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Planning Agreement

A planning agreement, under section 7.4 of the *Environmental Planning and Assessment Act 1979*

2 Collingwood Drive, Matcham NSW 2250

Central Coast Council (ABN 73 149 644 003)
and

James M Ryan and Veronica P Ryan

[##Date] 2019

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Planning Agreement

Dated _____

Parties

Central Coast Council (ABN 73 149 644 003) of 49 Mann Street, Gosford, NSW 2250, (the Council)

and

James M Ryan & Veronica P Ryan of 2 Collingwood Drive, Matcham, NSW 2250 (the Developer).

Recitals

- A. On 17 May 2017, Council lodged with the Department a planning proposal (**Planning Proposal**) which sought to zone the Land from 7(a) Conservation and Scenic Protection (Conservation) to 7(c2) Conservation and Scenic Protection (Scenic Protection – Rural Small Holdings) under IDO 122 and to utilise the provisions of clause 18(4) of IDO 122 (the 'bonus lot' provision) to enable subdivision of the Land to a minimum of 1 ha, supported by a contribution to Council towards the Public Purpose. The Department issued a gateway determination dated 4 July 2017. The Department subsequently issued an Alteration to Gateway Determination on 3 October 2017, and a further Alteration to Gateway Determination on 23 July 2018.
- B. The Draft CCLEP phases out the 'bonus lot' provision relied on by the Planning Proposal. Given that it was likely that the provisions of IDO 122 would not be in effect when the Planning Proposal was finalised, on 11 March 2019 Council resolved to:
- B.1 amend the Planning Proposal to replace zone 7(c2) Conservation and Scenic Protection (Scenic Protection – Rural small Holdings) under IDO 122 to E4 Environmental Living under the Draft CCLEP;
 - B.2 amend the planning proposal to include appropriate provisions to permit subdivision to a minimum lot size of 1 ha; and
 - B.3 prepare a planning agreement for the amount that would have been required under IDO 122.
- C. Council lodged with the Department an amended planning proposal on 19 March 2019 which reflects Council's resolution referred to at Recital B.
- D. The Department issued an Altered Gateway Determination on 12 April 2019 (**2019 Altered Gateway Determination**). The 2019 Altered Gateway Determination amended the Gateway Determination by:

D.1 changing the description of the Planning Proposal from:

amendment to the Gosford IDO 122 to permit rural residential development at 2, 14, 24 Collingwood Road and 107 Matcham Road, Matcham

to

amendment to the relevant planning instrument to permit rural residential development at 2, 14, 24 Collingwood Road and 107 Matcham Road, Matcham;

D.2 replacing condition 1 with, relevantly:

Council is to update the Planning Proposal prior to community consultation to:

...

- remove from the explanation of provisions and planning proposal the reference to 'Schedule 1 Additional Permitted Uses' to permit the subdivision and state the outcome is to enable subdivision of the land to permit 1ha minimum lot sizes.

D.3 Replacing condition 6 with:

The time frame for completing the LEP is by 4 February 2020.

E. Subject to the commencement of the CCLEP in accordance with the Amended Planning Proposal, the Developer proposes to carry out the Development.

F. The Developer and the Council agree that this Planning Agreement provides for a material public benefit, being the payment of the Development Contribution, to be applied to the Public Purpose.

Operative provisions

1. Definitions and Interpretations

In this Agreement, the following definitions apply:

2019 Altered Gateway Determination means the altered gateway determination in relation to the Amended Planning Proposal, issued by the Department on 12 April 2019.

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

Agreement means this agreement and any schedules, annexures and appendices to this Agreement.

Authorisation means:

- (a) an approval, consent, declaration, exemption, accreditation, notarisation, licence, permit, certificate, waiver or other authorisation, however described, required by any law (including, for the avoidance of doubt, approvals specifically defined in this Agreement); and
- (b) in relation to anything that could be prohibited or restricted by law if an Authority acts in any way within a specified period, the expiry of that period without that action being taken,

including any variation, modification, renewal or amendment with any Authority.

Authority means any:

- (a) government, government department or government agency;
- (b) governmental, semi-governmental or judicial person carrying out any statutory authority or function; or
- (c) other person (whether autonomous or not) who is charged with the administration of a Law,

including, for the avoidance of doubt, Authorities specifically defined in this Agreement and including Council when performing its regulatory functions but in that capacity only.

Business Day means a day other than a Saturday, Sunday or public holiday in New South Wales.

