

PLANNING AGREEMENT No. of 2012

Section 93L of the *Environmental Planning and Assessment Act 1979*

Parties

Wollongong City Council of 41 Burelli Street, Wollongong New South Wales (**Council**)
and
Towradgi Park Bowls & Recreation Limited of 2a Towradgi Road
Towradgi New South Wales (ABN 48 001 007 950) (**Developer**)

Background

- A. On 20 September 2010 the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.
- B. That Development Application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities if Development Consent was granted.

Operative Provisions

1 Planning agreement under the Act

The Parties agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

2 Application of this Agreement

This Agreement applies to the Land identified on Certificate of Title Folio Identifier 167/751301 and the Development identified as DA-2012/28.

3 Operation of this Agreement

- 3.1 Subject to clause 3.2, this Agreement operates from the date it is executed by both Parties.
- 3.2 Clauses 5 and 6 will only operate if and when Development Consent to the Development Application is granted.

4 Definitions and interpretation

4.1 In this Agreement the following definitions apply:

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

Construction Certificate has the same meaning as in the Act.

Dealing, in relation to the Land, means, without limitation, selling, transferring, assigning,

mortgaging, charging, encumbering or otherwise dealing with the Land.

Development means alterations and additions to the existing club building

Development Application means the application lodged by or on behalf of the Developer with Council, and given the Council identifier DA-2012/28.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost or the provision of a material public benefit.

GST has the same meaning as in the GST Law.

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

Land means Lot 167 DP 751301 known as 2A Towradgi Road, Towradgi, in New South Wales

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

Public Facilities means three car parking spaces located at the Land as described in the Development Application

Physical Commencement has the meaning provided at section 95(5) of the Act.

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

4.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- (k) References to the word 'include' or 'including' are to be construed without limitation.
- (l) A reference to this Agreement includes the agreement recorded in this Agreement.
- (m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- (n) Any schedules and attachments form part of this Agreement.

5 Development Contributions to be made under this Agreement

- 5.1 The Developer will and must pay a lump sum Development Contribution of \$9,000.00 by bank cheque to Council prior to making, pursuing or seeking any Construction Certificate relating to the Development or Development Consent granted to the Development Application.
- 5.2 Council shall hold the Development Contribution until the Development Contribution is applied in accordance with provisions of clause 6 of this Agreement.

6 Application of the Development Contributions

- 6.1 Subject to clause 6.2.2, Council will as and from the date of notice of Physical Commencement of the Development Consent permitting the carrying out of the Development commence the process of applying the whole of the Development Contribution to the cost of construction of the Public Facilities.
- 6.2 It is acknowledged and agreed between the Parties that:
 - 6.2.1 The Developer bears the onus of giving notice in writing in accordance with this Agreement to Council of the date that Physical Commencement of the Development Consent has commenced;
 - 6.2.2 Council has 14 business days from the receipt of the notice referred to in clause 6.2.1 of this Agreement to dispute with the Developer for the purposes of this Agreement that Physical Commencement of the Development Consent has occurred, failing which, for the purposes of this Agreement Council shall proceed to apply the Development Contribution in accordance with clause 6.1 of this agreement.
 - 6.2.3 Two years from the date of Physical Commencement of the Development Consent is a reasonable time for Council to have constructed sufficient of the Public Facilities to have exhausted the Development Contribution as applied for that purpose;
 - 6.2.4 If, at the expiration of 3 years from the date of Physical Commencement of the Development Consent Council has not commenced construction of the Public Facilities, then, provided notice of Physical Commencement of the Development Consent was duly given in accordance with clause 6.2.1 and was not disputed by Council in accordance with 6.2.2, the Developer shall be entitled to issue a demand in writing to the Council for a refund of the Development Contribution and within 28 days thereafter the Council shall refund the Development Contribution to the Developer.

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

Sections 94 and 94A apply to the Development the subject of this Agreement as described in this clause.

The following section 94A levy contribution is required towards the provision of public amenities and services in accordance with the Wollongong City Council section 94A Development Contributions Plan.

Pursuant to section 80A(1) of the Act, and the Wollongong City Council Section 94A Development Contribution Plan, a contribution of 1% of the cost of development amounting to \$9,240.00 shall be paid to Council prior to the release of any associated Construction Certificate.

