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## **Deed**

**15 Torakina Road, Brunswick Heads**

### **Planning Agreement**

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

**Byron Shire Council**

**Bayside Brunswick Pty Ltd**

[16 February 2023]

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## 15 Torakina Road, Brunswick Heads

### Planning Agreement

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## 15 Torakina Road, Brunswick Heads

### Summary Sheet

#### Council:

**Name:** Byron Shire Council  
**Address:** 70 Station Street Mullumbimby NSW 2482  
**Telephone:** (02) 6626 7000  
**Email:** council@byron.nsw.gov.au  
**Representative:** [INSERT DETAILS]

#### Developer/Landowner:

**Name:** Bayside Brunswick Pty Ltd  
**Address:** PO Box 1478 BALLINA NSW 2478  
**Telephone:** 1300 382 862  
**Email:** enquiry@clarencproperty.com.au  
**Representative:** James Fletcher

#### Land:

See definition of *Land* in clause 1.1.

#### Development:

See definition of *Development* in clause 1.1.

#### Development Contributions:

See Clause 9 and Schedule 1.

#### Application of s7.11, s7.12 and s7.24 of the Act:

See clause 8.

**Registration:**

See clause 16

**Restriction on dealings:**

See clause 17.

**Dispute Resolution:**

See Part 3.

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## 15 Torakina Road, Brunswick Heads

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

### Parties

**Byron Shire Council** of 70 Station Street, Mullumbimby NSW 2482 (**Council**)  
and

**Bayside Brunswick Pty Ltd**

ACN 646 802 306 of PO Box 1478, Ballina NSW 2478 (**Developer**)

### Background

- A The Developer is the owner of the Land.
- B The Developer has lodged a Development Application for the Development.
- C The Developer wishes to make provision for the dedication of the Reserves detailed in the Development Application for the Development in order for their conservation in accordance with the Concept Plan on the terms and conditions of this Deed.

### Operative provisions

#### Part 1 - Preliminary

##### 1 Interpretation

- 1.1 In this Deed the following definitions apply:

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

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

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

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

**Clearance Certificate** means a clearance certificate issued by the Commissioner for Taxation under paragraph 14-220 of Schedule 1 of the *Taxation Administration Act 1953* (Cth).

**Concept Plan** means concept plan approval 05\_0091 issued pursuant to Section 750 of the Act dated 9 July 2013.

**Contribution Value** means the \$ amount agreed between the Parties as the value of a Development Contribution made under this Deed.

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

**Covenant** in relation to land means a public positive covenant under s88E of the *Conveyancing Act 1919* burdening Lot 324 and Lot 402 in the Development to the satisfaction of the Department of Planning and Environment consistently with Schedule 2.

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

**Development** means DA10.2021.575.1 as amended for a staged subdivision (5 Stages) of the Land to create 127 lots comprising, 123 residential lots (two with additional conservation area), three (3) medium density lots, and one (1) public reserve together with associated roads and infrastructure services in accordance with the staging plan DA4 Issue C dated 16.11.2022 filed with the Development Application 10.2021.575.1 in Schedule 3.

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

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

**Development Contribution** means a monetary contribution, the dedication of land free of cost, the carrying out of work, or the provision of any other material public benefit, or any combination of them, to be used for, or applied towards a public purpose, but does not include any security or other benefit provided by a Party to the Council to secure the enforcement of that Party's obligations under this Deed for the purposes of s7.4(3)(g) of the Act.

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

**ELNO** has the meaning given to that term in the Participation Rules.

**Final Lot** means a lot created in the Development for separate residential occupation and disposition or a lot of a kind or created for a purpose that is otherwise agreed by the Parties, not being a lot created by a subdivision of the Land:

- (a) that is to be dedicated or otherwise transferred to the Council, or
- (b) on which is situated a dwelling-house that was in existence on the date of this Deed.

**Foreign Resident Capital Gains Withholding Amount** mean the amount (if any) a purchaser is required to pay to the Commissioner for Taxation under paragraph 14-200 of the *Taxation Administration Act 1953* (Cth).

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

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

**Item** means specified in Column 1 of Schedule 1.

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

**Land** means 15 Torakina Road, Brunswick Heads being Lot 13 in DP 1251383.

**Lot 521** means proposed Lot 521 in the Development.

**Participation Rules** means the participation rules as determined by the *Electronic Conveyancing National Law* as set out in the *Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW)*.