CCLEP means the Central Coast Local Environmental Plan upon its commencement.

COSS means Council's Coastal Open Space System as defined by the Council's Coastal Open Space System Strategy adopted by the former Gosford City Council on 3 August 2010.

Council means Central Coast Council.

Corporations Act means the *Corporations Act 2001* (Cth).

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

Department means the Department of Planning, Industry and Environment.

Developer means James M Ryan and Veronica P Ryan, being a party to this Agreement.

Development means subdivision of the Land into two 1 hectare lots.

Development Consent has the same meaning as in the Act.

Development Contribution means \$92,688.75.

Draft CCLEP means the draft Central Coast Local Environmental Plan.

Guarantee means an irrevocable unconditional bank guarantee or documentary performance bond for the Guarantee Amount which must:

- (a) be denominated in Australian dollars;
- (b) be an unconditional undertaking;
- (c) be signed and issued by a bank licensed to carry on business in Australia, an Australian Prudential Regulation Authority (**APRA**) regulated authorised deposit taking institution or an insurer authorised by APRA to conduct new or renewal insurance business in Australia having at all times an investment grade security rating from an industry recognised rating agency of at least:
 - (i) BBB + (Standard & Poors and Fitch);
 - (ii) Baa 1 (Moody's); or
 - (iii) Bbb (Bests);
- (d) be issued on behalf of the Developer;
- (e) have no expiry or end date;
- (f) state the beneficiary as Council;
- (g) be irrevocable;
- (h) state the Guarantee Amount as the minimum amount required by this document to be lodged as security;
- (i) state the purpose of the security as required in accordance with this document; and
- (j) be on such other terms approved by Council.

Guarantee Amount means the amount equal to the Development Contribution.

IDO 122 means Interim Development Order No 122 – Gosford.

Index Number means the Consumer Price Index (Sydney all groups) published by the Australian Bureau of Statistics from time to time.

Insolvency Event means:

- (a) having a controller, receiver, manager, administrator, provisional liquidator, liquidator or analogous person appointed;

- (b) an application being made to a court for an order to appoint a controller, provisional liquidator, trustee for creditors or in bankruptcy or analogous person to the person or any of the person's property
- (c) the person being taken under section 459F(1) of the Corporations Act to have failed to comply with a statutory demand;
- (d) an application being made to a court for an order for its winding up;
- (e) an order being made, or the person passing a resolution, for its winding up;
- (f) the person:
 - (i) suspending payment of its debts, ceasing (or threatening to cease) to carry on all or a material part of its business, stating that it is unable to pay its debts or being or becoming otherwise insolvent; or
 - (ii) being unable to pay its debts or otherwise insolvent;
- (g) the person taking any step toward entering into a compromise or arrangement with, or assignment for the benefit of, any of its members or creditors;
- (h) a court or other authority enforcing any judgment or order against the person for the payment of money or the recovery of any property; or
- (i) any analogous event under the Laws of any applicable jurisdiction,

unless this takes place as part of a solvent reconstruction, amalgamation, merger or consolidation that has been approved by the other party.

Land means Lot 2 DP 561283.

Law includes any legislation or any rule, principle, duty or requirement of or under common law or equity, and for the avoidance of doubt includes any Authorisations and the lawful requirements of Authorities.

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

Planning Proposal means (PP_2017_CCOAS_005_00) seeking to permit subdivision of the Land to a minimum lot size of 1 hectare.

Public Purpose means the acquisition, embellishment or maintenance of COSS land.

Regulation means the Environmental Planning and Assessment Regulation 2000 (NSW).

2. Planning Agreement under the Act

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

3. Application of this Agreement

This Agreement applies to the Land.

4. Operation of this Agreement

- 4.1 This Agreement will commence from the date it is executed by all the Parties.
- 4.2 This Agreement will remain in force until it is terminated.

5. Application of sections 7.11, 7.12 and 7.24 of the Act.

- 5.1 This Agreement does not exclude the application of section 7.11, section 7.12 and section 7.24 of the Act from the Development. The Parties acknowledge that either section 7.11 or section 7.12 will apply.
- 5.2 The Development Contribution obtained by Council under this Agreement is not to be taken into consideration in determining a development contribution under section 7.11 or section 7.12 of the Act with respect to the Development.

6. Development Contribution

- 6.1 The Developer agrees that prior to the issue of a subdivision certificate for the subdivision of the land, the Developer is to pay Council, by electronic bank transfer to Council's nominated bank account, the Development Contribution to be used by the Council for the Public Purpose.

