

## **Henderson Farm Planning Agreement**

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

**Ballina Shire Council**

**Lennox Developments Pty Ltd**

Dated 2 May 2011

Revision F – May 2011

## Henderson Farm Planning Agreement

### Summary Sheet

#### Council:

Name: Ballina Shire Council  
Address: PO Box 450  
BALLINA NSW 2478  
Telephone: 02 6686 4444  
Facsimile: 02 6686 7035  
Email: council@ballina.nsw.gov.au  
Representative: Mr Paul Hickey, General Manager

#### Landowner:

Name: Lennox Developments Pty Ltd  
Address: PO Box 141  
KEMPS CREEK NSW 2178  
Telephone: 02 9826 1256  
Facsimile: 02 9826 1712  
Email: terry@brandown.com.au  
Representative: Mr Terry Martin

#### Land:

See definition of *Land* in clause 1.1.

#### Development:

See definition of *Development* in clause 1.1.

**Application of s94, s94A and s94EF of the Act**

Not excluded. See clause 6.

**Environmental Rehabilitation commitments:**

See clause 9ff and Schedule 1.

**Heritage commitments:**

See clause 15 and Schedule 2.

**Provision of Security**

Yes,. See clause 18

**Dispute resolution**

Expert determination and mediation. See clauses 19 and 20.

**Registration on title:**

Yes. See clause 21.

## Henderson Farm Planning Agreement

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

### Parties

**Ballina Shire Council** ABN 53 929 887 369 of PO Box 450, BALLINA NSW 2478 (**Council**)  
and

**Lennox Developments Pty Ltd** ABN 63 103 214 633 of PO Box 141, KEMPS CREEK NSW 2178 (**Landowner**)

### Background

- A. The Landowner is the owner of the land
- B. The Landowner has sought the making of the LEP to permit the carrying out of the Development on the Land.
- C. The Landowner has agreed to provide the benefits under this Agreement in connection with the carrying out of the Development.

### Operative Provisions

#### Part 1 - Preliminary

##### 1. Definitions & Interpretation

1.1. In this Agreement the following definitions apply:

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

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

**Bank Guarantee** means an irrevocable and unconditional undertaking without any expiry or end date in favour of the Council to pay an amount or amounts of money to the Council on demand issued by:

- (a) one of the following trading banks:

- (i) Australia and New Zealand Banking Group Limited,
  - (ii) Commonwealth Bank of Australia,
  - (iii) Macquarie Bank,
  - (iv) National Australia Bank Limited,
  - (iv) St George Bank Limited,
  - (v) Westpac Banking Corporation, or
- (b) any other financial institution approved by the Council in its absolute discretion.

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

**Defects Liability Period** means the period commencing on the date on which the Work is completed in accordance with this Agreement and ending 12 months after that date.

**Development** means the subdivision of the Land for urban purposes to create residential lots, parks and environmental rehabilitation areas.

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

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

**Development Contribution** means any benefit provided by the Landowner under this Agreement being 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.

**Environmental Management Land** means the part or parts of the Land identified as an environmental rehabilitation area on the LEP Map.

**Environmental Rehabilitation** means the rehabilitation of the Environmental Management Land in accordance with Schedule 2.

**Environmental Rehabilitation Plan** means a plan prepared by the Landowner and approved by the Council, setting out particulars of the means by which the Landowner is to undertake the Environmental Rehabilitation.

**Environmental Rehabilitation Work** means Work the subject of the Environmental Rehabilitation Plan or a Vegetation Management Plan.

**Establishment Obligation** means the Environmental Rehabilitation in accordance with:

- (a) the relevant requirements of any Development Consent relating to the Development, and
- (b) to the extent not inconsistent with a Development Consent:
  - (i) the relevant parts of the Environmental Rehabilitation Plan relating to the establishment of the Environmental Rehabilitation;
  - (ii) relevant parts of the any Vegetation Management Plan relating to the establishment of the Environmental Rehabilitation; and
  - (ii) otherwise to the reasonable satisfaction of the Council.

**Establishment Period** means the period commencing when the Development is commenced (within the meaning of the Act) or such other period or periods commencing at such other time or times as the Parties agree and ending when the Establishment Obligation is completed to the reasonable satisfaction of the Council.

