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## Area 13 Environmental Land Management Planning Agreement

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

**Port Macquarie Hastings Council**

(Council)

A D Witchard

(Developer)

Dated

18/6/08

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## Planning Agreement

### Parties

**Port Macquarie Hastings Council** ABN 11 236 901 601 of Corner Lord and  
Burrawan Streets, Port Macquarie, New South Wales 2444 (**Council**)

Alan D Witchard of [REDACTED] (**Developer**)

### Background

- A The Developer is the owner of the Land and proposes to carry out the Development on the Land.
- B The Development cannot be lawfully carried out on the Land unless the Area 13 LEP takes effect under the Act.
- C The Developer has offered to make Development Contributions in connection with the carrying out of the Development in accordance with this Agreement and in consideration of the making of the Area 13 LEP.
- D Until the Planning Agreement operates, this Agreement constitutes the Developer's offer to make Development Contributions in connection with the Development on the terms and conditions set out in this Agreement.

### Operative provisions

#### 1 Definitions & Interpretation

- 1.1 The following definitions apply in this Agreement unless the context or subject-matter otherwise indicates or requires:

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

**Agreement** includes any schedules, annexures and appendices to this Agreement.

**Alternative Funding** means funding obtained by the Council for the ongoing management of Environmental Management Land dedicated to the Council



under this Agreement that does not rely on monetary Development Contributions obtained by the Council under Division 6 of Part 4 of the Act (including under this Agreement).

**Area 13** means the land to which the Area 13 LEP applies..

**Area 13 LEP** means the *Port Macquarie-Hastings Local Environmental Plan 2007* or a local environmental plan that is materially similar to that plan.

**Bank Guarantee** means an irrevocable and unconditional undertaking without any expiry or end date by one of the following trading banks:

- (a) Australia and New Zealand Banking Group Limited;
- (b) Commonwealth Bank of Australia;
- (c) Macquarie Bank;
- (d) National Australia Bank Limited;
- (e) St. George Bank Limited;
- (f) Westpac Banking Corporation; or
- (g) any other financial institution approved by the Council, in its absolute discretion, in response to a request from the Developer,

to pay an amount or amounts of money to the Council on demand and containing terms and conditions satisfactory to the Council.

**Council Land** means any land to which the Area 13 LEP applies that is vested in or under the control of the Council on which development for a residential, business or industrial purpose is permissible not being land required to be held by the Council for a public purpose.

**Detailed Management Plan** means a plan relating to the establishment and maintenance of the Environmental Management Land in accordance with the provisions of the document of the Council titled *DCP 2006 - Area 13 Thurmaster DCP* or any DCP that replaces or supplements that document that contains provisions relating to the establishment and maintenance of the Environmental Management Land.

**Development** means development on the Land of a type or for a purpose that is permissible under the Area 13 LEP but was not permissible before the Area 13 LEP took effect.



**Development Application** has the same meaning as in the Act.

**Development Consent** has the same meaning as in the Act.

**Development Contribution** means a monetary contribution, the dedication of land free of cost, the carrying out of work, or the provision of any other material public benefit, or any combination of them, to be used for, or applied towards, a Public Purpose.

**Environmental Management Land** means any part of the Land that is situated within Zone E2 Environmental Conservation or Zone E3 Environmental Management under the Area 13 LEP or any other part of the Land agreed between the Parties to be Environmental Management Land for the purposes of this Agreement before such land is required to be dedicated to the Council under this Agreement.

**Establishment Obligation** means the establishment of Environmental Management Land in accordance with:

- (a) the relevant requirements of any Development Consent relating to the Development, and
- (b) to the extent not inconsistent with such a Development Consent:
  - (i) any Detailed Management Plan approved by the Council, and
  - (ii) otherwise to the satisfaction of the Council.

**Establishment Period** means the period commencing when the Development is commenced (within the meaning of the Act) or such other period or periods commencing at such other time or times as the Parties agree and ending when the Establishment Obligation is completed to the satisfaction of the Council.

**Final Lot** means a lot having an area not exceeding 5,000 square metres to be created in the Development for separate occupation and disposition or a lot of a kind or created for a purpose that is otherwise agreed by the parties, not being:

- (a) a lot created by a subdivision of the Land that is to be dedicated or otherwise transferred to the Council, or



- (b) a lot created by a subdivision of the Land on which is situated a dwelling-house that was in existence on the date of this Agreement.