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

**Part Lot 324** means that part of proposed Lot 324 in the Development which is generally to the east of Road 2 at the date of this Deed as shown on plan DA4 Issue C dated 16.11.2022 filed with the Development Application for the Development.

**Part Lot 402** means that part of proposed Lot 402 in the Development which is generally to the west of Road 6 and Road 7 at the date of this Deed as shown on plan DA4 Issue C dated 16.11.2022 filed with the Development Application for the Development.

**Reserves** mean the land described as Part Lot 324, Part Lot 402 and Lot 521.

**Regulation** means the *Environmental Planning and Assessment Regulation 2021*.

**Stage** means a stage of the Development approved by a Development Consent or otherwise approved in writing by the Council for the purposes of this Deed.

**Subdivision Certificate** has the same meaning as in the Act.

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

1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Deed.

1.2.2 A reference in this Deed to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.

1.2.3 If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day.

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

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

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



- 1.2.7 A reference in this Deed to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
- 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- 1.2.10 Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- 1.2.11 A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.13 A reference to this Deed includes the agreement recorded in this Deed.
- 1.2.14 A reference to a Party to this Deed includes a reference to the employees, agents and contractors of the Party, the Party's successors and assigns.
- 1.2.15 A reference to 'dedicate' or 'dedication' in relation to land is a reference to dedicate or dedication free of cost.
- 1.2.16 Any schedules, appendices and attachments form part of this Deed.
- 1.2.17 Notes appearing in this Deed are operative provisions of this Deed.

## **2 Status of this Deed**

- 2.1 This Deed is a planning agreement within the meaning of s7.4(1) of the Act.

## **3 Commencement**

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

## **4 Application of this Deed**

- 4.1 This Deed applies to the Land and to the Development.

## **5 Warranties**

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

## **6 Further agreements**

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

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

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

## **8 Application of s7.11, s7.12 and s7.24 of the Act to the Development**

- 8.1 This Deed does not exclude the application of s7.11 to the Development.
- 8.2 This Deed does not exclude the application of s7.12 to the Development.
- 8.3 This Deed does not exclude the application of s7.24 to the Development.

# **Part 2 – Development Contributions**

## **9 Provision of Development Contributions**

- 9.1 The Developer is to make Development Contributions to the Council in accordance with Schedule 1, any other provision of this Deed relating to the making of Development Contributions and otherwise to the satisfaction of the Council.
- 9.2 Any Contribution Value specified in this Deed in relation to a Development Contribution does not serve to define the extent of the Developer's obligation to make the Development Contribution.
- 9.3 The Council is to apply each Development Contribution made by the Developer under this Deed towards the public purpose for which it is made and otherwise in accordance with this Deed.
- 9.4 A monetary Development Contribution is made for the purposes of this Deed when the Council receives the full amount of the contribution payable under

this Deed in cash or by unendorsed bank cheque or by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by the Council.

## 10 Dedication of land

- 10.1 A Development Contribution comprising the dedication of land as a public reserve is made for the purposes of this Deed when:
- 10.1.1 the Council is provided with:
- (a) a Clearance Certificate that is valid at the time of dedication of land, or
  - (b) the Foreign Resident Capital Gains Withholding Amount in respect of the land to be dedicated, and
- 10.1.2 one of the following has occurred:
- (a) a deposited plan is registered in the register of plans held with the Registrar-General that dedicates the land as a public reserve under the *Local Government Act 1993*, or
  - (b) the Council is given evidence that a transfer has been effected by means of electronic lodgement and registration through Property Exchange Australia Ltd or another ELNO under which the land is so dedicated.
- 10.2 The Parties are to do all things reasonably necessary to enable registration of the instrument of transfer to occur.
- 10.3 The Developer is to ensure that land dedicated to the Council under this Deed is free of all encumbrances and affectations (whether registered or unregistered and including without limitation any charge or liability for rates, taxes and charges) except as otherwise agreed in writing by the Council.
- 10.4 If, having used all reasonable endeavours, the Developer cannot ensure that land to be dedicated to the Council under this Deed is free from all encumbrances and affectations, the Developer 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.

