

# Market Street Planning Agreement

Bega Valley Shire Council ("**Council**")

ABN 26 987 935 332 of PO Box 492 Bega, NSW, 2550

And

Merimbula Central Pty Ltd ("**the Developer**")

ACN 651 417 195 of 26 Kimberley Drive, Bowral NSW 2576

And

Spungrow Pty Ltd ("**the Owner**")

ACN 002 333 404 c/- Kothes Accountants, 163 Auckland St, Bega NSW 2550



Deed made at Bega on .....2023

## Parties

**Bega Valley Shire Council** ABN 26 987 935 332 of PO Box 492 Bega, NSW, 2550  
(**Council**)

And

**Merimbula Central Pty Ltd** ACN 651 417 195 of 26 Kimberley Drive, Bowral NSW  
2576 (**Developer**)

And

**Spungrow Pty Ltd** ACN 002 333 404 of c/- Kothes Accountants, 163 Auckland St,  
Bega NSW 2550 (**Owner**)

## Background

- A. On or about 24 February 2022 the Developer, with the consent of the Owner, submitted the Planning Proposal to amend the Bega Valley Local Environmental Plan 2013 (**BLEP**) for land at 29-33 Market Street, Merimbula (**the Planning Proposal**). The Planning Proposal seeks to amend the BLEP Height of Buildings Map as it applies to the subject land by increasing the maximum building height for the site from 13 metres to 18 metres.
- B. On 20 May 2022, the Developer received a conditional gateway determination under section 3.34(2) of the *Environmental Planning and Assessment Act 1979* (**the Act**) that the BLEP amendment proposed by the Planning Proposal should proceed.
- C. On 24 May 2023, the Council resolved to support the Planning Proposal following the execution of a planning agreement.
- D. On 28 May 2023 the Developer made a formal offer to enter into a planning agreement to provide the following items of material public benefit in connection with the Planning Proposal:
  - 1. the widening of the Market Street public domain by 3m;
  - 2. the provision of street beautification works; and
  - 3. the provision of an alleyway access between Market Street and the Palmer Lane carpark, as detailed in Attachments E and F to the planning proposal.
- E. In accordance with section 7.4 of the Act, this deed formalises the Council's acceptance of the offer made by the Developer.

## Operative Provisions

### 1. Definitions and Interpretation

#### 1.1 Definitions

In this deed:

**"Accessway"** means a pedestrian thoroughfare on the Land between Market Street and Palmer Lane (including a right of public footway) in accordance with the requirements of cl.8 and Schedule 3 of this Deed.

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

**"Approval"** means any approvals, consents, modifications, certificates, permits, endorsements, licences, conditions or requirements (and any modifications or other variations to them) which may be required by law in connection with the commencement and carrying out, as applicable, of the works associated with the provision of the Contributions.

**"Authority"** means any governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity and includes a "certifier" as defined in s.6.1 of the Act.

**"BLEP"** means the *Bega Valley Local Environmental Plan 2013*.

**"Building Height"** has the same meaning as under the *BLEP*.

**"Business Day"** means any day on which banks are open for business generally in NSW, except for Saturday, Sunday or a day which is a public holiday in NSW.

**"Business Hours"** means from 9am to 5pm on each Business Day.

**"Commencement"** means the date that this deed is signed by both parties.

**"Contributions"** means the provision of the Accessway, the Public Domain and the Street Beautification Contribution in accordance with this Deed.

**"Construction Certificate"** has the same meaning as in the Act.

**"Costs"** means external costs, charges and expenses, including those incurred in connection with consultants and advisers.

**"Council"** means Bega Valley Shire Council.

**"Developer"** means the person who is entitled to carry out a Development which, as at the time this deed was executed, is Merimbula Central Pty Ltd,

**"development"** has the same meaning as under the Act.

**"Development"** means the development the subject of the Development Application or any other development proposed on the Land which complies with a maximum height development standard as a consequence of the making of the Planning Proposal, provided the amendment resulting from the making of the Planning Proposal is to allow a maximum development height of not less than 18m.

**“Development Application”** means the Development Application 2022.62 relating to the Land lodged by the Developer on or about 24 February 2022 as amended from time to time in accordance with the Act, and includes the Public Domain and the Accessway.

**“Explanatory Note”** means the explanatory note relating to this deed as required by clause 205 of the Regulation and attached as Annexure B to this deed.

**“Force Majeure Event”** means an event affecting a party which is outside that party’s reasonable control including fire, storm, flood, drought, earthquake, explosion, war, invasion, rebellion and sabotage.

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

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

**“Insolvent”** means where a Party:

- (a) has had a liquidator or receiver or receiver and manager is appointed to it (unless the application is withdrawn, struck out or dismissed within 14 days of being made); or
- (b) proposes a reorganisation, moratorium, deed of company arrangement or other administration involving one or more of its creditors, or its winding up or dissolution; or
- (c) has come under administration as defined in section 9 of the Corporations Act 2001 (Cth), or action is taken which would result in that event; or
- (d) is unable to pay its debts and liabilities as they fall due as disclosed in its accounts; or
- (e) a writ of execution is levied against it or its property;
- (f) any other secured creditor has commenced action to enforce its security; or
- (g) it is otherwise presumed insolvent under an applicable Law; or
- (h) anything occurs under the law of any jurisdiction which has a substantially similar effect to any of the above paragraphs of this definition.