**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.

**Land** means Lot 3 in DP 619643.

**Management Contribution** means a monetary contribution of \$10,584 per hectare of Net Developable Area indexed quarterly after 1 January 2008 in accordance with the Consumer Price Index (All Groups- Sydney) published by the Australian Bureau of Statistics.

**Management Contribution Refund** means an amount calculated as follows:

$$\text{Refund \$} = F \times \text{YE} \times A / T$$

Where

**F** = Balance of all Management Contributions paid under this Agreement and any other similar planning agreements that are held in the fund referred to in clause 12.7 of this Agreement.

**YE** = 20 – (the period of years between the date which the Management Contribution is paid and the date any Alternative Funding takes effect expressed as a number to two decimal places).

**A** = Net Developable Area in respect of which the Management Contribution is paid.

**T** = The sum of the values of  $\text{YE} \times A$  under this Agreement and under other planning agreements relating to land to which the Area 13 applies in which the definition of *Management Contribution Refund* in this Agreement appears.

**Management Obligation** means the management of Environmental Management Land in accordance with:



- (a) the relevant requirements of any Development Consent relating to the Development, and
- (b) to the extent not inconsistent with such a Development Consent:
  - (i) any Detailed Management Plan approved by the Council, and
  - (ii) otherwise to the satisfaction of the Council.

**Management Period** means the period of three years commencing immediately at the end of the Establishment Period, or such other period or periods commencing at such other time or times as the Parties agree.

**Management Work** means Work forming part of the Establishment Obligation or the Management Obligation.

**Net Developable Area** means the area of the Land remaining after excluding any part of the Land:

- (a) on which residential, business or industrial development is not permissible under the Area 13 LEP, and
- (b) that is, or will be, required to be dedicated to the Council for the purposes of a local park, and
- (c) that comprises a lot specified in paragraph (b) of the definition of *Final Lot*, and
- (d) that the Council agrees to exclude at the request of the Developer, and
- (e) that is or will be required for arterial road purposes (within the meaning of the document of the Council titled *DCP 2006 - Area 13 Thrumster DCP*, and
- (f) any Land that on which development is restricted under a Development Consent to the protection of hollow-bearing trees.

**Part 4A Certificate** has the same meaning as in the Act.

**Planning Agreement** means the provisions of this Agreement under which the Developer is required to make Development Contributions in connection



with the carrying out of the Development, and includes any provisions that are incidental or supplementary to those provisions.

**Public Purpose** has the same meaning as in s93F(2) of the Act.

**Residue Lot** means a lot to be created in the Development that is not a Final Lot.

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

**Security** means an unconditional bond or bank guarantee in favour of the Council in a form acceptable to the Council.

**Stage** means a stage of the Development provided for in a Development Consent or any part of the Development that the Parties agree is a stage for the purposes of this Agreement..

**Subdivision** has the same meaning as in the Act.

**Subdivision Certificate** has the same meaning as in the Act.

**Work** means building, engineering or construction work in, on, over or under land.

1.2 In the interpretation of this Agreement, the following provisions apply:

1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Agreement.

1.2.2 A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.

1.2.3 If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.

1.2.4 A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.

1.2.5 A reference in this Agreement 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.



- 1.2.6 A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- 1.2.7 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- 1.2.8 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- 1.2.9 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.
- 1.2.10 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.
- 1.2.11 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.12 A reference to this Agreement includes the agreement recorded in this Agreement.
- 1.2.13 A reference to a Party to this Agreement includes a reference to the servants, agents and contractors of the party, and the Party's successors and assigns.
- 1.2.14 Any schedules, appendices and attachments form part of this Agreement.

## **2 Application of this Agreement**

- 2.1 This Agreement applies to the Development.
- 2.2 The provisions of this Agreement relating to the Establishment Obligation and the Management Obligation are taken not be part of this Agreement if no part of the Land is Environmental Management Land.

## **3 Status of this Agreement**

- 3.1 The Developer irrevocably offers to enter into the Planning Agreement if Development Consent is granted to the Development.





- 3.2 However, the Planning Agreement operates only if Development Consent is granted to the carrying out of the Development subject to a condition requiring the Planning Agreement to be entered into or performed.
- 3.3 The Developer consents to a condition of the kind referred to in clause 3.2.
- 3.4 The provisions of this Agreement other than the Planning Agreement operate with full force and effect on and from the date this Agreement is entered into by all of the Parties.

