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# **VOLUNTARY PLANNING AGREEMENT**

## **WYONG SHIRE COUNCIL**



**AND**

**Rustrum Pty Ltd**

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# PLANNING AGREEMENT

## DATE:

**Wyong Shire Council** (ABN 47 054 613 735) of Council Chambers, Hely Street Wyong in the State of New South Wales ("**Council**")

and

**Rustrum Pty Limited** (ACN 094 517 067) of c/- Bedford Tittley, Level 6, 141 Walker Street, North Sydney NSW 2060 in the State of New South Wales ("**the Developer**")

## BACKGROUND

- A. The Developer is the owner of Lots 2, 3 & 4 in DP 406181, lot 2 in DP213097A and lot 91 in DP 565884 at Main Road, Toukley in the State of New South Wales and may become the owner of part lot 5 in DP514932.
- B. The Developer has sought amendments to the Instrument that will allow an increase in the size of the Development.
- C. The amendments sought to the Instrument are:
  - (a) The rezoning the Land from SP3 Tourist to B4 Mixed Use.
  - (b) An increase in the height limit above the maximum 25 metre permitted for Key Sites.
  - (c) An increase in the Floor Space Ratio.
  - (d) The deletion or remapping of foreshore area.
- D. The Developer intends to lodge a Development Application relating to the Land once the Instrument Amendments have been effected.
- E. Subject to the terms of this Agreement and the grant of Consent, the Developer agrees and commits under this agreement to the payment of:
  - (a) Section 94 contributions in accordance with adopted contributions plans for the Development , and
  - (b) An additional public benefit contribution.
- F. The Council agrees to use the Section 94 contributions and the public benefit contributions to enhance and improve public spaces and the pedestrian & cycleway access in the vicinity of the Land.

## **OPERATIVE PROVISIONS**

### **1 PLANNING AGREEMENT UNDER THE ACT**

- 1.1 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**

- 2.1 This Agreement applies to the Development to the extent it relates to the Land once the Development Consent has been granted.

### **3 OPERATION OF THIS AGREEMENT**

- 3.1 Subject to clause 3.2, this Agreement takes effect once the Instrument Amendments have been made under the Act
- 3.2 This Agreement identifies the arrangements with regards to the payment of Monetary Contributions by the Developer to Council towards the provision of infrastructure and facilities for public benefit in respect to the Development on the Land
- 3.3 This Agreement does **not** exclude the operation of sections 94 and 94A of the Act and the Public benefit contributions are not to be taken into account in determining the contribution under section 94 of the Act.
- 3.4 This Agreement does **not** apply to any obligation that the Developer may have to pay contributions, fees or charges under the *Water Management Act 2000* in respect to the Development of the Land.

## 4 DEFINITIONS AND INTERPRETATION

4.1 In this Agreement the following definitions apply:

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

**Consent** means the development consent (as defined in the Act) granted by the Consent Authority in respect of the Development Application.

**Consent Authority** has the same meaning as that term has in the Act.

**Council** means Wyong Shire Council or its representatives or assigns.

**CPI-A** means, for the purposes of clause 5.3 of this Agreement, the Consumer Price Index (All Groups and weighted average for all 8 cities) published by the Australian Bureau of Statistics at the time of Consent is issued.

**CPI-B** means, for the purposes of clause 5.3 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 that part of the Monetary Contribution is paid to Council.

**construction certificate** has the meaning given to that term in the Act.

**Contributions Plan** – means a contributions plan prepared for the provision and funding of community facilities and infrastructure made in accordance with Section 94EA of the Act.

**Current Contributions Plans** means the suite of adopted Contributions Plans that are applicable to the Development that are in force at the time the Consent is issued.

**Developer** means Rustrum Pty Limited (ACN 094 517 067) and in substitution the subsequent owner of the Land.

**Development** means the mixed use residential flat building complex (which may include commercial floorspace, below ground parking and service areas) on the Land permitted in the B4 Mixed use Zoning of the Instrument.

