
1.1.3. ECDEV - 24/05/2021 - Supplementary Report Modification of Development and Voluntary Planning Agreement DA021/18

Prepared by Paul Cashel – Development Manager

Department Economic Development and Environment

Authorised by Andrew Muir

Property Details Lot 1 DP 1230208, Lot 4 DP 1230208 and Lot 2 DP 1049398
43 Hillcrest Avenue, 13A Thornton Avenue and 994 Great
Western Highway, Bowenfels

Property Owner Noel Flynn

Applicant James Flynn

Reference

Min No 18 – 279: Ordinary Meeting of Council held on 29 October 2018 - DA021/18 - 86 Lot Residential Subdivision & Draft Planning Agreement, 43 Hillcrest Avenue, Bowenfels - *APPROVED*.

Min No 21 – 80: Ordinary Meeting of Council held on 22 March 2021 – Draft Voluntary Planning Agreement – MOD039/19 – 1 lot into 86 subdivision Lot 1 DP 1230208 – 43 Hillcrest Ave Bowenfels

Summary

This supplementary report seeks to finalise a proposed deed of agreement between Council and Transport for New South Wales (TfNSW) in addition to the recommendations in the original report relating to the Voluntary Planning Agreement and modification of development consent.

Commentary

The substantive report in the business paper on this matter outlines the request by Transport for New South Wales to enter into a deed of agreement for Council to construct the link road at a specified time. Negotiations had been proceeding to arrive at a satisfactory trigger point to ensure that the Council had the funds to construct the link road and the link road was constructed prior to the closure of the right-hand turn onto the Great Western Highway. As any deed would simply provide extra comfort to Transport for New South Wales and reflect the Council's adopted position it could have reasonably proceeded under delegation. However, subsequent negotiations have occurred with Transport for New South Wales to a point where the deed is now satisfactory to both parties, and it would seem also appropriate to seek formal Council approval to enter into a deed so all matters can be resolved at one time.

The draft deed is attached to this supplementary report. The key obligations under the deed are summarised as follows:

1. Council is to carry out the construction of the Link Road, prior to the release of the Subdivision Certificate for the 30th lot on the land or by such later date as may be agreed between the parties.
2. Any regulatory approvals will be the responsibility of the Council.
3. Council is to notify TfNSW, of any substantive modifications.

With the finalisation of the modification application, the Voluntary Planning Agreement and the deed of agreement, the matter will be resolved. An outcome has been achieved that will provide a proper link road for the development of the area and also ensure residents are not disadvantaged by the eventual removal of no right-hand turn onto the Great Western Highway.

Policy Implications

No additional implications as a result of the supplementary report.

Financial Implications

No additional implications as a result of the supplementary report.

Legal and Risk Management Implications

Whilst the deed of agreement places Council under no additional practical obligations as provided in the Voluntary Planning Agreement it is an undertaking between the parties which provides additional comfort to Transport for New South Wales.

Attachments

1. Draft deed LTL Amendment 24 May 2021 [1.1.3.1 - 13 pages]

Recommendation

THAT in addition to the recommendations in Item 10.1.1.2 in this business paper a point 5 be added as follows:

That Council enter into the Deed of Agreement with Transport for NSW as attached to this supplementary report relating to the construction of a link road at South Bowenfels and authorise the General Manager to sign accordingly.



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planning • environment • local government

Deed of Agreement

Lithgow City Council

Transport for New South Wales

24 May 2021

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Deed of Agreement

Table of Contents

Summary Sheet	4
Parties	6
Background	6
Operative provisions	6
Part 1 - Preliminary.....	6
1 Interpretation.....	6
2 Status of this Deed.....	9
3 Commencement.....	9
4 Application of this Deed	10
5 Warranties.....	10
6 Further agreements	10
7 Surrender of right of appeal, etc.	10
8 Application of s7.11, s7.12 and s7.24 of the Act to the Development.....	10
Part 2 – Development Contributions	11
9 Provision of Development Contributions.....	11
10 Payment of monetary Development Contributions	11
11 Dedication of land	11
12 Carrying out of Work	12
13 Variation to Work	12
14 Access to land by Developer	13
15 Access to land by Council.....	13
16 Council’s obligations relating to Work	13
17 Protection of people, property & utilities	13
18 Repair of damage	14
19 Completion of Work	14
20 Rectification of defects.....	14
21 Works-As-Executed-Plan.....	15
22 Removal of Equipment.....	15
Part 3 – Dispute Resolution.....	15
23 Dispute resolution – expert determination	15
24 Dispute Resolution - mediation	16
Part 4 - Enforcement	16

