

Planning Agreement

Reference: FPG001-00001

Draft

13 April 2021

Newcastle City Council

ABN 25 242 068 129

FPG Wickham Pty Limited

ACN 620 785 293

Contents

Parties	1
Background	1
Operative part	2
1 <i>Definitions</i>	2
2 <i>Interpretation</i>	4
3 <i>Planning Agreement under the Act</i>	6
4 <i>Application of this agreement</i>	6
5 <i>Operation of this agreement</i>	6
6 <i>Contributions to be made under this agreement</i>	6
6.1 Works	6
6.2 Dedication of Land	6
6.3 Maintenance of Works	7
7 <i>Application of s 7.11, s 7.12 and s 7.24 of the Act to the Development</i>	8
8 <i>Registration of this agreement</i>	8
8.1 Developer Interest	8
8.2 Registration of this agreement	8
8.3 Removal from Register	9
9 <i>Review of this agreement</i>	9
10 <i>Dispute Resolution</i>	9
10.1 Reference to Dispute	9
10.2 Notice of Dispute	9
10.3 Representatives of Parties to Meet	9
10.4 Further Notice if Not Settled	10
10.5 Mediation	10
10.6 Expert determination	11
10.7 Litigation	11
10.8 No suspension of contractual obligations	11
11 <i>Enforcement</i>	11
11.1 Default	11
11.2 Security	12
11.3 Compulsory Acquisition	12
11.4 Restriction on the issue of Certificates	13
11.5 General Enforcement	13

12	<i>Assignment and Dealings</i>	13
	12.1 Transfer of Land	13
13	<i>Approvals and consents</i>	14
14	<i>No fetter</i>	14
	14.1 Discretion	14
	14.2 No fetter	14
15	<i>Notices</i>	14
	15.1 Notices	14
16	<i>General</i>	15
	16.1 Relationship between parties	15
	16.2 Time for doing acts	15
	16.3 Further assurances	15
	16.4 Variation	15
	16.5 No assignment	16
	16.6 Counterparts	16
	16.7 Legal expenses and stamp duty	16
	16.8 Entire agreement	16
	16.9 Representations and warranties	16
	16.10 Severability	16
	16.11 Invalidity	16
	16.12 Waiver	16
	16.13 GST	17
	16.14 Governing law and jurisdiction	17
	Schedule 1 Summary of requirements (section 7.4)	18
	Annexure A Plan showing Dedication Land	21
	Annexure B Works Documents	24

Agreement

Date

Parties

First party

Name Newcastle City Council (**Council**)
ABN 25 242 068 129
Contact TBA
Telephone [party to insert]

Second party

Name FPG Wickham Pty Limited (**Developer**)
ACN 620 785 293
Contact TBA
Telephone [party to insert]

Background

- A. The Developer owns the Land.
- B. The Developer proposes to carry out the Development which will include a multi-storey mixed use development on the Land.
- C. To facilitate the Development, the Developer has lodged a Planning Proposal seeking the following amendments to LEP 2012:
 - a. an amendment to the Height of Buildings Map to allow a maximum building height of 22m for part of 41 Throsby Street;
 - b. an amendment to the Height of Buildings Map to allow a maximum building height of 28m for the remaining part of 41 Throsby Street and all of 47 Throsby Street; and
 - c. an amendment to the Floor Space Ratio Map to allow for a maximum floor space ratio for the Land of 3:1.
- D. The Developer has made an offer to enter into this agreement to provide public benefits in connection with the Planning Proposal and future Development of the Land, including:
 - a. dedication to Council of that part of Lot 62 DP 579890 shown as "LANE" on the draft Plan of Subdivision at Annexure A, for the purpose of constructing a new public laneway, including footpath; and
 - b. construction of a new public laneway, including footpath on the Dedication Land, generally in accordance with the Works Documents set out in Annexure B.

Operative part

1 Definitions

In this agreement, unless the context indicates a contrary intention:

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

Address means a party's address set out in the Notices clause of this agreement;

Approval means any certificate, licence, consent, permit, approval or other requirement of any Authority having jurisdiction in connection with the activities contemplated by this agreement;

Authority means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person; agency or entity and includes a certifier accredited under the *Building Professionals Act 2005* (NSW);

Bank Guarantee means an irrevocable and unconditional undertaking that is not limited in time and does not expire 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,
- (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;

Bond means an insurance bond from an AAA credit rated party;

Business Day means a day on which banks are open for general banking business in Sydney, excluding Saturdays and Sundays;

Claim means any claim, loss, liability, damage, proceeding, order, judgment or expense arising out of the operation of this agreement;

Compliance Certificate means a compliance certificate as defined under section 6.4 of the Act;

Construction Certificate means a construction certificate as defined under section 6.4 of the Act;

Contributions Plan has the same meaning as under the Act;

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

Damages means all liabilities, losses, damages, costs and expenses, including legal fees and disbursements and costs of investigation, litigation, settlement, judgment, interest and penalties;

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

Dedication Land means that part of the Land to be dedicated to Council in accordance with this agreement, shown as "LANE" on the plan at Annexure A, which may be dedicated as a stratum lot if required in accordance with the design of the approved Development;

Development means a proposed multi-storey mixed use development on the Land as modified from time to time, including commercial or retail uses, and residential apartments permitted as a consequence of the Instrument Change;

Development Application has the same meaning as in the Act;

Development Consent has the same meaning as in the Act;

Encumbrance means any:

- (a) security for the payment of money or performance of obligations, including a mortgage, charge, lien, pledge, trust, power or title retention;
- (b) right, interest or arrangement which has the effect of giving another person a preference, priority or advantage over creditors including any right of set-off;
- (c) easement, restrictive or positive covenant, lease, or licence to use or occupy; or
- (d) third party right or interest or any right arising as a consequence of the enforcement of a judgment,

or any agreement to create any of them or allow them to exist.

