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**Frensham School
Planning Agreement**

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

Wingecarribee Shire Council

Winifred West Schools Ltd ABN 14 000 025 267

Date:

7/12/12

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Frensham School Planning Agreement

Planning Agreement

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Frensham School Planning Agreement

Summary Sheet

Council:

Name: Wingecarribee Shire Council
Address: Civic Centre, Elizabeth Street, MOSS VALE, NSW, 2577
Telephone: 02 4868 0773
Facsimile: 02 4869 1203
Email: david.matthews@wsc.nsw.gov.au
Representative: David Matthews

Developer:

Name: Winifred West Schools Ltd
Address: PO Box 34 MITTAGONG NSW 3575
Telephone: (02) 4860 2000
Facsimile: (02) 4860 2020
Email: frensham@frensham.nsw.edu.au
Representative: Julie A Gillick

Land:

See definition of *Land* in clause 1.1.

Development:

See definition of *Development* in clause 1.1.

Development Contributions:

See clause 8, clause 9 and Schedule 1

Application of s94, s94A and s94EF of the Act:

See clause 7.



Security:

See clause 15.

Registration:

Yes. See clause 21.

Restriction on dealings:

See clause 22.

Dispute Resolution:

Expert determination and mediation. See clauses 19 and 20.



Frensham School Planning Agreement

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

Parties

Wingecarribee Shire Council ABN 49 546 344 354 of Civic Centre, Elizabeth Street, Moss Vale, NSW 2577 (**Council**)

and

Winifred West Schools Ltd ABN 14 000 025 267 of PO Box 34 Mittagong, NSW 2575 (**Developer**)

Background

- A The Developer is the owner of the Land.
- B The Developer intends to lodge with Council a Development Application relating to the Development.
- C The Developer is prepared to make Development Contributions in connection with the carrying out of the Development in accordance with this Agreement.

Operative provisions

Part 1 - Preliminary

1 Definitions & Interpretation

- 1.1 In this Agreement the following definitions apply:

Access Plan means plan comprising Sheets 1 and 2 in Schedule 2 as may be amended from time to time by written agreement between the Parties up until the commencement of construction of the Access Road or Public Pool Access.

Access Road means the road marked 'Access Road' on the Access Plan.

Access Road Work means the construction by the Council of the Access Road to where the Public Pool Access begins.

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.

Development means the Pool Development.

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost, the carrying out of work, or the provision of any other material public benefit, or any combination of them, to be used for, or applied towards, the provision of public infrastructure or another public purpose.

GST has the same meaning as in the GST Law.

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

Land means Lot 1 DP1133695, Lot 1 DP826387 and Lot 14 DP866594, Range Road, Mittagong.

WH&S Act means the *Work Health and Safety Act 2011 (NSW)*.

WH&S Legislation means the WH&S Act, the WH&S Regulations and any other applicable occupational health and safety legislation or regulations.

WH&S Regulation means the *Work Health and Safety Regulation 2011 (NSW)*.

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

Permitted Person means any one or more of the Council, its officers, employees, agents, contractors and workmen.

Pool 1 means an 8 lane swimming pool with a length of 25 metres.

Pool 2 means a swimming pool with a length of 15 metres and width of 8 metres.

Pool Development means the construction and use of an indoor swimming pool complex that houses Pool 1, Pool 2 and associated offices and includes associated car parking, access and other associated facilities on the Land in accordance with a Development Consent granted by the Council or other consent authority under the Act.



Public Pool Access means the way across the Land marked as such on the Access Plan.

Public Pool Use means public access to the Pool Development across the Public Pool Access and public use of the Pool Development in accordance with this Agreement.

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

School Term means the school term periods notified by the Developer to the parents of students attending the Developer's schools in a particular year.

School Holidays means any period in a particular year that is not School Term and includes any public holiday in New South Wales.

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

Term means the period commencing on the date of commencement of Public Pool Use and ending 20 years after that date, or other period of time as agreed in writing between the Parties.

