

POLICY NAME: PLANNING AGREEMENTS

POLICY REF: P05

MEETING ADOPTED: 22 February 2007
Resolution No. 2220207/032

POLICY HISTORY:



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OBJECTIVE

The objective of this policy is to set out Ballina Shire Council's policy and procedures relating to planning agreements under s93F of the *Environmental Planning and Assessment Act 1979*.

BACKGROUND

On 6 May 2005 the *Environmental Planning and Assessment Amendment (Development Contributions) Bill 2005* was passed by the NSW Parliament. The EP & A Act was amended to extend the way in which development contributions may be collected and used. Voluntary Planning Agreements can now be used as a means for councils to obtain contributions for public purposes. This policy establishes a framework for planning agreements in Ballina Shire.

Reasons why a planning agreement may benefit a developer and the Council

There are a number of reasons why the Council and a developer might consider negotiating a planning agreement. These include:

- the ability to ensure that particular development produces targeted public benefits, including to compensate for the loss of an existing public amenity, service, resource or asset caused by the development, or to meet the demands created by the development for new public facilities,
- development consent conditions, including those imposed under s94 of the Act, are often ill-equipped to produce such benefits, as they are primarily designed to mitigate the external impacts of development on surrounding land and communities,
- circumstances where a developer and the Council wish the certainty of an agreement up front as to the amount of s94 contributions payable in relation to development, in accordance with existing s94 contributions plans,
- developers are increasingly appreciating how their own developments benefit from the provision of targeted public facilities, and accordingly are seeking greater involvement in determining the type, standard and location of such facilities,
- negotiation tends to promote co-operation and compromise over conflict, and can provide a more effective means for public participation in planning decisions,
- agreements provide a flexible means of achieving tailored development outcomes and targeted public benefits,
- agreements can provide enhanced and more flexible infrastructure funding opportunities for planning authorities.

POLICY

1. Introduction

1.1 This Policy was adopted by resolution of the Council on [22 February 2007].

1.2 In this Policy, the following terminology is used:

Act means the *Environmental Planning and Assessment Act 1979*,

development application has the same meaning as in the Act,

development contribution means the kind of provision made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit,

instrument change means a change to an environmental planning instrument to enable a development application to be made to carry out development the subject of a planning agreement,

planning benefit means a development contribution that confers a net public benefit, that is, a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community,

public facilities means public infrastructure, facilities, amenities and services,

planning obligation means an obligation imposed by a planning agreement on a developer requiring the developer to make a development contribution,

Practice Note means the *Practice Note on Planning Agreements* published by the Department of Infrastructure Planning and Natural Resources (July 2005),

public includes a section of the public,

public benefit is the benefit enjoyed by the public as a consequence of a development contribution,

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

surplus value means the value of the developer's provision under a planning agreement less the sum of the value of public works required to be carried out by the developer under a condition imposed under s80A(1) of the Act and the value of development contributions that are or could have been required to be made under s94 or s94A of the Act in respect of the development the subject of the agreement.

1.3 The purposes of this Policy are:

- (a) to establish a framework governing the use of planning agreements by the Council
- (b) to ensure that the framework so established is efficient, fair, transparent and accountable,
- (c) to enhance planning flexibility in the Council's area through the use of planning agreements,
- (d) to enhance the range and extent of development contributions made by development towards public facilities in the Council's area,
- (e) to set out the Council's specific policies on the use of planning agreements,
- (f) to set out procedures relating to the use of planning agreements within the Council's area.

1.4 The Council's planning agreements framework consists of the following:

- (a) the provisions of Subdivision 2 of Division 6 of Part 4 of the Act,
- (b) the provisions of Division 1A of Part 4 of the Regulation, and
- (c) this Policy.

1.5 This Policy is not legally binding. However, it is intended that the Council and all persons dealing with the Council in relation to planning agreements will follow this Policy to the fullest extent possible.

1.6 It is intended that this Policy will be periodically updated. The updates may cover additional matters to those covered in this Policy or provide more detailed information or guidance on specific matters covered in this Policy.

Council's Strategic Objectives for the use of Planning Agreements

1.7 The Council's strategic objectives with respect to the use of planning agreements include:

- (a) to provide an enhanced and more flexible development contributions system for the Council,
- (b) more particularly, to supplement or replace, as appropriate, the application of s94 and s94A of the Act to development,
- (c) to allow the community, through the public participation process under the Act, to agree to the redistribution of the costs and benefits of development in order to realise community preferences for the provision of public benefits.
- (d) to adopt innovative and flexible approaches to the provision of infrastructure in a manner that is consistent with:
 - the Council's adopted management plan,
 - the *Ballina Local Environmental Plan 1987* (or any applicable replacement local environmental plan),

- the Council's Sustainability Strategy,
 - all applicable Development Control Plans,
 - the Lennox Head Strategic Plan,
 - the Lennox Head Structure Plan, and
 - the Wardell Strategic and Land Use Plan,
- (e) to provide or upgrade infrastructure to appropriate levels that reflect and balance environmental standards, community expectations and funding priorities, and
- (f) to provide certainty for the community, developers and Council in respect to infrastructure and development outcomes.

Fundamental Principles Governing the use of Planning Agreements

1.8 The Council's use of planning agreements will be governed by the following principles:

- (a) planning decisions may not be bought or sold through planning agreements,
- (b) development that is unacceptable on planning grounds will not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms,
- (c) the Council will not allow planning agreements to improperly fetter the exercise of its functions under the Act, Regulation or any other Act or law,
- (d) the Council will not use planning agreements for any purpose other than a proper planning purpose,
- (e) the Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement,
- (f) the Council will not improperly rely on its statutory position, or otherwise act improperly, in order to extract unreasonable public benefits from developers under planning agreements, and will ensure that all parties involved in the planning agreement process are dealt with fairly, and without impropriety or appearance of improper conduct,
- (g) if the Council has a commercial stake in development the subject of a agreements, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its interest in the development.

