

Voluntary Planning Agreement

Wingecarribee Shire Council
ABN 49 546 344 354

and

Maria Josephine Loader, Elizabeth Anne Dolbel and Philippa Therese Dolbel as Executors of the Estate of Thomas William Dolbel, William Richard Beresford, Desmond John Gawthorne and Kathleen Margaret Florence Gawthorne

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Agreement

Date

Please Date

Parties

First party

Name Wingecarribee Shire Council (**Council**)

ABN 49 546 344 354

Contact Coordinator, Strategic Policy

Telephone (02) 4868 0888

Email mail@wsc.nsw.gov.au

Second party

Name Maria Josephine Loader, Elizabeth Anne Dolbel and Philippa Therese Dolbel as Executors of the Estate of Thomas William Dolbel of 121 Yarrowa Road, Moss Vale NSW 2577
William Richard Beresford of 131 Yarrowa Road, Moss Vale NSW 2577
Desmond John Gawthorne and Kathleen Margaret Florence Gawthorne of 153 Yarrowa Road, Moss Vale NSW 2577
(Developer)

Background

- A. The Developer owns the Land.
- B. The Developer has made an application for the Instrument Change to amend the Wingecarribee Local Environmental Plan 2010 as described in the Planning Proposal PP.2022-4351.
- C. The Developer has made an offer to enter into this agreement with Council to make a Development Contribution in support of the application for Instrument Change.

Operative part

1. Definitions

In this agreement, unless the context indicates a contrary intention:

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

Address means a party's address set out in the Notices clause of this agreement;

Appendix means the appendix at the end of this agreement;

Approval means any certificate, licence, consent, permit, approval or other requirement of any Authority having jurisdiction in connection with the activities contemplated by this agreement;

Assign as the context requires refers to any assignment, sale, transfer, disposition, declaration of trust over or other assignment of a legal and/or beneficial interest.

Authority means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person;

Bank Guarantee means an irrevocable and unconditional undertaking without any expiry or end date by one of the following trading banks:

- (a) Australia and New Zealand Banking Group Limited.
- (b) Commonwealth Bank of Australia.
- (c) Macquarie Bank.
- (d) National Australia Bank Limited.
- (e) St George Bank Limited.
- (f) Westpac Banking Corporation.
- (g) Any other financial institution approved by the Council, in its absolute discretion, in response to a request from the Developer.

Business Day means a day on which banks are open for general banking business in Sydney, excluding Saturdays and Sundays;

Claim means, against any person, any allegation, action, demand, cause of action, suit, debt, cost, claim, loss, liability, damage, proceeding, order, judgment or expense howsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at law, in equity, under statute or otherwise;

Contribution Value means the amount specified in **Schedule 1** in the column headed "contribution value" for each item of the Development Contribution as indexed in accordance with this agreement.

CPI means the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics or any other index which supersedes the Consumer Price Index (All Groups Sydney).;

Damages means all liabilities, losses, damages, costs and expenses, including legal fees and disbursements and costs of investigation, litigation, settlement, judgment, interest and penalties;

Dealing, in relation to the Land, means, without limitation, selling, transferring, assignment, mortgaging, charging, encumber or otherwise dealing with the Land;

Defects Liability Period means a period of twelve (12) months commencing on the day

immediately after hand-over of the relevant Works to Council.

Development means development creation by subdivision of the Land into residential allotments;

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 to the Council and the contribution for embellishment of the land to be dedicated including as set out in **Schedule 1**.

Final Lots means a low density residential lot created as part of the Development, and in accordance with the Instrument Change, which is intended for separate occupation and disposition (and which is not intended for further subdivision), and not being a lot created by a subdivision of land that is to be dedicated for public use (to Council or otherwise) including for community use, ecological restoration, drainage, ecology, open space or infrastructure.

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;

Instrument Change means an amendment to Wingecarribee Local Environmental Plan 2010 in response to a planning proposal (PP.2022-4351) seeking to:

- (a) rezone part of the Land to R2. Low Density Residential with a minimum lot size of 600m²; and
- (b) Rezone approximately 1 ha of the Land along Yarrowa Road frontage to RE1 Public Recreation;

Land means the land comprised in the following certificate of title and known as 121, 131 and 153 Yarrowa Road Moss Vale, NSW:

- (a) folio identifier 4/706194 (known as 121 Yarrowa Road, Moss Vale);
- (b) folio identifier 5/706194 (known as 131 Yarrowa Road, Moss Vale);
- (c) folio identifier 2/610352 (known as 153 Yarrowa Road, Moss Vale);

Law means:

- (a) any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation;
- (b) any Approval, including any condition or requirement under it; and
- (c) any fees and charges payable in connection with the things referred to in paragraphs (a) and (b);

Monetary Contribution means the monetary contribution payable under clause 6 of this agreement and as set out in **Schedule 1**.

Planning Legislation means the Act, the *Local Government Act 1993* (NSW) and the *Roads Act 1993* (NSW).

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

Regulation means the *Environmental Planning and Assessment Regulation 2001*;

Related Body Corporate has the meaning given to that term in a s 9 of the *Corporations Act 2001* (Cth);

Security has the meaning ascribed to it in clause 11.3.

Subdivision Certificate has the same meaning as ascribed to it in the Act.

Subdivision Works Certificate has the same meaning as ascribed to it in the Act.

Works means the works specified or described in **Schedule 1**.

