

DRAFT 17 March 2022

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Port Stephens Council

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Defence Housing Australia

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# Planning Agreement

Fern Bay Rifle Range

DRAFT

**Date**

## **Parties**

**Port Stephens Council** ABN 16 744 377 876 of 116 Adelaide Street, Raymond Terrace NSW 2324  
(Council)

**Defence Housing Australia** ABN 72 968 504 934 of 26 Brisbane Avenue, Barton ACT 2600  
(Developer)

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## **Background**

- A The Developer owns the Land.
- B The Developer requested that the Council prepare a Planning Proposal in respect of the Land and the Developer proposes to submit a Development Application for the Development to the Council in respect of the Land.
- C On 25 November 2019, the Minister for Planning and Public Spaces issued a Gateway determination in respect of the Planning Proposal.
- D The Planning Proposal and associated proposed Development Control Plan were publicly exhibited from 3 June 2020 to 3 July 2020.
- E By letter dated 2 July 2021, the Developer made an offer to enter into a Voluntary Planning Agreement under section 7.4 of the Act.
- F On 27 July 2021, the Council resolved to agree to the preparation and exhibition of a draft Voluntary Planning Agreement to manage sand dune transgression in accordance with the Developer's offer.
- G The Parties have entered into this Agreement to give effect to the Developer's offer.

## **Operative provisions**

- 1 Planning agreement under the Act
  - 1.1 The Parties agree that this Agreement is a planning agreement within the meaning of section 7.4(1) of the Act, governed by Part 7, Division 7.1, Subdivision 2 of the Act.
- 2 Application of this Agreement
  - 2.1 This Agreement applies to Land and to the Development.
- 3 Operation of this Agreement
  - 3.1 This Agreement operates from the latter of:
    - (a) The date the Agreement is executed by all parties, as required by clause 25C(1) of the Regulation; and
    - (b) The Gazettal.
  - 3.2 Notwithstanding clause 3.1, clause 17 of this Agreement operates from the date the Agreement is executed by all parties.
- 4 Definitions and interpretation
  - 4.1 In this Agreement, unless the context otherwise requires the following definitions apply:

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

**Agreement** means this Deed.

**Business Day** means a day that is not a Saturday, Sunday, public holiday or bank holiday in New South Wales, Australia.

**Approved Implementation Plan** means the Implementation Plan approved in writing by the Council under clause 5.10 of this agreement.

**Claim** includes a claim, demand, remedy, suit, injury, damage, loss, cost, liability, action, proceeding or right of action.

**Community Association** means a Community Association, Precinct Association or Neighbourhood Association, as applicable, as defined in the *Community Land Development Act 2021*.

**Community Management Statement** means a Community Management Statement, Precinct Management Statement or Neighbourhood Management Statement, as applicable, as defined in the *Community Land Development Act 2021* and the *Community Land Management Act 2021*.

**Association Property** has the same meaning as in the *Community Land Development Act 2021* and the *Community Land Management Act 2021* or any other common property including a common lot in a subdivision under the Strata Schemes Development Act 2015.

**Complete** means, in respect of the Stage 1 Dune Management Actions, that the Council has given the Developer a Notice of Completion under clause 5.24 of this agreement, to the effect that the Stage 1 Dune Management Actions have been carried out and completed in accordance with clause 5.16 of this agreement (excluding the Defects Liability Period), and "completion" and "completed" are to be interpreted accordingly.

**Council** means Port Stephens Council.

**Defect** means anything that adversely affects, or is likely to adversely affect, the appearance, integrity, functionality or use of the Stage 1 Dune Management Actions or any part of the Stage 1 Dune Management Actions, and "Defective" is to be interpreted accordingly.

**Defects Liability Period** means in respect of the Stage 1 Dune Management Actions a period of 12 months commencing from the date the works are Completed.

**Defects Liability Bond** means an unconditional and irrevocable bond or bank guarantee that is not limited in time and does not expire, containing terms and conditions reasonably acceptable to the Council, to pay the Council on demand in accordance with clause 5.28 of this agreement, an amount of:

- (a) One hundred thousand dollars (\$100,000); or
  - (b) 20% of the estimated cost of the Stage 1 Dune Management Action specified in the Approved Implementation Plan;
- whichever is the greater.

**Developer** means Defence Housing Australia (ACN 72 968 504 934)

**Development** means the residential Subdivision of the Land.

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

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

**Dunal Area** means that part of the Land specified in the Approved Implementation Plan as land on which the Stage 1 and Stage 2 Dune Management Actions will be carried, being the land generally shown as the Dunal Area on the plan at Annexure A.

**Dune Transgression Hazard Line** means a survey line on the Land depicted in the Approved Implementation Plan, being a line delineating the land affected by dune transgression (including dune toe position and windblown sand) commencing from the completion of the Stage 1 Dune Management Works to the year 2100, assuming no Stage 2 Dune Management Works are carried out.

**Investment Fund** means an investment fund established for the purposes of carrying out the Stage 2 Dune Management Actions in accordance with the Approved Implementation Plan and associated actions under the Approved Implementation Plan for a period of 50 years from the date of the first approval of the Implementation Plan under this agreement.

**Investment Fund Amount** means the initial amount required to be deposited in the Investment Fund that is, based on a report prepared by a suitably qualified person in accordance with the requirements in the Implementation Plan.

**Explanatory Note** means the explanatory note required by clause 25E of the Regulation.

**Gazettal** means the publication of the Instrument Change in the NSW Government Gazette or on the NSW legislation website.

**Implementation Plan** means a plan detailing the Stage 1 and Stage 2 Dune Management Actions prepared to address clause 5 and Schedule 2 of this agreement.

**Instrument Change** means the amendment of the *Port Stephens Local Environmental Plan 2013* to give effect to the Planning Proposal.

**Land** means Lot 5 DP 233358, being 14 Popplewell Road Fern Bay, known as the Fern Bay Rifle Range.

**Near Dune Residential Lot** means a lot (including a Residential Lot) or proposed Residential Lot that comprises any land located east of the Dune Transgression Hazard Line and west of the Dunal Area.

**Notice of Completion** means a notice given by the Council to the Developer under clause 5.24 of this agreement, to the effect that the Stage 1 Dune Management Actions are Complete.

**Party** means a party to this agreement, including their successors and assigns.

**Planning Proposal** means the planning proposal to rezone part of the Land under the *Port Stephens Local Environmental Plan 2013* from E2 Environmental Conservation to R3 Medium Density Residential with maximum building heights of 9 metres and 15 metres, and minimum lot sizes of 200m<sup>2</sup> and 500m<sup>2</sup>, and to categorise the Land as an Urban Release Area. Council reference 58-2017-10-1 and Department reference PP\_2019\_PORTS\_002\_00.

**Register** means the register kept under the *Real Property Act 1900*.

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

**Residential Lot** means a lot on the Land zoned under the *Port Stephens Local Environmental Plan 2013* (or any amendment or replacement thereof) for residential accommodation that will not be further subdivided as part of the Development.

**Safety Threshold** means a line or lines that depict the extent of dune transgression that is likely to pose a safety threat to occupation of Near Dune Residential Lots as determined in the Approved Implementation Plan.

**Stage 1 Dune Management Actions** means the short-term dune rehabilitation work (including the Defects Liability Period) as detailed in the Approved Implementation Plan, to be carried out on the Land.

**Stage 2 Dune Management Actions** means the medium-term and long-term dune transgression mitigation, management and monitoring actions (not including the Stage 1 Dune Management Actions) detailed in the Approved Implementation Plan.

**Subdivision** means as defined in section 6.2 of the Act, and “subdivide” is to be interpreted accordingly.

**Subdivision Certificate** means as defined in section 6.4 of the Act.

Note section 6.4 of the Act defines subdivision certificate as “a certificate that authorises the registration of a plan of subdivision under Part 23 of the Conveyancing Act 1919.”

**Supervisor** means a suitably qualified expert consultant approved in writing by the Council, who is responsible for supervising and certifying the carrying out of the Stage 1 Dune Management Actions.

**Transfer** means, without limitation, to sell, transfer, assign or dispose of, in any way, but does not include the creation of Association Property.

4.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) 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.
- (c) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (e) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced by agreement of the parties.
- (f) References to the word ‘include’ or ‘including’ are to be construed without limitation.
- (g) A reference to this Agreement includes the agreement recorded in this Agreement.
- (h) 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.
- (i) Any schedules and attachments form part of this Agreement.

## 5 Obligations of the Developer

5.1 The Developer agrees to provide material public benefits in the form of the following:

- (a) the Completion of the Stage 1 Dune Management Actions to be applied to the public purpose of the conservation or enhancement of the natural environment.
- (b) the Stage 2 Dune Management Actions to address the public purposes of monitoring of the planning impacts of development and the conservation or enhancement of the natural environment.

