

Parties

1. **The Council of the City of Shoalhaven** of Council Administrative Centre, Bridge Road, Nowra, NSW 2541 (**Council**).
2. **Vicki Lynn Stuart** of 90 Mullers Lane, Berry, NSW 2535 (**V L Stuart**).
3. **Town and Country Developments Pty Limited** (ACN 002 691 929) – 90 Mullers Lane, Berry, NSW 2535 (**Town & Country Developments**).

Background

- A. The Land is owned by V L Stuart and Town & Country Developments (**the Developer**).
- B. On 23 November 2010 the Developer lodged a Development Application with Council to carry out the Development on the Land.
- C. As part of the Development Application, the Developer has offered to enter into a voluntary planning agreement to provide the Public Benefits.
- D. In lieu of providing an additional 8 car park spaces, the Developer has offered to transfer to Council Footpath Land 1, Footpath Land 2 and to grant a right of footway over the Walkway Land.
- E. Council wishes to accept the Developer's offer subject to the terms in this Agreement and has granted the Development Consent. The Development Consent requires the Developer to enter into this Agreement

Agreed Terms

Part A – Condition Precedents

1. Operation of Agreement

This Agreement takes effect upon its execution by both parties.

Part B – Provision of Public Benefits

2. Footpath Land 1 & Footpath Land 2

2.1 Transfer of Land

- (a) The Developer must, at no cost to Council, cause to be registered within 70 days of the date of this Agreement, the plan under the Roads Act 1993 affecting Lot 1 DP 120417 and being Plan 2 in Schedule 4.
- (b) The Developer must, prior to the issue by Council of any Occupation Certificate with respect to any premises constructed by the Developer

pursuant to the Development Consent, transfer Footpath Land 1 and Footpath Land 2 to the Council.

2.2 Default by Developer

If the Developer fails to transfer Footpath Land 1 and Footpath Land 2 to the Council in accordance with **clause 2.1**:

- (a) the Developer agrees the Council has the right to buy Footpath Land 1 and Footpath Land 2 for the consideration of \$1.00 (one dollar); and
- (b) for the purpose of effecting the transfer of Footpath Land 1 and Footpath Land 2 to the Council only, the Developer hereby irrevocably appoints the Council to be an attorney with authority to execute such documents as are necessary to give effect to the transfer of Footpath Land 1 and Footpath Land 2 to the Council; and
- (c) the Developer must comply with any directions by the Council in respect of the transfer of Footpath Land 1 and Footpath Land 2 to the Council.

2.3 Caveat

- (a) Subject to **clause 2.3(c)**, the Council may lodge a caveat on the Land to record its interest in Footpath Land 1 and Footpath Land 2 under **clause 2.1**.
- (b) The Developer agrees not to object to the lodgement of a caveat by the Council on the Land.
- (c) If the Council and the Developer enter into a novation deed under **clause 14.2**, the Council must, at the time of execution of the novation deed, provide a withdrawal of caveat to allow the transfer of the Land and, following completion of the transfer by the Developer, the Council may lodge a further caveat on the Land to record its interest in Footpath Land 1 and Footpath Land 2 under **clause 2.1**.

3. Walkway Land

3.1 Grant of Right of Footway

The Developer must, prior to the issue by Council of any Occupation Certificate with respect to the premises constructed by the Developer pursuant to the Development Consent, at no cost to Council, grant the Council a right of footway over Walkway Land in accordance with the terms contained in Schedule 5 of this Agreement.

3.2 Default by Developer

If the Developer fails to grant the Council a right of footway over the Walkway Land in accordance with **clause 3.1**:

- (a) the Developer agrees the Council has the right to buy the right of footway over the Walkway Land for the consideration of \$1.00 (one dollar); and
- (b) for the purpose of effecting the grant of the right of footway over the Walkway Land to Council only, the Developer hereby irrevocably appoints the Council to be an attorney with authority to execute such documents as are necessary to give effect to the grant of the right of footway over the Walkway Land to the Council; and
- (c) the Developer must comply with any directions by the Council in respect of the grant of the right of footway over the Walkway Land to the Council.

3.3 Caveat

- (a) Subject to 2.3(c), the Council may lodge a caveat on the Land to record its interest in the Walkway Land under **clause 3.1**.
- (b) The Developer agrees not to object to the lodgement of a caveat by the Council on the Land.
- (c) If the Council and the Developer enter into a novation deed under **clause 14.2**, the Council must, at the time of execution of the novation deed, provide a withdrawal of caveat to allow the transfer of the Land and, following completion of the transfer by the Developer, the Council may lodge a further caveat on the Land to record its interest in the Walkway Land under **clause 3.1**.

4. Lapsing of Consent

If the Developer does not implement the Development Consent and the Development Consent lapses in accordance with the Act or the Development Consent is declared invalid, then the Developer's obligations under **clause 2.1** and **clause 3.1** will cease and the Council will provide any withdrawal of Caveat lodged under Clauses 2.3 or 3.3.

5. Scope & Value of Developer Works

5.1 Scope of Works

The parties agree the works described in **Schedule 2** comprise the Developer Works for the purposes of this Agreement.

5.2 Design & Construction Drawings

- (a) The Developer must, prior to the issue of the first Construction Certificate for the Development, prepare the design and construction drawings for the Developer Works and submit them to Council's Representative for approval.
- (b) Prior to submitting the design and construction drawings to Council for approval, the Developer must consult with the Council in respect of the design and construction of the Developer Works.

