

LEGAL DOCUMENT LODGEMENT FORM

Lodgement Date 6/3/12

Date of Legal Documents: 29/2/12

Type of Documents Voluntary Planning Agreement
le: Agreements, Contracts, Easements, General, Lease, Loans (see separate forms of Bank Guarantees and Certificates of Title)

Expiry Date of Document (if applicable): NA

Parties WSC and AV Jennings Properties Ltd

Address AV Jennings Properties: Level 3, 11-13 Brookhollow Ave, Baulkham Hills NSW 2153

Details of Document Governs the payment of monetary contributions

Property Description Lot DP Various - refer VPA

Review Date 30/6/2014

Responsible Officer Sharon Colquhoun

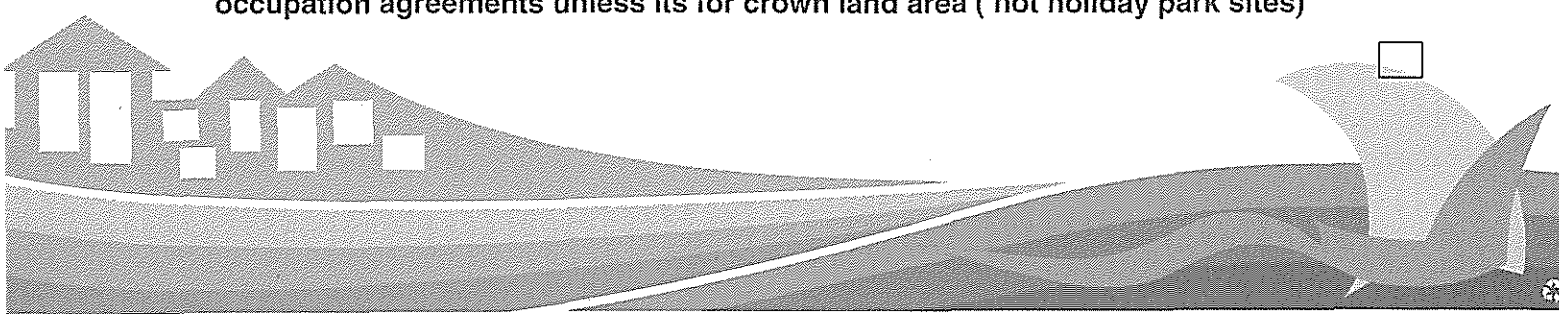
Folder Number DA 2790/2004

Note: This form and the original documents are to be delivered to Corporate Information

Legal Document supersedes LDOC _____ (if applicable)

After legal document is recorded on the computer a Trim link is e-mailed to the responsible officer advising of registration.

Send Link to Sonia Witt for the Agreement Register to be updated – doesn't need occupation agreements unless its for crown land area (not holiday park sites)



VOLUNTARY PLANNING AGREEMENT

WYONG SHIRE COUNCIL (ABN 47 054 613 735)

AND

AV JENNINGS PROPERTIES LTD (ABN 50 004 601 503)

PLANNING AGREEMENT

DATE 29 / 2 / 2012

PARTIES

Wyong Shire Council of 2 Hely Street Wyong, New South Wales ("**Council**")

and

AV Jennings Properties Ltd of Level 3, 11-13 Brookhollow Ave, Baulkham Hills, New South Wales ("**the Developer**")

BACKGROUND

- A. The Stage 9 Consent permits the subdivision of the Stage 9 Land into 33 residential lots. Condition 53 of the Stage 9 Consent required that developer contributions be paid to Council as set out in the Schedule to that Consent. The Schedule to the Stage 9 Consent contains errors that result in the quantum of developer contributions to be paid under condition 53 of that Consent being \$460,056.97 less than the developer contributions provided for in the Developer Contributions Plan.
- B. In September 2007 Council completed an audit of developer contributions owed by and paid for by the Developer and its related entities. That audit identified that the Developer owed Council \$19,136.35 for unpaid developer contributions in respect of various development consents.
- C. The Developer is entitled to a credit of \$59,935.09 pursuant to the Development Servicing Plan for sewer works it has undertaken in respect to the Stage 8 Land.
- D. The Parties have agreed that payment of \$419,258.23 to Council by the Developer would correct the error identified in Recital A, effect payment of the unpaid developer contributions identified in Recital B, and provide an offset of the credit referred to in Recital C.
- E. The Stage 10 Consent permits the subdivision of the Stage 10 Land into 39 lots in three stages. Condition 5 of the Stage 10 Consent required that developer contributions be paid to Council as set out in the Schedule to that Consent.
- F. The Developer and Council have agreed that the Developer will pay the Monetary Contributions, in accordance with this Agreement. The Parties enter in to this Agreement to provide certainty for the planning and budgetary purposes for each of the Parties

