

ITEM 9

**DRAFT PLANNING AGREEMENT - HANLYN PTY LTD - 344 FARMBOROUGH ROAD, FARMBOROUGH HEIGHTS**

A draft Planning Agreement has been lodged in association with a Development Application 2020/1245 which proposes 30 rural-residential community title lots at 344 Farmborough Road, Farmborough Heights. The proponent, Hanlyn Pty Ltd, has requested that Council enter into a Planning Agreement for the dedication of 7.7363 hectares of environmentally sensitive land with a monetary contribution of \$476,025 toward the ongoing maintenance cost.

The Draft Planning Agreement and Explanatory Note are provided as attachments to this report. It is recommended that Council endorse these documents and exhibit for community feedback.

## RECOMMENDATION

- 1 The Draft Planning Agreement and Explanatory Note between Wollongong City Council and Hanlyn Pty Ltd (Attachments 2 and 3) for 344 Farmborough Road, Farmborough Heights, be exhibited for a period of 42 days (including an extension of the required 28 days due to the Christmas – New Year holiday period).
- 2 The Wollongong Local Planning Panel be advised that Hanlyn Pty Ltd and Council are proposing to enter into a Planning Agreement for the dedication of land and a monetary contribution, and should it determine that DA-2020/1245 be approved, appropriate conditions of consent be included requiring the Planning Agreement to be entered into and the terms of the Agreement to be satisfied.
- 3 The General Manager be delegated authority to determine, finalise and execute the Planning Agreement, including making minor amendments, after consideration of any issues raised in the public exhibition.

## REPORT AUTHORISATIONS

Report of: Chris Stewart, Manager City Strategy

Authorised by: Linda Davis, Director Planning + Environment - Future City + Neighbourhoods

## ATTACHMENTS

- 1 Location and Zoning Map
- 2 Draft Planning Agreement
- 3 Explanatory Note

## BACKGROUND

### Planning Proposal

In 2015, a draft Planning Proposal request was lodged to rezone 344 Farmborough Road, Farmborough Heights (Lot 101 DP 825516), from RU2 Rural Landscape to E4 Environmental Living and E2 Environmental Conservation (Attachment 1). The site is located in the area covered by the Farmborough Heights to Mount Kembla Strategic Management Plan (2013) where any draft Planning Proposal for residential development needs to demonstrate improved conservation outcomes.

The areas proposed to be zoned E2 Environmental Conservation are environmentally significant and include moist forest and grassy woodland. These areas are also mapped as natural resource sensitivity – biodiversity land.

The E2 zoned land was proposed to be dedicated to Council as public reserve together with a Vegetation Management Plan (VMP) and funding. In February 2016, a VMP was prepared for the site which indicated an estimated in-perpetuity maintenance cost of \$370,000.

On 27 June 2016, Council resolved to prepare a draft Planning Proposal and that -

- 3 *Council support the proposed dedication (with funding) of the area proposed to be rezoned E2 Environmental Conservation (7.8 hectares) to re-vegetate and protect in perpetuity the identified environmental values of the site.*

Following exhibition of the Planning Proposal, Council resolved on 13 March 2017 to finalise the Planning Proposal and that -

- 2 *Council support the proposed dedication (with funding) of the area proposed to be rezoned E2 Environmental Conservation (7.8 hectares) to re-vegetate and protect in perpetuity the identified environmental values of the site.*
- 3 *The legal agreement for the transfer of E2 zoned land with funding to Council be finalised prior to development consent for subdivision.*

On 19 May 2017, Wollongong LEP 2009 (Amendment No 34) was notified which rezoned the site to E4 Environmental Living and E2 Environmental Conservation. The site now contains four separate areas of E2 zoned land.

## **Development Applications**

### **DA-2018/1035 – Withdrawn by Applicant**

In 2018, DA-2018/1035 was lodged for “*Subdivision - demolition of existing dwelling, tree removals, construction of a 30 lot Community title rural residential subdivision and Neighbourhood lot for the access road and a four (4) lot Torrens title subdivision for public reserves to be dedicated to Council and utility infrastructure*”.

This application proposed the dedication of the four E2 zoned areas to Council as public reserve lots. During the assessment concern was raised regarding fragmentation of the E2 areas, in particular the two areas to the south east, and ensuring continuation of the areas and maintenance access.

During negotiations the in-perpetuity maintenance costs were reviewed and updated to account for all of the E2 land, updated unit rates and updated discount rate using the Office of Environment and Heritage (OEH) Total Fund Deposit worksheet which calculates the Present Value of establishing and maintaining the land. As a result, the monetary contribution increased from \$370,000 to \$476,025 and this was agreed to by the applicant.

The applicant then submitted a Letter of Offer to enter into a Planning Agreement and a Draft Planning Agreement and Explanatory Note were prepared on this basis.

On 21 November 2018, the DA was withdrawn by the applicant and the Draft Planning Agreement was put on hold while the applicant prepared a revised development application for lodgement.

### **DA-2020/1245 – Under Assessment**

On 5 November 2020, DA-2020/1245 was lodged for the “*Demolition of existing dwelling house, tree removal, four (4) lot Torrens Title subdivision creating three (3) public reserves and a residue lot, Community Title subdivision of the residue lot to create 30 rural-residential lots and one (1) community lot*”. The DA was accompanied by a request to enter into a Planning Agreement, including the Draft Planning Agreement and Explanatory Note previously prepared.

