

ITEM 2 PUBLIC EXHIBITION: WILKIES WALK, MCCAULEYS BEACH PLANNING AGREEMENT

A draft Planning Agreement has been prepared in association with Development Consent DA-2021/1324 issued by the NSW Land & Environment Court on 19 April 2023. The consent relates to a subdivision of land into three lots at 1 Amy Street, Thirroul (Lot 101 in DP 268549). The lot extends from Amy Street behind the McCauley's Beach estate to the corner of Wilkies Way and Panmills Drive, Thirroul (Attachment 1).

The draft Planning Agreement proposes to rearrange pedestrian access to Wilkies Walk at the corner of Wilkies Way and Panmills Drive, Thirroul. The proposal will separate vehicle movement to the subdivision from the pedestrian movement through the relocation of a short section of Wilkies Walk (Attachment 2). These works will be carried out to the south of the existing path on land owned by Council and Anglican Community Services. The cost of all works will be borne by the proponent, High Dune Pty Ltd.

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 High Dune Pty Ltd and Anglican Community Services for Lot 101 DP 268549, be exhibited for a period of at least 28 days.
- 2 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 Map
- 2 Proposed works
- 3 Draft Planning Agreement
- 4 Explanatory Note

BACKGROUND

Development Application

On 17 November 2021, Development Application DA-2021/1324 was lodged with Council for land subdivision into three lots and associated works at 1 Amy Street, Thirroul (Lot 101 in DP 268549). On 3 June 2022, a Class 1 Appeal (deemed refusal) was filed with the Land & Environment Court (Court). Following subsequent section 34 mediation, conditions were agreed between the parties and consent for the proposed development was issued by the Court dated 19 April 2023.

Suitable access to the residential zoned portion of Lot 101 was a key assessment issue given the site is serviced by a narrow road reserve from the corner of Wilkies Way and Panmills Drive, Thirroul. The narrow road reserve is the current location for a section of the Wilkies Walk pathway (approved under DA-2013/1321).

The mechanism for vehicular access to the site was ultimately resolved during the Court Appeal. To facilitate access to the site, Council negotiated certain works to be undertaken at the full cost of the proponent. These works include construction of a vehicle passing bay and relocation of a section of Wilkies Walk.

The passing bay and portion of the relocated walkway will be constructed on land owned by Anglican Community Services (105.2m²). Anglicare and the owner of Lot 101 Amy Street have agreed to commercial terms to transfer Anglicare's land for the purpose of DA-2021/1324.

The remaining section of relocated walkway will be constructed on Council land, classified as community land, and categorised as Natural Area (Bushland). The construction of a walkway is permitted under the Community Land Plan of Management 2022. No change to the land classification or categorisation is proposed or required because of the draft Planning Agreement.

The land owned by the Anglican Community Services which will accommodate the proposed vehicle passing bay and short section of Wilkies Way will be dedicated to Council with the intent of converting it to road reserve.

The above arrangement is reflected in Condition 32 of the Consent as follows:

Prior to issue of Subdivision Works Certificate, the Proponent must enter into a Planning Agreement with Wollongong City Council (Council) under the Environmental Planning and Assessment Act 1979. The Planning Agreement must be consistent with the terms of the offer made by the Applicant in connection with the development application as set out in the letter from the Applicant to Council dated 14 November 2022 a copy of which is annexed and marked 'A' and the letter from High Dune Pty Ltd dated 3 February signed by Paul Nichols a copy of which is annexed and marked "B".

A modification to DA-2021/1324 condition 32 is currently being assessed which, if approved, would allow certain early subdivision works to occur on-site prior to a Planning Agreement being entered into.

The cost of all works, land acquisition and land dedication will be borne by the proponent, High Dune Pty Ltd.

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.

During the Court proceedings the applicant submitted Letters of Offer to enter into a Planning Agreement under Section 7.4 of the *Environmental Planning and Assessment Act 1979* (Act) for the relocation of Wilkies Walk further south parallel to its existing alignment. The relocation works will allow the narrow road to be used for vehicle access to the development site. Other improvement works including construction of a vehicle passing bay is also proposed. The draft Planning Agreement includes plans showing the proposed works.

A draft Planning Agreement to implement the Court determination and Explanatory Note has been prepared by Council officers and agreed to by the applicant (Attachments 3 and 4).

CONSULTATION AND COMMUNICATION

During the Court proceedings, the Letters of Offer were considered by Council officers from Development Assessment & Certification. The draft Planning Agreement has been reviewed by Council's Land Use Planning and Legal Teams.