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

- 1.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:
- 1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
 - 1.2.2 A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
 - 1.2.3 If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
 - 1.2.4 A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
 - 1.2.5 A reference in this Agreement to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
 - 1.2.6 A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
 - 1.2.7 A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
 - 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
 - 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.



- 1.2.10 Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- 1.2.11 A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.13 A reference to this Agreement includes the agreement recorded in this Agreement.
- 1.2.14 A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- 1.2.15 Any schedules, appendices and attachments form part of this Agreement.
- 1.2.16 Notes appearing in this Agreement are operative provisions of this Agreement.

2 Application of this Agreement

- 2.1 This Agreement applies to the Development on the Land and is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

3 Commencement of this Agreement

- 3.1 This Agreement commences when it has been executed by all of the Parties and terminates at the end of the Term.
- 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 Operation of this Agreement

- 4.1 The Developer is under no obligation to provide the Public Pool Use in accordance with this Agreement unless and until:
 - 4.1.1 Development Consent for the Pool Development is granted,
 - 4.1.2 the Council completes the Access Road Work.
- 4.2 The Developer consents to Development Consent being granted to the Pool Development subject to a condition that this Agreement be entered into.

5 Further Agreements Relating to this Agreement

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



6 Surrender of right of appeal, etc.

- 6.1 The Developer is not to commence or maintain, or cause to be commenced or maintained, any proceedings involving an appeal against, or questioning the validity of, a Development Consent relating to the Pool Development or an approval under s96 of the Act to modify a Development Consent relating to the Pool Development to the extent that it relates to the existence of this Agreement.

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

- 7.1 This Agreement excludes the application of s94 to the Development.
- 7.2 This Agreement excludes the application of s94A to the Development.
- 7.3 This Agreement does not exclude the application of s94EF to the Development.

Part 2 – Public Pool Use

8 Provision of Public Pool Use

- 8.1 The Developer at its own cost is to provide the Public Pool Use at such times and for such sessions during School Term and School Holidays as is agreed in writing between the Parties.
- 8.2 The Parties are to review the times and sessions for the provision of the Public Pool Use every six months (or at such intervals as is agreed in writing between the Parties), with the first review occurring on the date six months from the date that the Public Pool Use is first provided, and after each review to agree in writing either to maintain the existing times and sessions for Public Pool Use, or to modify the times and sessions for Public Pool Use.
- 8.3 If no agreement is reached between the Parties regarding the times and sessions for Public Pool Use under clause 8.1 or 8.2, the Developer at its own cost is to provide the Public Pool Use in accordance with this Agreement at the times specified in Part A and Part B of Schedule 1 until such time as agreement is reached.
- 8.4 The Public Pool Use is to be provided on and from the date not later than 30 days after the last of:
- 8.4.1 completion of the Pool Development, and
 - 8.4.2 completion of the Access Road Work,
- or at such other time as is agreed in writing between the Parties.
- 8.5 The Developer is to do such things as are necessary to ensure that the Public Pool Use may be carried out by the public in safety and without any obstruction or impediment.



- 8.6 Despite any other provision in this clause, the Developer may allow any other person access to the Pool Development provided that access does not adversely impact on the times and sessions for Public Pool Use as agreed between the Parties under clause 8.1 and 8.2 or as specified in Part A and Part B of Schedule 1.

9 Public Pool Access

- 9.1 The Developer at its own cost is to ensure that the Public Pool Access is provided during, and for a reasonable time before and after, the times the Public Pool Use is provided pursuant to clause 8.1, 8.2 or 8.3.
- 9.2 The Developer is to consult with the Council in relation to the design and specification of the Public Pool Access.
- 9.3 The Developer is to allow the public to use the Public Pool Access to gain access to the Pool Development during, and for a reasonable time before and after, the times the Public Pool Use is provided.
- 9.4 The Developer is to do such things as are necessary to ensure that the public may use the Public Pool Access in safety and without any obstruction or impediment.

