

VOLUNTARY PLANNING AGREEMENT

[Part 4 Division 6 Subdivision 2 Environmental Planning and Assessment Act 1979]

PORT STEPHENS COUNCIL
[“the Council”]

AND

BUILDEV DEVELOPMENT (NSW) PTY LIMITED
[“the developer”]

**PROPOSED REZONING – 2(a) RESIDENTIAL TO 3(a) BUSINESS –
MEDOWIE**

EXPLANATORY NOTE

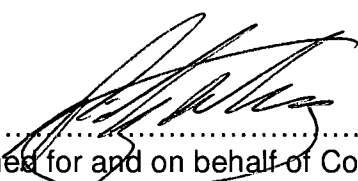
[clause 25E Environmental Planning and Assessment Regulation 2000]

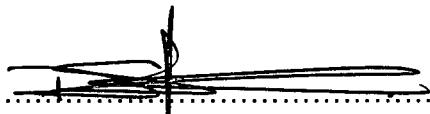
1. The developer has requested the spot rezoning of 5 parcels of land (“the land”) at the intersection of Peppertree and Ferodale Roads Medowie from 2(a) residential to 3(a) business general.
2. The land is part of the land identified as the ‘town centre’ in the Medowie Strategy (“the Strategy”) adopted by Council on 24 March 2009.
3. The Strategy requires the preparation of an infrastructure plan to identify hard critical public infrastructure such as roads and drainage which will be required by all development both residential and commercial in the area covered by the Strategy. This plan has not yet been prepared.
4. The developer wishes to progress its request and, instead of waiting for the completion of the infrastructure plan, has offered to contribute to the wider infrastructure needs of the area covered by the Strategy in three ways:
 - (a) by funding the cost of a strategic traffic study to identify current and future intersection capacities based on the footprint in the Strategy and to recommend required upgrades;
 - (b) by contributing to the cost of a drainage study to identify the local sub-catchment and the drainage and water quality works required to upgrade the sub-catchment to the capacity required

to cater for the future land-use footprint and site coverage identified by the Strategy; and

(c) by dedicating part of the land to enable the widening of Peppertree Road.

5. The voluntary planning agreement, which Council and the developer propose to enter into, relates to contributions by the developer in support of its rezoning request only. When the developer lodges a development application in respect of the land, or any part of it, Council's discretion to impose conditions and contributions under either section 94 or section 94A of the Environmental Planning and Assessment Act 1979 ("the Act") appropriate to the impacts of the development remains unfettered.
6. This agreement promotes the public interest by helping to ensure that the cumulative impacts of future development in the area covered by the Strategy are identified and taken into account at an early stage, with appropriate contributions from those developments contributing to the meeting the costs occasioned by those cumulative impacts.
7. This agreement promotes the objects of the Act by contributing to the promotion and co-ordination of the orderly and economic use and development of land.
8. This agreement promotes that element of Council's charter under section 8 of the Local Government Act 1993 which requires Council to engage in long-term strategic planning on behalf of the local community.
9. This agreement serves the planning purposes of identifying the needs of the broader area surrounding the land and consequently allowing appropriate planning decisions to be made on the basis of this information.
10. This agreement does not conform with Council's current capital works program for the Medowie area. This program will be updated once the additional information obtained from the traffic and drainage studies is available.


.....
Signed for and on behalf of Council


.....
Signed for and on behalf of the Developer

Dated: 26/7/2010

This explanatory note has been jointly prepared by the Council and the developer.

**BUILDEV DEVELOPMENT (NSW) PTY LIMITED
ABN 31 115 089 122
("THE DEVELOPER")**

AND

**PORT STEPHENS COUNCIL
("THE COUNCIL")**

**REZONING REQUEST
MEDOWIE**

VOLUNTARY PLANNING AGREEMENT

Harris Wheeler Lawyers
3rd Floor, Hunter Mall Chambers
175 Scott Street
NEWCASTLE NSW 2300
DX 7814 NEWCASTLE
PH: 02 4907 6300
FAX: 02 4907 6333