**Deed of Agreement
Lithgow City Council
Transport for NSW**



25	Security for performance of obligations	16
26	Grant of Charge	17
27	Caveat and Discharge	17
28	Priority	18
29	Acquisition of land required for Work	18
30	Acquisition of land required to be dedicated	19
31	Breach of obligations	19
32	Enforcement in a court of competent jurisdiction	20
Part 5 – Registration & Restriction on Dealings		21
33	Registration of this Deed	21
34	Restriction on dealings	21
Part 6 – Indemnities & Insurance		22
35	Risk	22
36	Release	22
37	Indemnity	22
38	Insurance	22
Part 7 – Other Provisions		23
39	Annual report by Developer	23
40	Review of Deed	23
41	Notices	23
42	Approvals and Consent	24
43	Costs	24
44	Entire Deed	24
45	Further Acts	25
46	Governing Law and Jurisdiction	25
47	Joint and Individual Liability and Benefits	25
48	No Fetter	25
49	Illegality	25
50	Severability	25
51	Amendment	26
52	Waiver	26
53	GST	26
54	Explanatory Note	27
Schedule 1		28
Execution		29
Appendix		30



Deed of Agreement

Summary Sheet

Parties to Deed:

Name: Lithgow City Council (**Council**)
Address: 180 Mort Street, Lithgow NSW 2790
Telephone: 02 6354 9999
Email: council@lithgow.nsw.gov.au
Representative: Andrew Muir

Name: Transport for New South Wales (TfNSW)
Address: 231 Elizabeth Street, Sydney
Telephone: (02) 8202 2200
Email: development.western@rms.nsw.gov.au
Representative: Andrew McIntyre

Land:

See definition of *Land* in clause 1.1.

Development:

See definition of *Development* in clause 1.1.

Deed of Agreement
Lithgow City Council
Transport for NSW



Deed of Agreement between Lithgow City Council and Transport for NSW

Parties

Lithgow City Council (Council)

and

Transport for New South Wales (TfNSW)

Background

- A Council is the recipient of an application MOD39/19 to modify development consent DA021/18 pursuant to s 4.15(1A) of the *Environmental Planning and Assessment Act 1979* relating to the development of the Land.
- B MOD39/19 proposed to delete conditions 2, 42 and 49 of development consent DA021/18.
- C On 23 April 2020, an appeal was commenced in the Land and Environment Court in proceedings 2020/121999.
- D As part of the assessment and determination of MOD39/19, Council proposes to enter into a Planning Agreement with the Developer of the Land as publically exhibited between 1 April 2021 until 3 May 2021 as contained in Annexure A.
- E Pursuant to the Planning Agreement, the Developer of the Land will pay an amount of \$275,000 as contribution towards the construction of the Link Road. The construction of the Link Road, including any regulatory approvals, assessment, dedication, registration, opening as a local unclassified road, and future maintenance, will be the responsibility of Council.
- F Subject to the determination of MOD39/19 by approval, including the entering of the Planning Agreement between Council and the Developer of the Land, the parties enter into this Deed.
- G A copy of the development consent, as proposed to be modified by MOD 39/19 as set out in Annexure B.

Operative provisions

1 Interpretation

- 1.1 In this Deed the following definitions apply:

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

Deed of Agreement
Lithgow City Council
Transport for NSW



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

Developer means the owner of the Land, the applicant for development consent DA021/18 (including any applicant for subsequent modifications) and any person carrying out development pursuant to development consent DA021/18.

Development Consent means development consent 021/18 as subsequently modified pursuant to s 4.55 of the Act such as MOD 30/19.

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

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

MOD 30/19 means the application lodged by the Developer on 11 September 2019 to modify development consent 021/18.