The amount to be paid will be adjusted at the time of actual payment, in accordance with the provisions of the Wollongong City Councils section 94A Development Contributions Plan. The Consumer Price Index All Group Index Number for Sydney at the time of the development application determination is 178.8. The following formula for indexing contributions is to be used:

Contribution at time of payment = \$C x (CP2/CP1)

Where

\$C is the original contribution as set out in the Consent

CP1 is the consumer price index (all groups index for Sydney) used in the proceeding indexation calculation

CP2 is the consumer price index (all groups index for Sydney) at the time of indexation.

Details of CP1 and CP2 can be found in the Australian Bureau of Statistics website Catalogue No. 6401.0 – Consumer Price Index, Australia

Payment must be made by cash, credit card or bank cheque. Payments may be made by mail or in person at Council's Customer Service centre, located at 41 Burelli Street Wollongong during business hours or on council's website at www.wollongong.nsw.gov.au

In consideration of this Agreement and having regard to s93F(3)(d) of the Act, the parties acknowledge that the application of sections 94, 94A and 94EF of the Act are wholly excluded to the Development provided that there is no refund of the Development Contribution to the Developer as provided for in clause 6 of this Agreement.

8 Registration of this Agreement

The parties acknowledge and agree that this Agreement does not require to be registered having regard to the provisions of section 93H of the Act.

9 Dispute Resolution

In the event of a dispute the Parties can either agree upon an independent arbitrator or can ask the President of the Institute of Arbitrators and Mediators Australia to nominate a person to consider the dispute and provide a direction that will be accepted by both parties as representing resolution of the dispute. That direction shall be binding upon both parties. The arbitrator is to be provided with a summary of both parties' positions in writing a minimum of 7 days prior to an agreed date on which the arbitration shall be heard. Both Parties may also elect to have a joint meeting with the arbitrator to present their positions, but only where both Parties agree.

The arbitrator is not able to consider or determine matters that are otherwise expressed within this Agreement. The arbitrator is also limited by the terms of the Agreement and may not vary provisions expressed within the Agreement.

The arbitrator is to be limited to consideration of matters associated with the undertaking of the Public Facilities, in particular whether they have been implemented; are in the agreed location; whether they have been completed; whether the contribution has been fully expended and/or the extent of any surplus upon completion to be returned to the developer; and costs payable by parties in the event of a dispute regarding costs and/or the reasonableness of the dispute (see paragraph below).

The arbitrator shall be funded equally by both Parties, irrespective of the direction made by the arbitrator in resolving the dispute. In the event of dispute regarding costs, the costs shall be limited to those that are reasonable, as determined by the arbitrator, but only when costs are considered to be excessive due to unreasonable action and/or claim of one of the Parties. The determination of that unreasonableness is to be determined by the arbitrator and that determination is to be taken as binding. Any payment of costs, and the timing of that payment, is at the discretion of the arbitrator.

Any decision of the arbitrator is to be provided in writing to each of the Parties. The reasoning of the determination is required to be provided. This requirement may be waived by the parties.

The costs of the arbitrator shall be agreed between the Parties with the arbitrator prior to engagement and shall be paid equally by the Parties upon engagement of the arbitrator.

10 Enforcement and security

This Agreement is legally binding and is enforceable as a legal contract between the parties, or any assignee to this agreement as a consequence of transfer of the land and/or implementation of the Development.

Any determination of the arbitrator to disputes is to be taken as binding and enforceable as if it were a provision within this Agreement. There is no right of appeal to that determination.

11 Notices

11.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

- (a) Delivered or posted to that Party at its address set out below.
- (b) Faxed to that Party at its fax number set out below.
- (c) Emailed to that Party at its email address set out below.

Council
Attention: General Manager
Address: 41 Burelli Street WOLLONGONG
Locked Bag 8821 WOLLONGONG DC NSW 2500
Fax Number: 02 4227 7277
Email: records@wollongong.nsw.gov.au

Developer

Attention:
Address:
Fax Number:
Email:

11.2 If a Party gives the other Party 3 business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.

11.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:

- (a) If it is delivered, when it is left at the relevant address.
- (b) If it is sent by post, 2 business days after it is posted.
- (c) If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.