## Preparation of Implementation Plan

- 5.2 The Developer must, at no cost to the Council, procure the preparation of a draft Implementation Plan in accordance with Schedule 2 of this Agreement (or otherwise with the consent of Council, acting reasonably) to be submitted for review by the Council prior to the lodgement of a Development Application in respect of the Development.
- 5.3 For the avoidance of doubt, provided the Developer notifies the Council under clause 5.4, the Developer may submit the draft Implementation Plan to Council under clause 5.2 at any time prior to the lodgement of a Development Application in respect of the Development.
- 5.4 The Developer must notify the Council of the date the draft Implementation Plan will be submitted to the Council, one (1) week prior to that date.
- 5.5 Within twenty (20) Business Days of receipt of the draft Implementation Plan from the Developer, the Council must engage a suitably qualified independent expert or experts, to peer review the draft Implementation Plan and prepare a report including discussion of specific areas for improvement (**Peer Review Report**). The purpose of the Peer Review Report is to provide independent, technical guidance to the Council to inform the Council's consideration of the draft Implementation Plan.
- 5.6 Prior to engaging the expert or experts to conduct the Peer Review Report, Council must provide the Developer with the expert or experts estimate of total fees for carrying out the work and producing the Peer Review Report.
- 5.7 The Peer Review Report must specify the documents that have been briefed by the Council and all documents referenced and relied on in preparing the report.
- 5.8 All reasonable costs associated with the Council's engagement of the expert/s and procurement of the Peer Review Report are to be borne by the Developer.
- 5.9 Within forty (40) Business Days of receipt of the draft Implementation Plan from the Developer, the Council must provide the Developer with:
  - (a) a copy of the Peer Review Report;
  - (b) additional requirements, if any, to be incorporated into the final Implementation Plan to be submitted under clause 5.8, which may, at the Council's absolute discretion, include some or all of the recommendations in the Peer Review Report;
- 5.10 Within ten (10) Business Days of receipt of a revised draft Implementation Plan (that incorporates the additional requirements specified by the Council under clause 5.9(b), if any), the Council must notify the Developer whether the Implementation Plan is approved, such approval not to be unreasonably withheld by the Council.
- 5.11 The parties agree that the timeframes specified in, and the requirements of, clauses 5.4, 5.5, 5.9 and 5.10 may be varied by agreement in writing by the parties.
- 5.12 If, at any time after an Implementation Plan has been approved by the Council under clause 5.10 of this Agreement, a modification of a Development Consent in respect of the Development is granted that results in different treatment of, or impacts on, the Dunal Area, or a Safety Threshold being triggered:
  - (a) Any Approved Implementation Plan is void and of no effect; and
  - (b) The owner of the Dunal Area must comply with clauses 5.2 to 5.9 of this Agreement (and all references to "Developer" in those clauses means the owner of the Dunal Area) to obtain approval of an amended Implementation Plan that is consistent with the Development Consent in respect of the Development, as modified;

- (c) An approval of an amended Implementation Plan submitted under clause 5.2 as a consequence of this clause 5.12 supersedes any plan previously approved under clause 5.10 of this Agreement.
- 5.13 In the event of any inconsistency between the Approved Implementation Plan and the Development Consent in respect of the Development (including as modified, if applicable), the latter will prevail to the extent of any inconsistency.
- 5.14 If, in accordance with its terms, the Approved Implementation Plan is reviewed, and the estimated cost of carrying out the Stage 2 Dune Management Actions changes, or the basis of the calculation of the Investment Fund Amount changes:
  - (a) clauses 5.12(b) and (c) apply;
  - (b) the review must include a report, at no cost to Council, from a suitably qualified person confirming any consequential revision to the Investment Fund Amount (a copy of which must be provided to the Council); and
  - (c) where Council has, in accordance with clause 11.1 or clause 11.2, been provided with evidence that the Investment Fund has been established, Council may request, and the owner of the Dunal Area must provide, further evidence establishing that the revised Investment Fund Amount has been deposited into the Investment Fund, or that there is a mechanism satisfactory to Council (acting reasonably) to ensure the Investment Fund will adequately cover the cost of the Stage 2 Dune Management Actions in accordance with the revised Implementation Plan.

#### **Carrying out the Stage 1 Dune Management Actions**

- 5.15 The Developer must carry out and Complete the Stage 1 Dune Management Actions (excluding the Defects Liability Period) prior to:
  - (a) the issue of the first Subdivision Certificate for a plan of Subdivision that will create the Dunal Area as Association Property under a Development Consent for the Development ; and
  - (b) the Transfer of the Dunal Area or any land zoned for residential purposes.
- 5.16 The Stage 1 Dune Management Actions must be carried out and completed in accordance with:
  - (a) the Approved Implementation Plan;
  - (b) any Development Consent and any certificate under the Act in respect of the Development; and
  - (c) any other necessary approval, consent, authority or permit required under legislation;
  - (d) industry best practice;and in the event of any inconsistency between requirements of sub-clauses (a), (b) and (d), the Development Consent in respect of the Development will prevail to the extent of any such inconsistency.
- 5.17 The Developer will give the Council not less than 10 Business Days' written notice of the date on which it will commence the Stage 1 Dune Management Actions.
- 5.18 Prior to the commencement of the Stage 1 Dune Management Actions, the Developer must submit, for Council's written approval, the name and details of relevant qualifications and experience of the person nominated to supervise the carrying out of the works (the **Supervisor**).

- 5.19 The carrying out of the Stage 1 Dune Management Actions must be supervised by the Supervisor.
- 5.20 Upon finalising the Stage 1 Dune Management Actions, the Developer must provide the Council with:
- (a) a report by the Supervisor certifying that the Stage 1 Dune Management Actions have been carried out and completed in accordance with clause 5.16 of this agreement; and
  - (b) a notice specifying any Stage 1 Dune Management Actions not Completed or Defective;
  - (c) a works-as-executed plan in respect of the Stage 1 Dune Management Actions.
- 5.21 The Developer, being the copyright owner in the Implementation Plan and the works-as-executed plan referred to in clause 5.20, gives the Council a non-exclusive licence to use the copyright in the plans for the purposes of this Agreement.

#### **Access to Land by Council**

- 5.22 The Council may, at its own risk, enter any land on which the Stage 1 Dune Management Actions are being carried out by the Developer under this Agreement in order to inspect the Stage 1 Dune Management Actions.
- 5.23 The Council is to give the Developer prior reasonable notice before it enters land under clause 5.22 and must comply with all reasonable work, health and safety directions of the Developer or the Supervisor when inspecting the Stage 1 Dune Management Actions.

#### **Completion of Stage 1 Dune Management Actions**

- 5.24 The Stage 1 Dune Management Actions are completed for the purposes of this agreement when the Council, acting reasonably, gives a written notice to the Developer to that effect (a **Notice of Completion**).
- 5.25 Before the Council gives the Developer a Notice of Completion, acting reasonably, it may give the Developer a written direction to complete, rectify or repair any specified part of the Stage 1 Dune Management Actions in accordance with the Approved Implementation Plan, the Development Consent in respect of the Development and other approvals referred to in clause 5.16 to the reasonable satisfaction of the Council.
- 5.26 The Developer, at its own cost, within a reasonable period of time (which must not be less than 20 Business Days), is to comply with a direction referred to in clause 5.25.
- 5.27 For the avoidance of doubt, the report by the Supervisor under clause 5.20(a) must identify Defects that must be rectified during the Defects Liability Period and a Notice of Completion may be issued despite these Defects, provided the Developer provides the Defects Liability Bond to Council in accordance with clause 5.28.
- 5.28 The Developer must provide the Defects Liability Bond to Council prior to the issue of a Notice of Completion for the Stage 1 Dune Management Actions.
- 5.29 The Developer must:
- (a) rectify any Defects identified in the report by the Supervisor within the Defects Liability Period; and
  - (b) rectify any Defects identified in writing by Council during the Defects Liability Period, within the time specified in the notice, which must not be less than 20 Business Days.
- 5.30 If the Developer fails to comply with clause 5.29 Council may call on the Defects Liability Bond and use the proceeds to satisfy the obligations of the Developer and return any unused

portion of the proceeds to the Developer within 20 Business Days after satisfying those obligations.

- 5.31 If Council calls on a Defects Liability Bond under clause 5.30, the Developer must ensure that Council will be entitled to enter, access the Land and carry out the work required to satisfy the Developer's obligations.
- 5.32 If the Council calls on the Defects Liability Bond in accordance with this agreement, the Council may, by notice in writing to the Developer, require the Developer to pay a further amount that, when added to any unused portion of the existing Defects Liability Bond, does not exceed the amount of the Defects Liability Bond.
- 5.33 Nothing in this clause prevents or restricts the Council from taking any enforcement action in relation to:
  - a. any obligation of the Developer under this agreement;
  - b. any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this agreement.

#### **Dune Management Actions**

- 5.34 The Developer, and any subsequent owner of land comprising the Dunal Area must carry out the Stage 2 Dune Management Actions in the manner and at the times specified in the Approved Implementation Plan.
- 5.35 The Developer, and any subsequent owner of land comprising the Dunal Area, must provide the Council with a report that demonstrates compliance with the Approved Implementation Plan prior to the issue of each Subdivision Certificate for the Development.
- 5.36 The report must specifically document compliance with reference to the timeline of works in the Approved Implementation Plan.
- 5.37 The owner of the Dunal Area must, within twenty (20) Business Days of receiving a request by Council, provide the Council with documentary evidence of the funds being held in the Investment Fund.

## **6 Registration of Covenants**

#### **Positive Covenant**

- 6.1 At the time of registration of the first plan to Subdivide the Land for the purpose of the Development, the Developer must register a dealing under section 88E of the *Conveyancing Act 1919* which registers a Public Positive Covenant, benefitting the Council as prescribed authority, and burdening any lot comprising land within the Dunal Area (as identified in the Approved Implementation Plan) the terms of which are generally consistent with the draft terms set out in Schedule 3.

#### **Restrictive Covenant**

- 6.2 At the time of registration of any plan of Subdivision creating a Near Dune Residential Lot, the Developer (and any subsequent owner of land comprising the Dunal Area) must register a dealing under section 88B of the *Conveyancing Act 1919* which registers a restriction on the use of land, benefitting the Dunal Area, and burdening all Near Dune Residential Lots the subject of the plan of Subdivision, the terms of which are generally consistent with the draft terms set out in Schedule 4. The dealing must specify the Council as the person with the right to release, vary or modify the restriction.

## 7 Application of s7.11 and s7.12 of the Act to the Development

- 7.1 For the purposes of section 7.4(3)(d) of the Act, the Parties expressly agree that the application of section 7.11, 7.12 and 7.24 of the Act to the Development is **not** excluded and benefits under this Agreement are **not** to be taken into consideration in determining a development contribution under section 7.11 of the Act.

