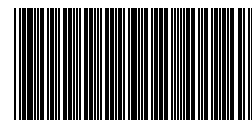




Filed: 23 December 2020 3:14 PM



D0001D3T9K

Section 34 Agreement

COURT DETAILS

Court	Land and Environment Court of NSW
Division	Class 1
Registry	Land and Environment Court Sydney
Case number	2020/00122833

TITLE OF PROCEEDINGS

First Applicant	NOAKES GROUP PTY LIMITED ABN 36002057294
First Respondent	NORTH SYDNEY COUNCIL ABN 32353260317

FILING DETAILS

Filed for	NORTH SYDNEY COUNCIL, Respondent 1
Legal representative	Kirston Gerathy
Legal representative reference	
Telephone	0293348628

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Section 34 Agreement (S34 agreement with deed.pdf)

[attach.]

AGREEMENT BETWEEN THE PARTIES
SECTION 34(3) LAND & ENVIRONMENT COURT ACT 1979

COURT DETAILS

Court	Land and Environment Court of New South Wales
Class	1
Case number	2020/00122833

TITLE OF PROCEEDINGS

Applicant	NOAKES GROUP PTY LTD ABN 36002057294
Respondent	NORTH SYDNEY COUNCIL ABN 32353260317

FILING DETAILS

Filed for	Noakes Group Pty Ltd, Applicant
Legal representative	Richard John Bain Allsop Allsop Glover Lawyers
Legal representative reference	
Contact name and telephone	Richard Allsop Tel. 02 8224 0900

TERMS OF AGREEMENT

1. The Court notes that the parties have:
 - (a) reached agreement on terms set out on the deed annexed to this agreement and marked A; and
 - (b) agreed as to the terms of a decision in the proceedings that would be acceptable to the parties (being a decision that the Court could have made in the proper exercise of its functions).
2. The terms of the decision as agreed by the parties are as follows:
 - (a) The appeal is upheld.
 - (b) Development Control Order issued by North Sydney Council pursuant to Part 9, Division 9.3, section 9.34 (Schedule 5, Part 1, Item 11) of the Environmental Planning and Assessment Act 1979 is revoked.
3. Pursuant to section 34(3)(a) and (b) of the *Land and Environment Court Act* NSW 1979, the parties request the Commissioner to dispose of the proceedings in accordance with the terms of the decision set out in paragraph 2 above.
4. The Court notes that each party will pay its own costs of the proceedings.


SIGNATURES

Applicant

Signature of legal representative

Capacity

Date of signature

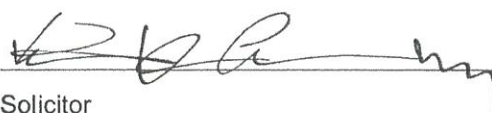

Solicitor
23 December, 2020

Respondent

Signature of legal representative

Capacity

Date of signature


Solicitor
23/12/20

Annexure A

HWL
EBSWORTH
LAWYERS

Deed of Settlement

Noakes Group Pty Limited

and

North Sydney Council

Ref AH:KRM:978214

Doc ID 796948593/v1

Level 14, Australia Square, 264-278 George Street Sydney NSW Australia
DX 129 Sydney

Telephone (02) 9334 8477
Facsimile 1300 369 656
hwlebsworth.com.au

Handwritten initials 'EAA' and a signature.

Table of contents

ABN 32 353 260 317 of 200 Miller Street, North Sydney NSW 2060	1
1. Definitions and interpretation clauses	2
1.1 Definitions	2
1.2 Interpretation	4
1.3 Business Day	5
2. Agreement	5
3. Confidentiality	7
4. No fetter	8
5. Enforcement	8
6. Notices	8
6.1 Notice requirements	8
6.2 When Notices considered given and received	8
6.3 Nominated Contact Details	9
7. General	9
7.1 Variation	9
7.2 Costs and expenses	9
7.3 Waiver	9
7.4 Severance	10
7.5 Governing law and jurisdiction	10
7.6 Further assurances	10
7.7 No reliance	10
7.8 Entire agreement	10
7.9 Counterparts	10
Annexure A - Plan showing Caretakers Unit, Mobile Structure and Worksheds	12
Annexure B - Draft Section 34 Agreement	13
Annexure C - Plan showing Site	15
Annexure D - Plan showing northern slipway	16

Annexure E - Plan showing where Non-Commercial Boats to be kept	17
Annexure F - Plan showing area for Minor Repair Works	18
Signing page	19

Handwritten signature and initials in black ink, appearing to be 'JF' followed by 'GWA'.

