

## **Deed**

### **Enterprise Avenue, South Nowra Planning Agreement**

Under s93F of the *Environmental Planning and Assessment Act 1979*

**Shoalhaven City Council**  
**Palmira Holdings Pty Ltd**

Date:

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## **Enterprise Avenue, South Nowra Planning Agreement**

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## **Enterprise Avenue, South Nowra Planning Agreement**

### **Summary Sheet**

#### **Council:**

**Name:** Shoalhaven City Council  
**Address:** City Administration Centre, 36 Bridge Road NOWRA NSW 2541  
**Telephone:** (02) 4429 3111  
**Facsimile:** (02) 4422 1816  
**Email:** council@shoalhaven.nsw.gov.au  
**Representative:** Russ Pigg, General Manager, Shoalhaven City Council

#### **Landowner:**

**Name:** Palmira Holdings Pty Ltd  
**Address:** 104 Princes Highway, South Nowra NSW 2541  
(PO Box 1007, South Nowra NSW 2541)  
**Telephone:** (02) 4421 4777  
**Facsimile:** (02) 4421 7984  
**Email:** admin@nowratoyota.com.au  
**Representative:** Ian Henry

#### **Land:**

See definition of *Palmira Land* in clause 1.1.

#### **Development:**

See definition of *Development* in clause 1.1.

#### **Development Contributions:**

See clauses 9, 10 and 11.

**Application of s94, s94A and s94EF of the Act:**

See clause 8.

**Security:**

See Part 4.

**Registration:**

See clause 30.

**Restriction on dealings:**

See clause 31.

**Dispute Resolution:**

See Part 3.

## **Enterprise Avenue, South Nowra Planning Agreement**

Under s93F of the *Environmental Planning and Assessment Act 1979*

### **Parties**

**Shoalhaven City Council** ABN 59 855 182 344 of City Administration Centre, 36 Bridge Road NOWRA NSW 2541 (**Council**)

and

**Palmira Holdings Pty Ltd** ABN 29 002 627 956 of 104 Princes Highway, South Nowra NSW 2541 (**Landowner**)

### **Background**

- A The Landowner owns the Palmira Land.
- B The Landowner proposes to make Development Applications to develop the Land.
- C The Landowner offers to enter into this Deed for the making of Development Contributions to the Council.

### **Operative provisions**

## **Part 1 - Preliminary**

### **1 Interpretation**

- 1.1 In this Deed the following definitions apply:

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

**Approval** includes approval, consent, licence, permission or the like.

**Associated Entity** means an associated entity of the Landowner within the meaning of s50AAA of the *Corporations Act 2001* (Cth).

**Authority** means the Commonwealth or New South Wales government, a Minister of the Crown, a government department, a public authority established by or under any Act, a council or county council constituted under the *Local Government Act 1993*, or a person or body exercising functions under any Act including a commission, panel, court, tribunal and the like.

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**Palmira Holdings Pty Ltd**

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**Bank Guarantee** means an irrevocable and unconditional undertaking without any expiry or end date in favour of the Council to pay an amount or amounts of money to the Council on demand issued by:

- (a) one of the following trading banks:
  - (i) Australia and New Zealand Banking Group Limited,
  - (ii) Commonwealth Bank of Australia,
  - (iii) Macquarie Bank Limited,
  - (iv) National Australia Bank Limited,
  - (iv) St George Bank Limited,
  - (v) Westpac Banking Corporation, or
- (b) any other financial institution approved by the Council in its absolute discretion.

**Claim** includes a claim, demand, remedy, suit, injury, damage, loss, Cost, liability, action, proceeding or right of action.

**Cost** means a cost, charge, expense, outgoing, payment, fee and other expenditure of any nature.

**Council Land** means Lot 7 DP731949.

**Deed** means this Deed and includes any schedules, annexures and appendices to this Deed.

**Defect** means anything that adversely affects, or is likely to adversely affect, the appearance, structural integrity, functionality or use or enjoyment of a Work or any part of a Work.

**Defects Liability Period** means the period of 1 year commencing on the day immediately after a Work is completed for the purposes of this Deed.

**Development** means:

- (a) development authorised by the Development Consents granted to:
  - (i) Development Application DA16/1588 for the purposes of a new motor vehicle showroom, and
  - (ii) Development Application DA16/2187 for the purposes of storage units, and
- (b) any development, within the meaning of the Act, on the Palmira Land the subject of Development Consent to a Development Application made by the Landowner or an Associated Entity that is granted after the commencement of this Deed.

**Development Application** has the same meaning as in the Act.

**Development Consent** has the same meaning as in the Act.

**Development Contribution** means a monetary contribution, the dedication of land free of cost, the carrying out of work, or the provision of any other material public benefit, or any combination of them, to be used for, or applied towards a public purpose, but does not include any Security or other benefit provided by a Party to the Council to secure the enforcement of that Party's obligations under this Deed for the purposes of s93F(3)(g) of the Act.

