

Roberts Road Works Planning Agreement

**Under S93F of the Environmental Planning and Assessment
Act 1979**

Wollondilly Shire Council

&

J & L A Slattery

Dated 21-01-2012 ~~2011~~

Planning Agreement

Parties

Wollondilly Shire Council ABN 93 723 245 808 of 62-64 Menangle Street, Picton, New South Wales 2571(**Council**)

J & L A Slattery of 90 Roberts Road, Werombi (**Owner**)

Background

- A. The Owner wishes to carry out the Development without upgrading Roberts Road in Werombi.
- B. The Council has issued a Development Application numbered D1562-04 to subdivide land legally described as Lot 2 in DP 816042 located at 90 Roberts Road Werombi under the provisions of Wollondilly Local Environmental Plan 1991. This consent included conditions to require the upgrading of Roberts Road.
- C. The Owner has lodged an application (numbered 10.2004.51136.2) under Section 96(2) of the Environmental Planning and Assessment Act, 1979 to modify the development consent. This application proposed to amend Conditions 4.1, 4.2, 4.3, 6.4, 6.5 and 6.6 to remove the requirement to construct Roberts Road and to instead require a contribution to be paid to Council.
- D. The parties agree that, instead of the owner constructing Werombi Road, a contribution towards works is a more appropriate way to ensure provision of the public benefit the works would cause.
- E. Until the Planning Agreement operates, this agreement constitutes the Owner's irrevocable offer to make a Development Contribution in connection with the Development on the terms and conditions set out in this agreement.

Operative provisions

1 Definitions & Interpretation

1.1 In this agreement the following definitions apply:

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

The Road means Roberts Road in Werombi NSW as identified on the plan at Schedule 2.

Compliance Certificate means a compliance certificate within the meaning of S109C(1)(a)(i) of the Act to the effect that the Council Works has been completed as specified in the certificate and complies with the plans and specifications the subject of the relevant Development Consent for the Council Works.

Construction Certificate has the same meaning as in the Act.

Contribution to Council Works means an amount of \$41 608.86.

Council Works means works undertaken by the Council to improve the Road.

Development means the approved subdivision the subject of the development consent.

Development Application has the same meaning as in the Act.

The Development Consent means Development Consent No. D1562-04 issued by Council on 4 October 2005.

Development Consent has the same meaning as in the Act, and includes a development consent as modified from time to time in accordance with the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost, the carrying out of a Council Works, or the provision of any other material public benefit, or any combination of them, to be used for, or applied towards, a Public Purpose.

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.

Land means the land the subject of the development consent as identified in Schedule 1.

Modification Application means the application to modify the development consent numbered 10.2004.51136.2 lodged with Council on 12 August 2011 pursuant to Section 96(2) of the Act.

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

Planning Agreement means this agreement and includes any schedules, annexures and appendices.

Public Facility means a public amenity, a public service, a public facility, public land, public infrastructure, a public road, a public work, or any other act, matter or thing that meets a Public Purpose.

Public Purpose means any purpose that benefits the public or a section of the public, including but not limited to, a purpose specified in S93F(2) of the Act.

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

Staged Subdivision means the various staging plans shown in Schedule 4.

Subdivision Certificate has the same meaning as in the Act.

- 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 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.
- 1.2.6 A reference in this agreement to any agreement or deed is to that agreement or deed as amended, novated, supplemented or replaced.
- 1.2.7 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of, or to this agreement.
- 1.2.8 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- 1.2.9 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.
- 1.2.10 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.
- 1.2.11 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.12 A reference to this agreement includes the agreement recorded in this agreement.
- 1.2.13 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.
- 1.2.14 Any schedules, appendices and attachments form part of this agreement.

2 Application of this agreement

- 2.1 This agreement applies to the modification application.

3 Status of this agreement

- 3.1 Until the Planning Agreement operates, this agreement constitutes the Owner's irrevocable offer to enter into the Planning Agreement if the modification application is approved.
- 3.2 The Planning Agreement operates only if:
- 3.3 the Development Consent is modified such that it becomes subject to a condition imposed under S93I(3) of the Act requiring this Planning Agreement to be entered into, and
- 3.4 the Planning Agreement is entered into as required by clause 25C(1) of the Regulation.

