday in New South Wales.</p>
next day	if an act under this agreement to be done by a party on or by a given day is done after 4.30pm on that day, it is taken to be done on the next day.
next Business Day	if an event must occur on a stipulated day which is not a Business Day then the stipulated day will be taken to be the next Business Day.
time of day	time is a reference to Sydney time.
headings	headings (including those in brackets at the beginning of paragraphs) are for convenience only and do not affect the interpretation of this agreement.
agreement	a reference to any agreement, agreement or instrument includes the same as varied, supplemented, novated or replaced from time to time.
gender	a reference to one gender extends and applies to the other and neuter gender.

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Schedule 3 Development Contributions

Works

Work	Description	Time for Completion	Contribution Value	Amount retained during Defects Liability Period
Traffic Improvements	Intersection upgrade of Governor Macquarie Drive and Munday Street as shown on and in accordance with Annexure 2.	Prior to the first Occupation Certificate being issued for any Development on the Business Development Land.	\$432,857	5%

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Schedule 4 Terms of Licence

1 Definitions

- (1) In this schedule, words beginning with a capital letter that are defined in Part 1 of **Schedule 1** of this agreement have the meaning ascribed to them in that schedule.
- (2) For the purpose of this **Schedule 4**:
 - (a) **the Land** means the land being accessed in accordance with this licence;
 - (b) **the Licensor** means the party that owns the land being accessed under this licence;
 - (c) **the Licensee** means the other party; and
 - (d) **the Purpose** means the purpose for which the Licensee is accessing the Land from time to time.

2 Licence

2.1 Personal rights

- (1) The Licence is personal to the Licensee.
- (2) The Licensee may not encumber, assign or transfer (either directly or indirectly) the Licence without the prior written consent of the Licensor.
- (3) The Licensor may refuse the granting of consent under paragraph (2) without reason and at its absolute discretion.

2.2 Leasehold interest

- (1) This agreement does not grant to the Licensee a leasehold interest in the Land. The parties agree that:
 - (a) subject to any contrary terms of this agreement, this licence does not confer exclusive possession of the Land on the Licensee; and
 - (b) the Licensee may not exclude the Licensor, its officers, employees and invitees from:
 - (i) entry onto the Land; and/or
 - (ii) the performance of any works on the Land;

provided that such entry onto and/or performance of work on the Land does not unreasonably interfere with the Purpose; and
- (2) the Licensee does not have any right to quiet enjoyment of the Land; and

- (3) the Licensee will not at any time seek to enforce an interest in the Land in competition with the interest held by the Licensee.

3 Compliance With authorities

3.1 No warranty as to suitability for use

The Licensee acknowledges and agrees that the Licensor has not made any representation or warranty to the Licensee regarding the suitability of the Land for the Purpose.

3.2 Compliance with the terms of consents

In the conduct of the Purpose and compliance with its obligations under this agreement, the Licensee must comply with the requirements of all Authorities.

3.3 Compliance with directions from Authorities

The Licensee must comply with all notices, directions, orders or other requests served upon itself or the Licensor and which arise from the conduct of the Purpose on the Land by the Licensee.

3.4 Obtaining further consents

- (1) If the Licensee requires further consents to conduct the Purpose it must:
- (a) make such applications itself; and
 - (b) bear all costs incurred by it in relation to obtaining the relevant consent.
- (2) The Licensor agrees that it will, where required, sign all authorities reasonably required by the Licensee to make any application for consent to any Authority.

4 Limitation of the Licensor's liability

4.1 Insurances

- (1) The Licensee must effect and keep current and in force the following policies of insurance:
- (a) a Broadform Public Liability Insurance policy with a reputable insurance company approved by the Licensor in an amount of \$20,000,000 for any one occurrence in respect of any liability for:
 - (i) personal injury or death of any person; and
 - (ii) loss of or damage to property,
 - (b) workers compensation insurance under the *Workers Compensation Act 1987* (NSW) covering all persons employed or deemed to be employed by the Licensee in connection with the conduct of the Purpose;
 - (c) a comprehensive policy of motor vehicle insurance or an unlimited third party property insurance policy in respect of all motor vehicles used in the conduct of the Purpose; and

(d) a contractor's risk policy of insurance in respect of all plant and equipment (including unregistered motor vehicles) used in the conduct of the Purpose.

(2) The policies referred to in paragraphs (1)(a), (1)(c) and (1)(d) must note the interest of the Licensor as principal.

4.2 Inspection of insurance

(1) The Licensee must produce at the renewal of each policy a certificate of currency issued by the insurer establishing that the policy is valid.

(2) The Licensor may carry out random audits to verify insurances held by the Licensee. the Licensee will assist in any audit and provide evidence of the terms and currency of the insurance policies whenever requested by the Licensor.

4.3 Cancellation of insurance

If any policy is cancelled either by the Licensee or the insurer the Licensee must notify the Licensor immediately.

4.4 Risk

The Licensee uses and occupies the Land at its own risk.

4.5 Indemnity

The Licensee indemnifies the Licensor against any Claim (of whatever nature) made in respect of the Licensee's use and occupation of the Land but only to the extent that any such Claim does not arise as the result of the wilful or negligent acts or omissions of the Licensor, its officers, employees, agents, contractors or invitees.

