

Memo to General Manager



SAC DA/545/2014

11 August 2015

*Received ??
28/8/15*

Michael Whittaker – General Manager

EXECUTION OF DRAFT AMENDMENT TO VOLUNTARY PLANNING AGREEMENT – PELICAN HORIZONS PTY LTD – DA/545/2014 – MIXED USE RESIDENTIAL DEVELOPMENT AT THE ENTRANCE

A Draft Amendment has been submitted to Council in respect to an existing executed Voluntary Planning Agreement (VPA) between Pelican Horizons Pty Ltd and Council relating to the residential/commercial development on Lot 1 in Deposited Plan 513519, (No. 2) Ocean Pde, & Lot 2 in Deposited Plan 536168 (No.14) The Entrance Rd, The Entrance (Key Site).

The Amendment proposes to amend the existing VPA to provide for an increase in development contributions commensurate with the increase in the density of the residential component proposed in DA/545/2014 relative to the development proposed at the time the existing VPA was executed.

The Draft Amendment was publicly exhibited from 8 July 2015 until 10 August 2015, with no submissions received.

Please find attached copy of the Amendment signed by Pelican Horizons Pty Ltd, and now submitted for your signature. Following execution, this original copy will be kept by Council and a certified copy of the Amendment will then be returned to the Developer.

A copy of the exhibition package (containing relevant background) is also attached for your information.

Regards

A handwritten signature in blue ink that reads "Steve Mann".

Steve Mann

**Manager
PROPERTY DEVELOPMENT**

Endorsed/Not Endorsed

Page 2



Mike Dowling
Director
PROPERTY & ECONOMIC DEVELOPMENT

Endorsed/Not Endorsed

Encl.



lindsaytaylorlawyers

planning • environment • local government

Deed

Marine Parade, The Entrance Planning Agreement Amendment

**Wyong Shire Council
Pelican Horizons Pty Ltd**

Date:

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Marine Parade, The Entrance Planning Agreement Amendment

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Summary Sheet

Council:

Name: Wyong Shire Council
Address: 2 Hely St, WYONG NSW 2259
Telephone: (02) 4350 5555
Facsimile: (02) 4351 2098
Representative: General Manager

Developer:

Name: Pelican Horizons Pty Ltd
Address: PO Box 815, LANE COVE NSW 1595
Telephone: (02) 9418 8977
Email: pelicanhorizons@hotmail.com
Representative: Pete de Gail



Marine Parade, The Entrance Planning Agreement Amendment

Parties

Wyong Shire Council ABN 47 054 613 735 of 2 Hely St, WYONG NSW 2259
(Council)

and

Pelican Horizons Pty Ltd ABN 38 144 699 605 of PO Box 815, LANE COVE,
NSW 1595 (Developer)

Background

- A The Parties entered into the Planning Agreement.
- B The Instrument Change occurred.
- C The Developer lodged the DA.
- D The Joint Regional Planning Panel granted the Consent subject to conditions including the Deferred Commencement Condition.
- E The Parties have agreed to amend the Planning Agreement in terms of the Letter of Offer subject to this Deed.

Operative provisions

Part 1 - Preliminary

1 Interpretation

- 1.1 In this Deed, and except as the context otherwise requires, the definitions set out in clause 1.1 of the Planning Agreement apply to this Deed.
- 1.2 In addition, the following further definitions apply:
 - Consent** means the Development Consent granted to the DA on 18 December 2014.
 - Deed** means this Deed and includes any schedules, annexures and appendices to this Deed.
 - DA** means DA545/2014 made to the Council in relation to the Land.



Deferred Commencement Condition means condition 1 in Schedule A of the Consent.

Letter of Offer means the Developer's letter of offer dated 20 November 2014 prepared by Ingham Planning Pty Limited.

Party means a party to this Deed.

Planning Agreement means the planning agreement entered into between the Parties dated 9 December 2013 as registered on the title of the Land.

