

## **Explanatory Note- DA 182/19**

### **Objectives of the Planning Agreement**

To provide a material benefit to be used for or applied towards a public purpose.

### **Nature of the Planning Agreement**

- The developer shall pay an amount of \$3,300 per allotment to go towards community facilities and public open space.
- The payment is to be paid in 2 stages; that being:
  - Stage 1: \$16,500.00,
  - Stage 2: \$46,200.00

### **Effect of the Planning Agreement**

The effect of the Planning Agreement will be to allow for the provision of facilities for public use within the Lithgow Local Government Area.

### **Merits of the Planning Agreement**

- The proposed development is for a subdivision of land from 1 allotment into 19 rural residential allotments. This will result in an increase in demand for public facilities.
- In the assessment of the merits of the development, Council must consider the social impacts of the proposal on the immediate locality and on the wider community, and ensure through whichever means are available for community facilities and infrastructure to be provided which will address this matter.
- The provision of community facilities and infrastructure is the main outcome derived from the development and operation of this Planning Agreement.

### **Promotion of Council's Charter**

Council has a 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 community facilities and infrastructure will assist in promoting this vision.

### **Planning Purpose**

The Planning purpose of the Planning Agreement is:

- In compliance with the Environmental and Planning Assessment Act and Regulations.
- In compliance with the public interest of the development, being to provide facilities which may be of benefit towards a public purpose.
- To enhance the positive social impact of the development on the locality.

**Capital Works Program**

Once funds from the Planning Agreement have been collected Council begins planning for their expenditure through incorporation into the capital works program.

As agreed this day:.....

Kevin Thompson (Director/Developer):.....

Lithgow City Council:.....

Between LITHGOW CITY COUNCIL AND KEVIN THOMPSON

## PLANNING AGREEMENT

### Parties

Lithgow City Council of 180 Mort Street Lithgow, New South Wales, 2790 (**Council**)

and

Kevin Thompson (Director); Above and Below Holdings; Po Box 217 Portland NSW 2847  
(**Developer**).

### Background

(For Development Applications)

- A. On, 8 October 2019, the Developer made a Development Application to the Council for Development Consent for a subdivision of 1 lot into 19 lots.
- B. That Development Application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards Public Facilities and Infrastructure if that Development consent was granted.

### Operative provisions

#### 1 Planning agreement under the Act

The Parties agree that this Agreement is a planning agreement governed by Part 7 of Division 7.1 of Subdivision 2 Section 7.4.

#### 2 Application of this Agreement

This application applies to Lot 20 DP 1176825, 1043 Pipers Flat Road, Pipers Flat NSW 2790, for a subdivision of 1 lot into 19 lots.

#### 3 Operation of this Agreement

This Agreement takes effect on the date of execution. All contributions must be paid prior to the release of the subdivision certificate for each stage of the development.

#### 4 Definitions and interpretation

4.1 In this Agreement the following definitions apply:

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

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

**Development** means that associated with DA182/19 for a subdivision of 1 lots into 19 lots.

**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 or the provision of a material public benefit.

**GST** has the same meaning as in the GST Law.

**GST Law** has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

**Land** means Lot 20 DP 1176825, 1043 Pipers Flat Road, Pipers Flat NSW 2790.

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

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

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

- (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 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.
- (f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, notated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) 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.
- (j) 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.
- (k) References to the word 'include' or 'including' are to be construed without limitation.
- (l) A reference to this Agreement includes the agreement recorded in this Agreement.
- (m) 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.
- (n) Any schedules and attachments form part of this Agreement.

## 5 Development Contributions to be made under this Agreement

- 5.1 The Developer shall pay to Council an amount of \$62,700 (\$3,300 per lot) to go towards community facilities and public open space.

5.2 The payment is to be paid in 2 stages; that being:

Stage 1: Lots 1 to 5

Stage 2: Lots 6 to 19

## 6 Application of the Development Contributions

6.1 Payments or provision of material public benefits must be made prior to the issue of the subdivision certificate for each stage.

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

Sections 7.11 & 7.12 do not otherwise apply to the development.

## 8 Registration of this Agreement

This Agreement will not be registered as provided for in s7.6 of the Act as its provisions are to be finalised prior to the issue of any subdivision certificate.

## 9 Review of this Agreement

This agreement shall not be reviewed except with the approval of both parties.

## 10 Dispute Resolution

Should a dispute arise as part of this agreement that cannot be resolved between the parties then the parties may engage an independent mediator to be funded by the parties to assist in resolving the dispute. If the dispute is not resolved by mediation then before either party has recourse to litigation, the party must submit the dispute to expert appraisal. If the parties do not agree upon an independent expert, either may request the Secretary General of the Australian Commercial Disputes Centre to nominate an expert.

## 11 Enforcement

If this agreement is not honoured prior to any request for the issue of any subdivision certificate then the parties agree that enforcement shall mean any subdivision certificate will not be released.

## 12 Notices

12.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

(a) Delivered or posted to that Party at its address set out below.

- (b) Faxed to that Party at its fax number set out below.
- (c) Emailed to that Party at its email address set out below.

**Council**

Attention: Andrew Muir

Address: 180 Mort Street, Lithgow, NSW 2790

Phone Number: 02 6354 9999

Fax Number: 02 63512927

Email: acm@lithgow.nsw.gov.au

**Developer**

Attention: Kevin Thompson

Address: Po Box 217 Portland NSW 2847

Phone Number: 0458224473

Email:

kevinthompson@aboveandbelowservices.  
com.au

12.2 If a Party gives the other Party 3 business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.

12.3 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.
- (c) If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.

12.4 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 4.30pm 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.

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

## **14 Assignment and Dealings**

The parties agree that should the developer intend to sell, transfer or assign the property, then the developer will, in any contract for sale or Deed of Assignment or Transfer, include a requirement that the purchaser or assignee must honour the same terms and conditions as this document.

## **15 Costs**

Any incidental costs associated with this agreement shall be borne by the developer.

## **16 Entire agreement**

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

## **17 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.

## **18 Governing law and jurisdiction**

This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

## **19 Joint and individual liability and benefits**

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



## 20 No fetter

Nothing in this Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

## 21 Representations and warranties

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

## 22 Severability

If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

## 23 Modification

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

## 24 Waiver

The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party. A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

## Execution

**Dated:**

**Executed as an Agreement:**

**Kevin Thompson (Director)**

**Above and Below Holdings**

**Lithgow City Council**