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 development of the Stage 9 Land in accordance with the Stage 9 Consent, and the development of the Stage 10 Land in accordance with the Stage 10 Consent.

3 OPERATION OF THIS AGREEMENT

3.1 Subject to clause 3.2, this Agreement takes effect once executed by all parties.

3.2 This Agreement identifies the arrangements with regards to the payment of monetary contributions by the Developer to Council for the provision of off-site community infrastructure in respect to development of the Stage 9 Land and the Stage 10 Land.

3.3 This Agreement does not exclude the operation of s.94 of the Act.

4 DEFINITIONS AND INTERPRETATION

In this Agreement the following definitions apply:

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

AVJ means AV Jennings Limited (ABN 44 004 327 771) of ~~1 Lakeside Drive, East Burwood, Victoria 3151~~ **Level 4, 108 Power Street, Hawthorn, Victoria 3122**

Corporate Guarantee means an irrevocable letter of undertaking, on terms acceptable to Council, issued by AVJ in favour of Council.

Council means Wyong Shire Council or its representatives or assigns.

CPI-A means, for the purposes of cl. 5.4 of this Agreement, the most recent Consumer Price Index (All Groups and weighted average for all 8 cities) published by the Australian Bureau of Statistics at the time a developer contribution is paid to Council.

CPI-B means, for the purposes of cl. 5.4 of this Agreement, the most recent Consumer Price Index (All Groups and weighted average for all 8 cities) published by the Australian Bureau of Statistics as at the date that is three years from the date of this Agreement.

Developer means AV Jennings Properties Limited (ABN 50 004 601 503).

Development Contributions Plan means Section 94 Contributions Plan No. 7A Warnervale District.

Development Servicing Plan means the document titled "Development Servicing Plan No. 7A – Warnervale East/Wadalba North-West" dated April 2006, being a plan for the purpose of determining contribution rates for water supply and sewerage infrastructure for the purposes of the *Water Management Act 2000*.

Monetary Contributions means the monetary contributions specified at clause 5 of this Agreement.

Parties means Council and the Developer, including both their successors and assigns.

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

Stage 8 Land means Lot 2 DP 1064784 as well as Lots A and B of DP386170, that land having a street address of 465-475 Pacific Highway, Wadalba, New South Wales.

Stage 9 Consent means the conditional consent to development application DA/2790/2004 that was granted by Council on 16 December 2004 and modified by Council on 8 February 2008 that relates to the Stage 10 Land.

Stage 9 Land means land known as Lots 901 to 933 DP 1141346 having a street address of 465-481 Pacific Highway, Wadalba, New South Wales

Stage 10 Consent means the conditional consent to development application DA/1722/2004 that relates to the Stage 10 Land that was granted by Council on 26 November 2004, modified by Council on 1 September 2008, and further modified by Council on 7 March 2011.

Stage 10 Land means the land known as Pt Lot 1 DP 180012 having a street address of 483 Pacific Highway, Wadalba, New South Wales.

5 PAYMENT OF THE MONETARY CONTRIBUTIONS

5.1 The Developer agrees to pay the Monetary Contributions to Council by way of the following four equal instalments to be paid by the following dates:

- (a) \$104,814.57 by 30 January 2012; and
- (b) \$104,814.57 by 30 June 2012; and
- (c) \$104,814.57 by 30 June 2013; and
- (d) \$104,814.57 by 30 June 2014.

