

DATE:

Parties

Barton Realty Pty Limited (ABN 30 681 614 933)

(Developer)

Lithgow City Council (ABN 59 986 092 492)

pursuant to its legal capacity and powers of a consent authority under the
Environmental Planning and Assessment Act 1979 (Council)

VOLUNTARY PLANNING AGREEMENT

Land – Lot 1 DP1253903, 19 Barton Avenue, Wallerawang NSW
2845

DA226/22 – Application to subdivide 1 Lot into 54 Residential
Allotments, 4 New Roads, 2 Lots for Drainage and Public
Reserve

TABLE OF CONTENTS

Background	4
Operative provisions	5
Part 1 – Preliminary	5
1 Definitions and Interpretation	5
2 Planning agreement under the Act	7
3 Application of this Deed	7
4 Date upon which this Deed takes effect	8
5 Warranties	8
6 Further agreements	8
7 Surrender of right of appeal, etc.	8
Part 2 – Development Contributions - General.....	8
8 Development Contributions to be made under this Deed.....	8
9 Application of Development Contributions.....	8
10 Increase in Yield of Development and Additional Contributions.....	8
11 Application of s7.11, s7.12 and s7.24 of the Act to the Development	9
12 Indexation of Contributions	9
Part 3 – Monetary Development Contributions.....	10
13 How money is paid.....	10
Part 6 – Review, Monitoring, Registration, Assignment and Dispute Resolution	10
14 Review of Deed	10
15 Monitoring and Reporting	11
16 Registration of planning agreement.....	11
17 Notation on Planning Certificate	12
18 Dispute resolution – expert determination	12
19 Dispute Resolution - mediation.....	12
Part 7 – Enforcement and Consequences of Non-Compliance	13
20 Default in Performance and Step-in Rights.....	13
21 Enforcement in a court of competent jurisdiction.....	14
22 Conditions of Consent	14
Part 8 – Restriction on Dealings	14
23 Restriction on dealings.....	14
Part 9 – Indemnities & Insurance.....	15
24 Risk.....	15
25 Release.....	15
26 Indemnity	15
27 Insurance	15
Part 10 – Other Provisions	16

28	Confidentiality	16
29	Notices.....	16
30	Approvals and Consent	17
31	Costs.....	17
32	Entire Deed	17
33	Further Acts.....	17
34	Governing Law and Jurisdiction	17
35	Joint and Individual Liability and Benefits	18
36	No Fetter	18
37	Illegality.....	18
38	Severability.....	18
39	Amendment.....	18
40	Waiver	19
41	GST.....	19
42	Explanatory Note.....	20
43	Electronic Execution	20
	Schedule 1: Contributions Table	22
	APPENDIX: EXPLANATORY NOTE	24

Operative provisions

Part 1 – Preliminary

1 Definitions and Interpretation

1.1 In this Deed the following definitions apply:

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

Affordable Housing has the same meaning as in the Act.

Approval includes approval, consent, licence, permission or the like.

Authority means any:

- (a) federal, state or local government;
- (b) a Minister of the Crown;
- (c) department of any federal, state or local government;
- (d) any court or administrative tribunal; or
- (e) public authority established under any legislation;
- (f) statutory corporation or regulatory body.

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

Confidential information means any information and all other knowledge at any time disclosed (whether in writing and orally) by the Parties to each other, or acquired by the Parties in relation to the other's activities or services which is not already in the public domain and which:

- (a) is by its nature confidential;
- (b) is designated, or marked, or stipulated by either party as confidential (whether in writing or otherwise);
- (c) any party knows or ought to know is confidential; or
- (d) is information which may be reasonably considered to be of a confidential nature.

Contributions Table means the table in Schedule 1.

Cost means a cost, charge, expense, outgoing, payment, fee and other expenditure of any nature.

Dealing, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.

Deed means this agreement and includes any schedules, annexures and appendices to this Deed.

Development means the subdivision of Subdivision 1 Lot into 54 Residential Allotments, 4 New Roads, 2 Lots for Drainage and Public Reserve (DA226/22).

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost, the carrying out of works, or the provision of any other material public benefit which is required to be made under this Deed.