If Council endorses the recommendations of this report the draft Planning Agreement (Attachment 3) and Explanatory Note (Attachment 4) will be placed on public exhibition for at least 28 days for community comment.

PLANNING AND POLICY IMPACT

The draft Planning Agreement has been 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 2021*.

This report contributes to the delivery of Our Wollongong Our Future 2032 Goal 5 – 'We have a healthy community in a liveable city'. It also delivers on core business activities as detailed in the Land Use Planning Operational Plan 2022-23.

RISK MANAGEMENT

The proposed Planning Agreement provides a formal instrument to manage and mitigate any risks associated with the proposed dedication of land and the infrastructure works to be undertaken. The land dedication and works will need to be provided prior to a Subdivision Certificate for the subdivision of the land.

The Planning Agreement will be registered on title to ensure the land is encumbered by the requirements. The Planning Agreement also provides the appropriate legal mechanism for the developer to fulfil the relevant conditions of the Development Consent.

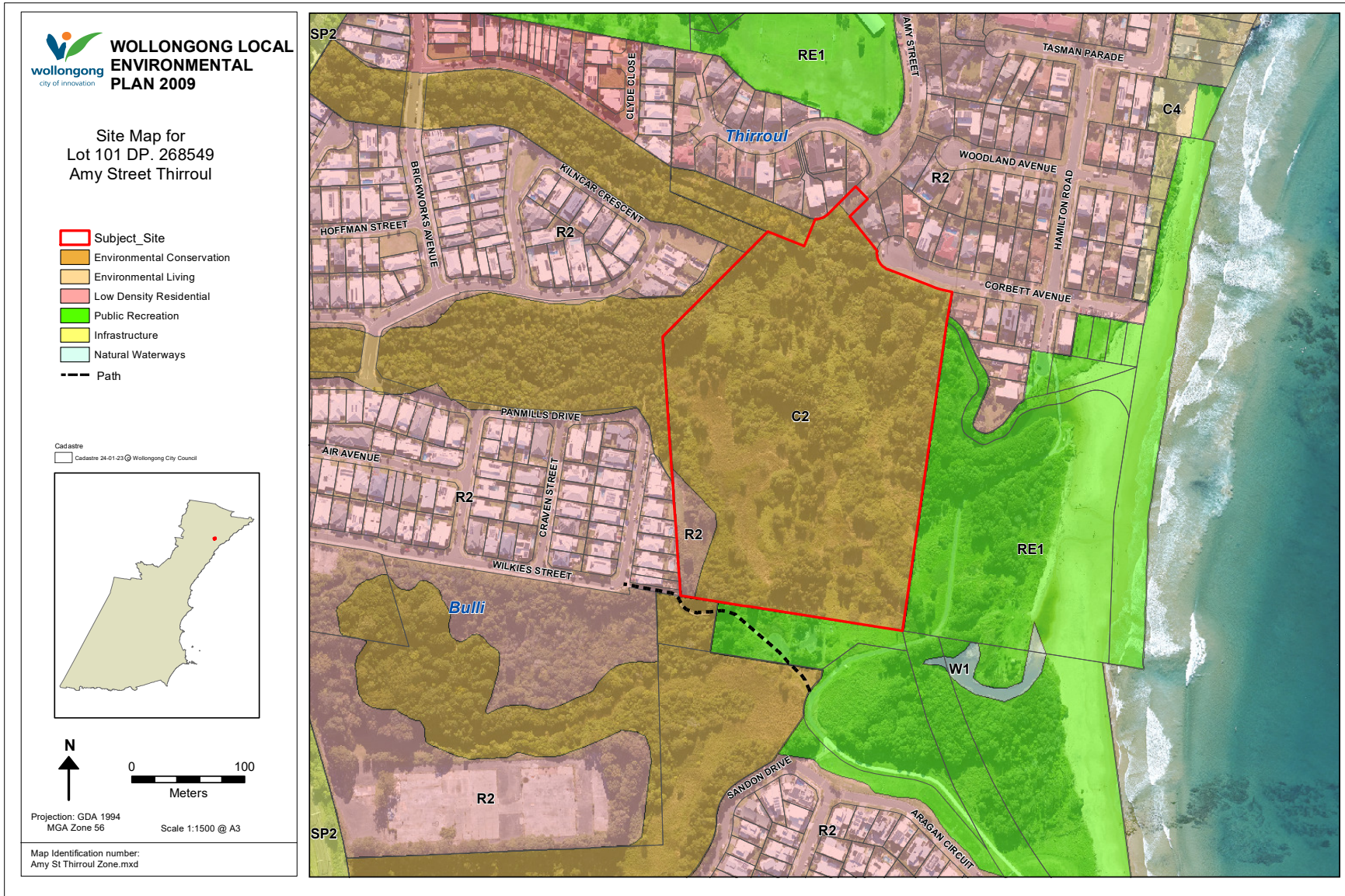
FINANCIAL IMPLICATIONS

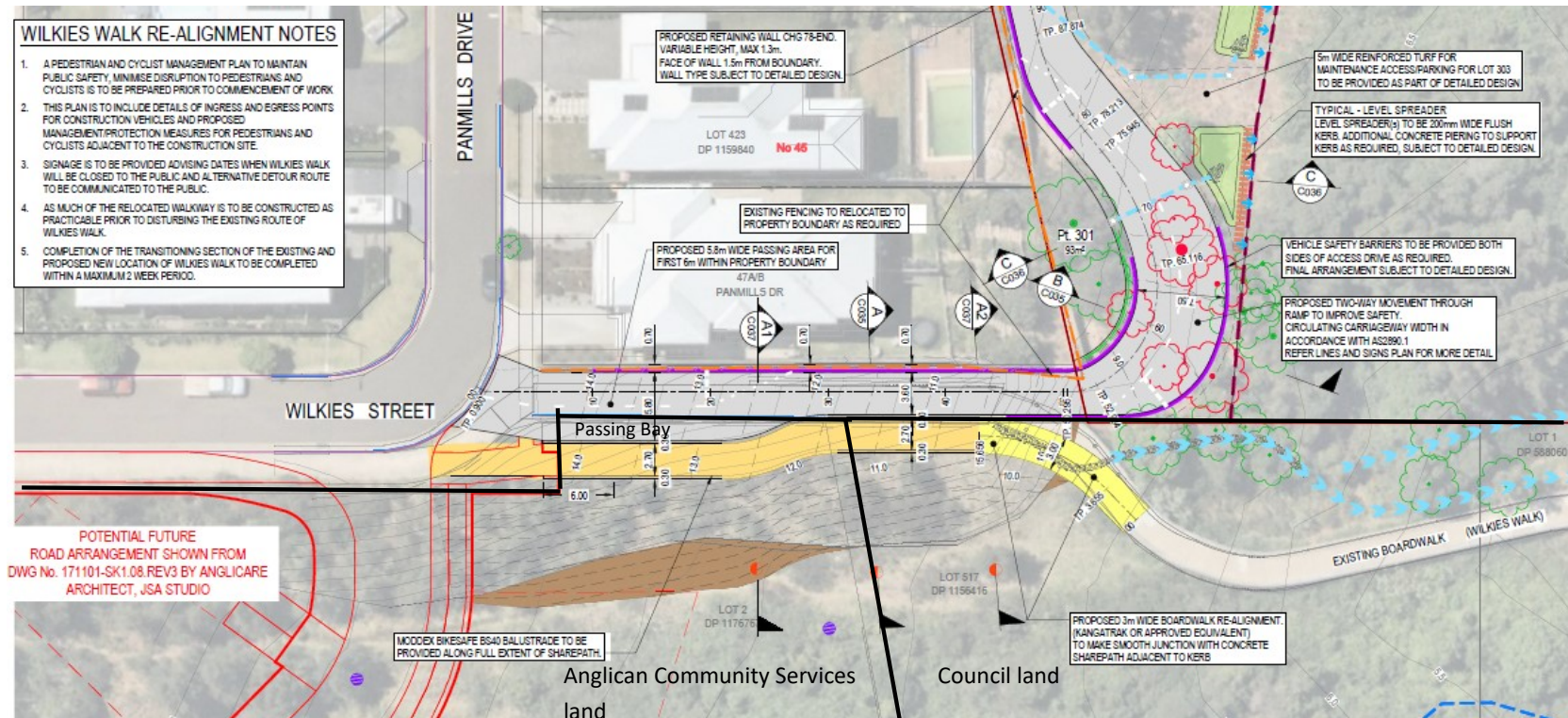
The Planning Agreement will ensure that the infrastructure and land is provided as part of the development. It should be noted that the Planning Agreement does not exclude the application of any development contributions plan that applies, that is the Wollongong City-Wide Development Contributions Plan. Development contributions for the subdivision have been levied as part of the Development Consent issued by the Court.