## 8 Registration of this Agreement

### 8.1 Registration of deed

The Developer will take all practical steps and otherwise do anything reasonably required to lodge this deed for registration with the NSW Land Registry Service within 20 Business Days of the date of this deed in the relevant folio of the Register for the Land, and thereafter, promptly respond to any requisitions made by the Registrar-General in respect of this deed and/or any ancillary documents.

### 8.2 Evidence of registration

- (a) The Developer must provide the Council with evidence of the lodgement of this deed pursuant to clause 8.1 within 5 Business Days of such lodgement at the NSW Land Registry Services.
- (b) The Developer will provide the Council with a copy of the relevant folio of the Register for the Land and a copy of the registered dealing containing this deed within 10 Business Days of receipt of notice of registration of this deed.

### 8.3 Release and discharge of deed

- (a) The Council agrees to do all things reasonably required by the Developer, including executing any form or providing any consent required by the NSW Land Registry Services to extinguish and discharge this deed over any lot in the event that this deed is terminated or otherwise comes to an end for any other reason.
- (b) Council will do all things reasonably necessary to provide a release and discharge of this Deed including executing any relevant documents so that this Deed may be removed from the folios of the Register for any proposed Residential Lot the subject of an application for a Subdivision Certificate, provided the Council is satisfied the Developer has duly fulfilled its obligations under this Deed to:
  - (i) Complete the Stage 1 Dune Management Actions (except any Defects Liability Period) in accordance with clause 5.16;
  - (ii) register the Public Positive Covenant in accordance with clause 6.1 and, if applicable, the Restrictive Covenant in accordance with clause 6.2; and
  - (iii) provide any report confirming compliance with the Approved Implementation Plan as required under clause 5.35 prior to or with the application for the Subdivision Certificate.
- (c) The Developer agrees to do all things necessary to ensure that this deed is not registered against the title of any land comprised in the Land that is, or will be, owned, controlled or managed by the Council.

### 8.4 Costs

The Developer is responsible for all costs, including any costs reasonably incurred by the Council, in association with this clause 8.

- 8.5 All references in this clause 8 to the "Developer" includes a subsequent owner of the Land and all references to "this deed" includes a deed of novation entered into in accordance with clause 11 of this agreement, as applicable.

## 9 Dispute Resolution

- 9.1 If a dispute arises between the parties in relation to this Agreement, a party must not commence any court proceedings relating to the dispute unless that party has complied with this clause 9, except where that party seeks urgent interlocutory relief.
- 9.2 The party wishing to commence the dispute resolution process must give written notice (**Notice of Dispute**) to the other parties of:
- (a) The nature of the dispute,
  - (b) The alleged basis of the dispute, and
  - (c) The position which the party issuing the Notice of Dispute believes is correct.
- 9.3 The representatives of the parties must promptly (and in any event within 10 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute. The parties may, without limitation:
- (a) resolve the dispute during the course of that meeting,
  - (b) agree that further material or expert determination in accordance with clause 9.6 about a particular issue or consideration is needed to effectively resolve the dispute (in which event the parties will, in good faith, agree to a timetable for resolution); or
  - (c) agree that the parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.
- 9.4 If the dispute is not resolved within 20 Business Days after the nominated representatives have met, either party may give to the other party a written notice calling for determination of the dispute (**Determination Notice**) by mediation under clause 9.5 or by expert determination under clause 9.6.
- 9.5 If a party gives a Determination Notice calling for the dispute to be mediated:
- (a) The parties must agree to the terms of reference of the mediation within 10 Business Days of the receipt of the Determination Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply;
  - (b) The mediator will be agreed between the parties, or failing agreement within 10 Business Days of receipt of the Determination Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
  - (c) The mediator appointed pursuant to this clause 9.5 must:
    - (i) Have reasonable qualifications and practical experience in the area of the dispute; and
    - (ii) Have no interest or duty which conflicts or may conflict with his or her function as a mediator he or she being required to fully disclose any such interest or duty before his or her appointment;
  - (d) The mediator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties;
  - (e) The parties must within 10 Business Days of receipt of the Determination Notice notify each other of their representatives who will be involved in the mediation;

- (f) The parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement; and
- (g) In relation to costs and expenses:
  - (i) Each party will bear its own professional and expert costs incurred in connection with the mediation; and
  - (ii) The costs of the mediator will be shared equally by the parties unless the mediator determines that a party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that party.

9.6 If the dispute is not resolved under clause 9.3 or clause 9.5, or the parties otherwise agree that the dispute may be resolved by expert determination, the parties may refer the dispute to an expert, in which event:

- (a) The dispute must be determined by an independent expert in the relevant field:
  - (i) Agreed upon and appointed jointly by the parties; and
  - (ii) In the event that no agreement is reached or no appointment is made within 10 Business Days of the agreement to refer the dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales.
- (b) The expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) The determination of the dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (d) The expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (e) Each party will bear its own costs in connection with the process and the determination by the expert and will share equally the expert's fees and costs; and
- (f) Any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
  - (i) Within 20 Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and commences litigation; or
  - (ii) The determination is in respect of, or relates to, termination or purported termination of this agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal.

9.7 If the dispute is not *finally* resolved in accordance with this clause 9.1, then either party is at liberty to litigate the dispute.

9.8 Subject to any interlocutory order obtained under clause 9.1, the referral to or undertaking of a dispute resolution process under this clause 9 does not suspend the parties' obligations under this Agreement.

## 10 Enforcement

10.1 In the event a party considers another party has failed to perform and fulfil an obligation under this Agreement, it may give notice in writing to the other party (**Default Notice**) giving

all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than 21 days.

- 10.2 In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- 10.3 If a party disputes the Default Notice it may refer the dispute to dispute resolution under clause 9 of this Agreement.
- 10.4 Without limiting any other remedies available to the parties, this Agreement may be enforced by any party in any Court of competent jurisdiction.
- 10.5 Nothing in this Agreement prevents:
  - (a) a party from bringing proceedings in a Court of competent jurisdiction to enforce any aspect of this Agreement or any matter to which this Agreement relates, or seeking damages for breach of any obligation under this Agreement; and
  - (b) 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.

## 11 Restriction on dealings

### 11.1 The Developer is not to:

- (a) Transfer the Land or any part of it, other than a Residential Lot or part of the Land proposed to be under the ownership of the Council; or
- (b) Assign or novate its rights or obligations under this agreement; to any person (**Transferee**) unless:
  - (i) the Developer has, based on a report prepared by a suitably qualified expert, to be approved in writing by the Council (which approval is not be unreasonably withheld):
    - A. confirmed that the calculation of the Investment Fund Amount in the Approved Implementation Plan remains current; or
    - B. provided a revised calculation of the Investment Fund Amount;The Council's review and approval of the report under clause 11.1(b)(i) may involve, at the Council's discretion, the engagement of a peer review expert at the cost of the Developer;
  - (ii) the Developer has, at no cost to Council, delivered to the Council a Deed executed by the Developer and the Transferee in the form of the novation deed at Annexure B;
  - (iii) if the Dunal Area is to be Transferred to the Transferee:
    - A. the Transferee provides to Council a copy of the report (and revised report under clause (b)(i)) on which the Investment Fund Amount was established and documentary evidence confirming the establishment of the Investment Fund and deposit of the Investment Fund Amount (based on the calculation in the report provided under clause 11.1(b)(i));
    - B. the Transferee provides to Council a copy of the terms governing the management of the Investment Fund, which confirm that the Investment Fund may be used only for the purposes of carrying out the Stage 2 Dune Management Actions in accordance with the Implementation Plan;

- (iv) any default by the Developer has been remedied by the Developer or waived in writing by Council;
    - (v) the Transferee undertakes to pay the Council's reasonable costs associated with the transfer, assignment or novation, and compliance with this clause 11.1, including the registration of the deed of assignment or novation on the Register of the title of any lot on which this agreement is registered at the date of transfer, assignment or novation;
    - (vi) the Council has given written notice (which may be withheld by the Council, acting reasonably) to the Developer stating that the Transferee is acceptable to the Council.
  - (c) For the avoidance of doubt, clauses 11.1(a) and (b) do not apply to any transfer or assignment of interests that may occur on the registration of a plan of Subdivision creating Association Property that contains the Dunal Area.
- 11.2 Prior to the registration of any plan of Subdivision creating Association Property that contains the Dunal Area or one or more Near Dune Residential Lots, the Developer must:
- (a) provide to Council:
    - (i) a draft Community Management Statement that includes by-laws under clause 9 of Schedule 2 of the Community Land Development Act 2021 that:
      - A. requires the Community Association to provide a copy of the Approved Implementation Plan to the owners of each Residential Lot in the scheme plan;
      - B. requires the Community Association to carry out the Stage 2 Dune Management Actions in accordance with the Approved Implementation Plan; and
      - C. provides that an amount equivalent to the Investment Fund Amount from the Community Association's capital works fund must be invested for the purposes of funding the Stage 2 Dune Management Actions in accordance with the Approved Implementation Plan and otherwise implementing the Approved Implementation Plan;
      - D. restricts the Subdivision of the Dunal Area;
      - E. restricts the use of the Dunal Area for any purpose other than as Association Property;
      - F. repeats clauses 13.4 and 13.5 of this agreement.
    - (ii) documentary evidence confirming the establishment of the Investment Fund, the report on which the Investment Fund Amount was established and the deposit of the Investment Fund Amount; and
    - (iii) a copy of the terms governing the management of the Investment Fund, confirming that the Investment Fund must be used by the Community Association only for the purposes of carrying out the Stage 2 Dune Management Actions in accordance with the Approved Implementation Plan.
- 11.3 The Community Management Statement in respect of Association Property that comprises the Dunal Area must include by-laws under clause 9 of Schedule 2 of the Community Land Development Act 2021 that:
- (a) requires the Community Association to provide a copy of the Approved Implementation Plan to the owners of each Residential Lot in the scheme plan;
  - (b) requires the Community Association to carry out the Stage 2 Dune Management Actions in accordance with the Approved Implementation Plan; and

- (c) provides that an amount equivalent to the Investment Fund Amount from the Community Association's capital works fund must be invested for the purposes of funding the Stage 2 Dune Management Actions in accordance with the Approved Implementation Plan and otherwise implementing the Approved Implementation Plan;
  - (d) restricts the Subdivision of the Dunal Area;
  - (e) restricts the use of the Dunal Area for any purpose other than as Association Property;
  - (f) repeats clauses 13.4 and 13.5 of this agreement.
- 11.4 The Developer must not Transfer the Dunal Area separate from any land east of the Dune Transgression Hazard Line unless a restrictive covenant has been registered in accordance with clause 6.2 of this agreement.
- 11.5 Any purported Transfer, assignment or novation that is not permitted by this clause 11 or is not otherwise consented to by Council is of no effect.
- 11.6 A reference to the "Developer" in this clause 11 includes any subsequent owner of the Dunal Area.