Floor Space Ratio Map means the Floor Space Ratio Map in LEP 2012;

GFA means gross floor area, as defined in LEP2012;

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 of or administration of the GST;

Height of Buildings Map means the Height of Buildings Map in LEP 2012;

Instrument Change means an amendment to LEP 2012 in response to the Planning Proposal;

Land means Lot 63 in Deposited Plan 579890, Lots 1 and 2 in Deposited Plan 112816, Lot 200 in Deposited Plan 534787 and Lot 62 in Deposited Plan 579890 known as 41 and 47 Throsby Street, Wickham;

Law means:

- (a) any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation;
- (b) any Approval, including any condition or requirement under it; and
- (c) any fees and charges payable in connection with the things referred to in paragraphs (a) and (b);

LEP 2012 means the *Newcastle Local Environmental Plan 2012*;

Modification Application means any application to modify the Development Consent under section 4.55 of the Act;

Occupation Certificate means an occupation certificate as defined under section 6.4 of the Act, and includes an Occupation Certificate for a part of a building;

Permitted Encumbrance means each of:

- (a) easements benefiting statutory authorities or network providers, encroachments authorised by Approvals, and environmental management requirements; and
- (b) any of the following:
 - (i) an Encumbrance or other agreement or arrangement the Council (acting reasonably) agrees in writing are permitted encumbrances; and
 - (ii) any Encumbrance that does not prevent the future use of the relevant land for the public purpose for which it is to be dedicated under this agreement.

Planning Proposal means PP_2020_NEWCA_001_00 lodged with the Council on or about 26 May 2020, seeking to amend LEP 2012:

- (a) to increase the building height control applying to part of 41 Throsby Street from 10m to 22m;
- (b) to increase the building height control applying to part of 41 Throsby Street and all of 47 Throsby Street from 10m to 28m; and
- (c) to establish an overall maximum floor space ratio control applying to the Land of 3:1.

Register means the Torrens Title register maintained under the *Real Property Act 1900* (NSW);

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

Related Body Corporate has the meaning given to that term in s 9 of the *Corporations Act 2001* (Cth);

Security means a Bank Guarantee or Bond; and

Works means the construction of a new public laneway, including footpath, on the Dedication Land in accordance with the Works Documents; and

Works Documents means the Design Intent Statement, Technical Specifications and Concept Design showing the Laneway and Laneway Section in Annexure B.

2 Interpretation

In this agreement, unless the context indicates a contrary intention:

- (a) **(documents)** a reference to this agreement or another document includes any document which varies, supplements, replaces, assigns or novates this agreement or that other document;
- (b) **(references)** a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this agreement;
- (c) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this agreement;

- (d) **(person)** a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns;
- (e) **(party)** a reference to a party to a document includes that party's personal representatives, executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) **(president, CEO or managing director)** the president, CEO or managing director of a body or Authority means any person acting in that capacity;
- (g) **(requirements)** a requirement to do any thing includes a requirement to cause that thing to be done, and a requirement not to do any thing includes a requirement to prevent that thing being done;
- (h) **(including)** including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind;
- (i) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (j) **(singular)** the singular includes the plural and vice-versa;
- (k) **(gender)** words importing one gender include all other genders;
- (l) **(parts)** a reference to one or more things includes each part and all parts of that thing or group of things but nothing in this clause implies that part performance of an obligation constitutes performance of that obligation;
- (m) **(rules of construction)** neither this agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting;
- (n) **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (o) **(time and date)** a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in Sydney, Australia, even if the obligation is to be performed elsewhere;
- (p) **(joint and several)** an agreement, representation, covenant, right or obligation:
 - (i) in favour of two or more persons is for the benefit of them jointly and severally; and
 - (ii) on the part of two or more persons binds them jointly and severally;
- (q) **(writing)** a reference to a notice, consent, request, approval or other communication under this agreement or an agreement between the parties means a written notice, request, consent, approval or agreement;
- (r) **(replacement bodies)** a reference to a body (including an institute, association or Authority) 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 power or functions;
- (s) **(Australian currency)** a reference to dollars or \$ is to Australian currency;

- (t) **(month)** a reference to a month is a reference to a calendar month; and
- (u) **(year)** a reference to a year is a reference to twelve consecutive calendar months.

3 Planning Agreement under the Act

- (a) The parties agree that this agreement is a planning agreement within the meaning of section 7.4 of the Act.
- (b) Schedule 1 of this agreement summarises the requirements for planning agreements under section 7.4 of the Act and the way this agreement addresses those requirements.

4 Application of this agreement

This agreement applies to:

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

5 Operation of this agreement

This agreement commences on and from the date it is executed by all parties.

6 Contributions to be made under this agreement

6.1 Works

- (a) The Developer will carry out the Works in accordance with:
 - (i) this agreement;
 - (ii) any Development Consent or other Approval granted for the Works; and
 - (iii) the Works Documents.
- (b) The Works or any part of the Works required under this agreement will be taken to have been completed for the purposes of this agreement when a Compliance Certificate has been issued for those Works.
- (c) The Works or any part of the Works required under this agreement will be taken to have been delivered to Council when the land on which those Works are located is dedicated to Council.
- (d) The Works must be delivered to the Council prior to the issue of an Occupation Certificate for the Development or any part of the Development.
- (e) The parties agree and acknowledge that the Works serve the public purposes of providing and improving pedestrian and traffic access in the vicinity of the Development.

6.2 Dedication of Land

- (a) The Developer must dedicate or cause to be transferred to the Council, at no cost to the Council, the Dedication Land freed and discharged from all Encumbrances except Permitted Encumbrances.
- (b) The obligation to dedicate the Dedication Land will be taken to have been satisfied when either a Certificate of Title is issued by NSW Land Registry

Services for the whole of the Dedication Land identifying the Council as the registered proprietor of that land or when the Dedication Land is dedicated to Council as a public road by operation of the registration of a plan of subdivision in accordance with section 9 of the *Roads Act 1993*.