(c) Within 21 days of receiving the design and construction drawings to be submitted under **clause 5.2(a)**, the Council may by written notice to the Developer:

- (i) approve the design and construction drawings for the Developer Works; or
- (ii) direct the Developer to vary the construction drawings for the Developer Works so as to reflect the documents or standards (as the case may be) set out in **Schedule 3**.

(d) An approval by the Council for the purpose of this **clause 5.2** means an approval solely for the purpose of acknowledging that the Developer has provided design and construction drawings that comply with the terms of this Agreement and does not constitute the issue of a construction certificate, the grant of development consent or any other approval under the Act.

(e) The Developer must comply with any reasonable direction given by the Council under **clause 5.2(b)(ii)** in respect of the design and implementation of the Developer Works, unless there is an unresolved dispute under **clause 15**.

5.3 Developer Does Not Prepare Construction Drawings

If the Developer:

- (a) does not prepare the design and construction drawings in accordance with **clause 5.2(a)**; or
- (b) does not, within three months of the issue of any direction under **clause 5.2(b)(ii)**, comply with that direction,

then, unless there is unresolved dispute under **clause 15** in respect of **clause 5.2**, the Council may call on an appropriate sum from the Guarantee for the purposes of completing the design and construction drawings in accordance with this Agreement.

5.4 Value of Works

- (a) The value attributed to the Developer Works is set out in **Schedule 2**.
- (b) The Developer expressly acknowledges and agrees that:
 - (i) the costs of the work set out in **Schedule 2** are estimates only; and
 - (ii) the Developer is not entitled to change or reduce the Developer Works by reason only that the costs actually incurred are greater than those anticipated and evidenced in **Schedule 2**.

6. Construction of Developer Works

6.1 Approvals and Consents

The Developer must (at its cost):

- (a) obtain all relevant approvals and consents for the Developer Works whether from the Council or any other relevant authority; and
- (b) before commencing the Developer Works, give to the Council copies of all Authority approvals and consents for the Developer Works, including copies of any construction certificate issued for the Development, except those granted by the Council.

6.2 Construction of Work

The Developer must (at its cost); and unless Council may by written communication approve a variation to the Developer works;

- (a) carry out the Developer Works in accordance with the design and construction drawings prepared under **clause 5.2**.
- (b) carry out the Developer Works in accordance with all Authority approvals and consents relating to the Developer Works;
- (c) ensure that the Developer Works are constructed in a good and workmanlike manner so that they are structurally sound and reasonably fit for their purpose and suitable for their intended use; and
- (d) comply with all reasonable directions from the Council in respect of the construction of the Developer Works.

6.3 Inspection of Works

- (a) The Council as a party to this Agreement and not as a consent authority may (but is not obliged) at reasonable times and on reasonable notice inspect the Developer Works during the course of construction.
- (b) The Council will promptly and in good faith inform the Developer, in writing, of any material or significant defect, error, or omissions relating to the construction or installation of the Developer Works identified during or as result of such inspection.
- (c) The parties agree that any failure to identify a defect, error and omission, will not be construed as amounting to an acceptance by Council of that defect, error or omission.

6.4 Completion of Works

When, in the opinion of the Developer, the Developer Works have reached a state of Completion, so that Council could issue a notice under **clause 6.5(a)(i)**, the Developer must notify the Council's Representative in writing and must include in that notice:

- (a) a statement from the person with direct responsibility for carriage and supervision of that work that in their opinion the Developer Works have reached Completion;
- (b) copies of any warranties, guarantees, maintenance information or other material reasonably required for the ongoing maintenance or management of the Developer Works;
- (c) at least three sets of the "as built" drawings of the Developer Works, including one in electronic format.

6.5 Final Inspection by Council

- (a) Within 21 business days of receipt of a notice under **clause 6.4**, Council's Representative will inspect the Developer Works and must by written notice to the Developer:
 - (i) agree that Completion has been achieved; or
 - (ii) disagree that Completion has been achieved and identify the errors or omissions and which in the opinion of Council's Representatives prevent Completion.
- (b) Nothing in this **clause 6.5**, or in any notice issued under this **clause 6.5**, will be construed to reduce or waive in any manner the Developer's responsibilities to correct minor defects or minor omissions, whether or not these are identified by Council
- (c) If a notice is given by the Council under **clause 6.5(a)(ii)**, the Developer must carry out any and all work necessary to correct errors or omission and issue a further notice to the Council under **clause 6.4** once the Developer is of the view that the further work has reached a state of completion.

6.6 Date of Completion of Developer Works

The Developer must ensure that the Developer Works reach Completion on or before the earlier of:

- (a) the date on which an Occupation Certificate is issued in respect of any part of the buildings the subject of the Development Consent; and
- (b) two years after the date of the issue of the first Construction Certificate for the Development Consent.

6.7 Insurance

The Developer must:

- (a) maintain public liability insurance, with an insurer approved by Council, with Council nominated as an interested party, for an amount not less than the amount stated in **Item 9 of Schedule 1** covering all aspects and staging of the Developer Works;

- (b) submit a copy of the certificate of insurance to Council before the commencement of the construction of the Developer Works and when otherwise required by the Council;
- (c) maintain all other necessary insurance policies in respect of the Developer Works including, but not limited to, insurance of the Developer Works and insurance against death or injury to persons employed in relation to the undertaking of the Developer Works, and any other insurances required at law; and
- (d) maintain the insurances in **clause 6.7(a)** and **clause 6.7(c)** until the expiration of the Defects Liability Period.

6.8 Indemnity by the Developer

Except to the extent that the Council has, by act or omission contributed to its loss, the Developer indemnifies and releases the Council against all damage, expense, loss or liability of any nature suffered or incurred by the Council arising from any act or omission by the Developer (or any person engaged by it) in connection with carrying out the Developer Works.