Dispute means a dispute or difference between the Parties under or in relation to this Deed.

Equipment means any equipment, apparatus, vehicle or other equipment or thing to be used by or on behalf of the Developer in connection with the performance of its obligations under this Deed.

Event of Default means a breach of this Deed.

Land means Lot 1 DP1253903, 19 Barton Avenue, Wallerawang NSW 2845, including any lots created as a result of the subdivision or consolidation of that land.

Occupation Certificate has the same meaning as in the Act.

Part 6 Certificate means a certificate under Part 6 of the Act.

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

Planning Application means a Development Application, an application to modify a Development Consent, an application for a complying development certificate (within the meaning of the Act) or an application for a Part 6 Certificate.

Rectify means rectify, remedy or correct.

Regulation means the *Environmental Planning and Assessment Regulation 2021*.

Subdivision Certificate has the same meaning as in the Act.

Value means the \$ amount agreed between the Parties as the value of a Development Contribution made under this Deed, as shown in the Contributions Table or as otherwise agreed between the Parties.

Work means the physical result of any building, engineering or construction work in, on, over or under land required to be carried out under this Deed.

1.2 **Interpretation** - In the interpretation of this Deed, the following provisions apply unless the context otherwise requires:

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

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

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

- 1.2.4 A reference in this Deed to **dollars or \$** means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
- 1.2.5 A reference in this Deed to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
- 1.2.6 A reference in this Deed to any **law, legislation or legislative provision** includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- 1.2.7 A reference in this Deed to any **agreement, deed or document** is to that agreement, deed or document as amended, novated, supplemented or replaced.
- 1.2.8 A reference to a **clause, part, schedule or attachment** is a reference to a clause, part, schedule or attachment of or to this Deed.
- 1.2.9 An expression importing a **natural person** includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- 1.2.10 Where a **word or phrase is given a defined meaning**, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- 1.2.11 A word which denotes **the singular denotes the plural**, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- 1.2.12 References to the word **'include'** or **'including'** are to be construed without limitation.
- 1.2.13 A reference to **this Deed** includes the agreement recorded in this Deed.
- 1.2.14 A reference to **a Party to this Deed** includes a reference to the employees, agents and contractors of the Party, the Party's successors and assigns.
- 1.2.15 A reference to **'dedicate'** or **'dedication'** in relation to land is a reference to dedicate or dedication free of cost.
- 1.2.16 Any schedules, appendices and attachments form part of this Deed.
- 1.2.17 Notes appearing in this Deed are operative provisions of this Deed.

2 Planning agreement under the Act

This Deed is a planning agreement governed by Subdivision 2 of Part 7 of the Act.

3 Application of this Deed

This Deed applies to the Land and the Development.

4 Date upon which this Deed takes effect

This Deed takes effect when signed by both parties.

5 Warranties

5.1 The Parties warrant to each other that they:

5.1.1 have full capacity to enter into this Deed, and

5.1.2 are able to fully comply with their obligations under this Deed.

6 Further agreements

The Parties may, at any time and from time to time, enter into agreements relating to the subject-matter of this Deed that are not inconsistent with this Deed for the purpose of implementing this Deed.

7 Surrender of right of appeal, etc.

The Developer is not to commence or maintain, or to cause or procure the commencement or maintenance, of any proceedings in any court or tribunal or similar body appealing against, or questioning the validity of this Deed, or an Approval relating to the Development in so far as the subject-matter of the proceedings relates to this Deed.

Part 2 – Development Contributions - General

8 Development Contributions to be made under this Deed

8.1 The Developer is required to make the Development Contributions described in the Contributions Table in Schedule 1 in accordance with the Contributions Table and the provisions of this Deed.

8.2 In summary the Development Contributions consist of \$6,800.00 per residential lot, totalling \$367,200.00.

9 Application of Development Contributions

9.1 The Council will apply the Development Contribution towards:

9.1.1 The provision of open space and recreational needs.

9.2 Council will under no circumstances refund any monetary Development Contributions made under this Deed, including where the amount of the monetary Development Contribution exceeds the amount necessary to meet the public purpose for which the monetary Development Contribution was made.

