



abn: 56 291 496 553  
6 Porter Street, Byron Bay, NSW, 2481  
PO Box 538, Lennox Head, NSW, 2478  
Bundjalung Country  
Telephone: 1300 66 00 87

19 January 2023  
Our reference: 1837.4286

The General Manager  
Ballina Shire Council  
PO Box 450  
BALLINA NSW 2478

Attention: Mr Simon Scott  
(Delivered by hand)

Dear Sir

**RE: Voluntary Planning Agreement associated with the Planning Proposal to relocate the Commercial Centre at Ballina Heights.**

Council at its meeting of 24<sup>th</sup> November 2022 resolved to continue to support the alterations to the zoning of land at Ballina Heights estate to facilitate the development of a new commercial centre in the locality. Following that meeting, you instructed Council's solicitors to finalise the Voluntary Planning Agreement. By email of 17 January 2023 you provided us with the final Voluntary Planning Agreement document. Please find attached that deed signed by the appropriate parties from the Catholic Church and Vixsun Pty Ltd.

Can you please advise when you forward the subject Planning Proposal to the Department for Gateway consideration.

Yours faithfully,

**PLANNERS NORTH**

**Stephen Connelly RPIA (Fellow)**  
PARTNERSHIP PRINCIPAL  
(m) 0419 237 982  
(e) [steve@plannersnorth.com.au](mailto:steve@plannersnorth.com.au)

Encl. Signed VPA



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## **Voluntary Planning Agreement**

**Ballina Shire Council**

**ABN 53 929 887 369**

**AND**

**Vixsun Pty. Limited**

**ABN 45 079 491 839**

**AND**

**The Trustees Of The Roman Catholic Church for the Diocese of  
Lismore**

**ABN 72 863 788 198**

Bartier Perry Pty Limited  
ABN 30 124 690 053  
Level 10, 77 Castlereagh Street, Sydney NSW Australia  
Phone: +61 2 8281 7800 Fax 61 2 8281 7838  
[www.bartier.com.au](http://www.bartier.com.au)

## Table of Contents

Parties	1
Background	1
Operative Provisions	2
1 Planning Agreement under the EPA Act	2
2 Operation	3
3 Definitions and Interpretation	3
4 Section 7.11, 7.12 and 7.24 of the EPA Act	6
5 Planning Proposal	6
6 Material Public Benefit to be provided under this Deed	7
7 Dispute Resolution	9
8 Enforcement	11
9 Risk	11
10 Registration and Restriction on Dealings	12
11 Notices	13
12 General	13
13 Costs	15
Schedule 1 – Planning Proposal	16
Schedule 2 – Letter of Offer	18
Schedule 3 – TRCCDL Property Portfolio	22
Schedule 4 – Land to which this Deed relates	23
Schedule 5 – Explanatory Note	25

**Date** 2022

## Parties

**Council** Ballina Shire Council ABN 49 907 174 773 ("**Council**")  
**Address** 40 Cherry Street  
Ballina NSW 2478  
**Attention** General Manager – Paul Hickey  
**Contact Telephone** 02 6686 1270  
**Contact Email** [Paul.Hickey@ballina.nsw.gov.au](mailto:Paul.Hickey@ballina.nsw.gov.au)

**First Applicant** Vixsun Pty. Limited ABN 45 079 491 839  
**Address** ("**Vixsun/The First Applicant**")  
17 Bellevue Avenue  
Ballina NSW 2478  
**Attention** Mr Rod Gates (Director)

**Second Applicant** The Trustees of The Roman Catholic Church for the  
**Address** Diocese of Lismore ABN 72 863 788 198  
("**TRCCDL/The Second Applicant**")  
51 Crane Street Ballina 2478.  
**Attention**  
**Contact Telephone** Steve Connelly, Planners North  
0419 237 982  
**Contact Email** [steve@plannersnorth.com.au](mailto:steve@plannersnorth.com.au)

## Background

- A The First Applicant (Vixsun) is the registered proprietor of the Existing Commercial Site.
- B The Existing Commercial Site is zoned B2 Local Centre pursuant to the *Ballina Local Environmental Plan 2012*. The land immediately to the north and south is zoned R3 Medium Density Residential.
- C The Second Applicant (TRCCDL) is the registered proprietor of the Proposed Commercial Site.
- D The Proposed Commercial Site is zoned R3 Medium Density Residential pursuant to the *Ballina Local Environmental Plan 2012*.
- E For the purpose of this Deed, the First Applicant and Second Applicant are collectively referred to as "**The Applicant**".
- F On 4 November 2021, Vixsun and TRCCDL, together, lodged with Council the Planning Proposal Request to rezone part of the Existing Commercial Site.
- G Council has prepared the Planning Proposal which seeks to rezone part of the

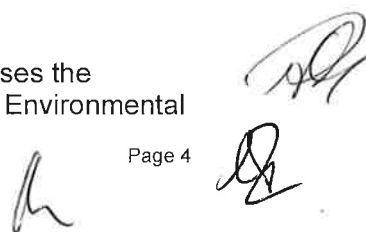
- H Existing Commercial Site to R3 Medium Density Residential (“**R3**”), and maintain the western part of the Existing Commercial Site (adjacent to the Pacific Highway) as B2 Local Centre (“**B2**”) pursuant to the LEP.
- I The Planning Proposal also seeks to rezone the Proposed Commercial Site from R3 to B2 to provide for the development of a neighbourhood commercial centre.
- J The purpose of the Planning Proposal is to enable the development of the rezoned portion of the Existing Commercial Site for residential housing, consistent with the pattern of development already established on the western side of Ballina Heights Drive, including the development of affordable housing and to provide for the timely development of the Ballina Heights commercial centre on the Proposed Commercial Site.
- K On 4 November 2021, the Applicant made an offer to Council noting that the Planning Proposal would be subject to the following terms:
- (i) Council will not sign any Subdivision Certificate for residential allotments on the rezoned portion of the Existing Commercial Site until an Occupation Certificate (for at least 1000m<sup>2</sup> of commercial floor space) has been issued in respect of the Proposed Commercial Site.
  - (ii) Notwithstanding clause K(i) and for the purpose of clarity, the First Applicant is not prohibited from obtaining development consent for residential subdivision and commencing works as permitted by the existing B2 Zone, and once rezoning occurs, works permitted by R3 Zone.
  - (iii) The TRCCDL must develop either a site of 1500m<sup>2</sup> or five (5) dwellings for the purpose of Affordable Rental Housing, which is to be retained in the TRCCDL Property Portfolio and rented through a registered Community Housing Provider.
  - (iv) The parties acknowledge that a restriction on use will be placed on the Affordable Housing Land by way of a Section 88B Instrument pursuant to the *Conveyancing Act 1919*. The restriction on use will be to providing affordable rental housing.
- L Vixsun, being the registered proprietor of the Existing Commercial Site at the time of execution of this Deed, acknowledges that Council requires the registration of this Deed on the folio of the Existing Commercial Site under section 7.6 of the EPA Act.

## Operative Provisions

### 1 Planning Agreement under the EPA Act

#### 1.1 Status of this Deed

- (a) The parties agree that this Deed is a planning agreement within the meaning given to that term in section 7.4(1) of the Environmental Planning and Assessment Act 1979.
- (b) The planning agreement constituted by this Deed applies to the Land and the Planning Proposal.
- (c) Schedule 5 of this Deed, being the Explanatory Note, summarises the requirements for planning agreements under section 7.4 of the Environmental



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Planning and Assessment Act 1979 and the way this Deed addresses those requirements.