- (c) The Dedication Land must be dedicated or transferred to Council prior to the issue of an Occupation Certificate for the Development or any part of the Development.
- (d) The parties agree and acknowledge that dedication of the Dedication Land serves the public purpose of providing land for public roads.

6.3 *Maintenance of Works*

- (a) In this clause, the following definitions apply:

Maintain means works to bring an item to a state of reasonable condition and in accordance with relevant standards applicable at the time of construction of the item, including repairing any defects due to use of poor materials or due to poor workmanship, but does not include repairing normal wear and tear, repairing damage caused by a user of the Dedication Land that is outside of the Developer's control, removing graffiti or repairing any item damaged as a consequence of vandalism.

Maintained and **Maintenance** have corresponding meanings.

Maintenance Period in relation to a particular item of Work, is the period of twelve (12) months from the time that item of Work is delivered to Council in accordance with this agreement.

- (b) The Works or any part of the Works, must be Maintained by the Developer to the reasonable satisfaction of the Council for the Maintenance Period in accordance with a Maintenance Schedule, which must be provided to Council prior to the issue of a Compliance Certificate for the Works.
- (c) The Developer must follow relevant Council policies and obtain all Approvals necessary to carry out the Maintenance required under this clause.
- (d) Forty (40) Business Days prior to the end of any Maintenance Period, the Developer must request Council to carry out an inspection of the Works or any part of those Works.
- (e) The Council must carry out the inspection as requested by the Developer within five (5) Business Days of the request.
- (f) The Council may, within five (5) Business Days of carrying out the inspection notify the Developer of any Maintenance work required, including any Maintenance required in addition to the work set out in the Maintenance Schedule.
- (g) If the Developer is issued with a notice to carry out Maintenance work under paragraph (f) of this clause, the Developer must, at the Developers' cost, carry out the Maintenance work as specified in the notice and in the timeframe specified by the notice.
- (h) If the Developer fails to substantially comply with an approved Maintenance Schedule and does not rectify that failure within twenty-one (21) Business Days of being notified of that failure or within a reasonable period of time agreed

between the parties, or if the Developer fails to comply with a notice issued under paragraph (f) of this clause, the Council may, by itself, its employees, contractors or agents, carry out the required works and may recover as a debt due to the Council by the Developer in a court of competent jurisdiction, the costs incurred by the Council in carrying out the maintenance work.

7 Application of s 7.11, s 7.12 and s 7.24 of the Act to the Development

- (a) This agreement does not exclude the application of section 7.11 of the Act to the Development.
- (b) This agreement does not exclude the application of section 7.12 of the Act to the Development.
- (c) This agreement does not exclude the application of section 7.24 of the Act to the Development.
- (d) The benefits provided by the Developer under this agreement are not to be taken into account when determining any condition to be imposed on the Development under section 7.11 of the Act.

8 Registration of this agreement

8.1 *Developer Interest*

The Developer represents and warrants to the Council that on the date of this agreement it is the registered proprietor of the Land.

8.2 *Registration of this agreement*

- (a) The Developer agrees to procure the registration of this agreement under the *Real Property Act 1900* (NSW) in the relevant folios of the Register of the Land in accordance with section 7.6 of the Act.
- (b) The Developer at its own expense will, promptly after the execution of this agreement, 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 registered under the *Real Property Act 1900* (NSW); or
 - (B) is seized or possessed of an estate or interest in the Land,
 - (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 8.2.
- (c) The Developer consents to the registration of the agreement in accordance with this clause 8.2.
- (d) The Developer, at its own expense, will take all practical steps, and otherwise do anything that the Council reasonably requires:
 - (i) to procure the lodgement of this agreement with the Registrar-General as soon as reasonably practicable after this agreement comes into operation,

but in any event, no later than twenty (20) 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.

8.3 *Removal from Register*

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*

- (a) This agreement may be reviewed or modified. Any review or modification of this agreement will be conducted in the circumstances and in the manner determined by the parties.
- (b) No modification or review of this agreement will be of any force or effect unless it is in writing and signed by the parties to this agreement.
- (c) A party is not in breach of this agreement if it does not agree to an amendment to this agreement requested by a party in, or as a consequence of, a review.

10 *Dispute Resolution*

10.1 *Reference to Dispute*

If a dispute arises between the parties in relation to this agreement, the parties must not commence any court proceedings relating to the dispute unless the parties have complied with this clause, except where a party seeks urgent interlocutory relief.

10.2 *Notice of Dispute*

The party wishing to commence the dispute resolution process must give written notice (**Notice of Dispute**) to the other parties of:

- (a) the nature of the dispute;
- (b) the alleged basis of the dispute; and
- (c) the position which the party issuing the Notice of Dispute believes is correct.

10.3 *Representatives of Parties to Meet*

- (a) The representatives of the parties must promptly (and in any event within fourteen (14) Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.
- (b) The parties may, without limitation:
 - (i) resolve the dispute during the course of that meeting;
 - (ii) agree that further material or expert determination in accordance with clause 10.6 about a particular issue or consideration is needed to effectively resolve the dispute (in which event the parties will, in good faith, agree to a timetable for resolution); or

- (iii) agree that the parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

10.4 *Further Notice if Not Settled*

If the dispute is not resolved within fourteen (14) Business Days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (**Determination Notice**) by mediation under clause 10.5 or by expert determination under clause 10.6.