7. Defects Liability Period

7.1 Defects in the Developer Works

If the Council notifies the Developer of a defect in the Developer Works within the Defects Liability Period, the Developer must remedy the defect to the reasonable satisfaction of the Council's Representative, within a reasonable period.

7.2 No Limitation

Clause 7.1 does not limit any right, power or privilege of the Council whether arising under this Agreement, any other document or otherwise at law.

7.3 Security for Defects Liability Period

- (a) Until the expiration of the Defects Liability Period, the Council may retain from the Guarantee an amount equal to 10% of the construction costs as security for the performance by the Developer of its obligations under this **clause 7**.
- (b) If the Developer does not rectify any defect in the Developer Works within the period specified in any notice issued under **clause 7.1**, the Council may:
 - (i) rectify the defect in the Developer Works; and
 - (ii) make an appropriation from the Guarantee to reimburse itself for all costs and expenses the Council has reasonably incurred in rectifying the defect.

8. Extensions of Time

8.1 Developer to Notify & Request Extension

When it becomes evident to the Developer that anything, including:

- (a) an act or omission of the Council;
- (b) delay or disruption caused by the Council, or a breach of this Agreement by the Council;
- (c) an event of Force Majeure; or
- (d) a change in Legislative Requirements,

may delay the performance of any obligations under this Agreement, the Developer may within 20 business days of becoming aware of the event notify the Council in writing with details of the possible delay and the cause and request an extension of time to perform the relevant obligation.

8.2 Contents of Notice

A notice under **clause 8.1** must:

- (a) set out the facts and include all supporting documentation on which the claim is based; and
- (b) state a fair and reasonable time by which, in the Developer's opinion, the date for performance of the relevant obligation should be extended, including all supporting documentation and evidence that supports that date.

8.3 Entitlement to Extension

If the Developer is delayed by any of the causes referred to in **clause 8.1** and such cause:

- (a) could not be reasonably avoided; and
- (b) affects an activity critical for completion or performance of the relevant obligation,

the Developer will be entitled to an extension of time under **clause 8.4** for the relevant obligation if the Developer has given notice under **clause 8.1** in accordance with **clause 8.2**.

8.4 Length of Extension

- (a) If the Developer is entitled to an extension of time, the Council must, within 30 business days of receipt of the notice under **clause 8.1**, grant a reasonable extension of time.

- (b) If the Council does not grant the full extension of time claimed, the Council must give the Developer notice in writing of the reason and must act reasonably in specifying an alternative period for the length of the extension of time.
- (c) In the event of a dispute under this clause, **clause 15** will apply.

8.5 Delay by Council

If the Council fails to grant the requested extension of time claimed or to grant any extension of time within 30 business days, the Developer may invoke **clause 15**.

9. Guarantee

9.1 Provision of Guarantee

- (a) The Developer must provide the Guarantee within 5 business days of this Agreement taking effect under **clause 1**.

9.2 Rights and Remedies of the Council

- (a) The Council may demand on or call on the Guarantee if the Developer fails to remedy any default in the performance of the Developer's obligations under this Agreement within such reasonable period of time (being not less than 30 business days) as is specified in a written rectification notice given to the Developer by Council.
- (b) The amount appropriated by the Council under **clause 9.2(a)** must be applied towards:
 - (i) the reasonable costs and expenses incurred by the Council in rectifying any default by the Developer under this Agreement; or
 - (ii) carrying out the Developer Works.

9.3 Right to Claim Not Affected

The Developer acknowledges and agrees that:

- (a) where the Council is entitled under this Agreement to call on the Guarantee, the Council may claim, and, where applicable, the bank will be entitled to make, payment under the Guarantee without reference to the Developer and despite any objection, claim or direction by the Developer to the contrary; and
- (b) the rights of the Council under this Agreement are without derogation from the other rights and remedies available to Council under this Agreement, at law and in equity in relation to any default of the Developer.

9.4 Adjustment of Guarantee Amount

- (a) On each anniversary of the date of this Agreement (the **Adjustment Date**) the Guarantee Amount must be adjusted in accordance with the indexation formula set out below:

$$CR_c = CR_p \times IPD_c \div IPD_p$$

where

CR_c = contribution rate for the current year

CR_p = contribution rate for the previous financial year

IPD_c = Implicit Price Deflator Index for current year

IPD_p = Implicit Price Deflator Index for previous financial year

That formula is consistent with Council's current s94 contributions plan.

- (b) The Council must give the Developer written notice of the revised Guarantee Amount to apply from the relevant Adjustment Date.
- (c) The Developer must give Council a replacement or further Guarantee so that the Council holds Guarantees for an amount equal to the revised Guarantee Amount no later than 10 business days after receipt of notice given under **clause 9.3(b)**.

9.5 Release of Guarantee

The Council will refund to the Developer, or, where applicable, release the Guarantee, apart from any amount retained in accordance with **clause 7.3**, within 10 business days of the date it provides written notice that completion has been achieved under **clause 6.5(a)(i)**.

9.6 Release of Guarantee for Defects Liability Period

If upon the expiration of the Defects Liability Period the Council's Representative (acting reasonably) is satisfied that there are no actual or contingent liabilities of the Council arising as a result of the performance of any Developer Works, then the Council will promptly pay the amount remaining from the Guarantee to the Developer.

10. Expenditure by Council

10.1 Expenditure by the Council

If the Council carries out the Developer Works, then the Council:

- (a) is not required to expend more money than is secured by the Guarantee. The Council may in its discretion elect not to carry out items of the Developer Works to ensure that the Developer Works can be achieved for an amount equal to, or less than, the amount secured by the Guarantee at the time; and
- (b) may expend more money than is secured by the Guarantee but will use all reasonable endeavours to ensure that the Developer Works are undertaken after consultation with the Developer, with the intention of ensuring that the

Developer Works may be completed without unreasonable or unnecessary expenditure.