4.6 OH & S

For the purposes of this agreement and in accordance with clause 210 of the *Occupational Health & Safety Regulation 2001* (NSW) (**OH&S Regulation**), the Licensor:

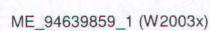
(1) will appoint as the "principal contractor" for any part of the Purpose conducted on the Land, the head civil works contractor specified by the Licensee from time to time; and

(2) will authorise the nominated head civil works contractor to exercise such authority of the Licensor as is necessary to enable the head civil works contractor to discharge the responsibilities imposed on a principal contractor under Part 8 of the OH&S Regulation.

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Annexure 1
Copy of Deposited Plan 1162276

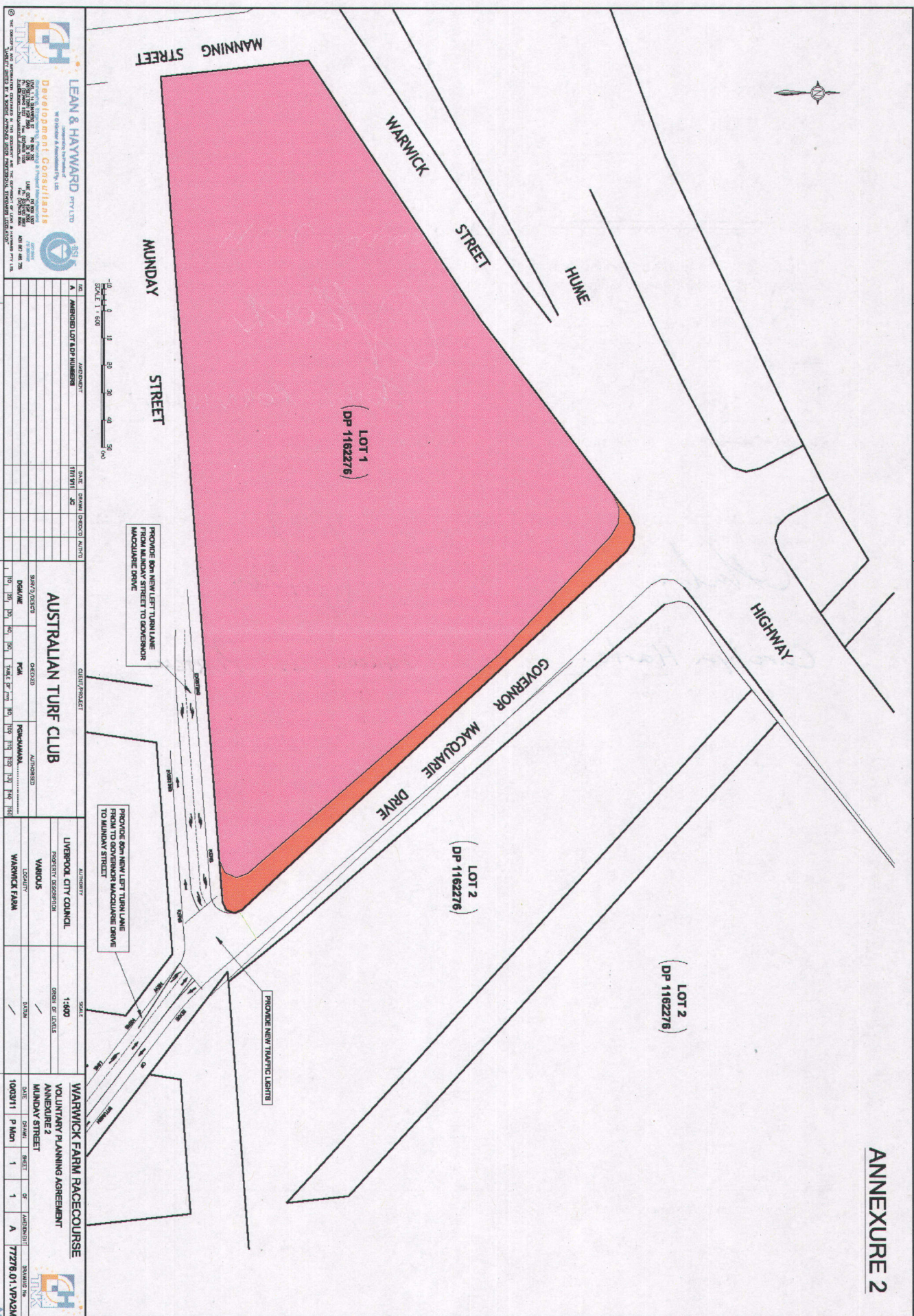




Annexure 2
Plan of the Traffic Improvements

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ANNEXURE 2



Execution page

Executed as a deed

Dated: ~~26 October 2011~~ 11 November 2011.

Signed, sealed and delivered by Australian Turf Club Limited in accordance with section 127(1) of the Corporations Act by authority of its directors.

Director/Secretary (Signature)

Darren Pearce

Name of Director/ Secretary (Print Name)

Director (Signature)

JOHN CORNISH

Name of Director (Print Name)

Signed, sealed and delivered by Liverpool City Council by its duly constituted Attorney Farooq Portelli pursuant to the registered Power of Attorney Book 4418 No 998 in the presence of:

Witness (Signature)

Carolyn Harle.

Name of Witness (Print Name)

Attorney (Signature)

FAROOQ C. PORTELLI

Name of Attorney (Print Name)