Circumstances in which Council will Consider Negotiating a Planning Agreement

1.9 The Council, in its complete discretion, may negotiate a planning agreement with a developer in connection with any application by the developer for an instrument change or for development consent relating to any land in the Council's area.

Acceptability test to be applied to all planning agreements

- 1.10 The Council will apply the following test in order to assess the desirability of a proposed planning agreement:
- (a) is the proposed planning agreement directed towards a proper or legitimate planning purpose having regard to its statutory planning controls and other adopted planning policies and the circumstances of the case?
 - (b) does the proposed planning agreement provide for a reasonable means of achieving the relevant purpose?
 - (c) can the proposed planning agreement be taken into consideration in the assessment of the relevant rezoning application or development application?
 - (d) will the planning agreement produce outcomes that meet the general values and expectations of the community and protect the overall public interest?
 - (e) does the proposed planning agreement promote the Council's strategic objectives in relation to the use of planning agreements?
 - (f) does the proposed planning agreement conform to the fundamental principles governing the Council's use of planning agreements?
 - (g) are there any relevant circumstances that may operate to preclude the Council from entering into the proposed planning agreement?

Consideration of Planning Agreements in Relation to Instrument Changes and Development Applications

- 1.11 Where an application is made by a developer for:

- (a) an instrument change, or
- (b) a development consent,

and there is a proposed planning agreement which relates to that application, the Council will, in exercising its functions under the Act, consider:

- (c) whether the proposed planning agreement is relevant to the application and hence may be considered in connection with the application, and
- (d) if so, the proper planning weight to be given to the proposed planning agreement.

Application of s94 and s94A to Development to which a Planning Agreement Relates

- 1.12 The Council has no general policy on whether a planning agreement should exclude the application of s94 or s94A of the Act to development to which the agreement relates. This is a matter for negotiation between the Council and a developer having regard to the particular circumstances of the case.
- 1.13 However, where the application of s94 of the Act to development is not excluded by a planning agreement, the Council will generally not agree to a provision allowing benefits under the agreement to be taken into consideration in determining a development contribution under section 94.

Form of Development Contributions under a Planning Agreement

- 1.14 The form of a development contribution to be made under a proposed planning agreement will be determined by the particulars of the instrument change or development application to which the proposed planning agreement relates.

Standard Charges

- 1.15 Wherever possible, the Council will seek to standardise development contributions sought under planning agreements in order to streamline negotiations and provide fairness, predictability and certainty for developers. This, however, does not prevent public benefits being negotiated on a case by case basis, particularly where planning benefits are also involved.

Recurrent Charges

- 1.16 The Council may request developers, through a planning agreement, to make development contributions towards the recurrent costs of public facilities.

Pooling of Development Contributions

- 1.17 Where a proposed planning agreement provides for a monetary contribution by the developer, the Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other planning agreements and applied progressively for the different purposes under those agreements, subject to the specific requirements of the relevant agreements. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair and equitable way.

Methodology for Valuing Public Benefits under a Planning Agreement

- 1.18 Unless otherwise agreed in a particular case, where the benefit under a planning agreement is the provision of land for a public purpose, the Council will generally seek to value the benefit on the basis of the estimated amount of compensation to which the Developer would be entitled under the *Land Acquisition (Just Terms Compensation) Act 1991* upon the compulsory acquisition of the land.
- 1.19 Unless otherwise agreed in a particular case, where the benefit under a planning agreement is the carrying out of works for a public purpose, the Council will generally seek to value the benefit on the basis of the estimated value of the completed works determined using the method that would be ordinarily adopted by a quantity surveyor.
- 1.20 Where the benefit under a planning agreement is the provision of a material public benefit, the Council and the developer negotiate the manner in which the benefit is to be valued for the purposes of the agreement.

Credits and Refunds

- 1.21 The Council generally will not agree to a planning agreement providing for the surplus value under a planning agreement being refunded to the developer or offset against development contributions required to be made by the developer in respect of other development in the Council's area.

Time when Developer's Obligations Arise under a Planning Agreement

- 1.22 The Council will generally require a planning agreement to provide that the developer's obligations under the agreement take effect when the first development consent operates in respect of development that is the subject of the agreement.

Implementation Agreements

- 1.23 In appropriate cases, the Council may require a planning agreement to provide that before the development the subject of the agreement is commenced, the Parties are to enter into an *implementation agreement* that provides for matters such as:
- (a) the times at which and, if relevant, the period during which, the developer is to make provision under the planning agreement,
 - (b) the design, technical specification and standard of any work required by the planning agreement to be undertaken by the developer,
 - (c) the manner in which a work is to be handed over to the Council,
 - (d) the manner in which a material public benefit is to be made available for its public purpose in accordance with the planning agreement.

Monitoring and Review of a Planning Agreement

- 1.24 The Council will continuously monitor the performance of the developer's obligations under a planning agreement.
- 1.25 The Council will require the planning agreement to contain a provision establishing a mechanism under which the planning agreement is periodically reviewed with the involvement of all parties. This will include a review of the developer's performance of the agreement.
- 1.26 The Council will require the planning agreement to contain a provision requiring the parties to use their best endeavours to agree on a modification to the agreement having regard to the outcomes of the review.

Modification or discharge of the developer's obligations under a planning agreement

- 1.27 The Council will generally only agree to a provision in a planning agreement permitting the Developer's obligations under the agreement to be modified or discharged where the modification or discharge is linked to the following circumstances:
- (a) the developer's obligations have been fully carried in accordance with the agreement,

- (b) the developer has assigned the developer's interest under the agreement in accordance with its terms and the assignee has become bound to the Council to perform the developer's obligations under the agreement,
 - (c) the development consent to which the agreement relates has lapsed,
 - (d) the performance of the planning agreement has been frustrated by an event beyond the control of the parties,
 - (e) the Council and the developer otherwise agree to the modification or discharge of the agreement.
- 1.28 Such a provision will require the modification or revocation of the planning agreement in accordance with the Act and Regulation.