**Development Application** means a development application made to the Consent Authority pursuant to the Act that seeks consent to undertake the Development on the Land.

**Estimated Costs** means the cost for the Developer to complete the Public Benefit Landscaping Works.

**GST** has the same meaning as in the GST Law.

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

**Independent QS** means a practising quantity surveyor of at least 10 years standing who is a member of the Australian Institute of Quantity Surveyors and who as at the date of his/her appointment practises in the Wyong area.

**Instrument** means the *Wyong Local Environmental Plan 2013*;

**Instrument Amendments** means the amendments that the Developer seeks to the Instrument, as described generally in Recital C;

**Land** means the Land Owned and the Land Acquired.

**Land Owned** means the land known as Lots 2, 3 & 4 in DP 406181 and lot 2 in DP213097A, located at Main Road, Toukley in the State of New South Wales.

**Land Acquired** means the land identified as proposed Lot 912 in the proposed subdivision of Lots 91 in DP 565884 and lot 5 in DP514932, being land located at Main Road, Toukley in the State of New South Wales.

**Monetary Contributions** means the Section 94 contributions and Public Benefit Contributions.

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

**Section 94 Contributions** means the contributions required to be paid under the Current Contributions Plans in respect to the Development.

**Section 94 Contributions Policy** means Council's policy on deferred payments of Section 94 contributions under the Act.

**Parties** mean the Council and the Developer.

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

**Public Benefit Contribution** – means the contributions towards infrastructure for public benefit offered by the Developer in respect to the Development and which is to be calculated as:

$$PBC = BC/2 - LWC$$

Where:

PBC = the Public Benefit Contribution;

BC = the Section 94 Contributions excluding Section 94 Contributions for car parking;

LWC = the Estimated Cost as determined in accordance with clause 5.

**Public Benefit Landscaping Works** means landscaping works (including the making, upgrading, renovating or repairing of paths, cycle paths, accessways, structures, gardens, or grass, tree or shrubs areas) to be carried out at Toukley Gardens Public Park, Toukley and/or Osborne Public Park, Toukley as a condition of the Consent.

**working day** means a day that is not a Saturday, Sunday or public holiday in Wyong, New South Wales

## 5 PAYMENT OF MONETARY CONTRIBUTIONS

- 5.1 Subject to Consent being granted, the Developer agrees to pay the Section 94 Contributions to the Council.
- 5.2 Subject to Consent being granted, the Developer agrees to pay the Public Benefit Contribution to the Council.
- 5.3 The Monetary Contributions (comprising both the Section 94 Contributions and the Public Benefit Contributions) shall be indexed in relation to the part of the Monetary Contribution paid in accordance with the following formula:

$$\text{Monetary Contribution} = (\text{Section 94 Contributions} + \text{Public Benefit Contributions}) \times (\text{CPI-B/CPI-A})$$

- 5.4 The Developer agrees to pay the total indexed Monetary Contributions required under this agreement to Council:
- (a) Prior to the release of the construction certificate for the Development; or
  - (b) As otherwise approved by Council, in its absolute discretion, under its Section 94 Contributions Policy
- 5.5 Council agrees that it will expend the Section 94 Contributions and Public Benefit Contribution monies to enhance and improve the public spaces and the pedestrian and cycleway access in the vicinity as the Land.
- 5.6 For the purpose of clarity, the Parties agree the Monetary Contributions (comprising the Section 94 Contributions and the Public Benefit Contributions") to be paid by the Developer to Council in respect to Development is exclusive of any amount that the Developer may be required to pay under the *Water Management Act 2000*.
- 5.7 The Public Benefit Landscaping Works cost is determined by the addition of the following:
- (a) The actual cost incurred by the Developer in undertaking the Public Benefit Landscaping Works at the time it provides the estimate referred sub clause 5.7(b); and
  - (b) Subject to clause 5.8, the Estimated Costs as set out in a notice (**Estimated Costs Notice**) issued by the Developer to Council prior to issue of the construction certificate.
- 5.8 If:
- (a) Council does not agree the Estimated Costs as set out in the Estimated Costs Notice it must, within 15 working days of the Estimated Costs Notice being given, give notice (**Objection Notice**) to the Developer objecting to the Estimated Costs and providing detailed reasons for its objection;
  - (b) Council does not give an Objection Notice in accordance with clause 5.8(a), it is deemed to have accepted the Estimated Costs as set out in the Estimated Costs Notice;
  - (c) an Objection Notice is given in accordance with clause 5.8(a), then the Developer and Council must within 10 working days of Council giving the Objection notice attempt in good faith to agree the appointment of and if agreed appoint an Independent QS to determine the Estimated



