

STAFF MEMORANDUM

Please sign attached original copy of VPA.

Lynda Hirst
F2012/01755

14 February 2014

Michael Whittaker - General Manager

METRO CINEMAS VPA - LAKE HAVEN

At its meeting of 11 December 2013 Council resolved:

*It will need
PC A also.*

1 That Council endorse the offer by Metro Cinemas to provide public domain improvements to the Council land surrounding the proposed Lake Haven Metro Cinema, in accordance with the draft Lake Haven Town Centre Masterplan. Such works are in lieu of Section 94A contributions and are to be valued at a minimum of \$100,000.

2 That Council agree to match the financial contribution by Metro Cinemas to an amount capped at \$100,000 and to make a provision in the 2014/15 budget.

3 That Council delegate responsibility to the General Manager to negotiate and execute the Voluntary Planning Agreement.

The Metro Cinemas VPA was publicly exhibited from 8 January 2014 to 6 February 2014 with no submissions received.

Please find attached two copies of the VPA signed by Metro Cinemas.

Council staff have reviewed the document and confirm it is the version that was previously agreed to and publicly exhibited.

In accordance with Council's resolution of 11 December 2013 the VPA is now submitted for your signature. One copy of the VPA will then be returned to Metro Cinemas.

Submitted for your consideration.

Paul Bowditch
Manager

STRATEGIC DEVELOPMENT

Steve Mann
Manager

PROPERTY DEVELOPMENT

Director

Jari Ihalaenen

PROPERTY & ECONOMIC DEVELOPMENT

Encl

Endorsed/Not Endorsed

Endorsed/Not Endorsed

Endorsed/Not Endorsed

Mick

1 copy of VPA signed by Metro Cinemas

Wants the PCA

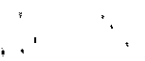
Wants WSC

Wants to negotiate and execute the VPA

~~Draft~~ Voluntary Planning Agreement

Metro Cinemas Lake Haven Pty Limited (Metro)
Wyong Shire Council (Council)

Our Ref: 201320:1JA



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- A Council is the registered proprietor of Lot 2 DP 1084245 at Lake Haven which currently contains playing fields, a recreation centre and a youth centre (Land).
- B The Land is situated adjacent the Lake Haven Shopping Centre and forms part of the Lake Haven District Centre for which Council has prepared a draft Masterplan.
- C Metro has entered into an agreement to lease from Council an area of land within Lot 2 which is designated in the Masterplan for entertainment facilities and Metro proposes to construct a Cinema complex on the Land (Cinema Proposal).
- D Metro has lodged a Development Application for the Cinema Proposal building for which development contributions would be levied under the Section 94A Contributions Plan adopted by Council (Development Application).
- E Metro proposes to make a contribution in excess of the required Section 94A contribution to be used for improvements to the public domain in the area south of the Cinema Proposal provided that Council makes a matching contribution to the proposed public domain works (Works).
- F In recognition of:
 - (a) the offer by Metro to pay additional contributions, and
 - (b) the agreement of Council to make a matching contribution,
 the Parties have agreed to enter into the Voluntary Planning Agreement (VPA).

Recitals

<p>Name Wyong Shire Council Description (Council) Notice details Hely Street Wyong NSW 2259 Attention The General Manager</p>	<p>Name Metro Cinemas Lake Haven Pty Limited Description (Metro) Notice details Locked Bag 1 Governor Phillip Tower 1 Farrer Place Sydney NSW 2000</p>
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Parties

Date 19 February 2014
~~December 2013~~

Details

Operational Provisions

1. Definitions and Interpretation

1.1 Dictionary

The following words have these meanings in the VPA unless the contrary intention appears:

Act means the *Environmental Planning and Assessment Act 1979*.

Agreement means this planning agreement.

Authority means a government, semi government, local government, statutory, public, ministerial, civil, administrative, fiscal or judicial body or other authority or body with relevant power or authority.

