

PLANNING AGREEMENT

Parties

WOLLONGONG CITY COUNCIL of 41 Burelli Street Wollongong, New South Wales
("Council")

and

WILLIAM MICHAEL CANAVAN of 17 Maidstone Street Helensburgh New South Wales
("Developer"/ Land Owner).

Background

A. On **2 February** 2011 the Developer lodged a Development Application for a Restaurant ("the Development") with Council in respect of property owned by the Developer at 121 Parkes Street corner Walker Street at Helensburgh, being Lot 1 DP 332178 ("the Land").

B. That Development Application was accompanied by an offer by the Developer to enter into this Agreement ("Planning Agreement"), the terms of which are set out herein, to provide the Contribution Works if that Development Consent was granted.

Operative provisions

1 *Planning agreement under the Act*

The Parties hereby agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

2 *Application of this Agreement*

This Agreement applies to the Development and the Land as defined above.

3 *Operation of this Agreement*

This Agreement is to be executed by the Parties prior to commencement of works, and commences on the date it is executed (or exchanged, if executed in counterparts) but the obligations in clauses 5,6 and 7 only take effect from the date a Development Consent is granted to the Development Application for the Development.

4 *Definitions and interpretation*

4.1 In this Agreement the following definitions apply:

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

Complete, Completed means, in relation to the Contribution Works, that it has been completed to the standard required under this Agreement.

Contribution Works means the works to be undertaken by the Developer under this Agreement, being construction of the Public Facilities as contemplated by, and in accordance with, the Development Consent and the Plan approved by Council.

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

Development means the construction and operation of a Restaurant on the Land;

Development Application has the same meaning as in the Act;

Development Consent has the same meaning as in the Act;

Occupation Certificate has the same meaning as in the Act, and includes an interim or final occupation certificate.

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

Public Facilities means the design and construction of a car parking area for sixteen (16) cars in a parallel arrangement, including concrete kerb, bitumen, signs & lines and pedestrian pathway on Council land on the east side of Waratah Street Helensburgh adjacent to Charles Harper Park, and on the location shown on Annexure "A" to this Agreement.

Regulation means the *Environmental Planning and Assessment Regulation 2000*.

4.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) 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.
- (c) 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.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or reenactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.

- (j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- (k) References to the word 'include' or 'including' are to be construed without limitation.
- (l) A reference to this Agreement includes the agreement recorded in this Agreement.
- (m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- (n) Any schedules and attachments form part of this Agreement.

5. Contribution Works to be provided under this Agreement

- 5.1 The Developer agrees to provide the Contribution Works.
- 5.2 The Developer must prepare a plan in accordance with the specification set out in Annexure "B" (as approved by the Development Consent) showing the detail of the Public Facilities ("the Plan").
- 5.3 The Plan is to be submitted to Council for approval in a timely fashion.
- 5.4 Council must give the Developer written notice, within 14 days of receipt of the Plan, of the acceptability of the Plan, or, if not acceptable, identify in writing the specific information or modifications required before the Plan will be acceptable to Council.
- 5.5 In the event that Council gives the Developer written notice pursuant to 5.4 above that the Plan is not acceptable, the Developer must, within 7 days of such written notice, submit an amended Plan to Council for consideration that reflects the information and modification required by Council.
- 5.6 If Council is again not satisfied, the process set out at sub-clauses 5.4 and 5.5 re-applies until Council advises the Developer in writing that the Plan is acceptable.

6 Works Developer is to undertake

- 6.1 The Developer undertakes to carry out, or procure the carrying out of, the Contribution Works, at no cost to Council.
- 6.2 The Developer acknowledges that the works detailed in the Plan approved by Council are to be completed prior to the release of any Occupation Certificate for the Development. The Developer will not pursue or seek an Occupation Certificate until all works in relation to the Contribution Works have been completed in accordance with the Plan approved by Council, the Development Consent, and to the satisfaction of Council.
- 6.3 Prior to the issue of any Occupation Certificate for the Development, the Developer must provide certification that the Public Facilities comply with relevant standards, the Development Consent, and are suitable for their intended purpose.

