

Explanatory Note

Proposed Deed of Voluntary Planning Agreement

Requirement for an Explanatory Note

The *Environmental Planning and Assessment Regulation 2000* cl 25E and Explanatory Note in respect of a proposed planning agreements:

25E Explanatory note

- (1) A planning authority proposing to enter into a planning agreement, or an agreement that revokes or amends a planning agreement, must prepare a written statement (referred to in this Division as an **explanatory note**)—
 - (a) that summarises the objectives, nature and effect of the proposed agreement, amendment or revocation, and
 - (b) that contains an assessment of the merits of the proposed agreement, amendment or revocation, including the impact (positive or negative) on the public or any relevant section of the public.
- (2) Without limiting subclause (1), an explanatory note must—
 - (a) identify how the agreement, amendment or revocation promotes the public interest and one or more of the objects of the Act, and
 - (b) if the planning authority is a development corporation, identify how the agreement, amendment or revocation promotes one or more of its responsibilities under the *Growth Centres (Development Corporations) Act 1974*, and
 - (c) if the planning authority is a public authority constituted by or under an Act, identify how the planning agreement, amendment or revocation promotes one or more of the objects (if any) of the Act by or under which it is constituted, and
 - (d) if the planning authority is a council, identify how the agreement, amendment or revocation promotes one or more of the elements of the council's charter under section 8 of the *Local Government Act 1993*, and
 - (e) identify a planning purpose or purposes served by the agreement, amendment or revocation, and contain an assessment of whether the agreement, amendment or revocation provides for a reasonable means of achieving that purpose, and
 - (f) identify whether the agreement, amendment or revocation conforms with the planning authority's capital works program (if any), and
 - (g) state whether the agreement, amendment or revocation specifies that certain requirements of the agreement must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued.
- (3) The explanatory note is to be prepared jointly with the other parties proposing to enter into the planning agreement.
- (4) However, if 2 or more planning authorities propose to enter into a planning agreement, an explanatory note may include separate assessments prepared by the planning authorities in relation to matters affecting only one of the planning authorities, or affecting those planning authorities in a different manner.
- (5) A copy of the explanatory note must be exhibited with the copy of the proposed agreement, amendment or revocation when it is made available for inspection by the public in accordance with the Act.
- (6) If a council is not a party to a planning agreement that applies to the area of the council, a copy of the explanatory note must be provided to the council when a copy of the agreement is provided to the council under section 7.5(4) of the Act.
- (7) A planning agreement may provide that the explanatory note is not to be used to assist in construing the agreement.

This is the Explanatory Note required by cl 25E of the Regulation.

Terms used in this Explanatory Note have the definitions and interpretation as specified in clause 4 of the Agreement.

1. Introduction

The purpose of this Explanatory Note is to provide a plain English summary to support the exhibition of the proposed Agreement prepared under section 7.4 of the Act.

2. Parties

The parties to the proposed Agreement are the Council and the Developer. This explanatory note has been prepared jointly by the parties.

3. Description of the Subject Land

The Planning Agreement applies to the Land owned by the Developer.

4. Description of the Development

The development is the subject of the 2020 Consent, being approved Development Application number 16-2018-660-1 for a staged development of a business park consisting of office premises, warehouse, cafe, signage, strata subdivision retaining wall and associated site works, and subdivision of Lot 16 into 2 lots, subject to the conditions in Annexure B to the NSWLEC Orders.