10.5 *Mediation*

If a party gives a Determination Notice calling for the dispute to be mediated:

- (a) The parties must agree to the terms of reference of the mediation within fifteen (15) Business Days of the receipt of the Determination Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply;
- (b) The mediator will be agreed between the parties, or failing agreement within fifteen (15) Business Days of receipt of the Determination Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (c) The mediator appointed pursuant to this clause 10.5 must:
 - (i) have reasonable qualifications and practical experience in the area of the dispute; and
 - (ii) have no interest or duty which conflicts or may conflict with his or her function as a mediator he or she being required to fully disclose any such interest or duty before his or her appointment;
- (d) The mediator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties;
- (e) The parties must within fifteen (15) Business Days of receipt of the Determination Notice notify each other of their representatives who will be involved in the mediation;
- (f) The parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement; and
- (g) In relation to costs and expenses:
 - (i) each party will bear its own professional and expert costs incurred in connection with the mediation; and
 - (ii) the costs of the mediator will be shared equally by the parties unless the mediator determines that a party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that party.

10.6 *Expert determination*

If the dispute is not resolved under clause 10.3 or clause 10.5, or the parties otherwise agree that the dispute may be resolved by expert determination, the parties may refer the dispute to an expert, in which event:

- (a) The dispute must be determined by an independent expert in the relevant field:
 - (i) agreed upon and appointed jointly by the parties; and
 - (ii) in the event that no agreement is reached or no appointment is made within twenty (20) Business Days of the agreement to refer the dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales;
- (b) The expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) The determination of the dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (d) The expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (e) Each party will bear its own costs in connection with the process and the determination by the expert and will share equally the expert's fees and costs; and
- (f) Any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
 - (i) within twenty (20) Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and commences litigation; or
 - (ii) the determination is in respect of, or relates to, termination or purported termination of this agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal.

10.7 *Litigation*

If the dispute is not *finally* resolved in accordance with this clause 10, then either party is at liberty to litigate the dispute.

10.8 *No suspension of contractual obligations*

Subject to any interlocutory order obtained under clause 10.1, the referral to or undertaking of a dispute resolution process under this clause 10 does not suspend the parties' obligations under this agreement.

11 **Enforcement**

11.1 *Default*

- (a) In the event a party considers another party has failed to perform and fulfil an obligation under this agreement, it may give notice in writing to the other party (**Default Notice**) giving all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than twenty-one (21) days.

- (b) In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (c) If a party disputes the Default Notice it may refer the dispute to dispute resolution under clause 10 of this agreement.

11.2 Security

- (a) Prior to the issue of a Construction Certificate for the Development the Developer must provide to the Council a Security in the amount of \$328,171.00 to secure the completion of the Works.
- (b) The Council may call on a Security provided under this clause if:
 - (i) the Developer is in material or substantial breach of this agreement and has failed to rectify the breach within a reasonable period of time after having been given reasonable notice (which must not be less than twenty-one (21) Business Days) in writing to do so in accordance with clause 11.1 of this agreement; or
 - (ii) the Developer becomes insolvent.
- (c) Subject to clause 11.2(b) and the provisions of this agreement, the Council may apply the proceeds of a Security in satisfaction of any obligation of the Developer under this agreement to carry out the Works, and may after giving reasonable notice to the Developer enter the Land for the purpose of carrying out the Works.
- (d) At any time following the provision of a Security under this clause, the Developer may provide the Council with one or more replacement Securities totalling the amount of all Securities required to be provided under this clause for the time being. On receipt of such replacement Security, the Council must release and return to the Developer, as directed, the Security or Securities which it holds that have been replaced as soon as reasonably practicable.
- (e) The Council must promptly return a Security provided under this clause if requested by the Developer and a Compliance Certificate has been issued for the item of Works to which the Security relates.
- (f) Nothing in this clause 11.2 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 or cannot be satisfied by calling on a Security.

11.3 Compulsory Acquisition

- (a) If the Developer does not dedicate the Dedication Land to Council as required by this agreement, the Council may compulsorily acquire the relevant land, in which case the Developer consents to the Council compulsorily acquiring that land for compensation in the amount of \$1.00 without having to follow the pre-acquisition procedures in the *Land Acquisition (Just Terms Compensation) Act 1991* and

may recover any costs, including legal costs, incurred by the Council on acquisition of the land as a debt due from the Developer.

- (b) Clause 11.3(a) constitutes an agreement for the purposes of section 30 of the *Land Acquisition (Just Terms Compensation) Act 1991*.
- (c) The Developer indemnifies and keeps indemnified the Council against all Claims made against the Council as a result of any acquisition by the Council of the whole or any part of the Dedication Land under clause 11.3(a).

11.4 *Restriction on the issue of Certificates*

- (a) For the purposes of section 6.8 of the Act and clause 146A of the Regulation the obligation to provide a Security under clause 11.2. must be satisfied prior to the issue of a Construction Certificate for the Development or any part of the Development.
- (b) In accordance with section 6.10(2) of the Act and clause 154E of the Regulation the obligations to:
 - (i) carry out the Works; and
 - (ii) dedicate the Dedication Land,
 must be satisfied prior to the issue of an Occupation Certificate for the Development or any part of the Development.

11.5 *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.

12 *Assignment and Dealings*

12.1 *Transfer of Land*

- (a) The Developer may not transfer, assign or dispose of the whole or any part of its right, title or interest in the Land (present or future) or in the Development to another person (**Transferee**) unless before it sells, transfers or disposes of that right, title or interest:
 - (i) the Transferee delivers to the Council a novation deed signed by the Transferee in a form and of such substance as is acceptable to the Council containing provisions under which the Transferee agrees to comply with all the outstanding obligations of the Developer under this agreement;
 - (ii) any default under any provisions of this agreement has been remedied or waived by the Council, on such conditions as the Council may determine, and

- (iii) the Developer and the Transferee pay the Council's reasonable costs in relation to the assignment.

13 Approvals and consents

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 obligated by this agreement to give its reasons for giving or withholding consent or for giving consent subject to conditions, but may be so obligated by law.

14 No fetter

14.1 Discretion

This agreement is not intended to operate to fetter, in any manner, the exercise of any statutory power or discretion of the Council, including, but not limited to, any statutory power or discretion of the Council relating to the Instrument Change or the Development (all referred to in this agreement as a "**Discretion**").

