

Attachment B

Construction Access Agreement

Construction Access Agreement

The Council of the City of Sydney (ABN 22 636 550 790)

and

The Owners – Strata Plan No. 77095

For the demolition of the outdoor gym at 49 Henderson Road,
Eveleigh

Reference:

CONSTRUCTION ACCESS AGREEMENT

DATED

PARTIES

- 1 **THE OWNERS – STRATA PLAN NO. 77095** of 49 Henderson Road, Eveleigh NSW 2015 (the **Licensor**).
- 2 **THE COUNCIL OF THE CITY OF SYDNEY ABN 22 636 550 790** of 456 Kent Street, Sydney NSW 2000 (the **City**).

RECITALS

- A. The Licensor is the owner of the Land.
- B. The Licensor has agreed to grant and the City has agreed to accept a licence to the City and its Employees and Agents to use the Licensed Area and carry out Works in accordance with the terms of this Agreement at no cost to the Licensor.

OPERATIVE PROVISIONS

2. Definitions and interpretation

2.1 Purpose

The purpose of this Agreement is to set out the terms and conditions for the occupation and use of the Licensed Area.

2.2 Reference Schedule

The Reference Schedule for this Agreement is set out below:

Item 1. Land

The land comprised in certificate of title folio identifier CP/SP77095 and known as 49 Henderson Road, Eveleigh NSW 2015.

Item 2. Licensed Area

The part of the Land as shown shaded in red in the Plan.

Item 3. Licensor

The Owners – Strata Plan No. 77095
49 Henderson Road, Eveleigh NSW 2015

Item 4. City

The Council of the City of Sydney ABN 22 636 550 790
Town Hall House, 456 Kent Street, Sydney, New South Wales

Item 5. Commencement Date

Date of the Agreement.

Item 6. Termination Date

The earlier of:

- (i) 30 June 2026; and
- (ii) the date that the certification in clause 4.5 has been provided to the Licensor.

Item 7. Licence Fee

\$1 per annum (plus GST) (if demanded by the Licensor).

Item 8. Works

The demolition of the outdoor gym and turfing of impacted areas, including turf establishment, as more particularly described in Schedule 2.

2.3 Definitions

The following meanings apply to capitalised terms used in this Agreement unless the context otherwise requires:

Agreement means this construction access agreement.

Approvals means any licence, permit, consent, certificate, approval or other authorisation required to be obtained pursuant to Law to perform an act or discharge an obligation under this Agreement.

City means the person described in Item 4.

Claim means any action, claim, demand or proceeding (including based in contract, tort or statute or under any indemnity, and including any action based on personal injury or death) made against the person concerned however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

Commencement Date means the date stated in Item 5.

Consequential Loss means any loss or damage which does not naturally or directly result in the ordinary course of events from the breach, action or inaction in question, whether or not a party has been advised of or is aware of that loss or damage, including any loss of revenue, profit, data, opportunity, business, goodwill or future reputation, any failure to realise anticipated savings, any downtime costs, any damage to credit rating, and any penalties payable under contracts other than this Agreement.

Contractor means the contractor engaged by the City to undertake the Works.

Date of the Agreement means the date the agreement is signed by the City.

Dispute Notice means a written notice given under clause 8.1.

Employees and Agents of a person means each of the person's employees, officers, agents, workmen, contractors, consultants, visitors, invitees and any other person engaged by or on its behalf or under the control or direction of the person.

Expert means an independent expert agreed between the parties or failing agreement, appointed under clause 8.3(c).

GIPA Act means the *Government Information (Public Access) Act 2009* (NSW).

Government Authority means any:

- (a) government, government department, government agency or government authority;
- (b) governmental, semi-governmental, municipal, judicial, quasi-judicial, administrative or fiscal entity or person carrying out any statutory authority or function; or
- (c) other entity or person (whether autonomous or not) having powers or jurisdiction under any statute, regulation, ordinance, by-law, order or proclamation, or the common law.

Insolvency Event means if a party:

- (a) becomes insolvent;
- (b) makes an assignment of its estate for the benefit of creditors; or
- (c) goes into liquidation, a receiver or receiver and manager or mortgagee's or chargee's agent is appointed.

Land means the land stated in Item 1.

Law includes:

- (a) any law, statute, regulation, ordinance, by-law, order or proclamation, and the common law; and
- (b) any authorisation, ruling, judgment, order, decree or other requirement of any Government Authority.

Liabilities means any and all damages, liabilities, actions (including actions based on personal injury or death), obligations, duties, losses, charges, costs or expenses (including legal expenses and consulting fees), interest, penalties, fines and taxes, excluding Consequential Loss.