**Dispute** means a dispute or difference between the Parties under or in relation to this Deed.

**Equipment** means any equipment, apparatus, vehicle or other equipment or thing to be used by or on behalf of the Landowner in connection with the performance of its obligations under this Deed.

**GST** has the same meaning as in the GST Law.

**GST Law** has the same meaning as in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

**Just Terms Act** means the *Land Acquisition (Just Terms Compensation) Act 1991*.

**Land Dedication Plan** means the plan in Schedule 1.

**Lot 2 Land** means the part of Lot 2 DP1170503 that the Council considers is required for the Road Work, generally being the part shown shaded in green on the Land Dedication Plan.

**Maintain**, in relation to a Work, means keep in a good state of repair and working order, and includes repair of any damage to the Work.

**Palmira Land** means Lot 1 DP1175256 and Lot 25-26 DP734975, otherwise known as 104 and 128 Princess Highway, South Nowra.

**Palmira Dedication Land** means Lot 26 DP734975.

**Part 4A Certificate** has the same meaning as in the Act.

**Party** means a party to this Deed.

**Rectification Notice** means a notice in writing:

- (a) identifying the nature and extent of a Defect,
- (b) specifying the works or actions that are required to Rectify the Defect,
- (c) specifying the date by which or the period within which the Defect is to be rectified.

**Rectify** means rectify, remedy or correct.

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

**Road Work** means the construction of half-width (north direction) of the extension of Enterprise Avenue to connect Enterprise Avenue with Quinns Lane at South Nowra.

**Security** means a Bank Guarantee, or a bond or other form of security to the satisfaction of the Council indexed in accordance with the positive movements in the *Consumer Price Index (All Groups – Sydney)* published by the Australian Bureau of Statistics from the date of this Deed.

**Work** means the physical result of any building, engineering or construction work in, on, over or under land.

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

- 1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Deed.
- 1.2.2 A reference in this Deed to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.



- 1.2.3 If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day.
- 1.2.4 A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
- 1.2.5 A reference in this Deed to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
- 1.2.6 A reference in this Deed 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.
- 1.2.7 A reference in this Deed to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
- 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- 1.2.10 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.
- 1.2.11 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.
- 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.13 A reference to this Deed includes the agreement recorded in this Deed.
- 1.2.14 A reference to a Party to this Deed includes a reference to the servants, agents and contractors of the Party, the Party's successors and assigns.
- 1.2.15 A reference to 'dedicate' or 'dedication' in relation to land is a reference to dedicate or dedication free of cost.
- 1.2.16 Any schedules, appendices and attachments form part of this Deed.
- 1.2.17 Notes appearing in this Deed are operative provisions of this Deed.

## **2 Status of this Deed**

- 2.1 This Deed is a planning agreement within the meaning of s93F(1) of the Act.

## **3 Commencement**

- 3.1 This Deed commences and has force and effect on and from the date when the Parties have:

- 3.1.1 both executed the same copy of this Deed, or
- 3.1.2 each executed separate counterparts of this Deed and exchanged the counterparts.
- 3.2 The Parties are to insert the date when this Deed commences on the front page and on the execution page.

#### **4 Application of this Deed**

- 4.1 This Deed applies to the Palmira Land, the Council Land, the Lot 2 Land and to the Development.

#### **5 Warranties**

- 5.1 The Parties warrant to each other that they:
  - 5.1.1 have full capacity to enter into this Deed, and
  - 5.1.2 are able to fully comply with their obligations under this Deed.

#### **6 Further agreements**

- 6.1 The Parties may, at any time and from time to time, enter into agreements relating to the subject-matter of this Deed that are not inconsistent with this Deed for the purpose of implementing this Deed.

#### **7 Surrender of right of appeal, etc.**

- 7.1 The Landowner is not to commence or maintain, or to cause or procure the commencement or maintenance, of any proceedings in any court or tribunal or similar body appealing against, or questioning the validity of this Deed, or an Approval relating to the Development in so far as the subject-matter of the proceedings relates to this Deed.

#### **8 Application of s94, s94A and s94EF of the Act to the Development**

- 8.1 This Deed excludes the application of s94 and s94A of the Act to the Development.
- 8.2 This Deed does not exclude the application of s94EF of the Act to the Development.

## **Part 2 – Development Contributions**

### **9 Provision of Development Contributions**

- 9.1 The Landowner is to make Development Contributions to the Council in accordance with the provisions of this Deed relating to the making of Development Contributions and otherwise to the satisfaction of the Council.
- 9.2 The Council is to apply each Development Contribution made by the Landowner under this Deed towards the public purpose for which it is made and otherwise in accordance with this Deed.
- 9.3 Despite clause 9.2, the Council may apply a Development Contribution made under this Deed towards a public purpose other than the public purpose specified in this Deed if the Council reasonably considers that the public interest would be better served by applying the Development Contribution towards that other purpose rather than the purpose so specified.