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

**GST Law** has the meaning given to that term 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.

**Heritage Item** means an item specified or described in Schedule 2.

**Heritage Item Archival Recording** means a document containing an archival record of each Heritage Item prepared by a suitably qualified heritage consultant in accordance with the document published by the NSW Heritage Office titled *How to Prepare Archival Records of Heritage Items*.

**Land** means Lot 1 DP 1070446, Lot 99 DP 755684 and Lot 1 DP 829277

**LEP** means a local environmental plan applying to the Land that permits the carrying out of the Development on the Land.

**LEP Map** means the map accompanying the LEP.

**Management Obligation** means the Environmental Rehabilitation in accordance with:

- (a) the relevant requirements of any Development Consent relating to the Development, and
- (b) to the extent not inconsistent with a Development Consent:
  - (i) the relevant parts of the Environmental Rehabilitation Plan relating to the management of the Environmental Rehabilitation once established;
  - (ii) relevant parts of the any Vegetation Management Plan relating to the management of the Environmental Rehabilitation once established; and
  - (ii) otherwise to the reasonable satisfaction of the Council.

**Management Period** means the period commencing immediately at the end of the Establishment Period and ending three (3) years after the Environmental Management Land is dedicated to the Council, or such other period or periods as the Parties agree.

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

**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.

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

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

**Vegetation Management Plan** means a plan prepared by the Landowner and approved by the Council, setting out particulars of the means by which the Landowner is to

undertake the Environmental Rehabilitation in so far as it relates to vegetation management on the Land, including particulars relating to detailed planting and vegetation maintenance regimes, the handover of works and the dedication of land to 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 Landowner 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 an Agreed Benefit 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. Commencement of this Agreement**

- 3.1. This Agreement commences when it has been executed by both of the Parties.
- 3.2. The Party who executes this Agreement last is to notify the other Party once it has done so and promptly provide it with a copy of the fully executed version of this Agreement.

## **4. Commencement of Agreed Benefits Obligations**

- 4.1. The Landowner is under no obligation to make the Development Contributions to the Council in accordance with this Agreement unless the following events have occurred:
  - 4.1.1. the LEP takes effect,
  - 4.1.2. Development Consent is granted to the Development or any part of it under the LEP subject to a condition requiring the Development Contributions to be made in accordance with this Agreement;
  - 4.1.3. the Development is commenced (within the meaning of the Act).

## **5. Further Agreements Relating to this Agreement**

- 5.1. The Parties may, at any time, enter into such other agreements or arrangements relating to the subject-matter of this Agreement that they consider are necessary or desirable in order to give effect to this Agreement.
- 5.2. An agreement or arrangement referred to in clause 5.1 is not to be inconsistent with this Agreement.

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

- 6.1. The Landowner 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 validity of this Agreement or a condition of Development Consent that requires this Agreement to be entered into or performed according to the terms of this Agreement.

## **7. Application of s94, s94A and s94EF of the Act to the Development**



- 7.1. This Agreement does not exclude the application of s94 to the Development.
- 7.2. The Development Contributions provided by the Landowner under this Agreement are not be taken into consideration in relation to the imposition of a condition under s94 of the Act in relation to the Development.
- 7.3. This Agreement does not exclude the application of s94A to the Development.
- 7.4. This Agreement does not exclude the application of s94EF to the Development.

## **Part 2 - Development Contributions under this Agreement**

### **8. Provision of Development Contributions**

- 8.1. The Landowner is to make Development Contributions to the Council in accordance with this Agreement and otherwise to the satisfaction of the Council.

## **Part 3 – Environmental Rehabilitation Work**

### **9. Environmental Rehabilitation Plan**

- 9.1. The Landowner is to obtain the Council's approval to the Environmental Rehabilitation Plan before the granting of Development Consent for the Development.
- 9.2. If the Landowner makes more than one Development Application for the Development, the Landowner is to obtain the Council's approval to Environmental Rehabilitation Plan before the granting of the first Development Consent for the Development.