## Part 3 – Dispute Resolution

### 11 Dispute resolution – expert determination

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

- 11.2 A Dispute to which this clause applies is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 11.3 If a notice is given under clause 11.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 11.4 If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 11.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 11.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 11.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

## **12 Dispute Resolution - mediation**

- 12.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute to which clause 11 applies.
- 12.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 12.3 If a notice is given under clause 12.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 12.4 If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.
- 12.5 If the Dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the Dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.
- 12.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 12.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

## **Part 4 - Enforcement**

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

- 13.1 If the Developer does not dedicate land required to be dedicated under this Deed at the time at which it is required to be dedicated, the Developer consents to the Council compulsorily acquiring the land for compensation in the amount of \$1 without having to follow the pre-acquisition procedure under the Just Terms Act.

- 13.2 The Council is to only acquire land pursuant to clause 13.1 if it considers it reasonable to do so having regard to the circumstances surrounding the failure by the Developer to dedicate the land required to be dedicated under this Deed.
- 13.3 Clause 13.1 constitutes an agreement for the purposes of s30 of the Just Terms Act.
- 13.4 If, as a result of the acquisition referred to in clause 13.1, the Council is required to pay compensation to any person other than the Developer, the Developer is to reimburse the Council that amount, upon a written request being made by the Council.
- 13.5 The Developer indemnifies and keeps indemnified the Council against all Claims made against the Council as a result of any acquisition by the Council of the whole or any part of the land concerned except if, and to the extent that, the Claim arises because of the Council's negligence or default.
- 13.6 The Developer is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 13, including without limitation:
  - 13.6.1 signing any documents or forms,
  - 13.6.2 giving land owner's consent for lodgement of any Development Application,
  - 13.6.3 producing certificates of title to the Registrar-General under the *Real Property Act 1900*, and
  - 13.6.4 paying the Council's costs arising under this clause 13.

## **14 Breach of obligations**

- 14.1 If the Council reasonably considers that the Developer is in breach of any obligation under this Deed, it may give a written notice to the Developer:
  - 14.1.1 specifying the nature and extent of the breach,
  - 14.1.2 requiring the Developer to:
    - (a) rectify the breach if it reasonably considers it is capable of rectification, or
    - (b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification,
  - 14.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 14.2 The Developer is to fully comply with a notice referred to in clause 14.1.
- 14.3 Any costs incurred by the Council in remedying a breach in accordance with clause 14.2 may be recovered by the Council as a debt due in a court of competent jurisdiction.
- 14.4 For the purpose of clause 14.3, the Council's costs of remedying a breach the subject of a notice given under clause 14.1 include, but are not limited to:
  - 14.4.1 the costs of the Council's employees, agents and contractors reasonably incurred for that purpose,

- 14.4.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
- 14.4.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- 14.5 Nothing in this clause 14 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 Developer, including but not limited to seeking relief in an appropriate court.

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

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

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

### **16 Registration of this Deed**

- 16.1 The Parties agree to register this Deed for the purposes of s7.6(1) of the Act.
- 16.2 Not later than 10 days after the commencement of this Deed, the Developer is to deliver to the Council in registrable form:
  - 16.2.1 an instrument requesting registration of this Deed on the title to the Land duly executed by the Developer, and
  - 16.2.2 the written irrevocable consent of each person referred to in s7.6(1) of the Act to that registration.
- 16.3 The Developer is to do such other things as are reasonably necessary to enable registration of this Deed to occur.
- 16.4 The Parties are to do such things as are reasonably necessary to remove any notation relating to this Deed from the title to the Land:
  - 16.4.1 in so far as the part of the Land concerned is a Final Lot,
  - 16.4.2 in relation to any other part of the Land, once the Developer has completed its obligations under this Deed to the reasonable satisfaction of the Council or this Deed is terminated or otherwise comes to an end for any other reason.

## **17 Restriction on dealings**

- 17.1 The Developer is not to:
- 17.1.1 sell or transfer the Land, other than a Final Lot, or
  - 17.1.2 assign the Developer's rights or obligations under this Deed, or novate this Deed,
- to any person unless:
- 17.1.3 the Developer has, at no cost to the Council, first procured the execution by the person to whom the Land or part is to be sold or transferred or the Developer'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
  - 17.1.4 the Council has given written notice to the Developer stating that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this Deed, and
  - 17.1.5 the Developer is not in breach of this Deed, and
  - 17.1.6 the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.
- 17.2 Subject to clause 17.3, the Developer 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 17.1.
- 17.3 Clause 17.1 does not apply in relation to any sale or transfer of the Land if this Deed is registered on the title to the Land at the time of the sale.

