

VOLUNTARY PLANNING AGREEMENT

WYONG SHIRE COUNCIL

AND

TINBANA PTY LIMITED

SCANNED
16 SEP 2013

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PLANNING AGREEMENT

DATE 31/10/13

PARTIES

Wyong Shire Council of 2 Hely Street Wyong in the State of New South Wales

and

Tinbana Pty Limited (ABN 28105064159) of 249 Silvesters Road, Somersby, New South Wales

BACKGROUND

- A. The Land was created as a separate lot pursuant to a subdivision permitted by the 2004 Consent. The 2004 Consent provided that the Land would comprise a single lot with a building entitlement within a net developable area of 825m² with noise and fire impacts imposing constraints on the development of those parts of the Land outside the net developable areas of 825m².
- B. The 2013 Application proposes the subdivision of the Land into 3 lots, each of those lots having a building entitlement where the total area of developable area between the three lots has been enlarged to 1,372m².
- C. The Developer and Council have agreed that the Developer will pay Monetary Contributions in accordance with this Agreement in substitution of contributions required under the 94 Plans.

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 the 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 towards the provision of off-site infrastructure and facilities in respect to the 2013 Consent and the 2004 Consent.
- 3.3 This Agreement excludes the operation of s.94 of the Act.

4. DEFINITIONS AND INTERPRETATION

4.1. In this Agreement the following definitions apply:

94 Plans means the "Section 94 Contributions Plan No. 7A - Drainage, Water Quality, Open Space, Community Facilities and Roads -Warnervale District - dated September 2005" and "Section 94 Contributions Plan No. 11 – Shire Wide Infrastructure, Services and Facilities – dated July 2007" adopted by Council.

2013 Application means development application DA/93/2013;

2004 Consent means the conditional consent granted to development application DA/3139/2004;

2013 Consent means any future conditional consent granted to development application DA/93/2013;

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

Council means Wyong Shire Council, a body politic established under the *Local Government Act 1993* and a consent authority for the purposes of the *Environmental Planning and Assessment Act 1979*;

CPI-A means, for the purposes of clause 5.1 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 of this Agreement;

CPI-B means, for the purposes of clause 5.1 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;

Developer means Tinbana Pty Ltd, a company registered in New South Wales having its registered office at 249 Silvesters Road, Somersby, New South Wales

Land means the land identified as Lot 1301 DP 1135355 having a street address of 6 Florin Place, , Wadalba, New South Wales;

Monetary Contributions means the monetary contributions specified at clause 5.1 of this Agreement;

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

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

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5. PAYMENT OF THE MONETARY CONTRIBUTIONS

- 5.1. The Developer agrees to pay the following amount to Council in respect to development of the Land pursuant to the 2013 Consent:

$$\text{Amount to be paid} = \$54,990 \times (\text{CPI-B/CPI-A})$$

- 5.2. The Developer agrees to pay the Monetary Contribution set out in clause 5.1:
- (a) Prior to the issue of the subdivision certificate or a construction certificate for the erection of a dwelling, whichever occurs first; or
 - (b) As otherwise approved by Council, in its absolute discretion, under its deferred payment of Section 94 contributions policy
- 5.3. The Parties agree that contributions that Council has received in respect to development of the Land pursuant to the 2004 Consent do not form part of this Agreement and cannot be used to offset the monies required to be paid under this Agreement.
- 5.4. The parties agree that the payment required under clause 5.1 includes all outstanding contributions required to be paid in respect of the 2004 Consent, comprising:
- (a) Warnervale/Wadalba Drainage Land (F) (NDA) - $\$107,344.26 \times 0.8 \text{ ha} = \$8,587.54$
 - (b) Warnervale/Wadalba Water Quality Works (F) (NDA) - $\$63,347.54 \times 0.8\text{ha} = \$5,067.80$
 - (c) Warnervale/Wadalba Drainage Works (F) (NDA) - $\$51,771.31 \times 0.8\text{ha} = \$4,141.70$
- 5.5. The Developer acknowledges that its obligation to pay contributions for water and sewer under the *Water Management Act 2000* are not affected by this Agreement.



6. DEVELOPER WARRANTIES AND INDEMNITIES

6.1. 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

6.2. 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.

6.3. 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.

7. REVIEW OF THIS AGREEMENT

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.

- (i) 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.
- (ii) 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.

- (iii) The Parties to the mediation will be jointly responsible for the fees of the mediation and each party shall bear its own costs.
- (iv) The Parties may, but are not required, to enter into a written agreement before mediating a Dispute.
- (v) If any procedural aspects are not specified sufficiently in the rules under Clause 13, 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.
- (vi) 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 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.

8.5. Despite clauses 8.1, 8.2, 8.3 and 8.4, 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.

9. COSTS

The Developer agrees to pay or reimburse the costs of Council in connection with the:

- (a) Negotiation, preparation and execution of this planning agreement, to a maximum of \$1200.
- (b) Advertising and exhibiting this planning agreement in accordance with the Act, to a maximum of \$215.

within 7 working days after receipt of a tax invoice from Council.



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

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

- (i) Developer: Tinbana Pty Limited
Attention: Peter Johnson
Address: **249 Silvesters Road, Somersby, NSW**
Fax No: Nil
Email: peter@delroypark.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. 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.

12. 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.

13. 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 8 of this Agreement have first been satisfied.

14. 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.

15. 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.

16. 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.



17. EXECUTION PANEL

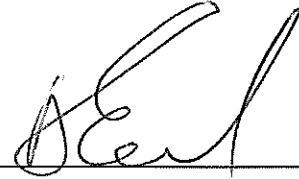
EXECUTED as a Voluntary Planning Agreement

Date:

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



Mayor

Executed for and on behalf of Tinbana Pty
Limited
ABN 28105064159 in accordance with
section 127(1) of the Corporations Act:

Director/Secretary [if not Sole Director]



Director/Sole Director

Name [BLOCK LETTERS]

PETER JOHNSON

Name [BLOCK LETTERS]