Assignment and Dealings by the Developer

- 1.29 The Council will require every planning agreement to provide that the Developer may not to assign its rights or obligations under the agreement nor have any dealing in relation to the land the subject of the agreement unless, in addition to any other requirements of the agreement:
- (a) the developer has, at no cost to the Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of the Council by which that person agrees to be bound by the agreement as if they were a party to the original planning agreement, and
 - (b) the Developer is not in breach of this planning agreement.

Provision of Security under a Planning Agreement

- 1.30 The Council generally **will/will not require*** a planning agreement to make provision for security by the developer of the developer's obligations under the agreement.

***[Delete whichever is inapplicable]**

- 1.31 The form of security will generally be the unconditional bank guarantee from an Australian Bank in favour of the Council to the full value of the Developer's provision under the Agreement and on terms otherwise acceptable to the Council.

[Delete this subclause if no security is required or amend this subclause to provide for a different form of security.]

Preparation and Form of the Planning Agreement

- 1.32 The Council and the developer will, in each particular case, decide who will prepare a planning agreement.
- 1.33 However, the Council will generally require the planning agreement to be in or to the effect of the standard-form planning agreement contained in the **Annexure** to this Policy.

Council's Costs of Negotiating, Entering into, Monitoring and Enforcing a Planning Agreement

- 1.34 The Council will generally require a planning agreement to make provision for payment by the developer of the Council's costs of and incidental to:
- (a) negotiating, preparing and entering into the agreement,
 - (b) enforcing the agreement.
- 1.35 The amount to be paid by the developer will be determined by negotiation in each case. However as a general rule, the Council considers that whether the planning agreement relates to an application by the developer for an instrument change, or to a development application, in each case it is fair and reasonable that the developer will pay the whole of the Council's costs.
- 1.36 In particular cases, the Council may require the planning agreement to make provision for a development contribution by the developer towards the on-going administration of the agreement.

Notations on Certificates under s149(5) of the Act

- 1.37 The Council will generally require a planning agreement to contain an acknowledgement by the developer that the Council may, in its absolute discretion, make a notation under s149(5) of the Act about a planning agreement on any certificate issued under s149(2) of the Act relating to the land the subject of the agreement or any other land.

Registration of Planning Agreements

- 1.38 The Council and the developer will negotiate in each particular case whether a planning agreement is to contain a provision requiring the developer to agree to registration of the agreement pursuant to s93H of the Act if the requirements of that section are satisfied.

Dispute Resolution

- 1.39 The Council will generally require a planning agreement to provide for mediation of disputes between the parties to the agreement, at their own cost, before the parties may exercise any other legal rights in relation to the dispute.

Hand-over of Works

- 1.40 The Council will generally not accept the hand-over of a public work carried out under a planning agreement unless the developer furnishes to the Council a certificate to the effect that the work has been carried out and completed in accordance with the agreement and any applicable development consent.
- 1.41 The Council will also require the agreement to provide for a defects liability period during which any defects must be rectified at the developer's expense.

Management of land or works after hand-over

- 1.42 If a planning agreement provides for the developer, at the developer's cost to manage or maintain land that has been dedicated to the council or works that have been handed-over to the Council, the Council will generally require the parties to enter into a separate implementation agreement in that regard (see paragraph 2.18 of this Policy).
- 1.43 The failure of the parties to reach agreement in relation to management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the planning agreement.

Public use of Privately-Owned Facilities

- 1.44 If a planning agreement provides for the developer to make a privately-owned facility available for public use, the Council will generally require the parties to enter into a separate implementation agreement in that regard (see paragraph 2.18 of this Policy).
- 1.45 Such an agreement may, subject to the Council's agreement, provide for payment to the developer of a reasonable fee by a member of the public who desires to use the relevant facility
- 1.46 The failure of the parties to reach agreement in relation to management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the planning agreement.

PROCEDURES RELATING TO THE USE OF PLANNING AGREEMENTS**Council's Negotiation System**

- 1.47 The Council's negotiation system for planning agreements aims to be efficient, predictable, transparent and accountable.
- 1.48 The system seeks to ensure that the negotiation of planning agreements runs in parallel with applications for instrument changes or development applications.
- 1.49 The system is based on principles of fairness, co-operation, full disclosure, early warning, and agreed working practices and timetables.

When should a planning agreement be negotiated?

- 1.50 The Council is required to ensure that a planning agreement is publicly notified as part of and in the same manner as and contemporaneously with the application for the instrument change or the development application to which it relates.
- 1.51 The planning agreement must therefore be negotiated and documented before it is publicly notified as required by the Act and Regulation.
- 1.52 The Council prefers that a planning agreement is negotiated before lodgement of the relevant application and that it accompanies the application on lodgement.

Who will Negotiate a Planning Agreement on behalf of the Council?

- 1.53 A Council officer with appropriate delegated authority will negotiate a planning agreement on behalf of the Council.
- 1.54 The councillors will not be involved in the face to face negotiation of the agreement.

Separation of the Council's Commercial and Planning Assessment Roles

- 1.55 If the Council has a commercial interest in the subject matter of a planning agreement as a landowner, developer or financier, the Council will ensure that the person assesses the application to which a planning agreement relates is not the same person or a subordinate of the person who negotiated the terms of the planning agreement on behalf of the Council in its capacity as landowner, developer or financier.

Role of the governing body of the Council in relation to development applications to which planning agreements relate

- 1.56 The governing body of the Council will, in all cases, determine development applications to which planning agreements relate.

Involvement of Independent Third Parties in the Negotiation Process

- 1.57 The Council will encourage the appointment of an independent person to facilitate or otherwise participate in the negotiations or aspects of it, particularly where:
- (a) an independent assessment of a proposed instrument change or development application is necessary or desirable,
 - (b) factual information requires validation in the course of negotiations,
 - (c) sensitive financial or other confidential information must be verified or established in the course of negotiations,
 - (d) facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved,
 - (e) dispute resolution is required under a planning agreement.
- 1.58 The costs of the independent person will be borne equally between the parties to the planning agreement.