11.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

12 Approvals and consent

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 obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

13 Assignment and Dealings

There are no restrictions on the Developer's dealing in the land to which the Agreement applies or to the period during which those restrictions apply except that any contract associated with the Dealing is to include the following notice:

- This Agreement is to carry with the Development Consent, and the person/entity with whom the Developer has the dealing, and as such is responsible for the carrying out of the Development, and is assumed to be the Developer; and
- The Developer shall advise the Council of any such Dealing, including details of the Dealing, and advise of the details of any replacement Developer (Replacement Developer). Alternatively, the Replacement Developer may, on proof of any dealing, provide new contact details to the Council, and shall provide written proof that the Developer has been advised of the provision of such details to the Council. Written acceptance of the proof of the Dealing by the Developer to a Replacement Developer shall be at the Council's discretion, with such acceptance to be in writing. Acceptance shall not be unreasonably withheld. The Replacement Developer shall be accepted as becoming the Developer for the purpose of this Agreement once written confirmation of the Council's acceptance is received by the Replacement Developer. The Replacement Developer is assumed thereafter to be the Developer.

14 Costs

All costs associated with the negotiating, preparing, executing, stamping and registering the initial agreement are to be borne by the Developer, excluding time spent by the council for

such work (which shall be at the cost of the council); or any related cost arising from subsequent modification of the Development Consent that requires modification of the agreement, on the same basis.

15 Entire agreement

This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.

16 Further acts

Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.

17 Governing law and jurisdiction

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

18 Joint and individual liability and benefits

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

19 No fetter

Nothing in this Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

20 Representations and warranties

The Parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under the Agreement and that entry into this Agreement will not result in the breach of any law.

21 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.

22 Modification

No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

23 Waiver

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

24 GST

24.1 Interpretation

In this clause

- (a) except where the context suggests otherwise, terms used in this clause have the meanings given to those terms by the GST Act (as amended from time to time);
- (b) any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause ; and
- (c) a reference to something done (including a supply made) by a party includes a reference to something done by any entity through which that party acts.

24.2 Intention of the parties

Without limiting the operations of this clause , the parties intend that:

- (a) Divisions 81 and 82 of the GST Act apply to the supplies made under and in respect of this Agreement;
- (b) no tax invoices will be exchanged between the parties; and
- (c) no additional amounts will be payable on account of GST.

24.3 Reimbursement

Any payment or reimbursement required to be made under this agreement 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.

24.4 Consideration GST exclusive

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST. 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

24.5 Additional amount of GST payable

Subject to clause 24.7 if GST becomes payable on any supply made by a party (“**Supplier**”) under or in connection with this Agreement:

- (a) 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 GST payable on that supply (“**GST Amount**”), and the GST Amount is payable at the same time as any other consideration is to be first provided for that supply; and
- (b) 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 in accordance with clause 24.5(a).

24.6 Variation

- (a) If the GST Amount properly payable in relation to a supply (as determined in accordance with clause 24.5 and clause 24.7), varies from the additional amount paid by the Recipient under clause 24.5 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 24.6(a) is deemed to be a payment, credit or refund of the GST Amount payable under clause 24.5
- (b) 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 Agreement as soon as reasonably practicable after the Supplier becomes aware of the adjustment event.

24.7 Exchange of non-monetary consideration

- (a) To the extent that the consideration provided for the Supplier’s taxable supply to which clause 24.5 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 24.5 shall be reduced by the amount of GST payable by the Recipient on the Recipient Supply.
- (b) 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 24.5 or the time at which such GST Amount would have been payable in accordance with clause 24.5 but for the operation of clause 24.7(a).

24.8 No merger

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

Execution

Executed as an Agreement

Dated: 11-4-13,

Executed by and on behalf of
WOLLONGONG CITY COUNCIL
by its authorised officer:



Signature of Witness



Signature of authorised person

CAROL SNOWDON

[Print] Name of Witness

DAVID FARMER

[Print] Name of authorised person

GENERAL MANAGER

Office Held

Executed by and on behalf of)

TOWRADGI PARK BOWLS & RECREATION LIMITED

ABN 48 001 007 950)

By its authorised representative:)



Signature of Witness



Signature of authorised person

VICKI ANDERTON RON CHINNOCK

[Print] Name of Witness

[Print] Name of authorised person

Explanatory Note

(Clause 25E of the Environmental Planning and Assessment Regulation 2000)

[*Note:* To be completed upon finalisation of Planning Agreement]

Draft Planning Agreement

Under s93F of the Environmental Planning and Assessment Act 1979

1 Parties

The parties to the Planning Agreement are **Wollongong City Council** of 41 Burelli Street, Wollongong New South Wales (**Council**) and **Towradgi Park Bowls & Recreation Limited** of 2a Towradgi Road, Towradgi New South Wales (ABN 48 001 007 950) (**Developer**).