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## 2 Operation

### 2.1 Commencement

- (a) The Parties agree that this Deed takes effect on the execution of this Deed by all of the Parties to it.
- (b) The party who executes this Deed last is to insert, on page 1, the date on which they did so and provide a copy of the fully executed and dated Deed to all other Parties to this Deed.

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## 3 Definitions and Interpretation

### 3.1 Definitions

In this Deed, the following definitions will apply:

**Affordable Rental Housing** means rental housing where the rent payable does not exceed 30% of the income of the median Ballina Local Government Area household, as reported in the latest Australian Bureau of Statistics Census of Population and Housing and adjusted by CPI.

**Affordable Housing Land** means the portion of land contained within the TRCCDL Property Portfolio which will be either:

- (a) developed by the Applicant for the sole purpose of providing Affordable Rental Housing; or
- (b) dedicated to Council to provide Affordable Rental Housing (being an area of land that must be no smaller than 1500 m<sup>2</sup>)

and in accordance with the provisions of this Deed.

**Applicant** means Vixsun Pty. Limited ABN 45 079 491 839 and The Trustees of the The Trustees of the Roman Catholic Church for the Diocese of Lismore ABN 72 863 788 198, together.

**Business Day** means any day except a bank or public holiday throughout New South Wales or a Saturday or Sunday.

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

**Council** means Ballina Shire Council ABN 53 929 887 369.

**Commercial Tenants** means tenants operating in a commercial premises, as defined in the Standard Instrument – Principal Local Environmental Plan (2006 EPI 155a).

**CPI** means the Consumer Price Index (All Groups – Sydney) published by the Australian Bureau of Statistics.

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

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

**EPA Act** means the *Environmental Planning and Assessment Act 1979*.

**Existing Commercial Site** means the land at Lot 497 Deposited Plan 1261230 Ballina Heights Drive, Cumbalum owned by Vixsun Pty. Limited ABN 45 079 491 839, and identified in Schedule 4 to this Deed.

**Explanatory Note** means an explanatory note prepared under clause 25E(1) of the Regulation.

**Land** means both the Existing Commercial Site and Proposed Commercial Site. If subclause (a) of the Applicant's Contribution has been elected, then that part of the TRCCDL Property Portfolio dedicated to Council also forms part of this definition of Land.

**LEP** means the *Ballina Local Environmental Plan 2012*.

**Offer** means the offer made on behalf of the Developer (in the form of a letter from Planners North dated 4 November 2021) to enter into this Deed for the development or dedication of the Affordable Housing Land and agreement to the Planning Proposal Term and which is included under Schedule 2 of this Deed.

**Parties** means the parties to this Deed.

**Planning Proposal Request** means the Planning Proposal Request Submission proposing amendments to the LEP lodged by Vixsun and the TRCCDL c/- Planners North Developer with Council dated 4 November 2021 and which is included under Schedule 1 of this Deed.

**The Planning Proposal** means the Planning Proposal prepared by the Council to give effect to the change to the LEP sought by the Applicant.

**Planning Proposal Term** means the requirement associated with the timing of the residential subdivision and commercial development, set out in clause 6 of this Deed.

**Proposed Commercial Site** means the land at part Lot 66 in Deposited Plan 1276775 located at Ballina Heights Drive, Cumbalum owned by The Trustees of the Roman Catholic Church for the Diocese of Lismore ABN 72 863 788 198, and identified in Schedule 4 of this Deed.

**Public Purpose** means the public purpose for which the Land will be used, subject to the conditions set out in clause 6 of this Deed.

**TRCCDL Property Portfolio** means, for the purposes of this Deed only, the land owned at Ballina Heights, Cumbalum (known as Ballina Heights Estate) by (the Ballina Parish) The Trustees of the Roman Catholic Church for the Diocese of Lismore (Ballina Parish) ABN 72 863 788 198 as identified in Schedule 3 of this Deed.

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

### 3.1 Interpretation

In this Deed, unless the context otherwise requires:

- (a) words denoting any gender include all genders;
- (b) headings are for convenience only and do not affect interpretation;
- (c) the singular includes the plural and vice versa;
- (d) any schedule or annexure attached to this Deed forms part of it;
- (e) a reference to a party includes its legal personal representatives, successors and permitted assigns;
- (f) a reference to a person includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity;
- (g) a reference to a statute or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (h) unless expressly stated to be otherwise, the meaning of general words is not limited by specific examples introduced by 'including', 'for example' or similar inclusive expressions; and
- (i) a reference to this Deed means this Deed and includes any variation or replacement of this Deed.

### 3.2 No fettering clause

The Applicant acknowledges that Council cannot fetter in advance the exercise of any of its statutory discretions, whether by way of contract, estoppel or otherwise, in relation to any application relating to the Land to be lodged with the vendor in its capacity as a governmental authority nor pre-determine any decision in respect of any such application.

### 3.3 Warranties

The Parties warrant to each other that they:

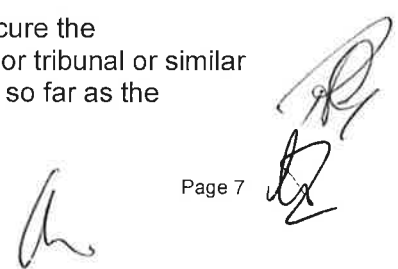
- (a) have full capacity to enter into this Deed, and
- (b) are able to fully comply with their obligations under this Deed.

### 3.4 Further agreements

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.

### 3.5 Surrender of right of appeal

The Applicant 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 in so far as the subject-matter of the proceedings relates to this Deed.





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#### **4 Section 7.11, 7.12 and 7.24 of the EPA Act**

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##### **4.1 Application of section 7.11, 7.12 and 7.24**

This Deed does not exclude the application of sections 7.11, 7.12 and 7.24 of the EPA Act in respect of any development applications for the future redevelopment of the Land.

##### **4.2 Benefits**

Benefits obtained by Council under this Deed are not to be taken into consideration in determining any development contribution under section 7.11 of the EPA Act in respect of any development applications for the future redevelopment of the Land.

##### **4.3 Offer by the Applicant**

The Applicant acknowledges that this Deed is in the terms of the Offer made by the Applicant in connection with the Planning Proposal.

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#### **5 Planning Proposal**

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##### **5.1 Lodgment of Planning Proposal**

- (a) The Applicant has lodged the Planning Proposal Request with Council. Council has prepared a Planning Proposal to give effect to that request.
- (b) The Planning Proposal seeks the following changes to the LEP in relation to the Land:
  - i. the rezoning of part of the Existing Commercial Site from B2 Local Centre to R3 Medium Density Residential as shown in **Schedule 1 Planning Proposal Zoning Map**; and
  - ii. the rezoning of the Proposed Commercial Site from R3 Medium Density Residential to B2 Local Centre zone as shown in **Schedule 1 Planning Proposal Zoning Map**.
- (c) This Deed constitutes a planning agreement within the meaning of section 7.4 of the EPA Act and constitutes the Applicant's irrevocable offer with respect to the provision of material public benefits associated with development of the Land.
- (d) The Planning Proposal envisages the future development of the rezoned portion of the Existing Commercial Site for residential purposes in accordance with the proposed changes to the LEP under clause 5.1 (b) of this Deed. The portion of the Proposed Commercial Site, being rezoned to B2 Neighbourhood Centre pursuant to the LEP will facilitate the development of the commercial centre. The remaining portion of the Existing Commercial Site, being zoned B2 Neighbourhood Centre pursuant to the LEP will be retained to provide for other future commercial uses within the Ballina Heights Estate.

