

30 Tickle Drive, Thirlmere Voluntary Planning Agreement

5 August 2020

Wollondilly Shire Council ("**Council**")

ABN 93 723 245 808

Michael Bartholomew Russo ("**Developer**")


M.B.R.
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LAWYERS

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Deed made at Picton on

Parties

Wollondilly Shire Council ("Council")

ABN 93 723 245 808

Michael Bartholomew Russo ("Developer")

Background

- A. The Developer is the owner of the Land.
- B. On 13 June 2019 the Developer obtained Development Consent to carry out the Development on the Land.
- C. Condition 15 of the Development Consent requires the Developer to enter into a Voluntary Planning Agreement with the Council in accordance with the Developer's letter of offer dated 9 January 2019 prior to the issue of the first Subdivision Certificate for the Development.
- D. The Council and the Developer have agreed to enter into this deed to satisfy the requirements of Condition 15 of the Development Consent.
- E. The Developer agrees to provide the Development Contributions to the Council on the terms and conditions of this deed.

Operative Provisions

1. Definitions and Interpretation

1.1 Definitions

In this deed:

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

"Approval" means any approvals, consents, modifications, certificates, permits, endorsements, licenses, conditions or requirements (and any modifications or other variations to them) which may be required by law in connection with the commencement and carrying out, as applicable, of the works associated with the provision of the Contributions.

"Authority" means any governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity and includes an "accredited certifier" as that term is defined in the Act.

"Bank Guarantee" means an irrevocable and unconditional undertaking by a bank or financial institution approved by the Council to pay an amount or amounts of money to

the Council on demand and containing terms and conditions reasonably acceptable to the Council.

"Business Day" means any day on which banks are open for business generally in NSW, except for Saturday, Sunday or a day which is a public holiday in NSW.

"Business Hours" means from 9am to 5pm on each Business Day.

"Construction Certificate" means a construction certificate as defined in the Act.

"Contributions" means the development contributions, being dedication of land and infrastructure and making of monetary contributions, as described in clause 5.

"Costs" means external costs, charges and expenses, including those incurred in connection with consultants and advisers.

"Council" means Wollondilly Shire Council.

"Council's Policy" means the Council's *Planning Agreement Policy - PLA0037*, adopted by Council on 19 October 2015.

"Defects Liability Period" means the period of 1 year from the date the Road is taken to be complete under clause 5.4(e).

"Development" means the development or any part of the development approved under the Development Consent (including any subsequent modification of the Development Consent).

"Development Application" has the meaning given to that term under the Act.

"Development Consent" means the consent granted by the Wollondilly Shire Council Local Planning Panel to Development Application No.010.2017.00000018.001 for a 6 lot residential subdivision, construction and dedication of a road, tree removal, demolition of structures, earthworks and stormwater drainage works.

"Explanatory Note" means the explanatory note in relation to the Planning Agreement, as required by clause 25E of the Regulations, and attached as Schedule 2 to this deed.

"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 of or administration of the GST.

"Land" means lot 192 DP 618071, known as 30 Tickle Drive, Thirlmere.

"Law" means

- (a) the common law including principles of equity; and
- (b) the requirements of all statutes, rules, ordinances, codes, regulations, proclamations, by-laws or consents by an Authority,

presently applying or as they may apply in the future.

"Legislation" means any statute, rule, ordinance, code, regulation, proclamation, by-law or consent by an Authority.

“**Minister**” means the NSW Minister for Planning and Public Spaces.

“**Modification Application**” means any application to modify the Development Consent under section 4.55 of the Act.

“**Monetary Contribution**” means the monetary contribution payable by the Developer under clause 5 of this deed.

“**Party**” means a party to this deed, including their respective successors and assigns.

“**Register**” means the Torrens title register maintained under the *Real Property Act 1900* (NSW).

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

“**State**” means the State of New South Wales.

“**Subdivision Certificate**” means a subdivision certificate as defined in the Act.

1.2 Interpretation

In this deed:

(a) headings are for convenience only and do not affect interpretation;

and unless the context indicates a contrary intention:

(b) “person” includes an individual, the estate of an individual, a corporation, an Authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;

(c) a reference to a Party includes that party’s executors, administrators, successors and permitted assigns, including persons taking by way of novation;

(d) a reference to an Authority in this deed includes,

(1) where an Authority ceases to exist, the body which replaces it; and

(2) where an Authority has its powers or functions transferred to another body the body which has the same or similar powers and which performs the same or similar functions.

(e) neither this deed nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting;

(f) a reference to a document (including this deed) is to that document as varied, novated, ratified or replaced from time to time;

(g) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;

(h) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;

- (i) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this deed, and a reference to this deed includes all schedules, exhibits, attachments and annexures to it;
- (j) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (k) "includes" in any form is not a word of limitation;
- (l) a reference to dollars or \$ is to Australian currency; and
- (m) a reference to a term or expression defined in the Act shall have the meaning given to it by the Act.