- 6.2 Council agrees:

- 6.2.1 to accept the Development Contribution as a material public benefit; and
- 6.2.2 to use the Development Contribution for the Public Purpose.

- 6.3 The Developer acknowledges and agrees that Council retains sole discretion as to the priority and timing of the Public Purpose.

6.4 Adjustment of Development Contribution

- 6.4.1 On each anniversary of the date of this Agreement (the **Development Contribution Adjustment Date**), the Development Contribution is to be adjusted to a revised amount by applying the following formula:

$$\mathbf{RGA} = \mathbf{DC} \times (\mathbf{A/B})$$

where:

RGA is the revised Development Contribution applicable from the relevant Development Contribution Adjustment Date

DC is the Development Contribution that is current on the relevant Development Contribution Adjustment Date

A is the Index Number most recently published before the relevant Development Contribution Adjustment Date

B is the Index Number most recently published:

- (a) before the date of the Development Contribution for the first Development Contribution Adjustment Date; and
 - (b) before the preceding Development Contribution Adjustment Date for every subsequent Development Contribution Adjustment Date
- 6.4.2 If after the formula is applied under clause 12.2.1 the revised Development Contribution will be less than the amount held at the preceding Development Contribution Adjustment Date, the Development Contribution will not be adjusted.

7. Registration of this Agreement

7.1 Acknowledgement

The Developer acknowledges that Council intends to register this Agreement on the title to the Land in accordance with section 7.6 of the Act at NSW Land Registry Services and, upon registration by the Registrar-General, this Agreement will be binding on and enforceable against the owner of any part of the Land from time to time as if each owner for the time being had entered into this Agreement and was a Developer.

7.2 Consents to registration

The Developer:

- 7.2.1 consents to the registration of this Agreement at NSW Land Registry Services on the title to the Land; and
- 7.2.2 warrants that it has obtained all consents and approvals that are required and will do all things necessary to enable the registration of this Agreement on the title to the Land.

7.3 Developer's obligations

- 7.3.1 The Developer must within 10 Business Days of a written request by Council do all things necessary to enable this Agreement to be registered by Council on the title to the Land under s 7.6 of the Act, including:
 - (a) producing any documents or letters of consent required by the Registrar-General of the NSW Land and Registry Services;
 - (b) providing the production slip number when the Developer produces the certificate of title to the Land at the NSW Land and Registry Services; and
 - (c) providing Council with a cheque for registration fees payable in relation to registration of this Agreement at the NSW Land and Registry Services.
- 7.3.2 The Developer must act promptly in complying with and assisting to respond to any requisitions raised by the NSW Land and Registry Services that relate to registration of this Agreement.

7.4 Release from registration

If Council is satisfied that the Developer has:

- 7.4.1 paid all of its required Development Contribution to Council; and
- 7.4.2 fully complied with its other obligations under this Agreement,

Council will at the request of the Developer, execute the relevant forms to remove the registration of this Agreement from the certificates of title for the Developer's Land.

7.5 **Registration expenses**

The Developer must pay Council's expenses including registration fees, legal costs and disbursements on an indemnity basis, for the registration of this Agreement and the subsequent removal of registration under this clause 7.

8. Caveatable interest

8.1 **Lodgement of caveat**

8.1.1 The Developer acknowledges and agrees that the rights under this Agreement give Council a caveatable interest in the Land.

8.1.2 Council may at any time after the date of this Agreement, lodge a caveat on the relevant folios of the Register held by the NSW Land Registry Services pertaining to the Land.

8.1.3 A caveat lodged by Council in accordance with this clause 8 must not prevent or prohibit the lodgement of any instrument dealing or matter required for the registration of any mortgage, subdivision plan, easement, covenant, right of way, deposited plan or strata plan relating to the Development. The Developer must not lodge a lapsing notice or take any action to obtain or seek a withdrawal or removal of the caveat, unless:

- (a) Council has confirmed in writing to the Developer that its obligations under this Agreement have been satisfied; or
- (b) this Agreement has otherwise come to an end.

8.2 **Withdrawal of caveat**

If Council lodges a caveat in accordance with this clause 12, Council must do all things reasonably required to remove the registration of that caveat from the title to the Land once this Agreement has been registered on the title to Land in accordance with clause 8.

9. Notation on planning certificate

The Developer agrees that Council may, in its absolute discretion, make a notation on any planning certificate under section 10.7(5) of the Act relating to the Land.