2. Interpretation

In this agreement, unless the context indicates a contrary intention:

- (a) **(documents)** a reference to this agreement or another document includes any document which varies, supplements, replaces, assigns or novates this agreement or that other document;
- (b) **(references)** a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this agreement.
- (c) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this agreement.
- (d) **(person)** a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns.
- (e) **(party)** a reference to a party to a document includes that party's personal representatives, executors, administrators, successors, substitutes (including person taking by novation) and permitted assigns;
- (f) **(present, CEO, general manager or managing director)** the president, CEO, general manager or managing director of a body or Authority includes any person acting in that capacity;
- (g) **(requirements)** a requirement to do anything includes a requirement to cause that thing to be done, and a requirement not to do anything includes a requirement to prevent that thing being done;
- (h) **(including)** including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind;
- (i) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (j) **(singular)** the singular includes the plural and vice-versa;
- (k) **(gender)** words importing one gender include all other genders;

- (l) **(parts)** a reference to one or more things includes each part and all parts of that thing or group of things but nothing in this clause implies that pat performance of an obligation constitutes performance of that obligation.
- (m) **(rules of construction)** neither this agreement 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.
- (n) **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (o) **(time and date)** a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in Australia, even if the obligation is to be performed elsewhere.
- (p) **(joint and several)** an agreement, representation, covenant, right or obligation:
 - (i) In favour of two or more persons is for the benefit of them jointly and severally; and
 - (ii) On the part of two or more persons binds them jointly and severally;
- (q) **(writing)** a reference to a notice, consent, request, approval or other communication under this agreement or an agreement between the parties means a written notice, request, consent, approval or agreement.
- (r) **(replacement bodies)** a reference to a body (including an institute, association or Authority) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions;
- (s) **(Australian currency)** a referenced to dollars (\$) is in Australian currency;
- (t) **(month)** a reference to a month is a reference to a calendar month; and
- (u) **(year)** a reference to a year is a reference to twelve consecutive calendar months.

3. Planning Agreement under the Act

- (a) The parties agree that this agreement is a planning agreement within the meaning of section 7.4 of the Act and governed by Subdivision 2 of Division 7.1 of Part 7 of the Act.

4. Application of this agreement

This agreement is made in respect of the Instrument Change and applies to:

- (a) the Instrument Change, and
- (b) the Development; and
- (c) the Land.

5. Operation of this agreement

This agreement commences and operates on and from the date it is executed by all parties.

6. Contributions to be made under this agreement

6.1 Monetary Contribution

- (a) The Developer must pay to Council the Monetary Contribution (as indexed in accordance with the CPI) in accordance with **Schedule 1**;
- (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 Council;
- (c) the Monetary Contribution will be taken to have been made and received when the Council notifies the Developer in writing that the full amount of the Monetary Contribution has been received either when the bank cheque has been received or cleared funds or electronic funds have been deposited in the Council's bank account;
- (d) the parties agree and acknowledge that the Monetary Contribution will be used by the Council towards community infrastructure within the Wingecarribee Shire.

6.2 Dedication of Land to Council

- (a) The Developer will dedicate to Council with registration of the plan of subdivision of the Land an area of land of approximately 1 hectare to be rezoned RE1 Public Recreation ("Public Recreation Land") along the Yarrowa Road frontage to the Land as identified in **Appendix 1**.
 - (i) If the Developer does not dedicate Public Recreation Land with the registration of the plan of subdivision the Council may compulsorily acquire the Public Recreation Land for \$1.00 pursuant to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)
Provided that such compulsory acquisition cannot take place before registration of the plan of subdivision.

6.3 Embellishment Works

- (a) The Developer, at its cost, must carry out and complete the Works to the satisfaction of Council and in accordance with **Schedule 1**.
- (b) The embellishment works are to be completed on or before the date of registration of the plan of subdivision dedicating the Public Recreation Land to Council or the date that Council compulsorily acquire the Public Recreation Land, whichever is the later.

7. Application of sections 7.11, 7.12 and 7.24 of the Act to the Development

- (a) This agreement excludes the application of section 7.11 of the Act to the Development.
- (b) This agreement excludes the application of section 7.12 of the Act to the Development.
- (c) This agreement does not exclude the application of Division 7.1, Subdivision 4 of the Act to the Development.

8. Registration of this agreement

8.1 *Developer Interest*

The Developer represents and warrants to the Council that on the date of this agreement the Developer is the registered proprietor of the Land.

8.2 *Registration of this agreement*

- (a) The Developer agrees that they will register this agreement 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 their expense, must:
 - (i) register this agreement with the Registrar-General as soon as reasonably practicable after this agreement comes into operation, but in any event, no later than 40 Business Days after that date;
 - (ii) procure the registration of this agreement by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this agreement is lodged for registration; and
 - (iii) Provide documentary evidence that the registration of this agreement has been completed to Council within 5 Business Days of receiving confirmation that the registration has occurred.
- (c) The Developer at their own expense will take all practical steps, and otherwise do anything that the Council reasonably requires to procure:
 - (i) 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,
 - (ii) An acceptance of the terms of this agreement and an acknowledgement in writing from any existing mortgagee in relation to the Land that the mortgagee will adhere to the provisions of this agreement if it takes possession of the Land as mortgagee in possession,
 - (iii) the execution of any documents; and
 - (iv) the production of the relevant duplicate certificates of title,to enable the registration of this agreement in accordance with this clause 8.2.
- (d) For the avoidance of doubt, the Developer warrants that the landowners of the Land consent to the registration of the agreement in accordance with this clause 8.2.