14.2 No fetter

No provision of this agreement is intended to constitute any fetter on the exercise of 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 a 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 is substantially satisfied,
- (b) in the event that (a) cannot be achieved without giving rise to a fetter on the exercise of a Discretion, the relevant provision is to be severed and the remainder of this agreement has full force and effect, and
- (c) to endeavour to satisfy the common objectives of the parties in relation to the provision of this agreement which is to be held to be a fetter on the extent that is possible having regard to the relevant court judgment.

15 Notices

15.1 Notices

Any notice given under or in connection with this agreement (**Notice**):

- (a) must be in writing and signed by a person duly authorised by the sender;
- (b) must be addressed as follows and delivered to the intended recipient by hand, by prepaid post or by email at the address below, or at the address last notified by the intended recipient to the sender after the date of this agreement:
 - (i) to Newcastle City Council:
 - TBA
 - Email: TBA
 - Attention: TBA
 - (ii) to FPG Wickham Pty Limited:
 - TBA
 - Email: TBA
 - Attention: TBA

- (c) is taken to be given or made:
 - (i) in the case of hand delivery, when delivered;
 - (ii) in the case of delivery by post, three (3) Business Days after the date of posting (if posted to an address in the same country) or seven (7) Business Days after the date of posting (if posted to an address in another country); and
 - (iii) when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above or when the Notice is first opened or read by the recipient, whichever occurs first; and
- (d) if under clause (c) a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it is taken to have been given or made at the start of business on the next Business Day in that place.

16 General

16.1 *Relationship between parties*

- (a) Nothing in this agreement:
 - (i) constitutes a partnership between the parties; or
 - (ii) except as expressly provided, makes a party an agent of another party for any purpose.
- (b) A party cannot in any way or for any purpose:
 - (i) bind another party; or
 - (ii) contract in the name of another party.
- (c) If a party must fulfil an obligation and that party is dependent on another party, then that other party must do each thing reasonably within its power to assist the other in the performance of that obligation.

16.2 *Time for doing acts*

- (a) If the time for doing any act or thing required to be done or a notice period specified in this agreement expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.
- (b) If any act or thing required to be done is done after 5.00 pm on the specified day, it is taken to have been done on the following Business Day.

16.3 *Further assurances*

Each party must promptly execute all documents and do all other things reasonably necessary or desirable to give effect to the arrangements recorded in this agreement.

16.4 *Variation*

A provision of this agreement can only be varied by a later written document executed by or on behalf of all parties and in accordance with the provisions of the Act.

16.5 No assignment

A party cannot assign or otherwise transfer its rights under this agreement without the prior written consent of the other party.

16.6 Counterparts

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

16.7 Legal expenses and stamp duty

Each party will pay their own legal costs and disbursements in connection with the negotiation, preparation and execution of this agreement.

16.8 Entire agreement

The contents of this agreement constitute the entire agreement between the parties and supersede any prior negotiations, representations, understandings or arrangements made between the parties regarding the subject matter of this agreement, whether orally or in writing.

16.9 Representations and warranties

The parties represent and warrant that they have the power and authority 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.

16.10 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.

16.11 Invalidity

- (a) A word or provision must be read down if:
 - (i) this agreement is void, voidable, or unenforceable if it is not read down;
 - (ii) this agreement will not be void, voidable or unenforceable if it is read down; and
 - (iii) the provision is capable of being read down.
- (b) A word or provision must be severed if:
 - (i) despite the operation of clause (a), the provision is void, voidable or unenforceable if it is not severed; and
 - (ii) this agreement will be void, voidable or unenforceable if it is not severed.
- (c) The remainder of this agreement has full effect even if clause 16.11(b) applies.

16.12 Waiver

- (a) A right or remedy created by this agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver

(either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.

- (b) 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.

16.13 GST

- (a) Words and expressions which are not defined in this agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this agreement are exclusive of GST.
- (c) If GST is imposed on any supply made under or in accordance with this agreement, the consideration payable or to be provided for that supply under this agreement but for the application of this clause is increased by, and the recipient of the supply must also pay to the supplier, an amount equal to the GST payable by the supplier on that supply.

16.14 Governing law and jurisdiction

- (a) The laws applicable in New South Wales govern this agreement.
- (b) The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

Schedule 1 Summary of requirements (section 7.4)

Subject and subsection of the Act	Planning Agreement
<p>Planning instrument and/or Development Application – Section 7.4(1)</p> <p>The Developer has:</p> <p>(a) Sought a change to an environmental planning instrument</p> <p>(b) Made, or proposes to make a Development Application</p> <p>(c) Entered into an agreement with, or are otherwise associated with, a person to whom paragraph (a) or (b) applies</p>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>
<p>Description of the public purpose to which the Planning Agreement applies – Section 7.4(2)</p>	<p>The public purpose served by the Planning Agreement is the provision of public roads. Land will be dedicated and works carried out to provide a new public laneway, including footpath. See clauses 6.1(e) and 6.2(d).</p>
<p>Description of the land to which the planning Agreement applies – Section 7.4(3)(a)</p>	<p>Lot 63 in Deposited Plan 579890, Lots 1 and 2 in Deposited Plan 112816, Lot 200 in Deposited Plan 534787 and Lot 62 in Deposited Plan 579890 also known as 41 and 47 Throsby Street, Wickham.</p>
<p>Description of the change to the environmental planning instrument to which the agreement applies – Section 7.4(3)(b)</p>	<p>See the definition of Planning Proposal in clause 1.</p>
<p>Nature and extent of the provision to be made by the developer under the agreement, the time or times by which the provision is to be made and the manner by which the provision is to be made – Section 7.4(3)(c)</p>	<p>See clauses 6.1, 6.2 and 6.3, and Annexures A and B.</p>
<p>Applicability of section 7.11 of the Act – Section 7.4(3)(d)</p>	<p>The application of section 7.11 of the Act is not excluded in respect of the Development.</p>
<p>Applicability of section 7.12 of the Act – Section 7.4(3)(d)</p>	<p>The application of section 7.12 of the Act is not excluded in respect of the Development.</p>
<p>Applicability of section 7.24 of the Act – Section 7.4(3)(d)</p>	<p>The application of section 7.24 of the Act is not excluded in respect of the Development.</p>

Mechanism for dispute resolution – Section 7.4(3)(f)	See clause 10.
Enforcement of the Planning Agreement – Section 7.4(3)(g)	See clause 11.
Registration of the Planning Agreement – Section 7.4(3)(g)	See clause 8.2.
No obligation to grant consent or exercise functions – Section 7.4(9)	See clause 14 (no fetter).