**“Land”** means 29-33 Market Street, Merimbula NSW being all the land in Folio Identifiers lot 11 DP838058 and lot 112 DP1227927.

**“Law”** means:

- (a) the common law including principles of equity; and
- (b) the requirements of all statutes, rules, ordinances, codes, regulations, proclamations, by-laws or consents by an Authority,

presently applying or as they may apply in the future.

**“Legislation”** means any statute, rule, ordinance, code, regulation, proclamation, by-law or consent by an Authority.



**"Occupation Certificate"** has the same meaning as in the Act.

**"Owner"** means the registered proprietor of the Land which, as at the time this deed was executed, is Spungrow Pty Ltd.

**"Party"** means a party to this deed, including their respective successors and assigns.

**"Planning Proposal"** means the planning proposal submitted by the Developer on or about 24 February 2022 to amend the the Height of Buildings Map under the BLEP as it applies to the Land by increasing the maximum building height for the site from 13 metres to 18 metres.

**"Practical Completion"** means the time when works required to be carried out under this Deed relating to the Public Domain or the Accessway by the Developer are substantially complete and any incomplete part or defect is of a minor nature.

**"Public Domain"** means the part of the Land situated between the eastern boundary of the Land and outer edge of the façade of any building comprising the Development as shown in Annexure C of this Deed.

**"Register"** means the Torrens title register maintained under the *Real Property Act 1900* (NSW).

**"Road Reserve"** means the Market Street Road Reserve.

**"Regulation"** means the *Environmental Planning and Assessment Regulation 2021* (NSW).

**"Security"** means the security to be provided by the Owner in accordance with clause 7.5 of this deed.

**"State"** means the State of New South Wales.

**"Street Beautification Contribution"** means the provision of the Street Beautification Works in accordance with cl.7 of this deed.

**"Street Beautification Works"** means the works described in Schedule 2.

## 1.2 Interpretation

In this deed:

(a) headings are for convenience only and do not affect interpretation;

and unless the context indicates a contrary intention:

(b) "person" includes an individual, the estate of an individual, a corporation, an Authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;

(c) a reference to a Party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation;

(d) a reference to an Authority in this deed includes,

(1) where an Authority ceases to exist, the body which replaces it; and

- (2) where an Authority has its powers or functions transferred to another body the body which has the same or similar powers and which performs the same or similar functions.
- (e) neither this deed nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting;
- (f) a reference to a document (including this deed and the BLEP) is to that document as varied, novated, ratified or replaced from time to time;
- (g) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (h) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;
- (i) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this deed, and a reference to this deed includes all schedules, exhibits, attachments and annexures to it;
- (j) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (k) "includes" in any form is not a word of limitation;
- (l) a reference to dollars or \$ is to Australian currency; and
- (m) a reference to a term or expression defined in the Act shall have the meaning given to it by the Act.

## **2. Status of this deed**

This deed takes effect from Commencement.

## **3. Planning Agreement under the Act**

- (a) The Parties agree that this deed is a planning agreement within the meaning of section 7.4 of the Act.
- (a) Annexure B of this deed summarises the requirements for planning agreements under section 7.4 of the Act and the way this deed addresses those requirements.

## **4. Application of this deed**

This deed applies to:

- (a) the Land; and
- (b) any Development.

## **5. Contributions**

5.1 The Developer must provide the following Contributions for the public benefit in connection with the Development:

- (a) the Public Domain;
- (b) the Street Beautification Works in accordance with cl.7 of this deed; and
- (c) the Accessway.

5.2 For the avoidance of doubt, the Developer must provide the Contributions required under this deed whether or not the cost of doing so may exceed any cost estimate for any works relating to the Contributions that may have been provided to or by Council.

## **6. Widening of public domain**

### **6.1 Design and approval**

- (a) For the purpose of integrating the Public Domain with the adjacent footpath and public landscaping, following the granting of consent to the Development Application, the Developer shall request that the Council provide design principles and specifications for the materials which the Council reasonably requires be used by the Developer to form the surface of the widened Public Domain. The Council shall provide the specifications to the Developer within 28 days of the request being made.
- (b) The Developer must, at its own cost, prepare a design for the Public Domain.
- (c) The design must be submitted, in writing, to the Council for its approval.
- (d) On receipt of a design in accordance cl.6.1(c) the Council must, within 28 days:
  - (1) Notify the Developer, in writing, that the design for the Public Domain is accepted by the Council; or
  - (2) Give a written notice to the Developer to the effect that the design for the Public Domain is not accepted, and specify any matter which must be addressed. The Owner may then submit a further design in accordance with cl.6.1(c).
- (e) The Developer shall include in its application for a Construction Certificate for the Development the materials specified by the Council under Clause 6.1(c).
- (f) The Parties may, by written agreement, vary the requirements of Schedule 1 or any design for the Public Domain approved by the Council.

### **6.2 Construction**

- (a) The Developer must, as part of the Development and at its own cost, construct the Public Domain in accordance with the design and specification for materials provided for in cl.6.1.
- (b) The Developer must achieve Practical Completion of the construction of the Public Domain before the Developer applies for a final Occupation Certificate for a Development.