TABLE OF CONTENTS

1	DEFINITIONS AND INTERPRETATION	4
2	PLANNING AGREEMENT	5
3	APPLICATION OF SECTIONS 94, 94A AND 94EF OF THE ACT TO THE DEVELOPMENT	6
4	REZONING CONTRIBUTIONS	6
5	ACKNOWLEDGEMENTS	6
6	TIMING AND METHOD OF PAYMENTS	6
7	COUNCIL NOT BOUND BY STUDIES	7
8	COUNCIL ENDORSEMENT OF REZONING REQUEST	8
9	REVIEW OF THIS AGREEMENT	8
10	DISPUTE RESOLUTION	8
11	ACKNOWLEDGEMENT OF COMPLIANCE	9
12	NOTICES	9
13	COSTS	10
14	ENTIRE AGREEMENT	10
15	FURTHER ACTS	10
16	GOVERNING LAW AND JURISDICTION	10
17	REPRESENTATIONS AND WARRANTIES	10
18	SEVERABILITY	10
19	WAIVER	10
20	GST	11
	Annexure A	12
	Annexure B	13
	Annexure C	14

VOLUNTARY PLANNING AGREEMENT

BETWEEN: **BUILDEV DEVELOPMENT (NSW) PTY LIMITED, ABN 31 155 089 122** of Suite 1, Level 3, Honeysuckle House, Sparke Helmore Building, Honeysuckle Drive, Newcastle NSW 2300 ("**the developer**")

AND: **PORT STEPHENS COUNCIL** of 116 Adelaide Street, Raymond Terrace, NSW ("**the Council**")

BACKGROUND

- A. The subject land is situated in the Port Stephens Local Government Area and is subject to the LEP 2000.
- B. The developer has made a rezoning request to the Council for the subsequent purpose of making the development application.
- C. The subject land is within the area covered by the Strategy adopted by Council on 24 March 2009.
- D. The Strategy requires the preparation of an infrastructure plan to identify the hard critical infrastructure (including drainage and roads) which will be required to support the rezoning under the Strategy.
- E. The infrastructure plan has not yet been developed. A flooding and drainage study for Medowie has yet to be completed.
- F. The developer wishes to progress the rezoning and development of the subject land prior to the finalisation of the Strategy and has offered as part of its contribution to the wider infrastructure needs of the area and for other public purposes to:
 - (a) pay \$20,000.00 towards the cost of a strategic traffic study to be undertaken by consultants engaged by Council for the area around the subject land
 - (b) provide \$36,960.00 towards the cost of the drainage report
 - (c) dedicate part of lot 11 in DP 19101 being the land contained in Volume 5466 Folio 6 for the purpose of widening Peppertree Road.
- G. The parties have agreed to enter into a voluntary planning agreement to document this agreement.

OPERATIVE PROVISIONS

THE PARTIES AGREE:

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this agreement:

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

"business day" means any day excluding Saturdays, Sundays and public holidays.

"development" means the construction of a Woolworths Supermarket or any other proposal to develop the subject land.

"development application" means a development application in respect of the development.

"drainage report" means an assessment and report to be undertaken by consultants engaged by Council identifying the local sub-catchment within which the subject land is located and the drainage and water quality works required for future development in that catchment as outlined in the Strategy.

"explanatory note" has the same meaning as it has in clause 25E of the Regulation.

"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.

"LEP 2000" means the Port Stephens Local Environmental Plan 2000.

"local sub-catchment" means the area in which the subject land is located as identified in the plan which forms annexure "B" to this agreement.

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

"rezoning request" means the request to rezone the subject land from 2(a) residential to 3(a) business general by way of amendment no 32 to the LEP 2000.

"road widening land" means that part of lot 11 in DP 19101 being the land contained in Volume 5466 Folio 6 which is required for the widening of Peppertree Road as identified in the plan which forms annexure "C" to this agreement being an area tapering from zero to 5 meters in width over 74.27 meters in length before running parallel with the existing boundary at 5 meters in width.

“strategic traffic study” means a traffic study of current and future intersection capacities based on the footprint in the Strategy, together with a recommendation for required upgrades.

“Strategy” means the Medowie Strategy.

“subject land” means lot 7 in DP 19101 being the land contained in certificate of title folio identifier 7/19101; lot 8 in DP 19101 being the land contained in certificate of title folio identifier 8/19101; lots 9 and 10 being the land contained in certificate of title volume 7087 folio 171; and lot 11 in DP 19101 being the land contained in certificate of title volume 5466 folio 6 as shown in annexure “A” to this agreement.

“tax invoice” has the meaning given to it in GST Law.

“traffic consultant” means the traffic engineer appointed by Council to carry out the strategic traffic study.

1.2 Interpretation

In this agreement, unless the context indicates a contrary intention:

- (a) 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.
- (b) A reference in this agreement to dollars or \$ means Australian dollars and all amounts payable under this agreement are payable in Australian dollars.
- (c) A reference to any law, legislation or provision of legislation includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (d) Clause headings and the table of contents are inserted for convenience only and do not affect the interpretation of this agreement.
- (e) A reference to a corporation includes its successors and permitted assigns.
- (f) A reference to a statutory corporation includes its successors and permitted assigns.