10.2 Debt Due and Owing to the Council

If, under **clause 10.1(b)**, the Council expends more money than is recovered or recoverable in respect of the Guarantee in carrying out the Developer Works, the amount in excess of the Guarantee will be a debt immediately due and owing to the Council by the Developer.

Part C – General

11. Planning Agreement under the Act

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

12. Scope and Application of Agreement

- (a) This Agreement binds the parties and applies to the Land on which the Developer will carry out the Development.
- (b) This Agreement does not exclude the application of section 94 of the Act.
- (c) This Agreement does exclude the application of section 94A of the Act.

13. Registration of this Agreement

13.1 Registration

The Developer must promptly:

- (a) obtain such consents as to the registration of this Agreement on the title to the Site as are necessary for the registration of this Agreement under section 93H of the Act;
- (b) lodge the Agreement for registration with the Land & Property Management Authority and take all steps to procure registration of the Agreement on the title to the Land under section 93H of the Act;
- (c) produce to the Council within 35 days of execution of this Agreement details of lodgement of the Agreement with the Land & Property Management Authority; and
- (d) following registration of the Agreement, notify the Council of registration by enclosing a title search of the Land confirming the registration.

13.2 Removal of Registration

- (a) The Developer may only remove this Agreement from the title to the Land at the Developer's cost, with the written consent of Council.

(b) The Council must, within 10 business days, provide its consent under **clause 13.2(a)** in any of the following events:

- (i) this Agreement is terminated for any reason; or
- (ii) all of the Developer's obligations under this Agreement have been performed; or
- (iii) the Development Consent lapses in accordance with the Act or the Development Consent is declared invalid.

14. Assignments & Dealings

14.1 Future Owners

This Agreement is intended by the parties to bind successors in title to the Land.

14.2 Dealings with the Land

The Developer must not have any Dealings with the Land unless the Developer:

- (a) first informs the proposed assignee, purchaser or other party (the **Incoming Party**) of this Agreement;
- (b) provides the Incoming Party with a copy of this Agreement;
- (c) enters into a novation deed with the Incoming Party and the Council, whereby the Incoming Party agrees to perform the obligations of the Developer under this Agreement;
- (d) remedies any default by the Developer, unless such default has been waived by the Council; and
- (e) pays the Council's reasonable costs in relation to the assignment and novation.

14.3 Substitution of Guarantee

As soon as is practicable after the Developer has any Dealings with the Land and the Incoming Party executes the novation deed referred to in **clause 14.2(c)** and provides a Guarantee for the amount of the estimated costs of unperformed works (verified by an independent quantity surveyor) in terms acceptable to the Council, the Council will, if so directed by the Developer, release the Guarantee held at that time.

14.4 Claim if No Substitution

If the Developer fails to comply with its obligations under this clause, then the Council may make an appropriation from the Guarantee in such amount as is reasonably required to complete the Developer's outstanding obligations to complete the Developer Works.

15. Dispute Resolution

15.1 Reference to Dispute

If a dispute arises between the parties in relation to this Agreement, then either party may seek to resolve that dispute in accordance with this **clause 15**.

15.2 Notice of Dispute

The party wishing to commence dispute resolution processes must notify the other in writing of:

- (a) the nature, or subject matter, of the dispute, including a summary of any efforts made to resolve the dispute other than by way of this **clause 15**;
- (b) the intent to invoke this **clause 15**;
- (a) (if practicable) the outcomes which the notifying party wishes to achieve; and
- (b) any material impact which the dispute has upon the completion of all obligations under this Agreement.

The contents of a notice issued under **clause 15.2** are deemed to be confidential.

15.3 Representatives of Parties to Meet

The representatives of the parties must promptly (and in any event within 14 days of written notice) meet in good faith to attempt to resolve the notified dispute. The parties may, without limitation:

- (a) resolve the dispute during the course of that meeting;
- (b) agree that further material, expert opinion or consideration is needed to effectively resolve the dispute (in which event the parties will in good faith agree to a timetable for resolution);
- (c) agree that the parties are unlikely to resolve the dispute 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.

15.4 Neither Party May Constrain

If:

- (a) at least one meeting has been held in accordance with **clause 15.3**; and
- (b) the parties have been unable to reach an outcome identified in **clause 15.3(a) to (c)**; and

- (c) either of the parties (acting in good faith) forms the view that the dispute is reasonably unlikely to be resolved in accordance with the process agreed under **clause 15.3**.

then that party may, by 14 days written notice to the other, terminate the dispute resolution process in respect of that dispute. The termination of the process set out in this clause does not of itself amount to a breach of the Agreement.

16. Termination

- 16.1 If the Developer is in breach of this Agreement, the Council may, despite any other provision of this Agreement, give the Developer written notice requiring the Developer to show cause why the Council should not terminate this Agreement.
- 16.2 A notice under **clause 16.1** must:
 - (a) state that it is a notice given under this Agreement and **clause 16.1**;
 - (b) particularise the nature of the breach by the Developer;
 - (c) require the Developer to show cause by notice to the Council why the Council should not terminate this Agreement;
 - (d) specify a date by which the Developer must show cause.
- 16.3 If the Developer fails to show cause to the reasonable satisfaction of the Council why the Council should not terminate this Agreement in relation to the Developer's breach, the Council may terminate this Agreement by written notice to the Developer.
- 16.4 If the Council terminates this Agreement under **clause 16.3** the rights and liabilities of the parties are the same as they would have been at common law had the Developer repudiated this Agreement and the Council elected to treat this Agreement at an end and recover damages.
- 16.5 **Clause 15** does not prevent a notice being given under clause 16.1 and does not apply to such a notice or the circumstances relating to the giving of that notice, and any procedure commenced under **clause 15** ceases to apply when such a notice is given.