CONCLUSION

High Dune Pty Ltd and Anglican Community Services have requested that Council enter into a Planning Agreement to facilitate the relocation of part of a public pathway known as Wilkies Walk and the provision of a vehicle passing bay at the entry to Panmills Drive, Thirroul. The separation of the vehicular access to the land zoned for residential purposes from the pedestrian use of Wilkies Walk is a positive outcome for the community.

It is recommended that Council endorse the draft Planning Agreement and Explanatory Note for public 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.





PLANNING AGREEMENT

Wollongong City Council

and

High Dune Pty Ltd

and

Anglican Community Services



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
ABN: 63 139 525 939 – GST Registered



PLANNING AGREEMENT

DATE

PARTIES

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

HIGH DUNE PTY LTD (ACN 614 310 057) of 301 Keira Street, Wollongong, NSW (**Developer**)

ANGLICAN COMMUNITY SERVICES (ABN 36 922 848 563) of Norwest Business Park, Level 2, 62 Norwest Boulevard, Baulkham Hills NSW (**Landowner**)

BACKGROUND

- 1 The Developer intends to carry out the Development.
- 2 The Development requires the relocation of a public pathway and the provision of an accessway passing bay at the entry to Panmills Drive to permit access.
- 3 The Developer has offered to construct the relocated public pathway and accessway passing bay, and the Landowner has offered to dedicate the Parcel to Council when that construction is carried out.

OPERATIVE PROVISIONS

1 DEFINITIONS

The following definitions apply unless the context otherwise requires:

| | |
|--|--|
| Act | means the <i>Environmental Planning and Assessment Act 1979</i> (NSW). |
| 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 | Includes any government entity, agency, department or local government or court. |
| Claim | 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. |
| Complete, Completed, Completion | means completed in accordance with the requirements of this document. |
| Council | means Wollongong City Council. |
| Defects Liability Period | Means 12 months commencing from the date Council issues a notice pursuant to clause 7.2 that the Works are complete. |
| Developer | means High Dune Pty Ltd. |
| Development | means the demolition of part of the elevated boardwalk section of Wilkies Walk and reconstruction of part of the boardwalk, and a Torrens title subdivision of the Land into three Lots as approved by DA-2021/1324 issued by the Land and Environment Court and dated 19 April 2023. |



PLANNING AGREEMENT

| | |
|--------------------------------|--|
| Development Application | has the same meaning as in the Act. |
| Development Consent | Has the same meaning as in the Act. |
| Encumbrance | means an interest or power: <ul style="list-style-type: none"> • reserved in or over an interest in any asset; • 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 • by way of security for the payment of a debt or other monetary obligation or the performance of any obligation. |
| GST Law | 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. |
| Land | means the whole of the land contained in Lot 101 DP 268549 as shown at Appendix A. |
| Law | means all legislation, regulations, by-laws, common law and other binding order made by any Authority. |
| Lot | means a lot in the Development created on the registration of a plan of subdivision as part of the Development where the construction of one (1) or more residential dwellings is permissible. |
| Parcel | means that part of the Parent Parcel designated Lot 22 on the draft plan at Annexure A to this Agreement. |
| Parent Parcel | Means Lot 2 DP 116767, currently owned by the Landowner. |
| Planning Legislation | means the Act, the <i>Local Government Act 1993</i> (NSW) and the <i>Roads Act 1993</i> (NSW). |
| Subdivision Certificate | means a subdivision certificate as defined in section 6.4(d) of the Act. |
| Works | means the works specified or described in Schedule 2. |

2 INTERPRETATION

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

| | |
|---|---|
| clauses, annexures and schedules | a clause, annexure or schedule is a reference to a clause in, or annexure or schedule to, this document. |
| reference to statutes | 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. |



PLANNING AGREEMENT

| | |
|--|---|
| singular includes plural | the singular includes the plural and vice versa. |
| person | the word 'person' includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association or any government agency. |
| executors, administrators, successors | a particular person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns. |
| dollars | Australian dollars, dollars, \$ or A\$ is a reference to the lawful currency of Australia. |
| calculation of time | 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. |
| reference to a day | a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later. |
| reference to a group of persons | a group of persons or things is a reference to any two or more of them jointly and to each of them individually. |
| meaning not limited | 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. |
| next day | 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. |
| next Business Day | 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. |
| Business Day | means any day that is not a Saturday, Sunday, gazetted public holiday or bank holiday in Sydney, and concludes at 5pm on that day. |
| time of day | time is a reference to Sydney time. |
| headings | headings (including those in brackets at the beginning of paragraphs) are for convenience only and do not affect the interpretation of this document. |
| agreement | a reference to any agreement, Agreement or instrument includes the same as varied, supplemented, novated or replaced from time to time. |

3 OPERATION OF AGREEMENT

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

This document operates from the date it is executed by all parties.