### **10. Vegetation Management Plan**

- 10.1. The Landowner is to obtain the Council's approval to the Vegetation Management Plan before the issuing of a Construction Certificate for any part of the Development.
- 10.2. Despite clause 10.1, if Development Consent is granted to the carrying out of the Development in stages, the Landowner is only required to obtain the Council's approval to the Vegetation Management Plan in so far as it relates to each stage of the Development before the issuing of a Construction Certificate for any part of that stage of the Development:

### **11. Establishment and Management of Environmental Management Land**

- 11.1. The Landowner, at its own cost, is to perform:
  - 11.1.1. the Establishment Obligation during the Establishment Period; and

- 11.1.2. the Management Obligation during the Management Period,  
to the reasonable satisfaction of the Council.
- 11.2. The Landowner is to perform its obligations under clause 11.1 in accordance with:
  - 11.2.1. this Agreement, and
  - 11.2.2. any further agreement that is entered into by the Parties under clause 4, and
  - 11.2.3. any requirements and directions notified in writing by the Council to the Landowner at any time before the Environmental Rehabilitation Work is completed that are not inconsistent with:
    - 11.2.3.1. this Agreement, or
    - 11.2.3.2. any agreement referred to in clause 11.2.2, or
    - 11.2.3.3. any Development Consent relating to the Development.
- 11.3. The Establishment Obligation and the Management Obligation are not to be varied by the Landowner, unless:
  - 11.3.1. the Parties agree in writing to the variation,
  - 11.3.2. any consent or approval required under the Act or any other law to the variation is first obtained, and
  - 11.3.3. the Landowner bears all of the Council's costs of and incidental to agreeing to and approving the variation
- 11.4. On 1 August of each year during the Management Period, the Landowner is to give the Council a written report in a form acceptable to the Council on the Landowner's performance of the Management Obligation during the period ending on 30 June in that year.

## **12. Inspection of the Environmental Management Land**

- 12.1. Before the Environmental Management Land is dedicated to the Council in accordance with any relevant requirement of the Environmental Rehabilitation Plan or the Vegetation Management Plan, the Landowner is to permit the Council, its officers, employee, agents and contractors, to enter that land at any time and from time to time, for the purposes of establishing the Landowner's compliance with the requirement of that plan.
- 12.2. Before the Environmental Management Land is dedicated to the Council in accordance with any relevant requirement of the Environmental Rehabilitation Plan or the Vegetation Management Plan, Landowner is to permit the Council, its officers, employees, agents and contractors to reasonably pass through land owned, occupied or otherwise controlled by the Landowner to enable the Council to obtain reasonable access to the Environmental Management Land.

## **13. Completion of Environmental Rehabilitation Work**

- 13.1. Environmental Rehabilitation Work is completed for the purposes of this Agreement when the Council, at the request of the Landowner, notifies the Landowner in writing that it is satisfied that the Work has been carried out in accordance with the relevant requirements of the Environmental Rehabilitation Plan or a Vegetation Management Plan.
- 13.2. During the Defects Liability Period, the Council may give the Landowner a Rectification Notice.
- 13.3. Subject to the resolution of a dispute in accordance with this Agreement, the Landowner is to comply with a Rectification Notice at its own cost and to the reasonable satisfaction of the Council.
- 13.4. If the Landowner breaches clause 13.3, the Council may have the relevant defect rectified and may recover its costs of so doing from the Landowner as a debt due in a court of competent jurisdiction.

#### **14. Dedication of the Environmental Management Land**

- 14.1. The Landowner is to dedicate the Environmental Management Land to the Council in accordance with any relevant requirements of the Environmental Rehabilitation Plan or a Vegetation Management Plan.
- 14.2. Land is dedicated for the purposes of clause 14.1 when:
  - 14.2.1. a deposited plan is registered in the register of plans held at the Land and Property Management Authority that dedicates land as a public road (including a temporary public road) under the *Roads Act 1993* or creates a public reserve or drainage reserve under the *Local Government Act 1993*, or
  - 14.2.2. 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.
- 14.3. For the purposes of clause 14.2.2:
  - 14.3.1. the Landowner 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,
  - 14.3.2. the Council is to execute the instrument of transfer and return it to Landowner within 7 days of receiving it from the Landowner,
  - 14.3.3. the Landowner is to lodge the instrument of transfer for registration at the Land and Property Management Authority within 7 days of receiving it from the Council duly executed,
  - 14.3.4. the Landowner and the Council are to do all things reasonably necessary to enable registration of the instrument of transfer to occur.