8.3 *Removal from Register*

The Council will provide a release and discharge of this agreement so that it may be removed from the folios of the Register for the Land (or any part of it) provided the Council is satisfied the Developer has duly fulfilled its obligations under this agreement, and is not otherwise in default of any of its obligations under this agreement.

9. Review of this agreement

- (a) This agreement may be reviewed or modified. Any review or modification of this agreement will be conducted in the circumstances and in the manner determined by the parties.
- (b) No modification or review of this agreement will be of any force or effect unless it is in writing and signed by the parties to this agreement.
- (c) A party is not in breach of this agreement if it does not agree to an amendment to this agreement requested by a party in, or as a consequence of, a review.

10. Dispute Resolution

10.1 Reference to Dispute

If a dispute arises between the parties in relation to this agreement, the parties must not commence any court proceedings relating to the dispute unless the parties have complied with this clause, except where a party seeks urgent interlocutory or declaratory relief concerning any matter arising out of this agreement.

10.2 Notice of Dispute

The party wishing to commence the dispute resolution process must give written notice (**Notice of Dispute**) to the other parties of;

- (a) The nature of the dispute (providing details of the dispute).
- (b) The alleged basis of the dispute,
- (c) The position which the party issuing the Notice of Dispute believes is correct; and
- (d) What that party believes will resolve the dispute.

10.3 Representatives of Parties to Meet

- (a) The representatives of the parties must promptly (and in any event within 20 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.
- (b) The parties may, without limitation.
 - (i) resolve the dispute during the course of that meeting;
 - (ii) agree that further material or expert determination in accordance with clause 10.6 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 or resolution); or
 - (iii) agree that the 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.

10.4 Further Notice if Not Settled

If the dispute is not resolved within 10 Business Days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute

(Determination Notice) by mediation under clause 10.5 or by expert determination under clause 10.6.

10.5 Mediation of non-technical issues in dispute

If a party gives a Determination Notice calling for the dispute of a non-technical matter to be mediated:

- (a) The parties must agree to the terms of reference of a mediation within 15 Business Days of the receipt of the Determination Notice (the terms shall include a requirement that the Mediation Rules of the Law Society of New South Wales published from time to time;
- (b) The mediator will be agreed between the parties, or failing agreement within 15 Business Days of receipt of the Determination Notice, either Party may request the president of the Law Society of New South Wales to appoint a mediator.
- (c) The mediator appointed pursuant to this clause 10.5 must:
 - (i) Have reasonable qualifications and practical experience in the area of the dispute; and
 - (ii) Have no interest or duty which conflicts or may conflict with his or her function as a mediator he or she being required to fully disclose any such interest or duty before his or her appointment.
- (d) The mediator shall be required to undertake 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 parties must within 15 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, the Council must advise of the representative within 5 Business Days of the resolution.
- (f) The parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement; and
- (g) in relation to costs and expenses:
 - (i) Each party will bear its own professional and expert costs incurred in connection with the mediation; and
 - (ii) The costs of the mediator will be shared equally by the 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.

10.6 Expert determination of Technical Issues in Dispute

If the dispute relates to technical matters, such as a valuation or engineering matter, the parties agree that the dispute may be resolved by expert determination, the parties may refer the dispute to an expert, in which event:

- (a) The dispute must be determined by an independent expert in the relevant field:
 - (i) Agreed upon and appointed jointly by the parties; and

- (ii) In the event that no agreement is reached or not appointment is made within 20 Business Days of the agreement to refer the dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales.
- (b) The expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) The determination of the dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination.
- (d) The expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (e) If the expert does not award costs, each party will bear its own costs in connection with the process and the determination by the expert and will share equally the expert's fees and costs; and
- (f) Any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
 - (i) Within 20 Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and commences litigation; or
 - (ii) The determination is in respect of, or relates to, termination or purported termination of this agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal.

10.7 Litigation

If the dispute is not finally resolved in accordance with this clause 10 then either party is at liberty to litigate the dispute.

10.8 No suspension of contractual obligations

Subject to any interlocutory order obtained under clause 10.1, the referral to or undertaking of a dispute resolution process under this clause 10 does not suspend the parties' obligations under this agreement.

11. Enforcement

11.1 Default

- (a) In the event a party considers another party has failed to perform and fulfil an obligation under this agreement, it may give notice in writing to the other party (**Default Notice**) giving all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than 21 days.
 - (i) 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 and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (b) If a party disputes the Default Notice it may refer the dispute to dispute resolution under clause 10 of this agreement.

- (c) Where the Developer breaches a Default Notice, Council may, in addition to any rights it has at Law:
 - (i) exercise its step-in-rights so as to carry out any work specified in the relevant Default Notice; or
 - (ii) call on the Security to the extent of any compensation claimed in a Default Notice and not paid by the Developer.

11.2 General Enforcement

- (a) Without limiting any other remedies available to the parties, this agreement may be enforced by any party in any Court of competent jurisdiction.
- (b) Nothing in this agreement prevents:
 - (i) 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; and
 - (ii) 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.