Licence Fee means the amount stated in Item 7.

Licensed Area means the licensed area stated in Item 2.

Licensor means the person described in Item 3.

Licensor's Authorised Persons means authorised persons under the Licensor's actual control.

Plan means the plan in Schedule 1 in this Agreement.

Principal Contractor has the meaning given in section 293 of the *Work Health and Safety Regulation 2011* (NSW).

Reference Schedule means the reference schedule set out in clause 2.2.

Site Management Plan means a plan in relation to the Works which sets out working hours, site access arrangements, fencing, environmental controls, and the nominated City's representative.

Term means the period from the Commencement Date to the Termination Date or earlier termination of this Agreement.

Termination Date means the date stated in Item 6.

WHS Law means the *Work Health and Safety Act 2011* (NSW) and all Codes of Practice approved under Part 14 of that Act, the *Work Health and Safety Regulation 2011* (NSW), and any other work health and safety Law that applies to work being carried out on the Licensed Area.

Works means the works stated in Item 8.

2.4 Interpretation

The following rules of interpretation apply to this Agreement unless the context otherwise requires:

- (a) a heading may be used to assist interpretation, but is not legally binding;
- (b) a word or expression in the singular includes the plural and the converse also applies;
- (c) a word or expression denoting any gender include all genders;
- (d) writing includes writing in digital form;
- (e) a person includes an individual and a corporation;
- (f) a reference to **legislation**, includes any State or Federal statute, enactment, ordinance, code or other legislation, or a section or provision of that legislation, includes any order, regulation, rule, bylaw, proclamation or statutory instrument made or issued under that legislation and any amendment, modification, consolidation, re-enactment or replacement of, or substitution for, that legislation from time to time; and
- (g) any term or expression defined in any legislation has the statutory meaning given to that term or expression in relevant legislation when used in this Agreement; and
- (h) a reference to any notice, claim, demand, consent, agreement, approval, authorisation, specification, direction, disclosure, notification, request, communication, appointment, or waiver being given or made by a party to this Agreement is a reference to its being given or made in writing, and the expression **notice** includes any of the foregoing; and
- (i) the word right or power includes right, power, remedy, authority, discretion or option or right to make or give any request, requisition, notice or demand, and the word consent includes approval, agreement, permission or authorisation; and
- (j) a person includes the legal personal representatives, successors and permitted assigns of that person, and in the case of a trustee, includes any substituted or additional trustee; and
- (k) a reference to **Item** means an item in the Reference Schedule; and
- (l) a reference to **business days** means any day on which trading banks are open for business in New South Wales other than a Saturday, Sunday or a public holiday in New South Wales; and
- (m) any body (**Original Body**) which no longer exists or has been reconstituted, renamed, replaced or whose powers or functions have been removed or transferred to another body or agency, is a reference to the body which most closely serves the purposes or objects of the Original Body; and
- (n) anything to be done on a Saturday, Sunday or a public holiday in New South Wales may be done on the next business day, except obligations relating to trading hours.

2.5 Role of the City

Nothing in this Agreement in any way restricts or otherwise affects the unfettered discretion of the City as to the exercise of its statutory powers as a Government Authority and in the event of any conflict between the unfettered discretion of the City in the exercise of such powers and the performance of obligations under this Agreement, the former prevails.

3. Grant of Licence

3.1 Licence

In consideration of the payment of the Licence Fee and the performance by the City of its obligations under this Agreement, the Licensor grants and the City accepts a non-exclusive licence for the City, the City's Employees and Agents and the Contractor to access and use the Licensed Area for the Term for the purpose of carrying out the Works.

3.2 Licence Fee

The City must pay the Licence Fee to the Licensor on or before the Commencement Date (if demanded).

3.3 No Interest in the Licensed Area

- (a) The City has a personal right of occupation on the terms and conditions contained in this Agreement and has no interest in the Licensed Area.
- (b) The legal right to possession of and control over the Licensed Area remains vested in the Licensor at all times.

4. Works

4.1 Program for Works

- (a) At least 14 days prior to the commencement of the Works, the City shall provide to the Licensor a program setting out the indicative timeline for the proposed Works.
- (b) The Licensor acknowledges that any program provided to the Licensor under clause 4.1(a) is indicative only. The City is entitled to vary the program at any time during the Term with reasonable notice to the Licensor, except in the case of an emergency.

