
Lake Macquarie City Council

Hydrox Nominees Pty Limited

Planning Agreement

Section 93F of the Environmental Planning
and Assessment Act, 1979 (NSW)

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Parties

Lake Macquarie City Council ABN 81 065 027 868 of 126 – 138 Main Road,
Speers Point, New South Wales (**Planning Authority**)

Hydrox Nominees Pty Limited ACN 139 262 123 of 3 City View Road,
Pennant Hills, New South Wales (**Developer**)

Background

- A The Planning Authority currently owns the Land.
 - B On 9 November 2009, the Planning Authority resolved to sell the Land through an “expression of interest” and a “call for detailed proposals” process.
 - C The Planning Authority sought proposals for the sale of the Land on the basis that the successful proponent obtain all necessary consents including subdivision consent required for the Development.
 - D The Developer was the successful bidder and consequently, the Developer and the Planning Authority entered into the Development Agreement for the sale of the Land subject to the satisfaction of a number of conditions precedent. Woolworths Limited is a guarantor for the Developer under the Development Agreement.
 - E The Developer has submitted DA/251/2013 to the Planning Authority to carry out the Development on the Land.
 - F The Development is likely to impact the threatened species of plant known as *Grevillea parviflora* subsp. *parviflora* which is located on the Land.
 - G The Developer has made an offer to enter into this Agreement, if Planning Approval is granted, to transfer the Roads Lands to the Planning Authority, to carry out the Maintenance Works on the Environmental Conservation Land and to provide to the Planning Authority the Endowment Fund Monies for ongoing Management Works on the Environmental Conservation Lands, in accordance with the provisions of this Agreement, to offset the impacts of the Development on the threatened species.
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Operative provisions

1 Planning Agreement under the Act

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

2 Application of this Agreement

This Agreement applies to:

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

3 Operation of this Agreement

This Agreement operates only when:

- (a) The Planning Approval for the Development is granted by the relevant consent authority under the Act;
- (b) A condition of the Planning Approval requires this Agreement to be entered into; and
- (c) The Agreement is entered into as required by clause 25C(1) of the Regulation.

4 Definitions and interpretation

4.1 Definitions

In this Agreement the following definitions apply:

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

Agreement means this voluntary planning agreement including any schedules and annexures.

Bank Guarantee means an irrevocable and unconditional undertaking that is not limited in time and does not expire by one of the following trading banks:

- (a) Australia and New Zealand Banking Group Limited;
- (b) Commonwealth Bank of Australia;
- (c) Macquarie Bank;
- (d) National Australia Bank Limited;
- (e) St George Bank Limited;
- (f) Westpac Banking Corporation; or
- (g) other financial institution approved by the Planning Authority,

to pay an amount or amounts of money to the Planning Authority on demand and containing terms and conditions reasonably acceptable to the Planning Authority.

Business Day means a day which is not a Saturday, Sunday or bank or public holiday in Sydney or Newcastle.

Commencement of the Maintenance Works means the date which is included in the notice issued by the Developer to the Planning Authority under **clause 5.4(d)**.

Completion means the date (being not less than 3 years from the Commencement of the Maintenance Works) upon which the Environmental Conservation Lands reach a Stable State, confirmed by a written notice issued by the Planning Authority in accordance with **clause 5.4(h)(i)** or by determination by an expert that the Maintenance Works have been completed.

Construction Certificate means a construction certificate for any stage of the Development as defined under s109C of the Act.

Contractor means a contractor who is suitably qualified to carry out the Management Works.

Contributions means:

- (a) the Roads Land to be dedicated/transferred to,
- (b) the Maintenance Works to be carried out for the benefit of,
- (c) the Plan of Management to be prepared for,
- (d) the Vegetation Management Plan to be prepared for,
- (e) the payment of the Endowment Fund Monies to, and
- (f) all other requirements to be satisfied for the benefit of,

the Planning Authority by the Developer, or procured by it, pursuant to this Agreement including those set out in the Contributions Schedule.

Contributions Schedule means the Schedule attached to this Agreement entitled "**Schedule 2**".

Development means the proposed staged development of the Land for the construction and use of a Masters Home Improvement Centre and the concept design of a Bulky Goods Centre and restaurant, as modified from time to time. The Development is proposed to be staged as follows:

- (a) Stage 1A:
 - (i) Demolition of the skate park in the northern portion of the Land;
 - (ii) Consolidation and further subdivision of the Land;
 - (iii) Construction of a Masters Home Improvement Centre comprising a single building with associated parking, loading areas and landscaping; and
 - (iv) The construction of internal roads and connections with the Pacific Highway to the Development.
- (b) Stage 1B
 - (i) Use, buildings, parking, loading areas and landscaping areas associated with 13 tenancies forming a Bulky Goods Centre; and

- (ii) Use, buildings, parking and drive thru facility, loading areas and landscaping areas associated with a restaurant.
- (c) Stage 2
 - (i) Detailed design of the individual bulky goods tenancies and restaurant.

Development Application means DA/251/2013 or any application for modification thereof.

Development Agreement means the development agreement between the Planning Authority, the Developer and Woolworths Limited (as guarantor) dated 28 November 2011 which provides for the sale of the Land to the Developer on the basis that the Developer obtains all necessary consents required for the proposed Development.

Endowment Fund Monies means the sum calculated in accordance with the formula in **clause 5.5** and to be contributed by the Developer under **clause 5.5** for the Management Works.

Environmental Conservation Lands means the land owned by the Planning Authority and contained in:

- (a) Lot 1 and 3-8 Section E DP 2469;
- (b) Lot 1-30 Section F DP 2469;
- (c) Lot 1-16 & Lots 18-21 Section G DP 2469;
- (d) Lot 1-6 Section H DP 2469;
- (e) Lot 7-15 Section A DP 2469;
- (f) Lot 6-8 and Lots 10-26 Section B DP 2469;
- (g) Lots 2-12, 15-19, 21, 23 and 25-26 Section C DP 2469;
- (h) Lots 8,11,12 and 15-17 DP 738277; and
- (i) the Roads Land, once transferred to the Planning Authority under this Agreement.

Excluded Roads Land means such parts of the Roads Land as the Planning Authority determines should be classified as operational land.

Explanatory Note means the Explanatory Note attached at **schedule 4**.

Final Plan of Management means the Plan of Management submitted by the Developer to the Planning Authority's delegate, and considered acceptable by the Planning Authority under clause 1.2(e) of **schedule 3**.

Final Draft Plan of Management means the Plan of Management submitted by the Developer to the Planning Authority's delegate, and considered acceptable by the Planning Authority's delegate under clause 1.1(x) of **schedule 3**.

GST has the same meaning as in the GST Law.

GST Act means *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

GST Law has the meaning given to that term in the GST Act and any other Act or regulation relating to the imposition or administration of the GST.

Land means the land subject of the Development being part Lot 10 and Lots 11 - 14 DP 1013486 known as 4B South Street, Windale, New South Wales and which is currently owned by the Planning Authority and is subject of the Development Agreement.

Land Owner means the registered proprietor of the Land, from time to time.

LG Act means *Local Government Act 1993* (NSW).

Local Government Area means the Lake Macquarie Local Government Area.