Deed of Settlement

Date

Parties	Noakes Group Pty Limited ACN 002 057 294 of 6 John Street, McMahon's Point NSW 2059	Applicant
	North Sydney Council	
	ABN 32 353 260 317 of 200 Miller Street, North Sydney NSW 2060	Respondent

Recitals	<p>A. The Applicant is the applicant in the Proceedings.</p> <p>B. The Applicant is the defendant in the Local Court Proceedings.</p> <p>C. The Applicant is the operator of a commercial boatyard on the Site.</p> <p>D. The Respondent is the respondent in the Proceedings.</p> <p>E. The Respondent is the prosecutor in the Local Court Proceedings.</p> <p>F. The Site has the benefit of Development Consent DA 1164/90 and the Part 5 Approval.</p> <p>G. The parties are in dispute as to the application of Development Consent DA 1164/90 and the Part 5 Approval to the Site, and the activities carried out at the Site.</p> <p>H. In or about March 2020, the Respondent issued the PIN.</p> <p>I. On 17 April 2020, the Applicant elected for the PIN to be heard in the Local Court.</p> <p>J. On 30 March 2020, the Respondent issued the DCO subject of the Proceedings.</p> <p>K. On 24 April 2020, the Applicant commenced the Proceedings.</p> <p>L. On 7 August 2020, the Proceedings were referred to mediation pursuant to section 26 of the <i>Civil Procedure Act 2005</i> together with a resumed conciliation conference under section 34 of the <i>Land and Environment Court Act 1979</i>.</p> <p>M. The parties have agreed to resolve the Proceedings and the Local Court Proceedings by entering into an agreement in the form of the Draft Section 34 Agreement, to effect revocation of the DCO.</p>
-----------------	---

This deed witnesses that in consideration of, among other things, the mutual promises contained in this deed the parties agree as follows:



1. Definitions and interpretation clauses

1.1 Definitions

In this deed:

- Agreement** means the terms of agreement in this deed.
- Blasting Activities** means any abrasive blasting processes that use sand with compressed air or sodium bicarbonate with compressed air..
- Building Information Certificate** has the same meaning as in section 6.26(2) of the EPA Act.
- Building Information Certificate Application** means an application or separate applications made in accordance with Division 6.7 of the EPA Act, in relation to the Caretakers Unit and the Mobile Structure.
- Business Day** means a day on which banks are open for business in Sydney in the State of New South Wales excluding a Saturday, Sunday or public holiday in that city.
- Caretakers Unit** means the structure located on the Site in the location shown on the plan in Annexure A.
- DCO** means the development control order issued by the Respondent on 30 March 2020 pursuant to Schedule 5, Part I, Item 11 of the EPA Act.
- Development Application** means a development application or modification application of Development Consent 1164/90, made in accordance with the EPA Act.
- Development Consent** has the same meaning as in the EPA Act.
- Development Consent DA 1164/90** means development consent DA1164/90 issued by North Sydney Council on 20 December 1990, as modified on 15 July 1991 and 16 September 1992, and Building Approval 91/690 issued by North Sydney Council on 19 March 1992.
- Draft Section 34 Agreement** means the draft agreement provided at Annexure B which the parties intend will be made by the Land and Environment Court pursuant to section 34(3) of the Land and Environment Court Act 1979.
- End Date** means the earlier of:
1. the Sunset Date; or
 2. the later of the following:

- (a) the final determination of the applications referred to in clauses 2.2.a and 2.2.d of this deed, either by North Sydney Local Court or the Land and Environment Court NSW, if an appeal is lodged within 30 days of any determination by North Sydney Council; and
- (b) final determination of the applications referred to in clauses 2.2.b, 2.2.e and 2.2.g of this deed, either by North Sydney Local Court or the Land and Environment Court NSW, if an appeal is lodged within 30 days of any determination by North Sydney Council or in the event that a Development Consent is granted in respect of the matters in clauses 2.2.b, 2.2.e and 2.2.g of this deed, notification of commencement of the Development Consents in accordance with clause 2.2.s; and