5.2 Council undertakes and agrees that it will upon receipt of each of the instalments received by it pursuant to cl. 5.1 apply such part of each of those instalments to part payment of the contributions that the Developer is required to pay pursuant to condition 5 of the Stage 10 Consent.

5.3 The Parties agree that upon the Developer complying with its obligation under cl. 5.1(a) of this Agreement that the following rights as between the Parties are extinguished and that this sub-clause can be relied upon in any proceedings as a complete defence to any attempt to enforce either of those rights:

- (a) Any right Council may have to recover the unpaid developer contributions referred to in Recital B of this Agreement; and
- (b) Any right the Developer may have to the credit referred to in Recital C of this Agreement.

5.4 The Parties agree that upon the Developer meeting its obligations under cl. 5.1 and 6.1 the maximum aggregate developer contributions that Council will seek to recover from the Developer pursuant to condition 5 of the Stage 10 Consent will be:

- (a) Where those developer contributions are paid to Council within 3 years of the date of this Agreement, \$1,352,602.20 (being \$34,682.11 x 39) or
- (b) Where those developer contributions are paid to Council later than 3 years after the date of this Agreement, the amount calculated in accordance with the following formula:

$$\text{Amount to be paid} = \$34,682.11 \times 39 \times (\text{CPI-A/CPI-B})$$

5.5 For the avoidance of doubt, the issue of a certificate of compliance in relation to any plan of subdivision in relation to Stage 10 is not dependent on completion of the instalment payments referred to in clause 5.1.

6 SECURITY

6.1 The Developer will procure that AVJ will lodge with Council a Corporate Guarantee to the value of \$419,258.23 within 10 business days after execution of this agreement.

6.2 Council agrees that that upon receipt of each instalment under sub-clause 5.1 Council will relinquish to AVJ the Corporate Guarantee provided that AVJ lodges with Council a replacement Corporate Guarantee equivalent to the value of the unpaid instalments due to Council. On completion of payment of all instalment payments under clause 5.1, Council will relinquish the Corporate Guarantee then held by Council to AVJ.

- 6.3 If any of the instalments specified in sub-clause 5.1 are not received by Council by the dates specified in that sub-clause, Council may call upon the Corporate Guarantee and apply monies received from the redemption of that Corporate Guarantee as a payment or part payment of the outstanding instalment without prejudice to any other rights Council has (under this Agreement or otherwise) to pursue any outstanding instalment(s) of the Monetary Contributions.

7 DEVELOPER WARRANTIES AND INDEMNITIES

- 7.1 The Developer warrants to Council that:
- (a) It is able to fully comply with their obligations under this Agreement;
 - (b) It has full capacity to enter into this Agreement; and
 - (c) There is no legal impediment to it entering into this Agreement, or performing its obligations under this Agreement.
- 7.2 The Developer guarantees to Council the due and punctual payment of all moneys due and payable or from time to time due and payable to Council by the Developer pursuant to or in connection with this agreement.
- 7.3 The Developer agrees that Council is not required to proceed against the Developer or exhaust any remedies it may have in relation to the Developer or enforce any security it may hold with respect to the Developer's obligations, but is entitled to demand and receive payment when any payment is due under this Agreement.

8 REVIEW OF THIS AGREEMENT

- 8.1 Any amendments, variation or modification to or of, or consent to any departure by any party from the terms of this Agreement shall have no force or effect unless effected by a document executed by the parties which complies with the requirements of Section 93G of the Act.
- 8.2 Each of the Parties individually reserves the right to review this Agreement if and when there is a grant of approval for modification to the Development Consent.

9 DISPUTE RESOLUTION

- 9.1 If a dispute arises out of or relates to this Agreement (including any dispute as to the meaning, performance, validity, subject matter, breach or termination of this Agreement or as to any claim in tort, in equity or pursuant to any statute) (**Dispute**), any court or arbitration proceedings shall not be commenced by or against Council, the Developers or their successors or assigns, relating to the Dispute unless the parties to the Dispute (**Parties**) have complied with this clause, except where a party seeks urgent interlocutory relief.