2. Status of this deed

- (a) This deed takes effect from the date on which it has been is executed by all Parties.
- (b) The Parties will use their best endeavours to execute this deed within 28 Business Days from the end of the public notice period required by clause 25D of the Regulations.

3. Planning Agreement under the Act and Policy

- (a) The Parties agree that this deed is a planning agreement within the meaning of section 7.4 of the Act.
- (b)

Schedule 2: Explanatory **Note** of this deed summarises the requirements for planning agreements under section 7.4 of the Act and the way this deed addresses those requirements.

- (c) This deed has been prepared in accordance with Council's Policy.

4. Application of this deed

This deed applies to:

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

5. Contributions

5.1 The Road Works

- (a) Prior to the issuing of a Construction Certificate, the Developer must prepare and submit engineering design plans to the Council for approval, as required by condition 8 of the Development Consent.
- (b) Subject to the issuing of a Construction Certificate, the Developer must construct a road (**the Road**) in accordance with:
 - i. condition 8 of the Development Consent; and
 - ii. the engineering design plans approved under clause 5.1(a), the Road Works Plan prepared by Martens & Associates Pty Ltd (Drawing PS02-D100 – Revision C dated 21/02/2018) and the Subdivision Proposal Plan prepared by John Lowe and Associates Pty Ltd (Sheet 1/1 dated 14/11/2016) included in Attachment A. To the extent of any inconsistency between those plans in so far as they relate to the Road, the latest approved plan prevails.
- (c) The design or specifications for the Road may be varied at any time by agreement in writing between the Parties, acting reasonably, without the necessity for an amendment to this deed.
- (d) The Developer must ensure that all construction work is to be carried out by suitably qualified and experienced contractors who hold insurance policies covering workers compensation, and public liability.
- (e) For the avoidance of doubt, the Applicant must do all of the works described in this clause whether or not the cost of doing so may exceed any cost estimate for these works that may have been provided to Council.
- (f) This clause 5.1 operates as a restriction on the issue of a Subdivision Certificate pursuant to section 6.15 of the Act and a Subdivision Certificate for the Development will not be issued until the construction of the Road is complete.

5.2 Dedication of Land

- (a) The Developer must dedicate the Road and Road curtilage, being the land identified as 'Proposed Road 15m Wide' on Road Works Plan prepared by

Martens & Associates Pty Ltd (Drawing PS02-D100 – Revision C dated 21/02/2018) included in Attachment A (**the Road**) to the Council, at no cost to the Council.

- (b) Prior to the issue of a Subdivision Certificate, a Plan of Survey showing the Road that is suitable for registration with the NSW Land Registry Services must be prepared and provided to the Council for approval. The plan is to bear the Council approved road name and statement of intent to dedicate the Road as a public road. This clause operates as a restriction on the issue of a Subdivision Certificate pursuant to section 6.15 of the Act.
- (c) Once it is complete, the Road is to be dedicated to the Council for use as a public road by causing the approved Plan of Subdivision that bears a statement of intention to dedicate the land as a public road to be registered in the office of the Registrar-General in accordance with the s.9 of the *Roads Act 1993*.
- (d) The Road is to be dedicated generally in accordance with Council's *Dedication of Land Policy PLA0036* as in force at the date of this deed.

5.3 Monetary Contribution

- (a) The Developer must pay the Council a monetary contribution of \$26,940, as adjusted to reflect the change in the All Groups (Sydney) Consumer Price Index between June 2019 and the date the contribution is to be paid.
- (e) The Monetary Contribution has been calculated by reducing the amount that the Developer would be otherwise be required to pay to the Council under s.7.11 of the Act to take account of the material public benefit to be provided by the construction and dedication of the Road (valued at \$73,060 as at June 2019).
- (b) The Monetary Contribution must be paid by way of bank cheque in favour of Council or by deposit by means of electronic funds transfer into an account specified by the Council.
- (c) The Monetary Contribution will be taken to have been made when the Council receives the full, cleared amount of the contribution by bank cheque or by electronic funds transfer to the Council's bank account.
- (d) It is a requirement of this deed that the Council receive the Monetary Contribution before a Subdivision Certificate for the Development will be issued. This clause therefore operates as a restriction on the issue of a Subdivision Certificate pursuant to section 6.15 of the Act.
- (e) The Monetary Contribution may be applied by the Council towards any one or more of the public amenities and services described in A3 of the Wollondilly Development Contributions Plan 2011.

5.4 Completion and acceptance of public road works

- (a) The Developer is to give the Council written notice of the date on which it will complete the construction of the Road.
- (b) Once the Developer considers that the Road is complete, the Developer is to provide a certificate to the Council confirming that the works have been carried

out and completed in accordance with the requirements of this deed and the Development Consent and any relevant Australian Standards.