10 Increase in Yield of Development and Additional Contributions

10.1 The Developer acknowledges that the Development Contributions are made in respect of 54 residential lots (**Yield**).

- 10.2 If the Development Consent which is granted to the Development, or if the Development Consent for the Development as modified approves additional Yield, then subject to clause 10.5, the Developer is to pay additional monetary Development Contributions calculated on the following basis:

$$\mathbf{AMDC = \frac{(VDC \times MY)}{YA} - VDC}$$

Where:

AMDC is the additional monetary Development Contribution payable;

VDC is the Value of all Development Contributions at the date of this Deed;

YA is the Yield anticipated at the date of this Deed;

MY is the Yield approved by the Development Consent for the Development (including as modified).

- 10.3 The additional monetary Development Contribution is to be paid at the time any other monetary Development Contribution is to be paid under this Deed, unless that time has passed in which case the additional monetary Development Contribution is to be paid within 7 days of the grant of Development Consent to the additional Yield, or approval of a modification application for the additional Yield.
- 10.4 Any additional monetary Development Contribution will be applied by Council for public purposes which Council considers best serve the public interest.
- 10.5 Council may, in its absolute discretion consider an amendment to this Deed to require the carrying out of works, or dedication of land, or other public benefits, instead of requiring the payment of the additional monetary Development Contribution pursuant to clause 10.2, but only where satisfied that it is in the public interest to do so, and the value of the alternative contributions is not less than the value of the additional monetary Development Contributions.

11 Application of s7.11, s7.12 and s7.24 of the Act to the Development

- 11.1 This Deed excludes the application of s7.11 to the Development.
- 11.2 This Deed excludes the application of s7.12 to the Development.
- 11.3 This Deed excludes the application of s7.24 to the Development.

12 Indexation of Contributions

- 12.1 All monetary Development Contributions and the Value of all other Development Contributions are to be indexed from the date of this Deed to the date of payment in accordance with the following formula:

$$\mathbf{RC = AC \times Index A/Index B}$$

Where:

RC is the indexed Development Contribution or Value of the Development Contribution;

AC is the Development Contribution or Value of the Development Contribution at the date of this Deed;

Index A is the most recent Index number before the payment of the monetary Development Contribution or the date when the indexed Value of a Development Contribution needs to be determined;

Index B is the most recent Index number before the date of this Deed.

12.2 In this clause **Index** means:

12.2.1 the *Consumer Price Index – Sydney All Groups* published by the Australian Bureau of Statistics; or

12.2.2 where the Development Contribution is for or to be applied towards Affordable Housing, the acquisition of land or the acquisition of a building on land (not including infrastructure), the *House Price Index – Established House Prices (Sydney)* published by the Australian Bureau of Statistics.

Part 3 – Monetary Development Contributions

13 How money is paid

13.1 A monetary Development Contribution is made for the purposes of this Deed when the Council receives the full amount of the contribution payable under this Deed in cash or by unendorsed bank cheque or by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by the Council. Council will not accept any other forms of payment.

13.2 Despite clause 13.1, if Council agrees, in its absolute discretion, to accept payment of a monetary Development Contribution by EFTPOS using a credit card, the Developer will be required to pay a surcharge in accordance with Council's adopted schedule of fees and charges.

Part 6 – Review, Monitoring, Registration, Assignment and Dispute Resolution

14 Review of Deed

14.1 If either Party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Deed the Party may request a review of the whole or any part of this Deed.

14.2 For the purposes of clause 14.1, the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables the Council or any other Authority to restrict or prohibit any aspect of the Development.

- 14.3 If a review is requested in accordance with clause 14.1, the Parties are to use all reasonable endeavours, in good faith, to agree on and implement appropriate amendments to this Deed.
- 14.4 If this Deed becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.
- 14.5 A failure by a Party to agree to take action requested by the other Party as a consequence of a review referred to in clause 14.1 (but not 14.4) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.
- 14.6 If the Parties agree to amend this Deed under this clause 14, any such amendment must be in writing and signed by the Parties and exhibited in accordance with the Act and Regulation.