11.3 Security

- (a) The Developer must deliver to Council separate Bank Guarantees, bonds or other forms of security to the satisfaction of the Council:
 - (i) prior to the issue of a Subdivision Certificate or Subdivision Works Certificate in respect of the Development, for an amount equivalent to one hundred per cent (100%) of the Contribution Value for the Works (**Works Security**); and
 - (ii) prior to the completion of the Works, for an amount equivalent to ten per cent (10%) of the Contribution Value for the Works (**Defects Security**),
(collectively referred to as the **Security**).
- (b) The Developer may satisfy these obligations (either in whole or in part), by directing Council to retain any Security held by Council which is required to be released by Council under this agreement.
- (c) The Developer may replace any Security provided by it at any time, provided that the amount of that replacement is not less than that which is required to be provided under this agreement. On receipt of a replacement Security, Council must immediately release the Security being replaced and return it to the Developer.
- (d) If the Developer breaches this agreement, Council, without limiting any other remedies available to it, may call on any Security provided by the Developer. If Council calls on any Security, it may use the amount so paid to it in satisfaction of any costs incurred by it in remedying the relevant breach.
- (e) Unless:
 - (i) Council has made or intends to make a demand against any Security provided by the Developer;
 - (ii) the Development Contributions on account of which that Security was provided have not been made; or
 - (iii) the Developer is in breach of this agreement at the relevant time, Council, upon a written request being made by the Developer, must return the Works Security within ten (10) business days of such a request being made.
- (f) Unless:
 - (i) Council has made or intends to make a demand against any Defects Security
 - (ii) the relevant Defects Liability Period has not expired; or
 - (iii) the Developer is in breach of this agreement at the relevant time, Council, upon a written request being made by the Developer, must return the Defects

Security within ten (10) business days of such a request being made.

12. Assignment and Dealings

12.1 Assignment

- (a) A party must not Assign or deal with any right under this agreement without the prior written consent of the other parties.
- (b) Any change of ownership or control (as defined in section 50AA of the Commonwealth Corporations Act 2001) of a party (excluding the Council) shall be deemed to be an Assignment of this agreement for the purposes of this clause.
- (c) Any purported dealing in breach of this clause is of no effect.

12.2 Transfer of Land

- (a) The Developer may not transfer, assign or dispose of the whole or any part of its right, title or interest in the Land (present or future) or in the Development to another person (**Transferee**) unless before it sells, transfers or disposes of that right, title or interest:
 - (i) The Transferee delivers to the Council a novation deed signed by the Transferee in a form and of such substance as is acceptable to the Council containing provisions under which the Transferee agrees to comply with all the outstanding obligations of the Developer under this agreement.
 - (ii) Any default under any provisions of this agreement has been remedied or waived by the Council, on such conditions as the Council may determine, and
 - (iii) The Developer and the transferee pay the Council's reasonable costs in relation to the assignment.

The Council otherwise consents to the transfer, assignment or novation.

13. Approvals and consents

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. A party is not obligated to give its reasons for giving or withholding consent or for giving consent subject to conditions.

14. No fetter

14.1 Consent Authority

The parties acknowledge that Council is a consent authority with statutory rights and obligations pursuant to the terms of the Planning Legislation.

14.2 Discretion

This agreement is not intended to operate to fetter, in any manner, the exercise of any statutory power or discretion of the Council, including, but not limited to, any statutory power or

discretion of the Council relating to any other application for Development Consent of the Land or the power of Council to make any law (all referred to in this agreement as a **(Discretion)**).

14.3 *No fetter*

No provision of this agreement is intended to, or does, constitute any fetter on the exercise of any Discretion. If, contrary to the operation of this clause, any provision of this agreement is held by a court of competent jurisdiction to constitute a fetter on any Discretion, the parties agree:

- (a) They will take all practical steps, including the execution of any further documents, to ensure the objective of this clause is substantially satisfied.
- (b) In the event that (a) cannot be achieved without giving rise to a fetter on the exercises of a Discretion, the relevant provision is to be severed and the remainder of this agreement has full force and effect, and
- (c) To Endeavour to satisfy the common objectives of the parties in relation to the provision of this agreement which is to be held to be a fetter on the extent that is possible having regard to the relevant court judgment.

Where the law permits Council to contract out of a provision of that Law or gives Council power to exercise a Discretion, then if Council has in this agreement contracted out of a provision or exercised a Discretion under this agreement, then to the extent of this agreement is not to be taken to be inconsistent with the Law.

14.4 *Planning Certificates*

The Developer acknowledges that Council may, at its discretion, include advice on any planning certificate issued under section 10.7 of the Act that this agreement affects the Land.

15. Notices

15.1 *Notices*

Any notice given under or in connection with this agreement (**Notice**):

- (a) must be in writing and signed by a person duly authorised by the sender;
- (b) must be addressed as follows and delivered to the intended recipient by hand, by prepaid post or by email at the address below, or at the address last notified by the intended recipient to the sender after the date of this agreement.
 - (i) to Wingecarribee Shire Council
Civic Centre,
68 Elizabeth Street,
MOSS VALE NSW 2577
Email: mail@wsc.gov.au
Attention: Manager, Land Use Planning
 - (ii) to Maria Josephine
Loader, Elizabeth
Anne Dolbel and
Philippa Therese
Dolbel as Executors
of the Estate of
Thomas Dolbel
William Beresford

Desmond Gawthorne
Kathleen Gawthorne

C/- Boyce Law DR
3/194 Bong Bong Street
BOWRAL NSW 2576
Email: philip.boyce@boycelawdr.com.au

- (c) is taken to be given or made:
 - (i) in the case of hand delivery, when delivered;
 - (ii) in the case of delivery by post, 7 Business Days after the date of posting (if posted to an address in the same country); and
- (d) If under clause (c) a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it is taken to have been given or made at the start of business on the next Business Day in that place.