- (c) On receipt of a notice under clause 5.4(a) the Council may, at its discretion, inspect the Road to verify completion. Any such inspection is to take place within 20 Business Days of the date the notice is received (or such other time as agreed between the parties).
- (d) If the Council carries out an inspection under clause 5.4(c) (or a reinspection clause 5.5(c)(2)) then, within 14 Business Days of that inspection, the Council is to:
 - (1) issue a notice confirming that the Road is complete; or
 - (2) give the Developer a notice under clause 5.5 to the effect that the Road contains a defect and needs to be rectified.
- (e) The Road is taken to be complete at the later of:
 - (1) if the Council has not carried out an inspection under clause 5.4(c), 21 Business Days after the date the Council receives the certificate provided under clause 5.4(b); or
 - (2) if the Council has carried out an inspection under clause 5.4(c) (or a reinspection clause 5.5(c)(2)) and considers that the works are complete, the date the Council issues a notice to that effect under clause 5.4(d)(1).
- (f) The Council assumes responsibility for the maintenance of the Road on the later of the following:
 - (1) if the Council is the owner of public road at the time the Defects Liability Period ends, at that time; or
 - (2) if the Council is not yet the owner of the public road at the time the Defects Liability Period ends, at the time it becomes the owner.

5.5 Defects in the Road

- (a) The Council may give the Developer a notice to the effect that the Road contains a defect and needs to be rectified:
 - (1) following an inspection under clause 5.45.4(c); or
 - (2) at any time during the Defects Liability Period.
- (b) The Developer must, at his cost, rectify any such defects promptly, in accordance with the terms of the defect notice and to the reasonable satisfaction of the Council.
- (c) If the Council issues a defects notice under this clause, the Council may do one or more of the following:
 - (1) require the Developer to certify that the rectified work has been carried out and completed in accordance with the requirements of this deed and the Development Consent and any relevant Australian Standards;

- (2) re-inspect the Road within 14 Business Days of being given notice that the defect has been rectified.
- (d) The Council must provide all reasonable assistance to the Developer to enable the defect to be rectified, including allowing access to Council land.
- (e) If the Developer does not rectify a breach within 30 Business Days of receiving notice under clause 5.5(a) (or within any alternative period the Council allows) the Council may do one or more of the following:
 - (1) Apply the Security to rectify that defect; or
 - (2) Require the Developer to do all or any of the following:
 - (a) assign to Council its rights under any warranties or rights of action which it has under any contract for the construction of the public road;
 - (b) appoint the Council as its attorney to exercise its rights and powers under any contract for the construction of the public road, including any right to conduct proceedings or prosecute any action to enforce the Developer's rights against others under any such contract;
 - (c) execute all such documents and do all such things on the Developer's behalf as are necessary or desirable to enable the Council to rectify any defects in accordance with the terms of this deed and any such contract; or
 - (d) provide any assistance required for the purpose of defending or settling any claim or the pursuit of any rights of recovery from others under any such contract.

5.6 Access to land by Council

In addition to the inspections contemplated by clauses 5.4 and 5.5, the Council may enter the Land in order to inspect or test the Road, or to remedy any breach by the Developer of his obligations under this deed at any time provided that, before entering the Land, it gives the Developer no less than 2 Business Days notice of its intention to do so.

5.7 Assignment of Intellectual Property

- (a) At the time the Road is dedicated to the Council, the Developer must also provide:
 - (1) any relevant works-as-executed plans to the Council; and
 - (2) a non-exclusive, royalty free licence to the Council which allows the Council to use the copyright in those plans for the purposes of using and maintaining and making alterations to the Road and exercising any of its statutory powers and performing any of its statutory duties and functions.

6. Application of s.7.11, s.7.12 and s.7.24 of the Act to the Development

- (a) This deed excludes the application of section 7.11 of the Act to the Development.
- (b) This deed excludes the application of section 7.12 of the Act to the Development.
- (c) This deed does not exclude the application of section 7.24 of the Act to the Development.

7. Interests in the Land

7.1 Ownership

The Developer represents and warrants to the Council that it is the legal owner of the Land.

7.2 Registration

- (a) The Developer agrees to procure the registration of this deed under the *Real Property Act 1900* (NSW) in the relevant folios of the Register of the Land in accordance with section 7.6 of the Act.
- (b) The Developer, at his own expense, will, within 10 Business Days after this deed takes effect, take all practical steps and otherwise do anything that the Council reasonably requires, to procure:
 - (1) the consent of each person who:
 - (a) has an estate or interest in the Land registered under the *Real Property Act 1900* (NSW); or
 - (b) is seized or possessed of an estate or interest in the Land; and
 - (2) the execution of any documents; and
 - (3) the production of the relevant certificates of title,
to enable the registration of the planning agreement in accordance with clause 7.2(a).
- (c) The Developer, at his own expense, will take all practical steps and otherwise do anything that the Council reasonably requires to procure:
 - (1) the lodgement of this planning agreement with the Registrar-General as soon as reasonably practicable after the planning agreement takes effect but in any event, no later than 30 Business Days after that date; and
 - (2) the registration of the planning agreement by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after the planning agreement is lodged for registration.