## 12 Carrying out of Work

- 12.1 Without limiting any other provision of this Agreement, any work that is required to be carried out by the Developer under this Agreement as part of the Stage 1 and Stage 2 Dune Management Actions must be constructed and completed by the Developer:
  - (a) in accordance with all relevant Development Consents, standards, specifications, approvals, licences and applicable laws;
  - (b) in a good and workmanlike manner, and fit for the purpose of the work;
  - (c) without any defect; and
  - (d) to the satisfaction of Council, acting reasonably.
- 12.2 The design or specification of any work that is required to be carried out by the Developer under this Agreement may be varied by written agreement between the Parties, acting reasonably, without the necessity for an amendment to this Agreement.
- 12.3 The Council may after giving reasonable notice to the Developer enter the Land or any part of it on which is the Stage 1 or Stage 2 Dune Management Actions are being carried out by the Developer under this Agreement in order to inspect, examine or test the relevant work, or to remedy any breach by the Developer of its obligations under this Agreement relating to the work, provided that the Council gives reasonable notice and complies with any reasonable work, health or safety direction of the Developer or the Supervisor when accessing the Land.

## 13 Risk, Release & Indemnity

- 13.1 The Developer performs this Agreement at its own risk and its own cost.
- 13.2 The Developer releases the Council from any Claim it may have against the Council (other than statutory appeal rights) arising in connection with the carrying out of the Stage 1 Dune Management Actions by the Developer under this Agreement except if, and to the extent that, the Claim arises because of the negligence or substantive breach of Council, its employees, agents and contractors.
- 13.3 The Developer indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in connection with the performance of the carrying out of the Stage 1 Dune Management Actions by the Developer under this

Agreement except if, and to the extent that, the Claim arises because of the negligence or substantive breach of Council, its employees, agents and contractors.

- 13.4 The owner of the Dunal Area (which may include the Developer) releases the Council from any Claim it may have against the Council (other than statutory appeal rights) arising in connection with the carrying out of the Stage 2 Dune Management Actions by it under this Agreement except if, and to the extent that, the Claim arises because of the negligence or substantive breach of Council, its employees, agents and contractors.
- 13.5 The owner of the Dunal Area (which may include the Developer) indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in connection with the performance of the carrying out of the Stage 2 Dune Management Actions by it under this Agreement except if, and to the extent that, the Claim arises because of the actions or omissions of another entity required to carry out the Stage 2 Dune Management Actions or the negligence or substantive breach of Council, its employees, agents and contractors.

## 14 Insurance

- 14.1 The Developer must take out and keep current to the satisfaction of the Council the following insurances in relation to Stage 1 Dune Management Actions until those works are taken to have been Completed in accordance with this Agreement:
- (a) contract works insurance, noting the Council as an interested party, for the full replacement value of the Stage 1 Dune Management Actions (including the cost of demolition and removal of debris, consultants' fees and authorities' fees);
  - (b) public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party;
  - (c) workers compensation insurance as required by law, and
  - (d) any other insurance required by law.
- 14.2 The owner of the Dunal Area (which may include the Developer) must take out and keep current to the satisfaction of the Council the following insurances in relation to Stage 2 Dune Management Actions from the time those works commence until those works are taken to have been completed in accordance with the Implementation Plan:
- (a) contract works insurance, noting the Council as an interested party, for the full replacement value of the Stage 2 Dune Management Actions (including the cost of demolition and removal of debris, consultants' fees and authorities' fees);
  - (b) public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the owner of the Dunal Area and any subcontractor, for liability to any third party;
  - (c) workers compensation insurance as required by law, and
  - (d) any other insurance required by law.
- 14.3 If the Developer or the owner of the Dunal Area fails to comply with clause 14.1 or clause 14.2 above, the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Developer to the Council and may be recovered by the Council as it deems appropriate including recovery as a debt due in a court of competent jurisdiction.

- 14.4 The Developer must not commence or carry out any part of the Stage 1 Dune Management Actions unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 14.1 above.
- 14.5 The owner of the Dunal Area must not commence or carry out any part of the Stage 2 Dune Management Actions unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 14.2 above

## 15 Explanatory Note

- 15.1 The Explanatory Note shall not be used to assist in construing this Agreement.

## 16 Notices

- 16.1 The preferred method of providing any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is by email, except where actual hardcopy documentation is required to be delivered to the other party.
- 16.2 Such documentation must be sent in one of the following ways:
- (a) Delivered to that Party at its address set out below and written acknowledgement of receipt obtained upon delivery.
  - (b) Where practical and preferably emailed to that Party at its email address set out below.

### **Council**

Attention: Planning Agreements Officer

Address: Port Stephens Council Administration Building  
116 Adelaide Street, Raymond Terrace NSW 2324

Email: rezoning@portstephens.nsw.gov.au

### **Developer**

Attention: INSERT

Address: INSERT

Email: INSERT

- 16.3 If a Party gives the other Party 3 Business Days' notice of a change of these particulars, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or emailed to the latest particular provide.
- 16.4 Any notice, consent, information, application or request is to be treated as 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 Business Days after it is posted.
- 16.5 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.

## 17 Costs

- 17.1 The Developer must pay the Council's costs not exceeding \$30,000 (including GST) of negotiating, preparing, executing and attending to registration of this Agreement and the Explanatory Note.

## 18 Entire agreement

- 18.1 This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.

## 19 Further acts

Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.

## 20 Governing law and jurisdiction

- 20.1 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.

## 21 No fetter

- 21.1 Nothing in this Agreement shall be construed as requiring either party 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.

## 22 Representations and warranties

- 22.1 The Developer represents and warrants that at the date of this agreement it is the owner of the Land.
- 22.2 The Parties represent and warrant that they each:
- (a) have power to enter into this Agreement and comply with their obligations under the Agreement;
  - (b) that entry into this Agreement will not result in the breach of any law, and
  - (c) the person(s) who executes this Agreement on the part of the Party has the authority to execute.

## 23 Severability

- 23.1 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. 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.

## 24 Modification and rescission

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

## 25 Waiver

- 25.1 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. 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.

## 26 Counterparts

- 26.1 This document may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

DRAFT

## Executed as a Deed

**Executed by PORT STEPHENS COUNCIL** by )  
its authorised delegate, pursuant to )  
resolution made on                      in the )  
presence of: )  
)

.....  
Signature of Witness

.....  
Signature of Authorised Delegate

.....  
Print name

.....  
Print name and position

**Executed by DEFENCE HOUSING** )  
**AUSTRALIA** ACN 72 968 504 934 by its )  
delegate duly authorised pursuant to s.65 )  
of the *Defence Housing Australia Act 1987* )  
(Cth) by: )

.....  
Signature of Witness

.....  
Signature of Authorised Delegate

.....  
Print name

.....  
Print name and position

## Schedule 1: Section 7.4 Requirements

Requirement under the Act	This document
Planning Instrument and/or development application (s7.4(1)) The Developer has: (a) sought a change to an environmental planning instrument. (b) made, or proposes to make, a development application. (c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.	Yes  Yes  No
<b>Description of the land to which this document applies-</b> (Section 7.1(3)(a))	clause 4.1 (Definition of "Land")
<b>Description of the development to which this document applies-</b> (Section 7.4(3)(b)(ii))	clause 4.1 (Definition of "Development" and "Planning Proposal")
<b>The scope, timing and manner of delivery of development contributions required by this Deed</b> - (section 7.4(3)(c))	Clause 5 and Schedules 2 and 3
<b>Applicability of Sections 7.11, 7.12 and 7.24 of the Act</b> - (Section 7.4(3)(d))	clause 7
<b>Mechanism for Dispute resolution</b> - (section 7.4(3)(f))	clause 9
<b>Enforcement of this Deed</b> - (section 7.4(3)(g))	clause 6 and 8
<b>Registration of this document</b> (section 7.6)	clause 8
<b>No obligation to grant consent or exercise functions</b> - (section 7.4(9))	clause 21

## Schedule 2: Requirements for the preparation and content of an Implementation Plan

### Contents

#### **1 The report**

- 1.1 *Background*
- 1.2 *Regulatory and guiding framework*

#### **2 Knowledge base and supporting studies**

- 2.1 *Overview of existing environment*
- 2.2 *Additional contributing factors*
- 2.3 *Gap analysis*

#### **3 Dune transgression model review and Development**

- 3.1 *Review existing available models*
- 3.2 *Develop or select a model*

#### **4 Implementation Plan objectives**

#### **5 Risk assessment and management**

- 5.1 *Assessment of individual risks and management*
- 5.2 *Cumulative risk assessment*

#### **6 Dune Management Actions Implementation - works**

#### **7 Dune Management Actions Schedule**

#### **8 Performance criteria and safety thresholds**

- 8.1 *Identification of trajectories and performance criteria*
- 8.2 *Identification of the dune transgression affected area*
- 8.3 *Dune migration safety threshold triggers*

#### **9 Financial provision for works**

- 9.1 *Intention*
- 9.2 *Basis for calculating the financial provisions*
- 9.3 *Financial provisioning inclusions*
- 9.4 *Investment Fund terms and management*
- 9.5 *Contingency*

#### **10 Management of information and data**

- 11 *Provision of Implementation Plan Information*

## 1 The report

In preparing the Implementation Plan ('the Plan'), this document is to be read and understood with the accompanying Voluntary Planning Agreement ('VPA').