- 9.2 A party claiming that a Dispute has arisen under or in relation to this Agreement is to give written notice to the other parties to the Dispute, specifying the nature of the Dispute.
- (a) The two parties firstly meet in good faith to resolve the dispute, and if not resolved to the satisfaction of both parties within 1 month of the initial meeting then proceed with (b).
 - (b) The Parties agree to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales and to take action to have the Dispute mediated within 7 working days of the receipt of written notice of the Dispute.
 - (c) The Parties agree that the President of the Law Society of New South Wales or the President's nominee will select the mediator and determine the mediator's remuneration.
 - (d) The Parties to the mediation will be jointly responsible for the fees of the mediation and each party shall bear its own costs.
 - (e) The Parties may, but are not required, to enter into a written agreement before mediating a Dispute.
 - (f) If any procedural aspects are not specified sufficiently in the rules under Clause 13.1, the Parties agree to conduct the mediation regarding those aspects in accordance with the determination of the mediator whose decision regarding those aspects is final and binding on the Parties.
 - (g) A legal representative acting for either of the Parties may participate in the mediation.
- 9.3 From the time when a notice of Dispute is served, neither party shall take action to terminate this Agreement, until after the conclusion of the mediation.
- 9.4 Should mediation fail to resolve any dispute then the dispute shall be determined by arbitration pursuant to the Commercial Arbitration Act 1984 and the General Manager of the Council shall request the President for the time being of The Law Society of New South Wales to appoint an arbitrator to carry out such arbitration in accordance with the provisions of such Act.
- 9.5 Despite clauses 9.1, 9.2, 9.3 and 9.4, either Council or one or more of the Developers may institute court proceedings to seek urgent equitable relief in relation to a dispute or difference arising out of or in connection with this Agreement.

10 NOTICES

- 10.1 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 or emailed to that Party at the relevant details set out below.

(i) Council: Wyong Shire Council
Attention: General Manager
Address: DX 7306 WYONG
Fax No: (02) 4350 2098
Email: wsc@wyong.nsw.gov.au

(ii) Developer: AV Jennings Properties Limited
Attention: John Vagulans
Address: PO Box 7207, Baulkham Hills, BC, NSW 2153
Fax No: (02) 9846 6445
Email: JVagulans@avjennings.com.au

10.2 If a party gives the other party 3 working 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.

10.3 Any notice, consent, information, application or request is to be treated or 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 working 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.

10.4 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 it is on a business day, after 5.00pm 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.

11 COSTS

The Developer and Council agree to each pay their own costs in connection with the negotiation, preparation and execution of this planning agreement.

12 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.

13 FURTHER ACTS

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

14 GOVERNING LAW AND JURISDICTION

This Agreement is governed by the law of New South Wales, Australia. 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 provided that the dispute resolution provisions in clause 9 of this Agreement have first been satisfied.

15 NO FETTER

Nothing in this Agreement is to 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 is to be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

16 SEVERABILITY

If a clause or part of a clause in 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 the Agreement is not affected.

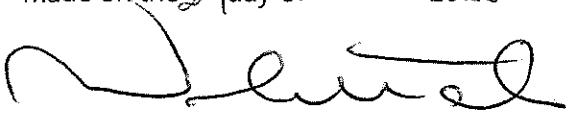
17 WAIVER

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.

EXECUTED as a Voluntary Planning Agreement

Date: 8th February 2012

The Common Seal of WYONG SHIRE COUNCIL
was hereunto affixed on the day of
2009 pursuant to a resolution of the Council
made on the 29 day of FEB 2012



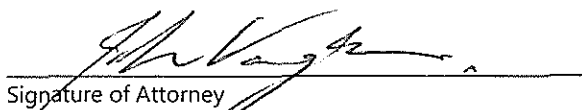
General Manager

Mayor

Signed by AVJennings Properties Ltd by the
person's attorney under power of attorney:

Book: 4562.....

No. 697.....



Signature of Attorney

The attorney states that he or she has no notice
Or suspension of the power

JOHN MARTIN VACULANS

Full Name (attorney)