Party means a party to this Deed.

Planning Agreement means the proposed Planning Agreement between the Council and the Developer of the Land as publically exhibited between 1 April 2021 until 3 May 2021 and annexed to this Deed as Annexure A.

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

Stage means a stage of the Development approved by a Development Consent or otherwise approved in writing by the Council for the purposes of this Deed.

Subdivision Certificate has the same meaning as in the Act.

Work means the physical result of any building, engineering or construction work in, on, over or under land.

- 1.2 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 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.
 - 1.2.6 A reference in this Deed to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.



- 1.2.7 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
- 1.2.8 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- 1.2.9 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.
- 1.2.10 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.
- 1.2.11 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.12 A reference to this Deed includes the agreement recorded in this Deed.
- 1.2.13 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.
- 1.2.14 A reference to 'dedicate' or 'dedication' in relation to land is a reference to dedicate or dedication free of cost.
- 1.2.15 Any schedules, appendices and attachments form part of this Deed.
- 1.2.16 Notes appearing in this Deed are operative provisions of this Deed.

2 Status of this Deed

- 2.1 This Deed is binding on the Parties and is intended to have immediate effect and is specifically enforceable.

3 Commencement

- 3.1 This Deed commences and has force and effect on and from the date when the Parties have:
 - 3.1.1 both executed the same copy of this Deed, or
 - 3.1.2 each executed separate counterparts of this Deed and exchanged the counterparts.
- 3.2 The Parties are to insert the date when this Deed commences on the front page and on the execution page.

4 Application of this Deed

- 4.1 This Deed applies to the carrying out of the Council's obligation to construct the Link Road under the Planning Agreement, including any regulatory approvals, assessment, dedication, registration, and opening as a local unclassified road.



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

- 6.1 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 Obligations under this Deed

- 7.1 Council is to carry out the construction of the Link Road, prior to the release of the Subdivision Certificate for the 30th lot on the Land or by such later date as may be agreed between the parties. Consent to any extension(s) to Council's requirement under this clause is not to be unreasonably withheld by TfNSW. For the purposes of this clause, the parties acknowledge and agree that Council's compliance with the requirements of this clause is dependent upon the Developer complying with the terms of the VPA as well as the speed with which the Developer releases lots pursuant to the Development Consent. Further, TfNSW will consider any extension to Council's obligation and requirement under this clause based on demonstration that Council have taken all reasonable efforts to ensure compliance with this clause.
- 7.2 Any regulatory approvals, assessment, dedication, registration, opening as a local unclassified road, and future maintenance will be the responsibility of the Council.
- 7.3 Council is to notify any further application for modification of (including any development application which has the effect of modifying) development consent O21/18 to TfNSW, if Council is of the opinion that the modification application relates to the requirements of this Deed.

8 Entire Deed

- 8.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with.
- 8.2 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.

9 Further Acts

- 9.1 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.



10 Governing Law and Jurisdiction

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

11 Joint and Individual Liability and Benefits

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

12 No Fetter

- 12.1 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, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

13 Illegality

- 13.1 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.

14 Severability

- 14.1 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.
- 14.2 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.

15 Amendment

- 15.1 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.



16 Waiver

- 16.1 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.
- 16.2 A waiver by a Party is only effective if it:
 - 16.2.1 is in writing,
 - 16.2.2 is addressed to the Party whose obligation or breach of obligation is the subject of the waiver,
 - 16.2.3 specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,
 - 16.2.4 is signed and dated by the Party giving the waiver.
- 16.3 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.
- 16.4 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.
- 16.5 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.

Deed of Agreement
Lithgow City Council
Transport for NSW



Execution

Executed as a Deed

Dated:

Executed on behalf of the Council

General Manager (or authorised delegate)

Witness Name

Signature

Witness Signature

Executed on behalf of Transport for NSW

Name/Position

Name/Position

Deed of Agreement
Lithgow City Council
Transport for NSW



Annexure A

Planning Agreement

DRAFT

Deed of Agreement
Lithgow City Council
Transport for NSW



Annexure B

Proposed Modified Development Consent DA021/18 Pursuant to Modification Application
MOD39/19

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