EPA Act	means the <i>Environmental Planning and Assessment Act 1979</i> .
EPL	means the Environment Protection Licence Number 10893 issued by the NSW EPA and as amended.
Execution Date	means the date this deed was executed by the last of the parties.
Interim Period -	means the period between the Execution Date and the End Date.
L10	means the noise level exceeded for 10% of the time of the measurement duration.
Site	means the whole area comprising the commercial boatyard operated by the Applicant including the land the wharves and berths, as shown highlighted in pink on the plan in Annexure C.
Sunset Date	means the date that is 18 calendar months after the Execution Date or such other date as the parties may agree in writing.
Local Court Proceedings	means proceeding No. 2020/00137244 before the Local Court of New South Wales with respect to the PIN.
Minor Repair Works	means the preparation and painting of isolated damaged areas of boats, the total of which isolated damaged areas must not exceed 10 square metres for each boat and documentary evidence of which is to be provided to Council upon request.
Mobile Structure	means the structure located on the Site in the location as shown on the plan in Annexure A.
Non-Commercial Boats	means boats (including 'the Morna') which are kept on the Site other than for commercial purposes.
Northern Slipway	Means the area marked as 'Northern Slipway' on the plan in Annexure D.
Occupation Certificate	has the same meaning as in the EPA Act.

A handwritten signature in black ink, appearing to be 'J. [unclear]', with the initials 'CFA' written below it.

- Part 5 Approval** means the activity approval issued by the Maritime Services Board dated 15 November 1990.
- PIN** means the penalty infringement notice issued by Council under section 4.2(1)(b) of the EPA Act for development not in accordance with a development consent.
- Proceedings** means the proceedings in the Land and Environment Court of New South Wales bearing case number 2020/00122833.
- Spray Painting** means the application of paints (including anti foulant) via a high pressure spray technique whether or not the technique uses compressed air.
- Worksheds** means the buildings shown highlighted on the plan in Annexure A.

1.2 Interpretation

In this deed, unless a contrary intention is expressed:

- (a) headings and italicised, highlighted or bold type do not affect the interpretation of this deed;
- (b) the singular includes the plural and the plural includes the singular;
- (c) a gender includes all other genders;
- (d) other parts of speech and grammatical forms of a word or phrase defined in this deed have a corresponding meaning;
- (e) a reference to a 'person' includes any individual, firm, company, partnership, joint venture, an unincorporated body or association, trust, corporation or other body corporate and any Government Agency (whether or not having a separate legal personality);
- (f) a reference to anything (including any right) includes a part of that thing, but nothing in this clause 1.2(f) implies that performance of part of an obligation constitutes performance of the obligation;
- (g) a reference to a clause, party, annexure, exhibit or schedule is a reference to a clause of, and a party, annexure, exhibit and schedule to, this deed and a reference to this deed includes any clause, annexure, exhibit and schedule;
- (h) a reference to a document (including this deed) includes all amendments or supplements to, or replacements or novations of, that document;
- (i) a reference to a party to any document includes that party's successors and permitted assigns;
- (j) a reference to time is to Sydney, New South Wales, Australia time;

- (k) a reference to any legislation includes all delegated legislation made under it and includes all amendments, consolidations, replacements or re-enactments of any of them, from time to time;
- (l) a reference to an agreement other than this deed includes an undertaking, deed, agreement or legally enforceable arrangement or understanding whether or not in writing;
- (m) a reference to a document includes any agreement or contract in writing, or any certificate, notice, deed, instrument or other document of any kind;
- (n) a provision of this deed may not be construed adversely to a party solely on the ground that the party (or that party's representative) was responsible for the preparation of this deed or the preparation or proposal of that provision;
- (o) a reference to a body, other than a party to this deed (including an institute, association or authority), whether statutory or not, which ceases to exist or whose powers or functions are transferred to another body, is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
- (p) the words 'include', 'including', 'for example', 'such as' or any form of those words or similar expressions in this deed do not limit what else is included and must be construed as if they are followed by the words 'without limitation', unless there is express wording to the contrary;
- (q) a reference to a day is to the period of time commencing at midnight and ending 24 hours later;
- (r) if a period of time is specified and dates from a day or the day of an act, event or circumstance, that period is to be determined exclusive of that day; and
- (s) if an act or event must occur or be performed on or by a specified day and occurs or is performed after 5.00 pm on that day, it is taken to have occurred or been done on the next day.

1.3 Business Day

If anything under this deed is required to be done by or on a day that is not a Business Day that thing must be done by or on the next Business Day.

2. Agreement

- 2.1 Without admissions, the Applicant and the Respondent agree to the terms of this deed to resolve the Proceedings and the Local Court Proceedings.
- 2.2 The Applicant agrees:
 - a. to lodge by 24 December 2020 an application for a Building Information Certificate to the Respondent, in relation to the Caretaker's Unit;
 - b. to lodge by 24 December 2020 the Development Application to the Respondent, for use of the Caretaker's Unit;

A handwritten signature in black ink, followed by the initials 'CMT' in a stylized font.

