

Appendix 5 – Proposed Voluntary Planning Agreement

DRAFT

Stoville / JC & RM Fleming Planning Agreement

Under s93F of the Environmental Planning and Assessment Act 1979

Ballina Shire Council
Stoville Pty Ltd
JC & RM Fleming

Dated "[Insert Date]" 2012

Updated draft March 2012

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Appendix 5 – Proposed Voluntary Planning Agreement (cont.)

Stoville / Duraplas Planning Agreement
Ballina Shire Council
Stoville Pty Ltd & JC & RM Fleming

STOVILLE / JC & RM FLEMING PLANNING AGREEMENT

Summary Sheet

Council:

Name: Ballina Shire Council
Address: PO Box 450
BALLINA NSW 2478
Telephone: 02 6686 4444
Facsimile:
Email: council@ballina.nsw.gov.au
Representative:

Developers:

Name: Stoville Pty Ltd
Address: PO Box 480
ALSTONVILLE NSW 2477
Telephone: 02 6629 5332
Facsimile: 02 6629 5332
Email: treilly@bigpond.com
Representative: Mr Tim Reilly

Name: JC & RM Fleming
Address: 8 Bertram Place
WOLLONGBAR NSW 2477
Telephone: 02 6628 0002
Facsimile: 02 6628 3804
Email: john@duraplas.com.au
Representative: Mr John Fleming

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Appendix 5 – Proposed Voluntary Planning Agreement (cont.)

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Ballina Shire Council
Stoville Pty Ltd & JC & RM Fleming

Land:

See definition of *Land* in clause 1.1.

Development:

See definition of *Development* in clause 1.1.

Development Contributions:

As per Council adopted Contributions Plans

Application of s94, s94A and s94EF of the Act

See clause 6.

Developer Commitments:

See Part 2 and clauses 7, 8 and 9.

Registration:

See clause 13.

Dispute resolution

Expert determination and mediation. See clauses 11 and 12.

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Appendix 5 – Proposed Voluntary Planning Agreement (cont.)

Stoville / Duraplas Planning Agreement
Ballina Shire Council
Stoville Pty Ltd & JC & RM Fleming

STOVILLE / JC & RM FLEMING PLANNING AGREEMENT

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

Parties

Ballina Shire Council ABN [tba] of PO Box 450, BALLINA NSW 2478
(Council)

and

Stoville Pty Ltd ABN [91923273253] of PO Box 141, KEMPS CREEK NSW 2178

and

JC & RM Fleming of 8 Bertram Place, WOLLONGBAR NSW 2477
(Developers)

Background

- A. Stoville Pty Ltd is the owner of the land.
- B. Duraplas Industries Pty Ltd, owned by JC & RM Fleming, currently occupies the land, utilising it to support activities undertaken by it on adjoining land in its ownership, being Lot 2 DP 707837.
- C. Stoville Pty Ltd has lodged with the Council a Rezoning Submission relating to the land, seeking to have it zoned for industrial use.
- D. Should the land be so zoned, the Developers are committed to proceeding with a boundary adjustment subdivision that transfers the land from Lot 1 DP 817406 to Lot 2 DP 707837.
- E. Following the boundary adjustment subdivision, the Developers are committed to removing the existing house on the land.
- F. The Developers are committed to providing a minimum 10 m wide landscaped buffer within the land.

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Operative Provisions

Part 1 - Preliminary

1 Definitions & Interpretation

1.1 In this Agreement the following definitions apply:

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

Agreement means this Agreement and includes any schedules, annexures and appendices to this Agreement.

Council means the *Ballina Shire Council*.

Development means the rezoning of the land from 7(l) Environmental Protection (Urban Buffer) Zone to 4 Industry Zone.

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.

Land means the land specified or described in Schedule 1.

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

Provision means the Developer's provision under this Agreement.

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

Work means the physical result of any building, engineering or construction work in, on, over or under land required to be carried out by the Developer under this Agreement.

1.2 In the interpretation of this Agreement, 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 Agreement.

1.2.2. A reference in this Agreement 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 Agreement 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 Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.

1.2.5. A reference in this Agreement to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.

1.2.6. A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.

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Ballina Shire Council
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- 1.2.7. A reference in this Agreement 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 Agreement.
- 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 Agreement includes the agreement recorded in this Agreement.
- 1.2.14. A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- 1.2.15. Any schedules, appendices and attachments form part of this Agreement.
- 1.2.16. Notes appearing in this Agreement are operative provisions of this Agreement.

2 Application of this Agreement

- 2.1 This Agreement applies to the Land and to the Development.

3 Status of this Agreement

- 3.1 The Developers are under no obligation in relation to the commitments provided for in this Agreement unless and until both of the following matters have occurred in sequence:
 - 3.1.1 the LEP amendment having the effect of rezoning the land from 7(i) Environmental Protection (Urban Buffer) Zone to 4 Industry Zone, comes into effect, and
 - 3.1.2 this Agreement is entered into as required by clause 25C(1) of the Regulation.
- 3.2 Until then, this document, executed only by the Developers, is to be read and construed as containing the Developers' irrevocable offer to make commitments once all of the matters specified in clause 3.1 have occurred.
- 3.3 The Council must notify the Developers immediately after the Council executes this Agreement and promptly provide the Developers with the Agreement as executed by the Council.