Executed as an agreement

Executed by Newcastle City Council by)
its duly appointed officer in the presence)
of:)
)
)
)

.....
Witness

.....
Officer

.....
Name of Witness (print)

.....
Name of Officer (print)

Executed by FPG Wickham Pty Limited)
ACN 620 785 293 in accordance with)
section 127 of the *Corporations Act 2001*)
(Cth) by:)
)
)

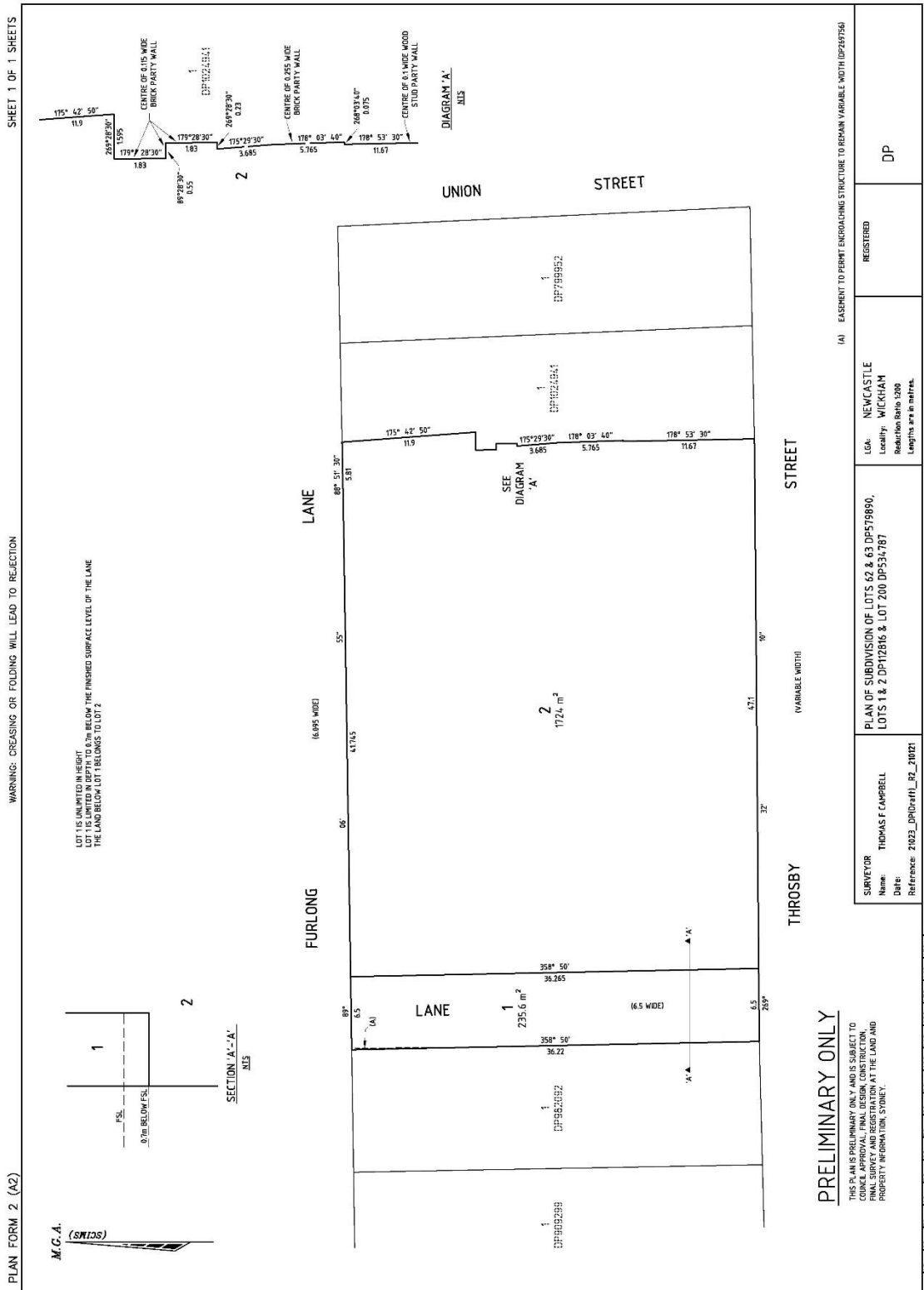
.....
Director

.....
Director/Secretary

.....
Name of Director (print)

.....
Name of Director/Secretary (print)