4 Further agreements Relating to this agreement

- 4.1 The Parties may, at any time, enter into such other agreements relating to the subject-matter of this agreement that they consider are necessary or desirable in order to give effect to this agreement in accordance with the provisions of Clause 25C(3) of the Regulations.
- 4.2 An agreement referred to in clause 4.1 is not to be inconsistent with this agreement.
- 4.3 Without limiting clause 4.1, an agreement may relate to:
- 4.4 the particulars of any Public Facility required by this agreement to be made available for a Public Purpose,
- 4.5 the location at which a Public Facility is to be provided and the time at which and the manner in which it will be made available,
- 4.6 the particulars of any work required by this agreement to be undertaken by the Owner, and
- 4.7 the time at which and the manner in which a Council work is to be handed over to the Council.

5 Surrender of right of appeal, etc.

- 5.1 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 existence of this Agreement or requires any aspect of this Agreement to be performed according to the terms of this Agreement.

6 Application of S94, S94A and S94EF of the Act to the Development

- 6.1 This Agreement does not exclude the application of s94 to the Development.
- 6.2 This Agreement does not exclude the application of s94A to the Development.
- 6.3 This Agreement does not exclude the application of s94EF to the Development.
- 6.4 The benefits under this agreement shall not be taken into consideration in the determination of developer contributions under s94.

7 Council Works

- 7.1 The Council must make use of all funds received under this agreement to undertake works for the improvement of Roberts Road.

8 Contribution to Council Works

- 8.1 The Parties acknowledge and agree that the monetary amount payable by the Owner is \$41 608.86.
- 8.2 The Parties acknowledge and agree that the amount payable by the Owner has been determined by the Parties acting reasonably.
- 8.3 The contribution to Council works specified in Clause 8.1 shall be paid within three months of the agreement being entered into.

9 Application of Development Contributions by the Council

- 9.1 The Council must apply the Contribution to Works made by the Owner under this agreement, towards the Public Purpose for which it is made.

10 Carrying Out of Council Works

- 10.1 Except as otherwise provided by this agreement, a Development Contribution by the Owner of the Contribution to Works, shall be utilised by the Council within a period of three (3) years for works on Roberts Road.
- 10.2 Subject to this agreement, the Council is to issue a Compliance Certificate relating to the Council Works to the owner once the works are complete.

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11 Procedure For Paying Monetary Contribution To Council

11.1 For the purposes of this agreement, a monetary contribution will have been made when Council has received the full amount of the contribution payable under this agreement, by one or more of the following methods:

11.1.1 Cash

11.1.2 Unendorsed Bank Cheque

11.1.3 Electronic Funds Transfer into a bank account nominated by Council

11.1.4 Credit Card

11.1.5 By written instrument authorising the Council to draw the contribution from existing funds currently held by the Council as a bond for the subject works.

12 Refund of Existing Bond

12.1 The Council agrees that, if this agreement is made and the contribution is paid in accordance with this agreement then any bonds held by the Council in respect of works on the road required by the development consent shall be refunded within 14 days.

13 Enforcement

13.1 The Council is entitled to retain any bond held for works required by the development consent conditions as in force prior to the determination of the modification application until payment is made under this agreement.

13.2 Without limiting any other remedies available to the Parties, this agreement may be enforced by either Party in any court of competent jurisdiction.

13.3 For the avoidance of doubt, nothing in this agreement prevents:

13.4 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,

13.5 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.

13.6 The Owner is to pay to the Council the Council's costs of enforcing this Agreement within 7 days of a written demand by the Council for such payment.

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13.7 The Council is to pay the Owner's costs of enforcing the Council's obligation under clause 12 or clause 17 of this Agreement in the Land and Environment Court not later than 7 days after having received a written demand by the Landowner for such payment.

13.8 Neither Council nor the Owner may make a demand for payment under clause 12.4 unless the Land and Environment Court has made a final order under this Agreement.

14 No Registration of this agreement

The Parties agree not to register this agreement under s93H of the Act.

15 Sale of the Land

15.1 In this clause, **Owners** includes any one of the Owners.

15.2 The Owners must not to sell, transfer or otherwise deal with the Land or part of the Land unless:

15.3 The Owners have, at no cost to the Council, first procured the execution by the person with whom the Owners are dealing of a deed with the Council (on terms reasonably acceptable to the Council, including in respect of the provision of security) under which that person agrees to be bound by this agreement in the same way as the Owners, and

15.4 the Council, by notice in writing to the Owners, has stated that evidence satisfactory to the Council has been produced by the Owners to show that the person with whom the Owners are dealing is reasonably capable of performing its obligations under this agreement, and

15.5 the Owners are not in breach of this agreement.