The development application includes an associated draft Planning Agreement and in accordance with Sections 2.17 to 2.20 of the *Environmental Planning and Assessment Act 1979* (Act), the Wollongong Local Planning Panel (WLPP) is the consent authority. If Council endorses this report and provide ‘in principle’ support for a Planning Agreement, it will give the WLPP certainty in terms of consent requirements should the Development Application be approved.

The applicant has addressed previous raised fragmentation concerns by proposing an additional land dedication which will provide a linkage between the two areas to the south east of the site. This has resulted in a small increase to the land area proposed to be dedicated to council.

## PROPOSAL

A Planning Agreement is a voluntary arrangement between a developer and Council to be used for or applied towards the provision of public infrastructure or another public purpose.

On 13 May 2019, the applicant provided a Letter of Offer to enter into a Planning Agreement under Section 7.4 of the Act under which, the developer has proposed to dedicate 7.7363 hectares of environmentally sensitive land and provide a monetary contribution of \$476,025 toward the ongoing cost of maintaining the land.

On 5 November 2020, the applicant submitted a development application (DA-2020/1245) including a draft planning agreement. The draft Planning Agreement process is being progressed separately but concurrently to the DA assessment. The draft Planning Agreement has been reviewed and updated to reflect the current development application. The next step in the process is for Council to endorse the draft Planning Agreement and for the documents to be exhibited for community comment.

The offer is considered reasonable as it will secure the environmentally sensitive land in Council's ownership and provide ongoing funding for Council to maintain the land. It is considered that the Planning Agreement will result in a positive outcome for Council and the community.

## CONSULTATION AND COMMUNICATION

The terms of the draft Planning Agreement have been reviewed by Council's Natural Areas Team and Legal Counsel. If Council endorses the recommendations of this report the draft Planning Agreement (Attachment 2) and Explanatory Note (Attachment 3) will be exhibited for community input for 42 days, which is an extended period from the required 28 days due to the Christmas-New Year holiday period.

## PLANNING AND POLICY IMPACT

The draft Planning Agreement has been negotiated and prepared in accordance with Council's Planning Agreements Policy (2018), Sections 7.4 to 7.10 of the Act and Clauses 25B – 25E of the *Environmental Planning and Assessment Regulation 2000*.

This report contributes to the delivery of Our Wollongong 2028 Goal 1 – 'We value and protect our natural environment. It also delivers on core business activities as detailed in the Land Use Planning Service Plan 2020-21.

## RISK MANAGEMENT

The proposed Planning Agreement provides a formal instrument to manage and mitigate any risks associated with the developer dedicating the land to council and ensures a funding source for the ongoing maintenance. The land dedication and monetary contribution will be required to be provided prior to the issue of a subdivision certificate for the development. The Planning Agreement also provides the appropriate legal mechanism for the developer to fulfill the outstanding requirements from the Planning Proposal resolutions.

## FINANCIAL IMPLICATIONS

The Planning Agreement will ensure that an upfront monetary contribution is paid to Council prior to the issue of a Subdivision Certificate. The funds collected will be held in a restricted asset account and invested in accordance with Council's Investment Policy. The funds will be allocated toward the maintenance costs as part of the Annual Budget preparation.

## CONCLUSION

Hanlyn Pty Ltd has requested that Council enter into a Planning Agreement to facilitate the dedication of environmentally sensitive land to Council together with a monetary contribution toward the ongoing maintenance costs. It is considered that this will provide positive outcomes to the community.

It is recommended that Council endorse the Draft Planning Agreement and Explanatory Note for exhibition to enable community comments. If there are no major issues raised during the exhibition

period, it is proposed that delegation be issued to the General Manager to determine, finalise and execute the Planning Agreement, including making minor changes.





# WOLLONGONG LOCAL ENVIRONMENTAL PLAN 2009

Location Plan  
344 Farmborough Road  
Farmborough Heights

## Zones

- E1 National Parks & Nature Reserves
- E2 Environmental Conservation
- E3 Environmental Management
- E4 Environmental Living
- IN2 Light Industrial
- R2 Low Density Residential
- RE1 Public Recreation
- RU1 Primary Production
- RU2 Rural Landscape
- RU4 Primary Production Small Lots
- SP2 Infrastructure
- Subject Site