Annexure A Plan showing Dedication Land



PLAN FORM 6 (2019)	DEPOSITED PLAN ADMINISTRATION SHEET	Sheet 1 of 2 sheet(s)
Office Use Only		Office Use Only
Registered:		PRELIMINARY ONLY <small>THIS PLAN IS PRELIMINARY ONLY AND IS SUBJECT TO COUNCIL APPROVAL, FINAL DESIGN, CONSTRUCTION, FINAL SURVEY AND REGISTRATION AT THE LAND AND PROPERTY INFORMATION, SYDNEY.</small>
Title System:		
PLAN OF SUBDIVISION OF LOTS 62 & 63 DP579890, LOTS 1 & 2 DP112816 & LOT 200 DP534787		LGA: NEWCASTLE Locality: WICKHAM Parish: NEWCASTLE County: NORTHUMBERLAND
Survey Certificate I, THOMAS F CAMPBELL of Delfs Lascelles Pty Ltd, 260 Maitland Road Mayfield 2304 a surveyor registered under the <i>Surveying and Spatial Information Act 2002</i> , certify that: *(a) The land shown in the plan was surveyed in accordance with the <i>Surveying and Spatial Information Regulation 2017</i> , is accurate and the survey was completed on, or *(b) The part of the land shown in the plan (*being* excluding ** was surveyed in accordance with the <i>Surveying and Spatial Information Regulation 2017</i>, the part surveyed is accurate and the survey was completed on, the part not surveyed was compiled in accordance with that Regulation, or *(c) The land shown in this plan was compiled in accordance with the <i>Surveying and Spatial Information Regulation 2017</i>. Datum Line: 'X' - 'Y' Type: *Urban/* Rural The terrain is *Level Undulating / *Steep Mountainous Signature: Dated: Surveyor Identification No: 8704 Surveyor registered under the <i>Surveying and Spatial Information Act 2002</i> * Strike through if inapplicable. ** Specify the land actually surveyed or specify any land shown in the plan that is not the subject of the survey.		Crown Lands NSW/Western Lands Office Approval I, (Authorised Officer) in approving this plan certify that all necessary approvals in regard to the allocation of the land shown herein have been given. Signature: Date: File Number: Office:
Plans used in the preparation of survey/compilation. DP 112816 DP 534787 DP 579890		Subdivision Certificate I, *Authorised Person/*General Manager/*Registered Certifier, certify that the provisions of section 6.15 of the <i>Environmental Planning and Assessment Act 1979</i> have been satisfied in relation to the proposed subdivision, new road or reserve set out herein. Signature: Accreditation number: Consent Authority: Date of endorsement: Subdivision Certificate number: File number: * Strike through if inapplicable
Surveyor's Reference: 21023_DP(Draft)_R2_210121		Statements of intention to dedicate public roads, create public reserves and drainage reserves, acquire/resume land. IT IS INTENDED TO DEDICATE LOT 1 TO THE PUBLIC AS PUBLIC ROAD SUBJECT TO THE EXISTING EASEMENT TO PERMIT ENCROACHING STRUCTURE TO REMAIN (DP269756)
		Signatures, Seals and Section 88B Statements should appear on PLAN FORM 6A

Annexure B Works Documents

Design Intent Statement

Design Intent Statement – Throsby St Wickham Mixed Use Development

DESIGN INTENT STATEMENT New Laneway 41-47 THROSBY ST WICKHAM

Issue	Description	Date	Checked	Authorised
B	Concept Phase	12/04/2021	GCS	KMG

DRAFT PLANNING AGREEMENT REQUIREMENTS

This document has been provided in response to the letter from City of Newcastle to Fidem Property Group dated 18 March 2021. Background item (b) in this letter requested a Statement of Design Intent for the proposed Laneway Works.

VERIFICATION OF QUALIFICATIONS

Kathy Marie Gresham is a Registered Architect of New South Wales and Director of EJE Architecture, with 30 years architectural practice experience. She is registered with the NSW Architects Registration Board with the registration number 5493.

THE PROPOSAL

The project is a mixed use development including Residential Units, Commercial space, and basement carparking spaces, on the site 41-47 Throsby St Wickham. Associated with the project is the creation of a new 6.5metre Laneway, which is the subject of this statement.

DESIGN INTENT STATEMENT

EJE Architecture are the design Architects for the project, having been involved with the design since 2018.

As part of the design development of the project, EJE and specialist consultants will undertake schematic and detailed design for the Laneway construction, on behalf of Fidem Property Group.

EJE will work with Civil, Stormwater and Traffic consultants, and in consultation with City of Newcastle, will prepare the necessary documentation for authority approvals and construction.

All works will be designed and constructed to the standards applicable at the time of issuing the Construction Certificate, including relevant AUS-SPEC Technical Specifications, standard drawings as published on City of Newcastle's website, and/or City of Newcastle's public domain technical manual.

Kathy Gresham

Signed: _____
Registered Architect, Reg No. 5493

EJE Architecture
412 King Street
NEWCASTLE NSW 2353

eje architecture

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newcastle nsw 2300

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e mail@eje.com.au

ACN 002 912 843
ABN 82 644 649 849



Technical Specifications

Relevant Standards

All Works will be designed and constructed to the standards applicable at the time of issuing the Construction Certificate, including relevant AUS-SPEC Technical Specifications, standard drawings as published on Council's website, and / or Councils public domain technical manual.

These may include the following:

Relevant City Standards

- Engineering Specification for Development Design and Construction
- City Centre Public Domain Technical Manual
- Newcastle Urban Forest Technical Manual
- Standard Drawings and relevant Specifications
- CN DCP and Policies

Relevant Australian Standards and Industry Standards for Roads, Verge Works and Public Links

The list below is some relevant referenced standards, however other Standards and Industry Specific standards may be applicable.

- Austroads Publications
- Transport for NSW (TfNSW) Supplements and Technical Directions
- AS 1725 Geotechnical Site investigations
- AS 4455 Masonry Units and segmental pavers
- AS 4678 Earth Retaining Structures
- AS 3600 Concrete Structures
- AS 2876 Concrete kerbs and channels
- AS 1158 Road Lighting
- AS 1743 Road signs
- AS 4282 Control of the Obtrusive Effects of Outdoor lighting
- AS 3500 Plumbing and Drainage
- AS 3700 Masonry Structures
- AS 2890 Parking Facilities
- AS 1428 Design for Access and Mobility
- AS 4454 Composts, soil conditioners and mulches Relevant Australian Standards – Roads (including pedestrian areas)
- AS 1742 Manual of uniform traffic control devices
- AS 1743 Road Signs

The above list of Standards is included for information purposes only, and as a guide to the relevant standards for the general nature of the Works identified in this document. Council makes no representation or warranty as to the currency of the standards identified, or their application on the final design of the Works. The Developer must make its own enquiries regarding whether any standard has been replaced or supplemented. In the event that an Australian Standard prescribed a different level of material, finish, work or workmanship than those contained in a Council standard, then the higher of the two standards will apply. If there is a conflict between Council then the Developer must request Council to nominate the correct and applicable Council standard. The Council's decision as to the applicable standard is final.