- 6.4 The Developer must provide a Completion Notice to Council within 7 days after finishing the Contribution Works.
- 6.5 Council must inspect the Public Facilities following receipt of the Completion Notice.
- 6.6 As soon as practicable after inspecting the Public Facilities, Council must provide notice in writing to the Developer that the Contribution Works:
- (a) have been Completed to Council's satisfaction and the Developer may now seek an Occupation Certificate; or
 - (b) have not been Completed to Council's satisfaction, in which case the notice must also detail:
 - (i) the defects or other matters that require rectification; and
 - (ii) the work Council requires the Developer to carry out in order to rectify those deficiencies.
- 6.7 The process outlined at sub-clauses 6.4-6.6 above re-applies until Council advises the Developer in writing that the Contribution Works have been Completed to Council's satisfaction and the Developer may now seek an Occupation Certificate.

7 Defects liability

- 7.1 Where the works required under this Agreement in relation to the Public Facilities are Complete but the Public Facilities contain a material defect (being a defect which is not minor or insignificant) which:
- (a) adversely affects the ordinary use of the Public Facilities; or
 - (b) will require maintenance or rectification works to be performed as a result of the existence of the defect,

Council may issue a defects notice (Defects Notice) concerning the Public Facilities, but only within the Defects Liability Period. The Defects Liability Period ends 24 months from the date that Council issues written notice to the Developer that the Public Facilities have been Completed to Council's satisfaction, pursuant to sub-clause 6.6.

- 7.2 The Developer must rectify the defects identified in the Defects Notice as soon as practicable after receipt of the Defects Notice.
- 7.3 Council may, at its discretion, rectify a defect set out in a Defects Notice where the Developer has failed to comply with a Defects Notice, but only after giving the Developer fourteen (14) days written notice to the Developer of its intention to do so.
- 7.4 Where Council exercises its step-in rights under this sub-clause, all reasonable costs incurred by Council in rectifying the relevant defects may be claimed by Council as a liquidated debt owed by the Developer.

8 Application of s94 and s94A of the Act to the Development

This Agreement does not exclude the application of sections 94 and 94A or 94EF to the Development (noting that the Development Consent for the Development may require the payment of contributions under one or more of those provisions).

9 Registration of this Agreement

- 9.1 The Developer and Council agree that this Agreement will be registered on the title of the Land pursuant to section 93H of the Act no later than 7 days after its execution.
- 9.2 The Developer must:
- (a) do all things necessary to allow the registration of this Agreement to occur under this clause; and
 - (b) pay any reasonable costs incurred by Council in undertaking that registration.
- 9.3 Council will, as soon as practicable after the expiry of the Defects Liability Period, remove the registration of this Agreement from the title of the Land or otherwise do all things necessary to enable the Developer to remove that registration.
- 9.4 The Developer must pay any reasonable costs incurred by Council in undertaking that discharge.

10 Review of this Agreement

This Agreement can only be reviewed prior to the issue of the Consent by either party issuing a notice of review to the other party and the agreement cannot be reviewed at any other time.

11 Dispute Resolution

- 11.1 If a dispute arises under this Agreement, a party will not commence any Court proceedings unless it has first complied with this clause, except to seek:
- (a) urgent interlocutory relief; or
 - (b) a remedy where a delay in commencing proceedings in Court could prejudice the party's entitlement to seek that remedy.
- 11.2 The parties will attempt to resolve any dispute which arises under this Agreement by negotiation between representatives of the parties who have authority to settle the dispute.
- 11.3 If the procedure at sub- clause 11.2 above does not resolve the dispute, then not earlier than 7 days after any negotiation referred to in that sub-clause has taken place, either party may give notice in writing to the other referring the matter for expert determination.
- 11.4 Notwithstanding the giving by either party of notice referring the matter for expert determination, the parties must continue to take all reasonable steps to attempt resolution without expert determination.
- 11.5 No later than fourteen (14) days from the date on which the notice concerning expert determination is provided to a party, the parties will organize for the dispute to be heard and determined by an independent expert agreed by the parties (or, if no agreement can be reached, appointed by the President of the NSW Law Society).



- 11.6 It is intended that the decision of the independent expert will be final and binding. The costs of the expert are to be shared equally between Council and the Developer, irrespective of the expert's determination.

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

Attention: The General Manager
Address: 41 Burelli St Wollongong NSW 2500
Fax Number: 42277 277
Email: council@wollongong.nsw.gov.au

Developer

Attention: William Canavan
Address: 17 Maidstone Street Helensburgh NSW 2508
Fax Number: 4294 1959
Email: William-canavan@hotmail.com

- 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 other 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

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. A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.