PLANNING AGREEMENT

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 Monetary Contributions that are to be provided pursuant to this document.

5 REGISTRATION OF THIS DOCUMENT

5.1 Registration

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

5.2 Obligations of the Developer and the Landowner

The Developer and Landowner 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 or Parent Parcel; and
- 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 and Parent Parcel

- i Council will do all things necessary to allow the Developer and Landowner to remove the registration of this document from the title of the Land or Parent Parcel, or any part of the Land or Parent Parcel, where the following has occurred:
 - a the Developer has Completed the Works;
 - b Council has issued a notice pursuant to clause 7.2 of this Agreement that the Works are Complete; and
 - c the Parcel has been dedicated to Council.
- ii The Developer must pay any reasonable costs incurred by Council in undertaking that discharge.

6 PROVISION OF CONTRIBUTIONS

6.1 Parcel

- i. The Landowner must dedicate the Parcel to Council:
 - a. free of any trusts, estates, interests, covenants and Encumbrances;
 - b. only after Completion of the Works but prior to any application by or on behalf of the Developer for a Subdivision Certificate for 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 Parcel in accordance with paragraph (i), including any costs incurred by Council in relation to that dedication.
- iii. Council agrees to do all things necessary to enable the Landowner to comply with paragraph (i).

6.2 Works



PLANNING AGREEMENT

The Developer, at its cost, must:

- i. if necessary, obtain any consents, approvals, licences, or permits required by a relevant Authority, for the conduct of the Works; and
- ii. carry out and complete the Works:
 - a. in accordance with the requirements of, or consents issued, by any Authority;
 - b. in accordance with the reasonable requirements of Council and any applicable Development Consent; and
 - c. in a proper and competent manner complying with current industry practice and standards, including applicable Australian Standards.

6.3 Prior to Subdivision of the Land

The Developer acknowledges that the Works are to be Completed prior to the release of any Subdivision Certificate for the Development. The Developer will not pursue or seek a Subdivision Certificate pertaining to or relating to the Development until Council has issued the notice contemplated at clause 7.2 that the Works have been Completed.

7 COMPLETION OF WORKS

7.1 Issue of Completion Notice

If the Developer considers that the Works are Complete it must serve a notice on Council within 14 days of Completion which:

- i. is in writing; and
- ii. specifies the date on which the Developer believes the Works were Completed.

7.2 Notice by Council

Within the earlier of:

- i. 14 days of inspecting the Works set out in a Completion Notice; and
- ii. 21 days from the receipt of the Completion Notice;

Council must provide notice in writing to the Developer that the Works:

- iii. have been Completed; or
- iv. have not been Completed, in which case the notice must also detail:
 - a. those aspects of the Works which have not been Completed; and
 - b. the work Council requires the Developer to carry out in order to rectify those deficiencies.

7.3 Deemed Completion

If Council does not provide the Developer with notice within the time specified in clause 7.2, the Works will be deemed to have been Completed on the date nominated in the Completion Notice.

7.4 Effect of Council Notice

- i. Where Council serves notice on the Developer pursuant to clause 7.2 identifying that the Works have not been Completed, the Developer must:
 - a. rectify the deficiencies in accordance with that notice within a reasonable time (not being less than 14 days from the date it is issued by Council); or
 - b. serve a notice on Council that it disputes the matters set out in the notice.
- ii. Where the Developer:
 - a. serves notice on Council in accordance with paragraph 7.4(i)(b) the dispute resolution provisions of this document apply; or



PLANNING AGREEMENT

- b. rectifies the Works in accordance with paragraph 7.4(i)(a) it must serve upon Council a new Completion Notice for the Works it has rectified (New Completion Notice).

7.5 New Completion Notice

The provisions of clauses 7.1 to 7.4 (inclusive) apply to any new Completion Notice issued by the Developer.

8 DEFECTS LIABILITY

8.1 Defects Notice

- i Where the Works are Complete but contain a defect which:
 - a adversely affects the ordinary use and/or enjoyment of the Works or a part of the Works; or
 - b will require maintenance or rectification works to be performed on it at some time in the future as a result of the existence of the defect;

(Defect) Council may issue a notice to the Developer (**Defects Notice**) concerning those Works or any aspect of the Works but only during the Defects Liability Period.