15 Monitoring and Reporting

- 15.1 The Developer acknowledges that the Council will continuously monitor compliance with the Developer's obligations under this Deed.
- 15.2 The Developer must provide an annual report to Council on or before 31 July each year in respect of its compliance with the provisions of this Deed in the previous financial year, and the progress of the Development in the previous financial year, including all Planning Applications made.
- 15.3 The annual report is to be in such a form and to address such matters as required by the Council from time to time and notified to the Developer and be prepared in a clear manner.
- 15.4 When lodging any Planning Application, the Developer must provide to Council or a certifier to whom the Planning Application is made, a report identifying what Development Contributions are required to be made in connection with the part of the Development the subject of the Planning Application, and the trigger for the making of those Development Contributions.

16 Registration of planning agreement

- 16.1 The parties agree that this Deed will be registered on the title of the Land pursuant to section 7.6 of the Act.
- 16.2 The Developer authorises Council to lodge a Request form 11R together with a copy of this Deed for registration on the title of the Land in the Register maintained by the Registrar General under the *Real Property Act 1900*.
- 16.3 The Developer will do all things necessary, including signing a Request form 11R and procuring the consent of any other person with an estate or interest in the Land, to facilitate the registration of this Deed on the title of the Land.
- 16.4 Council will arrange for the registration to be removed from title upon satisfaction of clause 8.1.

17 Notation on Planning Certificate

- 17.1 Council may, pursuant to s10.7(5) of the Act make a notation on a planning certificate within the meaning of the Act in respect of the Land, to be carried over to the subdivided lots, stating that the Land is subject to this Deed.
- 17.2 Council will remove a notation referred to in clause 17.1 from planning certificates in respect of the Land (or the subdivided lots) upon satisfaction of clause 8.1.

18 Dispute resolution – expert determination

- 18.1 This clause applies to a Dispute between any of the Parties to this Deed concerning a matter arising in connection with this Deed that can be determined by an appropriately qualified expert if:
 - 18.1.1 the Parties to the Dispute agree that it can be so determined, or
 - 18.1.2 the Chief Executive Officer of the professional body that represents persons who appear to have the relevant expertise to determine the Dispute gives a written opinion that the Dispute can be determined by a member of that body.
- 18.2 A Dispute to which this clause applies is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 18.3 If a notice is given under clause 18.2, the Parties are to meet within 10 business days of the notice in an attempt to resolve the Dispute.
- 18.4 If the Dispute is not resolved within a further 20 business days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 18.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 18.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 18.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

19 Dispute Resolution - mediation

- 19.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute to which clause 18 applies.
- 19.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 19.3 If a notice is given under clause 19.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 19.4 If the Dispute is not resolved within a further 20 business days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.

- 19.5 If the Dispute is not resolved by mediation within a further 20 business days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the Dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.
- 19.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 19.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

Part 7 – Enforcement and Consequences of Non-Compliance

20 Default in Performance and Step-in Rights

- 20.1 If the Council reasonably considers that the Developer has committed an Event of Default the Council may give a written notice to the Developer:
- 20.1.1 specifying the nature and extent of the breach,
- 20.1.2 requiring the Developer to:
- (a) rectify the breach if it reasonably considers it is capable of rectification, or
 - (b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification,
- 20.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 20.2 If the Developer fails to comply with a notice given under clause 20.1 relating to the carrying out of obligations under this Deed, the Council may step-in and remedy the breach and may enter, occupy and use any land owned or controlled by the Developer and any Equipment on such land for that purpose.
- 20.3 Any costs incurred by the Council in remedying a breach in accordance with clause 20.2 may be recovered by the Council as a debt due in a court of competent jurisdiction.
- 20.4 For the purpose of clause 20.3, the Council's costs of remedying a breach the subject of a notice given under clause 20.1 include, but are not limited to:
- 20.4.1 the costs of the Council's employees, agents and contractors reasonably incurred for that purpose,
- 20.4.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
- 20.4.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- 20.5 Nothing in this clause 20 prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Deed by the

Developer, including but not limited to seeking relief in an appropriate court.