10. Termination

10.1 Subject to the substantial commencement of the Development, should the Council at any time or for whatever reason no longer require the Development Contribution, no further monetary contribution may be imposed on the Developer except as required under clause 5.

10.2 A Party can terminate this Agreement by written notice to the other Party if any of the following events occur:

10.2.1 the Planning Proposal is declared to be invalid by a Court of competent jurisdiction;

- 10.2.2 the Minister determines that the Planning Proposal should not proceed;
 - 10.2.3 the Planning Proposal lapses; or
 - 10.2.4 the CCLEP is declared to be invalid by a Court of competent jurisdiction.
- 10.3 The termination of this Agreement is without prejudice to the accrued rights of Council at the time of such termination.
- 10.4 If this Agreement is terminated, then:
- 10.4.1 the rights of each party that arose before the termination or which may arise at any future time for any breach or non-observance of obligations occurring prior to the termination are not affected;
 - 10.4.2 the parties must take all steps reasonably necessary to minimise any loss that each party may suffer as a result of the termination of this document;
 - 10.4.3 Council will return the Guarantee to the Developer after first deducting any amounts owing to Council or costs incurred by Council by operation of this Agreement. If in exercising its rights under this Agreement Council expends more money than the Guarantee Amount, then the amount in excess of the Guarantee Amount will be deemed to be a debt due and owing to Council by the Developer; and
 - 10.4.4 Council will, at the cost of the Developer, do all things reasonably required to remove this Agreement from the title to the Land.

11. Dispute resolution

- 11.1 If a dispute arises out of or relates to this Agreement (including any dispute as to the meaning, performance, validity, subject matter, breach or termination of this Agreement or as to any claim in tort, in equity or pursuant to any statute) (Dispute), any court or arbitration proceedings shall not be commenced by or against a Party relating to the Dispute unless the Parties have complied with this clause, except where a Party seeks urgent interlocutory relief.
- 11.2 The Party claiming that a Dispute has arisen under or in relation to this Agreement is to give written notice to the other Parties to the Dispute, specifying the nature of the Dispute (**Dispute Notice**).
- 11.3 The Parties agree to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales and to take action to have the Dispute mediated within 7 working days of the receipt of the Dispute Notice.
- 11.4 The Parties agree that the President of the Law Society of New South Wales or the President's nominee will select the mediator and determine the mediator's remuneration.
- 11.5 The Parties to the mediation will be jointly responsible for the fees of the mediation and each party shall bear its own costs.
- 11.6 The Parties may, but are not required, to enter into a written agreement before mediating a Dispute.
- 11.7 If any procedural aspects are not specified sufficiently in the rules under Clause 11.2, the Parties agree to conduct the mediation regarding those aspects in accordance with the

determination of the mediator whose decision regarding those aspects is final and binding on the Parties.

- 11.8 A legal representative acting for either of the Parties may participate in the mediation.
- 11.9 From the time when a Dispute Notice is served, neither Party shall take action to terminate this Agreement, until after the conclusion of the mediation.
- 11.10 Should mediation fail to resolve any dispute then the dispute shall be determined by arbitration pursuant to the *Commercial Arbitration Act 1984 (CA Act)* and the Chief Executive Officer of the Council shall request the President for the time being of the Law Society of New South Wales to appoint an arbitrator to carry out such arbitration in accordance with the provisions of the CA Act.
- 11.11 Despite clauses 11.1, 11.2, 11.3 and 11.4, either Party may institute court proceedings to seek urgent equitable relief in relation to a dispute or difference arising out of or in connection with this Agreement.

12. Enforcement

12.1 Developer to provide Guarantee

The Developer must deliver the Guarantee for the Guarantee Amount to Council within 30 days of the commencement of this Agreement.

12.2 Adjustment of Guarantee Amount

- 12.2.1 On each anniversary of the date of the Guarantee (the **Guarantee Adjustment Date**), the Guarantee Amount is to be adjusted to a revised amount by applying the following formula:

$$\mathbf{RGA} = \mathbf{GA} \times (\mathbf{A/B})$$

where:

RGA is the revised Guarantee Amount applicable from the relevant Guarantee Adjustment Date

GA is the Guarantee Amount that is current on the relevant Guarantee Adjustment Date

A is the Index Number most recently published before the relevant Guarantee Adjustment Date

B is the Index Number most recently published:

- (a) before the date of the Guarantee for the first Guarantee Adjustment Date; and
- (b) before the preceding Guarantee Adjustment Date for every subsequent Guarantee Adjustment Date

- 12.2.2 If after the formula is applied under clause 12.2.1 the revised Guarantee Amount will be less than the amount held at the preceding Guarantee Adjustment Date, the Guarantee Amount will not be adjusted.