10 Charge for Public Pool Use

- 10.1 Nothing in this Agreement prevents the Developer from requiring members of the public to pay a fee to the Developer for the Public Pool Use.
- 10.2 The fee referred to in clause 10.1 is to not exceed the fee payable by members of the public to use a facility similar to the Pool Development in the Council's local government area and in any event is not to exceed an amount required by the Developer to recover its operating costs of the Public Pool Development.

11 Development Application for Pool Development

- 11.1 Any Development Application for the Pool Development is to make provision for the Public Pool Use and the Public Pool Access.
- 11.2 The Developer is to consult with the Council regarding any Development Application for the Pool Development, or any subsequent Development Application or application to modify a Development Consent affecting the Public Pool Use, before it is lodged with the Council or other consent authority under the Act.

12 Access to the Land

- 12.1 The Developer is to permit the Permitted Persons to enter the Land during normal business hours, upon giving reasonable prior notice, in order, at the Council's cost, to inspect or examine anything relating to the Pool Development or the Public Pool Access only in so far as it relates to the Public Pool Use.
- 12.2 During any period when a Permitted Person enters the Land, the Council:



- 12.2.1 is to have appropriate occupational health and safety procedures in place to comply with its obligations under the WH&S Legislation relevant to the activities of the Permitted Person, and
- 12.2.2 is to use its reasonable endeavours to ensure the Permitted Person complies with the Council's obligations in clause 12.2.1.
- 12.3 The Council must promptly rectify, at its cost, any damage caused to the Land by the acts or omissions of a Permitted Person while entering or accessing the Land.

13 Provision of Access Road

- 13.1 The Council at its own cost is to design the Access Road and carry out the Access Road Work.
- 13.2 The Council is to consult with the Developer in relation to the design and specification of the Access Road.
- 13.3 The Council is to complete the Access Road by not later than a date or time agreed in writing between the Parties.
- 13.4 The Developer is to do such things as are reasonably necessary to enable the Council to carry out and complete the Access Road Work.
- 13.5 The Council must, during the period commencing on the completion of the Access Road Work to the end of the Term, maintain the Access Road in good repair and condition.

Part 3 – Other Provisions

14 Indemnity and Insurance

- 14.1 Subject to clause 14.5, the Developer indemnifies the Council, its employees, officers, agents, contractors and workmen from and against all losses, damages, costs (including legal costs on a full indemnity basis), charges, expenses, actions, claims and demands whatsoever which may be sustained, suffered, recovered or made arising in connection with the Public Pool Use by the public and the use of the Public Pool Access by the public and the performance by the Developer of any other obligation under this Agreement except to the extent such losses, damages, costs, charges, expenses, actions, claims or demands are caused or contributed to by the Permitted Persons.
- 14.2 The Developer is to take out and keep current in its own name and to the satisfaction of the Council (acting reasonably) the following insurances in relation to the Public Pool Use and the use of the Public Pool Access by the public:
 - 14.2.1 during construction of the Works, contract works insurance, noting the Council as an interested party, for the full replacement value of the Works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover the Developer's liability in respect of damage to or destruction of the Works,



- 14.2.2 public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer for liability to any third party,
- 14.2.3 workers compensation insurance as required by law, and
- 14.2.4 any other insurance required by law.
- 14.3 If the Developer fails to comply with clause 14.2, the Council may effect and keep in force such insurances and pay such premiums as may be reasonably necessary for that purpose and the amount so paid shall be a debt due from the Developer to the Council and may be recovered by the Council as it deems appropriate including:
 - 14.3.1 by calling upon the Security provided by the Developer to the Council under this Agreement, or
 - 14.3.2 recovery as a debt due in a court of competent jurisdiction.
- 14.4 The Developer is not to commence to carry out any Work unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 14.2.
- 14.5 The Council indemnifies the Developer from and against all losses, damages, death or injury to persons or property arising from:
 - 14.5.1 entry or access to the Land by the Permitted Persons;
 - 14.5.2 the Access Road Work; and
 - 14.5.3 use of the Access Road by any person,except to the extent such losses, damages, death or injury are caused or contributed to by the Developer,