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

### **18 Risk**

- 18.1 The Developer performs this Deed at its own risk and its own cost.

### **19 Release**

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

### **20 Indemnity**

- 20.1 The Developer indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in connection with the performance of the Developer's obligations under this



Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

## **Part 7 – Other Provisions**

### **21 Review of Deed**

- 21.1 The Parties agree to review this Deed every 2 years, and otherwise if either party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Deed.
- 21.2 For the purposes of clause 21.1, the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development.
- 21.3 For the purposes of addressing any matter arising from a review of this Deed referred to in clause 21.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Deed.
- 21.4 If this Deed becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.
- 21.5 A failure by a Party to agree to take action requested by the other Party as a consequence of a review referred to in clause 21.1 (but not 21.4) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.

### **22 Notices**

- 22.1 Any notice, consent, information, application or request that is to or may be given or made to a Party under this Deed is only given or made if it is in writing and sent in one of the following ways:
  - 22.1.1 delivered or posted to that Party at its address set out in the Summary Sheet, or
  - 22.1.2 emailed to that Party at its email address set out in the Summary Sheet.
- 22.2 If a Party gives the other Party 3 business days' notice of a change of its address or email, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or emailed to the latest address.
- 22.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
  - 22.3.1 delivered, when it is left at the relevant address,
  - 22.3.2 sent by post, 2 business days after it is posted, or
  - 22.3.3 sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.



- 22.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

## **23 Approvals and Consent**

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

## **24 Costs**

- 24.1 The Developer is to pay to the Council the Council's costs not exceeding \$5,000.00 including GST of preparing, negotiating, executing and stamping this Deed, and any document related to this Deed within 7 days of a written demand by the Council for such payment.
- 24.2 The Developer is also to pay to the Council the Council's reasonable costs of enforcing this Deed within 7 days of a written demand by the Council for such payment.

## **25 Entire Deed**

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

## **26 Further Acts**

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

## **27 Governing Law and Jurisdiction**

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

## **28 Joint and Individual Liability and Benefits**

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

## **29 No Fetter**

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

## **30 Illegality**

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

## **31 Severability**

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

## **32 Amendment**

- 32.1 No amendment of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed in accordance with clause 203(5) of the Regulation.

## **33 Waiver**

- 33.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- 33.2 A waiver by a Party is only effective if it:
- 33.2.1 is in writing,

- 33.2.2 is addressed to the Party whose obligation or breach of obligation is the subject of the waiver,
- 33.2.3 specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,
- 33.2.4 is signed and dated by the Party giving the waiver.
- 33.3 Without limitation, a waiver may be expressed to be conditional on the happening of an event, including the doing of a thing by the Party to whom the waiver is given.
- 33.4 A waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given, and is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.
- 33.5 For the purposes of this Deed, an obligation or breach of obligation the subject of a waiver is taken not to have been imposed on, or required to be complied with by, the Party to whom the waiver is given.

## 34 GST

- 34.1 In this clause:
  - Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice** have the meaning given by the GST Law.
  - GST Amount** means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.
  - GST Law** has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
  - Input Tax Credit** has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.
  - Taxable Supply** has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.
- 34.2 If GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- 34.3 Clause 34.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.
- 34.4 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:
  - 34.4.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;

- 34.4.2 that any amounts payable by the Parties in accordance with clause 34.2 to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 34.5 No payment of any amount pursuant to this clause 34, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 34.6 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- 34.7 This clause continues to apply after expiration or termination of this Deed.

## **35 Explanatory Note**

- 35.1 The Appendix contains the Explanatory Note relating to this Deed required by clause 205 of the Regulation.
- 35.2 Pursuant to clause 205(5) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Planning Deed.