- 12.2.3 If after the formula is applied clause 12.2.1 the revised Guarantee Amount will be greater than the amount held at the preceding Guarantee Adjustment Date, the Developer must within 10 Business Days of the Guarantee Adjustment Date deliver to Council a replacement Guarantee to replace the Guarantee then held by Council, in the amount calculated under this clause 12.2.
- 12.2.4 Any unused portion of the Guarantee that is held by Council immediately prior to the receipt by Council of the replacement Guarantee under clause 12.2.3 must be returned to the Developer upon receipt of the replacement Guarantee.

12.3 **Right of Council to claim on Guarantee**

- 12.3.1 The Developer agrees that Council may make an appropriation from the Guarantee (and the proceeds of the Guarantee, including any interest earned in respect of such proceeds) at any time, without notice to the Developer, in such amount as Council, acting reasonably, thinks appropriate if:
- (a) the Developer fails to comply with clause 6.1 (payment of Development Contribution);
 - (b) an Insolvency Event occurs in respect of the Developer;
 - (c) Council incurs or reasonably expects to incur any other expense or liability in exercising its rights and powers under this document.
- 12.3.2 Any amount of the Guarantee appropriated by Council in accordance with clause 12.2 must be applied only towards any or all of:
- (a) the costs and expenses incurred by Council rectifying any default by the Developer under this document;
 - (b) the Public Purpose; and
 - (c) ensuring due and proper performance of the obligations of the Developer under this document.
- 12.3.3 The Developer is not entitled to, and must not seek, an injunction against either Council or the issuer of the Guarantee (if applicable) preventing a demand or payment under the Guarantee (whether the demand extends to the whole of the Guarantee or part thereof) or the use to which the proceeds of such a demand can be put.

12.4 **Top-up and return of Guarantee**

- 12.4.1 If Council calls upon the Guarantee in accordance with this clause 12 then the Developer must immediately provide to Council a replacement Guarantee to ensure that, at all times until the Guarantee is released in accordance with paragraph 12.4.2, Council is in possession of a Guarantee for a face value equivalent to the Guarantee Amount.
- 12.4.2 If:
- (a) the monies secured by the Guarantee have not been expended;
 - (b) the Developer has paid the Development Contribution in accordance with clause 6;

- (c) the Developer has paid Council's legal costs in accordance with clause 15; and
 - (d) the Developer has fulfilled its other obligations under this Agreement,
- then Council will promptly return the Guarantee to the Developer following the issue of a notice pursuant to clause 6.3(a)(i) of this document.

12.5 Trusts and interest

If Council has called up the Guarantee and holds surplus funds after the Developer's default has been remedied, Council:

- 12.5.1 may hold that surplus as a security deposit until the Developer replaces the Guarantee for the full Guarantee Amount; and
- 12.5.2 must provide the surplus to the Developer promptly after it receives the replacement Guarantee.

13. Notices

13.1 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:

- 13.1.1 delivered or posted to that party at its address set out below; or
- 13.1.2 faxed or emailed to that Party at its email address set out below.

Council Central Coast Council
Attention: The Chief Executive Officer
Address: 49 Mann Street, Gosford, NSW 2250
Email: ask@centralcoast.nsw.gov.au

Developer James M Ryan and Veronica P Ryan
Address: 2 Collingwood Drive, Matcham, NSW 2250
Email: [insert]

13.2 If a Party gives the other Party three 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 the other Party if it is delivered, posted or faxed to that address or fax number as notified.

13.3 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, five Business Days after it is posted; and
- (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.

13.4 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 5.00pm 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.

14. Assignment and Dealings

- 14.1 The Developer agrees that it will not Deal with, transfer, mortgage or otherwise encumber any interest in the Land, or assign or novate any rights or obligations under this Agreement, to a third party (**Third Party**) unless:
- 14.1.1 Council has given its prior written consent to the proposed assignment or Dealing;
 - 14.1.2 the Third Party has, at no cost to Council, entered into an agreement with the Developer and Council in which the Third Party agrees to be bound by the Agreement as if they were a party to the original Agreement; and
 - 14.1.3 the Developer is not in breach of the Agreement.
- 14.2 The Developer agrees that it will not lodge any caveat or other instrument upon the title of the Land which may prohibit or hinder registration of this Agreement.