21 Enforcement in a court of competent jurisdiction

- 21.1 Without limiting any other provision of this Deed, the Parties may enforce this Deed in any court of competent jurisdiction.
- 21.2 For the avoidance of doubt, nothing in this Deed prevents:
 - 21.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Deed or any matter to which this Deed relates, or
 - 21.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Deed or any matter to which this Deed relates.

22 Conditions of Consent

- 22.1 The Developer acknowledges that it will be a condition on any Development Consent granted to the Development requiring this Deed to be complied with.

Part 8 – Restriction on Dealings

23 Restriction on dealings

- 23.1 The Developer is not to:
 - 23.1.1 sell or transfer the Land, other than a lot to be sold to end-purchasers or otherwise created for separate occupation and disposition and which is not intended to be further subdivided, or
 - 23.1.2 assign the Developer's rights or obligations under this Deed, or novate this Deed,
to any person unless:
 - 23.1.3 the Developer has, at no cost to the Council, first procured the incoming purchaser or assignee to enter into a novation deed on terms reasonably satisfactory to the Council under which the incoming purchaser or assignee agrees to perform the Developer's obligations under this Deed, and
 - 23.1.4 the Council has given written notice to the Developer stating that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this Deed, and
 - 23.1.5 the Developer is not in breach of this Deed, and
 - 23.1.6 the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.
- 23.2 The Developer acknowledges and agrees that it remains liable to fully perform its obligations under this Deed unless and until it has complied with its obligations under clause 23.1.

Part 9 – Indemnities & Insurance

24 Risk

24.1 The Developer performs this Deed at its own risk and its own cost.

25 Release

25.1 The Developer releases the Council from any Claim it may have against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

26 Indemnity

26.1 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 Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

27 Insurance

27.1 The Developer is to take out and keep current to the satisfaction of the Council the following insurances in relation to Work required to be carried out by the Developer under this Deed up until the Work is taken to have been completed in accordance with this Deed:

27.1.1 contract works insurance, noting the Council as an interested party, for the full replacement value of the Works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover the Developer's liability in respect of damage to or destruction of the Works,

27.1.2 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,

27.1.3 workers compensation insurance as required by law, and

27.1.4 any other insurance required by law.

27.2 If the Developer fails to comply with clause 27.1, 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.

27.3 The Developer is not to commence to carry out any Work unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 27.1.

Part 10 – Other Provisions

28 Confidentiality

- 28.1 This agreement is a public document and its terms are not confidential.
- 28.2 The parties acknowledge that:
- 28.2.1 Confidential Information may have been supplied to some or all of the Parties in negotiations leading up to the making of this agreement; and
 - 28.2.2 the Parties may disclose to each other further Confidential Information in connection with the subject matter of this agreement.
- 28.3 Subject to clauses 28.4 and 28.5, each Party agrees:
- 28.3.1 not to disclose any Confidential Information received before or after the making of this agreement to any person without the prior written consent of the Party who supplied the Confidential Information; or
 - 28.3.2 to take all reasonable steps to ensure all Confidential Information received before or after the making of this agreement is kept confidential and protected against unauthorised use and access.
- 28.4 A Party may disclose Confidential Information in the following circumstances:
- 28.4.1 in order to comply with the law, or the requirements of any Authority; or
 - 28.4.2 to any of their employees, consultants, advisers, financiers or contractors to whom it is considered necessary to disclose the information, if the employees, consultants, advisers, financiers or contractors undertake to keep the Confidential Information confidential.
- 28.5 The obligations of confidentiality under this clause do not extend to information which is public knowledge other than as a result of a breach of this clause.

29 Notices

- 29.1 Any notice, consent, information, application or request that is to or may be given or made to a Party under this Deed is only given or made if it is in writing and sent in one of the following ways:
- 29.1.1 delivered or posted to that Party at its address, or
 - 29.1.2 emailed to that Party at its email address.
- 29.2 For the purposes of this clause a Party's address and email address are as noted under '**Parties to this Deed**'.
- 29.3 If a Party gives the other Party 3 business days' notice of a change of its address or email, 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 address.