costs

- (d) the Developer and Council have not agreed on and appointed the Independent QS in accordance with clause 5.8(c) then at anytime thereafter, either the Developer or Council may request the President for the time being of Australian Institute of Quantity Surveyors (New South Wales Chapter) to determine the appointment of and appoint the Independent QS on behalf of the Developer and Council;
- (e) an Independent QS is appointed pursuant to this clause, the Independent QS:
  - (i) is deemed to be the joint appointment by the Developer and Council and;
  - (ii) must act as an expert;
  - (iii) may require the Developer and/or Council to provide such information in its possession as the Independent QS reasonably requires in respect of completing the Public benefit landscaping works and the party requested to provide such information must do so within 5 working days of the request by the Independent QS;
  - (iv) must within 20 working days of his/her appointment determine the Estimated Cost in writing and provide a copy of the determination to the Developer and Council;

5.9 The Independent QS determination provided under clause 5.8 is final and binding (except in the case of manifest error) on the Developer and Council.

5.10 The Developer and Council must each pay one half of the Independent QS costs of his/her appointment.

5.11 Nothing in this agreement requires the Developer to lodge the Development Application or to acquire and the Developer becoming the registered owner of that part of the Land Acquired comprising part lot 5 in DP514932.

5.12 This agreement ends and is complete when the Developer has paid the Monetary Contributions in accordance with this agreement and following payment of the Monetary Contribution in full, Council will promptly on request execute any form and supply any information reasonably required by the Developer to enable the removal of the registration of this agreement from title to the Land.

## **6 DEVELOPER WARRANTIES AND INDEMNITIES**

6.1 The Developer warrants to Council so far as it is aware, that:

- (a) It is the registered owner of the Land Owned;
- (b) It is able to fully comply with the obligations under this Agreement;
- (c) It has full capacity to enter into this Agreement; and
- (d) There is no legal impediment to it entering into this Agreement, or performing its obligations under this Agreement.

6.2 The Developer agrees to procure, at no cost to Council, the registration of this Agreement pursuant to section 93H of the Act on the relevant folios of the Register pertaining to the Land as soon as practicable following the execution of this Agreement in respect of the land in its ownership and as

soon as practical after the Developer becoming the registered owner of that part of the Land Additional comprising part lot 5 in DP514932. This obligation includes the Developer procuring, at no cost to Council, the written consent of any mortgagee or other person holding an interest in the Land that is necessary to effect the registration required by this clause.

- 6.3 The Developer guarantees to Council the due and punctual payment of all monies due and payable or from time to time due and payable to Council by the Developer pursuant to or in connection with this agreement.
- 6.4 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.
- 6.5 The Developer agrees that where all or part of the Monetary Contributions required to be paid under this agreement are not paid at the time required for any reason but providing written demand for payment has been made by Council and such amount remains outstanding for 14 days after such demand is given, the Developer agrees that Council shall have the right to:
- (a) Record the outstanding Monetary Contribution as a debt against all or any part of the Land pursuant to Section 603 of the *Local Government Act 1993*; and
  - (b) Place a caveat on all or any part of the Land for the recovery of the outstanding Monetary Contributions pursuant to the *Conveyancing Act 1919*.
- 6.6 The Developer agrees that this Agreement will run with the Land and the Consent and until rescinded, terminated, or extinguished by full payment of the Monetary Contributions will bind all future owners of the Land.
- 6.7 The Developer agrees that until this agreement is registered on title to the Land, it will inform all persons that intend to take an interest in the Land while ever monetary contributions are outstanding prior to binding commitments being concluded and will obtain and forward to Council an undertaking (which may be by deed pole) from those persons that they intend to be bound by this Agreement.