### **10 Construction of Road Work**

- 10.1 The Landowner is to carry out and complete the part of the Road Work that is located on the Council Land and the Palmira Dedication Land before the earlier of the following:
  - 10.1.1 the date that is 18 months after the commencement of this Deed,
  - 10.1.2 the date the first Part 4A Certificate is issued in respect of the Development.
- 10.2 The Council is to use all reasonable endeavours to procure the irrevocable written consent of the owner of Lot 2 to the carrying out of the part of the Road Work on the Lot 2 Land by the Landowner in accordance with this Deed.
- 10.3 The Landowner is to carry out and complete the part of the Road Work on Lot 2 Land before the earlier to occur of the following:
  - 10.3.1 the date that is 18 months after the owner of Lot 2 gives the consent referred to in clause 10.2,
  - 10.3.2 the date that is 18 months after the date the Council becomes the owner of the Lot 2 Land.

### **11 Dedication of Palmira Dedication Land**

- 11.1 The Landowner is to dedicate the Palmira Dedication Land free of cost to the Council for the purposes of a public road.
- 11.2 The Palmira Dedication Land is to be dedicated before the earlier of the following:
  - 11.2.1 the date that is 12 months after the commencement of this Deed,
  - 11.2.2 the date that the part of the Road Work located on the Palmira Dedication Land is completed for the purposes of this Deed.

## **12 Dedication of land**

- 12.1 A Development Contribution comprising the dedication of land is made for the purposes of this Deed when:
- 12.1.1 a deposited plan is registered in the register of plans held with the Registrar-General that dedicates land as a public road (including a temporary public road) under the *Roads Act 1993* or creates a public reserve or drainage reserve under the *Local Government Act 1993*, or
- 12.1.2 the Council is given:
- (a) an instrument in registrable form under the *Real Property Act 1900* duly executed by the Landowner as transferor that is effective to transfer the title to the land to the Council when executed by the Council as transferee and registered,
  - (b) the written consent to the registration of the transfer of any person whose consent is required to that registration, and
  - (c) a written undertaking from any person holding the certificate of title to the production of the certificate of title for the purposes of registration of the transfer.
- 12.2 The Landowner is to do all things reasonably necessary to enable registration of the instrument of transfer to occur.
- 12.3 The Landowner is to ensure that land dedicated to the Council under this Deed is free of all encumbrances and affectations (whether registered or unregistered and including without limitation any charge or liability for rates, taxes and charges) except as otherwise agreed in writing by the Council.
- 12.4 If, having used all reasonable endeavours, the Landowner cannot ensure that land to be dedicated to the Council under this Deed is free from all encumbrances and affectations, the Landowner may request that Council agree to accept the land subject to those encumbrances and affectations, but the Council may withhold its agreement in its absolute discretion.
- 12.5 Despite any other provision of this Deed, if the Landowner is required to dedicate land to the Council on which the Landowner is also required to carry out a Work under this Deed, the Landowner is to comply with clause 12.1.2 not later than 7 days after the Work is completed for the purposes of this Deed.

## **13 Carrying out of Work**

- 13.1 Without limiting any other provision of this Deed, any Work that is required to be carried out by the Landowner under this Deed is to be carried out in accordance with any design or specification specified or approved by the Council, any relevant Approval and any other applicable law.
- 13.2 The Landowner, at its own cost, is to comply with any reasonable direction given to it by the Council to prepare or modify a design or specification relating to a Work that the Landowner is required to carry out under this Deed.

## **14 Variation to Work**

- 14.1 The design or specification of any Work that is required to be carried out by the Landowner under this Deed may be varied by agreement in writing between the Parties, acting reasonably, without the necessity for an amendment to this Deed
- 14.2 Without limiting clause 14.1, the Landowner may make a written request to the Council to approve a variation to the design or specification of a Work in order to enable it to comply with the requirements of any Authority imposed in connection with any Approval relating to the carrying out of the Work.
- 14.3 The Council is not to unreasonably delay or withhold its approval to a request made by the Landowner under clause 14.2.
- 14.4 The Council, acting reasonably, may from time to time give a written direction to the Landowner requiring it to vary the design or specification of a Work before the Work is carried out in a specified manner and submit the variation to the Council for approval.
- 14.5 The Landowner is to comply promptly with a direction referred to in clause 14.4 at their own cost.

## **15 Access to land by Landowner**

- 15.1 The Council authorises the Landowner to enter, occupy and use:
  - 15.1.1 the Council Land, and
  - 15.1.2 the Lot 2 Land, but only after the Council has obtained permission from the owner of the Lot 2 Land for access to that land for the purposes of the Road Work or the date the Council acquires the Lot 2 Land,for the purpose of performing its obligations under this Deed.
- 15.2 The Council is to permit the Landowner, upon receiving reasonable prior notice from the Landowner, to enter any other Council owned or controlled land in order to enable the Landowner to properly perform its obligations under this Deed.
- 15.3 Nothing in this Deed creates or gives the Landowner any estate or interest in any part of the land referred to in clause 15.1 or 15.2.