15.2 Notices sent by email

- (a) A party may serve a Notice by email if the Notice:
 - (i) includes a signature block specifying:
 - (A) the name of the person sending the Notice; and
 - (B) the sender's position within the relevant party;
 - (ii) states in the body of the message or the subject field that it is sent as a Notice under this agreement;
 - (iii) contains an express statement that the person sending the Notice has the authority to serve a Notice under this agreement;
 - (iv) is sent to the email address specified in clause 15.1 or the email address last notified by the intended recipient to the sender:
- (b) The recipient of a Notice served under this clause 15.2 must:
 - (i) promptly acknowledge receipt of the Notice; and
 - (ii) keep an electronic copy of the Notice.
- (c) Failure to comply with clause 15.2 does not invalidate service of a Notice under this clause.

15.3 Receipt of Notices sent by email

- (a) A Notice sent under clause 15.2 is taken to be given or made:
 - (i) when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above;
 - (ii) when the Notice enters an information system controlled by the recipient; or
 - (iii) when the Notice is first opened or ready by the recipient,

Whichever occurs first.

- (b) If under clause 15.3a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it will be taken to have been given or made at the start of business on the next Business Day in that place.

16. Contamination

16.1 Definitions

For the purpose of this clause 16:

Contamination means any material, gas, substance, liquid, chemical or biological mineral or other physical matter which would, if present on the Land:

- (a) result in an Authority issuing a notice, direction or order under an Environmental Law; or
- (b) which would constitute a violation of contribution of contravention of any Environmental Law.

Contaminated means subject to Contamination.

Environmental Law means all planning, environmental or pollution laws and any regulations, orders, directions, ordinances or requirements, permissions, permits, licences issued under those laws or instruments.

16.2 Warranties and Indemnities

The Developer:

- (a) warrants that as far as it is aware, and other than as disclosed to Council, the land to be dedicated to Council under this agreement is not Contaminated; and
- (b) indemnifies and must keep indemnified Council against all liability for and associated with all Contamination present in, on and under the land to be dedicated to Council under this agreement including full responsibility for compliance with any liability in respect of such Contamination under relevant legislation and the requirements of any relevant Authority.

16.3 Remediation

- (a) If Council becomes aware or reasonably suspects that any part of the land to be dedicated to Council under this agreement was Contaminated before the date of this agreement, Council may as soon as practicable notify the Developer in writing to that effect.
- (b) As soon as practicable after receipt of the notice pursuant to paragraph (a) the Developer will at its cost (with the assistance of qualified experts):
 - (i) carry out all reasonable investigations (including investigations which Council reasonably directs in writing) to enable the parties to be informed of the full nature and extent of the Contamination in, on, under the surface of, and leaving from the relevant part of the land to be dedicated to Council under this agreement (**Investigation Reports**); and
 - (ii) provide copies of all Investigation Reports to Council.
- (c) As soon as practicable after receipt by Council of the Investigation Reports the parties must meet to discuss in good faith the method by which the relevant part of the land to be dedicated to Council under this agreement might be dealt with so that it is no longer Contaminated.
- (d) Following the discussions pursuant to paragraph (c) the Developer must at its own cost undertake all reasonable measures which the Developer (acting reasonably) determines (and as Council acting reasonably approves in writing) as necessary to ensure that the relevant part of the land to be dedicated to Council under this agreement is no longer Contaminated.

17. Defect Liability

17.1 Defect Notice

- (a) Where any part of the Works has been completed but those Works contain a material defect which:
 - (i) adversely affects the ordinary use and/or enjoyment of the relevant Works; or
 - (ii) will require maintenance or rectification works to be performed on them at some time in the future as a result of the existence of the defect;

(Defect) Council may issue a defects notice (**Defects Notice**) concerning those Works but only within the Defects Liability Period.
- (b) A Defects Notice must contain the following information:
 - (i) the nature and extent of the Defect;
 - (ii) the work Council requires the Developer to carry out in order to rectify the Defect; and
 - (iii) the time within which the Defect must be rectified (which must be a reasonable time and not less than ten (10) business days).

17.2 Developer to Rectify Defect

- (a) The Developer must rectify the Defects contained within a Defects Notice as soon as practicable after receipt of the Defects Notice and within the timeframe stipulated in the Defects Notice.
- (b) If the Developer considers that a Defect the subject of a Defects Notice is rectified, it must serve written notice on Council identifying the Defect that has been rectified and which specifies the date on which the Developer believes the relevant Defect was rectified.
- (c) Within twenty (20) business days of Council receiving the notice in paragraph (b), Council may inspect the Defect(s) the subject of the Defects Notice, and must provide notice in writing to the Developer that the Defect(s) set out in the Defects Notice:
 - (i) has been rectified; or
 - (ii) has not been rectified, in which case the notice must also detail:
 - A. those aspects of the Defect(s) which has not been rectified; and
 - B. the work Council requires the Developer to carry out in order to rectify the deficiencies in relation to that Defect(s).
- (d) If the Developer receives notice in accordance with paragraph (c)(ii), the Developer must rectify the Defect(s) in accordance with that notice.
- (e) If Council receives a notice from the Developer in accordance with paragraph (b) and does not provide the Developer with a notice in accordance with paragraph (c), the Defects set out in the Defects Notice will be deemed to have been rectified.