5. Summary of Objectives, Nature and Effect of the proposed Planning Agreement

- a. A summary of the Objectives, Nature and Effect of the Agreement include:
 - i. The Developer commenced the Proceedings against Council and raised a number of contentions regarding the lawfulness of conditions imposed by the Lot 16 Consent;
 - ii. Prior to the Council and the Developer requesting the NSWLEC to make the NSWLEC Orders by consent, the parties had been through a conciliation process required by Section 34 *Land and Environment Court Act 1979*. That process resulted in:
 - A. the parties inviting the NSWLEC to make the NSWLEC Orders, the conditions of consent, and agreeing to the terms of the VPA Offer prior to that offer being made to the NSWLEC as the consent authority;
 - B. the parties agreeing to create obligations each to the other and to the public as specified in the VPA Offer and to be bound by those obligations.
 - iii. On 22 June 2020 the NSWLEC in the Proceedings:
 - A. approved Development Application number 16-2018-660-1 for a staged development of a business park consisting of office premises, warehouse, cafe, signage, strata subdivision retaining wall and associated site works at Lot 16 DP 1010867 known as 15 Kara Crescent Taylors Beach, and subdivision of Lot 16 into 2 lots, subject to the conditions in Annexure B to the NSWLEC Orders;
 - B. granted leave to the Developer to rely on an amended application for Development Consent to include an offer to enter into a voluntary planning agreement, as referred to in s 7.4 of the Act, in the terms in Annexure A to the NSWLEC Orders.
 - iv. The purposes of the Agreement include:

- A. To record the provisions made by the Developer for the public purpose in s 7.4(2) of the Act so as to justify the reduction to \$0 of the fixed developer contributions otherwise payable under s 7.12 of the Act.
- B. To enable the following to be lawfully required pursuant to the terms of the Development Consent granted by the NSWLEC as consent authority:
 - dedicate to the Council the area marked “road widening” on the Plan of Subdivision as public road for a cul-de-sac turning head area at the end of Kara Crescent without compensation;
 - dedicate to the Council Lot 2 in the Plan of Subdivision as drainage reserve without compensation, and create a public positive covenant requiring maintenance of the drainage infrastructure within the drainage reserve by the owner of Lot 1 in the Plan of Subdivision from time to time;
 - create an easement in gross (for the benefit of the Council) to drain water 3 metres wide marked (D) on the Plan of Subdivision over the stormwater infrastructure to be constructed on Lot 1 in the Plan of Subdivision to convey stormwater emanating from the pipe at the end of Kara Crescent currently discharging into the open drain on Lot 16 DP 1010867;
 - create the right of access marked (C) on the Plan of Subdivision permitting Lot 1 to access Lot 2 (the drainage reserve) for the purpose of maintenance and upkeep.
- C. To record and place into binding terms other commitments made by each of the parties as proposed in the VPA Offer.
- v. The obligations of the Developer are secured by Security being required to be provided by the Developer to Council, the timing of the Council reimbursing the Developer for part of the costs towards the works to be completed by the Developer, registration of the public positive covenant and the Agreement on the Register, and the ability for Council to lodge a caveat on the Register.

6. Assessment of the merits of the proposed Planning Agreement

- a. An assessment of the merits of the proposed Agreement, including the impact (positive or negative) on the public or any relevant section of the public includes:
 - i. This Agreement makes alternative provision for the imposition of Local Infrastructure Contributions such that no contributions have been levied in the 2020 Consent which were payable under s7.11 or s7.12 under the Lot 16 Consent.
 - ii. The public purposes of the dedication of land and other interests in favour of the Council, reduction in developer contributions, and other material public benefits, or any combination of them, to be used for or applied towards a public purpose as referred to in s7.4(2) of the Act being made by the Developer include:
 - A. construction of the pipes conveying stormwater through the easement to drain water 3 metres wide marked (D) in the Plan of Subdivision and the rain garden drainage infrastructure within proposed Lot 2 in the Plan of Subdivision, with the Council to reimburse the Developer the sum of \$50,000 for part of the costs of the works;