7.3 Caveat

- (a) The Developer acknowledges and agrees that:

- (1) when this deed is executed, the Council is deemed to have acquired and the Developer is deemed to have granted, an equitable estate and interest in the Land for the purposes of section 74F(1) of the *Real Property Act 1900* (NSW) and consequently the Council has a sufficient interest in the Land in respect of which to lodge a caveat over the Land notifying that interest; and
 - (2) he will not object to the Council lodging a caveat in the relevant folio of the Register for the Land nor will he seek to remove any caveat lodged by the Council provided the caveat does not prevent registration of any dealing or plan other than a transfer.
- (b) The Council must, at the Developer's cost, register a withdrawal of any caveat in respect of the Land within 20 Business Days after the planning agreement is registered on the certificate of title for the Land.

7.4 Notation on certificate

- (a) The Council may, at its discretion, decide to make a notation on any planning certificate issued under section 10.7 of the Act in relation to the Land about the planning agreement.

7.5 Release and Discharge

- (a) Once the Developer has completed his obligations under this deed, the Developer may request in writing that the Council provide a release and discharge of this deed so that he may be removed from the folios of the Register for the Land (or any part of it).
- (b) In response to a request made under clause 7.5(a) the Council agrees to provide a release and discharge of this deed if and when it is satisfied that:
- (1) the Developer has duly fulfilled all of his obligations under this deed;
 - (2) any default by the Developer under this deed has been remedied by the Developer or waived by the Council; and
 - (3) the Developer is not otherwise in default of any of his obligations under this deed.
- (c) The Council also agrees to provide a release and discharge of this deed if:
- (1) the development consent to which the deed relates has lapsed or has been surrendered; or
 - (2) the parties agree that the performance of the deed has been frustrated by an event beyond the control of the parties.

8. Security

8.1 Security for dedicated land

- (a) If the Developer does not comply with his obligations in clause 5.2 of this deed, the Developer agrees that the Council may compulsorily acquire the land to be dedicated to Council under that clause. For the purposes of section 30(2) of the *Land Acquisition (Just Terms Compensation) Act 1991*, the

Developer agrees that the compensation payable for the acquisition will be \$1.00 and that all relevant matters concerning the compulsory acquisition have been agreed.

- (b) The Council may exercise its rights under clause 8.1(a) by serving written notice and delivering a transfer or a registrable section 88B Instrument under the *Real Property Act 1900* (NSW), and the Developer must execute and return that form to the Council within 14 days.
- (c) The Developer agrees to do all things necessary to facilitate a transfer under this clause including to enable the Council to execute all such documents and do all such things on the Developer's behalf as are necessary or desirable to enable the transfer of that land to the Council.

8.2 Security for the public road

- (a) Prior to a Subdivision Certificate being issued for the Development, the Developer must provide a Bank Guarantee to the Council to the value of \$90,000, being equivalent to the estimated cost of the Road works, as adjusted to reflect the change in the All Groups (Sydney) Consumer Price Index between June 2019 and the date the Bank Guarantee is provided.
- (b) If the Developer does not comply with any of his obligations under this deed the Council may, after giving 14 days' notice;
 - (1) remedy any default at the expense of the Developer; and
 - (2) draw down on the security amount without notice to the Developer to reimburse the Council for the costs incurred in remedying the Developer's default, including to meet the costs of any associated liability, loss, costs, charges or expenses directly or indirectly incurred by the Council because of the failure of the Developer to fulfil his obligations under this deed.
- (c) The Council will return the relevant part of the Bank Guarantee to the Developer:
 - (1) Where no defect notice has been issued, within 30 Business Days from the end of the Defects Liability Period for the Road specified in clause 5.1, or
 - (2) Where the Council has given one or more defect notices to the Developer under clause 5.4, within 30 Business Days after the last defect has been rectified to the satisfaction of the Council.
- (d) If the Council calls on a Bank Guarantee in accordance with this deed, the Council may, by notice in writing to the Developer, require the Developer to provide a further Bank Guarantee in an amount that, when added to any unused portion of any existing Bank Guarantee, does not exceed the amount of the Bank Guarantee the Council is entitled to hold under clause 8.2.

9. Insurance

- (a) Prior to carrying out any works under this deed, and for the duration of the Defects Liability Period, the Developer or the Developer's Contractors

engaged to construct the Road, must take out and keep current the following insurances:

- (1) 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;
- (2) workers compensation insurance as required by law; and
- (3) any other insurance required by law.