- (c) Once the Developer considers that the construction of the Public Domain is complete, the Developer is to provide a notice to the Council confirming that the works have been carried out and completed in accordance with the requirements of this deed.
- (d) On receipt of a notice under clause 6.2(c), the Council may, at its discretion, inspect the Public Domain to verify completion. Any such inspection is to take place within 28 Business Days of the date the notice is received (or such other time as agreed between the parties).
- (e) If the Council carries out an inspection under clause 6.2(d) then, within 28 Business Days of that inspection, the Council must:
  - (1) issue a notice confirming Practical Completion; or
  - (2) give the Developer a notice to the effect that the Public Domain contains a defect and needs to be rectified. The Developer must then address the defect and submit a further notice in accordance with 6.2(c).

### 6.3 Right of Footway

- (a) The Owner must grant an easement in gross, in favour of and at no cost to the Council, described as a “right of footway”, over the Public Domain in accordance with the terms in Schedule 1.
- (b) The Owner must submit an instrument for the grant of the right of footway required under cl.6.3(a) to the NSW Land Registry Services for registration before the Developer applies for a final Occupation Certificate for the Development.
- (c) For the avoidance of doubt, the Owner acknowledges and agrees that the Council will authorise all members of the public to go, pass and repass over the Land the subject of the right of footway.
- (d) The Owner is to do all things reasonably necessary to ensure the grant of the right of footway to the Council occurs.
- (e) The Owner is to ensure that the land the subject of the right of footway granted to the Council in accordance with this clause is free of all encumbrances and affectations (whether registered or unregistered and including without limitations any charge or liability for rates, taxes and charges) except as otherwise agreed in writing by the Council.

## 7. Street Beautification Contribution

### 7.1 Design and approval

- (a) The Council may issue a written direction to the Developer under this clause requiring the Developer to, at its own cost, prepare a design for street beautification works in the area between the eastern edge of the Land shaded blue in Annexure C and the kerb of Market Street.
- (b) The Council’s written direction is to include:
  - (1) A copy of any design prepared by or on behalf of (and endorsed by) the Council for the upgrade of Market Street, if available; or

- (2) The design principles for the Street Beautification Works and specifications for the materials which the Council reasonably requires to be used by the Developer in carrying out the Street Beautification Works.
- (c) The Developer's design must be in accordance with the requirements set out at Schedule 2 and include an estimate of the costs to the developer to carry out the works.
- (d) The design and estimated works costings must be prepared and submitted to the Council for its approval within 6 months from the date of the Council's direction.
- (e) On receipt of a draft design and estimated works costings in accordance with 7.1(d) the Council must, within three months:
  - (1) Notify the Developer, in writing, that the design and costings for the Street Beautification Works is approved by the Council; or
  - (2) Give a written notice to the Developer to the effect that
    - (A) the design for the Street Beautification Works is not accepted, and specify any matter which must be addressed; or.
    - (B) the estimated works costings is not agreed, and specify the basis for the non-agreement; or
    - (C) the design and works costings are not accepted.
  - (3) The Developer may then submit a further design or updated works cost estimate or both in accordance with cl. 7.1(d).
- (f) The Parties may, by written agreement, vary the requirements in Schedule 2 or the design approved by the Council in accordance with cl.7.1(e)(1) without amending this deed.

## 7.2 Construction of Street Beautification Works

- (a) Unless otherwise advised by the Council, within three months from the date the Street Beautification Works are approved by the Council under cl. 7.1(e)(1), the Developer must apply for development consent or such other approvals as are required for the Street Beautification Works.
- (b) The Developer must construct the Street Beautification Works, as approved and accordance with any requisite consent, within 12 months of:
  - (1) the date the requisite consent or approval is given; or
  - (2) if no consent or approval is required, the date the design is approved.
- (c) Once the Developer considers that the Street Beautification Works have reached Practical Completion, the Developer is to provide a notice to the Council confirming that the works have been carried out and completed in accordance with the requirements of this deed.

- (d) On receipt of a notice under clause 7.2(c) the Council may, at its discretion, inspect the Street Beautification Works to verify completion. Any such inspection is to take place within 28 Business Days of the date the notice is received (or such other time as agreed between the parties).
- (e) If the Council carries out an inspection under clause 7.2(d) then, within 28 Business Days of that inspection, the Council must:
  - (1) issue a notice confirming Practical Completion of the Street Beautification Works; or
  - (2) give the Developer a notice to the effect that the Street Beautification Works contains a defect and needs to be rectified. The Owner must then address the defect and submit a further notice in accordance with cl. 7.2(c).

### 7.3 Maintenance

- (a) The Developer must, at its cost, maintain the Street Beautification Works in accordance with the requirements in Schedule 2, and submit an annual inspection and maintenance report for Council's consideration, for a period of 10 years from the date that the works achieve Practical Completion.
- (b) The Council may provide a notice to the Developer which requires the Developer to undertake works to maintain the Street Beautification Works.
- (c) The Developer must use all reasonable endeavours to carry out the necessary maintenance works to the reasonable satisfaction of the Council before the latter of:
  - (1) In relation to works undertaken of the Developer's own volition, within a reasonable time of becoming aware of the need to undertake maintenance works, but no more than three months;
  - (2) In relation to works which are the subject of a notice from the Council under clause 7.3(b), within the time specified, if any, by the Council under clause 7.3(b). If no time is specified, works must be undertaken within 3 months.
- (d) Once the Developer considers that any maintenance works required under a notice given by the Council under clause 7.3(b) are complete, the Developer is to provide notify the Council that the works have been carried out and completed in accordance with the requirements of this deed.
- (e) Within 28 days of receipt of a notice under clause 7.3(d) the Council may:
  - (1) issue a notice confirming the Practical Completion of maintenance works required under a notice given by the Council under clause **Error! Reference source not found.**; or
  - (2) give the Developer a notice to the effect that further work is required to notice to comply with the notice given by the Council under clause 7.3(b). The Developer must then address the defect and submit a further notice in accordance with cl. 7.3(d).