**Note:** The provisions that operate on and from the date this Agreement is entered into include (but are not limited to) those relating to the sale of the Land or the assignment of a Party's interest under this Agreement.

#### **4 Further Agreements Relating to this Agreement**

- 4.1 The Parties may, at any time, enter into such other agreements relating to the subject-matter of this Agreement that they consider are necessary or desirable in order to give effect to this Agreement.
- 4.2 An agreement referred to in clause 4.1 is not to be inconsistent with:
- 4.2.1 this Agreement, or
  - 4.2.2 any Development Consent for the Development, as modified from time to time, or
  - 4.2.3 any other applicable law.
- 4.3 An agreement referred to in clause 4.1 does not have effect to the extent that it contravenes clause 4.2.

#### **5 Application of s94 and s94A of the Act to the Development**

- 5.1 This Agreement does not exclude the application of s94 or s94A of the Act to the Development.
- 5.2 This Agreement permits the Council to take into consideration, to the extent relevant, the benefits under this Agreement in determining a Development Contribution under s94 of the Act in relation to the Development.

#### **6 Approval of Detailed Management Plan**

- 6.1 The Developer is not to establish or maintain the Environmental Management Land except in accordance with:



6.1.1 a Detailed Management Plan that has been approved by the Council,  
and

6.1.2 the terms of any approval granted by the Council as modified from  
time to time).

6.2 The Developer is to ensure that any Development Application that seeks  
Development Consent for the establishment and maintenance of the  
Environmental Management Land is accompanied by a Detailed Management  
Plan.

**7 Establishment and Management of Environmental Management Land by the  
Developer**

7.1 The Developer, at its own cost, is to perform:

7.1.1 the Establishment Obligation during the Establishment Period; and

7.1.2 the Management Obligation during the Management Period.

7.2 The Developer is to perform its obligations under clause 7.1 in accordance  
with:

7.2.1 this Agreement, and

7.2.2 any further agreement that is entered into by the Parties under clause  
4, and

7.2.3 any requirements and directions notified in writing by the Council to  
the Developer at any time before the Environmental Management  
Land Management Work is taken to have been completed in  
accordance with clause 7.7 that are not inconsistent with:

(a) this Agreement, or

(b) any agreement referred to in clause 7.2.2, or

(c) any Development Consent relating to the Development.

7.3 The Establishment Obligation and the Management Obligation are not to be  
varied by the Developer, unless:

7.3.1 the Parties agree in writing to the variation, and

7.3.2 any consent or approval required under the Act or any other law to  
the variation is first obtained.



- 7.4 The Developer, by written notices, is to inform the Council when it considers it has completed the Establishment Obligation and, again, when it considers it has completed the Management Obligation.
- 7.5 Not later than 14 days after receipt of a notice under clause 7.4, the Council may, by written notice, direct the Developer to do the things specified in the notice in order to complete the Establishment Obligation or the Management Obligation to its satisfaction.
- 7.6 The Developer, at its own cost, is to comply with a direction referred to in clause 7.5 according to its terms.
- 7.7 For the purposes of this Agreement, the Establishment Obligation and the Management Obligation are taken to have been completed:
- 7.7.1 if the Developer was not given a notice under clause 7.5 – at the end of the period specified in that clause, or
- 7.7.2 if the Developer was given a notice under clause 7.5 – when the Council, by written notice, informs the Developer that the Developer has complied with that notice to the satisfaction of the Council.

**8 Failure to Perform the Establishment Obligation or the Management Obligation**

- 8.1 If the Council considers that the Developer is in breach of the Establishment Obligation or the Management Obligation, the Council may give the Developer a notice requiring the breach to be rectified to the satisfaction of the Council.
- 8.2 A notice given under clause 8.1 is to allow the Developer a period of not less than 28 days or such other period as the Council considers appropriate in the circumstances of the case to rectify the breach.
- 8.3 The Developer is to comply with a notice under clause 8.1 strictly according to its terms.
- 8.4 Clauses 19 and 20 do not apply to a notice given by the Council to the Developer under clause 8.1, or the circumstances relating to the giving of that notice.