4.2 Construction obligations

The City must:

- (a) obtain and maintain at its own cost all Approvals required for the Works;
- (b) comply with all Laws relating to the use and occupation of the Licensed Area;
- (c) provide the Licensor with a Site Management Plan prior to the commencement of the Works;
- (d) ensure that the Works are carried out in a proper and workmanlike manner and in accordance with all Laws, Approvals and requirements by Government Authorities;
- (e) use reasonable endeavours to minimise any disruption to the use by the Licensor of the Licensed Area;

- (f) use reasonable endeavours to ensure that no loss, injury, death or damage is caused to the Licensor, the Licensed Area or any persons using the Licensed Area;
- (g) keep the Licensed Area clean and tidy; and
- (h) prior to the completion of the Works, make good any damage to the Licensed Area caused by the City to the condition it was at the Commencement Date of the Licence (having regard to the extent and nature of the damage) to the satisfaction of the Licensor, acting reasonably.

4.3 No interference

- (a) The Licensor agrees that the Licensor or the Licensor's Authorised Persons will not interfere with the Works or use the Land or any other land in a way which may adversely affect the Works.
- (b) If the Licensor or the Licensor's Authorised Persons does or allows anything to be done which damages the Works, the City may serve not less than 5 business days' notice on the Licensor requiring the damage to be repaired. If the Licensor does not comply with this notice, the City may enter the Land and repair the damage and may recover reasonable costs from the Licensor.

4.4 Workplace health and safety

- (a) This clause 4.4 applies to the extent that the Works or any part of them are construction work (as defined in the *Work Health and Safety Regulation 2011* (NSW)).
- (b) For the purposes of the WHS Law, the parties agree that:
 - (i) the City:
 - (A) appoints the Contractor as the Principal Contractor in respect of any construction works to be carried out by or on behalf of the City on the Licensed Area to which a WHS Law applies; and
 - (B) authorises the Contractor to exercise whatever authority is necessary for the Contractor to discharge the responsibilities of that appointment.

4.5 Completion of Works

- (a) As soon as possible after the Works are completed, the City must provide the Licensor with a certification confirming that the Works have been completed.
- (b) On and from completion, the risk and ongoing maintenance of the Licensed Area passes to the Licensor.

5. Insurance and indemnities

5.1 Insurance

- (a) The City must, at its own expense, keep current at all times during the Term:
 - (i) a policy of public risk insurance for an amount of \$20,000,000 (being the amount which may be paid arising out of any single accident or event) or such higher amount as the Licensor may from time to time require; and

- (ii) workers compensation insurance in accordance with applicable Laws.
- (b) The City must if so requested by the Licensor provide the Licensor with a certificate of currency for such policies.

5.2 Release

The City agrees to occupy and use the Licensed Area and carry out the Works at its own risk and releases to the fullest extent permitted by Law the Licensor, its Employees and Agents from all Claims and Liabilities and from all loss, damage or injury suffered by the City and persons under its control:

- (a) in respect of any damage occurring to any property (including the fittings) in or about the Licensed Area;
- (b) in respect of the death of or injury to any person; or
- (c) arising out of the entering into of this Agreement or its termination,

arising directly out of the City's use of the Licensed Area, except to the extent that the relevant Claims, Liabilities, loss, damage or injury was caused by any negligent act or omission of the Licensor or its Employees and Agents.

5.3 Indemnity

The City indemnifies the Licensor against all Claims and Liabilities of any nature which the Licensor suffers or incurs or for which the Licensor might become liable in respect of or arising out of:

- (a) any damage to any property within or on the Licensed Area;
- (b) the death of or injury to any person; or
- (c) any other loss, expense or damage of every description suffered by any person,

where the damage to property, death, injury or other loss, expense or damage is caused by any of the following:

- (d) the Works;
- (e) the negligent act or omission by the City in using the Licensed Area; and
- (f) a breach of this Agreement by the City,

provided that the City's liability is reduced proportionately to the extent that the relevant Claims or Liabilities were caused by any negligent act or omission of the Licensor or its Employees and Agents.

6. Assignment and novation

- (a) Neither party can assign, transfer or otherwise deal with any right under this Agreement without the other party's prior written consent which cannot be unreasonably withheld or delayed.
- (b) If the Licensor assigns, transfers or otherwise deals with the whole of its interest in the Licensed Area or Land, then the Licensor must at the Licensor's cost, procure that the assignee or transferee enter into a tripartite deed with the Licensor and the City in a form reasonably required by the City under which the right and obligations of the

Licensor under this Agreement are novated to the assignee or transferee on and from the date of assignment or transfer.