- (e) Nothing in this Deed relieves the Applicant of its statutory obligations under the EPA Act to obtain the necessary development consent/s for any such future redevelopment of the Land.
- (f) Nothing in this Deed fetters Council's discretion under the EPA Act in assessing and determining as it sees fit any future development applications for a future redevelopment of the Land.

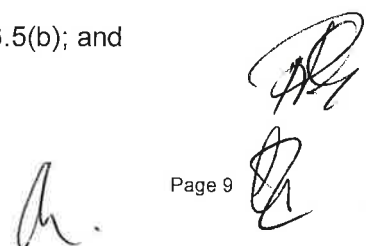
## **6 Material Public Benefit to be provided under this Deed**

### **Planning Proposal Terms**

- 6.1 To facilitate the Planning Proposal, The First Applicant agrees to the following terms:
- (a) Subject to the Provisions of Recital K (i) and (ii) in this Deed, no subdivision certificate under section 6.16 of the EPA Act shall be sought for the Existing Commercial Site until such time that:
    - i. Approval has been received for a commercial development with a minimum Gross Floor Area of 1000m<sup>2</sup>; and
    - ii. Development has substantially commenced on the Proposed Commercial Site; and
    - iii. Occupation certificate has been issued for that commercial development pursuant to section 6.10 of the EPA.
- 6.2 To facilitate the Planning Proposal and as soon as practicable after the issuance of the Occupancy Certificate under 6.1(a)(iii), the Second Applicant agrees to use its best endeavours to enter into agreements with Commercial Tenants so as to ensure the entire commercial centre has been tenanted.

### **Affordable Housing Land**

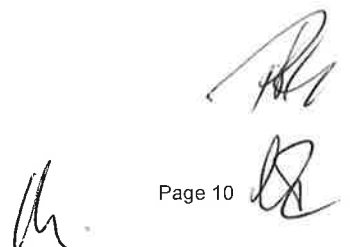
- 6.3 The TRCCDL agrees to either:
- (a) Dedicate 1500m<sup>2</sup> of Land from within the TRCCDL Property Portfolio as Affordable Housing Land to Council and in accordance with the conditions set out in clause 6.5; or
  - (b) Build a minimum of five (5) dwellings for the purposes of Affordable Rental Housing in perpetuity and in accordance with the conditions set out in clause 6.6.
- 6.4 The TRCCDL must provide Council with written confirmation of their election in Clause 6.3 by no later than 12 months from the execution of the deed. This written notification must be addressed to Paul Hickey and paul.hickey@ballina.nsw.gov.au.
- 6.5 If the Second Applicant elects clause 6.3(a) or is required under clause 6.6(d) to dedicate Land, then the following conditions apply:
- (a) The Land must be suitably zoned having regard to clause 6.5(b); and



- (b) The Land must comprise of one or more lots which have been created for the purpose of and are suitable for residential occupation.
- 6.6 If the Second Applicant elects clause 6.3(b) then the following conditions apply:
- (a) A minimum of five (5) dwellings are to be constructed with an occupation certificate having been issued for those dwellings, no later than five (5) years from the date that the LEP Amendment facilitated by the Planning Proposal, has been legally made; and
  - (b) The Second Applicant must obtain all relevant approvals including but not limited to occupancy certificates for each and every dwelling constructed on the Land, no later than five (5) years from the date that the LEP Amendment facilitated by the Planning Proposal, has been legally made; and
  - (c) At any stage, and at the request of Council, the Second Applicant must provide an update report on the development of the dwellings and any other information requested by Council. The update report must be provided within seven (7) days of the request; and
  - (d) If the Second Applicant does not deliver the affordable housing within the timeframe specified under 6.6(a) and/or the Second Applicant does not comply with clause 6.6(b), then the Second Applicant must dedicate land to Council in accordance with clause 6.3(a).
- 6.7 The parties acknowledge that a restriction on use will be placed on the Affordable Housing Land by way of a Section 88B Instrument pursuant to the *Conveyancing Act* 1919. The restriction on use will be to provide Affordable Rental Housing.
- 6.8 The Affordable Rental Housing must be managed by a registered Community Housing Provider.
- 6.9 Prior to the five (5) dwellings being managed by a registered Community Housing Provider and within fourteen (14) days of Council's request, TRCCDL must provide a status report on the Affordable Rental Housing.

#### Acquisition of Land

- 6.10 The parties acknowledge that if the TRCCDL breaches any of the conditions contained in clauses 6.1 to 6.8 of this Deed, then:
- (a) Council may exercise their sole discretion and acquire 1500m<sup>2</sup> of land comprising of one or more lots which have been created for the purpose of and are suitable for residential occupation, from the TRCCDL Property Portfolio;
  - (b) The amount of compensation payable in return will be \$1.00; and
  - (c) Council is not required to follow pre-acquisition procedures under the *Land Acquisition (Just Terms Compensation) Act* 1991 (**Just Terms Act**).

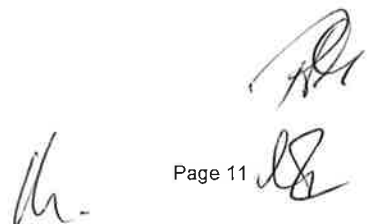


- 6.11 Notwithstanding Clause 6.10, Council must act reasonably having regard to the circumstances surrounding the failure by the Second Applicant to deliver the Affordable Rental Housing under this Deed.
- 6.12 Clause 6.10 constitutes an agreement for the purposes of section 30 of the Just Terms Act.
- 6.13 If, as a result of the acquisition referred to in clause 6.10, Council must pay compensation to any person other than the TRCCDL, the TRCCDL must reimburse the Council for that amount, upon a written request being made by the Council.
- 6.14 Except as otherwise agreed between the Parties, the TRCCDL must ensure that the Affordable Housing Land is free of all encumbrances and affectations (whether registered or unregistered and including without limitation any charge or liability for rates, taxes and charges), on the date on which the Council compulsorily acquires the whole, or any part of that land, in accordance with the Just Terms Act.
- 6.15 The TRCCDL is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 6, including without limitation:
- (a) signing any documents or forms;
  - (b) giving land owner's consent for lodgement of any Development Application;
  - (c) producing certificates of title to the Registrar-General under the Real Property Act; and
  - (d) paying the Council's reasonable conveyancing costs arising under this clause 6.
- 6.16 Notwithstanding clause 6.14, if, despite having used its best endeavours, the TRCCDL cannot ensure that the Affordable Housing Land to be transferred is free from all encumbrances and affectations, then the TRCCDL 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.

## **7 Dispute Resolution**

### **7.1 Dispute Resolution**

- (a) If a party claims a dispute has arisen under this Agreement (**Claimant**) it must give written notice to the other party (**Respondent**) stating the matters in dispute and designating as its representative a person to negotiate the dispute (**Claim Notice**).
- (b) Within 28 days after receiving a Claim Notice the Respondent must notify the Claimant of its representative to negotiate the dispute.