## **7 REVIEW OF THIS AGREEMENT**

- 7.1 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 DISPUTE RESOLUTION**

- 8.1 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.
- 8.2 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 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.
- (b) 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.
- (c) The Parties to the mediation will be jointly responsible for the fees of the mediation and each party shall bear its own costs.
- (d) The Parties may, but are not required, to enter into a written agreement before mediating a Dispute.
- (e) If any procedural aspects are not specified sufficiently in the Mediation Rules, 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.
- (f) A legal representative acting for either of the Parties may participate in the mediation.

8.3 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.

8.4 Should mediation fail to resolve any dispute then the Dispute may be determined by arbitration pursuant to the *Commercial Arbitration Act 1984* and either Council or the Developer may 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.

8.5 Despite clauses 8.1, 8.2, 8.3 and 8.4, either Council or the Developer 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.

## 9 COSTS

9.1 The Developer agrees to pay or reimburse the costs of Council within 7 working days after receipt of a tax invoice from Council in connection with the:

- (a) Negotiation, preparation and execution of this planning agreement, to a maximum of \$3,000.
- (b) Advertising and exhibiting this planning agreement in accordance with the Act, to a maximum of \$250 for each occasion, and
- (c) Registration of this planning agreement where required.

## 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 in (b) below.
- (b) Faxed 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

(ii) Developer: **Rustrum Pty Ltd**

Address (for personal service): C/- Bedfordd Titley, level 6, 141 Walker Street, North Sydney NSW 2060  
Address (for postal service): PO Box 249, Toukley, NSW 2263

Fax No.: 02 4396 7593

- 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 working day, or if it is on a working day, after 5.00pm on that day in the place of the party is to receive it, it is to be treated as having been given or made at the beginning of the next working day.

## **11 ENTIRE AGREEMENT**

- 11.1 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.

## **12 FURTHER ACTS**

- 12.1 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.

## **13 GOVERNING LAW AND JURISDICTION**

- 13.1 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 8 of this Agreement have first been satisfied.

## **14 NO FETTER**

- 14.1 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.

## **15 SEVERABILITY**

- 15.1 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.

## **16 WAIVER**

- 16.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement it, 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.

## **17 GST**

- 17.1 If GST is payable on a taxable supply made under, by reference to or in connection with this Agreement, the Party providing the consideration for that taxable supply must also pay the GST amount as additional consideration. This clause 17.1 does not apply to the extent that the consideration for the taxable supply is expressly stated in this agreement to be GST inclusive.
- 17.2 No additional amount will be payable by the Council under 17.1 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the taxable supply giving rise to the liability to pay GST.
- 17.3 No payment of any amount pursuant to this clause 17 and no payment of the GST amount where the consideration for the taxable supply is expressly agreed to be GST inclusive, is required until the supplier has provided a tax invoice or adjustment note (as the case may be) to the recipient.
- 17.4 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.
- 17.5 This clause continues to apply after expiration or termination of this agreement.

## **18 EXPLANATORY NOTE RELATING TO THIS AGREEMENT**

- 18.1 The Appendix contains the Explanatory Note relating to this Agreement required by clause 25E of the Regulation.
- 18.2 Pursuant to clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note in the Appendix is not to be used to assist in construing this Planning Agreement.