7. Termination

7.1 Events of Default

If at any time:

- (a) the Licence Fee or any other monies payable by the City are not paid on time and remain unpaid for 20 business days after service of a notice by the Licensor on the City requiring payment;
- (b) the City defaults in the performance of any of the other terms and conditions contained in this Agreement and continues such default a reasonable period (being no less than 20 business days) after service of a notice by the Licensor on the City requiring the City to remedy such default; or
- (c) an Insolvency Event occurs in respect of the City,

then, the City is in default under this Agreement and the Licensor may immediately terminate this Agreement by giving notice of termination in writing to the City.

7.2 Vacating the Licensed Area

At the end of the Term or if this Agreement is terminated, the City must at the City's cost:

- (a) stop the use of the Licensed Area and the carrying out of the Works (if the Works have not been completed) and vacate the Licensed Area;
- (b) remove all of the City's property (other than the Works) including plant, equipment and vehicles from the Licensed Area (unless the Licensor agrees otherwise); and
- (c) leave the Licensed Area in a clean and tidy condition.

7.3 Antecedent rights

Any termination of this Agreement under this clause 7 does not release either party from any breach existing at or before the date of termination.

8. Dispute resolution

8.1 Notice of dispute

- (a) If a dispute arises between the parties in connection with this Agreement, then either party may serve a Dispute Notice on the other party.
- (b) The Dispute Notice must:
 - (i) specify the matter the subject of the dispute; and
 - (ii) set out the facts and circumstances relevant to the dispute.

8.2 Negotiation

Following service of a Dispute Notice:

- (a) the parties must, within 20 business days after service of the Dispute Notice, use reasonable endeavours to resolve the dispute by negotiation (including if reasonably necessary by escalating responsibility for negotiation of the dispute to a senior officer of each of the parties); and
- (b) the parties must continue with their respective obligations under this Agreement until resolution of the dispute.

8.3 Expert determination

- (a) If the dispute has not been resolved:
 - (i) by the expiry of the 20 business day period in clause 8.2; or
 - (ii) within 10 business days of the end of any method for the resolution of the dispute agreed upon by the parties pursuant to clause 8.2,

the dispute must be referred to an Expert for determination in accordance with this clause.
- (b) If a party wants to refer a dispute for expert determination, it must issue a notice to the other party advising that it requires the dispute to be referred for expert determination to the Expert.
- (c) If the parties cannot agree upon the person to act as the Expert, either party may refer the nomination of the Expert to the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter), whose nomination will be final and binding on the parties.
- (d) The following applies in the case of any dispute referred for determination by the Expert:
 - (i) the Expert will:
 - (A) act as an expert and not as an arbitrator;
 - (B) direct what documents, information and other material he or she requires from either party and which he or she, in his or her absolute discretion, considers relevant to the determination of the dispute;
 - (C) if a matter requiring determination is in an area in which the Expert does not have appropriate qualifications, obtain advice under clause 8.3(d)(i)(F);
 - (D) make his or her decision within 10 business days from the referral of the dispute to him or her unless he or she requests more time to make his or her decision, which request the parties cannot unreasonably refuse;
 - (E) give a written decision including reasons;
 - (F) the Expert may commission his or her own advisers or consultants, including lawyers, accountants, bankers, engineers, surveyors, traffic consultants or other technical consultants, to provide information to assist the Expert in his or her decision;
 - (ii) unless there is a manifest error, the Expert's decision is final and binding; and
 - (iii) the parties will share the Expert's costs equally.

9. GIPA

The Licensor acknowledges that the City may disclose this Agreement (and information regarding the terms of this Agreement, the identity of the Licensor and other relevant information) under or in accordance with any Law, including the GIPA Act.

10. GST

10.1 Definitions

In this clause:

- (a) words and expressions that are not defined in this Agreement but which have a defined meaning in the GST Law have the same meaning as in the GST Law;
- (b) **GST** means GST within the meaning of the GST Law and includes penalties and interest. If under or in relation to the *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW) the supplier makes voluntary or notional payments, then:
 - (i) the definition of GST includes those voluntary or notional payments; and
 - (ii) expressions containing the term 'GST' have a corresponding expanded meaning; and
- (c) **GST Law** has the meaning given to that term in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

10.2 GST exclusive

Except where specified to the contrary in this Agreement, all consideration payable under this Agreement in relation to any supply is exclusive of GST.

10.3 Increase in consideration

If GST is payable in respect of any supply made by a supplier under this Agreement (**GST Amount**), the recipient must pay to the supplier an amount equal to the GST payable on the supply. Subject to clause 10.4, the recipient must pay the GST Amount at the same time and in the same manner as the consideration for the supply is to be provided under this Agreement in full and without deduction, set off, withholding or counterclaim (unless otherwise provided in this Agreement).