## **16 Access to land by Council**

- 16.1 The Council may enter any land on which Work is being carried out by the Landowner under this Deed in order to inspect, examine or test the Work, or to remedy any breach by the Landowner of its obligations under this Deed relating to the Work.
- 16.2 The Council is to give the Landowner prior reasonable notice before it enters land under clause 16.1.

## **17 Council's obligations relating to Work**

- 17.1 The Council is not to unreasonably delay, hinder or otherwise interfere with the performance by the Landowner of its obligations under this Deed, and is to use its reasonable endeavours to ensure third parties unrelated to the Landowner do not unreasonably delay, hinder or otherwise interfere with the performance of those obligations.

## **18 Protection of people, property & utilities**

- 18.1 The Landowner is to ensure to the fullest extent reasonably practicable in relation to the performance of their obligations under this Deed that:
- 18.1.1 all necessary measures are taken to protect people and property,
  - 18.1.2 unnecessary interference with the passage of people and vehicles is avoided, and
  - 18.1.3 nuisances and unreasonable noise and disturbances are prevented.
- 18.2 Without limiting clause 18.1, the Landowner is not to obstruct, interfere with, impair or damage any public road, public footpath, public cycleway or other public thoroughfare, or any pipe, conduit, drain, watercourse or other public utility or service on any land except as authorised in writing by the Council or any relevant Authority.

## **19 Repair of damage**

- 19.1 The Landowner is to maintain any Work required to be carried out by the Landowner under this Deed until the Work is completed for the purposes of this Deed or such later time as agreed between the Parties.
- 19.2 The Landowner is to carry out its obligation under clause 19.1 at its own cost and to the satisfaction of the Council.

## **20 Completion of Work**

- 20.1 The Landowner is to give the Council written notice of the date on which it will complete Work required to be carried out under this Deed.
- 20.2 The Council is to inspect the Work the subject of the notice referred to in clause 20.1 within 14 days of the date specified in the notice for completion of the Work.
- 20.3 Work required to be carried out by the Landowner under this Deed is completed for the purposes of this Deed when the Council, acting reasonably, gives a written notice to the Landowner to that effect.
- 20.4 If the Council is the owner of the land on which Work the subject of a notice referred to in clause 20.3 is issued, the Council assumes responsibility for the Work upon the issuing of the notice, but if it is not the owner at that time, it assumes that responsibility when it later becomes the owner.
- 20.5 Before the Council gives the Landowner a notice referred to in clause 20.3, it may give the Landowner a written direction to complete, rectify or repair any specified part of the Work to the reasonable satisfaction of the Council.

- 20.6 The Landowner, at its own cost, is to promptly comply with a direction referred to in clause 20.5.

## **21 Rectification of defects**

- 21.1 The Council may give the Landowner a Rectification Notice during the Defects Liability Period.
- 21.2 The Landowner, at its own cost, is to comply with a Rectification Notice according to its terms and to the reasonable satisfaction of the Council.
- 21.3 The Council is to do such things as are reasonably necessary to enable the Landowner to comply with a Rectification Notice that has been given to it under clause 21.1

## **22 Works-As-Executed-Plan**

- 22.1 No later than 60 days after Work is completed for the purposes of this Deed, the Landowner is to submit to the Council a full works-as-executed-plan in respect of the Work.
- 22.2 The Landowner, being the copyright owner in the plan referred to in clause 22.1, is to give the Council a non-exclusive licence to use the copyright in the plans for the purposes of this Deed.

## **23 Removal of Equipment**

- 23.1 When Work on any Council owned or controlled land is completed for the purposes of this Deed, the Landowner, without delay, is to:
- 23.1.1 remove any Equipment from the Palmira Land, Council Land and Lot 2 Land and make good any damage or disturbance to the land as a result of that removal, and
- 23.1.2 leave the land in a neat and tidy state, clean and free of rubbish.

## **Part 3 – Dispute Resolution**

### **24 Dispute resolution – expert determination**

- 24.1 This clause applies to a Dispute between any of the Parties to this Deed concerning a matter arising in connection with this Deed that can be determined by an appropriately qualified expert if:
- 24.1.1 the Parties to the Dispute agree that it can be so determined, or
- 24.1.2 the Chief Executive Officer of the professional body that represents persons who appear to have the relevant expertise to determine the Dispute gives a written opinion that the Dispute can be determined by a member of that body.

- 24.2 A Dispute to which this clause applies is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 24.3 If a notice is given under clause 24.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 24.4 If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 24.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 24.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 24.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

## **25 Dispute Resolution - mediation**

- 25.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute to which clause 24 applies.
- 25.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 25.3 If a notice is given under clause 25.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 25.4 If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.
- 25.5 If the Dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the Dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.
- 25.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 25.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

## **Part 4 - Enforcement**

### **26 Security for performance of obligations**

- 26.1 The Landowner is to provide Security to the Council in the amount of \$11,000.00 in relation to the performance of its obligations under this Deed.
- 26.2 The Landowner is to provide the Security to the Council on the commencement of this Deed.