- 29.4 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 29.4.1 delivered, when it is left at the relevant address,
 - 29.4.2 sent by post, 2 business days after it is posted, or
 - 29.4.3 sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.
- 29.5 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.

30 Approvals and Consent

- 30.1 Except as otherwise set out in this Deed, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Deed in that Party's absolute discretion and subject to any conditions determined by the Party.
- 30.2 A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

31 Costs

- 31.1 The Developer is to pay to the Council the Council's costs of preparing, negotiating, executing and stamping and registering this Deed, and any document related to this Deed within 5 business days of a written demand by the Council for such payment.
- 31.2 The Developer is also to pay to the Council the Council's reasonable costs of enforcing this Deed within 5 business days of a written demand by the Council for such payment.

32 Entire Deed

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

33 Further Acts

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

34 Governing Law and Jurisdiction

- 34.1 This Deed is governed by the law of New South Wales.

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

35 Joint and Individual Liability and Benefits

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

36 No Fetter

- 36.1 The parties acknowledge that Council is a consent authority with statutory rights and obligations pursuant to the Act.
- 36.2 This deed is not intended to operate, and shall not be construed as operating to fetter, in any unlawful manner:
- 36.2.1 the power of Council to make any law; or
- 36.2.2 the exercise by Council of any statutory power, discretion or duty.
- 36.3 Nothing in this Deed shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law.

37 Illegality

- 37.1 If this Deed or any part of it becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties are to co-operate and do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.

38 Severability

- 38.1 If a clause or part of a clause of this Deed 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.
- 38.2 If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Deed, but the rest of this Deed is not affected.

39 Amendment

- 39.1 No amendment of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed in accordance with section 203 of the Regulation.

40 Waiver

- 40.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- 40.2 A waiver by a Party is only effective if it:
- 40.2.1 is in writing,
 - 40.2.2 is addressed to the Party whose obligation or breach of obligation is the subject of the waiver,
 - 40.2.3 specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,
 - 40.2.4 is signed and dated by the Party giving the waiver.
- 40.3 Without limitation, a waiver may be expressed to be conditional on the happening of an event, including the doing of a thing by the Party to whom the waiver is given.
- 40.4 A waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given, and is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.
- 40.5 For the purposes of this Deed, an obligation or breach of obligation the subject of a waiver is taken not to have been imposed on, or required to be complied with by, the Party to whom the waiver is given.

41 GST

- 41.1 In this clause:

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

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

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

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

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

- 41.2 Subject to clause 41.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.

- 41.3 Clause 41.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.
- 41.4 No additional amount shall be payable by the Council under clause 41.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.
- 41.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:
- 41.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;
- 41.5.2 that any amounts payable by the Parties in accordance with clause 41.2 (as limited by clause 41.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 41.6 No payment of any amount pursuant to this clause 41, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 41.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- 41.8 This clause continues to apply after expiration or termination of this Deed.

42 Explanatory Note

- 42.1 The Appendix contains the Explanatory Note relating to this Deed required by s205 of the Regulation.
- 42.2 Pursuant to s205(5) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Deed.

43 Electronic Execution

- 43.1 Each Party:
- 43.1.1 consents to this Deed being signed by electronic signature by the methods set out in clause 43.3;
- 43.1.2 agrees that those methods validly identify the person signing and indicates that person's intention to sign this Deed;
- 43.1.3 agrees that those methods are reliable as appropriate for the purpose of signing this Deed, and

- 43.1.4 agrees that electronic signing of this Deed by or on behalf of a Party by those methods indicates that Party's intention to be bound.
- 43.2 If this Deed is signed on behalf of a legal entity, the persons signing warrant that they have the authority to sign.
- 43.3 For the purposes of clause 43.1, the methods are:
 - 43.3.1 insertion of an image (including a scanned image) of the person's own unique signature onto the Deed; or
 - 43.3.2 insertion of the person's name onto the Deed; or
 - 43.3.3 use of a stylus or touch finger or a touch screen to sign the Deed, provided that in each of the above cases, words to the effect of 'Electronic signature of me, [insert full name], affixed by me, or at my direction, on [insert date]' are also included on the Deed; or
 - 43.3.4 use of a reliable electronic signing platform (such as DocuSign or AdobeSign) to sign the Deed; or
 - 43.3.5 as otherwise agreed in writing between the Parties.