10.4 Tax invoice

The supplier must provide a tax invoice to the recipient before the supplier will be entitled to payment of the GST Amount under clause 10.3.

10.5 Reimbursements

If this Agreement requires a party to pay, reimburse or contribute to any expense, loss or outgoing suffered or incurred by another party, the amount which the first party must pay, reimburse or contribute is the sum of:

- (a) the amount of the payment, reimbursement or contribution, less any input tax credit in respect of the payment, reimbursement or contribution to which the other party is entitled; and

- (b) if the payment, reimbursement or contribution is subject to GST, an amount equal to that GST.

10.6 Adjustment events

If an adjustment event occurs in relation to a taxable supply under this Agreement:

- (a) the supplier must issue an adjustment note to the recipient within 5 business days after becoming aware of the adjustment; and
- (b) any payment necessary to give effect to that adjustment must be made within 5 business days after the date of receipt of the adjustment note.

11. Costs

The City must pay the Licensor's reasonable legal costs up to an amount of \$3,000 (excluding GST) for the review, negotiation and execution of this Agreement, subject to the Licensor providing the City an itemised invoice of any costs claimed, within 30 business days of receiving a valid tax invoice.

12. General

12.1 Notices

A notice or other communication required or permitted, under this Agreement, to be given to a person may be given in accordance with section 170 of the *Conveyancing Act 1919* (NSW).

12.2 Amendment

This Agreement may only be varied or replaced by a deed duly executed by the parties.

12.3 Counterparts

This Agreement may be executed in counterparts, all of which taken together constitute one document.

12.4 Entire understanding

This Agreement contains the entire understanding between the parties as to the subject matter contained in it. All previous agreements, representations, warranties, explanations and commitments, expressed or implied, affecting this subject matter are superseded by this Agreement and have no effect.

12.5 Further assurance

Each party must promptly execute and deliver all documents and take all other action necessary or desirable to effect, perfect or complete the transactions contemplated by this Agreement.

12.6 Waiver and exercise of rights

- (a) The Licensor's failure at any time to insist on performance of any provision of this Agreement or a related agreement is not a waiver of its right at any later time to insist on performance of that or any other provision of this Agreement or any related agreement.

- (b) Without limiting clause 12.6(a), the Licensor is not taken to have waived its rights under this Agreement or any related agreement, or another party's breach of any of those documents, by accepting the Licence Fee or any other payment under this Agreement (before or after the end of this Agreement).

12.7 No relationship

No party to this Agreement has the power to obligate or bind any other party. Nothing in this Agreement will be construed or deemed to constitute a partnership, joint venture or employee, employer or representative relationship between any of the parties.

12.8 Survival and enforcement of indemnities

Each indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the parties and survives termination of this Agreement. It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity conferred by this Agreement.

12.9 Governing Law

This Agreement is governed by the Law applying in New South Wales and the parties submit to the non-exclusive jurisdiction of the courts of New South Wales.

12.10 Liability

When two or more persons are named as a party, any agreement, representation or warranty expressed to be given or made by that party pursuant to this Agreement will be a joint and several liability of each named person.