LPI means the New South Wales Land and Property Information Office, or any other authority replacing it.

Maintenance Works means the works to be carried out by the Developer on the Environmental Conservation Lands in accordance with the Vegetation Management Plan.

Maintenance Works Period means the period for which the Maintenance Works must be carried out in accordance with **Column 3, Item 4 of schedule 2**.

Management Works means the works to be carried out by the Contractor (or any other person nominated by the Planning Authority) to manage the Environmental Conservation Lands in perpetuity in accordance with the Vegetation Management Plan after Completion of the Maintenance Works.

Noxious Weeds means those weeds as defined in the *Noxious Weeds Act 1993* (NSW).

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

Plan of Management means the plan of management prepared in accordance with the requirements of the LG Act and **schedule 3** of this Agreement.

Planning Approval means the determination by the grant of consent, including conditional consent, to the Development Application.

Public Purpose means any purpose that benefits the public or a section of the public including those purposes specified in section 93F(2) of the Act.

Regulation means the *Environmental Planning and Assessment Regulation 2000* (NSW).

Roads Land means Lot 1 DP 1198888 being residue title for the unformed road land comprised in Certificate of Title Volume 541 Folio 5 standing in the name of John Charles Bonarius, and is also subject to Caveat No. 364154 being approximately that part of the Environmental Conservation Lands identified as roads on the map in **annexure A**.

Stable State means the condition of the Environmental Conservation Lands so that they require minimum management works to maintain conservation value and can be mainly self-managed with only low levels of annual maintenance

management after the Maintenance Works have been undertaken and which must have achieved, at a minimum:

- (a) 100% removal of Noxious Weeds and Transformer Weeds (unless otherwise agreed with the Planning Authority, acting reasonably);
- (b) a locked gate at the start of the fire trail, nearest Wakefield Highway;
- (c) fencing on the perimeter of the Environmental Conservation Lands to prevent illegal vehicular access and at a minimum, the fencing is to be constructed along the Wakefield Road boundary including with adequate returns;
- (d) removal of rubbish (unless otherwise agreed by the Planning Authority, acting reasonably);
- (e) prevention of accelerated erosion through erosion control generally in accordance with the Blue Book "Managing urban stormwater: soils and construction" Volume 1, Landcom, Fourth Edition, March 2004 ISBN 0-9752303-3-7; and
- (f) signs on the perimeter to promote appropriate use of the Environmental Conservation Land. Signage is to be approved by Planning Authority prior to installation,

but excludes the upgrade of the track through the Environmental Conservation Lands.

Transformer Weeds means those weeds as listed in the Vegetation Management Plan as transformer weeds.

Vegetation Management Plan means a plan that includes management and maintenance measures to:

- (a) achieve the Stable State of the Environmental Conservation Lands including weed control (including the listing of Transformer Weeds), access management, fencing and access gates and maintenance thereof, feral animal control, invertebrate pest control, signage, appropriate erosion / stabilisation measures, firebreak / track maintenance including track erosion and stabilisation, monitoring and reporting requirements and any other matters as required by a condition of the Planning Approval; and
- (b) maintain the Environmental Conservation Lands in a Stable State.

4.2 Interpretation

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

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) 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.

- (c) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (d) 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.
- (e) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (f) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (g) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (h) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (i) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- (j) References to the word 'include' or 'including' are to be construed without limitation.
- (k) A reference to this Agreement includes the agreement recorded in this Agreement.
- (l) Any schedules and attachments form part of this Agreement.

5 Contribution to be made under this Agreement

5.1 Provision of Contributions

Subject to this Agreement, the Developer is to deliver to the Planning Authority the Contributions specified in **column 2 of schedule 2** in accordance with this **clause 5** and at the times specified in **column 3 of schedule 2**.

5.2 Acquisition and transfer of the Roads Land

- (a) Subject to **clauses 5.2(b) and (c)**, the Developer must, in accordance with the timing set out in **schedule 2**, transfer the Roads Land to the Planning Authority.
- (b) The Developer must use its best endeavours, and the Planning Authority must do all things reasonably necessary to assist the Developer, to transfer the Roads Land to the Planning Authority free from:
 - (i) any notation on the title that the Roads Land is a public road; and

- (ii) any easement, covenant, restriction as to user or other encumbrance excepting the reservations and conditions remaining within the Crown Grant.
- (c) The Developer must, in accordance with the timing set out in **schedule 2**, take all steps necessary to register at the LPI the transfer of the Roads Land to the Planning Authority including:
 - (i) delivering to the Planning Authority:
 - (A) a form of transfer in respect of the Roads Land executed by the Land Owner in registrable form transferring the Roads Land for \$1.00; and
 - (B) the certificates of title for the Roads Land;
 - (ii) lodging all necessary executed documents with the LPI and responding to any enquiries or requisitions made by the LPI; and
 - (iii) taking any other necessary action including the payment of fees (other than paying stamp duty associated with the transfer to the Planning Authority) to give effect to the transfer of the title of the Roads Land to the Planning Authority.
- (d) The Contribution comprising the transfer of the Roads Land to the Planning Authority is made for the purposes of this Agreement on the registration of the transfer of the Roads Land to the Planning Authority.

5.3 Plan of Management and Vegetation Management Plan

- (a) The Plan of Management will be prepared in accordance with **schedule 3** and must be completed within the time set out in **schedule 2**. The Contribution comprising the preparation of the Plan of Management will be made for the purposes of this Agreement when the Developer submits the Final Plan of Management to the Planning Authority, and the delegate confirms that it is acceptable in accordance with **clause 1.2(e)** of **schedule 3**.
- (b) The Vegetation Management Plan will be prepared in accordance with **schedule 3** and must be completed within the time set out in **schedule 2**. The Contribution comprising the preparation of the Vegetation Management Plan will be made for the purposes of this Agreement when the relevant delegate of the Planning Authority has approved the Final Vegetation Management Plan in accordance with **schedule 3**.

5.4 Maintenance Works

- (a) The Developer must carry out the Maintenance Works in accordance with the Vegetation Management Plan and the timing specified in **column 3, item 4 of schedule 2**.
- (b) The Planning Authority must not do anything that would prevent or delay the Developer in carrying out the Maintenance Works and must, at its cost and from the commencement of the Maintenance Works Period,

grant all such licences or other rights of access over the Environmental Conservation Lands, subject to terms and conditions set out in **Annexure B**, to enable the Developer to carry out the Maintenance Works and perform its obligations under this Agreement including in the event that the Planning Authority transfers the Environmental Conservation Offset Lands to another person or Authority.