- ii A Defects Notice must contain the following information:
 - a the nature and extent of the Defect;
 - b the work Council requires the Developer to carry out in order to rectify the Defect; and
 - c the time within which the Defect must be rectified by the Developer (which must be a reasonable time and not less than 14 days).

8.2 Developer to Rectify Defects

- i The Developer must rectify the Defects contained within a Defects Notice prior to the date specified in that notice.
- ii The Developer must follow the procedure set out in clause 7 in respect of the completion of the rectification of any Defect as if a reference in that clause to the Works is a reference to the relevant Defect.

8.3 Access to the Parcel

If the Developer is required to access, use and occupy any part of the Parcel for the purpose of discharging its obligations under this clause 7 or 8 after the relevant land has been dedicated or transferred to Council, Council will grant a licence to the Developer:

- i with respect to so much of the relevant Parcel; and
- ii for such period;

that is reasonably necessary to allow the Developer to properly discharge those obligations.

8.4 Right of Council to Step-in

Council may, at its absolute discretion, enter upon the Parcel or the Land for the purpose of rectifying a Defect set out in the Defects Notice where the Developer has failed to comply with a Defects Notice, but only after giving the Developer seven (7) days written notice of its intention to do so.

8.5 Consequence of Step-in

If Council elects to exercise the step-in rights granted to it under clause 8.4 then:

- i Council may:
 - a enter upon any part of the Parcel or Land reasonably required to exercise those step-in rights; and
 - b rectify the relevant Defects in accordance with the Defects Notice;



PLANNING AGREEMENT

- ii the Developer must not impede or interfere with Council in exercising those rights; and
- iii Council may claim any costs incurred by it in doing so from the Developer as a liquidated debt.

9 WARRANTIES AND INDEMNITIES

9.1 Warranties

The Developer and Landowner warrant to Council that:

- i each are fully comply with its obligations under this document;
- ii each 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.

9.2 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.

10 DETERMINATION OF THIS DOCUMENT

10.1 Determination

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

10.2 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.

11 ASSIGNMENT

11.1 Prohibition

No party may Assign their rights under this document without the prior written consent of each of the other parties.

11.2 Assignment of Land

The Developer must not Assign its interest in the Land, other than a single 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.

12 DISPUTE RESOLUTION

12.1 Notice of dispute

- i If a dispute between the parties arises in connection with this document or its subject matter (**Dispute**), then the aggrieved party (**First Party**) must give to the other (**Second Party or Parties**) 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



PLANNING AGREEMENT

- d designates its representative (**Representative**) with the necessary authority to negotiate and resolve the Dispute.
- ii The Second Party or additional Party (as the case may be) 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**).

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

12.3 Further steps required before proceedings

Subject to clause 12.7 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 12.5, 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 12.1 is served.

12.4 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 12.5.

12.5 Disputes for mediation

- i If the parties agree in accordance with clause 12.4 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 12.6.

12.6 Other courses of action

If the mediation referred to in clause 12.5 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.

12.7 Remedies available under the Act

This clause 12 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.

12.8 Urgent relief

This clause 12 does not prevent a party from seeking urgent injunctive or declaratory relief concerning any matter arising out of this document.

13 POSITION OF COUNCIL

13.1 Consent authority

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

13.2 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**).

13.3 Severance of provisions



PLANNING AGREEMENT

- 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 11 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
 - 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.

13.4 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.

14 CONFIDENTIALITY

14.1 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.

15 GST

15.1 Definitions

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

15.2 Intention of the parties

Without limiting any other provision of this clause 15, 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.

15.3 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.

15.4 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 15.

15.5 Additional amounts for GST



PLANNING AGREEMENT

Subject to clause 15.7, 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.

15.6 Variation

- i If the GST Amount properly payable in relation to a supply (as determined in accordance with clauses 15.5 and 15.7), varies from the additional amount paid by the Recipient under clause 15.5, 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 15.6 is deemed to be a payment, credit or refund of the GST Amount payable under clause 15.5.
- 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.

15.7 Non-monetary consideration

- i To the extent that the consideration provided for the Supplier's taxable supply to which clause 15.5 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 15.5 shall be reduced by the amount of GST payable by the Recipient on the Recipient Supply.
- ii 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 15.5 (or the time at which such GST Amount would have been payable in accordance with clause 15.5 but for the operation of clause 15.7(i)).

15.8 No merger

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

16 LEGAL COSTS

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

17 ADMINISTRATIVE PROVISIONS

17.1 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



PLANNING AGREEMENT

- 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.

17.2 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.

17.3 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.

17.4 Counterparts

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

17.5 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.