Cadastral

☐ Cadastral 16.11.20 @ Wollongong City Council



N

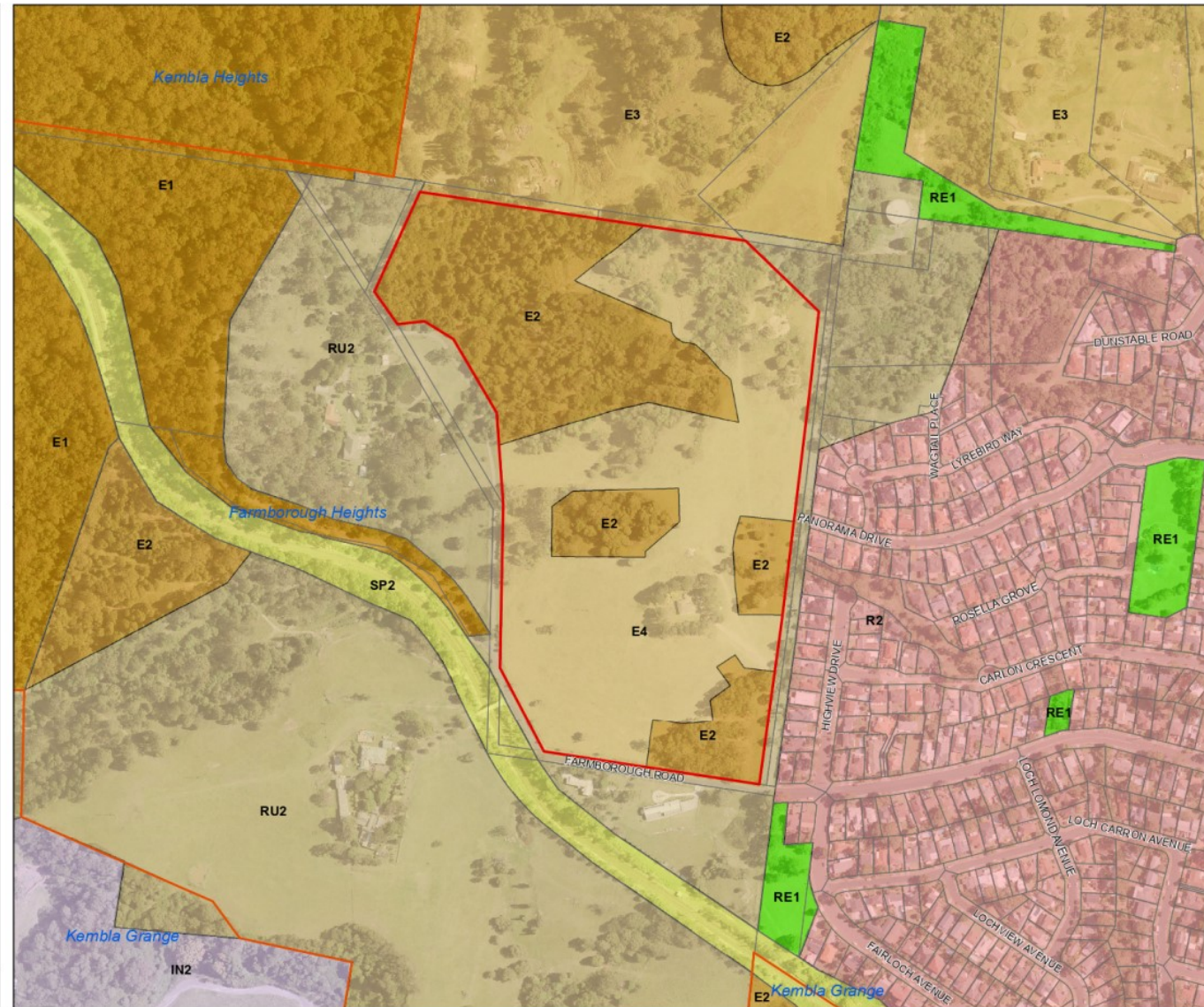


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Metres

Projection: GDA 1994  
MGA Zone 56

Scale 1:4000 @ A3

Map Identification number:  
344\_FarmboroughRd\_Zoning.mxd





## DRAFT PLANNING AGREEMENT

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# DRAFT PLANNING AGREEMENT

Wollongong City Council

and

Hanlyn Pty Ltd



WOLLONGONG CITY COUNCIL  
41 Burelli Street, Wollongong NSW 2500  
Locked Bag 8821, Wollongong DC NSW 2500  
Tel: 02 4227 7111  
Fax: 02 4227 7277  
Web: [www.wollongong.nsw.gov.au](http://www.wollongong.nsw.gov.au)  
ABN: 63 139 525 939 – GST Registered



## DRAFT PLANNING AGREEMENT

DATE [DATE]

PARTIES

**WOLLONGONG CITY COUNCIL (ABN 63 139 525 939)** of 41 Burelli Street, Wollongong in the State of New South Wales (**Council**)

**HANLYN PTY LTD (ABN 16 152 003 104)** of 70 Kenny Street, Wollongong in the State of New South Wales (**Developer**)

### BACKGROUND

- 1 The Developer is the registered proprietor of the Land.
- 2 The Developer has made a Development Application with Council.
- 3 The Developer has offered to provide the Contributions if the Development is undertaken.

### OPERATIVE PROVISIONS

#### 1 DEFINITIONS

The following definitions apply unless the context otherwise requires:

<b>Act</b>	means the <i>Environmental Planning and Assessment Act 1979</i> (NSW).
<b>Acquisition Act</b>	means the <i>Land Acquisition (Just Terms Compensation) Act 1991</i> (NSW).
<b>Assign</b>	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.
<b>Authority</b>	means (as appropriate) any: <ol style="list-style-type: none"><li>1 federal, state or local government;</li><li>2 department of any federal, state or local government;</li><li>3 any court or administrative tribunal; or</li><li>4 statutory corporation or regulatory body.</li></ol>
<b>Claim</b>	against any person any allegation, action, demand, cause of action, suit, proceeding, judgement, debt, damage, loss, cost, expense or liability howsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at law, in equity, under statute or otherwise.
<b>Complete, Completed, Completion</b>	means completed in accordance with the requirements of this document.
<b>Contributions</b>	means the dedication of the Designated Lands by the Developer and the making of the Monetary Contributions in accordance with this document.
<b>Council</b>	means Wollongong City Council.
<b>Designated Land</b>	means that part of the Land identified on the plan at <b>Schedule 2</b> to this document, and identified as "Proposed Public Reserve" on that plan.
<b>Developer</b>	means Hanlyn Pty Ltd.