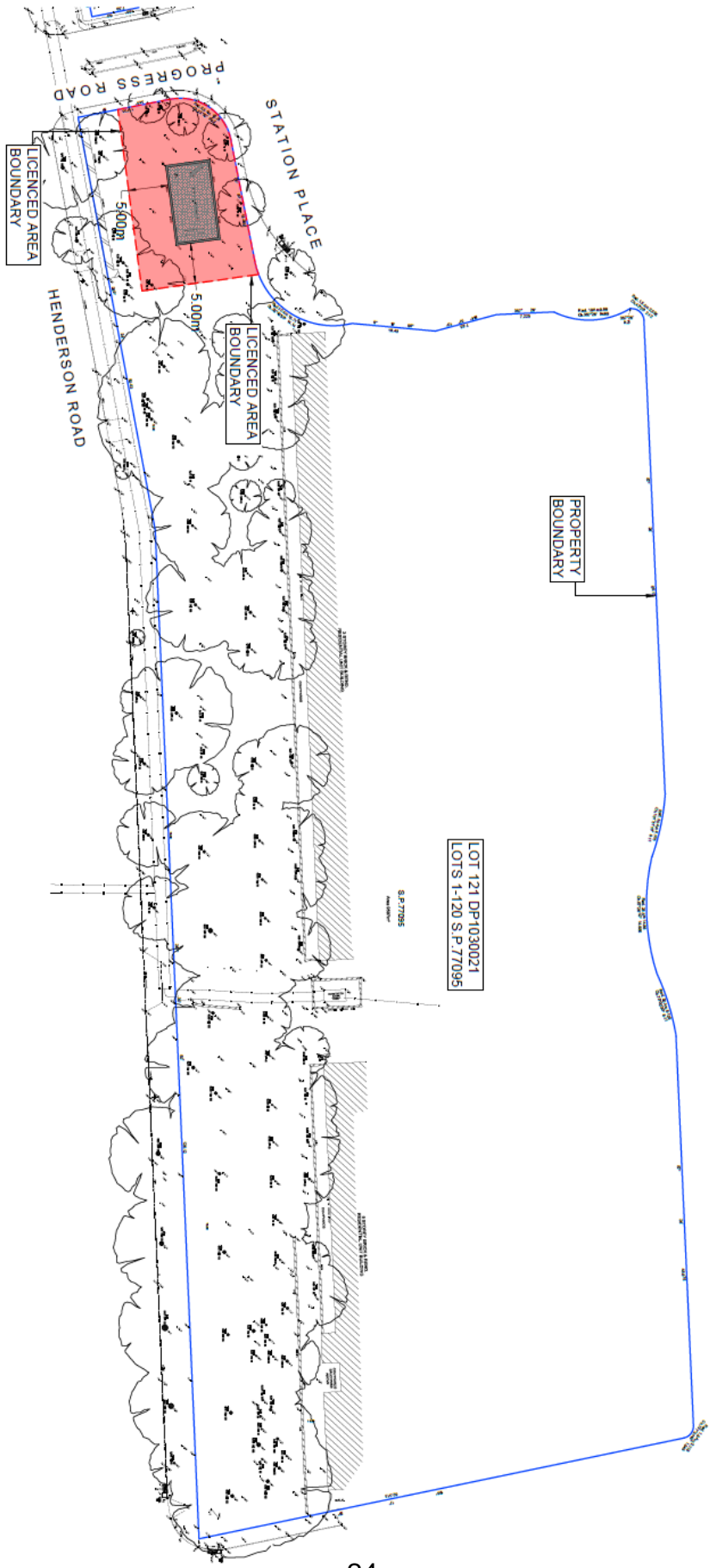
12.11 Severability

Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction will, as to that jurisdiction, be ineffective to the extent of that prohibition or