**9 Inspection of the Environmental Management Land by Council**

- 9.1 Before the Environmental Management Land is dedicated to the Council in accordance with this Agreement, the Developer is to permit the Council, its



officers, employees, agents and contractors to enter that land at any time, upon giving reasonable prior notice, to inspect, examine or test that land.

- 9.2 After the Environmental Management Land is dedicated to the Council in accordance with this Agreement, the Developer is to permit the Council, its officers, employees, agents and contractors to pass through land owned, occupied or otherwise controlled by the Developer to enable the Council to obtain access to the Environmental Management Land.

#### **10 Damage and Repairs to Management Work**

- 10.1 The Developer, at its own cost, is to repair and make good, to the satisfaction of the Council, any loss or damage to any Management Work, from any cause whatsoever, occurring prior to the commencement of the Management Period.

#### **11 Dedication of Environmental Management Land to the Council**

- 11.1 The Developer is to dedicate the Environmental Management Land to the Council free of cost in accordance with the Stages in which the Development is carried out and at the following times:
- 11.1.1 if the Development in a Stage involves Subdivision – upon registration of the first plan of subdivision relating to the Stage or at such other time as the Parties agree, or,
- 11.1.2 if the Development in a Stage does not involve Subdivision - before the first Part 4A Certificate is issued in respect of the Development in the Stage or at such other time as the Parties agree.
- 11.2 The Environmental Management Land is taken to have been dedicated to the Council for the purposes of clause 11.1 when the Council is given an instrument in registrable form under the Real Property Act 1900 that is effective to transfer title to the land to the Council when registered, free from all encumbrances (other than encumbrances that benefit the Council or a public authority or are otherwise agreed to by the Council in writing).
- 11.3 To allow for the registration of an instrument of transfer referred to in clause 11.2, the Developer is to:



- 11.3.1 produce to the Land Titles Office the certificate of title to land to be dedicated under this Agreement or a direction allowing the certificate of title to be used for that purpose, and
- 11.3.2 give to the Council an irrevocable undertaking to deliver to the Council the certificate of title if that certificate is released to the Developer by the Land Titles Office.
- 11.4 The Environmental Management Land is to be held by the Council for the purpose of the conservation and enhancement of the natural environment.

## **12 Management Contribution**

- 12.1 Subject to clause 12.2, the Developer is to pay to the Council the Management Contribution relating to each part of the Development to which a Development Consent relates based on the Net Developable Area of the Land the subject of the relevant Development Consent and at the following times:
  - 12.1.1 if the Development involves Subdivision that will create a Final Lot - before a Subdivision Certificate is issued in relation to the Development or at such other time as the Parties agree, or
  - 12.1.2 if the Development does not involve Subdivision that will create a Final Lot - before the first Part 4A Certificate is issued in respect of the Development or at such other time as the Parties agree.
- 12.2 Nothing in this Agreement requires the Developer to pay to the Council the Management Contribution in respect of the creation of a Residue Lot unless the Council is of the opinion that the lot will not be further subdivided.
- 12.3 The Management Contribution is paid for the purposes of this Agreement when the Council receives the full amount of that Contribution in cash or by unendorsed bank cheque or by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by the Council.
- 12.4 The Developer is to give the Council not less than 2 business days written notice of its intention to pay the Management Contribution.
- 12.5 The Developer is not required to pay the Management Contribution unless the Council, after having received the Developer's notice under clause 12.4, has given to the Developer a tax invoice for the amount of the Contribution.



- 12.6 The Developer is not in breach of this Agreement if it fails to pay the Management Contribution at the time required by this Agreement by reason only of the Council's failure to give to the Developer a tax invoice.
- 12.7 The Council is to deposit the Management Contribution paid by the Developer into the consolidated fund referred to in s409(3)(b) of the Local Government Act 1993.
- 12.8 The Management Contribution and any interest earned on its investment is to be held and applied by the Council for a period of 17 years on and from the expiration of the Management Period towards the ongoing environmental management of the land shown coloured on the map marked Map A2-1 Environmental Management Units contained in the document of the Council in existence on the date this Agreement is entered into titled DCP 2006 – Area 13 Thrumster DCP, a copy of which is deposited in the office of the Council.
- 12.9 The Council is to use its reasonable endeavours to obtain Alternative Funding as soon as reasonably practicable after this Agreement is entered into.
- 12.10 The Developer is not to raise any requisition or objection in respect of anything done by the Council under clause 12.9.
- 12.11 If, at any time after the date of this Agreement, the Council obtains Alternative Funding, the Council is to send a notice to the Developer:
- 12.11.1 informing the Developer that the Council has obtained the Alternative Funding, and
- 12.11.2 specifying the amount of the Management Contribution Refund that may be claimed by the Developer, and
- 12.11.3 in the case where the Developer has not yet paid the Management Contribution - informing the Developer that the amount of that contribution payable to the Council is to be reduced by the amount specified in clause 12.11.2, and
- 12.11.4 in the case where the Developer has paid the Management Contribution - informing the Developer that the amount specified in clause 12.11.2 will be paid by the Council to the Developer if the Council receives within 28 days of the date on the Council's notice a notice from the Developer claiming the Management Contribution Refund.