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<b>Development</b>	means the subdivision of the Land into four torrens title lots, including three public reserves and one community title lot that will create 30 rural-residential community title lots, and associated works.
<b>Development Application</b>	has the same meaning as in the Act.
<b>Development Consent</b>	has the same meaning as in the Act.
<b>Encumbrance</b>	means an interest or power: <ul style="list-style-type: none"> <li>• reserved in or over an interest in any asset;</li> <li>• created or otherwise arising in or over any interest in any asset under any mortgage, charge (whether fixed or floating), pledge, lien, hypothecation, title retention, conditional sale agreement, hire or hire purchase agreement, option, restriction as to transfer, use or possession, easement, subordination to any right of any other person and any other encumbrance or security interest, trust or bill of sale; or</li> <li>• by way of security for the payment of a debt or other monetary obligation or the performance of any obligation.</li> </ul>
<b>EPA</b>	means the NSW Environment Protection Authority.
<b>Event of Default</b>	means the occurrence of either of the following: <ul style="list-style-type: none"> <li>(a) an Insolvency Event occurs in respect of the Developer; or</li> <li>(b) subject to the provisions of this document, a breach of clauses 5.1, 5.2, 6.1, 6.2 of this document where that breach has not been rectified within 14 days after notice in writing from Council to do so.</li> </ul>
<b>GST Law</b>	means <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Commonwealth) and any other Act or regulation relating to the imposition or administration of the goods and services tax.
<b>Insolvency Event</b>	means the happening of any of these events: <ul style="list-style-type: none"> <li>(a) a body corporate is an insolvent under administration (as defined in the Corporations Act 2001);</li> <li>(b) a body corporate has a controller (as defined in the Corporations Act 2001) appointed, is under administration or wound up or has a receiver appointed, and, in each case, the appointment is not revoked or discharged within 5 Business Days;</li> <li>(c) a body corporate is subject to any arrangement, assignment, moratorium or composition, protected from creditors under any statute or dissolved (in each case other than to carry out a reconstruction or amalgamation while solvent on terms approved by Council);</li> <li>(d) an application or order has been made (and, in the case of an application, it is not stayed, withdrawn or dismissed within 30 days), resolution passed, proposal put forward, or any other action taken, in each case in connection with that body corporate, which results in the appointment of a liquidator or provisional liquidator in respect of a body corporate;</li> <li>(e) as a result of the operation of section 459F(1) of the Corporations Act 2001 a body corporate is taken to have failed to comply with a statutory demand; or</li> <li>(f) a body corporate takes any step to obtain protection or is granted protection from its creditors, under any applicable legislation or an</li> </ul>





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administrator is appointed to a body corporate.

<b>Land</b>	means the whole of the land contained in Lot 101 DP 825516, known as 344 Farmborough Road, Farmborough Heights, as shown at <b>Appendix A</b> .
<b>Law</b>	means all legislation, regulations, by-laws, common law and other binding order made by any Authority.
<b>Monetary Contributions</b>	means the monetary contribution set out in <b>Schedule 3</b> .
<b>Planning Legislation</b>	means the Act, the <i>Local Government Act 1993</i> (NSW) and the <i>Roads Act 1993</i> (NSW).
<b>Residential Lot</b>	means a single lot created on the registration of a plan of subdivision as part of the Development intended to not be further subdivided and to be used for the purpose of the construction of one (1) or more residential dwellings.
<b>Subdivision Certificate</b>	means a subdivision certificate as defined in section 6.4(d) of the Act.

## 2 INTERPRETATIONS

The following rules of interpretation apply unless the context requires otherwise:

<b>clauses, annexures and schedules</b>	a clause, annexure or schedule is a reference to a clause in, or annexure or schedule to, this document.
<b>reference to statutes</b>	a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them.
<b>singular includes plural</b>	the singular includes the plural and vice versa.
<b>person</b>	the word 'person' includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association or any government agency.
<b>executors, administrators, successors</b>	a particular person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns.
<b>dollars</b>	Australian dollars, dollars, \$ or A\$ is a reference to the lawful currency of Australia.
<b>calculation of time</b>	if a period of time dates from a given day or the day of an act or event, it is to be calculated exclusive of that day.
<b>reference to a day</b>	a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later.
<b>reference to a group of persons</b>	a group of persons or things is a reference to any two or more of them jointly and to each of them individually.
<b>meaning not limited</b>	the words 'include', 'including', 'for example' or 'such as' are not used as, nor are they to be interpreted as, words of limitation, and, when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind.



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<b>next day</b>	if an act under this document to be done by a party on or by a given day is done after 4.30pm on that day, it is taken to be done on the next day.
<b>next Business Day</b>	if an event must occur on a stipulated day which is not a Business Day then the stipulated day will be taken to be the next Business Day.
<b>Business Day</b>	means any day that is not a Saturday, Sunday, gazetted public holiday or bank holiday in Sydney, and concludes at 5pm on that day.
<b>time of day</b>	time is a reference to Sydney time.
<b>headings</b>	headings (including those in brackets at the beginning of paragraphs) are for convenience only and do not affect the interpretation of this document.
<b>agreement</b>	a reference to any agreement, Agreement or instrument includes the same as varied, supplemented, novated or replaced from time to time.
<b>Gender</b>	a reference to one gender extends and applies to the other.