- B. dedicate to the Council Lot 2 in the Plan of Subdivision as drainage reserve at no cost to the Council;
 - C. create a public positive covenant requiring maintenance of the drainage infrastructure within the drainage reserve by the owner of Lot 1 in the Plan of Subdivision from time to time, leaving no maintenance costs for the Council in perpetuity, at no cost to the Council;
 - D. create an easement in gross to drain water 3 metres wide marked (D) on the Plan of Subdivision over the stormwater infrastructure to be constructed on Lot 1 in the Plan of Subdivision to convey stormwater emanating from the pipe at the end of Kara Crescent currently discharging into the open drain on Lot 16 DP 1010867, at no cost to the Council;
 - E. dedicate to the Council the area marked "road widening" on the Plan of Subdivision as public road for a cul-de-sac turning head area at the end of Kara Crescent, at no cost to the Council;
 - F. construction of the Kara Crescent cul-de-sac turning head and drainage infrastructure in Kara Crescent, with the Council to reimburse the Developer the sum of \$115,000 for part of the costs of the works.
- iii. The Parties to the Agreement have assessed the minimum financial benefit being conferred upon the Council, as set out in clause 7 of the Agreement for the construction and dedication of public infrastructure and the land upon which that infrastructure is constructed to be conferred upon the Council is \$291,384.
 - iv. The financial benefit to the Council in the minimum sum of \$291,384, together with the Collateral Provisions provided by the Developer, justifies the reduction to \$0 of developer contributions otherwise payable in the amount is \$74,680 (or such other amount as is applicable according to the operation of the relevant Contributions Plan).
 - v. The Collateral Provisions provided by the Developer is that the Developer agrees not to commence or make any Claim for damages arising out of nuisance and/or negligence against the Council in respect of the discharge of stormwater from Kara Crescent and upstream properties currently discharging onto the Land.
 - vi. Public benefits flowing from the Agreement which have not been quantified include:
 - A. avoidance of the cost of proceedings in nuisance and/or negligence against the Council and the damages arising from such proceedings if successful against the Council;
 - B. avoidance of further legal costs in the Proceedings before the NSWLEC;
 - C. the certainty of resolution of drainage issues relating to Kara Crescent and the Land in a certain and timely manner;
 - D. no ongoing maintenance costs to the Council of the rain garden within the drainage reserve to be dedicated to the Council;
 - E. the Council being aware of fixed costs it will pay the Developer as contribution to the public works being undertaken with the Developer taking on the obligation in risk of a blowout in those costs;

7. How the Planning Agreement promotes the public interest and the objects of the Act

- a. Further to paragraph 6 above, the Agreement promotes the public interest and the objects in section 1.3 of the Act in that it:
 - i. promotes the orderly and economic use and development of land (s1.3(c));
 - ii. promotes good design and amenity of the built environment (s1.3(g)).

8. How the agreement promotes one or more of the elements of the council's charter under section 8 of the *Local Government Act 1993*

- a. The Agreement promotes the principles for local government under Chapter 3 of the *Local Government Act 1993*. In particular:
 - i. Councils should carry out functions in a way that provides the best possible value for residents and ratepayers (s8A(b)).
 - ii. Councils should manage lands and other assets so that current and future local community needs can be met in an affordable way (s8A(f)).
 - iii. Councils should work with others to secure appropriate services for local community needs (s8A(g)).
 - iv. Councils should invest in responsible and sustainable infrastructure for the benefit of the local community (s8B(b)).
 - v. Councils should identify and prioritise key local community needs and aspirations and consider regional priorities (s8C(a)).

9. The planning purpose or purposes served by the Agreement

- a. The planning purposes served by this Agreement include but are not limited to:
 - i. The Agreement facilitates the planning and development of:
 - A. drainage infrastructure within Kara Crescent and surrounding land catchments; and
 - B. road infrastructure with a cul-de-sac turning head in Kara Crescent.
 - ii. The resolution of the Proceedings through this Agreement serves:
 - A. the Aims of the *Port Stephens Local Environmental Plan 2013*; and
 - B. the Objective of the Zone B5 which applies to the Land to enable a mix of business and warehouse uses, and specialised retail premises that require a large floor area, in locations that are close to, and that support the viability of, centres.

10. Whether the Agreement conforms with the Council's capital works program (if any)

- a. The Agreement requires the Developer to carry out specified drainage and road works and dedicate land to Council. The works are not included in the Council's relevant current capital works program. However, the Council's Management Plan identifies these type 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.

11. The requirements of the Agreement which must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued

Construction Certificate

Conditions 4 to 20 of the 2020 Consent must be complied with before a construction certificate is issued.

Occupation Certificate

Requirements which must be complied with before a Occupation Certificate is issued are set out in Conditions 45 to 57 of the 2020 Consent in respect of each stage of the development.

Subdivision Certificate

Condition 5, Conditions 58 to 68 of the 2020 Consent must be complied with before the Strata Subdivision Certificate is issued.