2 Description of Subject Land

The land to which the Planning Agreement applies is located at 2A Towradgi Road, Towradgi, in the Local Government Area of Wollongong City Council. The Planning Agreement applies to the following land (the "Land"):

- Lot 167 DP 751301

3 Description of Proposed Change to Environmental Planning

Instrument/Development Application

The Developer will pay a lump sum Development Contribution of \$9,000.00 to Council to be applied to build three car parking spaces located at the Land.

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

Agreement

The Planning Agreement provides that the Owner will provide a contribution of \$9000 towards the construction of public facilities, being three car parking spaces, which will be required as a consequence of the Development, on the terms of the Planning Agreement ("the Contribution"). It is intended that these funds will contribute towards parking facilities serving the Development. The objective of the Planning Agreement is to facilitate the payment of the Contribution to the Council.

The Planning Agreement requires the Contribution to be paid by the Developer prior to making, pursuing or seeking any Construction Certificate relating to the Development or Development Consent granted to the Development Application. Council shall hold the Development Contribution until the Development Contribution is applied toward the construction of the public facilities.

The Planning Agreement once executed will allow the Council to determine whether satisfactory arrangements for local public facilities have been made.

The Developer wishes to enter into this Agreement to make Development Contributions towards the Public Facilities if Development Consent is granted. The Developer has made an offer to the Council to enter into the Planning Agreement to ensure that satisfactory facilities are available to serve the proposed development.

5 Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

The Planning Agreement promotes the public interest by making provision for the Developer to make contributions towards local public facilities.

By requiring the Developer, who will benefit from the development, to make contributions towards local public facilities, the orderly and economic use and development of land is promoted by the Planning Agreement.

The Planning Agreement assists the Council to provide the appropriate public facilities which are required to maintain and enhance amenity and service delivery within the area.

6 How the Draft Planning Agreement Promotes the Objects of the Environmental Planning and Assessment Act 1979

By providing contributions towards the provision of local public facilities, the Planning Agreement promotes the following object of the Act:

- the promotion and co-ordination of the orderly and economic use and development of land.

The contributions made under the Planning Agreement will promote this object by allowing parking facilities serving the Development to be appropriately developed.

How the Draft Planning Agreement Promotes the Public Interest

- (a) How the Draft planning Agreement Promotes the Elements of the Council's Charter

The Planning Agreement assists the Council to provide the appropriate public facilities which are required to maintain and enhance amenity and service delivery within the area

- (b) Whether the Draft Planning Agreement Conforms with the Council's Capital Works Program

No relevant capital works program by the Council is associated with this agreement.

The Impact of the Draft Planning Agreement on the Public or Any Section of the Public

The Planning Agreement facilitates the construction of additional public facilities in order to promote the orderly and economic use of the Land. It benefits the public in providing additional parking facilities, so the current facilities are not adversely impacted by the works to be carried out under the Development Application. It also benefits a section of the public, being the members of the Towradgi Park and Recreation Club.

Interpretation of Planning Agreement

This Explanatory Note is not to be used to assist in construing the Planning Agreement.

Dated: 11.4.13

Executed by and on behalf of
WOLLONGONG CITY COUNCIL
by its authorised officer:



Signature of Witness



Signature of authorised person

CAROL SNOWDON

[Print] Name of Witness

DAVID FARMER

[Print] Name of authorised person

GENERAL MANAGER

Office Held

Executed by and on behalf of

TOWRADGI PARK BOWLS & RECREATION LIMITED
ABN 48 001 007 950

By its authorised representative:



Signature of Witness



Signature of authorised person

VICKI ANDERTON

[Print] Name of Witness

REN CHINNOCK

[Print] Name of authorised person