### 3 DEFINITIONS

#### 3.1 Planning Agreement

This document is a planning agreement:

- i Within the meaning set out in section 7.4 of the Act; and
- ii Governed by Subdivision 2 of Division 7.1 of Part 7 of the Act.

#### 3.2 Application

This document applies to both the Land and the Development.

#### 3.3 Operation of document

- i Subject to paragraph (ii), this document operates from the date it is executed by both parties.
- ii Clause 6 of this Agreement will only operate if and when Development Consent is granted to the Development.

### 4 APPLICATION OF SECTION 7.11, SECTION 7.12 AND SECTION 7.24

#### 4.1 Application

This document does not exclude the application of section 7.11, section 7.12 or section 7.24 of the Act to the Development.

#### 4.2 Consideration of Benefits

Section 7.11(6) of the Act does not apply to the Contributions that are to be carried out or provided pursuant to this document.

### 5 REGISTRATION OF THIS DOCUMENT

#### 5.1 Registration

This document must be registered on the title of the Land pursuant to section 7.6 of the Act.

#### 5.2 Obligations of the Developer

The Developer must:

- i do all things necessary to facilitate the registration of this document to occur within 30 days of the execution of this document, including but not limited to obtaining the consent of any mortgagee registered on the title of the Land; and



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- ii pay any reasonable costs incurred by Council in undertaking that registration; and
- iii provide Council with a copy of the relevant folio within 10 Business Days of registration of this document.

### 5.3 Removal from Title of the Land

- i Council will do all things necessary to allow the Developer to remove the registration of this document from the title of the Land, or any part of the Land, where the Developer has:
  - a provided all Monetary Contributions; and
  - b Dedicated the Designated Land.
- ii The Developer must pay any reasonable costs incurred by Council in undertaking that discharge.

## 6 PROVISION OF CONTRIBUTIONS

### 6.1 Designated Land

- i The Developer must dedicate the Designated Land to Council:
  - a free of any trusts, estates, interests, covenants and Encumbrances;
  - b as part of the subdivision of the Land; and
  - c at no cost to Council.
- ii The Developer must meet all costs associated with the dedication of the Designated Land in accordance with paragraph (i), including any costs incurred by Council in relation to that dedication.
- iii Council must do all things reasonably necessary to enable the Developer to comply with paragraph (i).

### 6.2 Monetary Contributions

- i The Developer must make the Monetary Contributions to Council in accordance with Schedule 3.
- ii Where Schedule 3 establishes the payment of the Monetary Contribution to Council, the Developer agrees to make that Monetary Contribution prior to seeking or procuring the grant of any Subdivision Certificate in relation to the Development.

### 6.3 Indexation

- i The amount of the Monetary Contribution will be indexed in accordance with the following formula:

$$A = B \times (C / D)$$

where:

- A** = the indexed amount;
- B** = the relevant amount as set out in Schedule 3 of this agreement;
- C** = the Index at the time of payment; and
- D** = the Index at the date the Planning Agreement is executed.

If **A** is less than **B** then the amount of the relevant amount will not change.

- ii For the purposes of paragraph (i):
  - a the Monetary Contribution is indexed as at the date it is paid; and
  - b the Index means the *Consumer Price Index (All Groups) for Sydney* or such other index which replaces it from time to time.



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### 7 WARRANTIES AND INDEMNITIES

#### 7.1 Warranties

The Developer warrants to Council that:

- i it is able to fully comply with its obligations under this document;
- ii it has full capacity to enter into this document; and
- iii there is no legal impediment to it entering into this document, or performing the obligations imposed under it.

#### 7.2 Indemnity

The Developer indemnifies Council in respect of any Claim that may arise as a result of the conduct of the Works, but only to the extent that any such Claim does not arise as a result of the negligent acts or omissions of Council.

### 8 CONTAMINATION

#### 8.1 Definitions

For the purpose of this clause:

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

- result in an Authority issuing a notice, direction or order under an Environmental Law; or
- which would constitute a violation 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.

#### 8.2 Warranty and Indemnity

The Developer warrants that:

- i as far as it is aware, and other than as disclosed in writing to Council prior to the formation of this document, the Designated Land is not Contaminated; and
- ii in relation to any notices or orders issued pursuant to the Contaminated Land Management Act 1997, and the requirements of the EPA and any other relevant Authority, the Developer indemnifies and must keep indemnified Council against all liability for and associated with all Contamination present in, on or under the Designated Land as at the date of dedication or transfer of the Designated Land to Council in accordance with this document.

#### 8.3 Survival of the clause

This clause 8 shall survive the determination or termination of this document.

### 9 DETERMINATION OF THIS DOCUMENT

#### 9.1 Determination

This document will determine upon the Developer satisfying all of its obligations under the document.

#### 9.2 Effect of Determination

Upon the determination of this document Council will do all things necessary to allow the Developer to remove this document from the title of the whole or any part of the Land as quickly as possible.



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### 10 SECURITY

#### 10.1 Prohibition

Neither party may Assign their rights under this document without the prior written consent of the other party.

#### 10.2 Assignment of Land

The Developer must not Assign its interest in the Land, other than a single residential lot approved pursuant to a Development Consent and created by the registration of a plan of subdivision, unless:

- i Council consents to the Assignment; and
- ii the proposed assignee enters into an agreement to the satisfaction of Council under which the assignee agrees to be bound by the terms of this document with respect to the relevant part of the Land being Assigned.