12.12 If a notice under clause 12.11 is given in a case:

12.12.1 where the Developer has not yet paid the Management Contribution, that contribution is taken for the purposes of this Agreement to have been reduced by the amount specified in clause 12.11.2,

12.12.2 where the Developer has paid the Management Contribution, the Council is to pay the Management Contribution Refund to the Developer if it receives the notice from the Developer referred to in clause 12.11.4.

### **13 Indemnity and Insurance**

13.1 The Developer indemnifies the Council, its employees, officers, agents, contractors and workmen from and against all losses, damages, costs (including legal costs on a full indemnity basis), charges, expenses, actions, claims and demands whatsoever which may be sustained, suffered, recovered or made arising in connection with the management of the Environmental Management Land by the Developer between the date on which the Environmental Management Land is dedicated to the Council under this Agreement and the date on which the Management Obligation is completed in accordance with clause 7.

13.2 The Developer is to take out and keep current to the satisfaction of the Council appropriate insurances in connection with the Developer's obligations under this Agreement to maintain the Environmental Management Land between the date on which that land is dedicated to the Council under this Agreement and the date on which the Management Obligation is completed in accordance with clause 7.7.

13.3 If the Developer fails to comply with clause 13.2, the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and recover the cost of doing so from the Developer as a debt due in a court of competent jurisdiction.

### **14 Provision of Security**

14.1 The Developer is to provide the Security to the Council in accordance with the Stages in which the Development is carried out and at the following times:



- 14.1.1 if the Development in a Stage involves Subdivision – upon registration of the first plan of subdivision relating to the Stage or at such other time or times as the Parties agree, or,
- 14.1.2 if the Development in a Stage does not involve Subdivision - before the first Part 4A Certificate is issued in respect of the Development in the Stage or at such other time or times as the Parties agree.
- 14.2 The amount of the Security to be provided by the Developer in relation to a Stage is an amount satisfactory to the Council that does not exceed the Council's estimate of the cost to the Developer of the carrying out of the Establishment Obligation and the Management Obligation relating to the Stage.
- 14.3 The Council is not to call upon the Security unless the Council considers that the Developer has failed to comply with a notice referred to in clause 8.1 relating to the Stage of the Development to which the Security relates.
- 14.4 The Council may apply the Security in satisfaction of:
  - 14.4.1 the Developer's obligations under this Agreement to carry out the Establishment Obligation or the Management Obligation relating to the Stage of the Development to which the Security relates, and
  - 14.4.2 any liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to carry out the Establishment Obligation or the Management Obligation relating to the Stage of the Development to which the Security relates.
- 14.5 The Council may, in its absolute discretion, progressively release and return the Security to the Developer as and when the Developer complies with its obligations under this Agreement relating to the Stage of the Development to which the Security relates to the satisfaction of the Council but only if the remaining amount of the Security held by the Council in relation to the Stage is not less than the Council's estimate of the cost to the Developer of carrying out of the remainder of the Establishment Obligation or the Management Obligation relating to that Stage.
- 14.6 The Council is to release and return the Security or any remaining part of it to the Developer within 14 days of the date on which both the Establishment Obligation and the Management Obligation are completed in accordance with





clause 7.7 relating to the Stage of the Development to which the Security relates but only if the Developer is not in breach of this Agreement at that time.

14.7 If the Council calls on the Security in accordance with this Agreement, the Council may, by notice in writing to the Developer, require the Developer to provide a further Security in an amount which, together with any unused portion of any existing Security, does not exceed the amount specified in clause 14.2.