17.6 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.

17.7 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*.



PLANNING AGREEMENT

EXECUTED AS AN AGREEMENT

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

| | |
|--|---|
| _____ Signature of Authorised Person | _____ Signature of Witness |
| _____ [Print] Name of Authorised Officer | _____ [Print] Name of Witness |
| _____ Office Held | _____ Date |
| _____ Date | |

EXECUTED by **HIGH DUNE PTY LTD (ABN:)** in accordance with section 127(1) of the Corporations Act 2001 by authority of its directors.

| | |
|--|--|
| _____ Director Signature | _____ Director / Secretary Signature |
| _____ [Print] Name of Director | _____ [Print] Name of Director/Secretary |
| _____ Date | _____ Date |



PLANNING AGREEMENT

EXECUTED by **ANGLICAN COMMUNITY SERVICES (ABN)** in accordance with section 127(1) of the Corporations Act 2001 by authority of its directors.

Director Signature

Director / Secretary Signature

[Print] Name of Director

[Print] Name of Director/Secretary

Date

Date



PLANNING AGREEMENT

SCHEDULE 1: REQUIREMENTS UNDER SECTION 7.4 OF THE ACT

| REQUIREMENT UNDER THE ACT | THIS PLANNING AGREEMENT |
|--|--|
| <p>Planning instrument and/or Development Application – (Section 7.4(1))</p> <p>The Developer has:</p> <p>(a) sought a change to an environmental planning instrument.</p> <p>(b) made, or proposes to make, a Development Application.</p> <p>(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.</p> | <p>(a) No.</p> <p>(b) Yes.</p> <p>(c) No.</p> |
| <p>Description of land to which this agreement applies – (Section 7.4(3)(a))</p> | <p>Refer to the definitions of “Land”, “Parcel” and “Part Parcel” in this Agreement.</p> |
| <p>Description of development to which this agreement applies – (Section 7.4(3)(b))</p> | <p>Refer to the definition of “development” in this Agreement.</p> |
| <p>Application of section 7.11 of the Act – (Section 7.4(3)(d))</p> | <p>Refer to clause 4.1 in this Agreement.</p> |
| <p>Applicability of section 7.12 of the Act – (Section 7.4(3)(d))</p> | <p>Refer to clause 4.1 in this Agreement.</p> |
| <p>Applicability of section 7.24 of the Act – (Section 7.4(3)(d))</p> | <p>Refer to clause 4.1 in this Agreement.</p> |
| <p>Consideration of benefits under this agreement if section 7.11 applies – (Section 7.4(3)(e))</p> | <p>Refer to clause 4.2 in this Agreement.</p> |
| <p>Mechanism for dispute resolution – (Section 7.4(3)(f))</p> | <p>Refer to clause 12 in this Agreement.</p> |
| <p>Enforcement of this agreement (Section 7.4(3)(g))</p> | <p>Refer to clause 5 in this Agreement.</p> |
| <p>No obligation to grant consent or exercise functions – (Section 7.4(3)(9))</p> | <p>Refer to clause 13 in this Agreement.</p> |



PLANNING AGREEMENT

SCHEDULE 2: WORKS

The demolition of part of the elevated boardwalk section of Wilkies Walk and reconstruction of part of the boardwalk as described in the following drawings by Maker Eng:

| | |
|------------------------------|-------------|
| Drawing No: ISC00201-30-C010 | Revision P4 |
| Drawing No. ISC00201-30-C020 | Revision P4 |
| Drawing No. ISC00201-30-C035 | Revision P3 |
| Drawing No. ISC00201-30-C036 | Revision P4 |
| Drawing No. ISC00201-30-C037 | Revision P1 |
| Drawing No. ISC00201-30-C050 | Revision P1 |
| Drawing No. ISC00201-30-C055 | Revision P1 |
| Drawing No. ISC00201-30-C070 | Revision P1 |
| Drawing No. ISC00201-30-C110 | Revision P4 |
| Drawing No. ISC00201-30-C170 | Revision P1 |
| Drawing No. ISC00201-30-C185 | Revision P5 |
| Drawing No. ISC00201-30-C186 | Revision P1 |
| Drawing No. ISC00201-30-C187 | Revision P2 |
| Drawing No. ISC00201-30-C188 | Revision P1 |