#### 7.4 General requirements for Street Beautification Works

- (a) In constructing and maintaining the Street Beautification Works, the Developer must:
- i. ensure that all works are carried out by suitably qualified and experienced contractors who hold insurance policies covering workers compensation, and public liability;
  - ii. ensure all work is done to the Council's reasonable satisfaction and in accordance with all relevant approvals and consents;
  - iii. cause as little inconvenience as is practicable to the Council and/or any other person who may use the Road Reserve;
  - iv. cause as little damage as is practical to the Road Reserve and any improvement on it; and
  - v. repair any damage caused by the Developer to the satisfaction of the Council.

#### 7.5 Street Beautification Works – Security

- (a) To secure the construction and maintenance of the Street Beautification Works, the Developer shall provide a bank guarantee in favour of the Council within 30 days of the date the Council approves the Street Beautification Works design from an institution, and on terms, reasonably acceptable to the Council in the sum of 110% of the approved cost of works (as a Performance Bond), with 10% of the cost of works to be held as a Maintenance Bond) (**the Security**).
- (b) If the Developer does not comply with any of the Developer's obligations under this deed in relation to the Street Beautification Works the Council may, after giving 14 days' notice;
- (1) remedy any default at the expense of the Developer; and
  - (2) call upon on the Security amount (being either the Performance Bond or Maintenance Bond, as applicable), without notice to the Developer, to reimburse the Council for the costs incurred in remedying the Developer's default, including to meet the costs of any associated liability, loss, costs, charges or expenses directly or indirectly incurred by the Council because of the failure of the Developer to fulfil the Developer's obligations under this deed with respect to the Street Beatification Works.
  - (3) recover any additional costs incurred by the Council in remedying the Developer's default as a debt against the Developer.
- (c) If the Council calls on the Security in accordance with this deed, the Council may, by notice in writing to the Developer, require the Developer to provide a further Bank Guarantee in an amount that, when added to any unused portion of any existing Road Maintenance Security, does not exceed the amount of the Bank Guarantee the Council is entitled to hold under cl. 7.5(a).
- (d) The Developer is not required to continue to provide, and the Council agrees to release, the Performance Bond, on and from the date the Council gives notice of Practical Completion for the Street Beautification Works under cl.7.2(e)(1).

- (e) The Developer is not required to continue to provide, and the Council agrees to release, the Maintenance Bond, on the latter of:
  - i. the date 10 years from the date the Council gives notice of Practical Completion for the Street Beautification Works under cl.7.2(e)(1); or
  - ii. the date that the Council give notice of Practical Completion for any maintenance works required to be undertaken under cl.7.3(e)(2).
- (f) The maintenance obligation in cl. 7.3 and Maintenance Bond do not apply to material physical changes made by Council to the Street Beautification Works constructed by the Developer except where the changes result from emergency works required to be undertaken by Council.

## **8. Provision of Accessway**

### **8.1 Design**

- (a) The Developer must, at its own cost, and as part of its Development Application, prepare and provide a design for the Development which includes the Accessway.
- (b) The design must be in accordance with the requirements set out in Schedule 3 and must be provided to the Council for its approval.
- (c) On receipt of a design in accordance cl. 8.1(b) the Council must, within 28 days:
  - (1) Notify the Developer, in writing, that the design for the Accessway is accepted by the Council for the purpose of this Agreement; or
  - (2) Give a written notice to the Developer to the effect that the design for the Accessway is not accepted, and specify any matter which must be addressed. The Owner may then submit a further design in accordance with cl 8.1(b)6.1(c).
- (d) The parties may, by written agreement, vary the requirements of Schedule 3 or any design for the Accessway approved by the Council.

### **8.2 Construction**

- (a) The Developer must, as part of any Development of the Land and at its own cost, construct the Accessway in accordance with the design provided for in clause 8.1.
- (b) The Developer must achieve Practical Completion of the Accessway before the Developer applies for a final Occupation Certificate for the Development.
- (c) Once the Developer considers that the construction of the Accessway is complete, the Developer is to provide a notice to the Council confirming that the works have been carried out and completed in accordance with the requirements of this deed.
- (d) On receipt of a notice under clause 8.2(c), the Council may, at its discretion, inspect the Accessway to verify completion. Any such inspection is to take place within 28 Business Days of the date the notice is received (or such other time as agreed between the parties).



- (e) If the Council carries out an inspection under clause 8.2(d) then, within 28 Business Days of that inspection, the Council must:
  - (1) issue a notice confirming Practical Completion; or
  - (2) give the Developer a notice to the effect that the Accessway contains a defect and needs to be rectified. The Developer must then address the defect and submit a further notice in accordance with 8.2(c).