14.8 Any difference between the amount of the Security called upon by the Council and the costs incurred by the Council in completing the Establishment Obligation or the Management Obligation or both may be recovered by the Council from the Developer as a debt due in a court of competent jurisdiction.

**15 Future Development of Council Land**

15.1 The provisions of this Agreement bind the Council in relation to the development of the Council Land in the same way as they bind the Developer to the fullest extent practicable in the circumstances of that development.

**16 No Registration of this Agreement**

16.1 The Parties agree not to register this Agreement under s93H of the Act.

**17 Sale of Land, Assignment, etc**

17.1 If the Developer has not paid the Management Contribution nor performed the Establishment Obligation and the Management Obligation to the satisfaction of the Council:

17.1.1 the Developer is not to sell the Land or part of the Land other than a Final Lot, and

17.1.2 the Developer is not to assign their interest under this Agreement, to any person unless:

17.1.3 the Developer has, at no cost to the Council, first procured the execution by the person of an agreement in favour of the Council on terms reasonably satisfactory to the Council under which the person agrees to be bound by this Agreement, and



17.1.4 the Council, by notice in writing to the Developer has stated that evidence satisfactory to the Council has been produced to the Council to show that the person is reasonably capable of performing its obligations under this Agreement, and

17.1.5 the Developer is not in breach of this Agreement.

17.2 The Party in breach of clause 17.1 remains liable to the Council under this Agreement:

17.2.1 for any breach of this Agreement that occurred before the date of the breach of clause 17.1 and

17.2.2 for any breach of this Agreement by the purchaser or assignee after the date of the breach of clause 17.1,

until the breach of clause 17.1 is remedied to the satisfaction of the Council and at no cost to the Council.

Clauses 19 and 20 do not apply to a matter to which this clause 17 relates.

## **18 Enforcement**

18.1 Without limiting any other remedies available to the Parties, this Agreement may be enforced by either Party in any court of competent jurisdiction.

18.2 For the avoidance of doubt, nothing in this Agreement prevents:

18.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates,

18.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

## **19 Dispute Resolution – expert determination**

19.1 This clause applies to a dispute under this Agreement which relates to a matter that can be determined by an appropriately qualified expert.

19.2 Any dispute between the Parties as to whether a dispute to which this clause applies can be determined by an appropriately qualified expert is to be referred to the Chief Executive Officer of the professional body that represents persons with the relevant expertise for determination, which is to be final and binding on the Parties.



- 19.3 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 19.4 If a notice is given under clause 19.3, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- 19.5 If the dispute is not resolved within a further 28 days, the dispute must be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 19.6 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 19.7 Each Party must bear its own costs arising from or in connection with the appointment of the expert and the expert determination.

## **20 Dispute Resolution - mediation**

- 20.1 This clause applies to any dispute under this Agreement other than a dispute to which clause 19 applies.
- 20.2 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 20.3 If a notice is given under clause 20.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- 20.4 If the dispute is not resolved within a further 28 days, the Parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and must request the President of the Law Society, or the President's nominee, to select a mediator.
- 20.5 If the dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.

## **21 Review of this Agreement**

- 21.1 The Parties, acting in good faith and using their reasonable endeavours, agree to review this Agreement every 3 years, and otherwise if either party is



of the opinion that any change of circumstance has occurred that materially affects the operation of this Agreement.

21.2 For the purposes of clause 21.1, the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development.

21.3 A failure by a Party to agree to participate in, or to take action requested by the other Party as a consequence of, a review under clause 21.1 is taken to be a dispute for the purposes of clause 20.

## **22 Notices**

22.1 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:

22.1.1 delivered or posted to that Party at its address set out in the Schedule or such other address as that Party.

22.1.2 faxed to that Party at its fax number set out in the Schedule.

22.1.3 emailed to that Party at its email address set out in the Schedule.

22.2 If, before a Party gives a notice under this Agreement, the other Party has notified the Party intending to give the notice of a postal address, fax number or email address that is different to that specified in clause 22.1, the notice is to be sent to that different postal address, fax number or email address.

22.3 If a Party gives the other Party 3 business 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.

22.4 Any notice, consent, information, application or request is to be treated as given or made if it is:

22.4.1 delivered, when it is left at the relevant address.

22.4.2 sent by post, 2 business days after it is posted.

22.4.3 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.



22.5 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 on a business day, after 5pm 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.