- 26.3 The Council, in its absolute discretion and despite clause 15, may refuse to allow the Landowner to enter, occupy or use any land owned or controlled by the Council or refuse to provide the Landowner with any plant, equipment, facilities or assistance relating to the carrying out the Development if the Landowner has not provided the Security to the Council in accordance with this Deed.
- 26.4 The Council may call-up and apply the Security in accordance with clause 28 to remedy any breach of this Deed notwithstanding any other remedy it may have under this Deed, under any Act or otherwise at law or in equity.
- 26.5 The Council is to release and return the Security or any unused part of it to the Landowner within 14 days of completion of the obligation to which the Security relates.
- 26.6 The Landowner may at any time provide the Council with a replacement Security.
- 26.7 On receipt of a replacement Security, the Council is to release and return the Security that has been replaced to the Landowner.
- 26.8 If the Council calls-up the Security or any portion of it, it may, by written notice to the Landowner, require the Landowner to provide a further or replacement Security to ensure that the amount of Security held by the Council equals the amount it is entitled to hold under this Deed.
- 26.9 The Landowner is to ensure that the Security provided to the Council is at all times maintained to the full current indexed value.

## **27 Acquisition of land required to be dedicated**

- 27.1 If the Landowner does not dedicate land required to be dedicated under this Deed at the time at which it is required to be dedicated, the Landowner consents to the Council compulsorily acquiring the land for compensation in the amount of \$1 without having to follow the pre-acquisition procedure under the Just Terms Act.
- 27.2 The Council is to only acquire land pursuant to clause 27.1 if it considers it reasonable to do so having regard to the circumstances surrounding the failure by the Landowner to dedicate the land required to be dedicated under this Deed.
- 27.3 Clause 27.1 constitutes an agreement for the purposes of s30 of the Just Terms Act.
- 27.4 If, as a result of the acquisition referred to in clause 27.1, the Council is required to pay compensation to any person other than the Landowner, the Landowner is to reimburse the Council that amount, upon a written request being made by the Council, or the Council can call on any Security provided under clause 26.
- 27.5 The Landowner indemnifies and keeps indemnified the Council against all Claims made against the Council as a result of any acquisition by the Council of the whole or any part of the land concerned except if, and to the extent that, the Claim arises because of the Council's negligence or default.
- 27.6 The Landowner is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 27, including without limitation:

- 27.6.1 signing any documents or forms,
- 27.6.2 giving land owner's consent for lodgement of any Development Application,
- 27.6.3 producing certificates of title to the Registrar-General under the *Real Property Act 1900*, and
- 27.6.4 paying the Council's costs arising under this clause 27.

## **28 Breach of obligations**

- 28.1 If the Council reasonably considers that the Landowner is in breach of any obligation under this Deed, it may give a written notice to the Landowner:
  - 28.1.1 specifying the nature and extent of the breach,
  - 28.1.2 requiring the Landowner to:
    - (a) rectify the breach if it reasonably considers it is capable of rectification, or
    - (b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification,
  - 28.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 28.2 If the Landowner fails to fully comply with a notice referred to in clause 28.1, the Council may, without further notice to the Landowner, call-up the Security provided by the Landowner under this Deed and apply it to remedy the Landowner's breach.
- 28.3 If the Landowner fails to comply with a notice given under clause 28.1 relating to the carrying out of Work under this Deed, the Council may step-in and remedy the breach and may enter, occupy and use any land owned or controlled by the Landowner and any Equipment on such land for that purpose.
- 28.4 Any costs incurred by the Council in remedying a breach in accordance with clause 28.2 or clause 28.3 may be recovered by the Council by either or a combination of the following means:
  - 28.4.1 by calling-up and applying the Security provided by the Landowner under this Deed, or
  - 28.4.2 as a debt due in a court of competent jurisdiction.
- 28.5 For the purpose of clause 28.4, the Council's costs of remedying a breach the subject of a notice given under clause 28.1 include, but are not limited to:
  - 28.5.1 the costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
  - 28.5.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
  - 28.5.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.

- 28.6 Nothing in this clause 28 prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Deed by the Landowner, including but not limited to seeking relief in an appropriate court.

## **29 Enforcement in a court of competent jurisdiction**

- 29.1 Without limiting any other provision of this Deed, the Parties may enforce this Deed in any court of competent jurisdiction.
- 29.2 For the avoidance of doubt, nothing in this Deed prevents:
- 29.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Deed or any matter to which this Deed relates, or
  - 29.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Deed or any matter to which this Deed relates.

## **Part 5 – Registration & Restriction on Dealings**

### **30 Registration of this Deed**

- 30.1 The Parties agree to register this Deed for the purposes of s93H(1) of the Act on the Palmira Land.
- 30.2 On the commencement of this Deed, the Landowner is to deliver to the Council in registrable form:
- 30.2.1 an instrument requesting registration of this Deed on the title to the Palmira Land duly executed by the Landowner, and
  - 30.2.2 the written irrevocable consent of each person referred to in s93H(1) of the Act to that registration.
- 30.3 The Landowner is to do such other things as are reasonably necessary to enable registration of this Deed to occur.
- 30.4 The Parties are to do such things as are reasonably necessary to remove any notation relating to this Deed from the title to the Palmira Land once the Landowner has completed its obligations under this Deed to the reasonable satisfaction of the Council or this Deed is terminated or otherwise comes to an end for any other reason.