15 Provision of Security for Public Pool Use

- 15.1 During the period commencing on the completion of the Access Road Work to the end of the Term, the Developer is to provide Security to the Council for the Public Pool Use so that:
 - 15.1.1 the amount of Security provided from the date of completion of the Access Road to the date that is 5 years from the date of commencement of the Term is \$350,000.00 (being an amount that equates to the cost to the Council of carrying out the Access Road Work as estimated by the Council), and
 - 15.1.2 for each period of 5 years thereafter, that amount is to be reduced by 25%.
- 15.2 Any unused Security or part of any Security provided to the Council under clause 15.1 for a five-year period may be rolled-over and used as the Security or part of the Security for the following five-year period.

16 Provision of Security for Cost of Construction of Access Road

- 16.1 The Developer is to provide Security to the Council for the full cost to the Council of the construction of the Access Road as estimated by the Council



acting reasonably by not later than the date upon which the Council commences the construction of the Access Road.

- 16.2 The Council is to give the Developer not less than 30 days written notice of the date upon which the Council intends to commence the construction of the Access Road.
- 16.3 The Council is to release and return the Security provided under clause 16.1, or any unused part of it to the Developer on receipt of the Security provided under clause 15.1.1.

17 Other provisions relating to Security

- 17.1 An amount of the Security required to be provided under this Agreement is to be indexed annually in accordance with the *Consumer Price Index (All Groups - Sydney)* published by the Australian Bureau of Statistics.
- 17.2 The Developer is to ensure that the Security held by the Council at all times equals the amount of the Security so indexed.
- 17.3 The Developer may at any time provide the Council with a replacement Security and, in such case, the Council is to release and return to the Developer, as directed, the Security it holds that has been replaced.
- 17.4 The Council is to release and return a Security provided under clause 15.1 or any unused part of it to the Developer within 14 days of the end of the Term.
- 17.5 The Council may call-up a Security if it considers, acting reasonably, that the Developer has not complied with its obligations under this Agreement to which the Security relates.
- 17.6 However, the Council is not to call-up a Security unless it has given the Developer a period of not less than 14 days written notice of its intention to do so and the Developer has not rectified the non-compliance to the Council's reasonable satisfaction before that period has expired.
- 17.7 If the Council calls-up a Security, it may use the amount paid to it in satisfaction of any costs incurred by it in remedying the non-compliance including but not limited to:
 - 17.7.1 the reasonable costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
 - 17.7.2 all fees and charges necessarily or reasonably incurred by the Council in order to have the Work carried out, completed or rectified, and
 - 17.7.3 all legal costs and expenses reasonably incurred by the Council, by reason of the Developer's non-compliance.
- 17.8 If the Council calls-up a Security, it may, by notice in writing to the Developer, require the Developer to provide a further or replacement Security in an amount that, when added to any unused portion of any existing Security, does not exceed the amount of the Security the Council is entitled to hold under this Agreement relating to the relevant obligations.
- 17.9 The dispute resolution provisions of this Agreement do not apply to a matter the subject of this clause.



18 Enforcement in a court of competent jurisdiction

- 18.1 Without limiting any other provision of this Agreement, the Parties may enforce this Agreement in any court of competent jurisdiction.
- 18.2 For the avoidance of doubt, nothing in this Agreement prevents:
 - 18.2.1 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,
 - 18.2.2 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.

19 Dispute Resolution – expert determination

- 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 Law Society of New South Wales 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 Upon the execution of this Agreement, the Developer is to give to the Council a duly executed instrument in registrable form to enable this Agreement to be registered on the title to the Land pursuant to s93H of the Act.