15. Legal costs

- 15.1 The Developer agrees to pay or reimburse the costs of the Council, as follows:
- 15.1.1 negotiation, preparation and execution of this Agreement, and
 - 15.1.2 all costs associated with the registration of this Agreement in accordance with clause 7;
- within 14 Business Days after receipt of a tax invoice from the Council.
- 15.2 The Developer must pay its own legal costs and expenses in relation to the negotiation, preparation and execution of this Agreement and other documents referred to in it.

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 effect, 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 provided that the dispute resolution provisions in clause 11 of this Agreement have first been satisfied.

19. Legislation

In this Agreement, a reference to a statute includes regulations under it and consolidations, amendments, re-enactments or replacements of any of them.

20. Joint and individual liability and benefits

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

21. 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 or compelling the Council to give a consent to a development application applying to the Land.

22. Representations and warranties

22.1 The Developer warrants and represents to Council that:

- 22.1.1 it is the registered proprietor of the Land;
- 22.1.2 it is legally entitled to obtain all consents and approvals that are required by this Agreement and do all things necessary to give effect to this Agreement;
- 22.1.3 it has full legal capacity to own its property and to carry on its business and enter into this Agreement and carry out the obligations contemplated by this Agreement;
- 22.1.4 it is the intention of the Developer to expeditiously commence and complete the Development, if Development Consent is granted; and
- 22.1.5 it holds each Authorisation that is necessary or desirable to:
 - (a) enable it to properly execute this Agreement and to carry out the transactions that this Agreement contemplates;
 - (b) ensure that this Agreement is legal, valid, binding and admissible in evidence; and
 - (c) enable it to properly carry on its business,
 - (d) and it is complying with any conditions to which any of these Authorisations is subject; and

22.2 it is not aware of any matter which may materially affect the Developer's ability to perform its obligations under this Agreement;

- 22.3 neither its execution of this Agreement, nor the carrying out by it of the transactions that it contemplates, does or will:
- 22.3.1 contravene any Law to which it or any of its property is subject or any order of any Authority that is binding on it or any of its property;
- 22.3.2 contravene any Authorisation.

23. General interpretation

In this Agreement:

- 23.1 a reference to:
- 23.1.1 this or other document includes the document as varied or replaced regardless of any change in the identity of the Parties;
- 23.1.2 a clause, schedule, appendix or annexure is a reference to a clause, schedule, appendix or annexure in or to this Agreement all of which are deemed part of this Agreement;
- 23.1.3 writing includes all modes of representing or reproducing words in a legible, permanent and visible form;
- 23.1.4 a person includes a firm, partnership, joint venture, association, corporation or other corporate body;
- 23.1.5 a person includes the legal personal representatives, successors and permitted assigns of that person;
- 23.1.6 the singular includes the plural and vice versa;
- 23.1.7 a gender includes the other genders; and
- 23.1.8 any body which no longer exists or has been reconstituted, renamed, replaced or whose powers or functions have been removed or transferred to another body or agency, is a reference to the body which most closely serves the purposes or objects of the first-mentioned body.
- 23.2 headings and sub-headings are inserted for ease of reference only and do not affect the interpretation of this Agreement;
- 23.3 where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning; and
- 23.4 where the expression including or includes is used it means 'including but not limited to' or 'including without limitation'.

24. 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.

25. 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 or any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

26. GST

26.1 Definitions

In this clause:

26.1.1 words and expressions that are not defined in this Agreement, but which have a defined meaning in the GST Law have the same meaning as in the GST Law; and

26.1.2 **GST Law** has the meaning given to that term in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

26.2 GST exclusive

Except as otherwise provided in this Agreement, all consideration payable under this Agreement in relation to any supply is exclusive of GST.

26.3 Division 81 and 82 of GST Law

To the extent that Divisions 81 and 82 of the GST Law apply to a supply made under this Agreement:

26.3.1 no additional amount will be payable by a Party on account of GST; and

26.3.2 no tax invoices will be exchanged between the Parties.

26.4 Increase in consideration

Subject to clause 20.3, if GST is payable in respect of any supply made by a supplier under this Agreement (GST Amount), the recipient must pay to the supplier an amount equal to the GST payable on the supply. Subject to clause 20.5, the recipient must pay the GST Amount at the same time and in the same manner as the consideration for the supply is to be provided under this Agreement.