2 PLANNING AGREEMENT

This agreement constitutes a planning agreement within the meaning of section 93F of the Act and is governed by Subdivision 2 of Division 6 of Part 4 of the Act.

3 APPLICATION OF SECTIONS 94, 94A AND 94EF OF THE ACT TO THE DEVELOPMENT

- 3.1 This agreement does not exclude the application of sections 94, 94A and 94EF of the Act to the development.
- 3.2 The benefits under this agreement are a contribution to the broader infrastructure needs of the area consequent on the rezoning of the subject land and are not to be taken into consideration in determining a development contribution under sections 94, 94A or 94EF.

4 REZONING CONTRIBUTIONS

The developer will make the following contributions to the wider infrastructure needs of the area in which the subject land is located and for other public purposes.

Strategic Traffic Study

- (a) The developer will pay \$20,000.00 towards the cost of the strategic traffic study.

Local Drainage

- (b) The developer will pay \$36,960.00 towards the cost of the drainage report.

Dedication of Land for Road Widening Purposes

- (c) The developer will at its cost dedicate to Council the road widening land.

5 ACKNOWLEDGEMENTS

- 5.1 The parties acknowledge that the provision of the drainage report, strategic traffic study and the dedication of the road widening land relate only to the broader infrastructure needs of the area and do not relate to the specific impacts of the development which will be assessed and appropriate conditions imposed at the development application stage.
- 5.2 The specific impacts of the development may, inter alia, require further works based upon a merit assessment of the development.

6 TIMING AND METHOD OF PAYMENTS

Strategic Traffic Study

- (a) The developer will pay to Council an amount of \$20,000.00 at the time of signing this agreement, this amount to be held in trust by Council to pay for the strategic traffic study.

- (b) Should the rezoning request not be approved or not proceed for any reason Council will refund this amount to the developer.
- (c) Following gazettal of the rezoning Council will engage the traffic consultant to carry out the strategic traffic study and is authorised to use the funds held in trust to pay for the cost of the study.
- (d) If the cost of the strategic traffic study exceeds \$20,000.00, any amount over \$20,000.00 will be paid for by Council.
- (e) If the cost of the strategic traffic study is less than \$20,000.00, any surplus funds will be used for infrastructure planning or works in the area covered by the Strategy.
- (f) Council will use its best endeavours to complete the strategic traffic study as soon as practicable after gazettal of the rezoning.

Local Drainage

- (g) The developer will pay to Council an amount of \$36,960.00 at the time of signing this agreement, this amount to be used by Council to contribute to the cost of the drainage report.

Dedication of Land for Road Widening Purposes

- (h) The developer acknowledges that the dedication of the road widening land for the purpose of widening Peppertree Road is integral to the rezoning of the subject land and the development.
- (i) The development application will include a provision for the dedication of the road widening land for the purpose of widening Peppertree Road in its statement of environmental effects.
- (j) Should development consent be granted in respect of the development application the developer consents to and will not challenge the imposition of a condition requiring the dedication of the road widening land at no cost to Council for the purpose of widening Peppertree Road.
- (k) The developer will ensure that the development application is lodged with Council on or before 14 May 2010.
- (l) If the development of the subject land is undertaken by a third party the developer will ensure that that third party adheres to the provisions of this agreement in relation to the dedication of the road widening land.

7 COUNCIL NOT BOUND BY STUDIES

Council will take into account the contents of the strategic traffic study and drainage report but is not bound to accept any facts or recommendations contained in them or to take any specific action in relation to them.

8 COUNCIL ENDORSEMENT OF REZONING REQUEST

Following the execution of this agreement by both parties and provided that the developer has fully complied with its obligations under sub-clauses 6(a), 6(g) and 6(k) Council will endorse the rezoning request and request that the proposed amendment no 32 to the LEP 2000 be made by the NSW Minister for Planning.

9 REVIEW OF THIS AGREEMENT

This agreement may be reviewed or modified by agreement providing any variation must be in writing and be expressed to be supplemental to this agreement and must be executed by the parties.

10 DISPUTE RESOLUTION

10.1 A party may not commence any court proceedings relating to a dispute of any matter under this agreement ("a dispute") unless it complies with this clause 10.

10.2 Written Notice of Dispute

A party claiming that a dispute has arisen under or in relation to this agreement must give notice to the other party specifying the nature of the dispute.