22 Assignment, Sale of Land, etc

- 22.1 Unless the matters specified in clause 22.2 are satisfied, the Developer is not to do any of the following:
- 22.1.1 if the Developer is the owner of the Land, to transfer the Land to any person, or
 - 22.1.2 assign the Developer's rights or obligations under this Agreement, or novate this Agreement, to any person.
- 22.2 The matters required to be satisfied for the purposes of clause 22.1 are as follows:
- 22.2.1 the Developer has, at no cost to the Council, first procured the execution by the person to whom the Developer's rights or obligations under this Agreement are to be transferred, assigned or novated, of an agreement or deed in favour of the Council pursuant to which the person is to perform the obligations of the Developer under this Agreement to the extent that the obligations have not been performed as at the date of such agreement or deed, and
 - 22.2.2 the Developer has provided to the Council a copy of the agreement or deed referred to in clause 22.2.1 promptly after it is executed, and
 - 22.2.3 Council, by notice in writing to the Developer, has stated that evidence satisfactory to the Council has been produced to show that the assignee or novatee, is reasonably capable of performing its obligations under the Agreement,
 - 22.2.4 the Developer is not in breach of this Agreement, and
 - 22.2.5 the Council otherwise consents to the transfer, assignment or novation, the consent which shall not be unreasonably withheld.
- 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 the sale.



23 Review of this Agreement

- 23.1 The Developer is to provide to the Council by not later than each anniversary of the date on which this Agreement is entered into a report detailing the performance of its obligations under this Agreement.
- 23.2 The report referred to is to be in such a form and to address such matters as may be notified by the Council to the Developer from time to time.
- 23.3 The Parties agree to review this Agreement every 5 years, and otherwise if either party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Agreement.
- 23.4 For the purposes of clause 23.3, the relevant changes include (but are not limited to) any change to:
 - 23.4.1 a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development; or
 - 23.4.2 the performance by any Party of its obligations or the enjoyment of its rights under this Agreement.
- 23.5 For the purposes of addressing any matter arising from a review of this Agreement referred to in clause 23.3, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Agreement.
- 23.6 If this Agreement becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Agreement is entered into.
- 23.7 A failure by a Party to agree to take action requested by the other Party as a consequence of a review referred to in clause 23.3 is not a dispute for the purposes of clauses 19 and 20 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,
 - 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 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 or fax number.
- 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, 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, or
 - 24.3.4 sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.
- 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 Each Party is to pay its own costs of preparing, negotiating, and executing this Agreement, and any document related to this Agreement.
- 26.2 The Developer is to pay stamp duty (if any) in relation to this Agreement.
- 26.3 If:
 - 26.3.1 the Developer breaches its obligations under this Agreement, the Developer is to pay to the Council the Council's reasonable costs of enforcing this Agreement within 7 days of a written demand by the Council for such payment; and
 - 26.3.2 the Council breaches its obligations under this Agreement, the Council is to pay to the Developer the Developer's reasonable costs of enforcing this Agreement within 7 days of a written demand by the Developer for such payment.

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 Notations on section 149(2) Planning Certificates

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

30 Governing Law and Jurisdiction

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

31 Joint and Individual Liability and Benefits

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

32 No Fetter

- 32.1 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.

33 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.

34 Severability

- 34.1 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.
- 34.2 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.

35 Modification

- 35.1 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.

36 Waiver

- 36.1 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.
- 36.2 A waiver by a Party is only effective if it is in writing.
- 36.3 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.

37 GST

- 37.1 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.
- 37.2 Subject to clause 37.4, 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.



- 37.3 Clause 37.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Agreement to be GST inclusive.
- 37.4 No additional amount shall be payable by the Council under clause 37.2 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.
- 37.5 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:
- 37.5.1 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;
- 37.5.2 that any amounts payable by the Parties in accordance with clause 37.2 (as limited by clause 37.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 37.6 No payment of any amount pursuant to this clause 37, 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.
- 37.7 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.
- 37.8 This clause continues to apply after expiration or termination of this Agreement.