Schedule 1: Contributions Table

Development Contribution	Public Purpose	Manner and Extent	Timing/ Trigger	Value	Party Responsible	Property Affected, if relevant
DA226/22-Subdivision 1 Lot into 54 Residential Allotments, 4 New Roads, 2 Lots for Drainage and Public Reserve	Open Space and Recreational Needs	To be paid prior to the issue of the Subdivision Certificate.	Monetary Contributions to be paid to Council prior to issue of a subdivision certificate by the consent authority.	\$6,800.00 per residential allotment, totalling \$367,200.00	Barton Realty Pty Ltd (Developer) and Lithgow City Council (Council)	Lot 1 DP1253903, 19 Barton Avenue, Wallerawang NSW 2845

Executed as a Deed

Developer – Barton Realty Pty Ltd

Signed, sealed and delivered

By **Barton Realty Pty Ltd (ABN 30 681 614 933)**

in the

presence of:

.....
Director

.....
Director

Council - Lithgow City Council (in its legal capacity and powers of a consent authority under the *Environmental Planning and Assessment Act 1979*)

Signed, sealed and delivered

by **Lithgow City Council (ABN 59 986 092 492)**

in the presence of:

.....

General Manager

.....
Witness – signature

.....
Witness – name

APPENDIX: EXPLANATORY NOTE

For the purposes of *Environmental Planning and Assessment Regulation 2021* (section 205) in respect of a draft Planning Agreement under s7.4 of the *Environmental Planning and Assessment Act 1979*.

1. Introduction

The purpose of this explanatory note is to provide a plain English summary to support the notification of the draft planning agreement (the planning agreement).

This explanatory note explains what the planning agreement is proposing, how it delivers public benefit and whether it is an acceptable means of achieving the proposed planning outcomes.

2. The parties to this planning agreement are:

Lithgow City Council (consent authority) and Barton Realty Pty Ltd (developer).

3. The land subject to the planning agreement is:

19 Barton Avenue, Wallerawang NSW 2845 being Lot 1 in DP1253903

A map identifying the subject land is attached to this explanatory note.

Will the planning agreement be registered on the subject land title? No.

4. Description of the proposed development application

The developer is seeking approval for subdivision of Subdivision 1 Lot into 54 Residential Allotments, 4 New Roads, 2 Lots for Drainage and Public Reserve in accordance with Development Application DA226/22 and has made an offer to enter into the planning agreement in connection with the proposed development.

5. Description of the planning agreement

The objective of the planning agreement is to ensure the wider community shares in the benefits of the Development. The effect of the planning agreement will be to allow for the provision of open space and recreational facilities for public use within Wallerawang or surrounding areas.

Will the contributions be in the form of land, works or a monetary contribution?

The contributions required by the planning agreement will be provided in the form of a monetary contribution to be paid into a restricted reserve fund of Council. The contribution totals approximately **\$367,200.00** which must be used for the following purposes:

- (a) The provision of open space and recreational needs.

When will the contributions be provided?

The contributions required by the planning agreement will be paid prior to issue of a subdivision certificate by Council.

6. Assessment of the merits of the planning agreement

How is the planning agreement in the public interest?

The planning agreement provides an overall benefit to the wider community rather than purely addressing the direct impacts of the development.

What is the impact, positive or negative, of the planning agreement on the public or any section of the public?

The planning agreement will enhance the positive social impact of the Development on the locality.