### **23 Approvals and Consent**

23.1 Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in that Party's absolute discretion and subject to any conditions determined by the Party.

23.2 A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

### **24 Costs**

24.1 The Developer is to pay to the Council, within 7 days of receipt of a written demand by the Council, a share of the Council's costs of preparing and negotiating the template on which this Agreement is based being \$500.

24.2 The Developer is also to pay to the Council, within 7 days of receipt of a written demand by the Council, the Council's additional costs of preparing, negotiating, executing and stamping the final version of this Agreement and any document related to this Agreement.

### **25 Entire Agreement**

25.1 This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with.

25.2 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 Agreement was executed, except as permitted by law.

### **26 Further Acts**

26.1 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 Agreement and all transactions incidental to it.

### **27 Governing Law and Jurisdiction**



27.1 This Agreement is governed by the law of New South Wales.

27.2 The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them and they will not object to the exercise of jurisdiction by those courts on any basis.

**28 Joint and Individual Liability and Benefits**

28.1 Except as otherwise set out in this Agreement, any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

**29 No Fetter**

29.1 Nothing in this Agreement 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.

**30 Representations and Warranties**

30.1 The Parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under the Agreement and that entry into this Agreement will not result in the breach of any law.

**31 Severability**

31.1 If a clause or part of a clause of 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.

31.2 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 Agreement, but the rest of this Agreement is not affected.

**32 Modification**

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

**33 Waiver**



- 33.1 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.
- 33.2 A waiver by a Party is only effective if it is in writing.
- 33.3 A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given and 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.

#### 34 GST Provisions

- 34.1 In this clause:

**Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice** have the meaning given by the GST Law.

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

**GST Law** has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Input Tax Credit** has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.

**Taxable Supply** has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.

- 34.2 Subject to clause 34.4, 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.
- 34.3 Clause 34.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Agreement to be GST inclusive.
- 34.4 No additional amount shall be payable by the Council under clause 34.2 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.

34.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Agreement by one Party to the other Party that are not subject to Division 82 of the A New Tax System (Goods and Services Tax) Act 1999, the Parties agree:

34.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;

34.5.2 that any amounts payable by the Parties in accordance with clause 34.2 (as limited by clause 34.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.

34.6 No payment of any amount pursuant to this clause 34, 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.

34.7 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.

34.8 This clause continues to apply after expiration or termination of this Agreement.

### **35 Explanatory Note Relating to this Agreement**

35.1 The Appendix contains the Explanatory Note relating to this Agreement required by clause 25E of the Regulation.

35.2 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.





## Schedule

(Clause 22)

### Contact for Notices

**Developer:**

Contact Officer : ALAN WITCHARD

Telephone: [REDACTED]

Fax: [REDACTED]

Email: [REDACTED]

**Council:**

Contact Officer : General Manager

Telephone: (02) 6581 8111

Fax: (02) 6581 8123

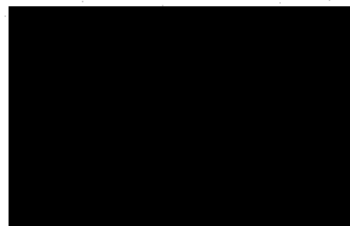
Email: council@pmhc.nsw.gov.au



**Execution Page**

**Executed as an Agreement**

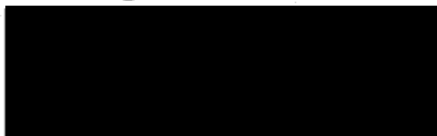
**Dated:** 18/6/08



**Signed on behalf of Council:** David Mead  
General Manager

J. Mead  
18/6/08  
Witness

**Signed on behalf of the Developer:**





## Appendix

(Clause 35)

*Environmental Planning and Assessment Regulation 2000*

(Clause 25E)

## Explanatory Note

### Draft Planning Agreement

### Under s93F of the Environmental Planning and Assessment Act 1979

#### Parties

**Port Macquarie Hastings Council** ABN 11 236 901 601 of Corner of Lord and Burrawan Streets, Port Macquarie, New South Wales, 2444 (**Council**)

**Alan D Witchard,** [REDACTED] (**Developer**)

#### Description of Subject Land

Lot 3 in DP 619643

#### Description of Proposed Change to Environmental Planning Instrument/Development Application

Draft *Port Macquarie-Hastings Local Environmental Plan 2007* (Area 13 LEP) applies to the Land to which the Draft Planning Agreement applies. The general effect of the draft Area 13 LEP is to rezone the land to which it applies for urban purposes. The specific aims, objectives, policies and strategies of the Area 13 LEP are set out in that document. It was determined by Council that it was not practicable to exhibit this Agreement contemporaneously with the Draft Area 13 LEP as the offer for the Planning Agreement was received after the exhibition of the Draft Area 13 LEP.