Explanatory Note - Planning Agreement: Lot 101 DP 268549 at Amy Street, Thirroul

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 205 of the *Environmental Planning and Assessment Regulation 2021* (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. HIGH DUNE PTY LTD (ACN 614 310 057) of 301 Keira Street, Wollongong NSW (the **Developer**)
3. ANGLICAN COMMUNITY SERVICES (ABN 36 922 848 563) of Norwest Business Park, Level 2, 62 Norwest Boulevard, Baulkham Hills NSW (the **Landowner**)

Description of the Subject Land

The Planning Agreement applies to this land:

- Lot 101 DP 268549 at Amy Street, Thirroul (**Subject Land**). (Figure 1)

Description of Proposed Development

The developer seeks to demolish part of the elevated boardwalk section of Wilkies Walk and reconstruct that part of the boardwalk. This is related to an approval to subdivide the land into 3 lots as approved by DA-2021/1324 issued by the Land and Environment Court and dated 19 April 2023. (**Development**). (Figure 2)

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

The Planning Agreement will require the Developer to:

- Demolish and reconstruct part of the boardwalk section of Wilkies Walk. (Figure 2)

Assessment of the Merits of the Planning Agreement

Wollongong City Council, the Developer and Landowner agree the proposed demolition and reconstruction of the boardwalk will have a positive public impact to separate traffic from the pedestrian path (Wilkies Walk).

The Planning Purpose of the Planning Agreement

The Planning Agreement has the following public purpose:

- the provision of (or the recoupment of the cost of providing) public amenities or public services
- the provision of (or the recoupment of the cost of providing) public transport or other infrastructure relating to land

This refers to section 7.4(2) of the Act.

In this instance, the developer is proposing to transfer 105.2m² of land to Council (currently owned by Anglican Community Services) and to conduct works on Council land.

The Planning Agreement is in addition to the requirement to pay development contributions required under section 7.12 of the Environmental Planning and Assessment Act 1979 and imposed through development consents.

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

The Planning Agreement promotes the objects (aims) of the Act by:

- to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
- to promote the orderly and economic use and development of land,
- to promote good design and amenity of the built environment,

This refers to section 1.3 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, community infrastructure and open space will be provided.

Figure 1 – Location plan

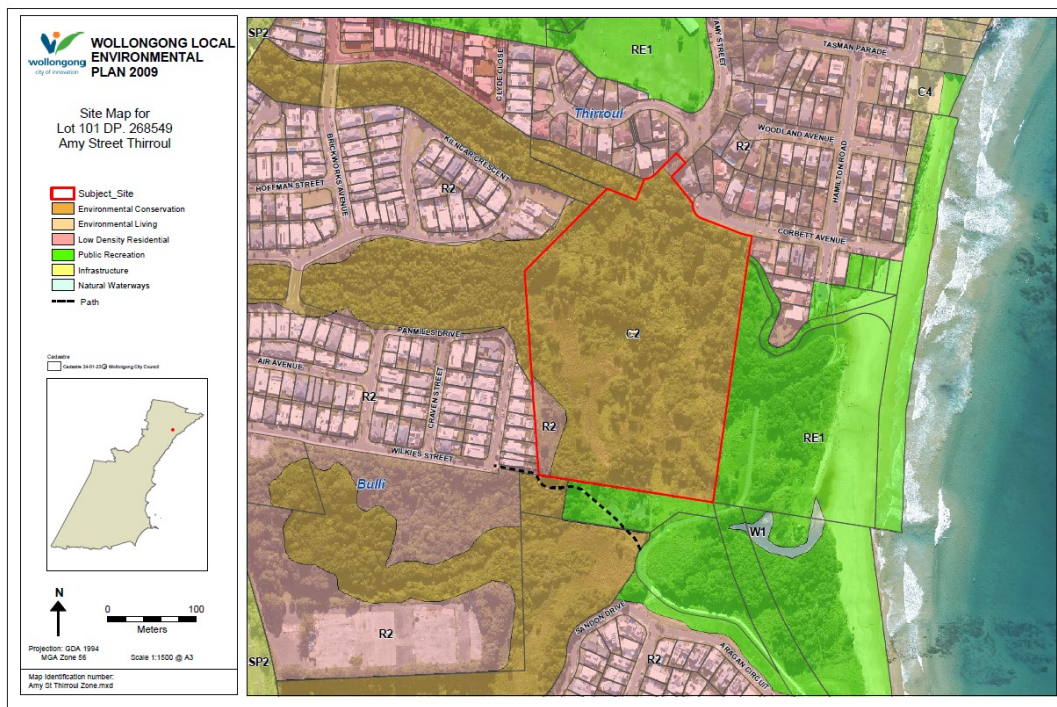


Figure 2 – Proposed works