- (c) The nominated representative must:
  - i. meet to discuss the matter in good faith within 10 days after service by the Respondent of notice of its representative; and
  - ii. use reasonable endeavours to resolve the dispute within 15 days after they have met.
- (d) If the dispute is not resolved within 15 days after the representatives have met, either party may give notice calling for determination of the dispute (Dispute Notice).
- (e) The parties agree that a dispute shall be mediated if it is the subject of a Dispute Notice, in which case:
  - i. the parties must agree to the terms of reference of the mediation within 5 business days of the receipt of the Dispute Notice. If there is no agreement, the mediation rules of the Resolution Institute Australia (NSW Branch) apply;
  - ii. the Mediator will be agreed between the parties or failing agreement within 5 business days of receipt of the Dispute Notice, either party may request the President of the Resolution Institute Australia (NSW Chapter) to appoint a mediator;
  - iii. the Mediator appointed pursuant to this clause 7.1(e) must:
    - (A) have reasonable qualifications and practical experience in the area of the dispute; and
    - (B) have no interest or duty which conflicts or may conflict with their function as mediator they being required to fully disclose any such interest or duty before their appointment;
  - iv. the mediator shall be required to undertake to keep confidential all matters coming to his knowledge by reason of their appointment and performance of their duties;
  - v. the parties must within five (5) business days of receipt of the Dispute Notice notify each other of their representatives who will be involved in the mediation;
  - vi. the parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement;
  - vii. in relation to costs and expenses:
    - (A) each party will bear their own professional expert costs incurred in connection with the mediation;
    - (B) the costs of the mediator will be shared equally by the parties unless the mediator determines a party has engaged in vexatious

or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that party.

- (f) If the dispute is not finally resolved either party is at liberty to litigate the dispute.
- (g) Each party must continue to perform its obligations under this Agreement notwithstanding the existence of a dispute.

7.2 Nothing in this clause 7 will prejudice the right of a party to institute proceedings to enforce payment due under this Deed or to seek injunctive or urgent declaratory relief.

7.3 Notwithstanding the existence of a Dispute, the parties must continue to perform their respective obligations under this Deed unless excused from performance by another provision of this Deed.

## **8 Enforcement**

### **8.1 Breach of Deed**

- (a) This clause applies to a breach of the Applicant's obligations under this Deed.
- (b) Council may give the Applicant written notice specifying the particulars of the breach, the means for rectifying the breach (if such exist), the reasonable timeframe for rectification of the breach or compensation Council will accept in a reasonable timeframe in lieu of the rectification of the breach.
- (c) Nothing in this clause 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 Applicant, including but not limited to seeking relief in an appropriate court.

## **9 Risk**

### **9.1 Risk**

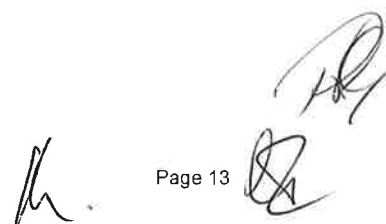
The Applicant performs this Deed at its own risk and its own cost.

### **9.2 Release**

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

### **9.3 Indemnity**

The Applicant indemnifies Council from and against all Claims that may be sustained, suffered, recovered or made against Council arising in connection with the performance of the Applicant's obligations under this Deed including but not limited to





the Applicant's non-performance of their obligations under this Deed, except if, and to the extent that, the Claim arises because of Council's negligence or default.

## **10 Registration and Restriction on Dealings**

### **10.1 Acknowledgment**

The First Applicant, being the registered proprietor of the Existing Commercial Site at the time of execution of this Deed, acknowledges that Council requires the registration of this Deed on the folio of Lot 497 DP 1261230 under section 7.6 of the EPA Act and that, on registration by the Registrar-General, this Deed will be binding on and enforceable against the registered proprietor of the Existing Commercial Site from time to time as if each registered proprietor for the time being had entered into this Deed.

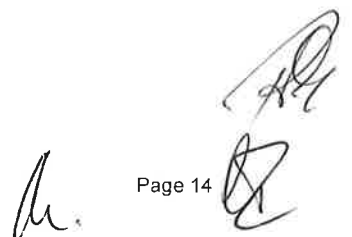
### **10.2 Consents to registration**

Not later than 10 Business Days after this Deed has been executed by the Parties, The First Applicant must, at its cost, obtain the consents to the registration of this Deed from each and every person who has an estate or interest in the land referred to under Clause 10.1).

### **10.3 First Applicant's obligations**

The First Applicant (being the registered proprietor at the time of execution of this Deed) of the land referred to under Clause 10.1) must:

- (a) not later than 10 Business Days after this Deed has been executed by the Parties:
  - i. deliver to the Council in registrable form required by NSW Land Registry Services an instrument to procure the registration of this Deed on the title to the Land duly executed by the First Applicant (being the registered proprietor at the time of execution of this Deed) and any other person required by NSW Land Registry Services to execute such instrument; and,
  - ii. provide all relevant consents to the registration (including the consents required under clause 10.2) to NSW Land Registry Services; and
  - iii. arrange for the production of the certificate of titles for the Land to the Council or NSW Land Registry Services for the purpose of registration of this Deed; and
- (b) immediately upon receiving the registrable form instrument executed by the Council, lodge the instrument and all other necessary documents with the NSW Land Registry Services to enable this Deed to be registered, and
- (c) do all other things reasonably necessary to enable this Deed to be registered pursuant to section 7.6 of the EPA Act.



#### 10.4 Release

Council must execute and give to the Applicant any forms required by NSW Land Registry Services to remove the registration of this Deed from the folio/s for the Land referred to under Clause 10.1) after the Applicant has complied with its obligations under Clause 6.1(a) to Council's satisfaction.

#### 10.5 Registration expenses

The First Applicant must pay Council's expenses including registration fees, legal costs and disbursements in relation to the registration of this Deed and its subsequent removal from the title to the Land referred to under Clause 10.1.

#### 10.6 Restriction on dealings

- (a) The First Applicant (being the registered proprietor at the time of execution of this Deed) of the Existing Commercial Site are not to:
- i. sell or transfer the Land or any part of it, or
  - ii. assign the First Applicant's rights or obligations under this Deed, or novate this Deed,
- to any person unless:
- iii. The First Applicant has, at no cost to the Council, first procured the execution by the person to whom the Land, or part thereof, is to be sold or transferred or the First Applicant'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
  - iv. the Council has given written notice to The First Applicant or the Landowner (as the case may be) stating that it reasonably considers that the
  - v. purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this Deed, and
  - vi. The First Applicant or the Landowner (as the case may be) is not in breach of this Deed, and
  - vii. the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.
- (b) Subject to clause 10.6(c), The First Applicant and the Landowner (as the case may be) acknowledges and agrees that it remains liable to fully perform its obligations under this Deed unless and until it has complied with its obligations under clause 10.6(a).
- (c) Clause 10.6(a) does not apply in relation to any sale or transfer of the Existing Commercial Site if this Deed is registered on the title to the Land at the time of the sale.





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## **11 Notices**

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### **11.1 Notices given under this Deed:**

- (a) must be in writing and clearly readable in the English language;
- (b) must be signed by the party giving or making it (or signed on behalf of that party by its authorised representative); and
- (c) may be delivered to a party by hand or by prepaid post to that party's address shown in page 1 of this Deed or to such other address or person as a party may specify by notice given in accordance with this clause.