38 Explanatory Note Relating to this Agreement

- 38.1 The Appendix contains the Explanatory Note relating to this Agreement required by clause 25E of the Regulation.
- 38.2 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

(Clause 8)

Public Access Times

Part A – During School Term (but excluding public holidays)

Column 1	Column 2	Column 3
Days (excluding public holidays) for public access during School Term	Time for public access during School Term	Session purpose for public access during School Term
Pool 1		
Monday to Friday	6.00am to 7.30am	Squad training
	7.30am to 9.00am	Squad training
	12.00pm to 2.00pm	Aqua-aerobics Fitness
	2.00pm to 3.30pm	Fitness General training
	4.00pm to 6.00pm	Squad training
	6.00pm to 7.30pm	Aqua-aerobics Squad training Fitness/General training Water polo
Saturday and Sunday	6.00am to 7.30am	Squad training
	1.00pm to 4.00pm	Aqua-aerobics Squad training Fitness General training Water polo



Pool 2		
Monday to Friday	9.00am to 11.00am or 1.00pm to 3.00pm	Learn to Swim
Saturday and Sunday	9.00am to 12.00pm or 1.00pm to 4.00pm	Learn to Swim

Part B –During School Holidays (including public holidays)

Public access is to be provided in accordance with Council's pool opening times for its Bowral, Mittagong and Moss Vale public swimming pools..



Schedule 2

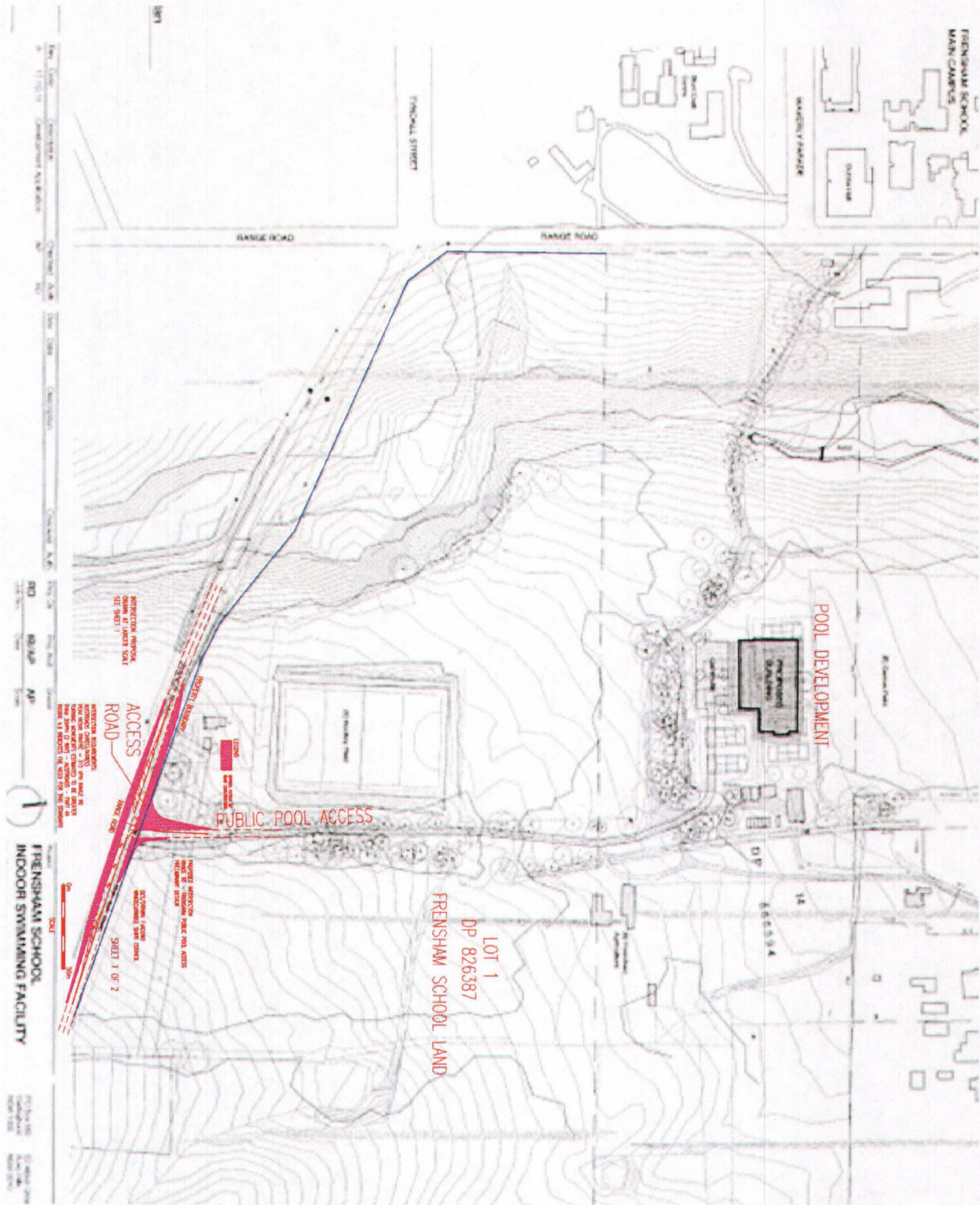
(Clause 13)