15.6 Clauses 14.1 to 14.5 (inclusive) do not apply after the monetary contribution has been paid in full in satisfaction of this agreement.

16 Transfer, assignment or novation of rights and obligations by Owner under this agreement

16.1 The Owner must not sell, transfer or otherwise deal with the Land or part of the Land or transfer, assign, novate or otherwise deal with its rights and obligations under this agreement unless:

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- 16.2 the Owner has, at no cost to the Council, first procured the execution by the person with whom the Owner is dealing of a Deed with the Council (on terms reasonably acceptable to the Council, including in respect of the provision of security) under which that person agrees to perform the Owner's obligations under this agreement, and
- 16.3 the Council, by notice in writing to the Owner, has stated that evidence satisfactory to the Council has been produced by the Owner to show that the person with whom the Owner is dealing is reasonably capable of performing its obligations under this agreement, and
- 16.4 the Owner is not in breach of this agreement.
- 16.5 Clauses 15.1 to 15.4 (inclusive) do not apply after the monetary contribution has been paid in full in satisfaction of this agreement.

17 Notices

- 17.1 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:
- 17.1.1 delivered or posted to that Party at its address set out in Schedule 5.
 - 17.1.2 faxed to that Party at its fax number set out in Schedule 5.
 - 17.1.3 emailed to that Party at its email address set out in Schedule 5.
- 17.2 If a Party gives the other Party 3 business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.
- 17.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 17.3.1 delivered, when it is left at the relevant address.
 - 17.3.2 sent by post, 2 business days after it is posted.
 - 17.3.3 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.
- 17.4 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.

18 Costs

18.1 Each Party is responsible for their own costs in relation to negotiating and executing this agreement.

19 Entire agreement

This agreement contains everything to which the Parties have agreed in relation to the matters it deals with. No Party can rely on an earlier agreement, 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.

20 Further Acts

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.

21 Notations of Section 149(2) Planning Certificates

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

22 Governing Law and Jurisdiction

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

23 Joint and Individual Liability and Benefits

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

24 No Fetter

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.

25 Representations and Warranties

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.

26 Severability

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

27 Modification

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.

28 Waiver

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

29 **GST Provisions**

29.1 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.

29.2 Subject to clause 28.4, 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.

29.3 Clause 28.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this agreement to be GST inclusive.

29.4 No additional amount shall be payable by the Council under clause 28.2 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.

29.5 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:

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- 29.5.1 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;
- 29.5.2 that any amounts payable by the Parties in accordance with clause 28.2 (as limited by clause 28.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 29.6 No payment of any amount pursuant to this clause 28, 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.
- 29.7 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.
- 29.8 This clause continues to apply after expiration or termination of this agreement.
- 30 Explanatory Note Relating to this agreement**
- 30.1 The Appendix contains the Explanatory Note relating to this agreement required by clause 25E of the Regulation.
- 30.2 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 agreement.

Schedule 1

(Clause 1.1)

The Land

being Lot 2 DP 816042.

Schedule 2

(Clause 16)

Contact for Notices

Council

Attention: The General Manager
Address: PO Box 21, Picton, NSW 2571
Fax Number: (02) 4677 2339
Email: council@wollondilly.nsw.gov.au

Owner

Attention: J Slattery
Address: 90 Roberts Road, Werombi, NSW, 2570
Fax Number:
Email:

Roberts Road Planning Agreement
Wollondilly Shire Council
J & L A Slattery

Execution

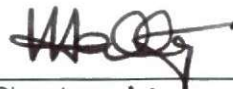
Dated:

Executed as an agreement:

On behalf of the Council:

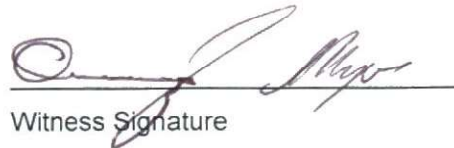
Executed on behalf of Wollondilly Shire Council under delegated authority in accordance with the instrument of delegation under Sections 378(2) and 381 of the Local Government Act, 1993, dated 14 / 11 / 2011.

in the presence of:



Signature MICHAEL KEW

TEAM LEADER DEVELOPMENT ASSESSMENT
Delegated Officer Name and Position



Witness Signature

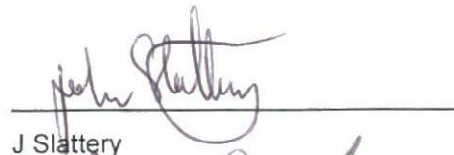
CERYLE MYERS

Name of Witness

Justice of the Peace No. 143798

On behalf of the Owner:

Sign Sealed and Delivered by the same Mr. John Slattery of 90 Roberts Road Werombi



J Slattery



Witness Signature

#132725

In the presence of:

KEVIN SMITH

Name of Witness

Justice of the Peace/Registered
~~Solicitor~~

Date: 21 / 01 / 2012

Roberts Road Planning Agreement
Wollondilly Shire Council
J & L A Slattery

Sign Sealed and Delivered by the same Mrs.
Lee Anne Slattery of 90 Roberts Road Werombi
In the presence of

L A Slattery

L A Slattery

Kevin Smith J.P
Witness Signature #132725

Date: 21, 01, 2012

KEVIN SMITH

Name of Witness

Justice of the Peace/~~Registered~~
~~Solicitor~~

Appendix

(Clause 28)

Environmental Planning and Assessment Regulation 2000

Explanatory Note

Draft Planning Agreement

Under s93F of the Environmental Planning and Assessment Act 1979

Parties

Wollondilly Shire Council of 62-64 Menangle Street, Picton, New South Wales,
2571 (**Council**)

J & L A Slattery of 90 Roberts Road, Werombi (**Owner**)

1 Description of Subject Land

Lot 2 in DP 816042

2 Description of Proposed Change to Development Application

The planning agreement relates to Development Consent numbered D1562-04 for the subdivision of Lot 2 in DP 816042 into 4 allotments. The Planning Agreement provides for the Owner to contribute \$41 608.86 to Council for the upgrading of Roberts Road, instead of providing upgrading works to that road.

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

3.1 Objectives of Draft Planning Agreement

The objective of the Planning Agreement is for the Owner to contribute to the upgrading of Roberts Road, instead of providing upgrading works to that road.

3.2 Nature of Draft Planning Agreement

The nature of the Planning Agreement is to provide a monetary contribution of \$ 41 608.86 towards the upgrading of Roberts Road.

3.3 Effect of the Draft Planning Agreement

Under the Planning Agreement the payment of the monetary Contribution

towards the upgrading of Roberts Road will require Council to undertake works within 10 years.

This Planning Agreement will therefore result in the upgrading of Roberts Road.

The monetary Development Contribution is required to be paid to Council within 6 months.

4 Assessment of the Merits of the Draft Planning Agreement

4.1 The Planning Purposes Served by the Draft Planning Agreement

In accordance with Section 93F(2) of the Act, this Agreement promotes the following public purpose;

- The provision of transport or other infrastructure relating to land.

The parties have assessed the Planning Agreement and state that the provisions of the Agreement provide a reasonable means of achieving the public purpose set out above by reason that the monetary contribution will be put towards the upgrading of Roberts Road, a road that services the land.

4.2 How the Draft Planning Agreement Promotes the Public Interest

The proposed agreement promotes the public interest by addressing the objects of the EP&A Act, LG Act and the Council Charter. It provides certainty for Council through a contractual relationship. The end use of the proposed works will provide benefits through improved infrastructure and services to the local community.

4.3 How the Draft Planning Agreement Promotes the Objects of the Act

In accordance with the Act, this Agreement promotes its intent to encourage:

- The provision and co-ordination of community services and facilities.

The agreement achieves this object by requiring the Owner to contribute to the upgrading of Roberts Road, and requiring Council to upgrade the road.

These requirements of the Agreement will result in:

- The Owner contributing to the construction of this public infrastructure, and

- The upgrading of Roberts Road.

4.4 For Planning Authorities:

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

N/A

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

N/A

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

The following elements of the Council's Charter are promoted by the proposed agreement:

- to provide directly or on behalf of other levels of government, after due consultation, adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively;
- to raise funds for local purposes by the fair imposition of rates, charges and fees, by income earned from investments and, when appropriate, by borrowings and grants.

The contributions made under the proposed agreement will promote these elements by allowing the Council to provide improved road infrastructure at a fair and reasonable cost to existing and future residents.

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

The specific works covered by the Planning Agreement are within Council's current capital works program and the contribution will assist in speeding the delivery of this project.