10. Enforcement of Obligations

10.1 Default

- (a) If a Party considers that another Party has failed to perform or fulfil an obligation under this deed it may give notice in writing to the other party (**Default Notice**) giving particulars of the default and requiring the default to be remedied within a reasonable time (not being less than 21 days).
- (b) In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it, as well as whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (c) If a party disputes the Default Notice it may refer the dispute to dispute resolution under clause 11 of this deed.

10.2 Enforcement

- (a) This Deed may be enforced by any Party in any court of competent jurisdiction.
- (b) The Developer covenants with the Council that he will not rescind or terminate this deed or make a claim that this deed is void, voidable, illegal or unenforceable because a condition of the Development Consent requires the Developer to enter into a planning agreement in the terms of this deed.

11. Dispute Resolution

11.1 Parties to meet

- (a) If a dispute between any of the Parties arises in connection with this deed or its subject matter then either Party may give the other Party a Notice of Dispute in writing identifying and providing details of the dispute.
- (b) The Parties must continue to perform their respective obligations under this deed despite the existence of a dispute.
- (c) Representatives of the Parties must promptly (and in any event within 10 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.
- (d) The disputing Parties may, without limitation:
 - (1) resolve the dispute during the course of that meeting;

- (2) agree that further material or arbitration about a particular issue or consideration is needed to effectively resolve the dispute (in which event the parties will, in good faith, agree to a timetable for resolution); or
- (3) agree that the disputing parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

11.2 Further Notice if Not Settled

If the dispute is not resolved within 20 Business Days after the nominated representatives have met, any disputing Party may give to the other a written notice calling for determination of the dispute (**Determination Notice**) by mediation under clause 11.3.

11.3 Mediation

If a disputing Party gives a Determination Notice calling for the dispute to be mediated:

- (a) The disputing Parties must agree to the terms of reference for the mediation within 20 Business Days of the receipt of the Determination Notice (or any further period agreed in writing by them), and those terms are to include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply.
- (b) The mediator will be agreed between the disputing Parties or, failing agreement within 20 Business Days of receipt of the Determination Notice (or any further period agreed in writing by them), any disputing Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator.
- (c) The mediator appointed pursuant to this clause 11.3 must:
 - (1) have reasonable qualifications and practical experience in the area of the dispute; and
 - (2) have no interest or duty which conflicts or may conflict with his or her function as a mediator and disclose any such interest or duty before his or her appointment.
- (d) The mediator is to be required to give an undertaking to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties.
- (e) The disputing Parties must within 20 Business Days of receipt of the Determination Notice notify each other of their representatives who will be involved in the mediation (except if a resolution of the Council is required to appoint a representative, in which case the Council must give notice of its representative within 5 Business Days of the resolution).
- (f) The disputing Parties agree to be bound by a mediation settlement (if settlement is achieved) and may only initiate court proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement.

- (g) In relation to costs and expenses:
 - (1) each Party will bear its own professional and expert costs incurred in connection with the mediation; and
 - (2) the costs of the mediator will be shared equally by the disputing Parties unless the mediator determines that a Party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that Party.

11.4 Litigation

- (a) If a dispute arises between the Council and the Developer in relation to this deed then the disputing Parties must not commence any court proceedings relating to the dispute unless the disputing Parties have first complied with the processes in clauses 11.1-11.3.
- (b) If the dispute is not finally resolved in accordance with the process in clauses 11.1-11.3 then any disputing Party is at liberty to litigate the dispute.
- (c) Nothing in this clause 11 prevents:
 - (1) either party from seeking urgent interlocutory relief;
 - (2) the Council from bringing proceedings in a Court of competent jurisdiction to enforce any aspect of this deed or any matter to which this deed relates; or
 - (3) the Council from exercising any function under any Legislation, including the Act, or any other Law relating to the enforcement of any aspect of this deed or any matter to which this deed relates.

12. Assignment, Novation and Dealing

- (a) The Developer must not transfer the Land to any person or transfer, assign or novate his rights or obligations under the deed unless:
 - (1) the person to whom the Land or rights are transferred agrees to be bound by the deed at no cost to the Council;
 - (2) the Council is satisfied that the person to whom the Land or rights are to be transferred is able to perform the obligations under the deed, based on such reasonable evidence as the Council requires to be provided;
 - (3) the Developer is not in breach of the deed; and
 - (4) the Council otherwise consents to the transfer.
- (b) Any purported dealing in breach of this clause is of no effect.

13. Review and amendment of this Deed

- (a) The Council and the Developer agree to review this deed:

- (1) within 20 days of each anniversary of the commencement of the deed; and
- (2) if the Development Consent is modified.
- (b) This deed may also be reviewed or modified by the Parties at any time. Any review or modification of this deed will be conducted in the circumstances and in the manner determined by the Parties.
- (c) No modification or review of this deed will be of any force or effect unless it is in writing and signed by both Parties.
- (d) A Party is not in breach of this deed if it does not agree to an amendment to this deed requested by a Party in, or as a consequence of, a review.