unenforceability, without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of that provision in any other jurisdiction.

Schedule 1

Plan of Licensed Area

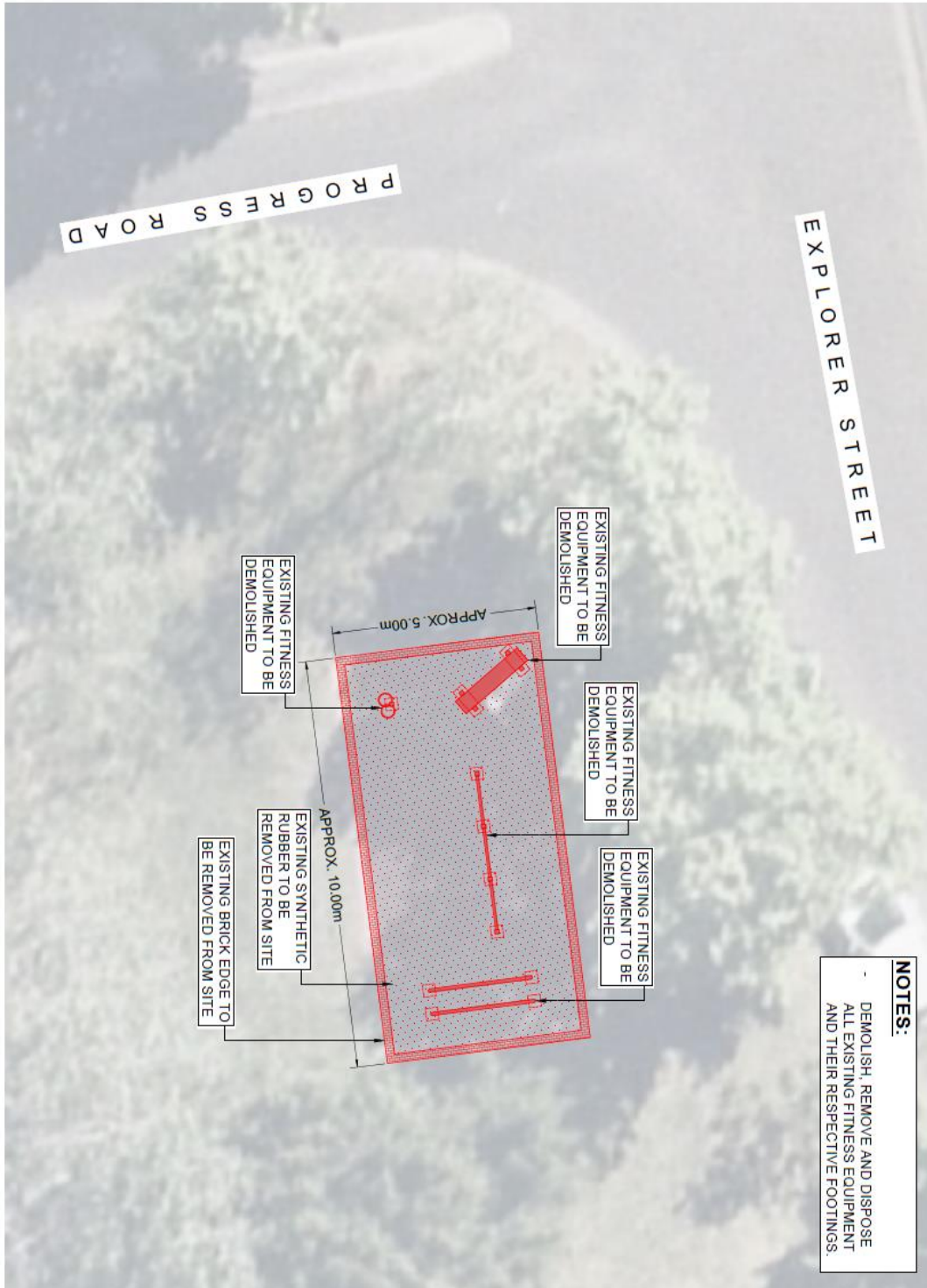
FITNESS EQUIPMENT
PLAN OF LICENCED AREA
SCALE 1:500