This document explains the context behind the Plan and provide a minimum requirement for information to be presented. The format is indicative only.

This Plan and any reporting confirming aspects of the Investment Fund is to be prepared by suitably qualified persons, as outlined in the VPA.

### 1.1 Background

The Stockton Sand dune is actively migrating towards the proposed development rezoning footprint for the Rifle Range site [add reference & diag]. It is currently modelled to progressively engulf eastern edge of it. Long-term management is needed to either slow or halt the migration or there is the risk of substantial impact on the development, in particular near dune lots, Council infrastructure and the reputation of the estate.

In response to Council and public concern about this impact and the need for long-term management, the developer and initial owner of the dunal area offered to enter into a VPA with Council to:

- 1) ensure the ongoing protection of the development;
- 2) through an agreement obligating current and subsequent owners of the dune area and near dune lots;
- 3) to manage and mitigate the dune migration in a manner consistent with its C2 Environmental Conservation zoning.

As a part of this the developer will submit an Implementation Plan under the terms outlined in the VPA, detailing the works required, their timing and costs to meet the purposes above.

This Plan also determines the financial costs of delivering the works and protections over 50 years, including amount of an Investment Fund to be provided to subsequent owners of the migrating dunal area to contribute to the costs of implementation and the terms under which it is given.

The minimum requirements of the Plan are contained in the body of the document.

### 1.2 Regulatory and guiding framework

Provide a summary of legal obligations, referenced documents, commitments and standards as they relate to the dune management works including, but not limited to:

- 1) Applicable legislation, standards, codes of practice, guidelines, any approvals, zoning requirements and tenure; including but not limited to:
  - a) Coastal Management Act 2016 (NSW)
  - b) State Environmental Planning Policy (Coastal Management) 2018
  - c) Port Stephens Local Environment Plan 2013
  - d) Coastal Dune Management: A Manual of Coastal Dune Management and Rehabilitation Techniques (NSW Department of Land and Water Conservation 2001).
  - e) Guidelines for Sand Nourishment (NSW Office of Environment and Heritage's Coastal Processes and Responses Node; J T Carley and R J Cox 2017).
- 2) All commitments made as part of the VPA in association with this Plan, for example:
  - a) the restrictions on subdivision and transfer of the dunal area;
  - a. safety threshold trigger actions should the dune transgression poses a safety risk to occupation.
- 3) current industry best practice;

- 4) any Development Consent and any certificate under the Act in respect of the Development; and
- 5) any other necessary approval, consent, authority or permit required under legislation.

## 2 Knowledge base and supporting studies

### 2.1 Overview of existing environment

Provide an overview of the existing environment of the Dune Management Area and potentially affected development footprint in relation to its local and regional setting, relevant information from adjacent and analogous areas including but not limited to:

- 1) the social setting – cultural and heritage aspects to be considered;
- 2) the physical environment – climate, topography, geomorphology, ground and surface water, substrates and sediments, wind, landforms and dune properties and migration characteristics;
- 3) the biological environment – terrestrial ecology, vegetation communities, flora species, weeds, vegetation ecology (i.e. the underlying geomorphology that influences site hydrological features and soil fertility, seasonality, predictability of climate and frequency and intensity of fire), fauna species, introduced fauna species;
- 4) site contamination (e.g. lead (from munitions), UXOs, organic (e.g. hydrocarbons) or inorganic contaminants, pesticide, asbestos, acid sulfate soil) limited to those that should be considered in the dune stabilisation and ecological restoration process;
- 5) existing programs or management strategies employed by owner e.g. weed, fire, revegetation, etc.
- 6) technical knowledge base – studies and information on the modelling of the dune transgression, sediment movement modelling, source terms e.g. beach re-nourishment, ecological restoration, landform stabilisation works etc.

### 2.2 Additional contributing factors

Additional factors for consideration when reviewing baseline information and developing or selecting the dune transgression model and the associated works include:

- 1) probability of extreme events and landscape-scale processes such as weather, climate change, storms, erosion, fire, sediment transfer, wave overtopping;
- 2) increase in source terms e.g. sand re-nourishment;
- 3) the affects of the changing beach and dune profile on the rate of dune transgression;
- 4) the capacity of the landform to sustainably support ecosystem restoration in the long term;
- 5) changing land uses; and
- 6) changing cost of labour, equipment and materials including fuel.

This is not an exhaustive list and it is left open to the proponent to address these and others as appropriate in presenting the Plan.

Changes from advances in science, engineering, our understanding of the natural environment and best available technology may provide an opportunity to revise the approach and financial provisioning.

This plan must reflect the current evidence-based and proven technological approaches.

### 2.3 Gap analysis

Describe information gaps relevant to drafting the Plan and any substitute information, data or assumptions used identified. Where significant information gaps exist that may affect the outcomes of the Plan, provide an analysis of their potential influence.

## 3 Dune transgression model review and Development

### 3.1 Review existing available models

Provide an overview of the existing dune transgression modelling and data for the site (and where appropriate, adjacent and analogous sites) evaluating the parameters and assumptions that make up the model and contribute to its outputs, including but not limited to:

- 1) the currency of all relevant data, assumptions and survey data;
- 2) relevant factors identified in section **Error! Reference source not found.** of this document; and
- 3) any other relevant factor.

### 3.2 Develop or select a model

Based on the review:

- 1) select or develop a dune transgression modelling scenario to form the basis for the Plan;
- 2) the model should show the incremental movement of the dune until the year 2100 and be capable of supporting the identification of dune migration safety threshold triggers discussed in section 8;
- 3) the chosen scenario should reflect existing conditions (e.g. dune toe positions etc.) and not include allowance for any management or mitigations works not in place as at 1 March 2022;
- 4) all relevant modeling information should form part of an appendix;
- 5) all relevant data and survey information should be provided electronically;
- 6) any information gaps or assumptions relevant to this specific scenario should be discussed; and
- 7) the body of the report should provide a rationale for the selection of this scenario.

## 4 Implementation Plan objectives

The objectives set out the long-term goals for the dunal area management and are an essential part of the dune management process, providing transparency for the community as to what the owner of the dunal area commits to achieve.

The overarching objectives for the plan are to ensure:

1. successful management of the migrating dune system over a 50 year period that will prevent impact on the proposed development footprint;
2. works consistent with the ecological management framework of the area's C2 Environmental Conservation zoning; and
3. that the community is informed, consulted and engaged with the Plan process and its outcomes.

## 5 Risk assessment and management

The purpose of the risk assessment is to identify the threats and consequences associated with selecting management options to slow or halt the dune migration. This will assist in determining the significance of any threats to the near dune lots and the environment to guide the selection of the most appropriate elimination, mitigation and management strategies.

The process should include:

- 1) compliance with the AS/NZ ISO 3100 process as the framework for the management of risks;
- 2) a semi-quantitative assessment;
- 3) initial risk assessment to be based on selected dune transgression modelling scenario identified in section 3 in which no elimination, mitigation or management measures have been accounted for;

- 4) the risks identified, the analysis and the management measures identified (individually and cumulatively) should be detailed and comprehensive;
- 5) the process should encompass a 50 year period from the anticipated commencement date of Stage 1 works with all works to achieve dune stabilisation to be completed within this timeframe.

### **5.1 Assessment of individual risks and management**

The purpose of the risk assessment is to create a comprehensive list of individual risks that have the potential to prevent, degrade or delay achieving the objectives identified in section 4. From this a framework for risk identification, risk evaluation and risk treatment (actions) would be developed.

### **5.2 Cumulative risk assessment**

Council recognises that examining risks individually is no longer considered to be best practice as it does not account for potential interactions between risks. To address this aspects, in addition to the individual risk assessment a cumulative risk assessment should be provided to examine the effects and combined integrated risks.

## **6 Dune Management Actions Implementation - works**

This should include a description of the work program and management incorporating the risk management strategies identified in section 5 and meet the objectives from section 4.

### **6.1 Works scope**

Including, but not limited to:

- 1) dune land form preparation disturbance and stabilisation works;
- 2) ecosystem establishment, restoration and works;
- 3) future use requirements (e.g. cultural activities, recreation, beach access etc.);
- 4) monitoring programs (e.g. dune transgression, weed, vegetation, fauna etc.);
- 5) maintenance (e.g. dune transgression, weed, vegetation, fauna etc.);
- 6) reporting;
- 7) impact of the seasonality of any of the works or monitoring;
- 8) plans for the placement, construction and maintenance of effective exclusionary fencing to protect the dune system, revegetation works and any access pathways for the community or works;
- 9) permitting and approval processes;
- 10) preparation of studies and reports including an amended implementation plan as required;

Works identified must be able to be identified individually in the schedule in section 7; and reflect significant start, stop wait times for intermittent activities (e.g. seasonal monitoring, weed management).

### **6.2 Presentation of works and links to scheduling and costs**

Provide descriptions of the works planned and with reference to how they address the risks and reflect the risk management option identified in section 5.

Include information on:

- 1) the individual categories of works;
- 2) the baseline /starting point e.g. environmental or physical condition and what is to be addressed (e.g. current shape of the landform pre-recontouring, weed infestations and locations, ecological assemblages, their current function and intended function in stabilisation etc.);

- 3) the intention the works and their deliverables or outcomes;
- 4) the sequencing of individual works to achieve the intended outcome;
- 5) the equipment resources and estimated completion times.