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

##### Objectives of Draft Planning Agreement

The objective of the Draft Planning Agreement is to provide suitable funding for the establishment, dedication and management of environmental lands in conjunction with urban development that is made permissible by the draft Area 13 LEP.



#### Nature of Draft Planning Agreement

The Draft Planning Agreement is a planning agreement under s93F of the Environmental Planning and Assessment Act 1979 (Act). The Draft Planning Agreement is a voluntary agreement under which Development Contributions (as defined in clause 1.1 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 Draft Planning Agreement

The Draft Planning Agreement:

- relates to the carrying out by the Developer of any development on the Land to which it applies that is made permissible by the draft Area 13 LEP,
- does not exclude the application of s94 of the Act to the Development (as defined in clause 1.1 of the Draft Planning Agreement),
- does not exclude the application of s94A of the Act to the Development,
- requires monetary Development Contributions of a specified minimum amount to be made towards management of environmental lands,
- requires the carrying out of specified Works by the Developer for the purposes of establishing and maintaining environmental lands where such land forms part of the Land,
- requires the dedication of specified land to the Council by the Developer on which some Works will be situated,
- requires the Council to apply monetary Development Contributions made under the agreement towards the specified purpose for which they were made and at the location, in the manner and to the standard (if any) specified in the agreement,
- imposes obligations on the Developer in relation to the carrying out of specified Works, the handing over of those Works to the Council and the rectification of defects in those Works,
- requires the Developer to provide the Council with security in the event that the Council is required to enforce the terms of the agreement,
- is not to be registered on the title to the Land,
- imposes restrictions on the Parties transferring the Land or part of the Land or assigning an interest under the agreement,



- provides two dispute resolution methods for a dispute under the agreement, being expert determination and mediation,
- 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

The Draft Planning Agreement reasonably provides for the achievement of the following planning purposes:

- promote and co-ordinate the orderly and economic use and development of the Land to which the agreement applies,
- provide land for public purposes in connection with the Development,
- provide increased opportunity for public involvement and participation in environmental planning and assessment of the Development,
- provide for the mitigation of any potential impact of the Development by providing for the Developer to make contributions to the Council.

#### How the Draft Planning Agreement Promotes the Public Interest and the objects of the Environmental Planning and Assessment Act 1979

The draft Planning Agreement, by making provision for the dedication of land to the Council and by making provision for the Developer to make contributions to the Council towards ongoing environmental management of particular land, promotes the public interest by promoting the following objects of the Act as set out in s5 of that Act:

- to encourage the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
- to encourage the promotion and co-ordination of the orderly and economic use and development of land,
- to encourage the provision of land for public purposes,



- to encourage the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats,
- to provide increased opportunity for public involvement and participation in environmental planning and assessment.

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*

The Draft Planning Agreement, by making provision for the dedication of land to the Council, by providing a means for the private funding of public facilities for the benefit of the Development and the wider community and by making provision for the Developer to make contributions to the Council towards ongoing environmental management of particular land, promotes the following elements of the Council's charter:

- to provide directly or on behalf of other levels of government, after due consultation, adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively,
- to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development,
- to raise funds for local purposes by the fair imposition of rates, charges and fees, by income earned from investments and, when appropriate, by borrowings and grants.

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

The Draft Planning Agreement requires that specified Works to be carried out by the Developer for the purposes of establishment and management of environmental lands



These works are not included in the Council's relevant current capital Works program.  
However, the Council's Management Plan identifies these types of works in the relevant capital Works program.

Accordingly, the provision of these Works under the agreement is consistent and conforms with the capital Works envisioned by the Council's Management Plan.

Signed on behalf of the Council: *David Mead*  
*General Manager*

*[Redacted]*  
*[Redacted]*  
*[Redacted]*  
*J Mead*  
*Witness* *18/6/08*

Signed on behalf of the Developer: *[Redacted]*