Cinema Proposal means the construction of a building located between the existing recreation centre and youth centre on Lot 2 and the subsequent fitout of that building for operation of a cinema complex.

Completed means completed in accordance with the requirements of this document.

Consideration has the meaning given by the GST Law.

CPI means Consumer Price Index (Sydney - All Groups) published by the Australian Bureau of Statistics.

Consent Authority means the Wyong Shire Council or such other consent authority as may be lawfully appointed and authorised to grant Development Consent.

Cost includes, but is not limited to, allowances for design (not to exceed 10% of overall cost for any such works), authorities' fees and charges, supply and construction costs.

Council means Wyong Shire Council.

Council Contribution means a cash contribution of \$100,000 (indexed) or the equivalent works in kind for public domain upgrade works generally as described in Schedule One.

Development Application means the development application for the construction of a cinema complex on the Land, and a development application for the fit out of a cinema complex on the Land.

Development Consent means consent to a development application for the development of the Cinema Proposal.

force majeure means any physical or material restraint beyond the reasonable control of the Party claiming force majeure.

GST has the meaning given by the GST Law.

GST Amount means in relation to a Taxable Supply the amount of GST payable in respect of that Taxable Supply.

GST Law has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*, or, if that Act does not exist means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulation made under that Act

Index means the CPI (All Groups Sydney), but if that Index ceases to be published, such other index as the Council and Metro may agree.

Invoice has the meaning given by the GST Law.

Land means part of Lot 2 DP 1084245.

Law means the relevant requirements of all statutes, rules, ordinances, codes, policies, regulations, proclamations, by-laws or consents issued by an Authority, present or future.

LEADR means LEADR, Association of Dispute Resolvers located at Level 1, 13-15 Bridge Street Sydney, NSW 2000.

Masterplan means the Lake Haven Town Centre Masterplan prepared by Wyong Shire Council.

Metro Contribution means a cash contribution of \$100,000 (indexed) or the equivalent works in kind for public domain upgrade works generally as described in Schedule One.

Party means a party or parties to the VPA or successors in title as contemplated by the VPA.

Taxable Supply has the meaning given by the GST Law excluding the reference to section 84-5 of the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.

Works means improvements to the public domain area south of the Cinema Proposal shown in Annexure A and as described in Schedule One.

1.2 VPA does not fetter discretion

(a) The Parties acknowledge and agree that nothing in the VPA abrogates or fetters, or is intended to abrogate or fetter, the lawful and proper discharge by Council of its statutory responsibilities, whether in relation to the subject-matter of the VPA or otherwise.

(b) If, contrary to the operation of this clause, any provision of the VPA is held by a court of competent jurisdiction to constitute an unlawful fetter on any discretion of the Council, the Parties agree:

(i) they will take all practical steps, including the execution of any further documents, to ensure the objectives of the VPA are substantially satisfied, and

(ii) in the event that any provision of the VPA cannot be achieved without giving rise to an unlawful fetter on the discretion of Council, the relevant provision is to be severed and the remainder of the VPA has full force and effect.

(c) Where a 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 the VPA contracted out of a provision or exercised a discretion under the VPA, then to that extent the VPA is not to be taken to be inconsistent with that Law.