### **11.2 A notice is taken to be duly given and received:**

- (a) if delivered by hand, when delivered; or
- (b) if delivered by prepaid post, three Business Days after being deposited in the mail with postage prepaid.

### **11.3 Despite clause 10.2, notices received after 5.00pm in the place of receipt or on a non-Business Day are taken to be received at 9.00am on the next Business Day.**

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## **12 General**

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### **12.1 Relationship between the Parties**

Except as expressly provided to the contrary in this Deed, nothing in this Deed will constitute the Parties as principal and agent, employer and employee, partners or otherwise liable for the acts or omissions of any other party.

### **12.2 Entire agreement**

This Deed records the entire agreement between the Parties in relation to its subject matter. It supersedes all prior contracts, arrangements, understandings or negotiations by, or between, the Parties in relation to the subject matter of this Deed.

### **12.3 Further assurance**

Each party must (at its own expense) do all things that any other party reasonably requires of it to give the other party the full benefit of any obligations owed to the other party and expressed in this Deed.

### **12.4 Counterparts**

This Deed and any variation of this Deed may be executed and take effect in two or more counterparts, each of which when taken together, will constitute one and the same instrument.

### **12.5 Survival**

All warranties, releases, exclusions and limitations of liability, indemnities, terms with respect to intellectual property and confidential information in this Deed will remain

valid and binding following expiry or termination of this Deed. Any other provision by its nature intended to survive expiry or termination of this Deed survives expiry or termination of this Deed.

**12.6 No waiver**

The failure, delay or omission by a party to exercise, or to partially exercise, a right, power or remedy under this Deed does not operate as a waiver of that right, power or remedy. A party which exercises, or partially exercises, a right, power or remedy maintains its right to further exercise the same right, power or remedy or to exercise another right, power or remedy. A party waives a right, power or remedy only by explicitly doing so in a written notice to the other party and the waiver is strictly limited to the matters specified in the notice.

**12.7 Cumulative rights**

The rights, powers, authorities, discretions and remedies of a party under this Deed do not exclude any other right, power, authority, discretion or remedy.

**12.8 Severability**

If any provision of this Deed is determined by a court or other competent tribunal or authority to be illegal, invalid or unenforceable then:

- (a) where the offending provision can be read down so as to give it a legal, valid and enforceable operation of a partial nature it must be read down to the extent necessary to achieve that result;
- (b) where the offending provision cannot be read down then that provision must be severed from the Deed in which event, the remaining provisions of this Deed operate as if the severed provision had not been included; and
- (c) the legality, validity or enforceability of that provision in any other jurisdiction or of the remaining provisions in that or any other jurisdiction is not affected,

but only to the extent that is consistent with giving substantial effect to the intentions of the parties under this Deed.

**12.9 Variation**

This Deed can only be amended, supplemented or replaced by another document publicly notified and signed by the Parties in accordance with the Regulation.

**12.10 Governing law and jurisdiction**

This Deed is governed by the law of New South Wales. Each party submits to the jurisdiction of the courts in New South Wales in connection with matters concerning this Deed.

**12.11 Explanatory Note**

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 Deed.

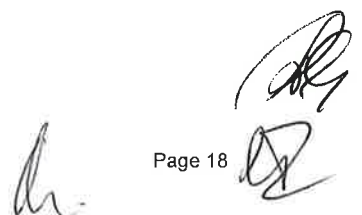
The Explanatory Note to this agreement is provided in Schedule 5.

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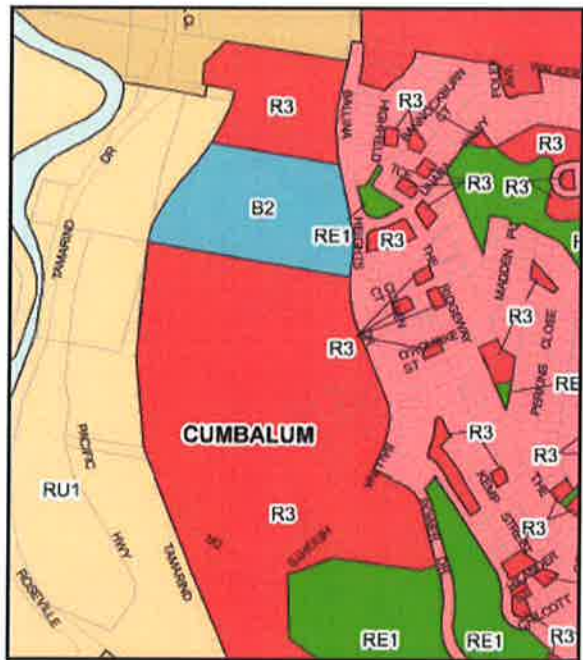
### **13 Costs**

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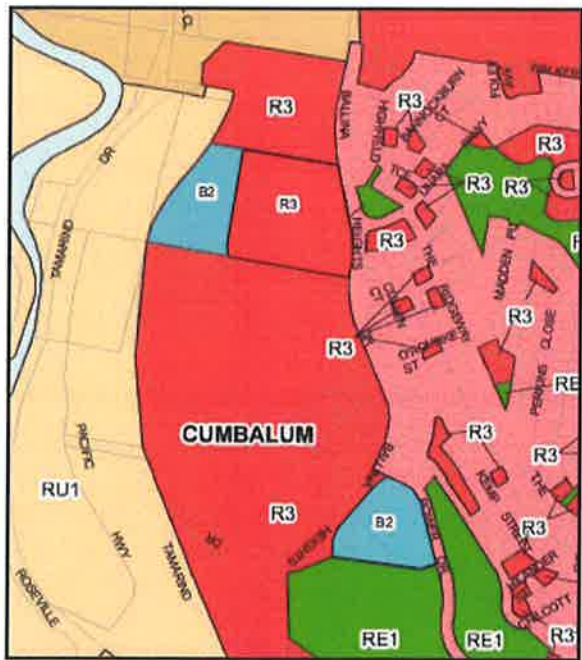
The Applicant agrees to pay Council's reasonable legal costs, to a maximum of \$3,500 inclusive of GST, incurred to give effect to this Deed including but not limited to, the costs of preparing, negotiating and executing this Deed and any other related document within 28 Business Days of a written demand by Council for such payment.



**Schedule 1 – Planning Proposal Map**



EXISTING ZONING






PLANNING PROPOSAL ZONING

Schedule 1 – Planning Proposal

**Legend**

	Local Centre Zone
	Medium Density Residential Zone

## Schedule 2 – Letter of Offer



abn: 56 291 496 553  
6 Porter Street, Byron Bay, NSW, 2481  
PO Box 538, Lennox Head, NSW, 2478  
Telephone: 1300 66 00 87

4<sup>th</sup> November 2021

Our reference: 1837.3859

The General Manager  
Ballina Shire Council  
PO Box 450  
BALLINA NSW 2478

Dear Sir

### RE: LEP Amendment Request – Ballina Heights Commercial Centre

PLANNERS NORTH provides town planning advice to Vixsun Pty Ltd ("Vixsun") and the Trustees of the Roman Catholic Church, Parish of Ballina ("Ballina Parish"). We write representing both entities in relation to an LEP amendment request associated with the commercial centre for Ballina Heights.