Key Steps in the Negotiation Process

- 1.59 The negotiation of a planning agreement will generally involve the following key steps:
- (a) before lodgement of the relevant application by the developer, the parties will decide whether to negotiate a planning agreement
 - (b) the parties will then appoint a person to represent them in the negotiations
 - (c) the parties will also appoint a third person to attend and take minutes of all negotiations

- (d) the parties will also decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it
- (e) the parties will also agree on a timetable for negotiations and the protocols and work practices governing their negotiations
- (f) the parties will then identify the key issues for negotiation and undertake the negotiations
- (g) if agreement is reached, the Council will prepare the proposed planning agreement and provide a copy of it to the developer
- (h) the parties will undertake further negotiation on the specific terms of the proposed planning agreement
- (i) once agreement is reached on the terms of the proposed planning agreement, the developer will be required to execute the agreement
- (j) the developer may then make the relevant application to the Council accompanied by a copy of the proposed agreement
- (k) the parties may be required to undertake further negotiations and, hence, a number of the above steps as a result of the public notification and inspection of the planning agreement or its formal consideration by the Council in connection with the relevant application.

Public notification of planning agreements

- 1.60 A planning agreement must be publicly notified and available for public inspection for a minimum period of 28 days.
- 1.61 As mentioned, the Council is required to ensure that a planning agreement is publicly notified as part of and in the same manner as and contemporaneously with the application for the instrument change or the development application to which it relates.
- 1.62 Where the application to which a planning agreement relates is required by or under the Act or Regulation to be publicly notified and available for public inspection for a period exceeding 28 days, the Council will publicly notify the planning agreement and make it available for public inspection for that longer period.
- 1.63 Where the application to which a planning agreement relates is permitted by or under the Act or Regulation to be publicly notified and available for public inspection for a period of less than 28 days, the Council will publicly notify the application and make it available for public inspection for a minimum period of 28 days.
- 1.64 The Council will publicly re-notify and make available for public inspection a proposed planning agreement and the application to which it relates if, in the Council's opinion, a material change is made to the terms of the agreement or the application after it has been previously publicly notified and inspected. Such a change may arise as a consequence of public submissions made in respect of the previous public notification and inspection of the agreement or the application, or their formal consideration by the Council, or for any other reason.

When is a Planning Agreement Required to be entered into?

- 1.65 A planning agreement is entered into when it is signed by all of the parties.

- 1.66 A planning agreement can be entered into at any time after the agreement is publicly notified in accordance with the Act and Regulation.
- 1.67 The Council will usually require a planning agreement to be entered into as a condition of granting development consent to the development to which the agreement relates.

Planning Agreement Register

The Council is required keep a register of planning agreements applying to land within the Council's area, whether or not the Council is a party to a planning agreement. The Council is required to record in the register the date an agreement was entered into and a short description of the agreement (including any amendment).

- 1.68 The Council will make the following available for public inspection (free of charge) during ordinary office hours:
- (a) the planning agreement register kept by the Council,
 - (b) copies of all planning agreements (including amendments) that apply to the area of the Council,
 - (c) copies of the explanatory notes relating to those agreements or amendments.

ANNEXURE 1



//Insert Name of Planning Agreement//

Planning Agreement

Under s93F of the Environmental Planning and Assessment Act 1979

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

//Insert Date//

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

**//Insert Name of Planning Agreement//
Planning Agreement**

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//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

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//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

//Insert Name of Planning Agreement//

Summary Sheet

Council:

Name: //Insert Name of Council//

Address: //Insert Details//

Telephone: //Insert Details//

Facsimile: //Insert Details//

Email: //Insert Details//

Representative: //Insert Details//

Developer:

Name: //Insert Name of Party 2//

Address: //Insert Details//

Telephone: //Insert Details//

Facsimile: //Insert Details//

Email: //Insert Details//

Representative: //Insert Details//

Land:

See definition of *Land* in clause 1.1.

Development:

See definition of *Development* in clause 1.1.

Development Contributions:

See Schedule 1.

Application of s94, s94A and s94EF of the Act:

See clause 6.

Security:

See clause 20.

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

Registration:

//Insert Details// See clause 27.

Restriction on dealings:

See clause 28.

Dispute Resolution:

Expert determination and mediation. See clauses 25 and 26.

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

//Insert Name of Planning Agreement//

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

Parties

//Insert Name of Council// ABN //Insert Details// of //Insert Details// (Council)

and

//Insert Name of Party 2//ABN //Insert Details// of //Insert Details// (Developer)

and

Insert Name of Party 3//ABN //Insert Details// of //Insert Details// (Landowner) //Drafting Note. Only required if the Developer is not the owner of the Land and part of the Land is to be dedicated to the Council or works are to be carried out or other material public benefits are to be provided on the Land whilst it remains in private ownership.//

Background

- A //Drafting note: if desired, provide a brief background to the Development and this Agreement. Amend as otherwise required//
- B The Developer is the owner of the Land. //Drafting Note. If the Developer is not the owner of the Land, the owner should also be a party to this Agreement and additional text should be inserted into the Background to reflect this.//
- C The Developer has lodged with Council a Development Application relating to the Development. //Drafting Note. This and other provision of this Agreement would need to be amended if this Agreement is entered into in connection with an instrument change.//
- D The Developer is prepared to make Development Contributions in connection with the carrying out of the Development in accordance with this Agreement.

Operative provisions

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

Part 1 - Preliminary

1 Definitions & Interpretation

1.1 In this Agreement the following definitions apply:

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

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

Bank Guarantee means an irrevocable and unconditional undertaking without any expiry or end date 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) any other financial institution approved by the Council, in its absolute discretion, in response to a request from the Developer.

Defects Liability Period means the period commencing on the date on which a Work is taken to have been completed under this Agreement and ending 12 months after that date.

Development means //Drafting Note. Insert description of the development to which this Agreement relates. The description can refer to a specific development application. The description can be included in a schedule to this Agreement if appropriate.//

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, the provision of Public Infrastructure or another public purpose.