### **8.3 Right of Footway over Accessway**

- (a) The Owner must grant an easement in gross, in favour of and at no cost to the Council, described as a “right of footway” over the Accessway in accordance with the terms contained in Schedule 3.
- (b) For the avoidance of doubt, the Owner acknowledges and agrees that the Council will authorise all members of the public to go, pass and repass over the Land the subject of the right of footway.
- (c) The Owner must submit an instrument for the grant of the right of footway required under cl.8.3(a) to the NSW Land Registry Services for registration on or before the date that the Developer applies for a final Occupation Certificate for a Development.
- (d) The Owner is to do all things reasonably necessary to ensure the grant of the right of footway to the Council occurs.
- (e) The Owner is to ensure that land the subject of the right of footway granted to the Council in accordance with this clause is free of all encumbrances and affectations (whether registered or unregistered and including without limitations any charge or liability for rates, taxes and charges) except as otherwise agreed in writing by the Council.

## **9. Application of s.7.11, s.7.12 and s.7.24 of the Act**

- (a) This deed does not exclude the application of section 7.11 of the Act to the Development.
- (b) The benefits provided under this agreement are not to be taken into consideration in determining a development contribution under section 7.11 of the Act in relation to the Development.
- (c) This deed does not exclude the application of section 7.12 of the Act to the Development.
- (d) This deed does not exclude the application of section 7.24 of the Act to the Development.

## **10. Interests in the Land**

### **10.1 Ownership**

The Owner represents and warrants to the Council that:

- (a) it owns the Land or has the exclusive right to own the Land; and

- (b) it has entered into an agreement with the Developer under which the Developer has the right to carry out the Development on the Land.

## 10.2 Registration

- (a) The Owner agrees to register this Deed on the title for the Land within 3 months of Commencement.
- (b) the Owner must do all things required to enable timely registration to occur, including by obtaining the consent of each person who has an estate or interest in the Land to its registration.
- (c) the Owner warrants that it has the unconditional and irrevocable consent of the owner of the Land and of each person who has an estate or interest in the Land to register this Deed on the title for the Land.

## 11. Enforcement of Obligations

### 11.1 Enforcement

This deed may be enforced by any Party in any court of competent jurisdiction.

### 11.2 Security

The parties acknowledge and agree that:

- (a) the effect of clauses 10.2 and 14 is to bind any future Owner to the terms of this deed; and
- (b) the effect of s.4.15(1)(iia) of the Act is that this agreement will be considered in the determination of a Development Application; and
- (c) the Council may impose conditions on any development consent granted under the Act to the Development Application to the effect that the Developer is required to make the Contributions required under this deed.

## 12. Termination

12.1 This deed terminates if any of the following circumstances arise:

- (a) *Bega Valley Local Environmental Plan 2013* is not amended generally in accordance with the Planning Proposal;
- (b) the parties agree in writing at any time to terminate this deed.

## 13. Dispute Resolution

### 13.1 Parties to meet

- (a) If a dispute between any of the Parties arises in connection with this deed or its subject matter then either disputing Party may give the other a Notice of Dispute in writing identifying and providing details of the dispute.
- (b) The disputing Parties must continue to perform their respective obligations under this deed despite the existence of a dispute.

- (c) Representatives of the disputing Parties must promptly (and in any event within 10 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.
- (d) The disputing Parties may, without limitation:
  - (1) resolve the dispute during the course of that meeting;
  - (2) **agree that further material, or arbitration about a particular issue** is needed to effectively resolve the dispute or agree to a form of alternative dispute resolution (in which event the parties will, in good faith, agree to a timetable for resolution); or
  - (3) agree that the disputing parties are unlikely to resolve the dispute.

### 13.2 Litigation

- (a) If a dispute arises between the Council and the Developer or the Owner in relation to this deed then the disputing Parties must not commence any court proceedings relating to the dispute unless the disputing Parties have first complied with the processes in clause 13.1.
- (b) If the dispute is not finally resolved in accordance with the process in clause 13.1 then a disputing Party is at liberty to litigate the dispute.
- (c) Nothing in this clause 13 prevents:
  - (1) a disputing Party from seeking urgent interlocutory relief;
  - (2) a disputing Party from bringing proceedings in a Court of competent jurisdiction to enforce any aspect of this deed or any matter to which this deed relates; or
  - (3) a disputing Party from exercising any function under any Legislation, including the Act, or any other Law relating to the enforcement of any aspect of this deed or any matter to which this deed relates.

## 14. Change of the owner of the land

- (a) If the Owner intends to cease to be the owner of the land or the Developer intends to cease to be the person who will carry out the Development (in either case, the **Outgoing Party**), they must:
  - (1) give 14 days advance notice to the Council of the identity of the person who will own the land or carry out the Development (**New Party**), including by providing a phone number, email address and postal address for the New Party and, if requested by the Council, provide evidence of the New Party's capacity to make the Contribution; and
  - (2) procure the entering into of a deed of novation between the Council, the New Party and the Outgoing Party on terms acceptable to the Council, acting reasonably, and under which
    - i. the New Party replaces the Outgoing Party in this Deed as if the New Party was an original party to this Deed;

- ii. the New Party obtains all the rights and assumes all the obligations of the Outgoing Party under this Deed;
- iii. the Outgoing Party and the Council each release the other from any Claim, obligation or liability arising under this Agreement, whether arising before or after the novation date.