### **Part 4 – Archival Recording of Local Heritage**

## **15. Heritage items under this Agreement**

- 15.1. The Landowner is to cause a Heritage Item Archival Recording to be prepared to the satisfaction of the Council before a Subdivision Certificate is issued for any part of the Development on land on which a Heritage Item is situated,
- 15.2. The Landowner is to store any salvageable materials (such as, but not limited to, bricks, rocks and timber) relating to a Heritage Item in a location considered by the Landowner and the Council to be suitable for that purpose.

## **Part 5 – Other provisions**

### **16. Indemnity and Insurance**

- 16.1. The Landowner 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 a negligent act or omission of the Landowner in carrying out any Work and the performance of any other obligation under this Agreement.
- 16.2. The Landowner 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 Landowner under this Agreement up until the Work is taken to have been completed in accordance with this Agreement:
  - 16.2.1. 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 Landowner's liability in respect of damage to or destruction of the Works,
  - 16.2.2. public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Landowner and any subcontractor of the Landowner, for liability to any third party,
  - 16.2.3. workers compensation insurance as required by law, and
  - 16.2.4. any other insurance required by law.
- 16.3. If the Landowner fails to comply with clause 16.2, 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 Landowner to the Council and may be recovered by the Council as it deems appropriate including:
  - 16.3.1. by calling upon the Security provided by the Landowner to the Council under this Agreement, or
  - 16.3.2. recovery as a debt due in a court of competent jurisdiction.

- 16.4. The Landowner 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 16.2.

#### **17. Enforcement in a court of competent jurisdiction**

- 17.1. Without limiting any other remedies available to the Parties, this Agreement may be enforced by either Party in any court of competent jurisdiction.
- 17.2. For the avoidance of doubt, nothing in this Agreement prevents:
- 17.2.1. 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,
  - 17.2.2. 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.

#### **18. Provision of Security**

- 18.1. Before the issuing of the first Construction Certificate for the Development, the Landowner is to provide the Council with Security to the full value of the Environmental Rehabilitation Work.
- 18.2. 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 Landowner must ensure that the Security held by the Council at all times equals the indexed amount notified to the Landowner by Council.
- 18.3. The Council may but is not obliged to progressively release and return the Security to the Landowner as and when the Landowner performs its obligations under this Agreement to the satisfaction of the Council but may only do so if:
- 18.3.1. the Council considers that the remaining amount of the Security is adequate having regard to the Landowner's remaining obligations under this Agreement, and
  - 18.3.2. the Landowner is not in breach of this Agreement at the time the Security is to be returned.
- 18.4. The Council is to return the Security or any remaining part of it to the Landowner within 28 days of the completion by the Landowner of all of its obligations under this Agreement to the satisfaction of the Council.
- 18.5. At any time following the provision of the Security, the Landowner may provide the Council with a replacement Security in the amount of the Security required to be provided under clause 18.1.
- 18.6. On receipt of a replacement Security, the Council is to release and return to the Landowner as directed, the Security it holds which has been replaced.
- 18.7. The Council may call-up the Security if, in its absolute discretion and despite clause 19, it considers that the Landowner has breached this Agreement.

- 18.8. 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 Landowner's breach being:
- 18.8.1. the reasonable costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
  - 18.8.2. all fees and charges necessarily or reasonably incurred by the Council in order to have the Work carried out, completed or rectified, and
  - 18.8.3. without limiting clause 18.8.2, all legal costs and expenses reasonably incurred by the Council, by reason of the Landowner's breach.
- 18.9. If the Council calls on the Security in accordance with this Agreement, the Council may, by notice in writing to the Landowner, require the Landowner 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 18.1.
- 18.10. 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 18.1, the Council may recover the cost from the Landowner in a court of competent jurisdiction.
- 18.11. For the purpose of clause 18.10, the Council's costs of carrying out, completing or rectifying a defect in a Work includes, but is not limited to:
- 18.11.1. the reasonable costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
  - 18.11.2. all fees and charges necessarily or reasonably incurred by the Council in order to have the Work carried out, completed or rectified, and
  - 18.11.3. without limiting clause 18.11.2, all legal costs and expenses reasonably incurred by the Council, by reason of the Landowner's failure to comply with this Agreement.