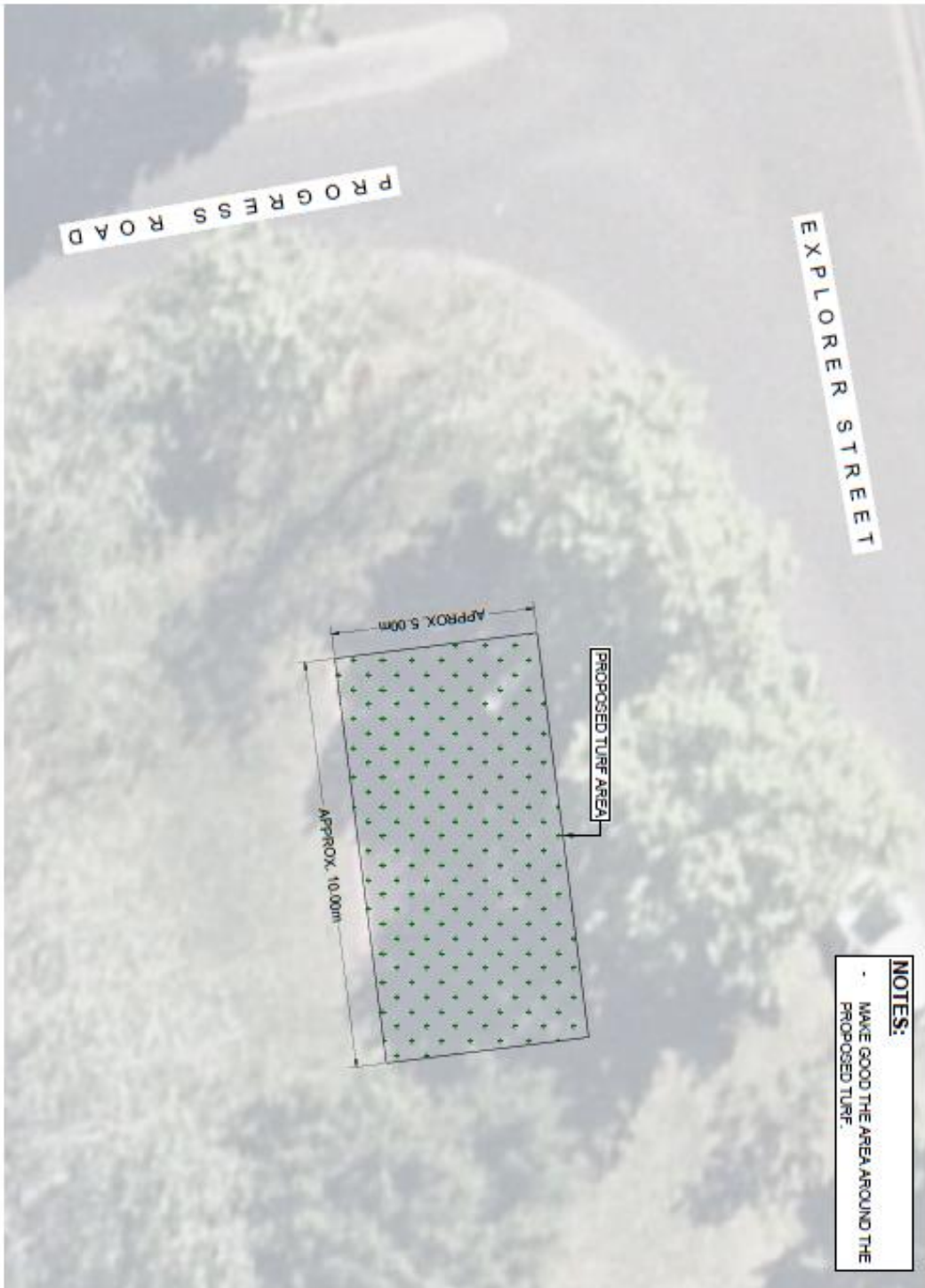
Schedule 2

Description of the Works

DEMOLITION - PLAN
SCALE 1:100



PROPOSED WORKS - PLAN
SCALE 1:100



Works Specification

Demolition

Demolish, remove and dispose all existing fitness equipment and their respective footings to a minimum of 300mm below existing level. Demolish, remove and dispose existing synthetic rubber, brick edge and subgrade to a minimum 150mm below existing level.

All materials are to be disposed of at a licenced recycling facility and/or proposed waste facility.

Turf installation

Supply new sandy loam turf underlay to demolition footprint, compact and level to match existing surrounding levels,

Supply new turf to the demolition footprint. Turf variety to match predominant existing cultivar. Turf shall be relatively free of thatch and have a sod layer less than 15mm in a compatible soil medium.

Any unhealthy or damaged turf will be rejected. Broken strips and torn or uneven ends will not be accepted.

Deliver and lay turf within 24 hours of cutting. Prevent turf from drying out between cutting and laying. Turf shall be laid in straight lines across the general line of the contour of the slope. Turf roll joints to be staggered and in stretcher bond layout.

Lay the turf to finish flush with adjacent finished surfaces. Lightly tamp or lightly roll the turf to an even surface immediately after laying. Water immediately after laying.

Turf Establishment

Undertake turf establishment for a period of 6 weeks following turf installation.

Water as required to maintain growth rates free of stress. When watering soak to a depth of 150 mm. Avoid frequent dampening of the surface. Allow the surface of the soil to partially dry out between waterings.

Weed unwanted plants and grasses considered invasive to the locality. Undertake weed treatment as determined by the relationship of the general lawn condition and weed growth so as to be weed free when observed at weekly intervals.

Once suitably established mow weekly. Do not mow under wet conditions. Mow to maintain the grass height within 30-40mm. Do not remove more than one third of the grass height at any one time.

Apply lawn fertiliser once after the first mowing and once after the last mowing within the establishment period, and at other times as required to maintain healthy grass cover.

Once suitably established lightly top dress new turf areas with Top Dressing Soil to a depth of 10 mm. Rub the dressing well into the joints and correct any unevenness in the turf surface. Top dress once during Maintenance period.

At the completion of the establishment period turf shall achieve an even green colour with a dense continuous sward covering the whole area. Turf shall exhibit signs of healthy growth and minimal visible joints. Turf areas shall be free of weeds, stones, sticks and deleterious material.

Make Good

Make good any damage caused by the construction of the works including pavements, landscape areas and the like. Restore any damaged areas to original condition prior to completion of the works.

Area of works



Executed as an agreement.

LICENSOR:

THE COMMON SEAL of THE OWNERS – STRATA PLAN NO. 77095 was affixed here in the presence of the following person(s) authorised by section 237 of the *Strata Schemes Management Act 2015* to attest the affixing of the seal:

Signature of Authorised Officer

Signature of Authorised Officer

Full Name and Position of Authorised Officer

Full Name and Position of Authorised Officer

LICENSEE:

SIGNED by **THE COUNCIL OF THE CITY OF SYDNEY** in the presence of:

Signature of Witness

Signature of Authorised Officer

Full Name of Witness

Full Name and Position of Authorised Officer