Following a workshop on 5<sup>th</sup> October 2021 Council at its meeting of 28<sup>th</sup> October 2021 unanimously resolved:

1. That Council provide in principle support for changing the location of the commercial precinct in the Cumbalum / Ballina Heights Estate to the corner of Power Drive and Ballina Heights Drive in order to bring forward the delivery of a much needed commercial precinct; and
2. This in principle support is subject to project timing providing for construction of commercial facilities up front, detailed analysis of site opportunities and constraints, the terms of any voluntary planning agreement that the developer proposes and details of overall public interest outcomes associated with the proposal.

The combined Vixsun and Ballina Parish proposal seeks:

1. A commercial zoning of 2.139ha over the Ballina Parish land at the intersection of Ballina Heights Drive and Power Drive and the concurrent rezoning of about 4ha of the eastern part of the Vixsun site from B2 to R3 (see Diagram C in the attached Plan);
2. The western (noise affected) part of the Vixsun site retaining a B2 zoning allowing for the development of that part of Lot 497, with its two grand fig trees, for a land use(s) compatible with highway noise but optimising the excellent landscape vistas available from the parcel to the south west;
3. That Vixsun will enter into a VPA, not registering any residential lots from Lot 497 until such time as an Occupation Certificate for at least 1000m<sup>2</sup> of commercial floor space had been issued at the Power Drive site; and
4. That the Ballina Parish enter into a VPA agreeing to immediately after the gazettal of the B2 zoning, commence the construction of a commercial centre (with the first stage being at least 1000m<sup>2</sup> of floor space) at the Power Drive site together with dedicating a site of at least 1500m<sup>2</sup> for affordable housing to Ballina Shire or building at least 5 affordable dwellings at an appropriate location within the Ballina Parish Cumbalum property portfolio to be managed by an organisation like North Coast Community Housing in perpetuity.

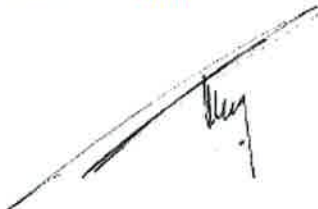


Further to the above, we confirm that the Ballina Parish has engaged an architect to prepare Development Application drawings for the establishment of a shopping centre and other compatible uses (e.g. child care centre etc.); and the Ballina Parish will lodge a Development Application, to be processed in parallel with the rezoning, which would facilitate the rapid implementation of commercial centre construction works post rezoning;

Should you require any additional information, or wish to clarify any matter raised by this request for a Councillor briefing, please feel free to contact me at any time.

Yours faithfully,

**PLANNERS NORTH**

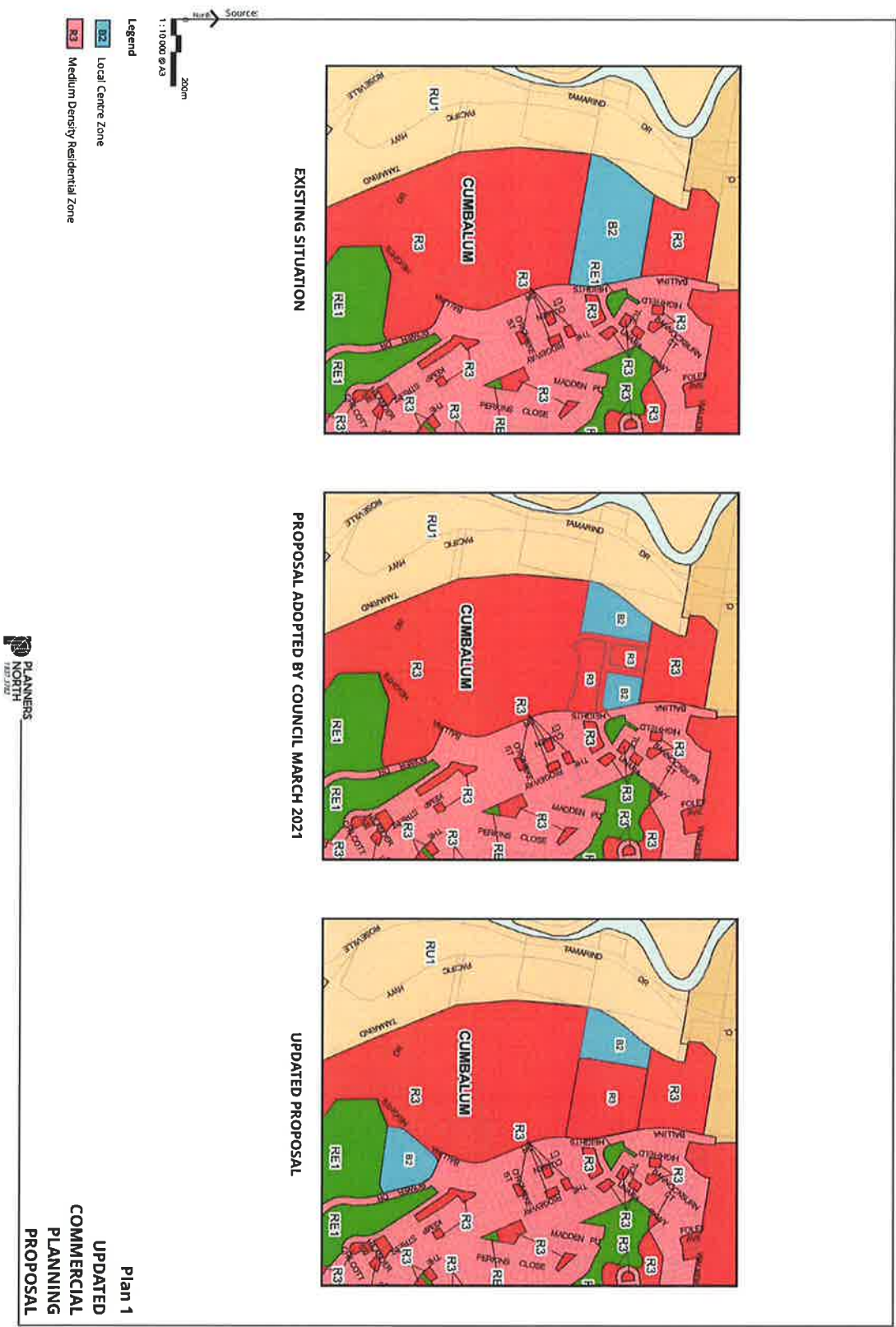




Stephen Connelly RPIA (Fellow)