## **19. Dispute Resolution - mediation**

- 19.1. This clause applies to a dispute under this Agreement which relates to a matter that can be determined by an appropriately qualified expert.
- 19.2. 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.
- 19.3. Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 19.4. If a notice is given under clause 19.3, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- 19.5. 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.

- 19.6. The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 19.7. Each Party must bear its own costs arising from or in connection with the appointment of the expert and the expert determination.

## **20. Dispute Resolution - mediation**

- 20.1. This clause applies to any dispute under this Agreement other than a dispute to which clause 19 applies.
- 20.2. Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 20.3. If a notice is given under clause 20.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- 20.4. 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.
- 20.5. 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.

## **21. Registration of this Agreement**

- 21.1. The Parties agree to register this Agreement, subject to obtaining the agreement of the persons specified in s93H(1) of the Act.
- 21.2. The Landowner is to use its reasonable endeavours to obtain the consent of the persons specified in s93H(1) of the Act to registration of this Agreement.
- 21.3. If the agreement of the persons specified in s93H(1) of the Act to Registration of this Agreement is obtained, the Parties are to do such things as are reasonably necessary to enable registration to occur.
- 21.4. Subject to this clause, within 60 days of commencement of this Agreement, the Landowner is to provide the Council with the following documents to enable registration of this Agreement:
  - 21.4.1. an instrument requesting registrations of this Agreement on the title to the Land in registrable form duly executed by the Landowner, and
  - 21.4.2. the written irrevocable consent of each person referred to in s93H(1) of the Act to that registration.
- 21.5. The Parties are to do such things as are reasonably necessary to remove any notation relating to this Agreement to the title to the Land:

- 21.5.1. in so far as the part of the Land concerned is a lot created in the Development for which a final occupation certificate is issued,
- 21.5.2. in relation to any other part of the Land, once the Landowner has completed its obligations under this Agreement to the reasonable satisfaction of the Council or this Agreement is terminated or otherwise comes to an end for any reason whatsoever.

## **22. Assignment, Sale of Land, etc**

- 22.1. Unless the matters specified in clause 22.2 are satisfied, the Landowner is not to do any of the following:
  - 22.1.1. to transfer the Land to any person, or
  - 22.1.2. assign or novate to any person the Landowner's rights or obligations under this Agreement.
- 22.2. The matters required to be satisfied for the purposes of clause 21.1 are as follows:
  - 22.2.1. the Landowner has, at no cost to the Council, first procured the execution by the person to whom the Landowner'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
  - 22.2.2. the Council, by notice in writing to the Landowner, 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,
  - 22.2.3. the Landowner is not in breach of this Agreement, and
  - 22.2.4. the Council otherwise consents to the transfer, assignment or novation.
- 22.3. Clauses 22.1 and 22.2 do not apply in relation to any sale or transfer of any land if this Agreement is registered on the title of that land at the time of sale.

## **23. Review of this Agreement**

- 23.1. The Parties, acting in good faith and using their best endeavours, agree to review this Agreement if either party is of the opinion that any change of circumstance has occurred that materially affects the operation of this Agreement.
- 23.2. For the purposes of clause 23.1, 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.
- 23.3. For the purposes of addressing any matter arising from a review of this Agreement referred to in clause 23.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Agreement.



- 23.4. If this Agreement becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Agreement is entered into.
- 23.5. 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 23.1 is not a dispute for the purposes of the dispute resolution provisions of this Agreement and is not a breach of this Agreement.

## **24. Notices**

- 24.1. 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:
  - 24.1.1. delivered or posted to that Party at its address set out in the Summary Sheet, or
  - 24.1.2. faxed to that Party at its fax number set out in the Summary Sheet, or
  - 24.1.3. emailed to that Party at its email address set out in the summary Sheet.
- 24.2. If a Party gives the other Party three (3) business days notice of a change of its address, fax number or email address, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted, faxed or emailed to the latest address, fax number or email address.
- 24.3. Any notice, consent, information, application or request is to be treated as given or made if it is:
  - 24.3.1. delivered, when it is left at the relevant address.
  - 24.3.2. sent by post, two (2) business days after it is posted.
  - 24.3.3. 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.
- 24.4. 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.