## **Schedule 1**

(Clause 9)

### **Development Contributions**

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Column 1	Column 2	Column 3	Column 4
Item/ Contribution	Public Purpose	Manner & Extent	Timing

#### A. Dedication of Land

1. Reserve	Conservation	Registration of a Covenant over Part Lot 324.	Prior to or on registration of the first subdivision certificate for Civil Stage 3 of the Development.
2. Reserve	Conservation	Registration of a Covenant over Part Lot 402.	Prior to or on registration of the first subdivision certificate for Civil Stage 4 of the Development.
3. Public Reserve	Conservation	The dedication of the Lot 521 as a public reserve.	Prior to or on registration of the first subdivision certificate for Civil Stage 5 of the Development..

#### B. Monetary Contributions

4. Public Reserve	Conservation	\$31,950 inc. GST for the maintenance (in perpetuity) of Lot 521 by the Council as a public reserve.	On the later of the date of completion of the rehabilitation of Lot 521 as required by the Development Consent for the Development or the dedication of Lot 521 to Council as a public reserve.
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## Schedule 2

(Clause 1.1)

### Covenant

#### Lot 324

Terms of Positive Covenant for conservation referred to as (XXX) in the abovementioned plan

To provide for conservation of the land, that part of the Lot in the Development which is generally to the east of Road 2 as shown on plan DA4 Issue C dated 16.11.2022 filed with the Development Application 10.2021.575.1 for the Development, and referred to as XXX on the plan, is to be conserved, managed and maintained by the owner of the Lot burdened in accordance with the relevant requirements of the Vegetation Management Plan prepared by Australian Wetlands Consulting revision J dated 09/11/2022, and the Concept Plan Approval 05\_0091 dated 9 July 2013. The owner of the Lot may not make use of that part of the Lot referred to as XXX on the plan for any purpose other than permitted by the Vegetation Management Plan or Concept Plan Approval.

This covenant may not be revoked, varied or modified without the prior consent of the Byron Shire Council as Prescribed Authority.

#### Lot 402

Terms of Positive Covenant for conservation referred to as (YYY) in the abovementioned plan

To provide for conservation of the land, that part of the Lot in the Development which is generally to the west of Road 6 and Road 7 as shown on plan DA4 Issue C dated 16.11.2022 filed with the Development Application 10.2021.575.1 for the Development, and referred to as YYY on the plan, is to be conserved, managed and maintained by the owner of the Lot burdened in accordance with the relevant requirements of the Vegetation Management Plan prepared by Australian Wetlands Consulting revision J dated 09/11/2022, and the Concept Plan Approval 05\_0091 dated 9 July 2013. The owner of the Lot may not make use of that part of the Lot referred to as YYY on the plan for any purpose other than permitted by the Vegetation Management Plan or Concept Plan Approval.

This covenant may not be revoked, varied or modified without the prior consent of the Byron Shire Council as Prescribed Authority.

