

NB – Strikethroughs ~~XXXX~~ and **bold highlights** denote changes from exhibited document and will be removed from the final adopted version.

Explanatory Note- MOD39/19

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 \$275,200 being \$3,200 for each of the 86 residential lots created, to go towards Council's provision of a link road between James O'Donnell Drive and Col Drew Drive, Bowenfels; and
 - Install a concrete island and "No Right Turn" signage on the James O'Donnell Drive approach to the Great Western Highway
- The payment is to be paid ~~and intersection works are to be completed~~ prior to the release of the subdivision certificate for the 21st lot to be created under DA021/18.
- The intersection works are to be completed prior to the release of the subdivision certificate for the ~~21st~~ **30th** lot to be created under DA021/18.

Effect of the Planning Agreement

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

Merits of the Planning Agreement

- The proposed development is for an 86 lot residential subdivision. This will result in an increase in usage on Council's road network and require the provision of the link road previously referred to.
- In the assessment of the merits of the development, Council must consider the traffic impacts of the proposal on the immediate locality and on the wider community, and ensure that those impacts are addressed by the development.
- The provision of the link road seeks to address those traffic impacts and is the main outcome derived from the 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 Regulation.
- 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:.....

Noel Flynn:.....

Lithgow City Council:.....

Between LITHGOW CITY COUNCIL AND NOEL FLYNN

PLANNING AGREEMENT

Parties

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

and

Noel Flynn of 996 Great Western Highway, Lithgow, New South Wales, 2790 (**Developer**).

Background

- A. The Developer is the owner of the Land
- B. On 30 October 2018, Council granted Development Consent to DA021/18 for an 86 lot residential subdivision.
- C. On 11 September 2019, James Flynn, with the consent of the Developer in accordance with cl 49 of the *Environmental Planning and Assessment Regulation 2000* (NSW), made an application to the Council to Modify DA 021/18 (**MOD39/19**).
- D. The Developer is associated with James Flynn, the applicant to DA021/18 and MOD39/19 for the purposes of s 7.4 of the *Environmental Planning and Assessment Act 1979* (NSW). James Flynn is appointed attorney for the Developer under registered power of attorney no. BK 4656 NO 655 dated 13 May 2013.
- E. On 23 April 2020 James Flynn commenced an appeal to the Land and Environment Court of NSW against the deemed refusal of MOD39/19 (**the Proceedings**).
- F. During the course of the Proceedings, the Developer made an offer to enter into this Agreement to make Development Contributions towards Infrastructure if the modification application was approved.

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 of the Act.

2 Application of this Agreement

This application applies to Lot 1 DP 1230208, known as 43 Hillcrest Avenue, Bowenfels for an 86 lot residential subdivision (**the Subdivision**).

3 Operation of this Agreement

This Agreement takes effect on the date of execution. All contributions must be paid prior to the release of any Subdivision Certificate beyond an initial certificate for the release of 21 lots of the subdivision.

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 DA021/18 for an 86 Lot Residential Subdivision.

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.

Intersection Treatment Works mean the installation of a concrete island on the James O'Donnell Drive approach to the Great Western

Highway and "No Right Turn" signage in accordance with the concept plan in Annexure A.

Land means Lot 1 DP 1230208, known as 43 Hillcrest Avenue, Bowenfels NSW 2790.

Link Road means a link road to be provided between James O'Donnell Drive and Col Drew Drive.

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 \$275,200 being \$3,200 for each of the 86 residential lots created, to go towards the provision of the Link Road.
- 5.2 The physical construction of the Link Road will be the responsibility of Council and is to be provided by the Council in a timely manner subject to the payment of the said \$275,200 having been paid to it.
- 5.3 The payment is to be paid prior to the release of the subdivision certificate for the 21st lot to be created under DA021/18.
- 5.4 The Developer shall carry out the Intersection Treatment Works at the intersection of James O'Donnell Drive and the Great Western Highway in accordance with the concept plan in Annexure A.
- 5.5 The Intersection Treatment Works shall be carried out prior to the release of the subdivision certificate for the 21st **30th** lot to be created under DA021/18.

6 Application of s7.11 & s7.12 of the Act to the Development

6.1 Sections 7.11 & 7.12 apply to the development except to the extent set out in section 6.2 hereof.

6.2 For future dwellings on individual allotments created under DA021/18, section 7.11 and 7.12 contributions will be excluded for the Link Road but not for any other applicable contributions.

7 Registration of this Agreement

This Agreement will be registered on the Land as provided for in s7.6 of the Act within twenty-eight (28) days of the parties' entry into it. Upon receipt of payment of the said \$275,200, **and following completion of the Intersection Treatment Works**, Council will promptly consent to the release of the VPA from the title to the Land.

8 Review of this Agreement

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

9 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.

10 Enforcement

If this agreement is not honoured prior to any request for the issue of any Subdivision Certificate beyond the initial 21 lots then the parties agree that enforcement shall mean that in accordance with section 6.15(1)(d) of the Act, no Subdivision Certificate will be issued.

11 Notices

11.1 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: Noel Flynn

Address: 996 Great Western Highway Lithgow,
NSW 2790

Phone Number: c/- James Flynn: 0417 285 868

Email: c/- James Flynn: zgflynn@bigpond.com

11.2 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.

11.3 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.

11.4 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.

12 Approvals and consent

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.

13 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.

14 Costs

The Developer must pay the reasonable costs incurred by the Council (including costs arising from the public notice and inspection process) relating to and arising directly from this Agreement.

15 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.

16 Further acts

16.1 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.

16.2 Provided that the Developer has met all of its obligations pursuant to this Agreement, including payment of the said sum of \$275,200, the issue of a Subdivision Certificate will not be unreasonably withheld by the Council and the Council agrees to issue the subdivision certificate in a timely manner in accordance with the provisions of the EP&A Act, to avoid unnecessary delays to the release of Stage 2.

17 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.

18 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.

19 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.

20 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.

21 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.

22 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.

23 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

Executed as a deed on _____

Signed, sealed and delivered for and on behalf of the **Lithgow City Council** (ABN 59 986 092 492) by its Authorised Officer, in the presence of:

.....
Signature of witness

.....
Signature of the Authorised Officer

.....
Name of witness in full

.....
Name of Authorised Officer

.....
Address of witness

.....
Office held

Executed for **Noel Flynn** by his attorney under registered power of attorney no. BK 4656 NO 655 dated 13 May 2013 who has no notice of revocation of that power of attorney in the presence of:

.....
Signature of Witness

.....
Signature of attorney

.....
Name of witness in full

.....
Name of attorney in full

Address of witness

Annexure A - Intersection Treatment Works Concept Plan