4 Further Agreements Relating to this Agreement

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

5 Surrender of right of appeal, etc.

- 5.1 The Developers are not to commence or maintain, or cause to be commenced or maintained, any proceedings in the Land and Environment Court involving an appeal against, or questioning the validity of, a Development Consent relating to the Development or an approval under s96 of the Act to modify a Development Consent relating to the Development to the extent that it relates to

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the existence of this Agreement or requires any aspect of this Agreement to be performed according to the terms of this Agreement.

6 Application of s94, s94A and s94EF of the Act to the Development

- 6.1 This Agreement does not exclude the application of s94 to the Development.
- 6.2 Any benefits under this Agreement will not be taken into consideration when determining a development contribution under s94 of the Act in relation to the Development.
- 6.3 This Agreement does not exclude the application of s94A to the Development.
- 6.4 This Agreement does not exclude the application of s94EF to the Development.

Part 2 - Developer and Council Commitments

7 Mechanism for Subdivision of the Land

- 7.1 The Developers agree that, following the rezoning of the land, subdivision will only proceed by way of a boundary adjustment that adds the rezoned portion of Lot 1 DP 817406 to Lot 2 DP 707837.

8 Future Use of Dwelling

- 8.1 The Developers agree that, prior to the issue of a Subdivision Certificate for the boundary adjustment subdivision, the existing dwelling on the land will be removed from the site or rendered uninhabitable.

9 Landscape Buffer

- 9.1 The Developers agree that, prior to the issue of a Subdivision Certificate for the boundary adjustment subdivision of the land, a 10 m wide landscape buffer will be planted within the dedicated buffer along the southern and eastern boundaries of the land.

Part 3 – Other provisions

10 Enforcement in a court of competent jurisdiction

- 10.1 Without limiting any other remedies available to the Parties, this Agreement may be enforced by either Party in any court of competent jurisdiction.
- 10.2 For the avoidance of doubt, nothing in this Agreement prevents:
 - 10.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates.
 - 10.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

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11 Dispute Resolution – expert determination

- 11.1 This clause applies to a dispute under this Agreement which relates to a matter that can be determined by an appropriately qualified expert.
- 11.2 Any dispute between the Parties as to whether a dispute to which this clause applies can be determined by an appropriately qualified expert is to be referred to the Chief Executive Officer of the professional body that represents persons with the relevant expertise for determination, which is to be final and binding on the Parties.
- 11.3 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 11.4 If a notice is given under clause 11.3, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- 11.5 If the dispute is not resolved within a further 28 days, the dispute must be referred to the President of the NSW Law Society to appoint an Expert for Expert Determination.
- 11.6 The Expert Determination is binding on the Parties except in the case of fraud or misfeasance by the Expert.
- 11.7 Each Party must bear its own costs arising from or in connection with the appointment of the Expert and the Expert Determination.

12 Dispute Resolution - mediation

- 12.1 This clause applies to any dispute under this Agreement other than a dispute to which clause 11 applies.
- 12.2 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 12.3 If a notice is given under clause 12.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- 12.4 If the dispute is not resolved within a further 28 days, the Parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and must request the President of the Law Society, or the President's nominee, to select a mediator.
- 12.5 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.

13 Registration of this Agreement

- 13.1 The Parties agree to register this Agreement, subject to obtaining the agreement of the persons specified in s93H (1) of the Act.

14 Assignment, Sale of Land, etc

- 14.1 Unless the matters specified in clause 14.2 are satisfied, the Developers are not to do any of the following:
 - 14.1.1 if the Developers are the owner of the Land, to transfer the Land to any person, or

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Appendix 5 – Proposed Voluntary Planning Agreement (cont.)

Stoville / Durapias Planning Agreement
Ballina Shire Council
Stoville Pty Ltd & JC & RM Fleming

14.1.2 assign or novate to any person the Developer's rights or obligations under this Agreement.

14.2 The matters required to be satisfied for the purposes of clause 14.1 are as follows:

14.2.1 the Developers have, at no cost to the Council, first procured the execution by the person to whom the Developer's rights or obligations under this Agreement are to be assigned or novated, of an agreement in favour of the Council on terms satisfactory to the Council, and

14.2.2 the Council, by notice in writing to the Developers, has stated that evidence satisfactory to the Council has been produced to show that the assignee or novatee, is reasonably capable of performing its obligations under the Agreement,

14.2.3 the Developers are not in breach of this Agreement, and

14.2.4 the Council otherwise consents to the transfer, assignment or novation.

15 Review of this Agreement

15.1 The Parties, acting in good faith and using their best endeavours, agree to review this Agreement if either party is of the opinion that any change of circumstance has occurred that materially affects the operation of this Agreement.

15.2 For the purposes of clause 15.1, 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.

15.3 For the purposes of addressing any matter arising from a review of this Agreement referred to in clause 15.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Agreement.