17. Notices

- 17.1 Any notice, consent, information, application or request that must or may be given or made to a party under this Agreement is only given or made if it is in writing and sent in one of the following ways:
 - (a) delivered or posted to that party at its address set out in **Item 10** of **Schedule 1**; or
 - (b) faxed to that party at its fax number set out in **Item 10** of **Schedule 1**.
- 17.2 If a party gives the other party three business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given

or made by that other party if it is delivered, posted or faxed to the latest address or fax number.

17.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:

- (a) If it is delivered, when it is left at the relevant address;
- (b) If it is sent by post, two business days after it is posted; or
- (c) If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.

17.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

18. Review

18.1 The parties agree to review their respective obligations under this Agreement annually on each anniversary of the date of the Development Consent until such time as all obligations have been fulfilled.

18.2 The parties agree to:

- (a) meet at a suitable location and time;
- (b) appoint a representative who is duly authorised to attend the meeting to review the Agreement;
- (c) participate in the review in good faith;
- (d) minute all matters discussed at the meeting.

19. General

19.1 Approvals & 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 obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

19.2 Legal and Administrative Costs

Each party must pay its own legal and administrative costs and expenses in relation to the negotiation, preparation and execution of this Agreement.

19.3 Stamp Duty

The Developer is liable for and must pay all stamp duty (including any fine or penalty except where it arises from default by any other party) on or relating to this Agreement, any document executed under it or any dutiable transaction evidenced or effected by it.

19.4 Entire Agreement

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

19.5 Further Acts

Each party must promptly execute all documents and do all things that another party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.

19.6 Governing Law & Jurisdiction

This Agreement is governed by the law of New South Wales. The parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.

19.7 Joint & Several Liability

An obligation on two or more persons binds them separately and together.

19.8 No Fetter

Nothing in this Agreement will be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law or under the Act, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty under the Act.

19.9 Representations & Warranties

The parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under the Agreement and that entry into this Agreement will not result in the breach of any law.

19.10 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.

19.11 Modification

This Agreement may only be varied or replaced by a document in writing, which is signed by the parties.

19.12 Waiver

The fact that a party fails to do, or delays in doing, something the party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another party. A waiver by a party is only effective if it is in writing. A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

19.13 Relationship of Parties

This Agreement is not intended to create a partnership, joint venture or agency relationship between the parties.

19.14 Counterparts

This Agreement may be signed in counterparts.

19.15 GST

- (a) In this **clause 19.15**:
 - (i) words and expressions which are not defined in this document but which have a defined meaning in GST Law have the same meaning as in the GST Law;
 - (ii) "**GST Law**" has the meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999*; and
 - (i) any reference to GST payable or an entitlement to an input tax credit includes a reference, as appropriate, to GST payable by, or an input tax credit entitlement of, the representative member of a GST group.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under, or in connection with, this Agreement are exclusive of GST.
- (c) If GST is payable in respect of any supply made by a supplier under, or in connection with, this Agreement, then to the extent that the consideration (or part thereof) payable by the recipient is:
 - (i) a monetary payment; or
 - (ii) a non-monetary payment which is not a taxable supply by the recipient, the recipient will pay to the supplier an additional amount equal to the GST payable by the supplier in respect of the supply (**GST Amount**).
- (d) Subject to paragraph (g), the recipient will pay the GST Amount referred to in **clause 19.15(c)** in addition to and at the same time the consideration for the supply is to be provided under this Agreement.

- (e) If GST is payable in respect of any supply made by a supplier under, or in connection with, this Agreement, then to the extent that the consideration (or part thereof) payable by the recipient is a non-monetary payment which is also a taxable supply by the recipient:
- (i) at or before the time of payment of any relevant consideration by either party, the parties agree that they will each exchange tax invoices; and
 - (ii) if the parties exchange non-monetary consideration of unequal GST-inclusive market value:
 - (A) in respect of the exchange, one party (**the First Party**) will have a GST liability on its supply (**First Party Supply**) that exceeds its entitlement to an input tax credit on its acquisition in exchange for that supply (**First Party Acquisition**);
 - (B) the other party (**Second Party**) must make a monetary payment to the First Party equal to the positive difference between the GST payable on the First Party Supply and a full input tax credit in respect of the First Party Acquisition plus any GST payable in respect of that payment (**Payment**); and
 - (C) the Payment referred to in paragraph (B) above will be made by the Second Party at the time the Second Party receives a tax invoice for the First Party Supply.
- (f) The parties will agree upon the market value of any non-monetary consideration which the recipient is required to provide under **clause 19.15(e)**. If agreement cannot be reached prior to the time that a party becomes liable for GST, the matter in dispute is to be determined by an independent expert nominated by the President for the time being of the Institute of Chartered Accountants in Australia. The parties will each pay one half of the costs of referral and determination by the independent expert.
- (g) The supplier must deliver a tax invoice to the recipient before the supplier is entitled to payment of the GST Amount under clause 19.15(c). The recipient can withhold payment of the GST Amount until the supplier provides a tax invoice.
- (h) If an adjustment event arises in respect of a taxable supply made by a supplier under, or in connection with, this Agreement;
- (i) any amount payable by the recipient under **clause 19.15(c)** will be recalculated to reflect the adjustment event, taking into account any previous adjustments under this clause, and a payment will be made by the recipient to the supplier or by the supplier to the recipient as the case requires and the supplier will issue an adjustment note to the recipient; or
 - (ii) in respect of an exchange of supplies that falls within **clause 19.15(e)**, the principle in that clause will be applied, taking into account the adjustment event and any previous adjustments under this **clause**

19.15(h), tax invoices or adjustment notes will be exchanged, and a further monetary payment made as required or appropriate.