### **31 Restriction on dealings**

- 31.1 The Landowner is not to:
- 31.1.1 sell or transfer the Palmira Land or any part of it, or
  - 31.1.2 assign the Landowner's rights or obligations under this Deed, or novate this Deed,
- to any person unless:

- 31.1.3 the Landowner has, at no cost to the Council, first procured the execution by the person to whom the Palmira Land or part is to be sold or transferred or the Landowner's rights or obligations under this Deed are to be assigned or novated, of a deed in favour of the Council on terms reasonably satisfactory to the Council, and
- 31.1.4 the Council has given written notice to the Landowner stating that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this Deed, and
- 31.1.5 the Landowner is not in breach of this Deed, and
- 31.1.6 the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.
- 31.2 Subject to clause 31.3, the Landowner acknowledges and agrees that it remains liable to fully perform their obligations under this Deed unless and until it has complied with its obligations under clause 31.1.
- 31.3 Clause 31.1 does not apply in relation to any sale or transfer of the Palmira Land if this Deed is registered on the title to the Palmira Land at the time of the sale.

## **Part 6 – Indemnities & Insurance**

### **32 Risk**

- 32.1 The Landowner perform this Deed at its own risk and its own cost.

### **33 Release**

- 33.1 The Landowner releases the Council from any Claim it may have against the Council arising in connection with the performance of the Landowner's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

### **34 Indemnity**

- 34.1 The Landowner indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in connection with the performance of the Landowner's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

### **35 Insurance**

- 35.1 The Landowner is to take out and keep current to the satisfaction of the Council the following insurances in relation to Work required to be carried out

by the Landowner under this Deed up until the Work is taken to have been completed in accordance with this Deed:

- 35.1.1 contract works insurance, noting the Council as an interested party, for the full replacement value of the Works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover the Landowner's liability in respect of damage to or destruction of the Works,
  - 35.1.2 public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Landowner and any subcontractor of the Landowner, for liability to any third party,
  - 35.1.3 workers compensation insurance as required by law, and
  - 35.1.4 any other insurance required by law.
- 35.2 If the Landowner fails to comply with clause 35.1, the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Landowner to the Council and may be recovered by the Council as it deems appropriate including:
- 35.2.1 by calling upon the Security provided by the Landowner to the Council under this Deed, or
  - 35.2.2 recovery as a debt due in a court of competent jurisdiction.
- 35.3 The Landowner is not to commence to carry out any Work unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 35.1.

## **Part 7 – Other Provisions**

### **36 Payment to Landowner**

- 36.1 This clause 36 applies if, and only if:
  - 36.1.1 the Landowner has carried out and completed all of the Road Work in accordance with this Deed, and
  - 36.1.2 the Landowner is not in breach of this Deed, and
  - 36.1.3 a Development Application is made by the Landowner or an Associated Entity for consent to carry out Development on the Palmira Land.
- 36.2 Upon receipt of a Development Application referred to in clause 36.1.3, the Council is to make a payment to the Landowner or the Associated Entity, as the case may be, in an amount equal to the Development Application Fee that was paid upon the making of the Development Application concerned.
- 36.3 The Council's obligation under clause 36.2 only applies to:
  - 36.3.1 Development Application DA16/1588 and DA16/2187, and
  - 36.3.2 the first Development Application made by the Landowner or an Associated Entity, as the case may be, in respect of the Palmira Land after the date of this Deed.

- 36.4 In this clause '**Development Application Fee**' means the fee accompanying the Development Application pursuant to clause 50(1)(c) of the Regulation and excludes any additional fee referred to in clauses 248, 251, 252, 252A and 253 of the Regulation.

### **37 Acquisition of Lot 2 Land**

- 37.1 The Council is to use its reasonable endeavours to enter into an agreement with the owner of the Lot 2 Land within 3 months of the date this Deed commences to acquire the Lot 2 Land for the purposes of this Deed.
- 37.2 If the agreement referred to in clause 37.1 is not entered into, to the extent permitted by law, the Council is to use its reasonable endeavours to acquire Lot 2 by compulsory process under the Just Terms Act.

### **38 Annual report by Landowner**

- 38.1 The Landowner is to provide to the Council by not later than each anniversary of the date on which this Deed is entered into a report detailing the performance of their obligations under this Deed.
- 38.2 The report referred is to be in such a form and to address such matters as required by the Council from time to time.

### **39 Review of Deed**

- 39.1 The Parties agree to review this Deed every 2 years, and otherwise if either party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Deed.
- 39.2 For the purposes of clause 39.1, the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development.
- 39.3 For the purposes of addressing any matter arising from a review of this Deed referred to in clause 39.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Deed.
- 39.4 If this Deed becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.
- 39.5 A failure by a Party to agree to take action requested by the other Party as a consequence of a review referred to in clause 39.1 (but not 39.4) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.