- 1.3 In the interpretation of this Deed, the following provisions apply unless the context otherwise requires:
- 1.3.1 Headings are inserted for convenience only and do not affect the interpretation of this Deed.
 - 1.3.2 A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
 - 1.3.3 A reference in this Deed 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.
 - 1.3.4 A reference in this Deed to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
 - 1.3.5 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
 - 1.3.6 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
 - 1.3.7 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.
 - 1.3.8 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.
 - 1.3.9 References to the word 'include' or 'including' are to be construed without limitation.
 - 1.3.10 A reference to this Deed includes the agreement recorded in this Deed.
 - 1.3.11 A reference to a Party to this Deed includes a reference to the servants, agents and contractors of the Party, the Party's successors and assigns.

2 Status of this Deed

- 2.1 This Deed is agreement within the meaning of s93I(4) of the Act and effects an amendment of the Planning Agreement.

3 Amendment of Planning Agreement



- 3.1 This Planning Agreement is amended as follows:
- 3.1.1 In clause 1.1 of the Planning Agreement, the definition of 'Development' is omitted and the following inserted in lieu:
'Development means the mixed use development on the Land including a residential flat building with a Floor space ratio up to 4.08:1, height up to RL70m AHD and a minimum of 178 on-site car spaces which specifically includes the development approved by the consent granted to development application DA/545/2014.'
- 3.1.2 Clause 4.1.2 of the Planning Agreement is omitted and the following inserted in lieu:
'The Development is commenced pursuant to a Development Consent.'
- 3.1.3 In clause 8.1 of the Planning Agreement:
- (a) '\$1,559,267.60' is omitted and '\$1,872,580.82' inserted in lieu; and
- (b) the reference to 'at the date of this Agreement' in the definition of CPI-B is omitted and 'for September 2014' is inserted in lieu.
- 3.1.4 The following new clause 8.2 is inserted after clause 8.1:
'8.2 Development contributions in addition to those required by subclause 8.1 shall be paid prior to the issue of the first construction certificate for any "development units" (as defined by the relevant development contributions plans) that may be approved in addition to those approved in DA/545/2014, in accordance with the relevant s94 contributions plans current at the time the additional "development units" are approved, multiplied by a public benefit factor of 1.5 and indexed in accordance with the methodology outlined in the relevant contributions plans.'

4 Costs

- 4.1 The parties are to bear their own costs of preparing, negotiating and executing this Deed.

5 Entire Deed

- 5.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with.
- 5.2 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 Deed was executed, except as permitted by law.

6 Further Acts



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

7 Governing Law and Jurisdiction

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

8 No Fetter

- 8.1 Nothing in this Deed 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.

9 Illegality

- 9.1 If this Deed or any part of it becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties are to co-operate and do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.

10 Severability

- 10.1 If a clause or part of a clause of this Deed 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.
- 10.2 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 Deed, but the rest of this Deed is not affected.

11 Amendment

- 11.1 No amendment of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed in accordance with clause 25D of the Regulation.

12 Explanatory Note

- 12.1 The Appendix contains the Explanatory Note relating to this Deed required by clause 25E of the Regulation.



- 12.2 Pursuant to clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Deed.



Execution

Executed as a Deed

Dated: 31/8/15

Executed on behalf of the Council

General Manager

Witness

Mayor

Witness

Executed on behalf of the Developer in accordance with s127(1) of the Corporations Act (Cth) 2001

PHILIPPE JOHN DE GAIL
DIRECTOR
Name/Position

DANIEL HOFBAUER
DIRECTOR
Name/Position

CATHERINE MAGENNIS



Appendix

(Clause 12)

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Amendment of Planning Agreement

Parties

Wyong Shire Council ABN 47 054 613 735 of 2 Hely St, WYONG NSW 2259 (**Council**)

Pelican Horizons Pty Ltd ABN 38 144 699 605 of PO Box 815, LANE COVE NSW 1595
(**Developer**)

Description of the Land to which the Draft Amendment of Planning Agreement Applies

Lot 1 DP 513519 also known as 2 Ocean Parade, The Entrance NSW 2261

Lot 2 DP 536 168 also known as 14 The Entrance Road East, The Entrance NSW 2261.