## **25. Approvals and Consent**

- 25.1. 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.
- 25.2. A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

## **26. Costs**

- 26.1. The Developer is to pay to the Council the Council's costs of preparing, negotiating, executing and stamping this Agreement, and any document related to this Agreement within 14 days of a written demand by the Council for such payment.
- 26.2. The Landowner, upon written demand by the Council, is to pay to the Council its reasonable costs of enforcing a breach of this Agreement by the Landowner.

## **27. Entire Agreement**

- 27.1. This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with.
- 27.2. 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.

## **28. Further Acts**

- 28.1. 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.

## **29. Governing Law and Jurisdiction**

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

## **30. Joint and Individual Liability and Benefits**

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

## **31. No Fetter**

- 31.1. 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.

## **32. Representations and Warranties**

- 33.1 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.

### 33. Severability

- 33.1. 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.
- 33.2. 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.

### 34. Modification

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

### 35. Waiver

- 35.1. 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.
- 35.2. 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.
- 35.3. 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.

### 36. GST

- 36.1. 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.

- 36.2. Subject to clause 36.4, 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.
- 36.3. Clause 36.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Agreement to be GST inclusive.
- 36.4. No additional amount shall be payable by the Council under clause 36.2 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.
- 36.5. 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:
  - 36.5.1. 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;
  - 36.5.2. that any amounts payable by the Parties in accordance with clause 36.2 (as limited by clause 36.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 36.6. No payment of any amount pursuant to this clause 36, 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.
- 36.7. 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.
- 36.8. This clause continues to apply after expiration or termination of this Agreement.

### **37. Explanatory Note Relating to this Agreement**

- 37.1. The Appendix contains the Explanatory Note relating to this Agreement required by clause 25E of the Regulation.
- 37.2. 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.

## **Schedule 1**

### **Environmental Rehabilitation**

#### **Part A – Rehabilitation Objectives**

An Environmental Rehabilitation Plan shall be prepared for those parts of the Land that are proposed to be zoned for environmental protection purposes on the LEP Map so as to achieve the following objectives:

- Protection and enhancement of threatened species habitat on the land, particularly the habitat of the Hairy Joint Grass (*Arthraxon hispidus*) located toward the north of the Land;
- Provision of a vegetated buffer to the SEPP 14 vegetation within the northern portion of the Land with appropriate wetland species;
- Provision of a vegetated connection between the SEPP 26 Littoral Rainforest and the central rainforest remnant using appropriate rainforest species;
- Rainforest reforestation around the central rainforest remnant attached to this Agreement;
- Rainforest reforestation of land within 80 m of the mapped SEPP 26 littoral rainforest;
- Provision of a vegetated corridor linking the reforestation within the SEPP 26 littoral rainforest area to connect to the southern boundary of the property, to join with proposed corridor planting on the adjoining land;
- Management of stormwater and surface water in the vicinity of the Hairy Joint Grass protection areas to mimic existing pre-development hydrology; and
- Protection of revegetated and reforested areas in perpetuity, by dedicated to Council as public lands for environmental protection purposes, or other agreed mechanism.
- Plant species used for rehabilitation shall utilise appropriate local species, with stock sourced from the local area.

#### **Part B –Plan Requirements**

##### ***Environmental Rehabilitation Plan***

In addition to identifying how the rehabilitation objectives will be achieved, the Environmental Rehabilitation Plan shall:

- specify the requirements for detailed Vegetation Management Plans to be prepared and submitted to Council for approval;
- clearly identify the land within which rehabilitation works will be undertaken;
- provide appropriate species list/s of species to be utilised in rehabilitation works;

- provide an outline of the process by which the finalised works areas will be dedicated to Council; and
- provide the mechanism by which the hand-over of the land containing the completed works will occur, including criteria that will be used by Council to determine that the works are acceptable prior to hand-over.