The information provided must be in sufficient detail to inform incoming owners of the dunal area of their responsibilities and required actions without the further opportunity for clarification.

### **6.3 Trajectories of works and performance criteria**

The Plan should describe the most appropriate sequence (trajectories) of activities to achieve the objectives outlined in section 4.

Quantitative measures like this give confidence that the desired state will be achieved after an extended period from initial establishment or delivery of works (e.g. ecosystem establishment, dune stabilisation civil works, weed management etc.).

Performance criteria are points selected within the trajectory that represent milestones measuring success or identifying diversion from the planned outcomes that may then be addressed in a timely manner.

Performance criteria must represent direct, measurable and quantifiable values. These points should be presented clearly and their monitoring and reporting form part of the program of works.

## **7 Dune Management Actions Schedule**

A detailed Gantt chart or other appropriate means of identifying the detailed sequence of planned works over the 50 year period correlating directly to the dune management actions implementation works (section 6).

All works in this schedule should include:

- 1) the trajectories and performance criteria milestones and their timelines;
- 2) time provision for any approvals, monitoring and reporting;
- 3) time for community consultation administration, procurement and management etc.;
- 4) consideration of seasonal timing e.g. revegetation; weed management;
- 5) list resources required against each action (e.g. equipment, consultants, mobilisation, demobilization, resources, reporting etc.);
- 6) associated itemised costs against all actions;
- 7) take into account a reasonable spread, availability and application of resources for the scale of the project.

Based on the presentation of the schedule it should be possible for the reader to understand clearly what individual works (including reporting, monitoring and approvals) are to be undertaken at any given time, the resources required and the trajectories and performance criteria that apply to them.

### **7.1 Dune modelling inclusive of planned works**

The dune transgression model should be run inclusive the works identified in the plan in the schedule given and information presented. The process should be reflective the process referred to in section 3 and be able to provide a comparative tool to assess the works progress against a baseline.

## **8 Dune migration safety threshold Triggers**

As the sand dune seeks to transgress towards the proposed development footprint, the key intention of the Plan activities is to arrest or slow this progression.

In contrast to performance criteria, safety threshold points represent triggers for enforcement action under the private restrictive covenant registered on the land under the VPA.

This occurs when for example, the nuisance wind-blown sand from or the toe of the advancing dune system reaches a point ('safety threshold trigger) where in two years from that date, it will adversely affect the ability of a lot owner in its path to the peacefully, safely and reasonably enjoy their property. Some of the enforcement actions in the VPA in relation to these triggers are:

- 1) For the dunal area owner to immediately notify all affected lot owners that the dune migration safety threshold has been triggered with two possible outcomes:
  - a) dunal area owner immediately take action to reverse this transgression to an acceptable level such that the safety threshold is not triggered with permitted land use remaining the same; or
  - b) dune movement not addressed or reversed and use for residential purposes must cease unless such use is by caravan or moveable dwelling with approval for occupation.
- 2) The trigger of the threshold also indicates that the Dune Implementation Plan Actions either need significant revision or have failed to be delivered in the manner intended. An amended implementation plan in accordance with the requirements set out in the VPA will then be required.

### **8.1 Identification of affected lots**

To form a basis for this action, the near dune residential lots that may be affected by the transgression of the dune must be identified. These lots will include all lots to the east of the line that represents the transgression of the dune to the year 2100 with only Stage 1 works completed. The affected lots will include all those touched by or to the east of the year 2100 line described in this section. The 2100 line must include the affects of both toe progression and nuisance windblown sand in the determination of its position.

The model used is that referred to in section 3, which does not include the effects of any proposed or actual dune mitigation works undertaken after the delivery of the Stage 1 Dune Management Actions.

Clearly illustrate the position of the dune transgression line and relevant features including the provision of survey data to demarcate the relevant features.

The Plan should:

- 1) identify and clearly articulate the criteria for what constitutes a safety threshold for the protection of property including infrastructure to be impacted such as Council roads etc.;
- 2) identify and reflect the proposed development plan layout;
- 3) demarcate all those affected lots;
- 4) be informed by the selected dune transgression model to the year 2100 (refer sections 3 and 7.1) inclusive of stage 1 works only.
- 5) detail the trajectory of the dune toe and nuisance wild-blown sand transgression spatially and temporally identifying the safety threshold points and when or if they are intended to be met, taking into account the two year buffer requirement;
- 6) provide all relevant coordinates and survey data for the 2100 year line and development; and
- 7) these safety threshold triggers must represent direct, measurable and quantifiable values.

### **8.2 Trigger for revision of the Implementation Plan and Investment Fund**

Given the 50 year period for the Stage 2 Dune Management Works, it is likely that at some stage the proposed works or their timing may not be able to be delivered to meet the objectives as outlined in section 4 of this schedule.

With reference to the dune transgression model (inclusive of planned works) referred to in section 7.1, a quantifiable and measurable method of determining what constitutes a significant deviation of the actual trajectory of the dune transgression from the planned trajectory must be provided.

Where deviation falls within the unacceptable range the Implementation Plan must provide for a revision of both the Implementation Plan, in its entirety, and the Investment Fund. The purpose of the revision is to ensure that the revised works and schedule in the Amended Implementation Plan will either direct remedial works to bring the actual trajectory of the dune transgression in line with the previously modelled dune transgression trajectory or a new suitable dune transgression trajectory should be substituted.

A monitoring plan should be designed and scheduled to ensure that this is captured. The Implementation Plan On noting significant deviation, the owner of the dunal area will notify the Council as soon as practicable.

The review and approval process for the Amended Implementation Plan and the Investment Fund will be consistent with the requirements of the VPA.

## **9 Financial provision for works**

The ultimate cost of the Stage two works will be inherently uncertain and may vary in response to a number of factors including technological change, change in the extent of the development footprint and weather events.

However, the specific purpose of this financial provisioning is to determine the amounts to be held in security for the defects period for the Stage 1 works and the quantum of the Stage 2 Investment Fund.

This Plan and resultant financial provisions will be independently assessed and costed by Council and an independent assessor with the Investment Fund provided by the Dune Area Owner to the subsequent owner, the management of which is provided for in the accompanying VPA document.

### **9.1 Intention**

Includes that:

- 1) The financial provisioning for the initial Duna Area Owner for:
  - a) the delivery of Stage 1 Dune Management Actions works;
  - b) the delivery of the subsequent 12 month defects liability period works which will form the basis of the security lodged with Council.
- 2) The financial provisioning for the owner of the Dunal Area for:
  - a) the delivery of Stage 2 Dune Management Actions works;
  - b) an Investment Fund which represents the total cost of the Stage 2 Dune Management works to be lodged with the subsequent owner of the Dunal Area should it be transferred.

### **9.2 Basis for calculating the financial provisions**

The basis for the financial provisioning is that:

- 1) calculation of costs are to be in compliance with appropriate financial reporting standards;
- 2) all provisioning to be based on current third party equipment and labour hire rates;
- 3) there must be a transparent verifiable costing methodology including the provision of all unit rates and time estimates;
- 4) there must be an ability to link the financial cost estimates to the work conducted on the ground;
- 5) costings must be directly reflect and be referable to the detailed scheduling worksheet (refer section 7) and proposed works and trajectories (refer section 6) ;
- 6) the cost estimate tool and schedule should be able to sufficiently identify and detail discrete works at future points in time so as to provide clear basis for preparing a scope of works or understanding costs at any given time;
- 7) the period for the provision is for the 50 years after the anticipated approval of the Plan;

- 8) costs to be presented in current Australian dollars and to include GST;

### **9.3 Financial provisioning inclusions**

Provisioning should include but not be limited to:

- 1) Costs associated with meeting obligations and commitments made as part of the transfer of the property.
- 2) All direct Plan execution costs as they relate to meeting the objectives (refer section 4);
- 3) Costs associated with any environmental and civil works, maintaining access, recontouring, track establishment and maintenance and other management of the dune management area for the purposes of the Plan over a 50 year period starting from the anticipated date of approval for the initial Plan.
- 4) Decommissioning, demolition, decontamination, removal and disposal costs.
- 5) Costs associated with performing studies needed to support the Plan and activities including but not limited to remediation, monitoring and remediation, landform design and reporting.
- 6) Quality control and assurance costs.
- 7) Mobilisation and demobilisation of equipment and personnel for all dune management activities.
- 8) Project owners management costs including any execution costs associated with third parties e.g. procurement, government permitting etc.
- 9) Environmental compliance monitoring and reporting obligations during the Plan period.
- 10) Any socio-economic costs associated with stakeholders such as community consultations, social impact assessments.
- 11) An estimate of corporate costs including relevant insurances (e.g. public liability, works insurance), administration, records management and work, health and safety requirements.
- 12) The cost of an approved supervisor for the period of the Plan.

### **9.4 Investment Fund terms and management**

The intention of the Investment Fund is to provide sufficient financial provisioning for at least 50 years to complete the Stage 2 Dune Management Actions in accordance with the approved Implementation Plan, should the ownership of the Dunal area change.

The terms of the Fund will stipulate that the Investment Fund Amount must be invested and managed by the subsequent owner of the Dunal Area and the proceeds of the investments used to fund the Stage 2 works. The terms of the Fund will also stipulate the circumstances and extent to which the subsequent owner can access the principle amount invested to undertake the Stage 2 Works and actions associated with in accordance with the Approved Implementation Plan.