Access Plan

The Access Plan is on the following pages.

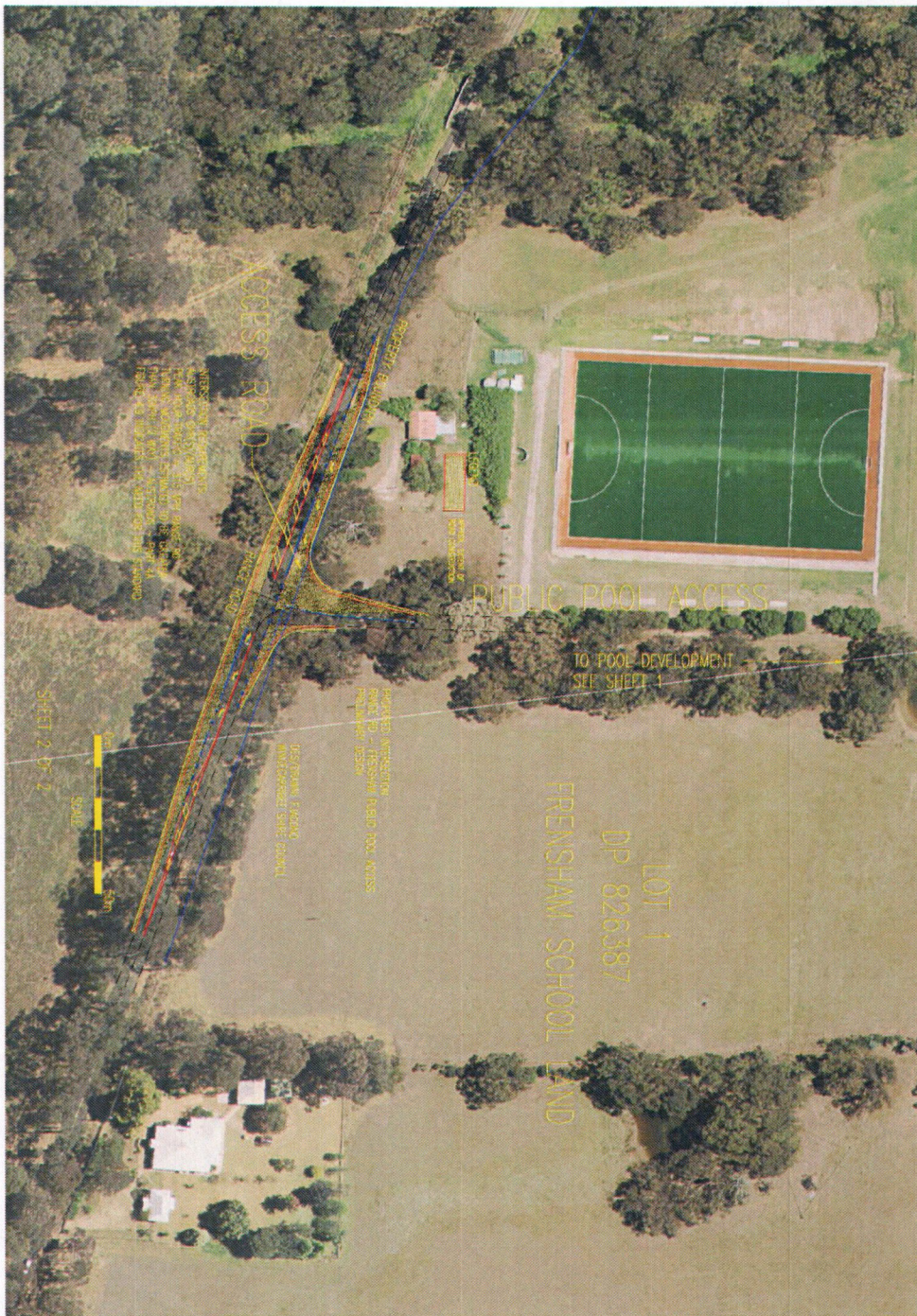


Sheet 1





Sheet 2





Execution

Executed as an Agreement

Dated: 7/12/12

Executed on behalf of the Council

General Manager

ELIZABETH JOHNSON
PTA to the Mayor

Witness/Name/Position

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

G. DANIEL - DIRECTOR

Name/Position

P. DUCK - SECRETARY

Name/Position



Appendix

(Clause 38)

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Planning Agreement

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

Parties

Wingecarribee Shire Council ABN 49 546 344 354 of Civic Centre, Elizabeth Street, Moss Vale, NSW 2577 (**Council**)

Winifred West Schools Ltd ABN14 000 025 267 of PO Box 34 Mittagong, NSW 2575 (**Developer**)

Description of the Land to which the Draft Planning Agreement Applies

Land means Lot 1 DP1133695, Lot 1 DP826387 and Lot 14 DP866594, Range Road, Mittagong.

Description of Proposed Development

The construction and use of a swimming pool complex comprising Pool 1 and Pool 2 on the Land in accordance with a Development Consent granted by the Council or other consent authority under the Act.



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

Objectives of Draft Planning Agreement

The objective of the Draft Planning Agreement is to require the Developer to provide material public benefits in relation to the Development, being the Public Pool Use and Public Pool Access.

Nature of Draft Planning Agreement

The Draft Planning Agreement is a planning agreement under s93F of the *Environmental Planning and Assessment Act 1979 (Act)*. The Draft Planning Agreement is a voluntary agreement under which Development Contributions (as defined in clause 1.1 of the Draft Planning Agreement) are made by the Developer for various public purposes (as defined in s93F(3) of the Act).

Effect of the Draft Planning Agreement

The Draft Planning Agreement:

- relates to the carrying out by the Developer of Development on the Land,
- excludes the application of s 94 of the Act to the Development,
- excludes the application of s94A of the Act to the Development,