- (c) The Developer must provide the Planning Authority with no less than 10 Business Days prior written notice of its intention to commence the Maintenance Works (**Anticipated Commencement Notice**)
- (d) Once the Developer has commenced the Maintenance Works, it must provide the Planning Authority with a written notice which includes details of the date upon which those Maintenance Works commenced.
- (e) During the Maintenance Works Period, the Developer will provide written notice to the Planning Authority, within 30 Business Days of each anniversary of the Commencement of the Maintenance Works, of:
 - (i) the stage or part of the Maintenance Works completed in the preceding year;
 - (ii) plans and specifications of the Maintenance Works carried out including any works as executed plans; and
 - (iii) the costs of completing those Maintenance Works.
- (f) When the Developer considers that the Environmental Conservation Lands have reached a Stable State as a consequence of the Maintenance Works, but not being less than 3 years after the Commencement of the Maintenance Works:
 - (i) the Developer will provide written notice to the Planning Authority that it is of the opinion that the Maintenance Works have been Completed;
 - (ii) the Planning Authority:
 - (A) may appoint, at its cost, an independent environmental consultant to provide advice about whether the Environmental Conservation Lands have reached a Stable State, and if not, what further works are required to bring the Environmental Conservation Lands to a Stable State; or
 - (B) may obtain its own advice internally about whether the Environmental Conservation Lands have reached a Stable State, and if not, what further works are required to bring the Environmental Conservation Lands to a Stable State; and
 - (iii) the Planning Authority may, within 10 Business Days of the date of the receipt of the notice referred to in **clause 5.4(f)(i)** request information about the Maintenance Works carried out by the Developer.

- (g) The Developer will provide any and all information about the Maintenance Works carried out which is requested by the Planning Authority or by any independent environmental consultant appointed by the Planning Authority within 10 Business Days of any request for that information or as otherwise agreed with the Planning Authority.
- (h) Within 30 Business Days of receipt of the notice referred to in **clause 5.4(f)(i)** or the provision of the additional information referred to in **clause 5.4(g)**, whichever is the later, the Planning Authority must provide written notice to the Developer that:
 - (i) it agrees that the Environmental Conservation Lands have reached a Stable State and the Maintenance Works have been Completed; or
 - (ii) having acted reasonably, it does not agree that the Environmental Conservation Lands have reached a Stable State and the Maintenance Works have been Completed and provide details of those matters that, in the Planning Authority's opinion, must be completed;
- (i) If the Planning Authority provides written notice under **clause 5.4(h)(ii)** the Developer must either:
 - (i) proceed to carry out the works that the Planning Authority has identified must be completed and, once those additional works have been completed, issue a further notice under **clause 5.4(f)(i)**; or
 - (ii) within 20 Business Days of receipt of the written notice by the Planning Authority, provide written notice to the Planning Authority that it considers that the Maintenance Works have been Completed and that the expert determination provisions in **clause 9.5** are to apply.
- (j) The Developer must continue to carry out the Maintenance Works until Completion, and for at least a period of 3 years from the Commencement of the Maintenance Works.
- (k) The Planning Authority must not amend or vary the Vegetation Management Plan as adopted under the Plan of Management during the Maintenance Works Period.
- (l) The Contribution comprising the Maintenance Works will be made for the purposes of this Agreement when Completion occurs or in the event that:
 - (i) the Planning Authority fails to provide any notice required under **clause 5.4(h)**; and
 - (ii) the Developer has notified the Planning Authority in writing that it has failed to issue a notice; and
 - (iii) within 20 Business Days of receiving the notice under **clause 5.4(l)(ii)** the Planning Authority again fails to provide the notice required under **clause 5.4(h)**.

5.5 Payment of the Endowment Fund Monies

- (a) The Developer must pay to the Planning Authority the Endowment Fund Monies at the time specified in and in accordance with **Item 5, Column 3 of schedule 2**.
- (b) The Endowment Fund Monies comprise an amount calculated using the following formula:

$$\text{EFM} = \frac{\text{Base EFM} \times \text{CPI 2}}{\text{CPI 1}}$$

Where

CPI 2 means the Consumer Price Index Number (Sydney – All Groups) last published by the Australian Bureau of Statistics at the time of payment.

CPI 1 means the Consumer Price Index Number (Sydney – All Groups) last published by the Australian Bureau of Statistics as at March 2014.

EFM means the Endowment Fund Monies.

Base EFM means \$429,000.

- (c) The Developer must provide the Planning Authority with at least 10 Business Days written notice of:
 - (i) the date upon which it anticipates that the Maintenance Works will be Completed; and
 - (ii) the quantum of the Endowment Fund Monies calculated in accordance with **clause 5.5(b)**.
- (d) If:
 - (i) the Planning Authority agrees with the calculation of the Endowment Fund Monies notified to it under **clause 5.5(c)**, then the Planning Authority must issue the Developer with a tax invoice (if the supply by the Planning Authority is a taxable supply within the meaning of the GST Law) or otherwise an invoice within 10 Business Days from the date of receipt of the written notice under **clause 5.5(c)** and specify the details of the Planning Authority's bank account into which the Endowment Fund Monies are to be deposited; or
 - (ii) the Planning Authority does not agree with the calculation of the Endowment Fund Monies notified to it under **clause 5.5(c)**, then the provisions of **clause 9** apply.
- (e) The Contribution comprising the payment of the Endowment Fund Monies is made for the purposes of this Agreement when cleared funds are deposited by means of electronic funds transferred by the Developer into a bank account nominated by the Planning Authority under this clause.

5.6 Reclassification of Environmental Conservation Lands

- (a) Subject to **clause 20**, as part of the delivery of the Contributions by the Developer, the Planning Authority has agreed to take steps to:
 - (i) reclassify the Environmental Conservation Lands (other than the Excluded Roads Land) from operational to community land; and
 - (ii) resolve to adopt the Final Plan of Management prepared in consultation with the Developer under **schedule 3**, in accordance with the timing set out in **schedule 2**.
- (b) If the Planning Authority fails to:
 - (i) reclassify the Environmental Conservation Lands (other than the Excluded Roads Land) to community land; or
 - (ii) adopt the Final Plan of Management,by the date of Completion of the Maintenance Works, the Developer will nevertheless be taken to have satisfied its obligations under this Planning Agreement in respect of those Maintenance Works.

6 Application of the Contributions

The Contributions are to be applied by the Planning Authority for the Public Purpose identified in **schedule 2**.

7 Application of sections 94, 94A and 94EF of the Act to the Development

- (a) This Agreement does not exclude the application of sections 94 and 94A of the Act to the Development.
- (b) This Agreement does not exclude the application of sections 94EF of the Act to the Development.
- (c) The Planning Authority must, in determining the application of a section 94 or section 94A contribution or levy to the Development connected with the environment and/or conservation (if applicable), take into consideration the benefits provided by the Developer under this Agreement as required under section 93F(3)(e) of the Act.

8 Review of this Agreement

- (a) The Parties agree that this Agreement may be reviewed or modified and that any review or modification of this Agreement will be conducted in the circumstances and in the manner determined by the Parties.
- (b) No modification or review of this Agreement, will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

9 Dispute Resolution

9.1 Reference to Dispute

- (a) If a dispute arises between the Parties in relation to this Agreement, then either Party must resolve that dispute in accordance with this clause; and
- (b) If the Developer gives notice of a dispute under **clause 5.4(i)(ii)**, the expert determination provisions in **clause 9.5** will apply.

9.2 Notice of Dispute

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

- (a) the intent to invoke this clause;
- (b) the nature or subject matter of the dispute, including a summary of any efforts made to resolve the dispute other than by way of this clause; and
- (c) the outcomes which the notifying Party wishes to achieve (if practicable).