- c. to not use the Caretaker's Unit until and unless both a Building Information Certificate has issued for the Caretaker's Unit structure and a Development Consent for the use of the Caretaker Unit has been granted;
- d. to lodge by 24 December 2020, an application for a Building Information Certificate to the Respondent, in relation to the Mobile Structure;
- e. to lodge by 24 December 2020, a Development Application to the Respondent for use of the Mobile Structure;
- f. subject to clause 2j, to not use the Mobile Structure until and unless both a Building Information Certificate has issued for the Mobile Structure and a Development Consent for the use of the Mobile Structure has been granted;
- g. to lodge by 1 February 2021, a Development Application seeking consent for the use of the Site, consistent with that permitted by the EPL and any amendment to condition D50 of the Development Consent 1164/90;
- h. to not keep or permit to be kept more than a maximum of 30 boats in total on the Site during the Interim Period;
- i. that during the Interim Period it will ensure that no more than 4 Non-Commercial Boats will be kept on the Site;
- j. that during the Interim Period it will keep the Non-commercial boats in the locations identified on the plan at Annexure E to this deed;
- k. that during the Interim Period any Spray Painting or Blasting Activities must only occur in the Worksheds with the exception of Minor Repair Works which may be carried out in the area on the Site shown outlined on the map in Annexure F;
- l. that during the Interim Period it will ensure that the operations at the Site do not generate noise levels when measured at the boundary of any neighbouring residential developments, which exceed:
 - (i) at John Street L10 = 57dBa
 - (ii) at Dumbarton Street L10 = 45dBA
 - (iii) at Munro Street L10 = 49dBA;
- m. to not carry out Spray Painting or Blasting Activities in the Northern Slipway during the Interim Period;
- n. that during the Interim Period, to not cause or permit the application of anti foulant to boats outside of a Workshed other than by roller, brush or airless spray technique and only when encapsulated / screened using shade cloth, plastic or the like;
- o. to comply with Development Consent DA 1164/90, the Part 5 Approval and the terms of the EPL except where provided to the contrary for the matters set out in this deed;
- p. to prosecute with due dispatch, including seeking a determination by lodging any appeal to the Land and Environment Court NSW, the applications foreshadowed in paragraphs 2.2(a), 2.2(b), 2.2(d), 2.2(e) and 2.2(g) of this deed;

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- q. In the event that any Development Application to modify condition D50 of Development Consent 1164/90 is refused by the Council, or following an appeal, refused by the Land and Environment Court of NSW, the Applicant will reduce the number of boats kept on the Site to 26, unless or until development consent is obtained for a greater number;
 - r. to notify Council within 2 weeks of such commencement of the commencement of any Development Consent granted in relation to the Development Applications referred to in clauses 2.2.b, 2.2.e, 2.2.f; and
 - s. to approach the Land and Environment Court NSW within 5 Business Days of the date of this deed to request that it make a decision in accordance with the terms of the s34 Agreement at Annexure B to this Agreement pursuant to s34(3) of the Land and Environment Court Act 1979.
- 2.3 For clarity, the Applicant agrees that no works shall be undertaken to any Non-Commercial Boats when stored in the Mobile Structure for the duration of this deed.
- 2.4 In consideration of the Applicant's agreement in paragraph 2.2 of the Agreement, the Respondent agrees to:
- a. withdraw the Local Court Proceedings within 7 days of the date of this deed;
 - b. approach the Land and Environment Court NSW within 5 Business Days of the date of this deed to request that it make a decision in accordance with the terms of the s34 Agreement at Annexure B to this Agreement pursuant to s34(3) of the *Land and Environment Court Act 1979*.
- 2.5 The parties agree that paragraphs 2.2(c), 2.2(f), 2.2(h), 2.2(i), 3(j), 2.2(k), 2.2(l), 2.2(m), 2.2(n), 2.2(o), 2.2(p), 2.5(a) and 2.5(b) are essential terms of this deed.
- 2.6 The parties agree that this deed shall not be construed as a consent or permission under any legislation.
- 2.7 In the event that:
- (a) the Applicant notifies the Respondent in accordance with clause 2.2.r of commencement of a Development Consent granted in respect of any of the matters in clauses 2.2.b, 2.2.e, 2.2.f; or
 - (b) a Building Information Certificate is issued in respect of, any of the matters in clauses to 2.2.a, 2.2.d,

of this deed, this deed shall cease to have effect in relation to those matters.