14. Costs

- (a) The Developer is to pay:
 - (1) his own costs and expenses (including legal fees) of and incidental to the preparation, negotiations, execution and (where applicable) the stamping and registration of this deed, including all Stamp Duty payable; and
 - (2) the Council's reasonable costs of and incidental to the preparation, negotiation, execution, stamping and registration and, where necessary, enforcement of this deed.

15. GST

- (a) Words and expressions which are not defined in this deed but which have a defined meaning in GST Law have the same meaning as in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this deed are exclusive of GST.
- (c) If GST is imposed on any supply made under or in accordance with this deed, the Developer must pay the GST or pay to the Council an amount equal to the GST payable on or for the taxable supply, whichever is appropriate in the circumstances.

16. Use of Explanatory Note

The Explanatory Note must not be used to assist in construing this deed.

17. Notices

- (a) A notice given by either Party pursuant to this deed has no legal effect unless it is in writing.
- (b) All written notices given under this deed may be validly given by any one of the following means:

- (1) by sending it by prepaid post or by document exchange to the address of the Party to be served or its solicitor;
 - (2) by email to the email address of the Party to be served or its solicitor;
or
 - (3) by delivering it to the Party to be served or to its solicitor.
- (c) The Parties expressly acknowledge that it is each Party's responsibility to ensure that the other is fully aware of that Party's current contact details at all times throughout the duration of this deed.
- (d) A notice shall be deemed to be given and received:
- (1) if sent by pre-paid post or by document exchange, 2 Business Days after it has been posted or has been delivered to the Document Exchange Centre;
 - (2) if sent by email during Business Hours, on the day it was sent and, if sent by email outside Business Hours, on the first Business Day after the day it was sent; and
 - (3) if delivered during Business Hours, on the day of delivery and, if delivered outside Business Hours, on the first Business Day after the day of delivery.
- (e) As at the date of this deed each Party's address for service is as follows:

For the Council:

Delivery address: 60-64 Menangle Street
Picton NSW 2571

Post: PO Box 21
Picton NSW 2571

Email: council@wollondilly.nsw.gov.au

For the Developer

Delivery address: 1107/12 Neild Ave Darlinghurst 2011

Post: 1107/12 Neild Ave Darlinghurst 2011

Email: michael_b_russo@hotmail.com

- (f) A notice given or a document signed or served on behalf of any Party by any director or company secretary or solicitor of that Party shall be deemed to have been given, signed or served by that Party personally.
- (g) Any notice sent by email will be taken to have been received by the addressee for the purposes of this deed unless the sender receives a message indicating that delivery has failed.

- (h) A Party may change its address for notices by giving the other Party 3 Business Days' written notice of the change.

18. Indemnity

- (a) The Developer indemnifies the Council from and against all claims for damages that may be sustained, suffered, recovered or made against the Council resulting or arising from any breach by the Developer of its obligations under this deed.
- (b) The Developer's liability in respect of any indemnity given under this clause will be reduced proportionally to the extent that any unlawful, negligent or deliberately wrongful act or omission of the Council, its contractors, employees or agents contributed to any loss or damage.

19. Miscellaneous

19.1 Relationship of the Parties

- (a) Nothing in this deed creates a relationship of agency between the Parties or, except as expressly provided, authorises one of them to enter into any contracts or other commitments which bind any other Party without their express written approval.
- (b) Nothing in this deed is intended or to be implied to create a relationship of employment, partnership or joint venture between the Parties or any of their respective agents, employees, sub-contractors and assigns.

19.2 No Waiver

- (a) Any delay or failure to enforce any term of this deed will not be deemed to be a waiver.
- (b) There is no implied waiver by either Party in respect of any term of this deed and any waiver granted by either Party shall be without prejudice to any other rights.
- (c) Any waiver must be in writing, and in the case of the Council, signed by the General Manager.
- (d) A waiver by a Party of its rights under this deed is only effective in relation to the particular obligation or breach in respect of which it is given, and does not cover subsequent breaches of the same or a different kind.

19.3 No Fetter

Nothing in this deed is to be construed as requiring an authority to do anything that would cause it to be in breach of any of its obligations at Law, and without limitation:

- (a) nothing in this deed is to be construed as limiting or fettering in any way the exercise of any statutory discretion or duty; and
- (b) nothing in this deed imposes any obligation on the Council to:
 - (1) grant development consent or project approval; or

- (2) exercise any function or power under the Act in relation to a change, or a proposed change, in an environmental planning instrument.

19.4 Governing Law

This deed shall be governed by and construed in accordance with the Law of New South Wales and the Commonwealth of Australia and the parties submit themselves to the exclusive jurisdiction of the courts of those jurisdictions and those that have jurisdiction to hear any appeals from them.

19.5 Entire Agreement

This deed:

- (a) is the entire agreement of the Parties concerning everything connected with the subject matter of this deed; and
- (b) supersedes any prior representations, statements, promises or understanding on anything connected with that subject matter.