26.5 Tax invoice

The supplier must provide a tax invoice to the recipient before the supplier will be entitled to payment of the GST Amount under clause 20.3.

26.6 Reimbursements

If this Agreement requires a Party to pay, reimburse or contribute to any expense, loss or outgoing suffered or incurred by another Party, the amount which the first Party must pay, reimburse or contribute is the sum of:

26.6.1 the amount of the payment, reimbursement or contribution, less any input tax credit in respect of the payment, reimbursement or contribution to which the other Party is entitled; and

26.6.2 if the payment, reimbursement or contribution is subject to GST, an amount equal to that GST.

26.7 Adjustment events

If an adjustment event occurs in relation to a taxable supply under this Agreement:

26.7.1 the supplier must issue an adjustment note to the recipient within 7 days after becoming aware of the adjustment; and

26.7.2 any payment necessary to give effect to that adjustment must be made within 7 days after the date of receipt of the adjustment note.

27. Explanatory note

27.1 Appendix 1 contains the Explanatory Note relating to this Agreement required by clause 25E of the Regulation.

27.2 Pursuant to clause 25E (7) of the Regulation, the Parties agree that the Explanatory Note in Appendix 1 is not to be used to assist in construing this Agreement.

28. Amendment of this Agreement

28.1 Any modification or variation to of this Agreement will be of no force or effect unless it is in writing and signed by the Parties to this Agreement, in accordance with section 7.5 of the Act.

29. Execution of Agreement

EXECUTED as an agreement in accordance with section 7.4 of the *Environmental Planning and Assessment Act 1979*:

Date:

Executed for and on behalf of Central Coast Council:

Signature of Chief Executive Officer, Central Coast Council

Signature of Witness

Name

Executed for and behalf of James M Ryan & Veronica P Ryan

Name

Name

Signature

Signature

Name of Witness

Signature of Witness

Schedule 1 Requirements under the Act and Regulation

(Clause 2)

The below table summarises how this Agreement complies with the Act and Regulation.

Item	Section of Act or Regulation	Provision/clause of this Agreement
1.	<p>Planning instrument and/or development application (section 7.4 of the Act)</p> <p>The Developer has:</p> <p>(a) sought a change to an environmental planning instrument;</p> <p>(b) made, or proposes to make, a Development Application; or</p> <p>(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.</p>	<p>(a) Yes</p> <p>(b) Yes</p> <p>(c) No</p>
2.	<p>Description of land to which this document applies (section 7.4(3)(a) of the Act)</p>	Clause 1 – definition of Land, being Lot 2 DP 561283
3.	<p>Description of change to the environmental planning instrument to which this document applies and/or the development to which this document applies (section 7.4(3)(b) of the Act)</p>	<p>The development to which this document applies is the Development, as defined in clause 1, being subdivision of the Land into 2 x 1 hectare lots.</p> <p>The changes to the Central Coast LEP to which this document applies are as set out in the 2019 Altered Gateway Determination.</p>
4.	<p>The scope, timing and manner of delivery of the provision to be made by the Developer required by this document (section 7.4(3)(c) of the Act)</p>	Clause 6 – payment of the Development Contribution of \$92,688.75 to Council (as indexed) prior to the issue of a subdivision certificate for the subdivision of the land.
5.	<p>Applicability of sections 7.11 or 7.12 of the Act (section 7.4(3)(d) of the Act)</p>	<p>Clause 5 of this Agreement.</p> <p>The application of sections 7.11 or 7.12 of the Act is not excluded in respect of the Development and for the avoidance of doubt, contributions (if any) under sections 7.11, 7.12 or 7.24 will be required to be paid.</p>
6.	<p>Applicability of section 7.24 of the Act (section 7.4(3)(d) of the Act)</p>	<p>Clause 5 of this Agreement.</p> <p>The application of section 7.24 of the Act is not excluded in respect of the Development and for the avoidance of doubt, contributions (if any) under section 7.24 will be required to be paid.</p>
7.	<p>Consideration of benefits under this document if section 7.11 applies (section 7.4(3)(e) of the Act)</p>	<p>Clause 5 of this Agreement.</p> <p>The benefits are not to be taken into consideration in determining a development contribution under section 7.11 of the Act.</p>
8.	<p>Mechanism for Dispute Resolution (section 7.4(3)(f) of the Act)</p>	Clause 11