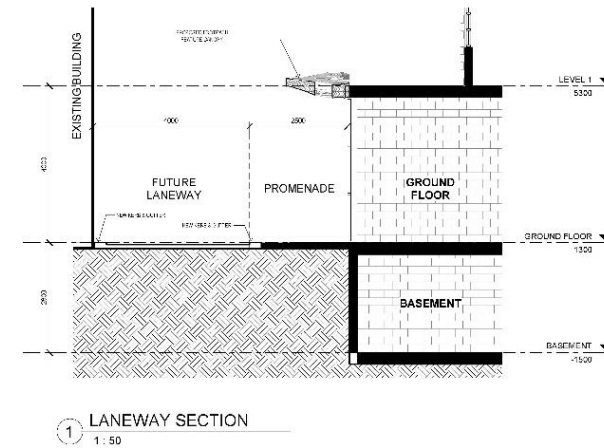
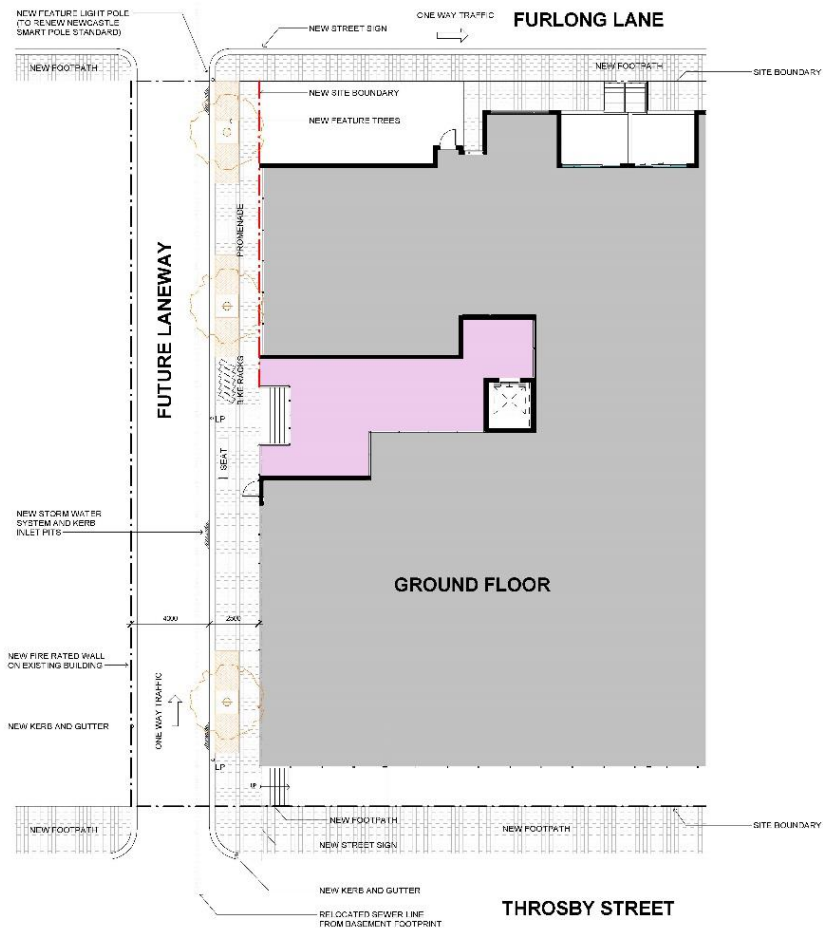
General Specifications

Works will include the following:

1. Kerb and gutter abutting the boundary building wall of 55 Throsby Street, with finished levels and grade designed to manage stormwater flows.

2. Carriageway of up to 4m wide accommodating a 1m wide shoulder off the western boundary to 55 Throsby Street delineated with line marking and a one-way travel path supporting vehicle flows in a northerly direction from Throsby Street to Furlong Lane.
3. The intersections to both Throsby Street and Furlong Lane will be designed to accommodate the travel and turning path of larger vehicles including Council garbage trucks and delivery vehicles.
4. Finished levels and cross grade will be designed to enable the future envisaged widening of the laneway (i.e. when 55 Throsby Street is redeveloped).
5. Kerb and gutter along the eastern side of the carriageway with finished levels and grade designed to manage stormwater flows.
6. A 2.5m wide footpath area, designed with a finished level and grade compliant to allow universal accessibility provided at a continuous minimum width of 1.5m along the eastern boundary and connecting seamlessly to adjoining footpaths and the pedestrian areas on adjoining private property.
7. The footpath area adjacent to the kerb (up to 1m) will incorporate:
 - a. streetlighting (three poles)
 - b. street trees (three with selected surrounds or landscape areas)
 - c. street furniture (one bench seat, one bicycle parking racks)
 - d. Street Signage

Concept Design

[illegible]

REV	DATE	DESCRIPTION
0	01/01/01	INITIAL BALANCE

REV. 10/94



THROSBY MIXED USE DEVELOPMENT

FPG WICKHAM PTY LTD

**41-47 THROSBY STREET,
WICKHAM**

**GROUND FLOOR LAYOUT
- UPDATED**

WORTHINGTON INDUSTRIES LTD. 0208 679 1111
JTS MAR 2021 As indicated

FED. POL. 12251 SK SK OP5-20



EJE architecture