15.4 If this Agreement 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 Agreement is entered into.

15.5 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 15.1 is not a dispute for the purposes of clauses 11 and 12 and is not a breach of this Agreement.

16 Notices

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

16.1.1 delivered or posted to that Party at its address set out in the Summary Sheet, or

16.1.2 faxed to that Party at its fax number set out in the Summary Sheet, or

16.1.3 emailed to that Party at its email address set out in the summary Sheet.

16.2 If a Party gives the other Party 3 business days notice of a change of its address, fax number or email address, 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, fax number or email address.

16.3 Any notice, consent, information, application or request is to be treated as given or made if it is:

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Appendix 5 – Proposed Voluntary Planning Agreement (cont.)

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Ballina Shire Council
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- 16.3.1 delivered, when it is left at the relevant address.
- 16.3.2 sent by post, 2 business days after it is posted.
- 16.3.3 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.
- 16.4 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.

17 Approvals and Consent

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

18 Costs

- 18.2 The Parties agree to bear their own costs of preparing, negotiating, executing and stamping this Agreement and any document related to this Agreement.

19 Entire Agreement

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

20 Further Acts

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

21 Governing Law and Jurisdiction

- 21.1 This Agreement is governed by the law of New South Wales.
- 21.2 The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.
- 21.3 The Parties will not object to the exercise of jurisdiction by those courts on any basis.

22 Joint and Individual Liability and Benefits

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

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Appendix 5 – Proposed Voluntary Planning Agreement (cont.)

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Stoville Pty Ltd & JC & RM Fleming

23 No Fetter

23.1 Nothing in this Agreement 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.

24 Representations and Warranties

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

25 Severability

25.1 If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way.

25.2 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 Agreement, but the rest of this Agreement is not affected.

26 Modification

26.1 No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement or their successors or assigns.

27 Waiver

27.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.

27.2 A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given.

27.3 It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

28 Explanatory Note Relating to this Agreement

28.1 The Appendix contains the Explanatory Note relating to this Agreement required by clause 25E of the Regulation.

28.2 Pursuant to clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note in the Appendix is not to be used to assist in construing this Planning Agreement.

Appendix 5 – Proposed Voluntary Planning Agreement (cont.)

Stoville / Durapias Planning Agreement
Ballina Shire Council
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Schedule 1

(Clause 1.1)

The Land

That portion of Lot 1 DP 817406 shown edged in heavy black in the attached illustration titled "The Land"

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Appendix 5 – Proposed Voluntary Planning Agreement (cont.)

Stoville / Duraplas Planning Agreement
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Insert Illustration

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Appendix 5 – Proposed Voluntary Planning Agreement (cont.)

Stoville / Durapias Planning Agreement
Ballina Shire Council
Stoville Pty Ltd & JC & RM Fleming

Execution

Executed as an Agreement

Dated:

Executed on behalf of the Council

General Manager

Witness / Name / Position

Executed on behalf of the Developer in accordance with s127(1) of the Corporations Act (Cth) 2001.

Stoville Pty Ltd

Name / Position

Witness / Name / Position

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JC & RM Fleming

Name / Position

Witness / Name / Position

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Appendix 5 – Proposed Voluntary Planning Agreement (cont.)

Stoville / Durapias Planning Agreement
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Appendix (Clause 33)

Environmental Planning and Assessment Regulation 2000
(Clause 25E)

Explanatory Note

Draft Planning Agreement

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

Parties

Ballina Shire Council ABN [tba] of cnr Tamar and Cherry Streets, Ballina, NSW 2478 (Council)
Stoville Pty Ltd Pty Ltd ABN [tba] of PO Box 480, Alstonville, New South Wales 2478 (Developer)
JC & RM Fleming of 8 Bertram Place, Wollongbar, New South Wales 2477 (Developer)

Description of Land to which this Draft Planning Agreement applies:

That portion of Lot 1 DP 817406 shown edged in heavy black in the illustration to Schedule 1, being land located in the north-eastern corner of Lot 1.

Description of Proposed Change to Environmental Planning Instrument/Development Application

Rezoning of the land from its current zoning of 7(i) Environmental Protection (Urban Buffer) Zone to 4 Industry Zone.

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

This Agreement commits the developers to:

- proceeding with subdivision of the land by way of a boundary adjustment between Lot 1 DP 817406 and Lot 2 DP 707837;
- removing the existing dwelling on the land; and
- planting a landscape buffer within the 10 m strip of land to be dedicated to Council along the southern and eastern boundaries of the land (subject to Council agreement below).



Appendix 5 – Proposed Voluntary Planning Agreement (cont.)

Stoville / Duraplas Planning Agreement
Ballina Shire Council
Stoville Pty Ltd & JC & RM Fleming

Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

- Resolution of a long-standing land use conflict.
- Provision of buffer between industrial and agricultural land uses.

How the Draft Planning Agreement Promotes the Public Interest

- Provides for resolution of land zoning in accordance with historic land uses in the area.

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

[## to be completed by the Council ##]

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

[## to be completed by the Council ##]