#### 10.3 Compulsory Acquisition of the Designated Land

- i The Developer consents to the compulsory acquisition of the Designated Land:
  - a in accordance with the Acquisition Act; and
  - b on the terms set out in this clause 10.
- ii Council may only acquire the Designated Land compulsorily in accordance with the Acquisition Act if the Developer has committed an Event of Default with respect to the dedication of that land under this document.
- iii If Council acquires the Designated Land compulsorily in accordance with the Acquisition Act:
  - a the Developer agrees that the compensation payable to it on account of that acquisition under the Acquisition Act is \$1.00; and
  - b Council must complete that acquisition within twelve (12) months of the relevant Event of Default.
- iv The parties agree that the provisions of this clause 10 are an agreement with respect to the compulsory acquisition of the Designated Land for the purpose of section 30 of the Acquisition Act.

### 11 DISPUTE RESOLUTION

#### 11.1 Notice of dispute

- i If a dispute between the parties arises in connection with this document or its subject matter (**Dispute**), then either party (**First Party**) must give to the other (**Second Party**) a notice which:
  - a is in writing;
  - b adequately identifies and provides details of the Dispute;
  - c stipulates what the First Party believes will resolve the Dispute; and
  - d designates its representative (**Representative**) with the necessary authority to negotiate and resolve the Dispute.
- ii The Second Party must, within five (5) Business Days of service of the notice of dispute, provide a notice to the First Party designating as its representative a person with the necessary authority to negotiate and settle the Dispute (the representatives designated by the parties being together, the **Representatives**).

#### 11.2 Conduct pending resolution

The parties must continue to perform their respective obligations under this document if there is a Dispute but will not be required to complete the matter the subject of the Dispute, unless the appropriate party indemnifies the other parties against costs, damages and all losses





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suffered in completing the disputed matter if the Dispute is not resolved in favour of the indemnifying party.

### 11.3 Further steps required before proceedings

Subject to clause 11.7 and except as otherwise expressly provided in this document, any Dispute must, as a condition precedent to the commencement of litigation or mediation under clause 11.5, first be referred to the Representatives. The Representatives must endeavour to resolve the dispute within five (5) Business Days of the date a notice under clause 11.1 is served.

### 11.4 Disputes for mediation

If the Representatives have not been able to resolve the Dispute, then the parties must agree within five (5) Business Days to refer the matter to mediation under clause 11.5.

### 11.5 Disputes for mediation

- i If the parties agree in accordance with clause 11.4 to refer the Dispute to mediation, the mediation must be conducted by a mediator agreed by the parties and, if the parties cannot agree within five (5) Business Days, then by a mediator appointed by the President of the Law Society of New South Wales for the time being.
- ii If the mediation referred to in paragraph (i) has not resulted in settlement of the Dispute and has been terminated, the parties may agree to have the matter determined by expert determination under clause 11.6.

### 11.6 Other courses of action

If the mediation referred to in clause 11.5 has not resulted in settlement of the dispute and the mediation has been terminated then either party may take whatever course of action it deems appropriate for the purpose of resolving the Dispute.

### 11.7 Remedies available under the Act

This clause 11 does not operate to limit the availability of any remedies available to Council under sections 9.45 and 9.46 and Division 9.6 of the Act.

### 11.8 Urgent relief

This clause 11 does not prevent a party from seeking urgent injunctive or declaratory relief concerning any matter arising out of this document.

## 12 POSITION OF COUNCIL

### 12.1 Consent Authority

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

### 12.2 Document does not Fetter Discretion

This document is not intended to operate to fetter:

- i the power of Council to make any Law; or
- ii the exercise by Council of any statutory power or discretion (**Discretion**).

### 12.3 Severance of Provisions

- i No provision of this document is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this document is held by a court of competent jurisdiction to constitute an unlawful 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 12 is substantially satisfied;
  - b in the event that paragraph (a) cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this document has full force and effect; and



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- c to endeavour to satisfy the common objectives of the parties on relation to the provision of this document which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.
- ii 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 document contracted out of a provision or exercised a Discretion under this document, then to the extent of this document is not to be taken to be inconsistent with the Law.

### 12.4 No Obligations

Nothing in this document will be deemed to impose any obligation on Council to exercise any of its functions under the Act in relation to the Development Consent, the Land or the Development in a certain manner.

## 13 CONFIDENTIALITY

### 13.1 Document not Confidential

The terms of this document are not confidential and this document may be treated as a public document and exhibited or reported without restriction by any party.

## 14 GST

### 14.1 Definitions

Words used in this clause that are defined in the GST Legislation have the meaning given in that legislation.

### 14.2 Intention of the parties

Without limiting any other provision of this clause 13, the parties intend that:

- i Divisions 81 and 82 of the GST Legislation apply to the supplies made under and in respect of this document; and
- ii no additional amounts will be payable on account of GST and no tax invoices will be exchanged between the parties.

### 14.3 Reimbursement

Any payment or reimbursement required to be made under this document that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which any entity is entitled for the acquisition to which the cost, expense or amount relates.

### 14.4 Consideration GST exclusive

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this document are GST Exclusive. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purposes of this clause 14.