#### **9.4.1 The initial estimate of the Investment Fund amount by the Developer**

The amount to be initially deposited in the Investment Fund must be calculated on the basis that:

- (a) the amount must not be less than the cost of the Stage 2 works for the first 10 years after:
  - (i) completion of the Stage 1 works; or
  - (ii) transfer of the Dunal Area;whichever is the greater; and
- (b) the amount must take into account contributions to the Investment Fund over time:
  - (i) from any levies to the capital works fund of the Association reasonably estimated at the time the Investment Fund Amount is determined and on the basis that all lots in

- the proposed subdivision will be created within five (5) years of the first Subdivision Certificate for a Residential Lot (if applicable); and
- (ii) from investment of the Investment Fund calculated at a conservative rate of return, being 3% above the average of interest rates published by Westpac Banking Corporation, Commonwealth Bank and National Australia Bank for a 12 month term deposit.
- (c) For the purpose of calculating the anticipated community title levies under sub-clause (b)(i):
  - (i) the proposed number of levy-paying Residential Lots (and Near Dune Residential Lots) and the estimated amount to be levied on each lot as a contribution to the capital works fund, must be stated, and
  - (ii) unless otherwise demonstrated under subclause (c)(i), community title levies are assumed to be zero in the period within five (5) years after the issue of the first Subdivision Certificate for a Residential Lot.

The report may provide calculations in respect of two cost alternative scenarios for the subsequent ownership of the Dunal Area as:

1. Torrens title; or
2. Community Title.

The Torrens title option will include all costs incurred over the 50 year period based on the conservative rate return identified.

The Community Title option may include contributions from common title scheme levies to be taken into account over time. The VPA includes a stipulation that the initial 5 year period will result in zero (0) levies, unless it is demonstrated otherwise that levies should be incurred.

That Implementation Plan and the component Investment Fund report may be reviewed by an independent technical expert engaged by Council under the terms of the VPA.

#### **9.4.2 Revision of the initial estimate of the Investment Fund by the Developer**

Should the current owner of the Dunal Area seek to transfer the Dunal Area to another owner, prior to doing this there must be a review of the Initial Investment Fund amount by a suitably qualified person and a report provided to Council. The report should identify whether there should be any changes to the basis for the calculation of the initial Investment Fund amount by the owner discussed above prior to transfer of the Dunal Area.

Examples of this could be:

1. In the event that the amount that could be levied by the Community Association to contribute to the Investment Fund is increased then the cost model will require review and the contribution sum by the developer may be amended to reduce the contribution amount required by the current owner.
2. The initial amount of for the Investment Fund estimate reported by the current owner of the Dunal Area is based on incoming community title ownership of the Dunal Area taking into account levies from the Community Association over the period of the works. Should the Dunal Area be sold under Torrens title, no such fees would be levied and the initial amount proposed to be contributed by the original owner would be need to be amended to make up the shortfall.
3. The Initial estimate of the Fund amount assumed say \$10M over 50 years with 100 lot owners contributing resulting in an annual levy of \$200,000 per annum and levies of \$2,000 per

annum per lot or unit entitlement (not inclusive all the other levies lot owners would need to pay as part of the association). If at the time of the subdivision of the community title resulted in only 10 leviable lots, then this would mean \$20,000 per lot per annum. The basis for the calculation and the cost model may then be reviewed to reduce the annual levies payable per lot or unit entitlement and increase the initial amount to be deposited.

### **9.5 Endowment fund terms and management**

Relevant information on mechanisms for managing expenditure against the Endowment Fund including but not limited to:

1. approved scope of expenditure and exclusions;
2. expenditure approval process or criteria;
3. identify the circumstances and extent to which the principal of the fund can be accessed to undertake the Stage 2 Dune Management Works;
4. all identified Stage 2 works;
5. reporting requirements including those listed in the VPA;
6. cost accretions to account for earlier than expected expenditure against the balance sheet;
7. the requirement for the accessibility of funds at any given time.

### **9.5 Contingency**

Any degree of uncertainty is to be accounted for in a contingency to be presented in addition to the financial provision estimates. This may be estimated based on probabilistic or deterministic methods.

## **10 Management of information and data**

The Plan should provide a description of the information systems to be used by the Dunal Area Owner to manage the Dune Management Actions related data. The retention and accessibility of multidisciplinary dune management related data is vital for ensuring the success and management of the area and activities.

The monitoring, recording and documentation of dune management processes is also key for auditing and the capacity for adaptive management.

To support any transition of the dunal area from one owner to another, a system of management must be provided with policies, standards and work instructions to ensure data is secure, maintained, accurate and retrievable. Management systems in which the information is kept will reduce the risk of lost information (e.g. on personal computers) and provides stability for knowledge retention should key staff in the dune management actions leave.

## **11 Provision of Implementation Plan Information**

The Plan should be fully referenced and submitted in a accessible electronic format. To assist in its timely, independent, technical assessment and communications, the report should be provided in both PDF and Microsoft Word document format.

Accessible electronic copies of the following information is to be provided in an ordered format:

- 1) topographical and other survey data;
- 2) modelling data;
- 3) spreadsheets, project programs and Gantt charts;
- 4) tables of all unit costs relied on in the calculation of the financial provisions;
- 5) copies of all documents referenced in the Plan i.e. reports, paper with the exception of text books that would not be available electronically;
- 6) other relevant information relied upon in the development of the Plan

## Schedule 3: Terms of Positive Covenant

### Terms of Positive Covenant [firstly] referred to in the Plan

In these terms:

**"Act"** means the *Conveyancing Act 1919*;

**"Implementation Plan"** means [INSERT REFERENCE FOR PLAN SUBMITTED TO AND APPROVED BY COUNCIL UNDER CLAUSE 5.10 OF THIS DEED] or any replacement Implementation Plan a copy of which is attached at **Annexure "A"**.

**"Dunal Area"** means areas identified in the Implementation Plan as being the land to which the Implementation Plan applies.

**"Council"** means Port Stephens Council, and includes its servants and authorised agents;

**"Owner"** means the registered proprietor for the time being of the lot burdened, their successors and assigns and anyone claiming through the registered proprietor.

1. The Owner will, at its own expense, carry out the actions required by the Implementation Plan and in accordance with the Implementation Plan.
2. Without limiting the Council's powers under section 88F of the Act, the Council shall have the following additional powers pursuant to section 88F(3) of the Act:
  - a) In the event that the Owner fails to comply with the terms of any written notice issued by the Council as set out above the Council may enter the Dunal Area with all necessary materials and equipment and carry out any work which the Council in its discretion considers reasonable to comply with the said notice referred to above; and
  - b) The Council may recover from the Owner in a Court of competent jurisdiction:
    - (i) Any expense reasonably incurred by it in exercising its powers under subparagraph (a) hereof. Such expense shall include reasonable wages for the Council's employees engaged in effecting the work referred to in (a) above, supervising and administering the said work together with costs, reasonably estimated by the Council, for the use of materials, machinery, tools and equipment in conjunction with the said work.
    - (ii) Legal costs on an indemnity basis for issue of the said notices and recovery of the said costs and expenses together with the costs and expenses of registration of a covenant charge pursuant to Section 88F of the Act or providing any certificate required pursuant to Section 88G of the Act or obtaining any injunction pursuant to Section 88H of the Act.
3. Without limiting any other right of the Council, the Owner indemnifies and agrees to keep indemnified, and releases the Council from and against any claim, loss or damage (including legal costs on a full indemnity basis) which the Council may suffer due to, and/or which arises from:
  - a) the non-compliance with or departure from these terms by the Owner (whether by act or omission); and/or
  - b) the exercise of the Council's rights for the purpose of this covenant.

## Schedule 4: Terms of Restrictive Covenant

### Terms of Restrictive Covenant [firstly] referred to in the Plan

In these terms:

**"Act"** means the *Conveyancing Act 1919*;

**"Implementation Plan"** means [INSERT REFERENCE FOR PLAN SUBMITTED TO AND APPROVED BY COUNCIL UNDER CLAUSE 5.10 OF THIS DEED] a copy of which is attached at **Annexure "A"** or any replacement Implementation Plan.

**"Council"** means Port Stephens Council, and includes its servants and authorised agents;

**"Dunal Area"** means areas identified in the Implementation Plan as being the land to which the Implementation Plan applies.

**"Owner"** means the registered proprietor for the time being of the lot burdened, their successors and assigns and anyone claiming through the registered proprietor.

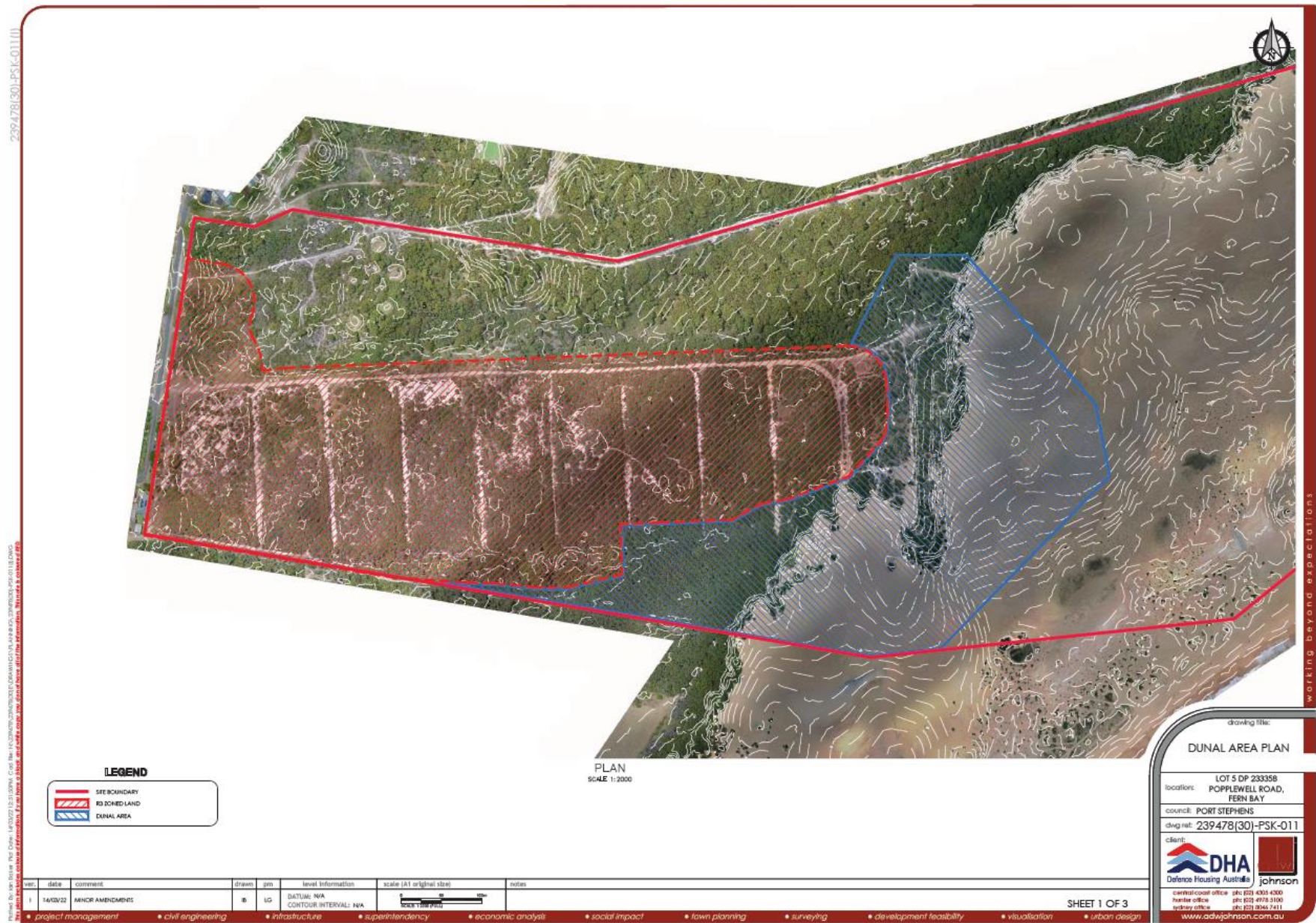
**"Lot Burdened"** means [insert title reference]