9.3 Representatives of Parties to Meet

- (a) The representatives of the Parties must promptly (and in any event within 10 Business Days of the written notice provided in accordance with **clause 9.2**) meet in good faith to attempt to resolve the notified dispute.
- (b) The Parties may, without limitation:
 - (i) resolve the dispute during the course of that meeting;
 - (ii) agree that further material, expert determination in accordance with **clause 9.5** or consideration is needed to effectively resolve the dispute (in which event the Parties will, in good faith, agree to a timetable for resolution); or
 - (iii) agree that the Parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

9.4 Neither party may constrain

If:

- (a) at least one meeting has been held in accordance with **clause 9.3**; and
- (b) the Parties have been unable to reach an outcome identified in **clause 9.3(b)(i) to (iii)**; and
- (c) either of the Parties, acting in good faith, forms the view that the dispute is reasonably unlikely to be resolved in accordance with a process agreed under **clause 9.3**,

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

9.5 Expert Determination

- (a) If a dispute arises between Parties to this Agreement, the Parties agree to refer the dispute to expert determination in Sydney, New South Wales administered by the Australian Commercial Dispute Centre (**ACDC**).
- (b) The expert determination will be conducted in accordance with the ACDC Rules for Expert Determination (**Rules**) in force at the date of this Agreement. The Rules set out the procedures to be adopted, the process of selection of the expert and the costs involved, including the parties' respective responsibilities for the payment of the expert's costs and other costs of the expert determination.
- (c) The expert determination will be final and binding on the Parties.
- (d) This **clause 9.5** survives termination of this Agreement.
- (e) At any time, a Party may, without inconsistency with this **clause 9.5**, seek urgent interlocutory relief in respect of a dispute subject of this **clause 9.5**, from any Court having jurisdiction.

10 Registration

10.1 Registration of Planning Agreement

- (a) Immediately after the operation of this Agreement in accordance with **clause 3**, the Developer must, at the Developer's expense, commence the actions necessary to procure the registration of the Agreement on the relevant folios of the register held by the LPI pertaining to the Land and must take all reasonable steps to have the Agreement registered as soon as is practically possible after the operation of this Agreement.
- (b) The Planning Authority agrees, at the Developer's cost:
 - (i) to provide a release and discharge of this Agreement with respect to the Land or any lot, including a strata lot, created on subdivision of the Land; and
 - (ii) to do all things reasonably necessary, including the execution of any documents, to enable the Land Owner to remove the notation of this Agreement on the relevant folios of the register, held by the LPI pertaining to the Land,on satisfaction by the Developer of the obligation to provide the Contributions.

11 Enforcement and Security

11.1 Enforcement by any party

- (a) Without limiting any other remedies available to the Parties, this Agreement may be enforced by any Party in any court of competent jurisdiction.

- (b) Nothing in this Agreement prevents:
 - (i) 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; and
 - (ii) the Planning Authority 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.

11.2 Bank Guarantee

- (a) The Developer must provide to the Planning Authority a Bank Guarantee in the amount of \$650,000.00 prior to issue of the first Construction Certificate.
- (b) Except as expressly permitted by this Agreement, the Planning Authority is not to call on a Bank Guarantee provided under this clause unless the Planning Authority considers that the Developer has failed to comply with its obligations under this Agreement in a timely manner and the Developer has failed to rectify the non-compliance after having been given reasonable notice (which must not be less than 20 Business Days) in writing to do so.
- (c) At any time following the provision of a Bank Guarantee, the Developer may provide the Planning Authority with one or more replacement Bank Guarantees totalling the amount of all Bank Guarantees required to be provided under this clause for the time being. On receipt of such replacement Bank Guarantee, the Planning Authority must release and return to the Developer, as directed, the Bank Guarantees which it holds that have been replaced.
- (d) Subject to this clause, the Planning Authority may apply the Bank Guarantee in satisfaction of:
 - (i) any obligation of the Developer under this Agreement to carry out the Maintenance Works or to pay the Endowment Fund Monies; and
 - (ii) any liability, loss, cost, charge or expense directly incurred by the Planning Authority because of the failure by the Developer to comply with this Agreement.
- (e) If the Planning Authority calls on a Bank Guarantee in accordance with this Agreement, the Planning Authority 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 the existing Bank Guarantee, does not exceed \$650,000.00.
- (f) The Bank Guarantee, or part thereof if any balance remains, will be returned to the Developer within 7 Business Days of the latest to occur of:
 - (i) Completion of the Maintenance Works; and

- (ii) Payment of the Endowment Fund Monies.
- (g) Nothing in this **clause 11.2** prevents or restricts the Planning Authority from taking any enforcement action in relation to:
 - (i) any obligation of the Developer under this Agreement; or
 - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Planning Authority because of the failure by the Developer to comply with this Agreement,that is not satisfied by calling on a Bank Guarantee.

11.3 Restriction on the issue of a Construction Certificate

For the purposes of s109F(1)(a) of the Act, the following requirements of this Agreement must be satisfied prior to the issue of any Construction Certificate, provision of the:

- (a) Contribution in **item 1** of **schedule 2**;
- (b) Contribution in **item 3** of **schedule 2**; and
- (c) Bank Guarantee under **clause 11.2**.

11.4 Termination

If on or before the date which is 5 years and one day from the date on which any such Planning Approval becomes operative:

- (a) the Planning Approval granted lapses; or
- (b) no Construction Certificate for any stage of the Development has been issued,

then either Party may terminate this Agreement by written notice to the other Party.

12 Notices

12.1 Delivery of notices and other documents

- (a) 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:
 - (i) Delivered or posted to that Party at its address set out below.
 - (ii) Faxed to that Party at its fax number set out below.
 - (iii) Emailed to that Party at its email address set out below.

Planning Authority

Attention: Development Contributions Coordinator Address: 126-138
Main Road, Speers Point, NSW 2284

Postal Address: Box 1906, Hunter Region Mail Centre, NSW, 2310

Fax Number: 02 4958 7257

With a copy to:
Attention: Corporate Lawyer
Address: 126-138 Main Road, Speers Point, NSW 2284
Postal Address: Box 1906, Hunter Region Mail Centre, NSW, 2310
DX Address: DX7941 Newcastle
Fax Number: 02 4921 0345

Developer

Attention: National Property Manager
Address: 1 Woolworths Way, Bella Vista, NSW 2153
Fax Number: (02) 8888 6545

With a copy to:
Attention: General Counsel
Address: 1 Woolworths Way, Bella Vista, NSW 2153
Fax Number: (02) 8888 0558

12.2 Change of Details

If a Party gives the other Party three Business Days notice of a change of its address or email address:

- (a) any notice, consent or invoice is only given or made by that other Party if it is served or posted by way of registered post to the latest address; or
- (b) any information, application or request is only given or made by that other Party if it is emailed to the latest email address.

12.3 Giving of Notice

Subject to **clause 12.4**, any notice, consent, invoice, information, application or request is to be treated as given or made at the following time:

- (a) if it is delivered by process server, when it is served at the relevant address;
- (b) if it is sent by registered post, four Business Days after it is posted; and
- (c) if it is sent by email, when a delivery confirmation report is received by the sender, unless subsequently the sender receives a delivery failure notification, indicating that the electronic mail has not been delivered.