### ***Vegetation Management Plan(s)***

A Vegetation Management Plan shall be prepared for the Environmental Management Land either as a single document or multiple plans that are associated with the staging of the Development. In any case, whether staged or not, a Vegetation Management Plan shall:

- be prepared by persons with professional qualifications and/or knowledge and experience in bush regeneration practices;
- identify and map all existing and proposed native vegetation;
- utilise species from the agreed species list (as provided for in the Environmental Rehabilitation Plan) and provide planting detail identifying the number and size of each species and the location of all planting;
- provide a detailed methodology for the rehabilitation works, including weed management, protection of existing native vegetation, planting of new vegetation, and timing of the works;
- outline criteria by which Council will accept bonding of the works, to delay implementation for any particular stage;
- provide a detailed methodology for the ongoing management of rehabilitation areas, including initial and follow-up maintenance / monitoring prior to dedication of the completed works areas; and
- ensure that the area to be rehabilitated under a Vegetation Management Plan is commensurate with the proportion of total residential area that is proposed in the stage that the Vegetation Management Plan is associated with, as a proportion of the total area to which the Environmental Rehabilitation Plan relates..

### **Part C - Timing of Environmental Rehabilitation Plan and Vegetation Management Plan**

The Landowner will prepare an Environmental Rehabilitation Plan to be submitted with any application for the Development, for Council approval.

A Vegetation Management Plan (or Plans where the Development is staged), will be drafted and approved by Council prior to the issue of relevant Construction Certificates.

The Landowner will complete the Establishment Obligation, to the reasonable satisfaction of Council in accordance with the Vegetation Management Plan, before a Subdivision Certificate is issued in respect of the first stage of the Development. Where the Development proceeds on a staged basis, the approved Establishment Obligation may also be staged.