17.3 Right of Council to Step-In

Council, at its absolute discretion, may enter upon the Land for the purpose of satisfying the Defects Notice where the Developer has failed to comply with a Defects Notice but only after giving the Developer five (5) business days written notice of its intention to do so.

17.4 Consequence of Step-In

If Council elects to exercise the step-in rights granted to it under clause 17.3 then:

- (a) Council may:
 - (i) enter upon any part of the Land that it requires access to in order to satisfy the obligations of the Developer in accordance with the Defects Notice; and
 - (ii) rectify the relevant Defects in accordance with the Defects Notice; and
- (b) the Developer must not impede or interfere with Council in undertaking that work.

17.5 Cost of Council

Where Council exercises its step-in rights, the Developer will be liable for the costs incurred by the Council in rectifying the Defects, where Council may call upon the Security provided by the Developer pursuant to clause 11.3 in respect of Defects and recover as a debt due in a court of competent jurisdiction any difference between the amount of that Security and the costs incurred by the Council in rectifying the Defects.

18. Termination

18.1 Termination

This agreement terminates in the following events:

- (a) The parties agree in writing to terminate the operation of this agreement at any time.
- (b) Council serves notice on the Developer terminating this agreement where the Developer has failed to comply with a Default Notice issued in accordance with clause 11.1.
- (c) The Development Consent lapses.

18.2 Consequence of Termination

Upon termination of this agreement:

- (a) all future rights and obligations of the parties are discharged; and
- (b) all pre-existing rights and obligations of the parties continue to subsist.

18.3 Determination

This agreement will determine upon the Developer satisfying all of the obligations imposed on it in full.

19. General

19.1 Relationship between parties

- (a) Nothing in this agreement:
 - (i) constitutes a partnership between the parties; or
 - (ii) except as expressly provided, makes a party an agent of another party for any purpose.
- (b) A party cannot in any way or for any purpose;
 - (i) bind another party; or
 - (ii) contract in the name of another party.
- (c) If a party must fulfil an obligation and that party is dependent on another party, then that other party must do each thing reasonably within its power to assist the other in the performance of that obligation.

19.2 Time for doing acts

- (a) If the time for doing any act or thing required to be done or a notice period specified in this agreement expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.
- (b) If any act or thing required to be done is done after 5.00 pm on the specified day, it is taken to have been done on the following Business Day.

19.3 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 agreement.

19.4 Joint and individual liability and benefits

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

19.5 Variations and amendments

A provision of this agreement can only be varied by a later written document executed by or on behalf of all parties and in accordance with the provisions of the Act.

19.6 Counterparts

This agreement may be executed in any number of counterparts. All counterparts taken together constitute one instrument.

19.7 Legal expenses and stamp duty

- (a) The Developer must pay the Council's reasonable legal costs and disbursements in connection with the negotiation, preparation, execution, carrying into effect, enforcement, registration and release and discharge of this agreement. Including the reasonable costs of obtaining any legal advice in connection with this agreement, no later than 10 Business Days after receiving a demand from the Council to pay such costs.
- (b) The Developer agree to pay or reimburse the costs and expenses incurred by Council in connection with the advertising and exhibition of this agreement in accordance with the Act.
- (c) The Developer agree to pay council any administrative fees as required by Council, acting reasonably, in connection with the administration of this agreement.

19.8 Entire agreement

The contents of this agreement constitute the entire agreement between the parties and supersede any prior negotiations, representations, understandings or arrangement made between the parties regarding the subject matter of this agreement, whether orally or in writing.

19.9 Representations and warranties

The parties represent and warrant that they have the power and authority 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.

19.10 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.

19.11 Invalidity

- (a) A word or provision must be read down if:
 - (i) this agreement is void, voidable, or unenforceable if it is not read down
 - (ii) this agreement will not be void, voidable or unenforceable if it is read down: and
 - (iii) the provision is capable of being read down.
- (b) A word or provision must be severed if:
 - (i) despite the operation of clause (1), the provision is void, voidable or unenforceable if it is not severed; and
 - (ii) this agreement will be void, voidable or unenforceable if it is not severed.
- (c) The remainder of this agreement has full effect even if clause C.19.11(b) applies.

19.12 Waiver

- (a) A right or remedy created by this agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.
- (b) 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.

19.13 GST

- (a) Words and expressions which are not defined in this agreement 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 agreement are exclusive of GST.

19.14 Governing law and jurisdiction

- (a) The laws applicable in New South Wales govern this agreement.
- (b) The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

20. Explanatory Note

- (a) Appendix 2 contains the Explanatory Note relating to this agreement required by clause 205 of the Regulations.

- (b) Pursuant to clause 205 (5) of the Regulations, the Parties agree that the Explanatory Note is not to be used to assist in construing this agreement.