### 14.5 Additional amounts for GST

Subject to clause 14.7, if GST becomes payable on any supply made by a party (Supplier) under or in connection with this document:

- i any party (Recipient) that is required to provide consideration to the Supplier for that supply must pay an additional amount to the Supplier equal to the amount of the GST payable on that supply (GST Amount);
- ii the GST Amount is payable at the same time as any other consideration is to be first provided for that supply; and
- iii the Supplier must provide a tax invoice to the Recipient for that supply, no later than the time at which the GST Amount for that supply is to be paid.



## DRAFT PLANNING AGREEMENT

### 14.6 Variation

- i If the GST Amount properly payable in relation to a supply (as determined in accordance with clauses 14.5 and 14.7), varies from the additional amount paid by the Recipient under clause 14.5, then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient. Any payment, credit or refund under this clause 14.6 is deemed to be a payment, credit or refund of the GST Amount payable under clause 14.5.
- ii The Supplier must issue an adjustment note to the Recipient in respect of any adjustment event occurring in relation to a supply made under or in connection with this document as soon as reasonably practicable after the Supplier becomes aware of the adjustment event.

### 14.7 Non-monetary consideration

- iii To the extent that the consideration provided for the Supplier's taxable supply to which clause 14.5 applies is a taxable supply made by the Recipient (the Recipient Supply), the GST Amount that would otherwise be payable by the Recipient to the Supplier in accordance with clause 14.5 shall be reduced by the amount of GST payable by the Recipient on the Recipient Supply.
- iv The Recipient must issue to the Supplier an invoice for any Recipient Supply on or before the time at which the Recipient must pay the GST Amount in accordance with clause 14.5 (or the time at which such GST Amount would have been payable in accordance with clause 14.5 but for the operation of clause 14.7(i)).

### 14.8 No merger

This clause will not merge on completion or termination of this document.

## 15 LEGAL COSTS

Each party must pay their own legal costs and disbursements with respect to the preparation, negotiation, formation and implementation of this document.

## 16 ADMINISTRATIVE PROVISIONS

### 16.1 Notices

- i Any notice, consent or other communication under this document must be in writing and signed by or on behalf of the person giving it, addressed to the person to whom it is to be given and:
  - a delivered to that person's address;
  - b sent by pre-paid mail to that person's address; or
  - c sent by email to that person's email address.
- ii A notice given to a person in accordance with this clause is treated as having been given and received:
  - a if delivered to a person's address, on the day of delivery if a Business Day, otherwise on the next Business Day;
  - b if sent by pre-paid mail, on the third Business Day after posting; and
  - c if sent by email to a person's email address and a conformation of receipt can be retrieved, on the day it was sent if a Business Day, otherwise on the next Business Day.
- iii For the purpose of this clause the address of a person is the address set out in this document or another address of which that person may from time to time give notice to each other person.



## DRAFT PLANNING AGREEMENT

### 16.2 Entire Agreement

This document is the entire agreement of the parties on the subject matter. All representations, communications and prior agreements in relation to the subject matter are merged in and superseded by this document.

### 16.3 Waiver

The non-exercise of or delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the parties to be bound by the waiver.

### 16.4 Counterparts

This document may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

### 16.5 Unenforceability

Any provision of this document which is invalid or unenforceable in any jurisdiction is to be read down for the purposes of that jurisdiction, if possible, so as to be valid or enforceable, and is otherwise capable of being severed to the extent of the invalidity or enforceability, without affecting the remaining provisions of this document or affecting the validity or enforceability of that provision in any other jurisdiction.

### 16.6 Power of Attorney

Each attorney who executes this document on behalf of a party declares that the attorney has no notice of:

- i the revocation or suspension of the power of attorney by the grantor; or
- ii the death of the grantor.

### 16.7 Governing Law

The law in force in the State of New South Wales governs this document. The parties:

- i submit to the exclusive jurisdiction of the courts of New South Wales and any courts that may hear appeal from those courts in respect of any proceedings in connection with this document; and
- ii may not seek to have any proceedings removed from the jurisdiction of New South Wales on the grounds of *forum non conveniens*.



## DRAFT PLANNING AGREEMENT

### EXECUTED AS AN AGREEMENT

**EXECUTED** by and on behalf of **WOLLONGONG CITY COUNCIL (ABN 63 139 525 939)** by its Authorised Officer:

_____ <b>Signature of Authorised Person</b>	_____ <b>Signature of Witness</b>
_____ <b>[Print] Name of Authorised Officer</b>	_____ <b>[Print] Name of Witness</b>
_____ <b>Office Held</b>	_____ <b>Date</b>
_____ <b>Date</b>	
<p><b>EXECUTED</b> by <b>HANLYN PTY LTD (ABN 16 152 003 104)</b> in accordance with section 127(1) of the Corporations Act 2001 by authority of its directors.</p>	
_____ <b>Director Signature</b>	_____ <b>Director / Secretary Signature</b>
_____ <b>[Print] Name of Director</b>	_____ <b>[Print] Name of Director / Secretary</b>
_____ <b>Date</b>	_____ <b>Date</b>
_____ <b>Signature of Witness</b>	_____ <b>Signature of Witness</b>
_____ <b>[Print] Name of Witness</b>	_____ <b>[Print] Name of Witness</b>