10.3 Attempt to Resolve

On receipt of notice under clause 10.2, the parties must endeavour in good faith to resolve the dispute expeditiously using informal dispute resolution techniques such as mediation, expert evaluation or other techniques agreed by them.

10.4 Mediation

If the parties do not agree within 7 days of receipt of notice under clause 10.2 (or any further period agreed in writing by them) as to:

- (a) the dispute resolution technique and procedures to be adopted;
- (b) the timetable for all steps in those procedures; and
- (c) the selection and compensation of the independent person required for such technique,

the parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales (or any replacement). The parties must request the President of the Law Society of New South Wales or the President's nominee to select the mediator and determine the mediator's remuneration.

10.5 Court Proceedings

If the dispute is not resolved within 42 days after notice is given under clause 10.2, then any party which has complied with the provisions of this clause 10 may in writing terminate any dispute resolution process undertaken pursuant to this clause 10 and may then commence court proceedings in relation to the dispute.

10.6 Not Use Information

The parties acknowledge the purpose of any exchange of information or documents or the making of any offer of settlement pursuant to this clause 10 is to attempt to settle the dispute. No party may use any information or documents obtained through any dispute resolution process undertaken pursuant to this clause 10 for any purpose other than in an attempt to settle the dispute.

10.7 No Prejudice

This clause 10 does not prejudice the right of a party to institute court proceedings for urgent injunctive or declaratory relief in relation to any matter arising out of or relating to this agreement.

11 ACKNOWLEDGEMENT OF COMPLIANCE

The parties acknowledge that this agreement together with the explanatory note were publicly exhibited as required by section 93G of the Act for a minimum of 28 days before this agreement was entered into.

12 NOTICES

12.1 Giving Notice

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 clearly readable, in writing and is sent in one of the following ways:

- (a) Delivered or posted to that party at its address as set out below.
- (b) Faxed to that party at its fax number set out below.
- (c) Emailed to that party at its email address set out below.

THE DEVELOPER

Attention: David Sharpe
Address: Suite 1, Level 3, Honeysuckle House, Sparke Helmore Building, Honeysuckle Drive, Newcastle NSW 2300
Fax Number: (02) 4926 2766
Phone Number: (02)4929 3299
Email:

THE COUNCIL

Attention: The General Manager
Address: 116 Adelaide Street, Raymond Terrace, NSW
Fax Number: (02)
Email:

12.2 Change of address

If a party gives the other party ten (10) business days' notice of a change of its address, email 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, email or fax number.

13 COSTS

13.1 Each party will bear its own costs of negotiating, preparing and executing this agreement.

13.2 Any costs of stamping and registering this agreement will be borne by the developer.

14 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.

15 FURTHER ACTS

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.

16 GOVERNING LAW AND JURISDICTION

This agreement is governed by the law of New South Wales. 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.

17 REPRESENTATIONS AND WARRANTIES

The Parties represent and warrant that they have the 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.

18 SEVERABILITY

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. 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.

19 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.

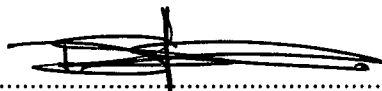
20 GST

- (a) If the Council reasonably decides that it is liable to pay GST on any development contribution made by the developer, the developer will, within 90 days of a receipt of a tax invoice, pay the amount of that tax invoice to the relevant Council.
- (b) Any tax invoice must comply with the GST Law.

EXECUTED as an agreement on the 26 day of July 2010.

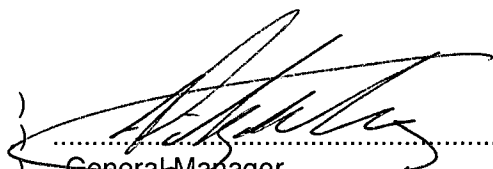
**The Common Seal of
BUILDEV DEVELOPMENT (NSW)
PTY LIMITED**
ACN 81 115 089 122
was affixed in the presence of:


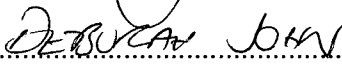
) 
)
) Director WITNESS
) MARK DANIELS
)
Print Name


.....
Secretary/Director
David Murray Sharpe
.....
Print name

SELF

**Executed for and on behalf of
PORT STEPHENS COUNCIL**
Under delegated authority:

) 
)
) General Manager
) P.G. Costing
)
Print Name


.....
Witness

.....
Print name

ANNEXURE C

Plan of the Road Widening Land
(Catchment defined by hatched area)