3. Confidentiality

- 3.1 The parties agree that the existence and contents of this deed are not confidential and that the parties may disclose the contents of this deed, in the absence of any prior approval of the non-disclosing party.

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4. No fetter

- 4.1 This deed 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 any Application or any other application for Development Consent (all referred to in this agreement as a “Discretion”).

5. Enforcement

- 5.1 In the event a party (**Non-Defaulting Party**) considers the other party has failed to perform and fulfil an obligation of a non-essential term under this deed (**Defaulting Party**), 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 7 days.
- 5.2 If the matters stipulated by the Default Notice are not rectified within 7 days, the Non-Defaulting party may terminate this deed by giving notice to the Defaulting Party and take any other action which may be available to the Non-Defaulting Party to enforce the terms of this deed, including seeking orders pursuant to section 29 of the *Civil Procedure Act 2005*, to give effect to this deed.
- 5.3 Either party may terminate this deed, upon 7 days written notice to the other party, in the case of a breach of an essential term, as that term is defined in section 2.6 of this deed.

6. Notices

6.1 Notice requirements

Any notice, demand, approval, consent or other communication under this deed (**Notice**) must be in writing in English or accompanied by a certified translation into English and must be:

- (a) delivered personally; or
- (b) sent by regular post (or airmail if posted to or from a place outside Australia),

to a party at:

- (c) the address of the party set out in clause 6.3 (**Nominated Contact Details**); or
- (d) such other contact details as the party may from time to time notify to the other party for the purposes of, and in accordance with, this clause.

6.2 When Notices considered given and received

A Notice given in accordance with clause 4 takes effect when received (or such later time as specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;

- (b) if sent from and to a place within Australia by regular post, at 9:00 am on the sixth Business Day after the date of posting;
- (c) if sent from a place within Australia to a place outside Australia by airmail, at 9.00 am on the tenth Business Day after the date of posting;
- (d) if sent from a place outside Australia by airmail, at 9.00 am on the twelfth Business Day after the date of posting,

but if the delivery, receipt or transmission is not on a Business Day or is after 5.00 pm on a Business Day, the Notice is taken to be received at 9.00 am on the next Business Day after that delivery, receipt or transmission.

6.3 Nominated Contact Details

For the purposes of this clause 6.1, the Nominated Contact Details of the parties are as follows:

(a) The Applicant:

Sean Langman, Noakes Group Pty Ltd, 6 John Street McMahons Point 2029,
sean@noakes.net.au

(b) The Respondent:

Craig Winn, 200 Miller Street, North Sydney NSW 2060

7. General

7.1 Variation

A variation of any term of this deed will be of no force or effect unless it is by way of deed and signed by each of the parties.

7.2 Costs and expenses

Each party must pay its own costs (including legal costs) and expenses in connection with the negotiation, preparation, execution and delivery of this deed.

7.3 Waiver

- (a) A waiver of a right, remedy or power must be in writing and signed by the party giving the waiver.
- (b) A party does not waive a right, remedy or power if it delays in exercising, fails to exercise or only partially exercises that right, remedy or power.

- (c) A waiver given by a party in accordance with clause 7.3(a):
 - (i) is only effective in relation to the particular obligation or breach in respect of which it is given and is not to be construed as a waiver of that obligation or breach on any other occasion; and
 - (ii) does not preclude that party from enforcing or exercising any other right, remedy or power under this deed nor is it to be construed as a waiver of any other obligation or breach.

7.4 Severance

If a provision in this deed is wholly or partly void, illegal or unenforceable in any relevant jurisdiction that provision or part must, to that extent, be treated as deleted from this deed for the purposes of that jurisdiction. This does not affect the validity or enforceability of the remainder of the provision or any other provision of this deed.

7.5 Governing law and jurisdiction

- (a) This deed is governed by and is to be construed under the laws in force in New South Wales, Australia.
- (b) Each party submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in New South Wales, Australia and courts of appeal from them in respect of any proceedings arising out of or in connection with this deed. Each party irrevocably waives any objection to the venue of any legal process in these courts on the basis that the process has been brought in an inconvenient forum.

7.6 Further assurances

Each party must, at its own expense, do all things and execute all further documents necessary to give full effect to this deed and the transactions contemplated by it.