## DRAFT PLANNING AGREEMENT

### SCHEDULE 1: REQUIREMENTS UNDER SECTION 7.4 OF THE ACT

REQUIREMENT UNDER THE ACT	THIS PLANNING AGREEMENT
<b>Planning instrument and/or Development Application – (Section 7.4(1))</b> The Developer has: <ul style="list-style-type: none"> <li>(a) sought a change to an environmental planning instrument.</li> <li>(b) made, or proposes to make, a Development Application.</li> <li>(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.</li> </ul>	<ul style="list-style-type: none"> <li>(a) No.</li> <li>(b) Yes.</li> <li>(c) No.</li> </ul>
<b>Description of land to which this agreement applies – (Section 7.4(3)(a))</b>	Lot 101 DP 825516, known as 344 Farmborough Road, Farmborough Heights
<b>Description of the development to which this agreement applies – (Section 7.4(3)(b))</b>	Subdivision of land into four torrens title lots, including three public reserves and one community title lot that will create 30 rural-residential community title lots.
<b>Application of section 7.11 of the Act – (Section 7.4(3)(d))</b>	Refer to clause 4.1 of the Planning Agreement.
<b>Applicability of section 7.12 of the Act – (Section 7.4(3)(d))</b>	Refer to clause 4.1 of the Planning Agreement.
<b>Applicability of section 7.24 of the Act – (Section 7.4(3)(d))</b>	Refer to clause 4.1 of the Planning Agreement.
<b>Consideration of benefits under this agreement if section 7.11 applies – (Section 7.4(3)(e))</b>	Refer to clause 4.2 of the Planning Agreement.
<b>Mechanism for Dispute resolution – (Section 7.4(3)(f))</b>	Refer to clause 11 of the Planning Agreement.
<b>Enforcement of this agreement (Section 7.4(3)(g))</b>	Refer to clauses 5 of the Planning Agreement.
<b>No obligation to grant consent or exercise functions – (Section 7.4(3)(9))</b>	Refer to clause 12 of the Planning Agreement.



## SCHEDULE 2: DESIGNATED LAND





## DRAFT PLANNING AGREEMENT

### SCHEDULE 3: MONETARY CONTRIBUTIONS

**Table 1 Monetary Contributions**

The Developer must pay the Monetary Contribution in accordance with this clause.

The Monetary Contributions payable are based on the following provisions:

Base contribution amount*	Timing
\$476,025.00	Prior to the issue of a Subdivision Certificate for the Development.

\* The base contribution rate is subject to indexation in accordance with clause 6.3.



## DRAFT PLANNING AGREEMENT

### APPENDIX A LAND



## Explanatory Note - Planning Agreement: 344 Farmborough Road, Farmborough Heights

### Introduction

The purpose of this explanatory note is to provide a plain English summary that helps the community understand how the proposed planning agreement (the **Planning Agreement**) will be of public benefit, and why it is acceptable and in the planning interest. The explanatory note is made available as part of the public exhibition, where the public can read the Planning Agreement and make comments on it. It is not a plain English version of the Planning Agreement.

Clause 25E of the *Environmental Planning and Assessment Regulation 2000* (the **Regulation**) is a guideline for how explanatory notes must be written. It requires all those wanting to enter into the planning agreement to prepare the explanatory note together. Council and the Developer prepared this explanatory note together.

The *Environmental Planning and Assessment Act 1979* (the **Act**) is the NSW law that must be followed when preparing a Planning Agreement. The section of the Act that relates to planning agreements is Part 7 > Division 7.1 > Subdivision 2 > Sections 7.4 to 7.10. This Planning Agreement was prepared in line with the Act and the Regulation.

### Parties to the Planning Agreement

The parties (people and organisations) to this Planning Agreement are:

1. Wollongong City Council ABN 38 755 709 681 (the **Council**); and
2. Hanyln Pty Ltd ABN 16 152 003 104 (the **Developer**).

### Description of the Subject Land

The Planning Agreement applies to this land:

- Lot 101 DP 825516 known as 344 Farmborough Road, Farmborough Heights NSW 2526 (**Subject Land**).

### Description of Proposed Development

The developer wants to split up the land (subdivide it) into four lots. One of these lots will be further split (subdivided) 30 Community Title residential lots. The other three lots are zoned E2 and will be dedicated to Council as public reserves. The Developer has lodged Development Application DA-2020/1245 with Council (**Proposed Development**).

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

The Planning Agreement will require the Developer to dedicate 7.7363 hectares of land to Council (Proposed lots 1, 13, and 23) and to pay a monetary contribution of \$476,025 for the ongoing maintenance of the land that will be handed to Council.

The land and the money, together with the low density residential development, allows the legal and financial mechanisms to ensure the long term conservation of the natural areas and the rehabilitate the riparian and habitat corridor in the north west, and the endangered ecological community in the south east of the site.

### Assessment of the Merits of the Planning Agreement

Wollongong City Council and the Developer both agree the land and funds will have a positive public impact in the area.

### The Planning Purpose of the Planning Agreement

The Planning Agreement has the following public purpose:

- the conservation or enhancement of the natural environment.



This refers to section 7.4(2)f of the Act. The Planning Agreement will enable land and money to be paid to Wollongong City Council before a subdivision certificate is issued. The money collected will be held in a restricted account and be used for the maintenance of the land in the future.

**How the Planning Agreement promotes the public interest and objects of the Act**

The Planning Agreement promotes the objects (aims) of the Act by encouraging 'the orderly and economic use and development of land'. This refers to section 1.3(c) of the Act. It means the development will happen in an appropriate location and the land will be developed in a way that fits with other development in the area. Land that is important for its environmental value will be protected and Council has enough money to maintain the land.