12.4 Delivery outside of business hours

If any notice, consent, information, application or request is delivered on a day that is not a Business Day, or if on a Business Day, after 5.00 pm 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.

13 Approvals and consent

Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in that Party's absolute discretion and subject to any

conditions determined by the Party. A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

14 Assignment and Dealings

14.1 Assignment

- (a) A Party must not assign or deal with any right under this Agreement without the prior written consent of the other Party.
- (b) Any purported dealing in breach of this clause is of no effect.

14.2 Transfer of the Land or Development

- (a) Subject to **clause 14.2(b)**, the Developer may not transfer or sell the whole of its title in the Land to another person (**Transferee**) unless before it sells or transfers that title:
 - (i) it satisfies the Planning Authority acting reasonably that the proposed Transferee is financially capable of complying with the Developer's obligations under this Agreement;
 - (ii) the Planning Authority is satisfied, acting reasonably, that the rights of the Planning Authority are not materially diminished or fettered;
 - (iii) the Transferee delivers to the Planning Authority a novation deed signed by the Transferee in a form and of such substance as is acceptable to the Planning Authority, acting reasonably, containing provisions under which the Transferee agrees to comply with all the outstanding obligations of the Developer under the Agreement;
 - (iv) any default by the Developer under any provisions of this Agreement has been remedied by the Developer or waived by the Planning Authority on such conditions as the Planning Authority may determine, acting reasonably; and
 - (v) the Developer and the Transferee pay the Planning Authority's reasonable costs in relation to the assignment,

and the Parties must use their best endeavours to enter into any novation deed within 14 Business Days of the Developer first notifying the Planning Authority of a proposed transfer.
- (b) The provisions of **clause 14.1(a)** do not apply in the event that the Developer provides notice to the Planning Authority that it will retain the responsibility for the Contributions under this Agreement.

15 Costs

The Developer will pay the Planning Authority's reasonable costs of preparing, negotiating, executing and stamping this Agreement and any document related to this Agreement, up to a maximum amount of \$10,000.00.

16 Entire Agreement

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

17 Further acts

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

18 Governing law and jurisdiction

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

19 Joint and individual liability and benefits

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

20 No fetter

Nothing in this Agreement shall be construed as requiring the Planning Authority 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.

21 Representations and warranties

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

22 Severability

If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

23 Waiver

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

24 GST

24.1 Construction

In this **clause 24**:

- (a) words and expressions which are not defined in this Agreement but which have a defined meaning in the GST Law have the same meaning as in the GST Law; and
- (b) **GST Law** has the same meaning given to that expression in the GST Act.

24.2 Intention of the Parties

Without limiting the operation of this **clause 24**, as at the date of this Agreement, the Parties intend that:

- (a) Divisions 81 and 82 of the GST Act apply to the supplies made under and in connection with this Agreement;
- (b) no tax invoices will be exchanged between the Parties; and
- (c) no additional amount will be payable to a Supplier (as defined in **clause 24.4** below) on account of GST.

24.3 Consideration GST exclusive

All prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST.

24.4 Payment of GST – additional payment required

- (a) If an entity (**Supplier**) makes a taxable supply under or in connection with this Agreement (**Relevant Supply**), then, subject to **clause 24.4(d)**, the Party required under the other provisions of this Agreement to provide the consideration for that Relevant Supply (**Recipient**) must pay an additional amount to the Supplier (**GST Amount**), as calculated under **clause 24.4(b), 24.4(c) and 24.4(e)** (as appropriate).
- (b) To the extent that the consideration to be provided by the Recipient for the Relevant Supply under the other provisions of this Agreement is a payment of money (including, for the avoidance of doubt, any payment under **clauses 24.4(c) and 24.4(e)**), the Recipient must pay to the Supplier an additional amount equal to the amount of the payment multiplied by the rate or rates of GST applicable to that Relevant Supply.
- (c) To the extent that the consideration to be provided by the Recipient for that Relevant Supply is neither:
 - (i) a payment of money; nor
 - (ii) a taxable supply,

(Non-taxable non monetary consideration),

the Recipient must pay to the Supplier an additional amount equal to 1/11th of the GST-inclusive market value of the Non-taxable non-monetary consideration.
- (d) To the extent that the consideration payable by the Recipient is a taxable supply made to the Supplier by the Recipient, then, notwithstanding **clause 24.4(a)** and subject to **clause 24.4(e)**, no additional amount is payable by the Recipient to the Supplier on account of the GST payable on that taxable supply.
- (e) Notwithstanding **clause 24.4(d)** if the GST-inclusive market value of the non-monetary consideration of the Relevant Supply (**Supplier's taxable supply**) is less than the GST-inclusive market value of the non-monetary consideration comprising the taxable supply made by the Recipient to the Supplier for the Supplier's taxable supply (**Recipient's taxable supply**) then, the Recipient must pay to the Supplier an additional amount equal to 1/11th of the difference between the GST-inclusive market value of the Recipient's taxable supply and the GST-inclusive market value of the Supplier's taxable supply.
- (f) The recipient will pay the GST Amount referred to in this **clause 24.4** in addition to and at the same time as the first part of the consideration is provided for the Relevant Supply.

24.5 Valuation of non-monetary consideration

The Parties will seek to agree upon the market value of any non-monetary consideration which the Recipient is required to provide under **clause 24.4**. If agreement cannot be reached prior to the time that a Party becomes liable for GST, the matter in dispute is to be determined by an independent expert nominated by the President for the time being of the Institute of Chartered Accountants in Australia. The Parties will each pay one half of the costs of referral and determination by the independent expert.

24.6 Tax invoice

The Supplier must deliver a tax invoice to the Recipient before the Supplier is entitled to payment of the GST Amount under **clause 24.4**. The Recipient can withhold payment of the GST Amount until the Supplier provides a tax invoice.

24.7 Adjustment event

If an adjustment event arises in respect of a taxable supply made by a Supplier under this Agreement, the GST Amount payable by the Recipient under **clause 24.4** will be recalculated taking into account any previous adjustment under this clause to reflect the adjustment event and a payment will be made by the Recipient to the Supplier or by the Supplier to the Recipient as the case requires.

24.8 Reimbursements

Where a party is required under this Agreement to pay, indemnify or reimburse an expense, loss or outgoing of another party, the amount to be paid, indemnified or reimbursed by the first party will be the sum of:

- (a) the amount of the expense, loss or outgoing less any input tax credits in respect of the expense, loss or outgoing to which the other party, or to which the representative member of a GST group of which the other party is a member, is entitled; and
- (b) any additional amount payable under **clause 24.4** in respect of that reimbursement.

24.9 No Merger

This **clause 24** does not merge in the completion, discharge, rescission or termination of this document or on the transfer of any property supplied or to be supplied under this document.

25 Effect of Schedules

The Parties agree to comply with any terms contained in Schedules to this Agreement as if those terms were included in the operative part of the Agreement.

26 Relationship of parties

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

27 Further steps

Each party must promptly do whatever any other party reasonably requires of it to give effect to this document and to perform its obligations under it.