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 the object of a Development Contribution specified in Column 1 of Schedule 1.

Land means //Drafting Note. Insert description of the land to which this Agreement relates. This can be done by reference to title or to a map or by other means as appropriate. The description of the land can be included in a schedule to this Agreement if appropriate. If a map is used, Map should be a defined term in this clause.//

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

Public Infrastructure has the same meaning as in the Act. //Drafting Note. This definition only applies when ss116C and 116T, as inserted by the *Environmental Planning and Assessment Amendment Act 2008* become operative.//

Rectification Notice means a notice in writing that identifies a defect in a work and requires rectification of the defect within a specified period of time.

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

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

Security means a Bank Guarantee, or a bond or other form of security to the satisfaction of the Council.

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

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

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

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

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

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

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

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

1.2.7 A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.

1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.

1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.

1.2.10 Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.

1.2.11 A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.

1.2.12 References to the word 'include' or 'including' are to be construed without limitation.

1.2.13 A reference to this Agreement includes the agreement recorded in this Agreement.

1.2.14 A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.

1.2.15 Any schedules, appendices and attachments form part of this Agreement.

1.2.16 Notes appearing in this Agreement are operative provisions of this Agreement.

2 Application of this Agreement

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

3 Status of this Agreement

3.1 The Developer is under no obligation to make the Development Contributions to the Council as provided for in this Agreement unless and until both of the following matters have occurred in sequence:

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

-
- 3.1.1 Development Consent is granted to any part of the Development subject to a condition imposed under section 93(3) of the Act requiring this Agreement to be entered into, and
 - 3.1.2 this Agreement is entered into as required by clause 25C(1) of the Regulation.
 - 3.2 Until then, this document, executed only by the Developer, is to be read and construed as containing the Developer's irrevocable offer to make the Development Contributions once all of the matters specified in clause 3.1 have occurred.
 - 3.3 The Council must notify the Developer immediately after the Council executes this Agreement and promptly provide the Developer with the Agreement as executed by the Council.

4 Further Agreements Relating to this Agreement

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

5 Surrender of right of appeal, etc.

- 5.1 The Developer is not to commence or maintain, or cause to be commenced or maintained, any proceedings in the Land and Environment Court involving an appeal against, or questioning the validity of, a Development Consent relating to the Development or an approval under s96 of the Act to modify a Development Consent relating to the Development to the extent that it relates to the existence of this Agreement or requires any aspect of this Agreement to be performed according to the terms of this Agreement.

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

- 6.1 This Agreement //excludes/does not exclude//¹ //Drafting Note. Delete whichever is not applicable// the application of s94 to the Development.
 //Drafting Note 1. The Agreement may only partially exclude the application of s94. If so, particulars of the exclusion must be provided.//
 //Drafting Note 2. If the Agreement does not wholly exclude the application of s94, a clause is required to stipulate whether any benefits under this Agreement should be taken into consideration when determining a development contribution under s94 of the Act in relation to the Development.//
- 6.2 This Agreement //excludes/does not exclude//² //Drafting Note. Delete whichever is not applicable// the application of s94A to the Development.
 //Drafting Note. The Agreement may only partially exclude the application of s94A. If so, particulars of the exclusion must be provided.//
- 6.3 This Agreement//excludes/does not exclude//³ //Drafting Note. Delete whichever is not applicable// the application of s94EF to the Development.
 //Drafting Note 1. The Agreement may only partially exclude the application of s94EF. If so, particulars of the exclusion must be provided.//
 //Drafting Note 2. The Agreement cannot exclude the application of s94EF without the approval of the Minister or a development corporation designated by the Minister to give such approval.//

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

Part 2 – Development Contributions

7 Provision of Development Contributions

- 7.1 The Developer is to make Development Contributions to the Council in accordance with this Agreement and otherwise to the satisfaction of the Council.
- 7.2 Schedule 1 has effect in relation to Development Contributions to be made by the Developer under this Agreement.
- 7.3 The Developer is to make such other Development Contributions to the Council as are provided for in this Agreement to the satisfaction of the Council.
- 7.4 The Council is to apply each Development Contribution made by the Developer under this Agreement towards the public purpose for which it is made and otherwise in accordance with this Agreement.
- 7.5 Despite clause 7.4, the Council may apply a Development Contribution made under this Agreement towards a public purpose other than the public purpose specified in this Agreement if the Council considers that the public interest would be better served by applying the Development Contribution towards that other purpose rather than the purpose so specified.

8 Procedures relating to payment of monetary Development Contributions

- 8.1 A monetary Development Contribution is made for the purposes of this Agreement when the Council receives the full amount of the contribution payable under this Agreement 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.
- 8.2 The Developer is to give the Council not less than 2 business days written notice of its intention to pay a monetary Development Contribution.
- 8.3 The Developer is not required to pay a monetary Development Contribution under this Agreement unless the Council, after having received the Developer's notice under clause 8.2, has given to the Developer a tax invoice for the amount of the Development Contribution.
- 8.4 The Developer is not in breach of this Agreement if it fails to pay a monetary Development Contribution at the time required by this Agreement by reason only of the Council's failure to give to the Developer a tax invoice in relation to the amount proposed to be paid by it.

9 Procedures relating to the dedication of land

- 9.1 A Development Contribution comprising the dedication of land is made for the purposes of this Agreement when the Council is given an instrument in registrable form under the *Real Property Act 1900* that is effective to transfer the title to the land to the Council when registered.
- 9.2 For the purposes of clause 9.1:
 - 9.2.1 the Developer is to give the Council, for execution by the Council as transferee, an instrument of transfer under the *Real Property Act 1900* relating to the land to be dedicated, and
 - 9.2.2 the Council is to execute the instrument of transfer and return it to Developer within 7 days of receiving it from Developer,
 - 9.2.3 the Developer is to lodge the instrument of transfer for registration at the Department of Lands within 7 days of receiving it from the Council duly executed,

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

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//Insert Name of Party 3//

9.2.4 the Developer is to do all things reasonably necessary to enable registration of the instrument of transfer to occur.