Schedule 1 – Development Contributions

Item	Development Contribution	Description	Contribution Value	Timing
1	Monetary Contribution	The amount of the contribution will be calculated at the time that it is required to be paid and will increase by \$12,727 for each additional Final Lot in the Development in excess of fifty-five (55) Final Lots in the Development.	As at the date of this document, the Contribution Value is \$700,000.00 (based on an anticipated development yield of fifty-five (55) Final Lots).	Prior to the issue of the first Subdivision Certificate that enables a subdivision for Final Lots within the Development.
2	Dedication Land	One (1) hectare along the Yarrowa Road frontage to the Land to be rezoned RE1 Public Recreation as identified in Appendix 1 .	\$300,000.00	Simultaneously with the registration of the first subdivision plan for the Development
3	Works	Provision and maintenance of trees, vegetation and rural fencing within the proposed land referenced at Item 2 in Schedule 1 consistent with adjoining rural fencing and all relevant provisions of Council's street tree master plan and Development Control Plan in force at the time of determination and with all relevant future Development Approval conditions of consent,	\$150,000.00	Prior to the issue of the first Subdivision Certificate for the Development.

Appendix 1 – Dedication Plan

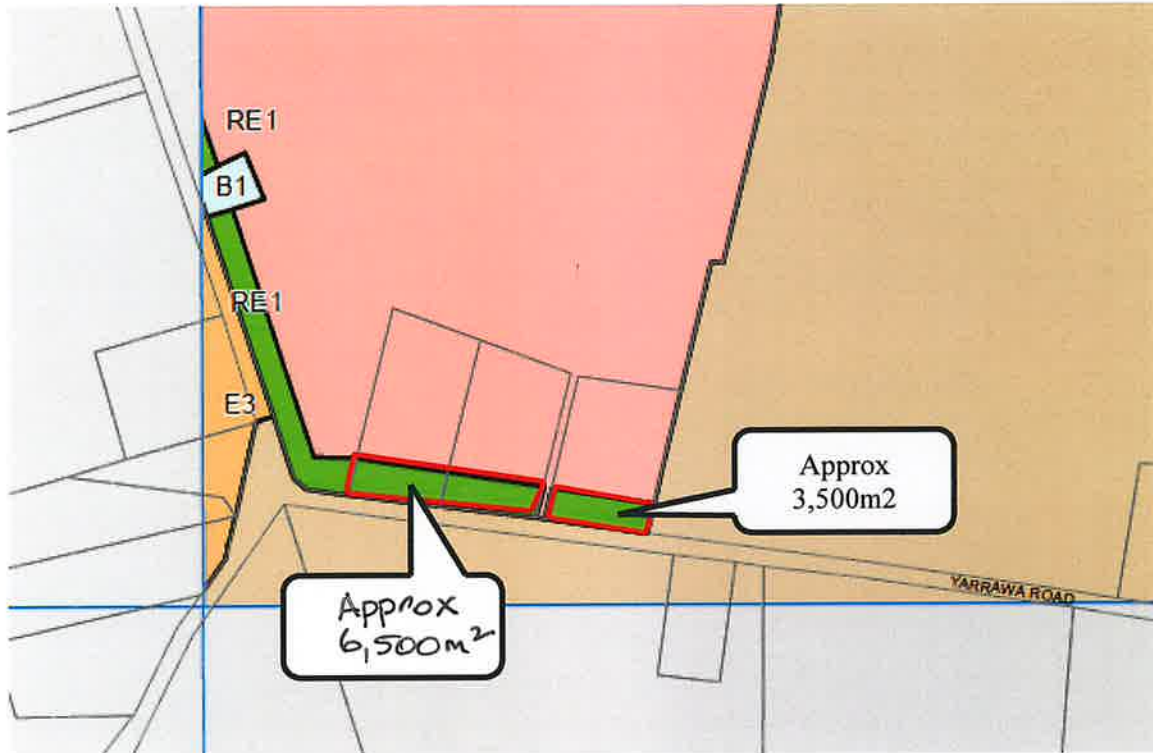


Figure 1- Extract from proposed rezoning map
(Measurements are approximate)

The area of land to be dedicated as described at 6.2(a) of this Agreement shall be shared equally between the three lots subject to this Agreement and shall constitute the whole of the land to be rezoned to RE1 Public Recreation to an estimated area of 1 hectare.

Appendix 2

Environmental Planning and Assessment Regulation 2021

(Clause 205)

EXPLANATORY NOTE (clause 205 of Regulations)

Voluntary Planning Agreement

Under section 7.4 of the *Environmental Planning and Assessment Act, 1979*

Parties

Wingecarribee Shire Council (ABN 49 546 344 354) of Civic Centre, 68 Elizabeth Street, Moss Vale in the State of New South Wales (**Council**)

and

Maria Josephine Loader, Elizabeth Anne Dolbel and Philippa Therese

Dolbel as Executors of the Estate of **Thomas William Dolbel** of 121 Yarrowa Road, Moss Vale NSW 2577

William Richard Beresford of 131 Yarrowa Road, Moss Vale NSW 2577

Desmond John Gawthorne of 153 Yarrowa Road, Moss Vale NSW 2577

Kathleen Margaret Florence Gawthorne of 153 Yarrowa Road, Moss Vale NSW 2577

(Developers)

Description of the Land to which the Planning Agreement Applies

Lots 4 & 5 in DP 706194 and Lot 2 in DP 610352 and known as 121, 131 and 153 Yarrowa Road, Moss Vale respectively

Description of Proposed Development

Development means the future development and use of the Land substantially as contemplated by the planning proposal (Department of Planning and Environment reference number PP2022-4351 including but not limited to a residential subdivision.