## **15. Review and amendment of this deed**

- (a) An amendment to a Schedule or an approved design under this deed is not an amendment to this deed for the purpose of sections 203, 204 and 205 of the Regulation.
- (b) This deed may be reviewed or modified by the Parties at any time. Any review or modification of this deed will be conducted in the circumstances and in the manner determined by the Parties.
- (c) No modification or review of this deed will be of any force or effect unless it is in writing and signed by both Parties.

## **16. Costs**

The Developer is to pay all Costs (including legal fees) incurred by the Council in relation to the preparation, negotiation, execution and (where applicable) the stamping and registration of this deed. For the avoidance of doubt, the Developer is liable for its own Costs in connection with this deed.

## **17. Indemnity**

- (a) The Developer indemnifies the Council from and against all claims for damages that may be sustained, suffered, recovered or made against the Council resulting or arising from any breach by the Developer of its obligations under this deed.
- (b) The Developer's liability in respect of any indemnity given under this clause will be reduced proportionally to the extent that any unlawful, negligent or deliberately wrongful act or omission of the Council, its contractors, employees or agents contributed to any loss or damage.

## **18. Use of Explanatory Note**

The Explanatory Note must not be used to assist in construing this deed.

## **19. Notices**

- (a) A notice given by a Party pursuant to this deed has no legal effect unless it is in writing.
- (b) All written notices given under this deed may be validly given by any one of the following means:
  - (1) by sending it by prepaid post to the address of the Party, which in the case of each of the Developer and the Landowner for service of notices by post, is PO Box 9482 Deakin ACT 2600;
  - (2) by email to the email address of the Party to be served; or

- (3) by delivering it to the Party to be served.
- (c) The Parties expressly acknowledge that it is each Party's responsibility to ensure that the other Parties are fully aware of that Party's current contact details at all times throughout the duration of this deed. Notices sent by one Party to another Party which are addressed to an address previously notified to the delivering Party as the other Party's address are deemed received by the other Party unless and until that other Party can prove it had notified the delivering Party of a more recent address.
- (d) A notice shall be deemed to be given and received:
- (1) if sent by pre-paid post or by document exchange, 2 Business Days after it has been posted;
  - (2) if sent by email during Business Hours, on the day it was sent and, if sent by email outside Business Hours, on the first Business Day after the day it was sent; and
  - (3) if delivered during Business Hours, on the day of delivery and, if delivered outside Business Hours, on the first Business Day after the day of delivery.
- (e) As at the date of this deed each Party's address for service is as follows:
- For the Council:**
- Delivery address: Zingel Place, Bega NSW 2550
- Post: PO Box 492, Bega NSW 2550
- Email: [council@begavalley.nsw.gov](mailto:council@begavalley.nsw.gov)
- For the Developer:**
- Delivery address: 26 Kimberley Drive, Bowral NSW 2576
- Post: PO Box 9482 Deakin ACT 2600
- Email: [merimbulacentral@gmail.com](mailto:merimbulacentral@gmail.com)
- For the Owner**
- Delivery address: c/- Kothes Accountants, 163 Auckland St, Bega NSW 2550
- Post: PO Box 9482 Deakin ACT 2600
- Email: [spungrow@gmail.com](mailto:spungrow@gmail.com)
- (f) A notice given or a document signed or served on behalf of any Party by any director or company secretary or solicitor of that Party shall be deemed to have been given, signed or served by that Party personally.

- (g) Any notice sent by email will be taken to have been received by the addressee for the purposes of this deed unless the sender receives a message indicating that delivery has failed.
- (h) A Party may change its address for notices by giving the other Parties 3 Business Days' written notice of the change.

## **20. Miscellaneous**

### **20.1 Relationship of the Parties**

- (a) Nothing in this deed creates a relationship of agency between the Parties or, except as expressly provided, authorises one of them to enter into any contracts or other commitments which bind another Party without their express written approval.
- (b) Nothing in this deed is intended or to be implied to create a relationship of employment, public-private partnership or joint venture between the Parties or any of their respective agents, employees, sub-contractors and assigns.

### **20.2 No Waiver**

- (a) Any delay or failure to enforce any term of this deed will not be deemed to be a waiver.
- (b) There is no implied waiver by any Party in respect of any term of this deed and any waiver granted by a Party shall be without prejudice to any other rights.
- (c) Any waiver must be in writing, and in the case of the Council, signed by the General Manager.
- (d) A waiver by a Party of its rights under this deed is only effective in relation to the particular obligation or breach in respect of which it is given, and does not cover subsequent breaches of the same or a different kind.

### **20.3 No Fetter**

Nothing in this deed is to be construed as requiring an authority to do anything that would cause it to be in breach of any of its obligations at Law, and without limitation:

- (a) nothing in this deed is to be construed as limiting or fettering in any way the exercise of any statutory discretion or duty; and
- (b) nothing in this deed imposes any obligation on the Council to:
  - (1) grant development consent or project approval, including granting development consent to a Development or any other development proposed by the Developer; or
  - (2) exercise any function or power under the Act in relation to a change, or a proposed change, to an environmental planning instrument, including the amendment to the BLEP proposed by the Planning Proposal .

**20.4 Governing Law**

This deed shall be governed by and construed in accordance with the Law of New South Wales and the Commonwealth of Australia and the parties submit themselves to the exclusive jurisdiction of the courts of those jurisdictions and those that have jurisdiction to hear any appeals from them.