//Drafting Note. This clause needs to be amended if the Developer is not the owner of the Land.//

9.3 If this Agreement requires the Developer to dedicate land to the Council on which the Developer is also required to carry out a Work under this Agreement, the Developer is to give to the Council the instrument of transfer of the land under clause 9.2.1 not later than 7 days after the Work is taken to have been completed in accordance with this Agreement.

10 Carrying out of Work

10.1 Any Work that is required to be carried out by the Developer under this Agreement is to be carried out in accordance with any design or specification specified by the Council, any relevant development consent and any other applicable law, and otherwise to the satisfaction of the Council.

10.2 If the Developer is required by the Council to prepare or modify a design or specification relating to a Work for approval by the Council under clause 10.1, the Developer is to bear all costs relating to the preparation or modification and approval of the design and specification.

11 Access to the Land

11.1 The Developer is to permit the Council, its officers, employees, agents and contractors to enter the Land or any other land at any time, upon giving reasonable prior notice, in order to inspect, examine or test any Work or to remedy any breach of the Developer relating to the carrying out of a Work.

//Drafting Note. This clause needs to be amended if the Developer is not the owner of the Land.//

11.2 The Council is to permit the Developer to enter and occupy any land owned or controlled by the Council for the purpose of enabling the Developer to carrying out any Work under this Agreement that is required to be carried out on such land or to perform any other obligation imposed on the Developer by or under this Agreement.

12 Protection of people and property

12.1 The Developer is to ensure to the fullest extent reasonably practicable in relation to the carrying out of any Work that:

12.1.1 all necessary measures are taken to protect people and property, and

12.1.2 unnecessary interference with the passage of people and vehicles is avoided, and

12.1.3 nuisances and unreasonable noise and disturbances are prevented.

13 Damage and repairs to Work

13.1 The Developer, at its own cost, is to repair and make good to the satisfaction of the Council any loss or damage to a Work from any cause whatsoever which occurs prior to the date on which the Work taken to have been completed under this Agreement.

14 Variation of Work

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

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//Insert Name of Party 3//

- 14.1 A Work is not to be varied by the Developer, unless:
 - 14.1.1 the Parties agree in writing to the variation, and
 - 14.1.2 any consent or approval required under the Act or any other law to the variation is first obtained, and
 - 14.1.3 the Developer bears all of the Council's costs of and incidental to agreeing to and approving the variation.
- 14.2 For the purposes of clause 14.1 a variation may relate to any matter in relation to the Works that is dealt with by this Agreement.

15 Procedures relating to the completion of Work

- 15.1 A Development Contribution comprising the carrying out of a Work is made for the purposes of this Agreement when the Council accepts the completion of the Work in accordance with this clause.
- 15.2 Subject to this Agreement, when the Developer considers that a Work required to be carried out by the Developer under this Agreement is complete, the Developer is to give to the Council a notice in writing to that effect.
- 15.3 The Council is taken to have accepted the completion of a Work that is the subject of a notice referred to in clause 15.2:
 - 15.3.1 where the Council has not given the Developer a Rectification Notice under clause 16.1 – at the expiration of the Defects Liability Period, or
 - 15.3.2 where the Council has given the Developer a Rectification Notice under clause 16.1 – on the date on which the Council gives the Developer a written notice stating that the defect the subject of the Rectification Notice has been rectified to the Council's satisfaction.
- 15.4 On completion of the Work, the Council accepts responsibility for the Work subject to anything to the contrary in this Agreement.

16 Procedures relating to the rectification of defects

- 16.1 During the Defects Liability Period, the Council may give to the Developer a Rectification Notice.
- 16.2 The Developer is to comply with a Rectification Notice at its own cost according to its terms and to the satisfaction of the Council.
- 16.3 If the Developer breaches clause 16.2, the Council may have the relevant defect rectified and may recover its costs of so doing as a debt due in a court of competent jurisdiction.

17 Failure to carry out Work

- 17.1 If the Council considers that the Developer is in breach of any obligation under this Agreement relating to the carrying out of any Work, the Council may elect to give the Developer a notice requiring:
 - 17.1.1 the carrying out of further work relating to the Work to immediately cease except in relation to the rectification of the breach, and
 - 17.1.2 the breach to be rectified to the Council's satisfaction, or
- 17.2 The Council is not required to give the Developer a notice under clause 17.1 as a pre-condition to calling-up the Security referred to in clause 20 in relation to the Developer's breach.

//Insert Name of Planning Agreement// **Planning Agreement**

Ballina Shire Council

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//Insert Name of Party 3//

-
- 17.3 A notice given under clause 17.1 is to allow the Developer a period of not less than 28 days or such further period as the Council considers reasonable in the circumstances to rectify the breach.
 - 17.4 Without limiting any other rights the Council has to enforce this Agreement, the Council may, if the Developer does not comply with a notice given under clause 17.1:
 - 17.4.1 call upon the Security referred to in clause 20, and
 - 17.4.2 carry out and complete the Work the subject of the Developer's breach.
 - 17.5 Clauses 25 and 26 do not prevent a notice being given under clause 17.1 and do not apply to such a notice or the circumstances relating to the giving of that notice, and any procedure commenced under clause 25 or clause 26 ceases to apply when such a notice is given.

18 Works-As-Executed-Plan

- 18.1 No later than 60 days after a Work is taken to have been completed in accordance with this Agreement, the Developer is to submit to the Council a full works-as-executed-plan in respect of the Work the subject of the notice.