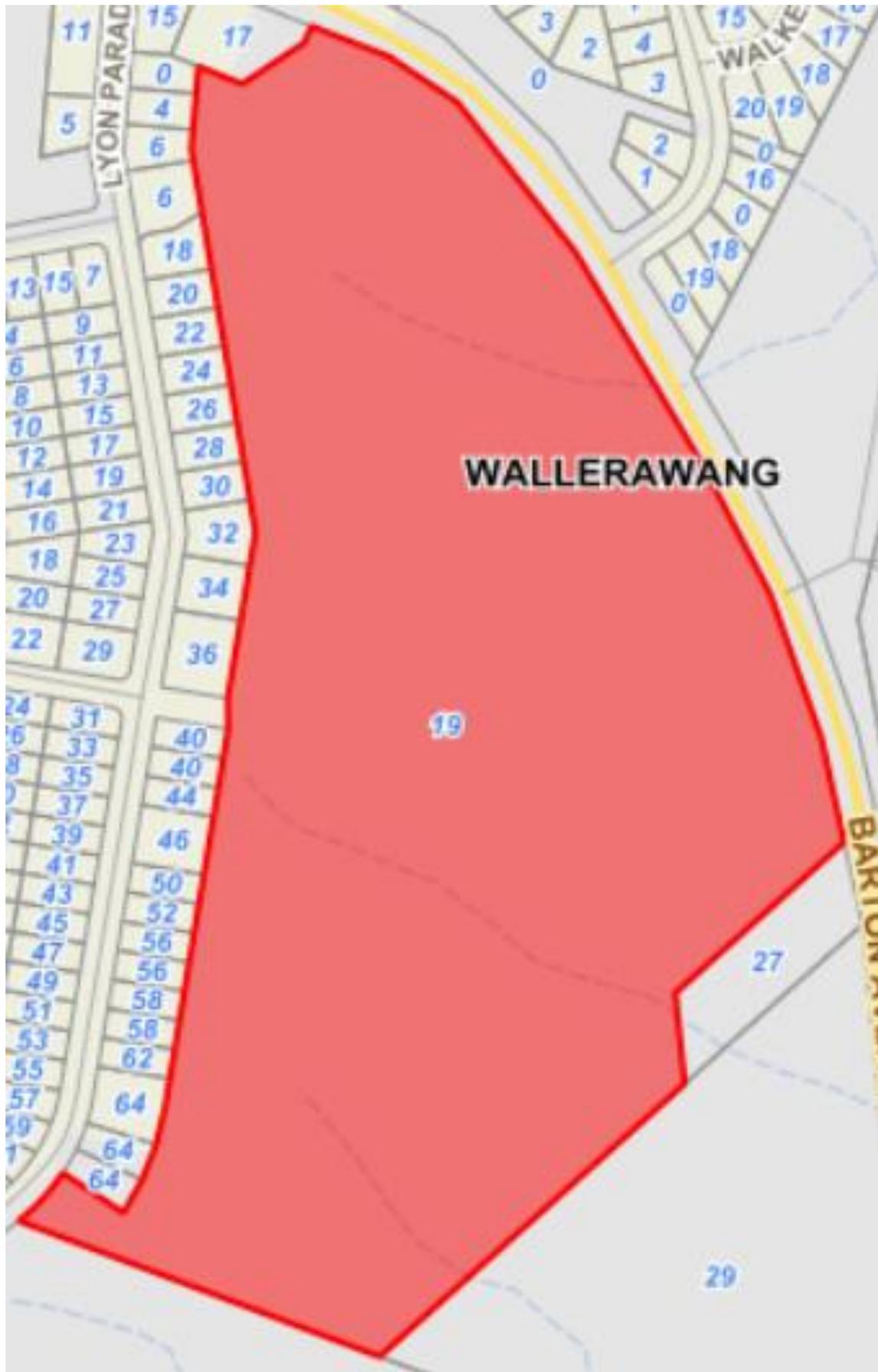
Also, the planning agreement supports Council's vision for the Lithgow area to be recognised as a desirable place to live and visit and a viable place in which to invest. The provision of open spaces and recreational facilities will assist in promoting this vision.

How does the planning agreement conform with the planning authority's strategic plans?

The planning agreement aligns with Council's Community Strategic Plan 2035 which aims to manage and provide public places that promote physical activity and recreational facilities that are accessible to achieve safe and healthy lifestyles.

Does the planning agreement specify that certain requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued?

Yes, the planning agreement requires the payment of the monetary contribution into a restricted reserve prior to the issue of a subdivision certificate.



DRAFT