**20.5 Entire Agreement**

This deed:

- (a) is the entire agreement of the Parties concerning everything connected with the subject matter of this deed; and
- (b) supersedes any prior representations, statements, promises or understanding on anything connected with that subject matter.

**20.6 Severability**

If any provision of this deed is void, unenforceable or illegal in the jurisdiction governing this deed, then:

- (a) it is to be read down so as to be valid and enforceable; or
- (b) if it cannot be read down, the provision (or where possible the offending words), is severed from this deed and the rest of this deed remains in force.

**20.7 Counterparts**

This deed may be executed in any number of counterparts, all of which taken together constitute one and the same document.

**20.8 Further assurances**

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

**20.9 Representation and Warranties**

The Parties represent and warrant that they have obtained, or had the opportunity to obtain, legal advice on the terms and effect of this deed and have the power to enter into this deed and to comply with their obligations under this deed.

**20.10 Confidentiality**

This deed may be treated as a public document and will be included in the Council's register of planning agreements.

**20.11 Time for doing acts**

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

Executed as a Deed on

11 December 2023

**EXECUTED** for and on behalf of Bega Valley  
Shire Council by its authorised delegate, in  
accordance with a resolution of the Council  
made on

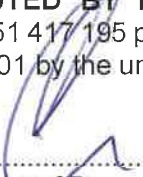
  
Signature of Authorised Delegate

ANTHONY MCMAHON  
Name of Authorised Delegate (in full)

  
Signature of Witness

JACQUELINE GRANT  
Name of Witness (in full)

**EXECUTED BY Merimbula Central Pty Ltd**  
ACN 651 417 195 pursuant to S.127 Corporations  
Act, 2001 by the undersigned

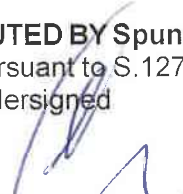
  
Signature of Director/ Secretary


  
THOMAS GREEN  
Name of Director/ Secretary

ROBERT GREEN  
Signature of Witness

Name of Director/ Secretary

**EXECUTED BY Spungrow Pty Ltd** ACN 002 333  
404 pursuant to S.127 Corporations Act, 2001 by  
the undersigned

  
Signature of Director/ Secretary  
ROBERT GREEN

  
THOMAS GREEN  
Name of Director/ Secretary

Signature of Witness

Name of Director/ Secretary



## **Schedule 1**

### **Widened Public Domain**

#### **1. Terms of Right of Footway**

- A. The Prescribed Authority indicated herein and every person authorised by it (including, for the avoidance of doubt, members of the public), may, by reasonable means, go, pass and repass on foot at all times and for all purposes over the land indicated herein as the servient tenement.
- B. The name of person or authority empowered to release, vary or modify the Right of Footway wide is the Bega Valley Shire Council.
- C. The owner of the lot burdened must, at all times, keep the site of the Right of Footway in a state of good repair and maintain the site of the Right of Footway so as to ensure the safe and orderly use of the Right of Footway.

## **Schedule 2**

### **Street Beautification Works**

The Street Beautification Works must provide all design elements (including, without limitation, lighting, paving, garden beds, street furniture, tree and vegetation plantings).

The Street Beautification Works must be designed to complement and be compatible with the implementation of the Merimbula Transport Plan, as adopted by the Council, as well as the design or design principles and materials, as applicable, provided by the Council under cl. 7.1(b)

The Street Beautification Works must include the placement and/or relocation of drainage, irrigation and additional conduits to facilitate future expansion of underground power, telecommunications or other utilities.

## Schedule 3

### Accessway

#### 1. Design and other requirements

The Accessway:

- A. must be a width of not less than 6m
- B. must be lined with active commercial premises on both sides at its Market Street Entrance;
- C. may have tables and chairs in association with cafes and restaurants other than on the right of footway;
- D. may include commercial premises, together with such other features as are reasonably required for a large mixed-use commercial and residential building; those features may include, but are not limited to, decorative features, seating, tables and chairs, noticeboards, signage; the Accessway may also be used as a means of accessing car parking, a loading bay, residential lobbies, garbage bins, toilet(s), communal areas, gardens and any other facilities which need access;
- E. must minimise changes of direction and maintain a line of sight through the arcade, with appropriate way finding signage;
- F. must be open for extended periods (minimum 8am-6pm daily);
- G. must be accessible in accordance with the requirements of the Building Code of Australia, relevant Australian Standards and with regard to the Disability Discrimination Act 1992 and well-lit when open;
- H. must be encumbered by the right of footway 2 metres wide centred within the Accessway in the terms of Part 2 of this Schedule 3.

#### 2. Terms of Right of Footway

- A. The Prescribed Authority indicated herein and every person authorised by it (including, for the avoidance of doubt, members of the public), may, by reasonable means, go, pass and repass on foot between the times of 8am and 6pm for all purposes over the land indicated herein as the servient tenement.
- B. The name of person or authority empowered to release, vary or modify the Right of Footway is the Bega Valley Shire Council.
- C. The owner of the lot burdened must, at all times, keep the site of the Right of Footway in a state of good repair and maintain the site of the Right of Footway so as to ensure the safe and orderly use of the Right of Footway.