Part 3 – Other Provisions

19 Indemnity and Insurance

- 19.1 The Developer indemnifies the Council, its employees, officers, agents, contractors and workmen from and against all losses, damages, costs (including legal costs on a full indemnity basis), charges, expenses, actions, claims and demands whatsoever which may be sustained, suffered, recovered or made arising in connection with the carrying out by the Developer of any Work and the performance by the Developer of any other obligation under this Agreement.
- 19.2 The Developer is to take out and keep current to the satisfaction of the Council the following insurances in relation to Work required to be carried out by the Developer under this Agreement up until the Work is taken to have been completed in accordance with this Agreement:
 - 19.2.1 contract works insurance, noting the Council as an interested party, for the full replacement value of the Works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover the Developer's liability in respect of damage to or destruction of the Works,
 - 19.2.2 public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party,
 - 19.2.3 workers compensation insurance as required by law, and
 - 19.2.4 any other insurance required by law.
- 19.3 If the Developer fails to comply with clause 19.2, the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Developer to the Council and may be recovered by the Council as it deems appropriate including:
 - 19.3.1 by calling upon the Security provided by the Developer to the Council under this Agreement, or
 - 19.3.2 recovery as a debt due in a court of competent jurisdiction.

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Ballina Shire Council

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//Insert Name of Party 3//

- 19.4 The Developer is not to commence to carry out any Work unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 19.2.

20 Provision of Security

- 20.1 Upon the execution of this Agreement by the all of the Parties, the Developer is to provide the Council with Security in the amount of \$//Drafting Note. Insert Amount//.
- 20.2 The amount of the Security is to be indexed quarterly in accordance with the Consumer Price Index (All Groups - Sydney) as provided by the Australian Bureau of Statistics and the Developer must ensure that the Security held by the Council at all times equals the indexed amount notified to the Developer by Council.

21 Release & return of Security

- 21.1 The Council may but is not obliged to progressively release and return the Security to the Developer as and when the Developer performs its obligations under this Agreement to the satisfaction of the Council but may only do so if:
- 21.1.1 the Council considers that the remaining amount of the Security is adequate having regard to the Developer's remaining obligations under this Agreement, and
- 21.1.2 the Developer is not in breach of this Agreement at the time the Security is to be returned.
- 21.2 The Council is to return the Security or any remaining part of it to the Developer within 28 days of the completion by the Developer of all of its obligations under this Agreement to the satisfaction of the Council.
- 21.3 At any time following the provision of the Security, the Developer may provide the Council with a replacement Security in the amount of the Security required to be provided under clause 20.1.
- 21.4 On receipt of a replacement Security, the Council is to release and return to the Developer as directed, the Security it holds which has been replaced.

22 Call-up of Security

- 22.1 The Council may call-up the Security if, in its absolute discretion and despite clauses 25 and 26, it considers that the Developer has breached this Agreement.
- 22.2 If the Council calls on the Security, it may use the amount so paid to it in satisfaction of any costs incurred by it in remedying the Developer's breach being:
- 22.2.1 the reasonable costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
- 22.2.2 all fees and charges necessarily or reasonably incurred by the Council in order to have the Work carried out, completed or rectified, and
- 22.2.3 without limiting clause 22.2.2, all legal costs and expenses reasonably incurred by the Council, by reason of the Developer's breach.
- 22.3 If the Council calls on the Security in accordance with this Agreement, the Council may, by notice in writing to the Developer, require the Developer to provide a further or replacement Security in an amount that, when added to any unused portion of any existing Security, does not exceed the amount of the Security the Council is entitled to hold under clause 20.1.

23 Recovery of cost of Work carried out by the Council

//Insert Name of Planning Agreement// **Planning Agreement**

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

-
- 23.1 If the Council incurs a cost in carrying out, completing or rectifying a defect in a Work that is not met by the Security referred to in clause 20, the Council may recover the cost from the Developer in a court of competent jurisdiction.
 - 23.2 For the purpose of clause 23.1, the Council's costs of carrying out, completing or rectifying a defect in a Work includes, but is not limited to:
 - 23.2.1 the reasonable costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
 - 23.2.2 all fees and charges necessarily or reasonably incurred by the Council in order to have the Work carried out, completed or rectified, and
 - 23.2.3 without limiting clause 23.2.2, all legal costs and expenses reasonably incurred by the Council, by reason of the Developer's failure to comply with this Agreement.

24 Enforcement in a court of competent jurisdiction

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

25 Dispute Resolution – expert determination

- 25.1 This clause applies to a dispute under this Agreement which relates to a matter that can be determined by an appropriately qualified expert.
- 25.2 Any dispute between the Parties as to whether a dispute to which this clause applies can be determined by an appropriately qualified expert is to be referred to the Chief Executive Officer of the professional body that represents persons with the relevant expertise for determination, which is to be final and binding on the Parties.
- 25.3 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 25.4 If a notice is given under clause 25.3, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- 25.5 If the dispute is not resolved within a further 28 days, the dispute must be referred to the President of the NSW Law Society to appoint an Expert for Expert Determination.
- 25.6 The Expert Determination is binding on the Parties except in the case of fraud or misfeasance by the Expert.
- 25.7 Each Party must bear its own costs arising from or in connection with the appointment of the Expert and the Expert Determination.

26 Dispute Resolution - mediation

- 26.1 This clause applies to any dispute under this Agreement other than a dispute to which clause 25 applies.
- 26.2 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

-
- 26.3 If a notice is given under clause 26.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
 - 26.4 If the dispute is not resolved within a further 28 days, the Parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and must request the President of the Law Society, or the President's nominee, to select a mediator.
 - 26.5 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.

27 Registration of this Agreement

- 27.1 The Parties agree to register this Agreement subject to obtaining the agreement of the persons specified in s93H(1) of the Act / not to register this agreement for the purposes of s93H of the Act. **//Drafting Note. Delete whichever is inapplicable//**

28 Assignment, Sale of Land, etc

- 28.1 Unless the matters specified in clause 28.2 are satisfied, the Developer is not to do any of the following:
 - 28.1.1 if the Developer is the owner of the Land, to transfer the Land to any person, or
 - 28.1.2 assign or novate to any person the Developer's rights or obligations under this Agreement.
 - 28.2 The matters required to be satisfied for the purposes of clause 28.1 are as follows:
 - 28.2.1 the Developer has, at no cost to the Council, first procured the execution by the person to whom the Developer's rights or obligations under this Agreement are to be assigned or novated, of an agreement in favour of the Council on terms satisfactory to the Council, and
 - 28.2.2 the Council, by notice in writing to the Developer, has stated that evidence satisfactory to the Council has been produced to show that the assignee or novatee, is reasonably capable of performing its obligations under the Agreement,
 - 28.2.3 the Developer is not in breach of this Agreement, and
 - 28.2.4 the Council otherwise consents to the transfer, assignment or novation.
- //Drafting Note. This clause needs to be amended if the Developer is not the owner of the Land//**

29 Review of this Agreement

- 29.1 The Developer is to provide to the Council by not later than each anniversary of the date on which this Agreement is entered into a report detailing the performance of its obligations under this Agreement.
- 29.2 The report referred to is to be in such a form and to address such matters as may be notified by the Council to the Developer from time to time.