28 Counterparts

This document may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

29 Rights cumulative

Except as expressly stated otherwise in this Agreement, the rights of a Party under this Agreement are cumulative and are in addition to any other rights of that Party.

Schedule 1

*Section 93F Requirements

Provision of the Act	This Agreement
Under section 93F(1), the Developer has:	
(a) sought a change to an environmental planning instrument.	(a) No
(b) made, or proposes to make, a development application.	(b) Yes
(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.	(c) No
Description of the land to which this Agreement applies- (Section 93F(3)(a))	Part Lot 10 and Lots 11-14 DP 1013486 known as 4B South Street, Windale, New South Wales
Description of the development to which this Agreement applies- (Section 93F(3)(b)(ii))	The proposed staged development of the Land for the construction and use of a Masters Home Improvement Centre and the concept design of a Bulky Goods Centre and restaurant on the subject land, as modified from time to time.
The scope, timing and manner of delivery of Development Contributions required by this Agreement - (Section 93F(3)(c))	Clause 5
Applicability of Section 94 of the Act - (Section 93F(3)(d))	Not excluded as they apply to the Development – clause 7
Applicability of Section 94A of the Act - (Section 93F(3)(d))	Not excluded as they apply to the Development - clause 7
Applicability of Section 94EF of the Act - (Section 93F(3)(d))	Not excluded as they apply to the Development - clause 7
Applicability of Section 93F(3)(e) of the Act	Benefits under this Agreement are to be taken into account when determining a contribution or a levy connected with the environment or conservation.
Mechanism for Dispute resolution - (Section 93F(3)(f))	Clause 9

Provision of the Act	This Agreement
Enforcement of this Agreement - (Section 93F(3)(g))	Clause 11
Registration of this Agreement (Section 93H)	Yes – clause 10
No obligation to grant consent or exercise functions - (Section 93F(9))	Clause 20

Schedule 2

Contributions Schedule

Column 1 – Item	Column 2 – Development Contribution	Column 3 – Timing	Column 4 – Public Purpose
1	Transfer of the Roads Land to the Planning Authority	The Roads Land is to be transferred to the Planning Authority prior to the issue of the first Construction Certificate for the Development.	Conservation and enhancement of the natural environment
2	Assist the Planning Authority, at the Developer's cost, to prepare the Plan of Management in accordance with the protocol identified in schedule 3 .	The contribution comprising the Plan of Management is to be completed in accordance with Schedule 3, prior to Completion.	Conservation and enhancement of the natural environment
3	Assist the Planning Authority, at the Developer's cost, to prepare the Vegetation Management Plan in accordance with the protocol identified in schedule 3 .	A final draft of the Vegetation Management Plan is to be approved by a delegate of the Planning Authority prior to the issue of the first Construction Certificate for the Development.	Conservation and enhancement of the natural environment
4	The carrying out of the Maintenance Works on the Environmental Conservation Lands in accordance	The Developer must:	Conservation and enhancement of

Column 1 – Item	Column 2 – Development Contribution	Column 3 – Timing	Column 4 – Public Purpose
	with the Vegetation Management Plan.	<p>(a) commence the carrying out of the Maintenance Works in accordance with the Vegetation Management Plan approved by a delegate of the Planning Authority in accordance with schedule 3, prior to the issue of the first Construction Certificate for the Development; and</p> <p>(b) continue to carry out those Maintenance Works until Completion.</p>	the natural environment
5	Endowment Fund Monies to be paid to the Planning Authority	<p>The Developer must pay the Endowment Fund Monies to the Planning Authority:</p> <p>(a) if there is no dispute in respect of the quantum of the Endowment Fund Monies, within 30 Business Days of the Completion of the Maintenance Works on the Environmental Conservation Lands; or</p> <p>(b) if there is a dispute in respect of the quantum of the Endowment Fund Monies, within 30 Business Days after, and in the quantum determined by, the final resolution of that</p>	Conservation and enhancement of the natural environment

Column 1 – Item	Column 2 – Development Contribution	Column 3 – Timing	Column 4 – Public Purpose
		dispute.	

Schedule 3

Protocol for Vegetation Management Plan and Plan of Management Preparation

1 Plan of Management

1.1 Preparation of Plan of Management

- (a) The Developer must assist, at its cost, the Planning Authority in preparing a site specific Plan of Management for the Environmental Conservation Lands as required under Chapter 6, Part 2, Divisions 1 and 2 of the LG Act (including for the Excluded Roads Land) including:
 - (i) engaging a suitably qualified consultant (**Consultant**) to prepare the draft Plan of Management who has prior experience in preparing Plans of Management under the LG Act;
 - (ii) preparing the Plan of Management in accordance with all legislative requirements and which is to be consistent with the Planning Authority's "Plan of Management for Community Land 2011";
 - (iii) the Consultant and the Developer are to consult with the Planning Authority during the preparation of the Plan of Management including meeting with the Planning Authority's nominated delegate when reasonably required by the Planning Authority. The Planning Authority and its nominated delegate must meet with the Consultant and the Developer within 10 Business Days of receiving written notice from the Developer requesting such a meeting;
 - (iv) submitting an initial draft Plan of Management (**Initial Draft POM**) prepared by its Consultant for review by the Planning Authority's nominated delegate;
 - (v) the Planning Authority must, within a reasonable period of time and no later than 20 Business Days after receipt of the Initial Draft POM from the Developer under **clause 1.1(a)(iv)** above, provide a written response to the Developer identifying the required changes to the Initial Draft POM;
 - (vi) on receipt of the comments from the Planning Authority on the Initial Draft POM, the Developer will instruct its Consultant to make any necessary changes to the Initial Draft POM; and
 - (vii) submit a final draft Plan of Management (**Final Draft POM**) to the Planning Authority's nominated delegate which addresses

the Planning Authority's nominated delegate's comments on the Initial Draft POM;

- (viii) the Planning Authority's nominated delegate and any of its consultants, the Developer and its Consultant must, within a reasonable period of time and no later than 10 Business Days after delivery of the Final Draft POM from the Developer under **clause 1.1(a)(vii)** meet to discuss any final changes to the Final Draft POM prior to its submission to the Planning Authority;
 - (ix) the Developer will instruct its Consultant to make any necessary changes to the Final Draft POM following the meeting in **clause 1.1(a)(viii)**; and
 - (x) the Developer must submit the Final Draft POM to the Planning Authority for determination of acceptability by a delegate of the Planning Authority, and for approval by Council for public exhibition in accordance with **clause 1.2**.
- (b) The Parties agree that the Plan of Management must include sufficient details as to the Management Works.