PARTNERSHIP PRINCIPAL

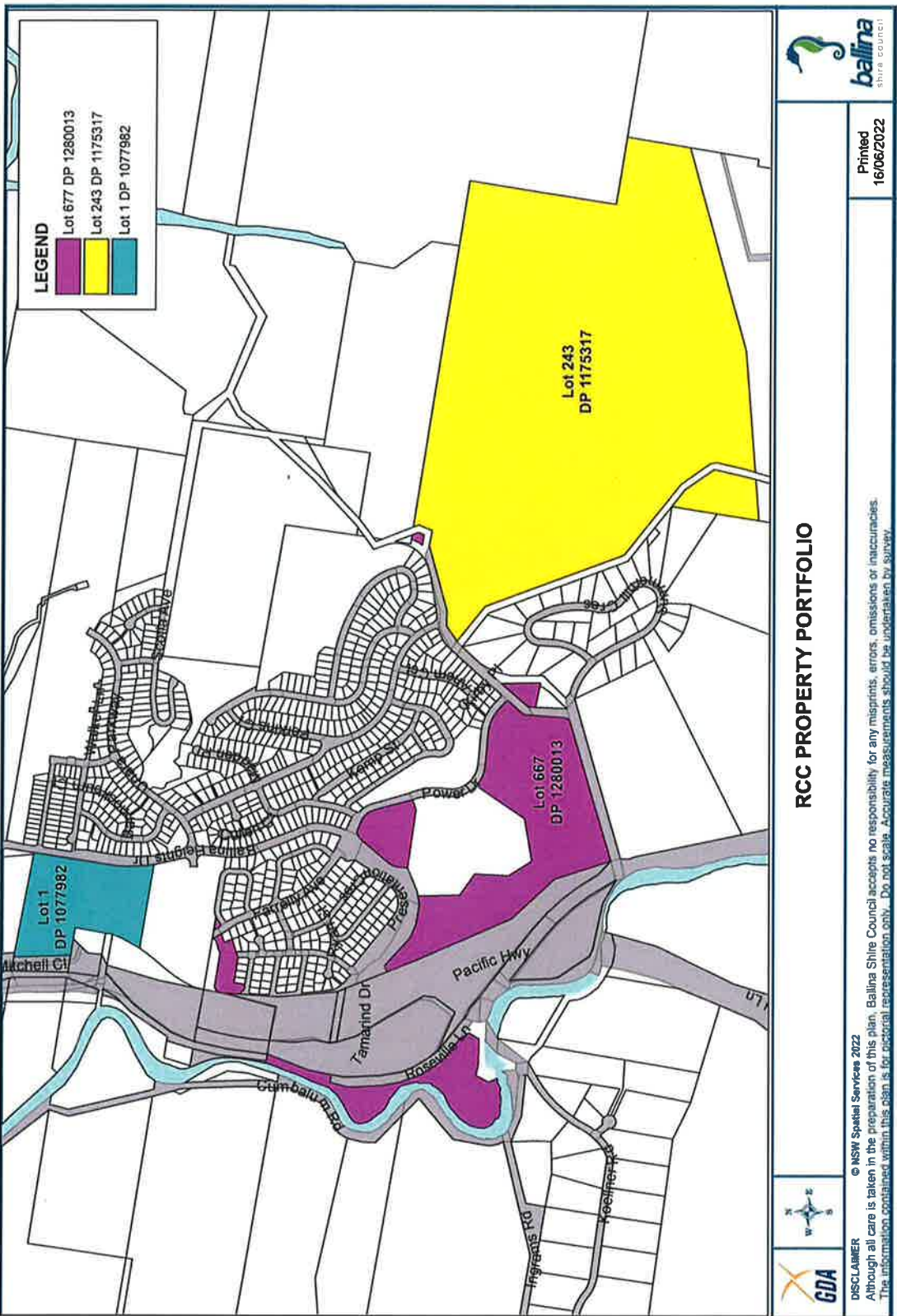
(m) 0419 237 982

(e) [steve@plannersnorth.com.au](mailto:steve@plannersnorth.com.au)



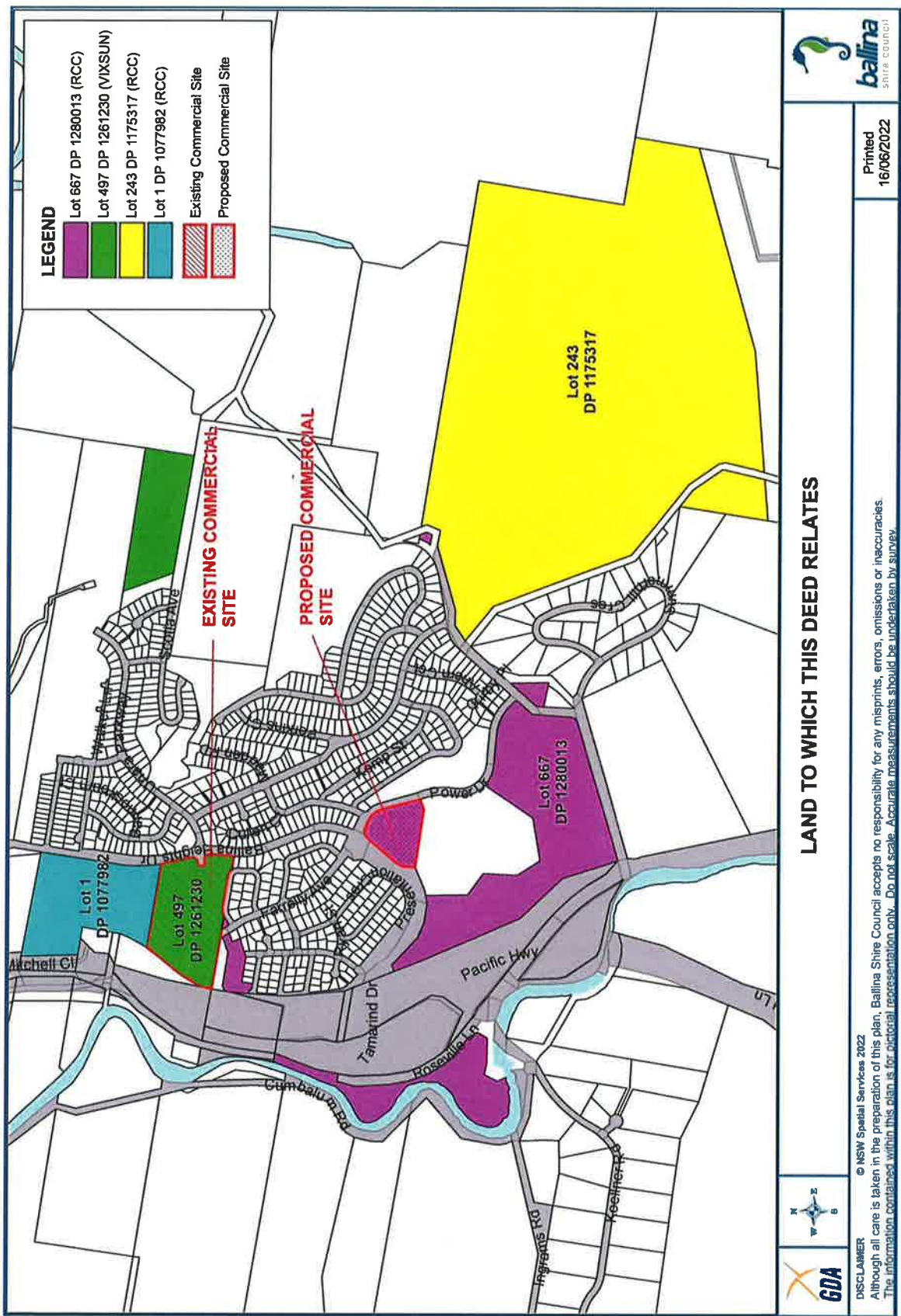
 

**Schedule 3– TRCCDL Property Portfolio**





**Schedule 4 – Land to which this Deed relates**



*[Handwritten signatures and initials]*

## Schedule 5– Explanatory Note

### EXPLANATORY NOTE

#### DRAFT PLANNING AGREEMENT FOR BALLINA HEIGHTS DRIVE, CUMBALUM

*Environmental Planning and Assessment Regulation 2000*  
(clause 25E)

#### 1. Introduction

The purpose of this Explanatory Note is to provide a plain English summary to support the exhibition of a proposed draft planning agreement (the **Planning Agreement**) prepared under section 7.4(1) of the *Environmental Planning and Assessment Act 1979* (the **Act**).