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

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//Insert Name of Party 3//

- 29.3 The Parties agree to review this Agreement every //Drafting Note. Insert number// 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 Agreement.
- 29.4 For the purposes of clause 29.3, 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.
- 29.5 For the purposes of addressing any matter arising from a review of this Agreement referred to in clause 29.3, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Agreement.
- 29.6 If this Agreement becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Agreement is entered into.
- 29.7 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 29.3 is not a dispute for the purposes of clauses 25 and 26 and is not a breach of this Agreement.

//Drafting Note. This clause can be amended to remove reporting requirements.//

30 Notices

- 30.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:
 - 30.1.1 delivered or posted to that Party at its address set out in the Summary Sheet, or
 - 30.1.2 faxed to that Party at its fax number set out in the Summary Sheet.
- 30.2 If a Party gives the other Party 3 business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.
- 30.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
 - 30.3.1 delivered, when it is left at the relevant address,
 - 30.3.2 sent by post, 2 business days after it is posted, or
 - 30.3.3 sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.
- 30.4 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.

31 Approvals and Consent

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

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

32 Costs

- 32.1 The Developer is to pay to the Council the Council's costs not exceeding \$//Insert amount// of preparing, negotiating, executing and stamping this Agreement, and any document related to this Agreement within 7 days of a written demand by the Council for such payment.
- 32.2 The Developer is also to pay to the Council a contribution of \$//Insert amount// towards the Council's costs of preparing the template document on which this Agreement is based within 7 days of a written demand by the Council for such payment.
- 32.3 The Developer is also to pay to the Council the Council's costs of enforcing this Agreement within 7 days of a written demand by the Council for such payment.

33 Entire Agreement

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

34 Further Acts

- 34.1 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 Agreement and all transactions incidental to it.

35 Notations on section 149(2) Planning Certificates

- 35.1 The Parties agree that the Council may, in its absolute discretion, make a notation under section 149(5) of the Act regarding this Agreement on any certificate issued under section 149(2) of the Act relating to the Land.

//Drafting Note. Delete this clause if not applicable//

36 Governing Law and Jurisdiction

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

37 Joint and Individual Liability and Benefits

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

//Insert Name of Planning Agreement// **Planning Agreement**

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

38 No Fetter

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

39 Representations and Warranties

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

40 Severability

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

41 Modification

- 41.1 No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

42 Waiver

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

43 GST

- 43.1 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.

//Insert Name of Planning Agreement// Planning Agreement

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//Insert Name of Party 3//

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.

- 43.2 Subject to clause 43.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Agreement, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- 43.3 Clause 43.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Agreement to be GST inclusive.
- 43.4 No additional amount shall be payable by the Council under clause 43.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.
- 43.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Agreement 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:
 - 43.5.1 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;
 - 43.5.2 that any amounts payable by the Parties in accordance with clause 43.2 (as limited by clause 43.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 43.6 No payment of any amount pursuant to this clause 43, 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.
- 43.7 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.
- 43.8 This clause continues to apply after expiration or termination of this Agreement.

44 Explanatory Note Relating to this Agreement

- 44.1 The Appendix contains the Explanatory Note relating to this Agreement required by clause 25E of the Regulation.
- 44.2 Pursuant to clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note in the Appendix is not to be used to assist in construing this Planning Agreement.

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

Schedule 1

(Clause 7)

Development Contributions

Column 1	Column 2	Column 3	Column 4
Item	Public Purpose	Manner & Extent	Timing
Part A - Monetary Contributions			
1.			
2.			
3.			
Part B - Dedication of land			
1.			
2.			
3.			
Part C - Carrying out of Work			
1.			
2.			
3.			
Part D - Other material public benefits			
1.			
2.			
3.			

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

Execution

Executed as an Agreement

Dated:

Executed on behalf of the Council

General Manager

Witness/Name/Position

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

Name/Position

Name/Position

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

Appendix

(Clause 44)

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Planning Agreement

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

Parties

//Insert Name of Council// ABN ## of ## (Council)

//Insert name of Party 2// ABN ## of ## (Developer)

//Insert Name of Party 3// ABN ## of ## (Landowner)

Description of the Land to which the Draft Planning Agreement Applies

//Drafting Note: To be Completed//

Description of Proposed Development

//Drafting Note: To be Completed//

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

Objectives of Draft Planning Agreement

//Drafting Note: To be Completed//

Nature of Draft Planning Agreement

//Drafting Note: To be Completed//

Effect of the Draft Planning Agreement

//Insert Name of Planning Agreement// Planning Agreement

Ballina Shire Council

//Insert Name of Party 2//

//Insert Name of Party 3//

//Drafting Note: To be Completed//

Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

//Drafting Note: To be Completed//

How the Draft Planning Agreement Promotes the Public Interest

//Drafting Note: To be Completed//

For Planning Authorities:

Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities

N/A

Other Public Authorities – How the Draft Planning Agreement Promotes the Objects (if any) of the Act under which it is Constituted

N/A

Councils – How the Draft Planning Agreement Promotes the Elements of the Council's Charter

The Draft Planning Agreement promotes the elements of the Council's charter by:

//Drafting Note: To be Completed//

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

//Drafting Note: To be Completed//