1.3	<p>Interpretation Act 1987</p> <p>Subject to the VPA, section 3, Part 2, and sections 36, 38 and 76 of the <i>Interpretation Act 1987</i> govern the interpretation of the VPA to the extent to which they are applicable as if a reference in that Act to an "Act" or "instrument" is a reference to the VPA and with such other modifications or adaptations as may be necessary for that governing purpose.</p>
1.4	<p>Application of Sections 94, 94A or 94EF of the Act</p> <p>The Parties acknowledge and agree that:</p> <p>(a) This agreement excludes either in whole or in part, the application of sections 94 and 94A of the Act in connection with the Development Applications.</p> <p>(b) This agreement does not exclude the application of section 94EF to the development.</p>
1.5	<p>Compliance with New Laws</p> <p>If a Law is changed or a new Law comes into force (both referred to as "New Law") and Metro is obliged by the New Law to do something or pay an amount which it is already contractually obliged to do or pay under the VPA then, to the extent only that the relevant obligation is required under both the New Law and the VPA, compliance with the New Law will constitute compliance with the relevant obligation under the VPA.</p>
1.6	<p>Indexation of amounts payable by the Parties</p> <p>Where the VPA provides that an amount is to be increased by CPI, then the amount will be increased in accordance the following formula:</p> $A = B \times \frac{D}{C}$ <p>Where:</p> <p>A = the indexed amount at the time the payment is to be made.</p> <p>B = the contribution amount stated in the VPA.</p> <p>C = the Index most recently published before the date of payment.</p> <p>D = the Index most recently published before the date of VPA.</p> <p>For the avoidance of doubt, if A is less than B, then the relevant amount will not change.</p>
2.	<p>Commencement and Terms of the VPA</p> <p>2.1 Commencement of the VPA</p> <p>The VPA commences on the date of execution of the VPA by the Parties.</p> <p>2.2 Terms of the VPA</p> <p>The VPA will remain in force until:</p> <p>(a) it is terminated by operation of Law, or</p> <p>(b) all obligations are performed or satisfied.</p>

If a Party disputes the Default Notice it may refer that dispute to dispute resolution under the VPA.

5.3 Suspension of time — dispute

In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the continuation of the default constitutes or causes a public nuisance or raises other circumstances of urgency or emergency.

5.2 Reasonable time

In the event a Party considers another Party has failed to perform and fulfill an obligation under the VPA, it may give notice in writing to that Party (**Default Notice**) giving full particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than twenty-one (21) days.

5.1 Notice of default

5. Performance Guarantee

The works shall be completed to the satisfaction of Council in accordance with the final design plans prior to the issue of a Final Occupation Certificate for the cinema building.

Should Metro fail to undertake the construction of the works prior to completion of construction of the cinema building, then Council will undertake full cost recovery less \$100,000 or 50% of the costs, whichever is the lesser by way of a cash contribution from Metro prior to the issue of any Occupation Certificate for the building.

Should Metro fail to undertake the construction of the works prior to completion of Metro will then undertake the work and Council will contribute up to 50% or \$100,000, whichever is the lesser, upon submission of a written payment request, Works As

Executed drawings, and final Quantity Surveyor Report or other documentation acceptable to Council in regard to the total amount of expenditure by Metro on the works. Council shall make payment to Metro within 21 days of receipt of the required documentation.

Upon issue of final design plans by Council, Metro will submit to Council within 30 days an updated Quantity Surveyors report re-confirming the value of the works and any modifications required to maintain the value of the works at \$200,000 (indexed).

Metro will prepare concept plans for the Works in accordance with the Masterplan for the cinema building. The concept plan shall be accompanied by a report by a Quantity Surveyor showing that the value of the proposed works is not less than \$200,000.

4.1 Summary of Obligations and Timing

4. Obligations

The obligations of Metro under the VPA are conditional on the granting of the Development Consents for the cinema proposal and the granting of a lease to Metro for the land on which the proposal is to be constructed.