## **Schedule 2**

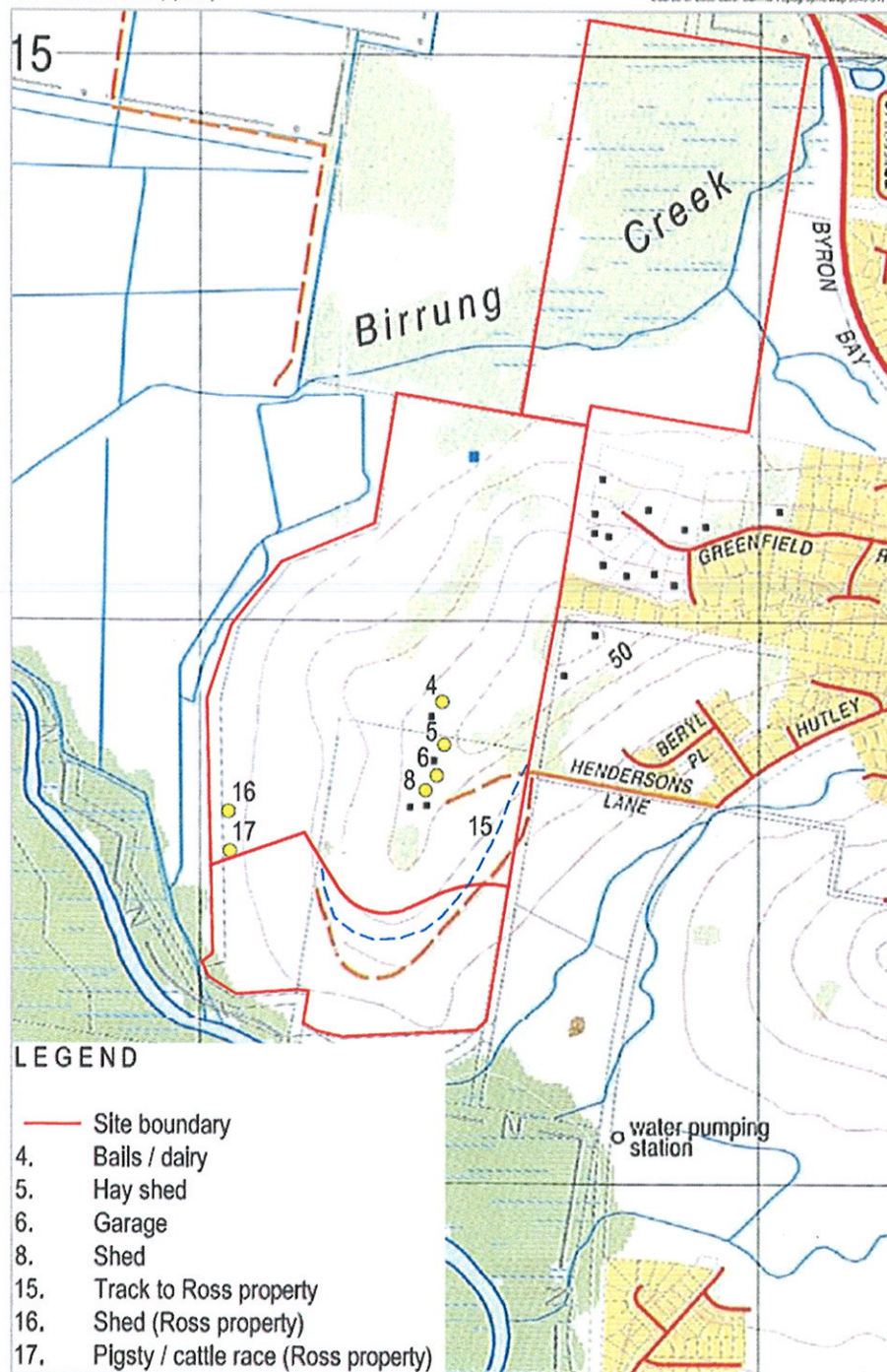
### **Heritage Items**

The following items situated on the Land in the locations shown on attached Plan:

- Item 4 Bails / Dairy
- Item 5 Hay Shed
- Item 6 Garage
- Item 8 Shed
- Item 15 Track to Ross Property
- Item 16 Shed (Ross Property)
- Item 17 Pigsty / Cattle Race (Crush) (Ross Property).

Information shown is for illustrative purposes only

Drawn by RE Checked by MVE Reviewed by MEJ Date: May 2011  
 Source of base data: Ballina Topographic Map 9540-3 N



Draft Henderson Farm Planning Agreement  
 0371436

## Henderson Farm Heritage Items



## Execution

Executed as an Agreement


Dated:

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Executed on behalf of the Council

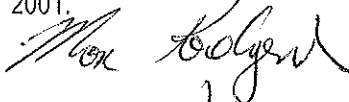
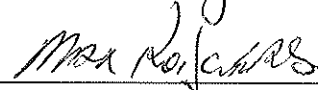
 30/7/12  
General Manager



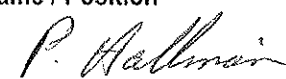
  
Witness / Name / Position  
C. Phillip Silver  
Mayor

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

  
 Director, 4/05/11.

Name / Position

  
PATRICK HALLINAN, DIRECTOR 4/05/11

Name / Position

## **Appendix**

### *Environmental Planning and Assessment Regulation 2000* (Clause 25E)

#### **Explanatory Note**

##### **Planning Agreement**

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

##### **Parties**

**Ballina Shire Council** ABN 53 929 887 369 of cnr Tamar and Cherry Streets, Ballina, NSW 2478  
(Council)

**Lennox Developments Pty Ltd** ABN 63 103 214 633 of PO Box 141, Kemps Creek, New South  
Wales 2178 (Landowner)

##### **Description of Land to which this Planning Agreement applies:**

Lot 1 in Deposited Plan 1070446

Lot 99 in Deposited Plan 755684

Lot 1 in Deposited Plan 829277

##### **Description of Proposed Change to Environmental Planning Instrument/Development Application**

Rezoning of the Land from its current rural zoning to a mix of urban and environmental protection zoning.

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

The Objective of the Planning Agreement is to provide suitable funding for the environmental rehabilitation of land, to achieve greater ecological benefit associated with the protection and enhancement of high conservation value vegetation and to record the local history associated with the Land.

##### **Assessment of the Merits of the Planning Agreement**

##### **The Planning Purposes Served by the Planning Agreement**

The Planning Agreement reasonably provides for the achievement of the following planning purposes:

- promote the orderly and economic use and development of the Land to which the agreement applies.
- to provide for the environmental and ecological protection and enhancement of land in connection with the Development.
- to provide for the conservation of items of local heritage significance.

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

Provides for local development in a manner that protects environmental and social values.

#### **For Planning Authorities:**

##### **Development Corporations - How the Planning Agreement Promotes its Statutory Responsibilities**

N/A

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

N/A

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

The Planning Agreement, by making provision for private environmental rehabilitation and ongoing environmental management of land for the benefit of the wider community promotes the following elements of the Council's charter:

- to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development.

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

The Planning Agreement does not affect or conflict with Council's Capital Works Program.