14 Assignment and Dealings

Once the Construction Certificate has issued for the Development including any Council approved amendment or modification of the Consent, the Developer may not sell or otherwise Deal with the Land without the written approval of the Council.

15 Costs

Each of the Parties shall pay their own costs of preparing and signing this agreement.

16 Entire Agreement

This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.

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 non-exclusive 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.

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

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. 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.

Execution

Executed as an Agreement

Dated: 18/11/2011

Executed on behalf of Wollongong City Council

General Manager

Witness/Name/Position

Executed on behalf of the Developer

William Michael Canavan

Witness/Name/Position

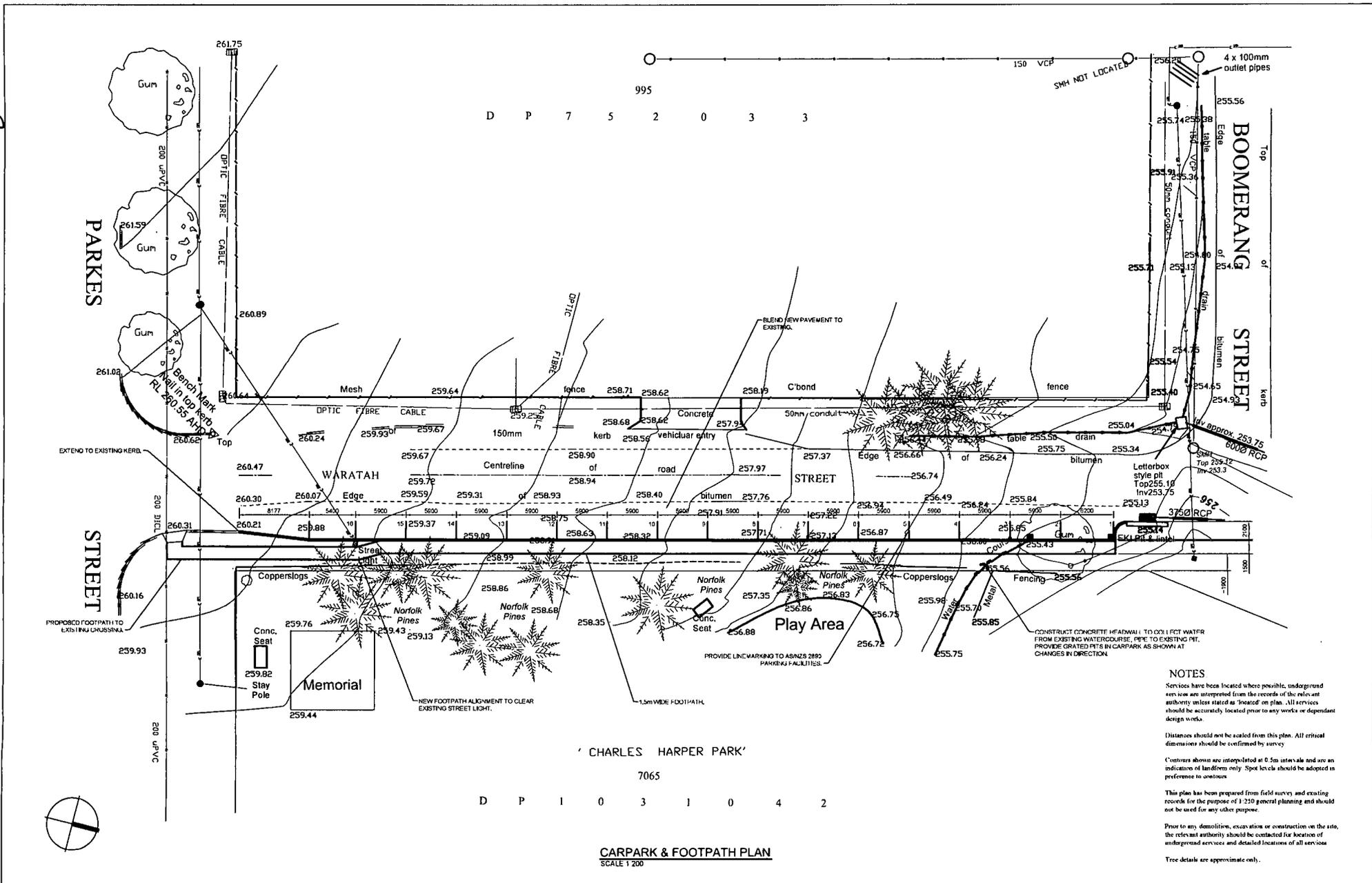
S Janet Todd
F

24 Waiver

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. A waiver by a Party is only effective if it is in writing. 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 GST