3.1 Condition Precedent to the VPA

3. Condition Precedent

6.	Dispute resolution	
6.1	Notice of dispute	
6.2	Conduct pending resolution	<p>The Parties must continue to perform their respective obligations under the VPA if there is a dispute but will not be required to complete the matter the subject of the dispute.</p> <p>The Parties must continue to perform their respective obligations under the VPA if there is a dispute but will not be required to complete the matter the subject of the dispute.</p>
6.3	Further steps required before proceedings	<p>Any dispute between the Parties arising in connection with the VPA or its subject matter must, as a condition precedent to the commencement of litigation, first be the subject of mediation by a mediator agreed by the Parties and, if the Parties cannot agree within fourteen (14) days, then by a mediator appointed by LEADR.</p>
7.	Miscellaneous	
7.1	Acknowledgement of Terms and Obligations	<p>The Parties acknowledge and agree that, upon the commencement of the VPA:</p> <p>(a) the terms and obligations of the VPA will supersede, replace and wholly substitute any prior agreements between the Parties in relation to the obligations and contributions the subject matter of the VPA</p>
7.2	Choice of Law	<p>The Laws of New South Wales as in force from time to time govern the VPA.</p>
7.3	Dealing with the Land	<p>Nothing in the VPA abrogates, fetters or in any way prevents Council from selling, mortgaging or in any other way dealing with the Land.</p>
7.4	Entire Agreement	<p>The VPA contains everything to which the Parties have agreed in relation to the terms and obligations referred to in the VPA. 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 the VPA was executed, except as permitted by law.</p>
7.5	Force Majeure	<p>(a) if a Party is unable by reason of force majeure to carry out wholly or in part its obligations under the VPA, it must give to the other Party prompt notice of the force majeure with reasonably full particulars.</p> <p>(b) The obligations of the Parties so far as they are affected by the force majeure are then suspended during continuance of the force majeure and any further period as may be reasonable in the circumstances.</p>

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

7.10 Modifications
 Each party shall be responsible for payment of its own legal and associated costs in connection with the preparation, execution and enforcement of this Planning Agreement.

7.9 Legal and Associated Costs
 If a clause or part of a clause of the VPA 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 the VPA, but the rest of the VPA is not affected.

7.8 Interpretation

(a) Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a Party, must exclude the amount of any Input Tax Credit entitlement of that Party in relation to the relevant cost, expense or other liability.

(b) If an amount payable under the VPA is adjusted by reference to a change to the CPI, then the impact of GST must be excluded from the change to the CPI.

(c) The Party entitled to any payment under the VPA will produce a tax invoice for the amount to be paid within seven (7) days of the request to do so by the Party making the payment.

(d) Each Party warrants that for the duration of the VPA they are registered under the GST law. If a Party requests written evidence of registration, the Party claiming to be registered will promptly produce evidence satisfactory to the Party seeking such evidence.

7.7 GST
 If GST is payable on a Taxable Supply made under, by reference to or in connection with the VPA, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.

Each Party to the VPA must sign and execute all documents and do all things as may be reasonably required to be done by the Party to give effect to the VPA.

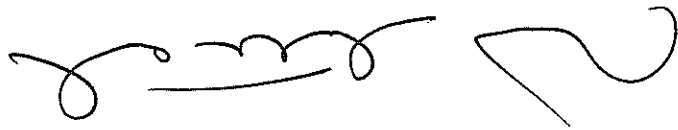
7.6 Further assurance

(c) The Party giving such notice under this clause must use all reasonable effort and diligence to remove the force majeure or ameliorate its effects as quickly as practicable.


(d) If the Parties are unable to agree on the existence of an event of force majeure or the period during which the obligations of the Parties are suspended during the continuance of the force majeure, that dispute must be referred for determination under the VPA.

- 7.11 Novation**
 Council agrees to execute any deeds of novation or other documents necessary to novate or otherwise transfer all of Metro's rights and obligations under the VPA to a successor if applicable within the terms of the VPA.
- 7.12 Waiver**
 The fact that a Party fails to do, or delays in doing, something the Party is required to do under the VPA, does not amount to a waiver of any obligation of any other Party.
- 7.13 Warranty of Authority**
 The Parties represent and warrant that they have power to enter into the VPA and comply with their obligations under the VPA and that entry into the VPA will not result in the breach of any law.

Wyong Shire Council



Metro Cinemas Lake Haven Pty Limited


M. WARDROP
DIRECTOR

Signed, sealed and delivered as a deed

Signing page

Schedule One – Scope of Works for Public Domain

- Paving in a mixture of textures and colours to give clear definition to pedestrian paths
- Modifications to existing landscaping
- Additional landscaping of low level plantings
- Bicycle parking facility
- New external seating
- Partial upgrading of other elements identified in the Masterplan (amphitheatre, playground or shade structures)