## Annexure A

### Section 7.4 Requirements

SUBJECT AND SUBSECTION OF THE ACT	THIS PLANNING AGREEMENT
The Developer has:	
(a) sought a change to an environmental planning instrument	The Developer has made a Planning Proposal to amend the <i>Bega Valley Local Environmental Plan 2013</i> and a Development Application.
(b) made, or proposes to make, a Development Application	
(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies	
Description of the land to which this Planning Agreement applies – s.7.4(3)(a)	Refer to clause 4 and definition of 'Land' in clause 1
Description of the development –s.7.4(3)(b)	Refer to the definition of Planning Proposal in clause 1
The nature and extent, timing, and manner of delivery of contribution required by this Planning Agreement – s. 7.4(3)(c)	Refer to clauses 5, 6, 7 and 8.
Applicability of s.7.11 of the Act – Section 7.4(3)(d)	Refer to clause 9
Applicability of section 7.12 of the Act – Section 7.4(3)(d)	Refer to clause 9
Applicability of section 7.24 of the Act – Section 7.4(3)(d)	Refer to clause 9
Whether benefits are to be taken into account under section 7.11 – Section 7.4(3)(e)	Refer to clause 9
Mechanism for dispute resolution – Section 7.4(3)(f)	Refer to clause 13
Enforcement of the Planning Agreement – Section 7.4(3)(g)	Refer to clause 11.1
Registration of the Planning Agreement – Section 7.6	Refer to clause 10.2
No obligation to grant consent or exercise functions – Section 7.4(9)	Refer to clause 20.3

## Annexure B

### Explanatory Note

### Planning Agreement for public benefits

#### Introduction

The purpose of this Explanatory Note is to provide a plain English summary to support the notification of the proposed Planning Agreement (the "**Planning Agreement**") prepared under Section 7.4 of the *Environmental Planning & Assessment Act 1979* (the "**the Act**").

This Explanatory Note has been prepared jointly by the Parties as required by clause 25E of the *Environmental Planning & Assessment Regulation 2000* ("**the Regulation**").

This explanatory note is not to be used to assist in construing the deed.

#### Parties to the Planning Agreement

The Parties to the Planning Agreement are Bega Valley Shire Council ("**Council**") and Merimbula Central Pty Ltd ("**Developer**"). The Developer has made a Planning Proposal to amend the Bega Valley Local Environmental Plan 2013 for land at 29-33 Market Street, Merimbula (**the Planning Proposal**). The Planning Proposal seeks to amend the LEP Height of Buildings Map as it applies to the subject land by increasing the maximum building height of the site from 13 metres to 18 metres.

The Council has resolved to support the Planning Proposal following the execution of a planning agreement.

On 28 May 2023 the Developer made a formal offer to enter into a planning agreement with the Council to provide the following matters of material public benefit in connection with the Planning Proposal:

3. the widening of the Market Street public domain by 3m;
4. the provision of street beautification works; and
5. the provision of an accessway between Market Street and the Palmer Lane carpark, as detailed in Attachments E and F to the planning proposal

(collectively, the **Public Benefit**)

#### Summary of the objectives, nature and effect of the Planning Agreement

The objective of the Planning Agreement is to record the terms of the offer made by the Developer and its obligations to provide the Public Benefit.

The effect of the agreement is that the Developer will be required to incorporate the Public Benefits into any development of the Land which complies with a maximum height development standard as a consequence of the making of the Planning Proposal (provided the amendment resulting from the making of the Planning Proposal is to allow a maximum development height of not less than 18m) .

## **Assessment of the Merits of the Planning Agreement**

The benefits of the Planning Agreement are that any development of the land which complies with a maximum height development standard as a consequence of the making of the Planning Proposal (provided the amendment resulting from the making of the Planning Proposal is to allow a maximum development height of not less than 18m) will provide greater and higher quality areas for public use will provide greater and higher quality areas for public use.

### **Identification of how the Planning Agreement promotes the public interest and the objects of the Act**

The Planning Agreement promotes the public interest and the objects of the Act by providing additional, high quality public areas.

### **Identification of how the Planning Agreement promotes elements of the Council's Charter under the *Local Government Act 1993***

The Planning Agreement is consistent with the following guiding principles for Councils in section 8A of the *Local Government Act 1993* (which have replaced the Council Charter):

- In exercising functions generally:
  - Councils should carry out functions in a way that provides the best possible value for residents and ratepayers.
  - Councils should plan strategically, using the integrated planning and reporting framework, for the provision of effective and efficient services and regulation to meet the diverse needs of the local community.
  - Councils should manage lands and other assets so that current and future local community needs can be met in an affordable way.
- In decision making:
  - Councils should recognise diverse local community needs and interests.
  - Councils should consider the long term and cumulative effects of actions on future generations.
  - Councils should consider the principles of ecologically sustainable development.

The Planning Agreement is consistent with these principles in that it requires the Developer to provide street beautification works and additional areas for public access as part of its Development.

### **Identification of the planning purpose served by the Planning Agreement and whether the Planning Agreement provides for a reasonable means of achieving that purpose**

The planning purpose served by the Planning Agreement is the provision of public spaces within the Developer's proposed development.

The Planning Agreement provides a reasonable means of achieving these public purposes by requiring that a design for public spaces which has been approved by the Council form part of any application for a Development which complies with a maximum height development standard as a consequence of the making of the Planning Proposal (provided the amendment resulting from the making of the Planning Proposal is to allow a maximum development height of not less than 18m)

## exhibition