## **Schedule 3**

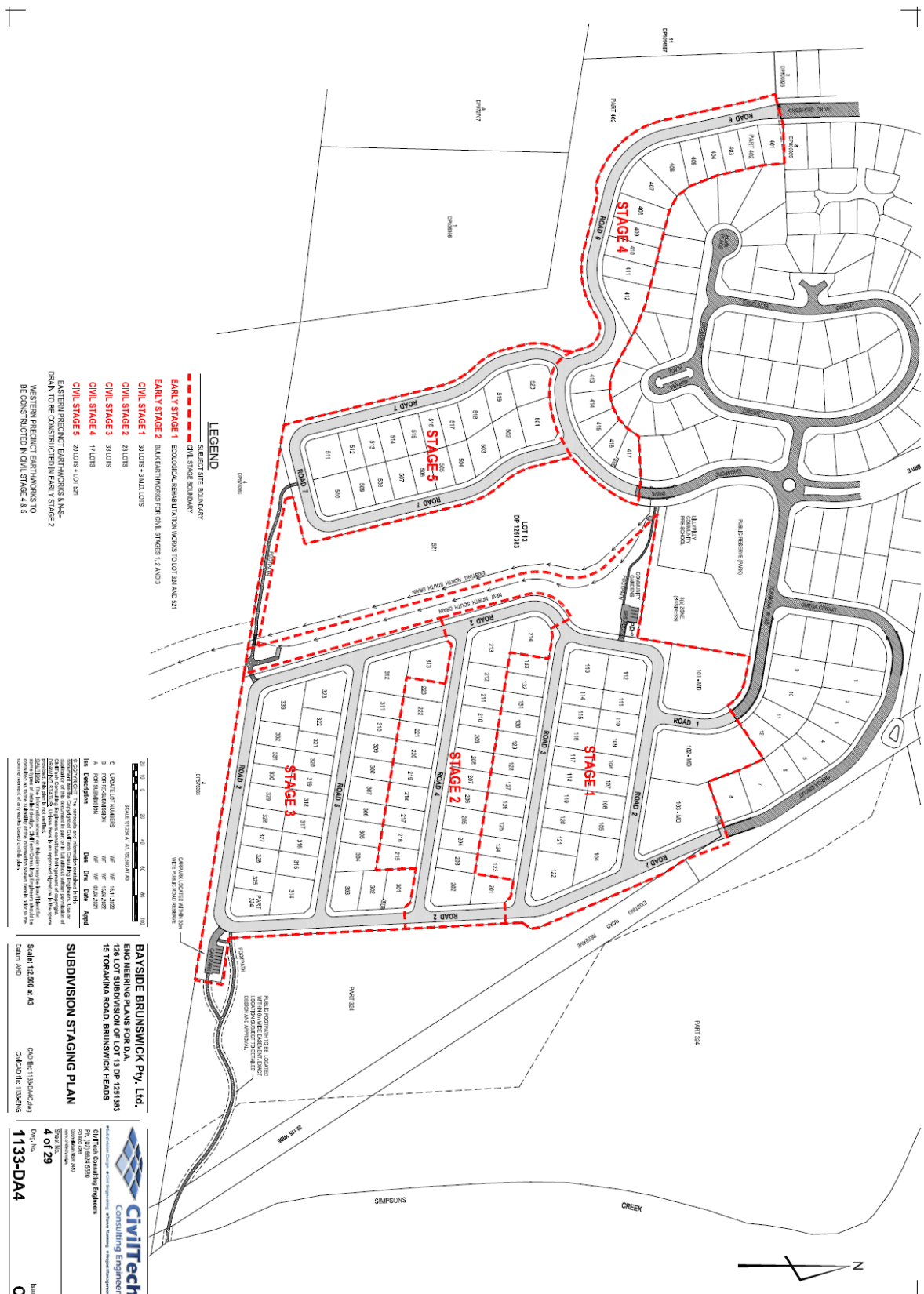
(Clause 1.1)

### **Staging Plan**

See next page.

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## Execution

### Executed as a Deed

**Dated:**

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### Executed on behalf of the Council

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**General Manager**

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**Witness**

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**Mayor**

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**Witness**

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

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**Name/Position**

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**Name/Position**

## Appendix

(Clause 35)

*Environmental Planning and Assessment Regulation 2021*

(Clause 205)

## Explanatory Note

### Draft Planning Agreement

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

### Parties

**Byron Shire Council** of 70 Station Street Mullumbimby NSW 2482 (**Council**)

**Bayside Brunswick Pty Ltd** ACN 646 802 306 of PO Box 1478 BALLINA NSW 2478  
(**Developer**)

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

15 Torakina Road, Brunswick Heads being Lot 13 in DP 1251383

### Description of Proposed Development

The development proposed by DA10.2021.575.1 as amended for a staged subdivision (5 Stages) of the Land to create 127 lots comprising, 123 residential lots (two with additional conservation area), three (3) medium density lots, and one (1) public reserve together with associated roads and infrastructure services.

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

To provide for the conservation of land Part Lot 402, Part Lot 324 and Lot 521 as shown on plan DA4 Issue C dated 16.11.2022 filed with the Development Application for the Development.

The Draft Planning Agreement is a planning agreement under s7.4 of the *Environmental Planning and Assessment Act 1979*. The Draft Planning Agreement is a voluntary agreement under which Development Contributions (as defined in clause 1.1 of the Draft Planning Agreement) are made by the Developer for various public purposes (as defined in s7.4(3) of the Act)

The objective of the Draft Planning Agreement is to require the dedication of the land above described filed with the Development Application for the Development as reserve in order to provide for its conservation. Lot 521 will be dedicated as a public reserve to the Council. Part Lot 402 and Part Lot 324 will be made the subject of a public positive covenant in favour of the Council requiring maintenance in accordance with the Development Consent for the Development. It is expected that any consent to the Development will provide for the implementation of a vegetation management plan for this land in conjunction with the carrying out of the Development.