**EXECUTION PANEL**

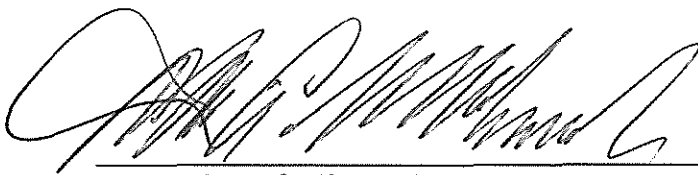
**EXECUTED** as a Voluntary Planning Agreement

The Common Seal of WYONG SHIRE COUNCIL was hereunto affixed on the      day of 20      pursuant to a resolution of the Council made on the      day of      20      :

\_\_\_\_\_  
General Manager

Date: \_\_\_\_\_

Executed for and on behalf of Rustrum Pty Limited (ACN 094 517 067) in accordance with Section 127(1) of the Corporations Act:



\_\_\_\_\_  
Director/Secretary [if not Sole Director]

MORRIS WHEELER

Name [BLOCK LETTERS]

Date: 25.11.2015



\_\_\_\_\_  
Director/Sole Director

JOY WHEELER

Name [BLOCK LETTERS]

Date: 25.11.2015

## Appendix

### ***Environmental Planning and Assessment Regulation 2000***

Explanatory Note

Draft Planning Agreement

under s93F of the *Environmental Planning and Assessment Act 1979*

#### **Parties**

Wyong Shire Council ABN 46 054 613 735 of 2 Hely Street, Wyong NSW 2259 (Council); and  
Rustrum Pty Ltd ABN 89 094 517 067 of PO Box 249 Toukley, NSW 2263 (Developer)

#### **Description of the Land to which the Draft Planning Agreement Applies**

Lots 2, 3 & 4 in DP 406181, lot 2 in DP213097A and proposed Lot 912 in subdivision of Lots 91 in DP 565884 and lot 5 in DP514932, Main Road, Toukley in the State of New South Wales.

#### **Description of Proposed Development**

Mixed use residential flat building complex with commercial floorspace, below ground parking and service areas on the Land permitted in the B4 Mixed use Zoning of the *Wyong Local Environmental Plan 2013*.

#### **Summary of Objectives, Nature and Effect of the Draft Planning Agreement**

##### **Objectives of Draft Planning Agreement**

To require the Developer to provide public benefit contributions to enhance and improve public spaces and the pedestrian & cycleway access in the vicinity of the Land.

##### **Nature of Draft Planning Agreement**

A planning agreement under s93F of the *Environmental Planning and Assessment Act 1979* (Act). The Draft Planning Agreement is a voluntary agreement under which monetary contributions (as set out at clauses 5.1 and 5.2 of the Draft Planning Agreement) are made by the Developer for various public purposes (as defined in s93F(3) of the Act).

##### **Effect of the Planning Agreement**

The Agreement:

- relates to the carrying out of a Development on the Land by the Developer,
- does not exclude the application of s 94 of the Act to the Development in relation to specified public amenities and public services,
- does not exclude the application of s94A of the Act to the Development,
- does not exclude the application of s94EF of the Act to the Development,
- requires the Developer to provide a monetary contribution for material public benefits,
- is to be registered on the title to the Land,
- provides two dispute resolution methods for a dispute under the Agreement, being mediation and arbitration,
- provides that the Agreement is governed by the law of New South Wales, and
- provides that the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* applies to the agreement.

##### **Assessment of the Merits of the Draft Planning Agreement**

The Planning Purposes Served by the Draft Planning Agreement

*Promotes the public interest by the payment of public benefit contributions to enhance and improve public spaces and the pedestrian & cycleway access in the vicinity of the Land.*

How the Draft 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(v)) and 5(c) of the Act.*

For Planning Authorities:

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

*N/A*

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

*N/A*

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

*The Draft Planning Agreement promotes elements of the Council's charter, as prescribed in s. 8(1) of the Local government Act 1993*

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

*The Draft Planning Agreement conforms.*

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

*The Draft Planning Agreement specifies that the section 94 contributions under the Act and the public benefit contributions must, unless otherwise approved by Council in its absolute discretion, be paid before a construction certificate is issued.*