19.6 Severability

If any provision of this deed is void, unenforceable or illegal in the jurisdiction governing this deed, then:

- (a) it is to be read down so as to be valid and enforceable; or
- (b) if it cannot be read down, the provision (or where possible the offending words), is severed from this deed and the rest of this deed remains in force.

19.7 Counterparts

This deed may be executed in any number of counterparts, all of which taken together constitute one and the same document.

19.8 Further assurances

Each Party must promptly execute all documents and do all other things reasonably necessary or desirable to give effect to the arrangements recorded in this deed.

19.9 Representation and Warranties

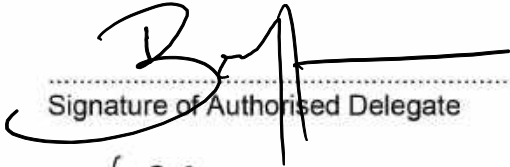
The Parties represent a warrant that they have the power to enter into this deed and to comply with their obligations under this deed.


19.10 Confidentiality

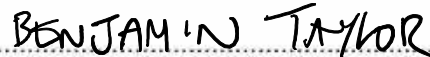
This deed may be treated as a public document.

Executed as a Deed on 5 August 2020

EXECUTED for and on behalf of **Wollondilly Shire Council** by its authorised delegate, in accordance with a resolution of the Council made on



.....
Signature of Authorised Delegate



.....
Signature of Witness


.....
Name of Authorised Delegate (in full)

Ron Dowd
.....
Name of Witness (in full)

EXECUTED by **Michael Bartholomew Russo**:

Signature: 
.....


.....
Signature of Witness

Natale Bridget Casale
.....
Name of Witness (in full)

Attachment A: Road Works Plan and Subdivision Proposal Plan





IMPORTANT
 Refer to the Consent Conditions prior to commencing this development. NSW Legislation provides penalties for breaching Conditions of Consent.

Wollondilly
 Shire Council

APPROVED PLAN
 Development Consent:
 610.2017.00000016.001
 Determined: 30/05/2019

SHEET 1 OF 1	
SUBDIVISION PROPOSAL PLAN LOT 192 IN DP 618071	APPROVED BY JAMES LLOYD GARDNER REGISTERED SURVEYOR (NSW) 4544, 76, ST. ST. 2019
PLAN DATE: 16/10/2018 DATE OF SURVEY: 16/10/18 SURVEY AND AT SHEET: SHEET 1 OF 1 (DP 618071)	ALL DIMENSIONS, CORNERING AND ENGINEERING INFORMATION IS TO BE TAKEN FROM THE SURVEY PLAN ALL DIMENSIONS, CORNERING AND ENGINEERING INFORMATION IS TO BE TAKEN FROM THE SURVEY PLAN ALL DIMENSIONS, CORNERING AND ENGINEERING INFORMATION IS TO BE TAKEN FROM THE SURVEY PLAN ALL DIMENSIONS, CORNERING AND ENGINEERING INFORMATION IS TO BE TAKEN FROM THE SURVEY PLAN
ATTEMPT HAS BEEN MADE TO VISIT ALL PROPOSED LOT 192 ALL LEVELS SHALL BE TAKEN FROM THE BENCHMARK SHOWN THE LOCATIONS OF ANY BOUNDARIES SHOWN ARE APPROXIMATE ONLY ONLY VISIBLE BOUNDARIES HAVE BEEN LOCATED	JAMES LLOYD GARDNER PTY LTD 4544, 76, ST. ST. 2019 4544, 76, ST. ST. 2019 4544, 76, ST. ST. 2019

Schedule 1: Section 7.4 Requirements

SUBJECT AND SUBSECTION OF THE ACT	THIS PLANNING AGREEMENT
The Developer has: (a) sought a change to an environmental planning instrument (b) made, or proposes to make, a Development Application (c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies	(a) No. (b) Yes. (c) No.
Description of the land to which this Planning Agreement applies – s.7.4(3)(a)	The whole of the Land.
Description of the development –s.7.4(3)(b)	Refer to the definition of Development in clause 1
The nature and extent, timing, and manner of delivery of contribution required by this Planning Agreement – s. 7.4(3)(c)	Refer to clause 5
Applicability of s.7.11 of the Act – Section 7.4(3)(d)	Refer to clause 6
Applicability of section 7.12 of the Act – Section 7.4(3)(d)	Refer to clause 6
Applicability of section 7.24 of the Act – Section 7.4(3)(d)	Refer to clause 6
Whether benefits are to be taken into account under section 7.11 – Section 7.4(3)(e)	Refer to clause 6
Mechanism for dispute resolution – Section 7.4(3)(f)	Refer to clause 11
Enforcement of the Planning Agreement – Section 7.4(3)(g)	Refer to clause 10
Registration of the Planning Agreement – Section 7.6	Refer to clause 7.2
No obligation to grant consent or exercise functions – Section 7.4(9)	Refer to clause 19.3





Schedule 2: Explanatory Note

Planning agreement for provision of works, the dedication of land and the payment of monetary contributions

Introduction

The purpose of this Explanatory Note is to provide a plain English summary to support the notification of the proposed Planning Agreement (the "**Planning Agreement**") prepared under Section 7.4 of the *Environmental Planning & Assessment Act 1979* (the "**the Act**").