- does not exclude the application of s94EF of the Act to the Development,
- requires the Developer to provide material public benefits,
- imposes obligations on the Developer in relation to the provision of the Public Pool Use and Public Pool Access,
- requires the Developer to provide the Council with Security in the event that the Council is required to enforce the terms of the Agreement,
- is to be registered on the title to the Land,
- imposes restrictions on the Parties transferring the Land or part of the Land or assigning an interest under the Agreement,
- provides two dispute resolution methods for a dispute under the Agreement, being expert determination and mediation,
- provides that the Agreement is governed by the law of New South Wales, and
- provides that the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* applies to the agreement.



Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

The Draft Planning Agreement:

- provides and co-ordinates community services and facilities in connection with the Development, and
- provides increased opportunity for public involvement and participation in environmental planning and assessment of the Development.

How the Draft Planning Agreement Promotes the Public Interest

The Draft Planning Agreement promotes the public interest by promoting the objects of the Act as set out in s5(a)(v) and 5(c) of the Act.

For Planning Authorities:

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

N/A

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

N/A

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

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

- setting out arrangements for provision of a facility to the community,
- providing for the needs of children.

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

No.

All Planning Authorities - Whether the Draft Planning Agreement specifies that certain requirements must be complied with before issuing a construction certificate, subdivision certificate or occupation certificate

The Draft Planning Agreement does not specify requirements that must be complied with before the issuing of a certificate under Part 4A of the Act for the Development.