- 25.1 In this Clause 25 the terms "Taxable Supply", "GST", "Tax Invoice" and "Input Tax Credit" have the meaning given in section 195-1 of the A New Tax System (Goods and Services Tax) Act 1999 (the GST Act).
- 25.2 The Parties believe that any non monetary supplies made by one party to the other pursuant to this Agreement will be exempt from GST pursuant to Division 82 of the GST Act. In the event that one party reasonably believes that a non monetary supply it makes to the other is a Taxable Supply then the Parties agree to negotiate in good faith to agree the GST inclusive market value of that Taxable Supply. The Party making the Taxable Supply will issue a Tax Invoice to the other as soon as practicable after agreeing the GST inclusive market value and will disclose the amount of GST included in the GST inclusive market value. The recipient of the Taxable Supply will pay to the other Party the amount of the included GST within 15 days of receiving the Tax Invoice.
- 25.3 In the event that both Parties reasonably believe that they each make a non monetary supply to the other any GST payable by one Party to the other will be offset against each other and any net difference will be paid by the Party with the greater obligation.
- 25.4 If any Party reasonably believes that it is liable to pay GST on a supply expressed in terms of money and made to the other Party under this Agreement, other than a reimbursement pursuant to clause 25.5, and the supply was not expressed to include GST, then the recipient of the supply must pay an amount equal to the GST on that supply to the other Party. The Party making the supply will issue a Tax Invoice to the other Party and the recipient of the supply will pay the amount of the GST to the supplier within 15 days of receiving the Tax Invoice.
- 25.5 If any expenses or costs incurred by one Party are required to be reimbursed by the other Party under this Agreement, then the amount of the reimbursement will be made in accordance with the following calculation. The amount of the cost or expense incurred by the Party seeking reimbursement will be initially calculated excluding any Input Tax Credit to which that party is entitled to claim. Then this amount initially calculated will be increased by the applicable rate of GST to equal a GST inclusive reimbursement amount and this amount will be paid by the Party liable to make the reimbursement. The Party being reimbursed will issue a Tax Invoice to the other at the GST inclusive reimbursement amount prior to being reimbursed.
- 25.6 This clause continues to apply after the expiration or termination of this Agreement.



CARPARK & FOOTPATH PLAN
SCALE 1:200

NOTES

Services have been located where possible, underground services are interpreted from the records of the relevant authority unless stated as 'located' on plan. All services should be accurately located prior to any works or dependent design works.

Distances should not be scaled from this plan. All critical dimensions should be confirmed by survey.

Contours shown are interpolated at 0.5m intervals and are an indication of landform only. Spot levels should be adopted in preference to contours.

This plan has been prepared from field survey and existing records for the purpose of 1:250 general planning and should not be used for any other purpose.

Prior to any demolition, excavation or construction on the site, the relevant authority should be contacted for location of underground services and detailed locations of all services.

Tree details are approximate only.

landscape architect	survey DENNIS SMITH SURVEYS P.R.: 9189-2 Date: 14 MARCH 2011	c FOLLOWING COUNCIL REVIEW b INFORMATION a INFORMATION issue description	30.03.11 25.03.11 23.03.11 date	job no. 11022 dwg no. C2 datum AHD design C. Lindsay MIEAust CPEng review R. Tenhave MIEAust CPEng	CONCEPT CARPARK LAYOUT PROPOSED CARPARKING 'CHARLES HARPER PARK' WARATAH STREET HELENSBURGH WILL CANAVAN	T 02 4285 4899 F 02 4285 4900 info@detom.com.au www.detomdesign.com.au po box 119 corrimall nsw 2518 suite 7 83-85 railway street corrimall	
---------------------	---	---	--	--	--	---	--

Copyright © of Detom Design. Figured dimensions take precedence over scaled dimensions. Locate services prior to commencement of works. Refer any discrepancies between plans to designers for determination prior to construction.