### **40 Notices**

- 40.1 Any notice, consent, information, application or request that is to or may be given or made to a Party under this Deed is only given or made if it is in writing and sent in one of the following ways:

- 40.1.1 delivered or posted to that Party at its address set out in the Summary Sheet,
  - 40.1.2 faxed to that Party at its fax number set out in the Summary Sheet, or
  - 40.1.3 emailed to that Party at its email address set out in the Summary Sheet.
- 40.2 If a Party gives the other Party 3 business days' notice of a change of its address, fax number or email, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted, faxed or emailed to the latest address or fax number.
- 40.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
  - 40.3.1 delivered, when it is left at the relevant address,
  - 40.3.2 sent by post, 2 business days after it is posted,
  - 40.3.3 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, or
  - 40.3.4 sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.
- 40.4 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.

## **41 Approvals and Consent**

- 41.1 Except as otherwise set out in this Deed, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Deed in that Party's absolute discretion and subject to any conditions determined by the Party.
- 41.2 A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

## **42 Costs**

- 42.1 The Landowner is to pay to the Council the Council's costs not exceeding \$4,313.60 of preparing, negotiating, executing and stamping this Deed, and any document related to this Deed within 7 days of a written demand by the Council for such payment.
- 42.2 The Landowner is also to pay to the Council the Council's reasonable costs of enforcing this Deed within 7 days of a written demand by the Council for such payment.

#### **43 Entire Deed**

- 43.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with.
- 43.2 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 Deed was executed, except as permitted by law.

#### **44 Further Acts**

- 44.1 Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to effect, perfect or complete this Deed and all transactions incidental to it.

#### **45 Governing Law and Jurisdiction**

- 45.1 This Deed is governed by the law of New South Wales.
- 45.2 The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.
- 45.3 The Parties are not to object to the exercise of jurisdiction by those courts on any basis.

#### **46 Joint and Individual Liability and Benefits**

- 46.1 Except as otherwise set out in this Deed:
  - 46.1.1 any agreement, covenant, representation or warranty under this Deed by 2 or more persons binds them jointly and each of them individually, and
  - 46.1.2 any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

#### **47 No Fetter**

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

#### **48 Illegality**

- 48.1 If this Deed or any part of it becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties are to co-operate and do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.



## **49 Severability**

- 49.1 If a clause or part of a clause of this Deed 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.
- 49.2 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 Deed, but the rest of this Deed is not affected.

## **50 Amendment**

- 50.1 No amendment of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed in accordance with clause 25D of the Regulation.

## **51 Waiver**

- 51.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- 51.2 A waiver by a Party is only effective if it:
  - 51.2.1 is in writing,
  - 51.2.2 is addressed to the Party whose obligation or breach of obligation is the subject of the waiver,
  - 51.2.3 specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,
  - 51.2.4 is signed and dated by the Party giving the waiver.
- 51.3 Without limitation, a waiver may be expressed to be conditional on the happening of an event, including the doing of a thing by the Party to whom the waiver is given.
- 51.4 A waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given, and 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.
- 51.5 For the purposes of this Deed, an obligation or breach of obligation the subject of a waiver is taken not to have been imposed on, or required to be complied with by, the Party to whom the waiver is given.

## **52 GST**

- 52.1 In this clause:  
**Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice** have the meaning given by the GST Law.  
**GST Amount** means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.

**GST Law** has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Input Tax Credit** has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.

**Taxable Supply** has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.

- 52.2 Subject to clause 52.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- 52.3 Clause 52.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.
- 52.4 No additional amount shall be payable by the Council under clause 52.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.
- 52.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:
- 52.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;
- 52.5.2 that any amounts payable by the Parties in accordance with clause 52.2 (as limited by clause 52.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 52.6 No payment of any amount pursuant to this clause 52, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 52.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- 52.8 This clause continues to apply after expiration or termination of this Deed.

## **53 Explanatory Note**

- 53.1 The Appendix contains the Explanatory Note relating to this Deed required by clause 25E of the Regulation.
- 53.2 Pursuant to clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Planning Deed.

## **Schedule 1**

(Clause 1.1)

### **Land Dedication Plan**

**Enterprise Avenue, South Nowra Planning Agreement**  
**Shoalhaven City Council**  
**Palmira Holdings Pty Ltd**

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**Enterprise Avenue, South Nowra Planning Agreement**  
**Shoalhaven City Council**  
**Palmira Holdings Pty Ltd**

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**Execution**

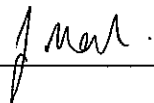
**Executed as a Deed**


**Dated:** 8 Dec. 2017


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**Executed on behalf of the Council**

  
\_\_\_\_\_  
General Manager

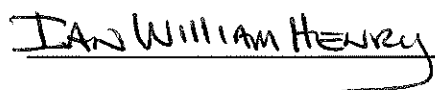
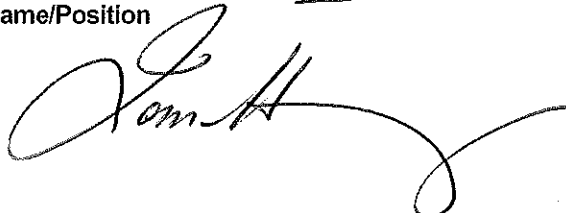
  