Description of Proposed Development

The Development as proposed to be modified by the Draft Amendment of Planning Agreement means the mixed use development on the Land which includes a residential flat building with an FSR of up to 4.08:1 and height of RL70m AHD and a minimum of 178 on-site car spaces which specifically includes the development approved by the consent granted to development application DA/545/2014.

Summary of Objectives, Nature and Effect of the Draft Amendment of Planning Agreement



Objectives of Draft Planning Agreement

The objective of the Draft Amendment of Planning Agreement is to amend the planning agreement entered into and dated 9 December 2013 in respect of the Land (**Planning Agreement**).

Nature of Draft Amendment of Planning Agreement

The Draft Amendment of Planning Agreement is an agreement within the meaning of s93I(4) of the *Environmental Planning and Assessment Act 1979 (Act)* which effects an amendment of the Planning Agreement

Effect of the Draft Amendment of Planning Agreement

The Draft Amendment of Planning Agreement amends the Planning Agreement to:

- alter the definition of 'Development' to accord with the development approved by DA545/2014 as follows:

'Development means the mixed use development on the Land including a residential flat building with a Floor space ratio up to 4.08:1, height up to RL70m AHD and a minimum of 178 on-site car spaces which specifically includes the development approved by the consent granted to development application DA/545/2014.'
- increase contributions payable under the Planning Agreement under clause 8.1 from '\$1,559,267.60' as indexed to '\$1,872,580.82' as indexed.
- provide for development contributions for *development units*" (as defined by the relevant development contributions plans) that may be approved in addition to those approved in DA/545/2014 to be paid at the rate of 1.5 times the rate for such development prescribed by applicable contributions plans at the time of any such approval.

Assessment of the Merits of the Draft Amendment of Planning Agreement

The Planning Purposes Served by the Draft Amendment of Planning Agreement

The Draft Amendment of Planning Agreement:

- promotes and co-ordinates the orderly and economic use and development of the Land to which the Agreement applies,
- provides and co-ordinates public domain improvements in connection with the Development, and
- provides increased opportunity for public involvement and participation in environmental planning and assessment of the Development.



The draft Amendment of Planning Agreement provides a reasonable means of achieving the above planning purposes because it appropriately balances the interests of the parties while promoting the public interest.

In particular, the draft Amendment of Planning Agreement is expected to secure development contributions significantly in excess of the contributions that could be secured in relation to the Development by condition imposed under s94 of the Act.

How the Draft Amendment of Planning Agreement Promotes the Public Interest

The Draft Planning Agreement promotes the public interest by promoting the objects of the Act as set out in s5(a)(ii),(v) and 5(c) of the Act.

For Planning Authorities:

Development Corporations - How the Draft Amendment of Planning Agreement Promotes its Statutory Responsibilities

N/A

Other Public Authorities – How the Draft Amendment of Planning Agreement Promotes the Objects (if any) of the Act under which it is Constituted

N/A

Councils – How the Draft Amendment of Planning Agreement Promotes the Elements of the Council's Charter

The Draft Amendment of Planning Agreement promotes the elements of the Council's charter by:

- by providing a means for the private funding of public facilities for the benefit of the Development and the wider community, and
- providing a means that allows the wider community to make submissions to the Council in relation to the Agreement.

All Planning Authorities – Whether the Draft Amendment of Planning Agreement Conforms with the Authority's Capital Works Program

The Draft Planning Agreement conforms with the Council's Capital Works Program as it seeks to partially fund the implementation of The Entrance Town Centre Masterplan.

All Planning Authorities - Whether the Draft Amendment of Planning Agreement specifies that certain requirements must be complied with before issuing a construction certificate, subdivision certificate or occupation certificate

No. However, the Planning Agreement as proposed to be amended does specify that the obligation to make monetary Development Contributions



under that agreement must be complied with before the issuing of the first Construction Certificate for the Development.