1.2 Exhibition of Final Draft POM

- (a) Once the Final Draft Plan of Management has been approved by the delegate of the Planning Authority, the Planning Authority must, without delay, do all things reasonably necessary to prepare a report to the Planning Authority seeking a resolution to exhibit the Final Draft Plan of Management for the prescribed statutory period. The Planning Authority agrees that the Final Draft Plan of Management must be included as an agenda item for Council resolution within 30 Business Days of receipt of the Final Draft Plan of Management or, if there is no Ordinary Meeting of Council scheduled within 30 days, then the next available Ordinary Meeting of Council following. If the agenda item is deferred by Council, Council must do all things necessary to have that agenda item back before an Ordinary Meeting of Council within 10 Business Days for resolution.
- (b) If the Planning Authority resolves to exhibit the Final Draft Plan of Management, the Planning Authority will arrange, at the cost of the Developer, for exhibition of the Final Draft Plan of Management for the prescribed statutory period.
- (c) Following exhibition of the Final Draft Plan of Management, the Planning Authority must provide all written public submissions received during the period of exhibition of the Final Draft Plan of Management to the Developer and the Consultant for consideration.
- (d) The Developer must provide a summary of submissions, and amend the Final Draft Plan of Management to address any submissions following the public exhibition period such that the Final Draft Plan of Management

is in a form ready to be submitted to the Planning Authority for adoption (**Final Plan of Management**).

- (e) The Developer must submit and obtain confirmation that the Final Plan of Management is acceptable from the Planning Authority's nominated delegate, with the Planning Authority's nominated delegate providing a response, acting reasonably, within 10 Business Days of the submission by the Developer of the Final Plan of Management. If the Planning Authority's nominated delegate confirms that the Final Plan of Management is acceptable, the contribution identified in **item 2 of Schedule 2** will be taken to have been satisfied.

1.3 Preparation of Planning Report and adoption of POM

- (a) Once the Final Plan of Management has been approved under **clause 1.2(e)**, the Planning Authority will, without delay, do all things necessary to prepare a report to the Planning Authority about the Final Plan of Management and the Planning Authority agrees that the Final Plan of Management must be included as an agenda item at an Ordinary Meeting of Council for resolution within 30 Business Days of the approval of the Final Plan of Management under **clause 1.2(e)**. If the agenda item is deferred by Council, Council must do all things necessary to have that agenda item back before Council at an Ordinary Meeting of Council within 10 Business Days for resolution.
- (b) Formal adoption of the Final Plan of Management is required by way of Council resolution and the Developer must incorporate any reasonable changes to the Final Plan of Management resolved to be made by Council.
- (c) The adopted Plan of Management will commence on the date the Council resolves to adopt it, unless otherwise specified in the resolution or in the adopted Plan of Management.

2. Vegetation Management Plan

2.1 Preparation of Vegetation Management Plan

- (a) The Developer must assist, at its cost, the Planning Authority in preparing a site specific Vegetation Management Plan for the Environmental Conservation Lands (including for the Excluded Roads Land) including:
 - (i) engaging a suitably qualified ecologist or bush regeneration consultant (**Consultant**) to prepare the draft Vegetation Management Plan;
 - (ii) preparing the Vegetation Management Plan in accordance with all legislative requirements, including the Office of Environment and Heritage concurrence conditions for a "Plan of Management" and the Planning Authority's "Guidelines for Vegetation Management Plans";

- (iii) the Consultant and the Developer are to consult with the Planning Authority during the preparation of the Vegetation Management Plan including meeting with the Planning Authority's nominated delegate when reasonably required by the Planning Authority.
 - (iv) submitting an initial draft Vegetation Management Plan (**Initial Draft VMP**) prepared by its Consultant for review by the Planning Authority's nominated delegate;
 - (v) the Planning Authority must, within a reasonable period of time and no later than 20 Business Days after receipt of the Initial Draft VMP from the Developer under **clause 2.1(a)(iv)** above, provide a written response to the Developer identifying the required changes to the Initial Draft VMP;
 - (vi) on receipt of the comments from the Planning Authority on the Initial Draft VMP, the Developer will instruct its Consultant to make any necessary changes to the Initial Draft VMP; and
 - (vii) submit a final draft Vegetation Management Plan (**Final Draft VMP**) to the Planning Authority's nominated delegate which addresses the Planning Authority's nominated delegate's comments on the Initial Draft VMP;
 - (viii) the Planning Authority's nominated delegate and any of its consultants, the Developer and its Consultant must, within a reasonable period of time and no later than 10 Business Days after delivery of the Final Draft VMP from the Developer under **clause 2.1(a)(vii)** meet to discuss any final changes to the Final Draft VMP prior to its submission to the Planning Authority's delegate for approval;
 - (ix) the Developer will instruct its Consultant to make any necessary changes to the Final Draft VMP following the meeting in **clause 2.1(a)(viii)**; and
 - (x) the Developer must submit the Final Vegetation Management Plan (**Final Vegetation Management Plan**) to the Planning Authority.
- (b) The Planning Authority must, within a reasonable period of time and no later than 10 Business Days after receipt of the Final Vegetation Management Plan from the Developer under **clause 2.1(a)(x)**, approve the Final Vegetation Management Plan if the Planning Authority is satisfied on a reasonable basis that the Council's requirements have been met.
- (c) The Parties agree that the Vegetation Management Plan must include sufficient details as to the:
- (i) Maintenance Works required to be completed or any stage of the Maintenance Works that are to be completed on an annual basis; and

(ii) Management Works.

Schedule 4

Explanatory Note

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Planning Agreement

This Explanatory Note provides a plain English summary to support the notification of a draft voluntary Planning Agreement (**the Planning Agreement**) under section 93F of the *Environmental Planning and Assessment Act 1979* (NSW) (**the Act**) requiring environmental offsets for a proposed development involving construction and use of a Masters Home Improvement Centre and the concept design of a bulky goods centre and restaurant on land within the Lake Macquarie local government area.

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

This Explanatory Note is not to be used to assist in construing the Planning Agreement.

1 Parties

Hydrox Nominees Pty Limited (**the Developer**) made an offer to Lake Macquarie City Council (**the Planning Authority**) to enter into a voluntary planning agreement, in connection with a development application it proposes to lodge relating to the subject land.

2 Description of Subject Land

The land to which the Planning Agreement applies is part Lot 10 and Lots 11 - 14 DP 1013486 known as 4B South Street, Windale, New South Wales. The land is currently owned by the Planning Authority.

3 Description of Proposed Change to Environmental Planning Instrument/Planning Application

The proposed development that is the subject of the Planning Agreement is the staged development of the subject land for the construction and use of a Masters Home Improvement Centre and the concept design of a bulky goods centre and restaurant, as modified from time to time. The proposed development will be staged as follows:

Stage 1A:

- Demolition of the skate park in the northern portion of the subject land;
- Consolidation and further subdivision of the subject land;
- Construction of a Masters Home Improvement Centre comprising a single building with associated parking, loading areas and landscaping; and
- The construction of an internal roundabout and access way from the Pacific Highway to the proposed development will be constructed.

Stage 1B

- Use, buildings, parking, loading areas and landscaping areas associated with 13 tenancies forming a Bulky Goods Centre; and
- Use, buildings, parking and drive thru facility, loading areas and landscaping areas associated with a restaurant.

Stage 2

- Detailed design of the individual bulky goods tenancies and restaurant.

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

The proposed development is likely to impact the threatened species of plant known as *Grevillea parviflora* subsp. *parviflora* which is located on the subject land. The Planning Agreement provides for contributions offered as an environmental offset against the impacts of the proposed development on threatened species.