- (i) Where a party is required under, or in connection with, this Agreement to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party is entitled.

20. Interpretation

20.1 Definitions

In this Agreement the following definitions apply:

Act means the *Environmental Planning and Assessment Act 1979* (NSW) as amended from time to time.

Authority means a Commonwealth, State or local government department, a Minister, body, instrumentality, trust or public authority in the exercise of a governmental regulatory function.

Completion means the stage in the construction of the Developer Works when, in the discretion of Council acting reasonably, Council gives notice under **clause 6.5(a)(i)** that the Developer Works are complete except for minor omissions and minor defects which are non-essential and:

- (e) which do not prevent the Developer Works from being reasonably capable of being used for their intended purposes;
- (f) which the Council determines the Developer has reasonable grounds for not promptly rectifying; and
- (g) the rectification of which will not prejudice the convenient use of the Developer Works.

Construction Certificate has the same meaning as in the Act.

Council's Representative means the person specified in **Item 11** of **Schedule 1** who is duly authorised to give approval under this Agreement.

Date means the date this Agreement commences as set out in **Item 1** of **Schedule 1**.

Dealing means selling, transferring, assigning, mortgaging, charging or encumbering the Land.

Defects Liability Period means the period of 12 months from the date on which the Developer Works reach Completion.

Developer Works means the works described in **Schedule 2**.

Development means the development the subject of the Development Consent.

Development Application means the development application set out in **Item 4 of Schedule 1** submitted to the relevant consent authority.

Development Consent means the development consent granted by Council in respect to the Development Application as set out in **Item 4 of Schedule 1**.

Footpath Land 1 means the land specified in **Item 5 of Schedule 1** to be transferred to Council free of cost in accordance with this Agreement.

Footpath Land 2 means the land specified in **Item 6 of Schedule 1** to be transferred to Council free of cost in accordance with this Agreement.

Force Majeure means an act of God, inclement weather, a strike, lockout, civil commotion, war (whether declared or undeclared), riot, blockade or insurrection, fire (including bush fire), flood, storm or tempest, smoke, earthquake, epidemic, explosion, tsunami, an act or restraint of any government or semi-governmental or other public or statutory authority or any other event beyond the reasonable control of the Developer or Council.

Guarantee means

- (a) a deposit by cash or unendorsed bank cheque in the sum of \$20,000 to be deposited with the Council; or, at the election of the Developer,
- (b) an unconditional bank guarantee, unlimited in time, issued by a bank licensed to carry on business in Australia that is:
 - (i) in favour of the Council;
 - (ii) for the Guarantee Amount; and
 - (iii) on such other terms the Council may approve from time to time.

Guarantee Amount means the amount of the Guarantee to be provided by the Developer in respect to the Developer Works as set out in **Item 8 of Schedule 1**.

Land means the land the subject of the Development Consent as set out in **Item 3 of Schedule 1**.

Legislative Requirements means:

- (a) an Act, ordinance, regulation, instrument, by-law, award and proclamation of the Commonwealth and the State of New South Wales including the Act and associated instruments;
- (b) any authorisation, licence or permit and the like, issued by an Authority and includes any Development Consent.

Occupation Certificate has the same meaning as in the Act.

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

Public Benefits means the provision of public access and car parking within Footpath 1 and Footpath 2, and public access over the Walkway Land

Relevant Plans means the plan set out in **Schedule 4**.

Walkway Land means the land specified in **Item 7** of **Schedule 1** over which a right of footway will be granted to Council.

20.2 Interpretation

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

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) A reference in this Agreement to a business day means a day other than Saturday or Sunday on which banks are open for business generally in the Shoalhaven local government area.
- (c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (g) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (h) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (i) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- (j) References to the word 'include' or 'including' are to be construed without limitation.

- (k) A reference to this Agreement includes the agreement recorded in this Agreement.
- (l) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- (m) Any schedules and attachments form part of this Agreement.
- (n) The Explanatory Note for this Agreement is not to be used to assist in construing this Agreement.

Executed by the parties as an Agreement:

Signed for and on behalf of the)
COUNCIL OF THE CITY OF)
SHOALHAVEN by its duly authorised)
officer in the presence of:)
)

Witness:

Name (printed):

Signed by VICKI LYNN STUART in the)
presence of:)
)

Witness

Name (printed):

SIGNED by TOWN & COUNTRY)
DEVELOPMENT PTY LIMITED (ACN)
002 691 929, in accordance with its)
Constitution (Section 127 of the)
Corporations Act 2001);

Signature:

RALPH STUART

Name:

Sole Director and Secretary

Position:

Signature:

General Manager:

Signature:

[Signature]

Vicki Lynn Stuart

Signature:

Name:

Position:

Schedule 1 Reference Schedule

Item	Name	Description
1	Date	2 ND DECEMBER 2011
2	Developer's Name	Vicky Lynn Stuart and Town & Country Developments Pty Limited
	Developer's ABN	24 002 691 929
	Developer's Address	90 Mullers Lane, Berry, NSW 2535
3	Land	Lot 1 DP 120417 (173 Prince Edward Avenue, Culburra Beach, NSW 2540)
4	Development Application	Commercial development containing three (3) shops with associated works as identified in Development Application: DA10/2514 as amended from time to time.
	Development Consent	Development Consent dated 20 April 2011 for Commercial development containing three (3) shops with associated works as identified in Development Application DA10/2514 as amended from time to time.
5	Footpath Land 1	Part Lot 1 DP 102417 (173 Prince Edward Avenue, Culburra Beach, NSW 2540) and being Lot 101 in proposed plan of land acquisition being plan noted as Plan 2 in Schedule 4.
6	Footpath Land 2	Part Lot 1 DP 102417 (173 Prince Edward Avenue, Culburra Beach, NSW 2540) and being Lot 102 in proposed plan of land acquisition being plan noted as Plan 2 in Schedule 4.
7	Walkway Land	Part Lot 1 DP 102417 (173 Prince Edward Avenue, Culburra Beach, NSW 2540) and being a Right of Footway, 2m wide, affecting Lot 100 in proposed plan of land acquisition being plan noted as Plan 2 in Schedule 4.
8	Guarantee Amount	\$20,000
9	Insurance	\$20 million
10	Notices	
	Council Attention	General Manager
	Address	Administrative Building Bridge Road Nowra NSW 2541

	Fax Number	02 4422 1816
	Developer Attention	Ralph Stuart
	Address	90 Mullers Lane Berry NSW 2535
	Fax Number	(02) 4464 3156
11	Council's Representative	General Manager

Schedule 2 Developer Works

Section 1 Description of Works

1. Construction of pedestrian footpath on Footpath Land 1 and Footpath Land 2 in accordance with the Relevant Plans.
2. Provision of Right of Footway 2 metres wide, in accordance with terms contained in Schedule 5 of this Agreement, over the Walkway Land, described as "(A) – Proposed Right of Footway – 2m wide" in proposed plan of land acquisition being plan noted as Plan 2 in Schedule 4.

Section 2 Estimated Costs

\$20,000.00

Schedule 3 Standards

Note: These standards are intended to act as a "base point" or minimum standard if there is an incomplete design or if the design (as submitted) is likely to evolve. The standards should be reviewed. Any current manuals, practices, policies etc which may impact on the Developer Works to be included here.

The priority should be to identify the most likely Council documents and then – if these are non applicable – the more generic Australian Standards.

Section 1 General

- (a) The standards referred to in Schedule 3 are included for information purposes only and as a guide to the relevant standards for the general nature of the work identified as the Developer Works in this Agreement.
- (b) The Council makes no representation or warranty whatsoever as to the currency of the standards identified, or their application to the final design of any particular element.
- (c) If any standard is replaced or supplemented, then a reference will be deemed to include any other standards as may replace or supplement that standard.

Section 2 Conflict

- (a) If any Australian Standard prescribes or describes a different level of material, finish, work or workmanship, than those contained in any Council standard, then the higher of the two standards apply.
- (b) If any one or more Council standards conflicts with another Council standard, then the Council must nominate the correct and applicable standard. The Council's decision as to the most applicable standard if there is conflict is final.

Section 3 Council Standards

Shoalhaven Local Environmental Plan 1985 (as amended)
Development Control Plan No 100 (Engineering Design Specifications)

Section 4 Australian Standards

AS/NZS 1158.3.1:2005 Pedestrian area, Category P Lighting, Performance and Installation Design Requirements;
AS/NZS 4586:2004 Slip resistance classification of new pedestrian surface materials;
AS/NZS 1428.1:2001 Design for access and mobility