7.7 No reliance

Neither party has relied on any statement by the other party which has not been expressly included in this deed.

7.8 Entire agreement

This deed states all of the express terms agreed by the parties in respect of its subject matter. It supersedes all prior discussions, negotiations, understandings and agreements in respect of its subject matter.

7.9 Counterparts

- (a) This deed may be executed in any number of counterparts, each signed by one or more parties. Each counterpart when so executed is deemed to be an original and all such counterparts taken together constitute one document.
- (b) A party that has executed a counterpart of this deed may exchange that counterpart with another party by faxing or emailing it, by way of PDF, to the other

party or the other party's legal representative and it is intended that such exchange is to take effect as delivery of this deed.

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Annexure A - Plan showing Caretakers Unit, Mobile Structure and Worksheds



Annexure B - Draft Section 34 Agreement

Form A (version 2)

**AGREEMENT BETWEEN THE PARTIES
SECTION 34(3) LAND & ENVIRONMENT COURT ACT 1979**

COURT DETAILS

Court	Land and Environment Court of New South Wales
Class	1
Case number	2020/00122833

TITLE OF PROCEEDINGS

Applicant	NOAKES GROUP PTY LTD ABN 36002057294
Respondent	NORTH SYDNEY COUNCIL ABN 32353260317

FILING DETAILS

Filed for	Noakes Group Pty Ltd, Applicant
Legal representative	Richard John Bain Allsop Allsop Glover Lawyers
Legal representative reference	
Contact name and telephone	Richard Allsop Tel. 02 8224 0900

TERMS OF AGREEMENT

1. The Court notes that the parties have:
 - (a) reached agreement on terms set out on the deed annexed to this agreement and marked A; and
 - (b) agreed as to the terms of a decision in the proceedings that would be acceptable to the parties (being a decision that the Court could have made in the proper exercise of its functions).

2. The terms of the decision as agreed by the parties are as follows:
 - (a) The appeal is upheld.
 - (b) Development Control Order issued by North Sydney Council pursuant to Part 9, Division 9.3, section 9.34 (Schedule 5, Part 1, Item 11) of the Environmental Planning and Assessment Act 1979 is revoked.

3. Pursuant to section 34(3)(a) and (b) of the *Land and Environment Court Act* NSW 1979, the parties request the Commissioner to dispose of the proceedings in accordance with the terms of the decision set out in paragraph 2 above.