**"Planning Agreement"** means the Planning Agreement dated [...] requiring the owner of the Dunal Area to carry out the works in accordance with the Implementation Plan to mitigate dune transgression.

**"Safety Threshold"** means the point of dunal transgression that poses a risk to the Lot Burdened, as identified in the Implementation Plan.

1. This restriction as to use will apply only in the following circumstances:
  - a. the dune management works carried out in accordance with the recommendations of the Implementation Plan fail to mitigate dune transgression, or the owner of the Dunal Area fails to carry out dune management works in accordance with the Planning Agreement and the recommendations of the Implementation Plan; and
  - b. the Safety Threshold is met, as certified in writing by an appropriately qualified person which the owner of the Dunal Area is required to engage in the event a circumstance in clause 1(a) applies.
2. The owner of the Dunal Area must, as soon as practicable, notify the Owner in writing that the circumstances specified in clause 1 have occurred and must provide the Owner with a copy of the report referred to in clause 1(b).
3. Within two (2) years after the date the Owner is notified under clause 2, the Owner must not commence and if already commenced, must cease, or any other permanent occupation of a building erected on the Lot Burdened, unless:
  - a. such use is by means of a caravan or moveable dwelling and any approval required for occupation of the land by that means is obtained; or
  - b. the owner of the Dunal Area has taken appropriate action to mitigate the dune transgression so that the Lot Burdened no longer meets the Safety Threshold, as certified in writing by an appropriately qualified person.
4. For the purpose of s88(1)(d) of the Act the consent of Council is required to release, vary or modify this covenant.

## Annexure A: Dunal Area



## Novation Deed

Port Stephens Council  
Council

[Developer]  
Transferor

[Insert Transferee's name]  
Transferee

**Novation Deed** made at \_\_\_\_\_ on \_\_\_\_\_

## Parties

Port Stephens Council ABN 16 744 377 876 of 116 Adelaide Street, Raymond Terrace NSW 2324  
(Council)

[Name and ABN/ACN] of [Address]  
(Transferor)

[Name and ABN/ACN] of [Address]  
(Transferee)

## Recitals

- A. The Council and the Transferor are parties to the Original Agreement.
- B. The Transferor is defined as the Developer under the terms of the Original Agreement.
- C. The Original Agreement relates to the whole of the Land.
- D. The Transferor proposes to transfer the *[whole or part]* of the Land and wishes to assign its rights and obligations under the Original Agreement to the Transferee in so far as it relates to the Required Obligations.
- E. The parties to this Deed have agreed to the novation of the Required Obligations under the Original Agreement to the Transferee.

## This deed provides

### 1 Definitions and interpretation

#### 1.1 Definitions

**Effective Date** means *[insert date of transfer]*.

**Land** has the meaning given to that term in the Original Agreement.

**Original Agreement** means the planning agreement dated *[insert]* and made between the Council and the Transferor.

**Required Obligations** means those obligations imposed on the Developer under the terms of the Original Agreement that have not yet been discharged as at the Effective Date relating to the proposed transfer of the Transfer Land, being *[insert details of specific obligations to be assigned]*.

**Transfer Land** means *[Insert details of land to be transferred to Transferee]*

#### 1.2 References to certain general terms

In this deed unless the contrary intention appears:

- (a) a reference to this deed or another instrument includes any variation or replacement of them;

- (b) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (c) the singular includes the plural and vice versa;
- (d) the word person includes a firm, body corporate, an unincorporated association or an authority;
- (e) a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including, without limitation, persons taking by novation) and assigns;
- (f) an agreement, representation or warranty on the part of or in favour of two or more persons binds or is for the benefit of them jointly and severally;
- (g) a reference to anything (including, without limitation, any amount) is a reference to the whole or any part of it and a reference to a group of persons is a reference to anyone or more of them;
- (h) "include" in any form when introducing a list of items does not limit the meaning of the words to which the list relates to those items or to items of a similar nature; and
- (i) capitalised terms which are used in this deed but are not otherwise defined have the meaning given to them in the Original Agreement.

### **1.3 Headings**

Headings are inserted for convenience and do not affect the interpretation of this deed.

## **2 Novation**

### **2.1 Original Agreement**

Subject to clause 2.4 and with effect from the Effective Date:

- (a) the Transferee is substituted for the Transferor as a party to the Original Agreement insofar as the Original Agreement relates to the Required Obligations, and agrees to perform the Required Obligations;
- (b) the Transferee will be bound by the Original Agreement, and will be entitled to the benefit of the Original Agreement, as if the Transferee was a party to the Original Agreement instead of the Transferor insofar as the Original Agreement relates to the Required Obligations; and
- (c) the Transferor is released and discharged from all obligations and liabilities, and from all Claims (whether for costs, legal Costs, damages, fees or otherwise), arising under the Original Agreement insofar as the Original Agreement relates to the Required Obligations.

### **2.2 Performance by Transferee**

- (a) The Transferee warrants to the Council that, as at the Effective Date, the Transferee is financially capable of performing the Required Obligations in accordance with the Original Agreement.
- (b) On and from the Effective Date, the Transferee must perform all of the Required Obligations under the Original Agreement as if named as the Transferor, whether or not the relevant obligations relate to works performed prior to the date of this Deed,

including, but not limited to the delivery of all relevant public benefits to Council (including the carrying out of works as required under the Original Agreement).

- (c) The Transferee indemnifies the Transferor from and against all Claims that may be sustained, suffered, recovered or made against the Transferor arising in connection with the performance or failure to perform the Required Obligations under the Original Agreement except if, and to the extent that, the Claim arises because of the negligence or substantive breach of the Transferor, its employees, agents and contractors

### **2.3 Liability before Effective Date**

The Transferor may not be released, relieved or discharged from liability under the Original Agreement before the Effective Date, or any breach of any provision of the Original Agreement by the Transferor occurring before the Effective Date (to the extent that it is not remedied by the Effective Date).

### **2.4 Transfer**

- (a) Council consents to the transfer of the Transfer Land from the Transferor to the Transferee.
- (b) Council consents to the transfer from the Transferor to the Transferee of the Required Obligations and corresponding rights under the Original Agreement so far as it relates to the Transfer Land.

## **3 Affirmation of the Original Agreement**

- (a) The Original Agreement will be read and construed subject to this deed, and in all other respects the provisions of the Original Agreement are ratified and confirmed, and, subject to the variation and novation contained in this deed, the Original Agreement will continue in full force and effect.
- (b) For the avoidance of doubt, the Transferee will be taken to be a party to the Original Agreement and the address for service of notices under the Original Agreement is the address set out in the Parties clause of this deed.

## **4 GST**

### **4.1 Payments exclusive of GST**

All payments or other consideration paid or payable under this deed are exclusive of GST unless otherwise noted.

### **4.2 Payment of GST**

In addition to payment for a supply in connection with this deed on which GST is paid or payable, the recipient of the supply must pay, at the same time and in the same manner as payment for the supply, the amount of the GST which is paid or payable in respect of that supply.

### **4.3 Tax invoice**

The supplier will provide a tax invoice as prescribed in the GST legislation.

## **5 Stamp duty and costs**

- (a) The Transferor and the Transferee are jointly and severally liable for the Council's reasonable legal costs, of and incidental to the negotiation, preparation and execution of this deed, and must reimburse the Council for such legal costs promptly on demand.
- (b) The Transferee will pay all stamp duty arising directly or indirectly from this deed.

**6 Further acts**

- (a) Each party will take all steps, execute all deeds and do everything reasonably required by any other party to give effect to any of the actions contemplated by this deed.
- (b) This deed binds each party which signs it even if other parties do not, or if the execution by other parties is defective, void or voidable.

**7 Governing law**

This deed is governed by the law in force in the place specified in the State of New South Wales and the parties submit to the non-exclusive jurisdiction of the courts of that place.

**8 Counterparts**

This deed may consist of a number of counterparts and the counterparts taken together constitute one and the same instrument.

*[insert Appropriate execution clauses for the parties to the Novation Deed]*