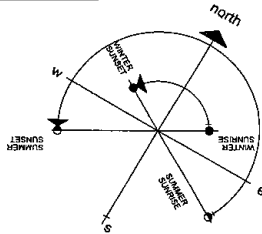
Schedule 4

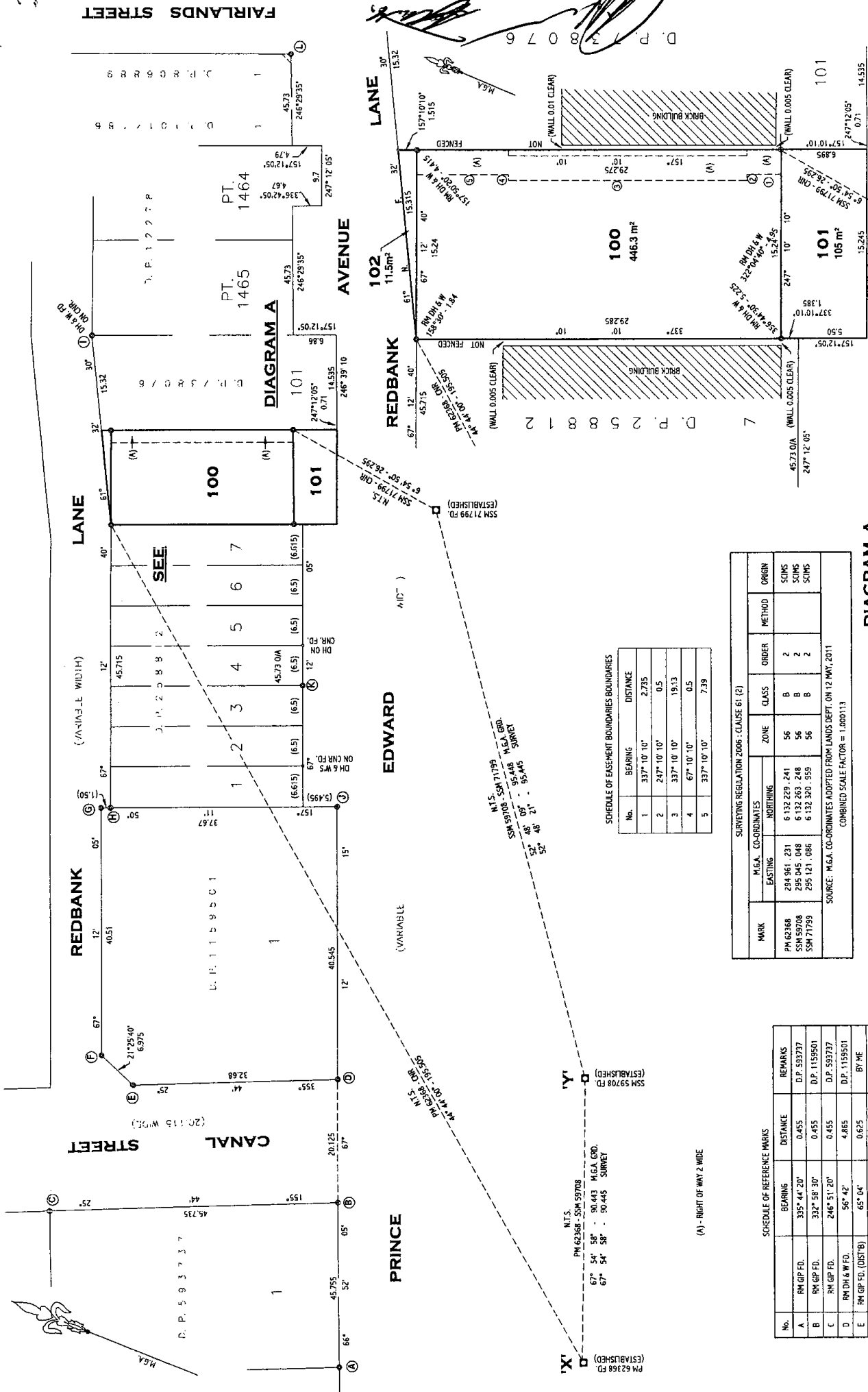
Relevant Plans

Insert plan of Tessra Design + Drafting Drawing No ~~27~~^G dated 18 February 2011 (highlight Walkway Land, Footpath Land 1 and Footpath Land 2)

Insert plan of Andrew George Johnson (Johnson Proctor Surveyors Pty Ltd), Surveyor Ref 10082 dated 11 May 2011

Insert plan of Pacific Westlake Drawing No 11023/C1 dated 23 May 2011





SCHEDULE OF EASEMENT BOUNDARIES

No.	BEARING	DISTANCE
1	337° 10' 10"	2.735
2	247° 10' 10"	0.5
3	337° 10' 10"	19.13
4	67° 10' 10"	0.5
5	337° 10' 10"	7.39

SURVEYING REGULATION 2006: CLAUSE 61 (2)

MARK	M.G.A. CO-ORDINATES		ZONE	CLASS	ORDER	METHOD	ORIGIN
	EASTING	NORTHING					
PM 62368	284 961 231	6 132 229 241	56	B	2		SCMS
SSM 59708	295 045 048	6 132 263 248	56	B	2		SCMS
SSM 71759	295 121 086	6 132 260 359	56	B	2		SCMS

SOURCE: M.G.A. CO-ORDINATES ADOPTED FROM LANDS DEPT. ON 12 MAY 2011
COMBINED SCALE FACTOR = 1.00013

SCHEDULE OF REFERENCE MARKS

No.	MARK	BEARING	DISTANCE	REMARKS
A	RM GP FD.	335° 44' 20"	0.455	D.P. 592737
B	RM GP FD.	332° 58' 30"	0.455	D.P. 1159501
C	RM GP FD.	246° 51' 20"	0.455	D.P. 592737
D	RM GP FD. (DIST' B)	56° 42'	4.865	D.P. 1159501
E	RM GP FD. (DIST' B)	65° 04'	0.625	BY ME
F	RM DH & W FD.	250° 04' 40"	2.105	D.P. 1159501
G	RM DH & W FD.	209° 35'	0.76	D.P. 1159501
H	RM C.B. FD.	202° 12' 20"	0.645	D.P. 258842
I	RM DH & W FD.	157° 15' 50"	0.5	D.P. 1159501
J	RM DH & W FD.	158° 33'	3.18	D.P. 1159501
K	RM DH & W FD.	337° 42' 30"	3.605	D.P. 1159501
L	RM DH & W FD.	313° 22' 50"	9.18	D.P. 40511

DIAGRAM A

R.R. 1: 200

PLAN OF LAND ACQUISITION UNDER THE
ROADS ACT 1993, AFFECTING LOT 120417

Surveyor: ANDREW GEROGE JOHNSON
Date of Survey: 11 MAY, 2011
Surveyor's Ref: 10082

Registered

LGA: SHOALHAVEN
Locality: CULBURRA
Subdivision No:
Lengths are in metres. Reduction Ratio: 1:400

DP

DRAFT

Schedule 5

Terms of Right of Footway

Right of Footway

1. The Body having the benefit of this right of footway may pass and repass on foot at all times and for all purposes over the land indicated herein as the servient tenement without vehicles
2. The Owner of the servient tenement covenants to:
 - Keep the trafficable surface of the footway in good repair suitable for its intended use by foot traffic, and
 - Undertake any necessary regular maintenance works as is necessary to keep the surface in good repair suitable for its intended use by foot traffic.
3. For the purposes of this easement:
 - "Vehicles" do not include motorised personal mobility aides and conveyances designed to facilitate mobility of one individual, and
 - the rights conferred upon the body are capable of exercise by its servants agents and every person authorised by it

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