In particular, the Planning Agreement promotes the public interest by requiring the Developer to:

- Acquire and transfer some land that is required to establish an area to be maintained as an environmental offset area;
- Assist the Council to prepare and draft a Vegetation Management Plan and Plan of Management for the environmental offset area;
- Carry out Maintenance works to the environmental offset area in accordance with the Vegetation Management Plan until that area reaches a "Stable State" (but not for a period of less than 3 years) which is to be determined by the Planning Authority, or an independent environmental consultant or an independent expert as part of the dispute resolution process; and

- Pay Endowment Fund Monies, once the environmental offset lands reach a stable state. The Endowment Fund Monies will be used by the Planning Authority for the management and maintenance of the environmental offset lands in perpetuity.

5 Assessment of the Merits of the Draft Planning Agreement

5.1 How the Planning Agreement promotes the objects of the Act and the public interest

The Planning Agreement promotes the following objectives of the Act:

... to encourage ... the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment ... (s5(a)(i))

... to encourage ... the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats ... (s 5(a)(vi))

5.2 How the Planning Agreement promotes the elements of the Local Government Act 1993 and the Council's charter

The Planning Agreement is consistent with the following purposes of the *Local Government Act 1993*:

- to give councils the ability to provide goods, services and facilities, and to carry out activities, appropriate to the current and future needs of local communities and of the wider public;
- to give councils a role in the management, improvement and development of the resources of their areas; and
- to require councils, councillors and council employees to have regard to the principles of ecologically sustainable development in carrying out their responsibilities.

The Planning Agreement promotes the following elements of the Council's Charter by endeavouring to protect and maintain habitat of threatened species within the local government area in perpetuity:

- to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development;
- to have regard to the long term and cumulative effects of its decisions; and
- to engage in long-term strategic planning on behalf of the local community.

5.3 The planning purposes served by the Planning Agreement

The Planning Agreement requires contributions by the Developer that will constitute an offset against the environmental impact caused by the proposed development. The environmental offset will ensure that an appropriate area of land is maintained in perpetuity to protect the habitat of the threatened species *Grevillea parviflora* subsp. *parviflora* in the area.

5.4 How does the Planning Agreement conform with the Planning Authority's Capital Works Program?

The Planning Agreement does not conform with the Planning Authority's Capital Works Program as no funds have been specifically allocated for the acquisition, maintenance and management in perpetuity of the environmental offset lands. The Planning Agreement offers contributions towards the conservation and enhancement of the natural environment beyond that planned for within the Council's capital works program.

The contributions offered in the Planning Agreement are intended to directly offset the impacts that will be caused by the proposed development.

5.5 What matters must be complied with before a construction certificate, occupation certificate or subdivision certificate?

Under the Planning Agreement, the following must occur prior to the issue of any Construction certificate for any part of the Masters Home Improvement Centre forming part of the Development:

- Dedication or transfer to the Planning Authority of land that will form part of the environmental offset area;
- The approval of the Final Vegetation Management Plan by a delegated representative of the Planning Authority;
- Commencement of the carrying out of the Maintenance Works in accordance with the Final Vegetation Management Plan; and
- The provision of a Bank Guarantee that will act as security for the carrying out by the Developer of the works to maintain the environmental offset area and the Endowment Fund Monies for the management of the environmental offset area in perpetuity.

Execution

Dated:

Executed as a Deed:

Executed by Hydrox Nominees Pty)
Limited (ACN 139 262 123))

.....
Company Secretary/Director

.....
Director

.....
Name of Company Secretary/Director
(print)

.....
Name of Director (print)

The Common Seal of Lake Macquarie)
City Council was hereto affixed in)
accordance with a resolution of the)
Council dated _____:)

.....
[Jodie Harrison]
Mayor

.....
[Brian Bell]
General Manager

Annexure A

Roads Land



Annexure B

Terms and Conditions of Access

1. Definitions

In this Annexure B:

- (a) **Occupier** means the person benefiting from the right to access the Environmental Conservation Lands granted by the Planning Authority in accordance with this Agreement including its contractors, employees and agents.
- (b) **Council** means Lake Macquarie City Council, the Planning Authority.

2. Access

The Occupier must:

- (a) access the Environmental Conservation Lands only for the purposes of carrying out Maintenance Works in accordance with the Plan of Management;
- (b) not do anything that would damage, remove or kill any vegetation (including any trees, saplings or shrubs) within the Environmental Conservation Lands, otherwise than in accordance with the requirements of the Plan of Management;
- (c) only access the Environmental Conservation Lands at the access points nominated by the Council or as identified in the Plan of Management;
- (d) not do, cause or permit to be done anything that may damage, alter, pollute, contaminate, interfere with, or which is otherwise dangerous or offensive to:
 - i) the Environmental Conservation Lands; and
 - ii) any land or buildings next to or in the vicinity of the Environmental Conservations Lands; or
 - iii) other owners, users or occupiers of the Environmental Conservation Lands or surrounding properties,excluding any activities or activities incidental to those permitted under the Plan of Management.
- (e) immediately repair any damage and take all necessary action to stop / clean up any leakage, spillage or pollution caused by the Occupier and if the Occupier fails to do so, Council can take all action it considers appropriate to repair such damage or stop / clean up the leakage, spillage or pollution at the Occupier's cost;
- (f) comply with all laws, statutes, regulations, ordinances by-laws and notices issued by, and the requirements of, any authority applicable to the Occupier's access to the Environmental Conservations Lands for the purpose of carrying out the Maintenance Works;

- (g) after a copy of the Council's current public liability insurance policy has been provided to the Occupier, not do anything that may cancel or make that insurance invalid; and
- (h) not assign or sublicense or otherwise seek to transfer its rights of access without the prior written consent of the Council.

3. Insurances

- (a) The Occupier must hold insurance policies in respect of the Environmental Conservation Lands for:
 - i) Public liability in the amount of \$20,000,000.00;
 - ii) Workers compensation;
 - iii) Property damage for any items in the Environmental Conservation Lands owned by the Council; and
 - iv) Any other insurance reasonably required by the Council.
- (b) All insurance policies must either note the Council's interests or otherwise extend to cover Council.
- (c) The Occupier must provide certificates of currency of all insurances to the Council for approval prior to accessing the Environmental Conservation Lands.

4. Risk

The Occupier accesses and occupies the Environmental Conservation Lands at the Occupier's own risk.

5. Release and Indemnity

- (a) The Occupier releases Council from, and agrees Council is not liable for, liability or loss arising from, or costs incurred in connection with, any accident, damage, loss, injury or death occurring to any person or property during the Occupier's access and occupation of the Environmental Conservation Lands, except to the extent that any such accident, damage, loss, injury or death is caused by the act, negligence or default of the Council, its contractors, consultants, employees, agents or invitees.
- (b) The Occupier indemnifies the Council against any action or demand arising out of or in any way connected with any accident, damage, loss, injury or death to any person or property to the extent it was caused or contributed to by:
 - i) The Occupier's act, omission, default or negligence;
 - ii) Any breach of the terms of access of the Environmental Conservation Lands; or
 - iii) The overflow, leakage or spillage of pollutants, chemicals or other hazardous substances in or from the Environmental Conservation Lands that is caused by the Occupier or as a consequence of the Occupier's occupation of the Environmental Conservation Lands.