Summary of Objectives, Nature and Effect of the Planning Agreement

Objectives of the Agreement

The objective of the Agreement is to require the provision of a Monetary Contribution by the Developer to the Council for the public purpose of funding the construction of, or improvements to, local infrastructure in the vicinity of the Land in connection with the Development of the Land.

Nature of the Planning Agreement

The Agreement is a planning agreement under section 7.4 of the *Environmental Planning and Assessment Act 1979 (Act)*. It is an agreement between the Council and the Developer. The Agreement is a voluntary agreement under which provisions are made by the Developers for the recoupment of costs and Council providing the construction of, or improvements to local infrastructure in the vicinity of the Land, dedication of land for Public Recreation and contribution to embellishment of that dedicated Public Recreation Land.

Effect of the Agreement

The Agreement

- Relates to the Instrument Change and Development of the Land
- excludes the application of section 7.11 and 7.12 of the Act to the Development
- does not exclude the application of section 7.24 of the Act to the Development
- requires the Developer to pay Monetary Contributions to Council
- requires the Developer to dedicate land for Public Recreation at no cost to Council
- requires a contribution by the Developer to embellish the dedicated Public Recreation Land
- commences once executed by all parties and once development consent has been granted for the Development.
- Is to be registered on the title to the Land
- Provides dispute resolution methods for a dispute under the Agreement, being mediation and arbitration, and
- Requires the Developer to provide Council with the following bank guarantees to ensure completion of the Development Contributions comprising Works:
 - A bank guarantee for an amount equivalent to one hundred per cent (100%) of the Contribution Value for the Works.
 - A bank guarantee for an amount equivalent to ten per cent (10%) of the Contribution Value for the Works prior to the completion of the Works to satisfy any defects in the Works during the relevant Defect Liability Period which will be twelve (12) months commencing from the date the Works are completed.
- Provides that the Agreement is governed by the law of New South Wales.

Assessment of the Merits of the Agreement

Public Purposes Served by the Agreement

The Agreement:

- Promotes and co-ordinates the orderly and economic use and Development of the Land to which it applies,

- Provides increased opportunity for public involvement and participation in environmental planning and assessment of the Development,
- Requires monetary contributions for the public purpose of providing Council with funding necessary for the construction of, or improvements to, local infrastructure in the vicinity of the Land.
- Provides for dedication of part of the Land the subject of any development for public
- Provides for part of the cost of embellishing dedicated public recreation land to be contributed to by the Developer in kind.

How the Agreement Promotes the Public Interest

The Agreement promotes the public interest by achieving the objectives of the Act by promoting;

- the social and economic welfare of the community by requiring monetary contributions to be paid to the Council to be used towards local infrastructure as determined by the General Manager of Council from time to time;
- the orderly and economic use and development of land and good design and amenity of the built environment by ensuring improved infrastructure;
- increased opportunity for community participation in environmental planning assessment through public notification of this agreement and opportunity for the public to make submissions in response to it.

For Planning Authorities:

Development Corporations - How the Agreement Promotes its Statutory Responsibilities

Not applicable

Other Public Authorities - How the Agreement Promotes the Objects of the Act under which it is Constituted

Not applicable

Councils - How the Agreement Promotes the Council's Charter

The Agreement promotes the elements of the Council's Charter by:

- Keeping the local and wider community informed about its activities;
- Provides value for residents and ratepayers by requiring the developer to contribute to community infrastructure.

Whether the Agreement specifies that certain requirements be complied with before issuing a Construction Certificate, Subdivision Certificate or Occupation Certificate

Yes

The Agreement specifies that the monetary contribution is required to be paid and dedication of land to be made prior to the issue of a subdivision certificate given under the Act.

Executed as an agreement

Executed by Wingecarribee Shire Council)
)
under seal in accordance with a)
)
resolution of the Council on)



[Handwritten signature]
.....
Signature of

[Handwritten signature]
.....
Signature of

MICHAEL MCCABE
.....
Print name

Lesi Miscombe
.....
Print name

Executed by MARIA JOSEPHINE LOADER)
ELIZABETH ANNE DOLBEL and)
PHILIPPA THERESE DOLBEL)
as Executors of the Estate of)
THOMAS WILLIAM DOLBEL)
)
in the presence of:)

[Handwritten signatures: Maria Josephine Loader, Elizabeth Anne Dolbel, Philippa Dolbel]
.....

[Handwritten signature: Marlene Denise Smalley]
.....
MARLENE DENISE SMALLEY
A Justice of the Peace for and in
the State of NSW
Registration Number 199732

Executed by WILLIAM RICHARD)
BERESFORD)
)
in the presence of:)

[Handwritten signature: William Richard Beresford]
.....

[Handwritten signature: Marlene Denise Smalley]
.....
MARLENE DENISE SMALLEY
A Justice of the Peace for and in
the State of NSW
Registration Number 199732

**Executed by DESMOND JOHN
GAWTHORNE**

)
)
)
)

in the presence of:

MARLENE DENISE SMALLEY
A Justice of the Peace for and in
the State of NSW
Registration Number 199732

**Executed by KATHLEEN MARGARET
FLORENCE GAWTHORNE**

)
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in the presence of:

MARLENE DENISE SMALLEY
A Justice of the Peace for and in
the State of NSW
Registration Number 199732