#### 2. Parties

The parties to the Planning Agreement are Ballina Shire Council ABN 80 690 785 443 (the **Council**) and Vixsun Pty. Limited ABN 45 079 491 839 and The Roman Catholic Church for the Diocese of Lismore ABN 72 863 788 198 (jointly the **Applicant**).

This explanatory note has been prepared jointly by the parties.

#### 3. Description of Subject Land

The Planning Agreement applies to the land identified in Schedule 4 (the **Land**).

Vixsun Pty Ltd is the owner of the Existing Commercial Site.

The Roman Catholic Church for the Diocese of Lismore is the owner of the Proposed Commercial Site and the Affordable Housing Land.

#### 4. Description of the Proposed Development

The Applicant proposes to develop part of the Existing Commercial Site in the future for residential purposes (the **Development**). A portion of the Land will also be retained for commercial purposes. The Proposed Commercial Site will be developed for the purpose of the neighbourhood commercial centre within the Ballina Heights Estate.

In order to facilitate the Development, the Applicant has sought an amendment to the environmental planning instrument applying to the Land, being the *Ballina Local Environmental Plan 2012* (the **LEP**).

The Planning Agreement does not permit the Development to be carried out and the Applicant will be required to seek and obtain the necessary development consent/s under the Act to do so.

#### 5. Summary of Objectives, Nature and Effect of the Planning Agreement

The Applicant has offered to enter into the Planning Agreement with the Council.

The objective of the Planning Agreement is to facilitate the timely development of the commercial centre within the Ballina Heights Estate and facilitate the provision of future affordable rental housing.

The Planning Agreement provides that The Roman Catholic Church for the Diocese of Lismore will develop about 1500m<sup>2</sup> of land (the **Applicant's Contribution**) for the purpose of Affordable Rental Housing, comprising a minimum of 5 dwellings, to be managed by a registered Community Housing Provider, upon the LEP being amended so that:

- i. the rezoning of part of the Existing Commercial Site from B2 Local Centre to R3 Medium Density Residential as shown in **Schedule 1 Planning Proposal Zoning Map**; and
- ii. the rezoning of the Proposed Commercial Site from R3 Medium Density Residential to B2 Local Centre zone as shown in **Schedule 1 Planning Proposal Zoning Map**.

Vixsun also agrees that no subdivision will be registered until such time as a neighbourhood commercial centre development on the Land has been approved and substantially commenced and an occupation certificate issued. This facilitates the development of the commercial centre to meet residents' needs.

The Roman Catholic Church for the Diocese of Lismore also agrees that should the Applicant fail to deliver the Affordable Rental Housing as agreed that the Council may, but is not obligated to, purchase the Affordable Housing Land for \$1.

The Roman Catholic Church also agrees to a restriction on use being applied on the Section 88B Instrument under the *Conveyancing Act 1919* to the Affordable Housing Land restricting the use of that land to the purpose of affordable rental housing.

Vixsun, agrees to the registration of this Deed on the folio of the Land that comprises the Existing Commercial Site under section 7.6 of the EPA Act.

## 6. Assessment of Merits of Planning Agreement

### ***The Planning Purpose of the Planning Agreement***

The Planning Agreement will benefit the public by facilitating the timely development of the commercial centre within the Ballina Heights Estate to meet the residents' needs and by requiring the development of land for future affordable rental housing.

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

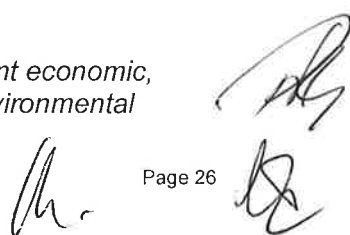
The Planning Agreement promotes the public interest by:

- facilitating the timely development of the commercial centre within the Ballina Heights Estate to meet the residents' needs and
- committing the Applicant to develop housing to be used for the purpose of affordable rental housing.

### ***How the Planning Agreement Promotes the Objects of the Act***

The Planning Agreement promotes the following objects of the Act:

- a) *to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- b) *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*



- c) *to promote the orderly and economic use and development of land.*

In addition to the above, the Planning Agreement will not be inconsistent with any of the other objects of the Act.

***How the Planning Agreement Promotes Elements of the Local Government Act 1993 and the Guiding Principles for Councils***

The Planning Agreement promotes the guiding principles for councils under section 8A of the *Local Government Act 1993* by assisting Council to:

- a) Carry out functions in a way that provides the best possible value for residents and ratepayers;
- b) Manage lands and other assets so that current and future local community needs can be met in an affordable way;
- c) Work with others to secure appropriate services for local community needs.
- d) Recognise diverse local community needs and interests;
- e) Consider the long term and cumulative effects of actions on future generations;
- f) Apply the principles of ecologically sustainable development;
- g) Invest in responsible and sustainable infrastructure for the benefit of the local community; and
- h) Identify and prioritise key local community needs and aspirations and consider regional priorities.

***How the Planning Agreement Promotes Council's Capital Works Program***

Works forming part of the public purpose to which the Applicant's Contribution may be applied are generally in addition to the Council's capital works program, although may conform with aspects of works identified as a priority by Council's other strategic plans.

***Requirements relating to Construction and Occupation Certificates***

The agreement sets out conditions on the Applicant seeking occupation and subdivision certificates in relation to the development of the land to facilitate the dedication of land for affordable rental housing and the timely development of the commercial centre.



Voluntary Planning Agreement

**Executed as a Deed**

**Executed by**  
**Ballina Shire Council ABN 53 929 887**  
**369** by its authorised officers:


\_\_\_\_\_  
Signature of Authorised Officer

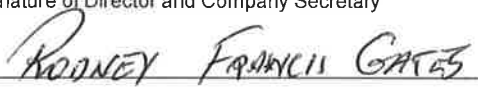
\_\_\_\_\_  
Signature of Witness


\_\_\_\_\_  
Name and Position of Authorised Officer

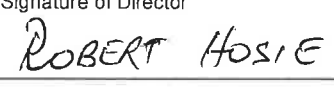
\_\_\_\_\_  
Name of Witness

**Executed by**  
**Vixsun Pty. Limited**  
**ABN 45 079 491 839**  
in accordance with section 127(1) of the  
*Corporations Act 2001* (Cth):


  
\_\_\_\_\_  
Signature of Director and Company Secretary

  
\_\_\_\_\_  
Name of Director

  
\_\_\_\_\_  
Signature of Director

  
\_\_\_\_\_  
Name of witness

**The Trustees of the Roman Catholic  
Church for the Diocese of Lismore**  
execute this Deed by Gregory Bernard  
Isaac, Diocesan Business Manager,  
signing as Power of Attorney, registered  
Book 4792 No. 253, on behalf of The  
Trustees of the Roman Catholic Church  
for the Diocese of Lismore, a body  
corporate constituted under the Catholic  
Church Trust Property Act 1936 (NSW).

  
\_\_\_\_\_  
Signature of Gregory Bernard Isaac  
Diocesan Business Manager

  
\_\_\_\_\_  
Name of Director