\_\_\_\_\_  
Witness

  
\_\_\_\_\_  
Mayor

  
\_\_\_\_\_  
Witness

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**Executed on behalf of the Palmira Holdings Pty Ltd** in accordance with  
s127(1) of the Corporations Act (Cth) 2001

  
\_\_\_\_\_  
Name/Position  


  
\_\_\_\_\_  
Name/Position

## **Appendix**

(Clause 53)

*Environmental Planning and Assessment Regulation 2000*

(Clause 25E)

## **Explanatory Note**

### **Draft Planning Agreement**

Under s93F of the *Environmental Planning and Assessment Act 1979*

### **Parties**

**Shoalhaven City Council** ABN 59 855 182 344 of City Administration Centre, 36 Bridge Road NOWRA NSW 2541 (**Council**)

**Palmira Holdings Pty Ltd** ABN 29 002 627 956 of 104 Princes Highway, South Nowra NSW 2541 (**Landowner**)

### **Description of the Land to which the Draft Planning Agreement Applies**

Lot 25-26 DP734975, Lot 1 DP1175256 Lot 7 DP731949, part Lot 2 DP1170503

### **Description of Proposed Development**

Development means any development, within the meaning of the Act, on the Palmira Land the subject of Development Consent granted after the commencement of this Deed.

### **Summary of Objectives, Nature and Effect of the Draft Planning Agreement**

#### **Objectives of Draft Planning Agreement**

**Enterprise Avenue, South Nowra Planning Agreement**  
**Shoalhaven City Council**  
**Palmira Holdings Pty Ltd**

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The objective of the Draft Planning Agreement is to secure the dedication of land and the design and construction of an extension to Enterprise Avenue to Quinns Lane.

**Nature of Draft Planning Agreement**

The Draft Planning Agreement is a planning agreement under s93F of the *Environmental Planning and Assessment Act 1979 (Act)*. The Draft Planning Agreement is a voluntary agreement under which Development Contributions (as defined in clause 1.1 of the Draft Planning Agreement) are made by the Landowner for various public purposes (as defined in s93F(3) of the Act).

**Effect of the Draft Planning Agreement**

The Draft Planning Agreement:

- relates to the carrying out of the Development (as defined in clause 1.1 of the Draft Planning Agreement) on the Palmira Land by the Landowner,
- excludes the application of s94, s94A or s94EF of the Act to the Development,
- makes provision for the dedication of land for the purpose of extending Enterprise Avenue to Quinns Lane.
- makes provision for the Landowner to carry out the design and construction of the extension of Enterprise Avenue.
- imposes obligations on the Landowner in relation to the carrying out of the road works, the handing over of those works to the Council and the rectification of defects in those works,
- is to be registered on the title to the Palmira Land,
- imposes restrictions on the Parties transferring the Palmira Land or part of the Palmira Land or assigning, or novating an interest under the agreement,
- provides for the provision of works as executed plans in respect of Works carried out by the Landowner,
- provides two dispute resolution methods for a dispute under the agreement, being expert determination and mediation,
- provides that the agreement is governed by the law of New South Wales, and
- provides that the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* applies to the agreement.

**Assessment of the Merits of the Draft Planning Agreement**

**The Planning Purposes Served by the Draft Planning Agreement**

The Draft Planning Agreement:

- promotes and co-ordinates the orderly and economic use and development of the land to which it applies,
- provides land for public purposes in connection with the Development,

- provides increased opportunity for public involvement and participation in environmental planning and assessment of the Development.

#### **How the Draft Planning Agreement Promotes the Public Interest**

The draft Planning Agreement promotes the public interest by promoting the objects of the Act as set out in s5(a)(ii),(iv) and 5(c) of the Act.

#### **For Planning Authorities:**

##### ***Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities***

N/A

##### ***Other Public Authorities – How the Draft Planning Agreement Promotes the Objects (if any) of the Act under which it is Constituted***

N/A

##### ***Councils – How the Draft Planning Agreement Promotes the Elements of the Council's Charter***

The Draft Planning Agreement promotes the elements of the Council's charter by:

- providing adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively,
- keeping the local and wider community informed about its activities.

##### ***All Planning Authorities – Whether the Draft Planning Agreement Conforms with the Authority's Capital Works Program***

Council will pay a portion of the design and construction works to represent the works to be undertaken on the land already owned by Council (Lot 7 DP 731949). Council is undertaking a review of road projects in the Contributions Plan which to provide this funding.

##### ***All Planning Authorities – Whether the Draft Planning Agreement specifies that certain requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued***

Yes. The Draft Planning Agreement requires the construction of the extension of Enterprise Avenue to be completed before the issuing of the first part 4A Certificate in respect of the Development.