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

This explanatory note is not to be used to assist in construing the Planning Agreement.

Parties to the Planning Agreement

The Parties to the Planning Agreement are the Wollondilly Shire Council ("**Council**") and Mr Michael Bartholomew Russo ("**Developer**"). The Wollondilly Shire Council Local Planning Panel has granted development consent to the development application lodged by the Developer for a 6 lot residential subdivision, construction and dedication of a road, tree removal, demolition of structures, earthworks and stormwater drainage works (Development Application No.010.2017.00000018.001).

The Developer has made the offer to carry out the following works, dedicate the following land and pay the following monetary contribution to the Council in connection with the development.

Summary of the objectives, nature and effect of the Planning Agreement

The objective of the Planning Agreement is to record the terms of the offer made by the Developer and his obligations to provide certain material public benefits to the Council.

The effect of the agreement is that the Developer will be required to provide the following public benefits:

- (a) Construct an all weather public road in accordance with agreed specifications and plans;
- (b) Dedicate the road to the Council; and
- (c) Pay a monetary contribution of \$26,940.00 to the Council, which is to be applied towards funding public amenities and services.

The Developer is also required to provide security for each contribution and register the planning agreement on the title of the land in accordance with section 7.6 of the Act and the Council's *Planning Agreements Policy (037)*.

Assessment of the Merits of the Planning Agreement

The benefits of the Planning Agreement are that:

- (a) the Developer will construct a public road and dedicate it to the Council. This road will provide a link between Hilton Park Road and Tickle Drive and be built to a standard sufficient to enable it to function as an alternative bushfire

evacuation route for residents of Hilton Park Road. This will avoid the need for the Council to expend public funds to construct a secondary emergency access route over Myrtle Creek.

- (d) the Developer will pay a lump sum monetary contribution to be applied towards one or more of the public amenities and services described in A3 of the Wollondilly Development Contributions Plan 2011.

Identification of how the Planning Agreement promotes the public interest and the objects of the Act

The Planning Agreement promotes the public interest and the objects of the Act by providing land for public purposes (in the form of a road constructed to specifications which facilitate use as an alternative bushfire evacuation route for residents of Hilton Park Road) and the provision of a monetary contribution to be applied towards one or more of the public amenities and services described in A3 of the Wollondilly Development Contributions Plan 2011

Identification of how the Planning Agreement promotes elements of the Council's Charter under the *Local Government Act 1993*

The Planning Agreement is consistent with the following guiding principles for Councils in section 8A of the *Local Government Act 1993* (which have replaced the Council Charter):

- In exercising functions generally:
 - Councils should provide strong and effective representation, leadership, planning and decision-making.
 - Councils should carry out functions in a way that provides the best possible value for residents and ratepayers.
 - Councils should plan strategically, using the integrated planning and reporting framework, for the provision of effective and efficient services and regulation to meet the diverse needs of the local community.
 - Councils should manage lands and other assets so that current and future local community needs can be met in an affordable way.
 - Councils should work with others to secure appropriate services for local community needs.
- In decision making:
 - Councils should recognise diverse local community needs and interests.
 - Councils should consider the long term and cumulative effects of actions on future generations.
 - Council decision-making should be transparent and decision-makers are to be accountable for decisions and omissions.

The Planning Agreement is consistent with these principles in that it recognises the strategic public benefit in the construction of an all weather public road that is able to function as an

alternative bushfire evacuation route for residents of Hilton Park Road. It will also provide a direct monetary contribution to fund public amenities and services.

Identification of the planning purpose served by the Planning Agreement and whether the Planning Agreement provides for a reasonable means of achieving that purpose

The planning purpose served by the Planning Agreement is the provision of land and facilities for public purposes, in the form of construction and dedication of an all weather public road and the making of a monetary contribution to be put towards public amenities and services.

The Planning Agreement provides a reasonable means of achieving these public purposes.

Identify whether the agreement, amendment or revocation conforms with the planning authority's capital works program (if any),

The planning agreement conforms with the Council's capital works program.

How the Planning Agreement promotes the public interest

The Planning Agreement promotes the public interest by providing for the construction of an all weather public road which will function as an alternative bushfire escape route for residents of Hilton Park Road in perpetuity and a monetary contribution to be put towards public amenities and services.

Two handwritten signatures in black ink. The top signature is a cursive name, possibly 'M. J. ...'. The bottom signature is a stylized signature, possibly 'B. J. ...'.