4. The Court notes that each party will pay its own costs of the proceedings.

SIGNATURES

Applicant

Signature of legal representative _____

Capacity Solicitor

Date of signature

Respondent

Signature of legal representative _____

Capacity Solicitor

Date of signature

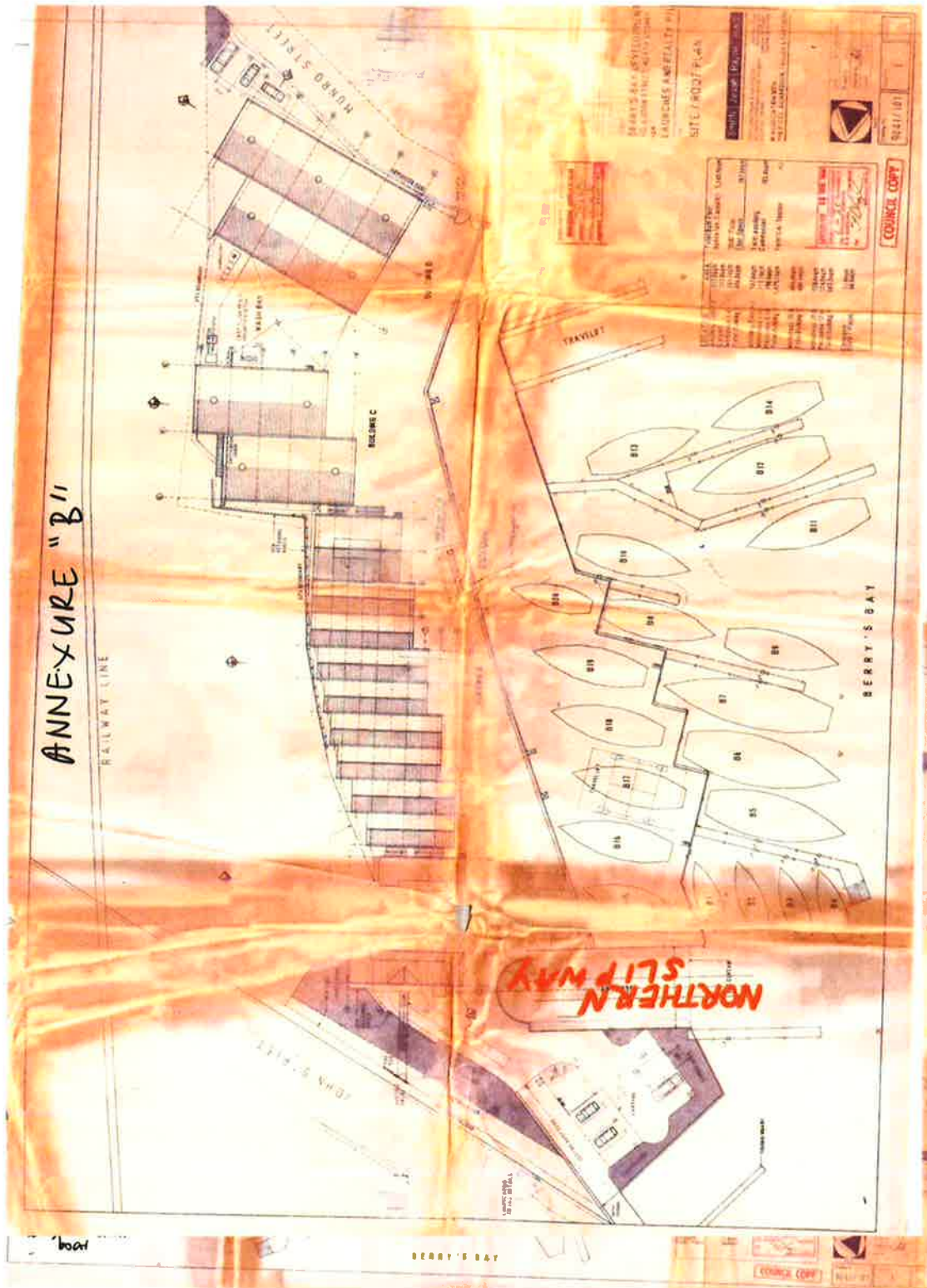
Page 74


Annexure C - Plan showing Site

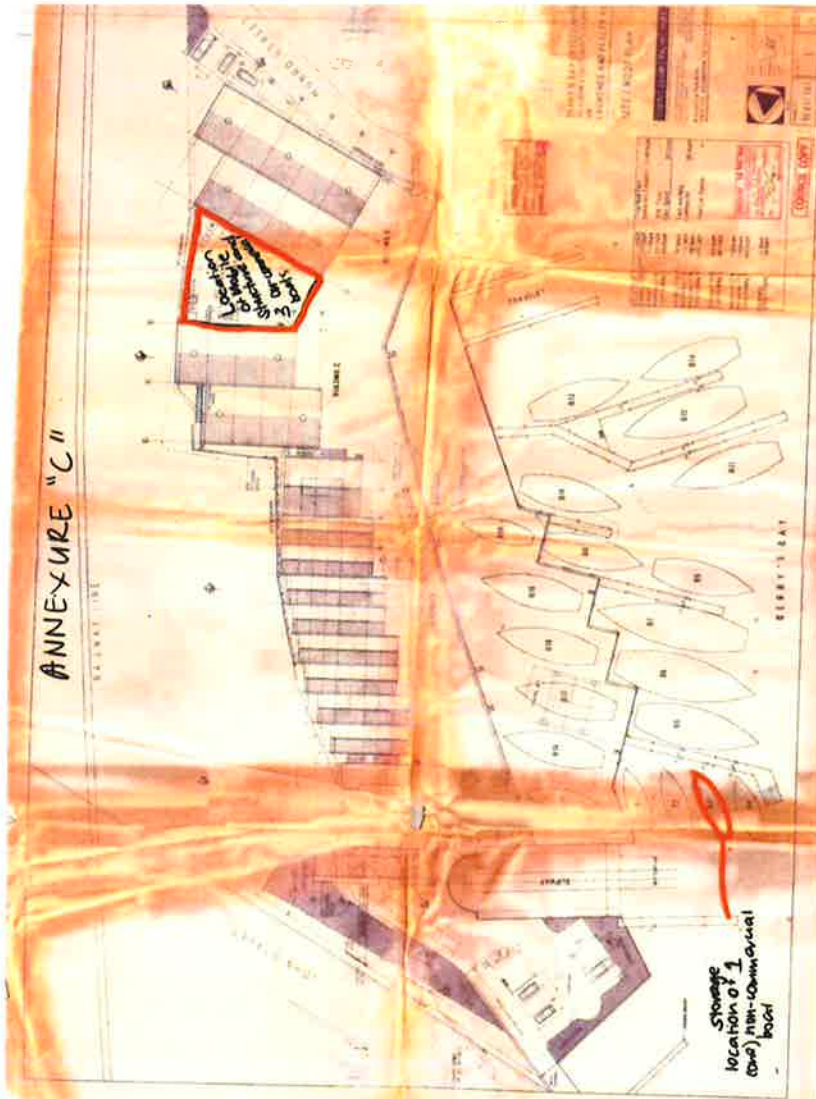


1. SHEET 2
2. SHEET 3
3. SHEET 4

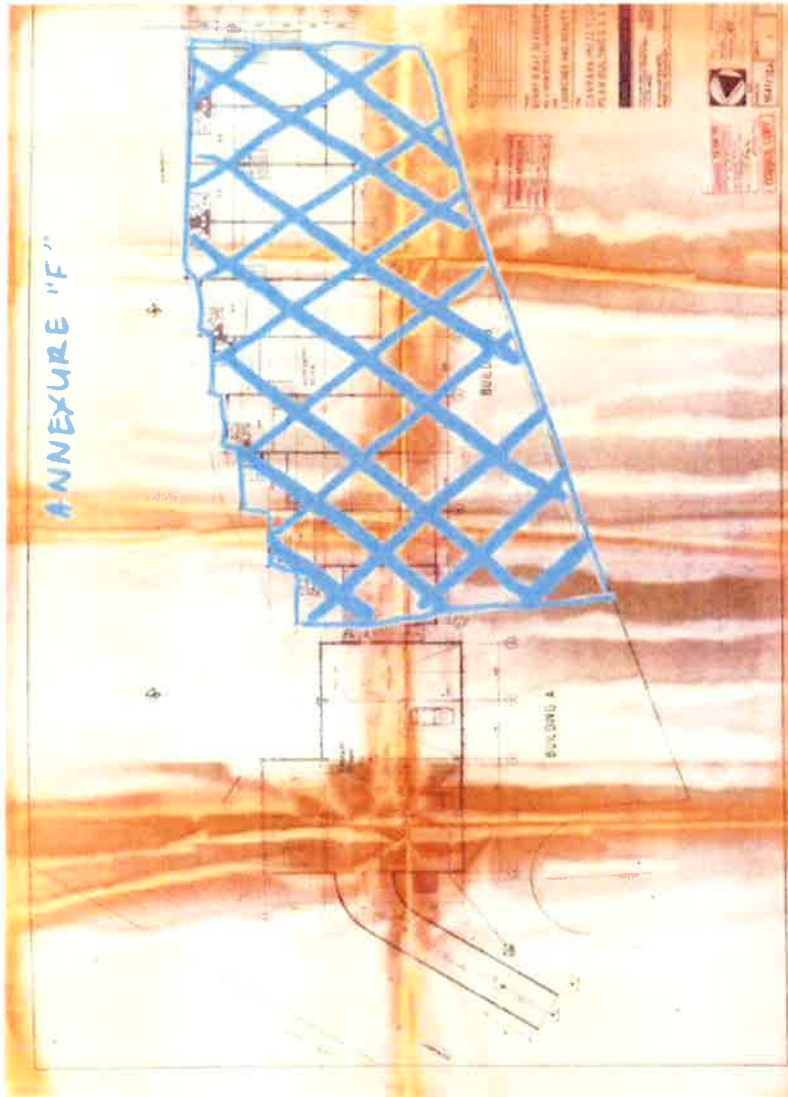
Annexure D - Plan showing northern slipway



Annexure E - Plan showing where Non-Commercial Boats to be kept



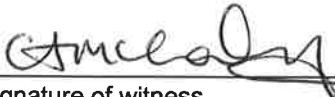
Annexure F - Plan showing area for Minor Repair Works



Signing page

Executed as a deed

Signed on behalf of North Sydney Council
by its duly authorised officer in the presence
of:



Signature of witness



Signature of authorised officer

CARLI McCOWKEY

Full name (print)

KM Gouldthorp

Full name (print)
General Manager

Signed by Noakes Group Pty Ltd ACN 353
260 317 in accordance with section 127 of
the *Corporations Act 2001 (Cth)*:

Director

Director/Secretary

Full name (print)

Full name (print)