The Development Contributions will be staged and provided respectively prior to or on registration of the first Subdivision Certificate for Stage 5 (Lot 521), Stage 4 (Part Lot 402) and stage 3 (Part Lot 324) of the Development .

The Draft Planning Agreement includes provisions to the effect of the following:

- relates to the carrying out of the Development (as defined in clause 1.1 of the Draft Planning Agreement),
- does not exclude the application of s7.11, s7.12 or s7.24 of the Act to the Development,
- makes provision for the dedication of the land to be conserved either as public reserve or subject to a public positive covenant in favour of the Council,
- such positive public covenant to *provide for conservation of the relevant land to be conserved, managed and maintained by the owner of the Lot burdened in accordance with the relevant requirements of the Vegetation Management Plan prepared by Australian Wetlands Consulting revision J dated 09/11/2022, and the Concept Plan Approval 05\_0091 dated 9 July 2013 including that the owner of the Lot may not make use of that part of the lot for any purpose other than permitted by the Vegetation Management Plan or Concept Plan Approval.*
- is to be registered on the title to the Land until the land is dedicated but may be progressively removed from Final Lots,
- imposes restrictions on the Developer transferring any part of the Land other than a Final Lot (unless the Deed is registered on the title of the Land) or assignment the Developer's rights or obligations under the Deed, or novating the Deed,
- otherwise provides for enforcement of the agreement whereby the Developer's interest in the land to be dedicated may be compulsorily acquired for \$1 if the land to be dedicated is not dedicated as required by the agreement;
- provides two dispute resolution methods for a dispute under the agreement, being expert determination and mediation,

- provides that the agreement is governed by the law of New South Wales, and
- provides that the A New Tax System (Goods and Services Tax) Act 1999 (Cth) applies to the agreement;
- provides for the Council's costs of entering in the agreement and enforcing the agreement are met by the Developer.

### **Assessment of the Merits of the Draft Planning Agreement including the positive and negative impacts on the public or a relevant section**

The dedication of the reserves under this Deed will ensure this land will be secured for conservation purposes and thereby (together with management actions required by conditions of any consent for the Development) operate to offset the biodiversity impacts of the Development on the balance of the Land.

The dedication of the proposed land is not provided for in any applicable contributions plan but such dedication does not have any adverse impact on such contributions plan or its implementation and is therefore an appropriate mechanism to secure the dedication if consent is granted to the Development Application for the Development.

The Draft Planning Agreement otherwise conforms with the Council's Planning Agreements Policy in that:

- a) The proposed planning agreement provide for a reasonable means of achieving the desired outcomes and securing the benefits
- b) The planning agreement provides for infrastructure or public benefits that are wholly related to development.
- c) The planning agreement will produce outcomes that meet the relevant general values and expectations of the community and the overall public interest in terms of conservation of biodiversity values.
- d) The proposed planning agreement is not inconsistent with the Council's strategic objectives as identified in the Community Strategic Plan, Delivery Plan, Operational Plan and other strategic documents.
- e) There any no relevant circumstances that may operate to preclude the Council from entering the proposed planning agreement.
- f) The proposed planning agreement promotes sustainability in terms of all relevant key elements being ecology
- g) It is proposed that the planning agreement be registered pursuant to section 7.6 of the Act and is it able to be registered
- h) The planning agreement protects the community against a planning outcome where the biodiversity values of the Land are not adequately offset by the Development.

The public exhibition of this explanatory note also provides increased opportunity for public involvement and participation in environmental planning and assessment of the proposed Development.

The Draft Planning Agreement also promotes the public interest by promoting the objects of the Act as set out in s1.3(b), (c), (e) and (j) of the Act.

The Draft Planning Agreement also promotes the guiding principles for local government as set out in s8A of the *Local Government Act 1993* by providing a means for the lands to be conserved so as:

- to achieve desired outcomes for the local community;
- to consider the long term and cumulative effects of the Development on future generations
- to manage land for current and future local community needs in an affordable way. and
- in consideration of the principles of ecologically sustainable development.

The Draft Planning Agreement also provides for the Council's costs of entering into and enforcement to be met by the Developer.

In so far as the Draft Planning Agreement provides for the dedication of land free of cost to the public - being land that would otherwise be in private ownership - the agreement is not assessed to have any relevant negative impacts.