Item	Section of Act or Regulation	Provision/clause of this Agreement
9.	Enforcement of this document (section 7.4(3)(g) of the Act)	Clause 11
10.	No obligation to grant consent or exercise functions (section 7.4(9) of the Act)	Clause 21
11.	Registration of this document (section 7.6 of the Act)	Clause 7
12.	Whether certain requirements of this document must be complied with before a construction certificate is issued (clause 25E(2)(g) of the Regulation)	Not required – the Development Contribution must be paid prior to the issue of a subdivision certificate for the subdivision of the land.
13.	Whether certain requirements of this document must be complied with before a subdivision certificate is issued (clause 25E(2)(g) of the Regulation)	Yes – the Development Contribution must be paid prior to the issue of a subdivision certificate for the subdivision of the land.
14.	Whether certain requirements of this document must be complied with before an occupation certificate is issued (clause 25E(2)(g) of the Regulation)	Not required – the Development Contribution must be paid prior to the issue of a subdivision certificate for the subdivision of the land.
15.	Whether the explanatory note that accompanied exhibition of this document may be used to assist in construing this document (clause 25E(7) of the Regulation)	Clause 27.2

Appendix 1

(Clause 27)

EXPLANATORY NOTE

Environmental Planning and Assessment Regulation 2000 (clause 25E)

Draft Planning Agreement

Under 7.4 of the *Environmental Planning and Assessment Act 1979*

Parties

Central Coast Council (ABN 73 149 644 003) of 49 Mann Street Gosford, NSW (**Council**)

James M Ryan and Veronica P Ryan of 2 Collingwood Drive, Matcham, NSW (**the Developer**)

Description of the Land to which the Draft Planning Agreement Applies

Lot 2 DP 561283.

Description of Proposed Development

Development means the subdivision of the Land.

Summary of Objectives, Nature and Effect of the Draft Planning Agreement

Objectives of the Draft Planning Agreement (cl 25E(1)(a))

The objective of the Draft Planning Agreement is to secure a material public benefit in the form of a monetary contribution for the purchase of, or the embellishment of, COSS land.

Nature of the draft Planning Agreement (cl 25E(1)(a))

The draft Planning Agreement is a planning agreement under section 7.4 of the Act between the Council and the Developer. The Draft Planning Agreement makes provisions for the contribution of money to Council for the purchase of land for inclusion in the COSS or embellishment of existing land within the COSS as a material public benefit.

Effect of the Draft Planning Agreement (cl 25E(1)(a))

The Draft Planning Agreement:

- relates to a change to an environmental planning instrument to enable a development application to be made to carry out the Development;
- relates to the carrying out of the Development on the Land;
- requires the Developer to contribute an amount of money for the purchase of, or the embellishment of COSS land as a material public benefit;
- is to be registered on the title to the Land;
- provides dispute resolution methods for a dispute under this agreement; and

- provides that the Agreement is governed by the law of New South Wales.

Assessment of the Merits of the Draft Planning Agreement

Planning Purposes Served by the Draft Planning Agreement (cl 25E(2)(e))

In accordance with 7.4 (2) of the Act, the Draft Planning Agreement has the following public purposes:

- the provision of public amenities;
- the protection of the environmental character of the local government area.

The collection of contributions, as required in the Draft Planning Agreement, in exchange for increased subdivision potential is integral to the overall implementation and ongoing management of the COSS. The COSS is public natural open space which is available to the community for use for low key recreational pursuits. Consequently, the Draft Planning Agreement provides the best means of achieving the public purposes set out above.

How the Draft Planning Agreement Promotes the Public Interest (cl 25E(2)(a))

The COSS is a network of reserves supporting native vegetation that are managed by Council for environmental and community values. The COSS maintains areas of native vegetation and wildlife habitat on public land. It also has the effect of protecting Aboriginal cultural sites and non-Aboriginal heritage items as well as local water catchments and geological formations. In addition, the retention of native vegetation on the ridgelines provides a green backdrop to many of the urban areas and ensures that most of the residents live in close proximity to natural environments.

The draft Planning Agreement requires payment of monies towards the acquisition and/or embellishment of the COSS. Such funds are important for the ongoing maintenance of the COSS and purchase of land identified in the COSS Strategy (2010) and hence promotes the public interest.

How the Draft Planning Agreement promotes the objects of the Act (cl 25E(2)(c))

The Draft Planning Agreement promotes the objects of the Act by:

- promoting the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources;
- facilitating ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment;
- facilitating the orderly and economic use and development of land;
- protecting the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats.

The Draft Planning Agreement provides Council with funds to assist in the purchase and/or embellishment of the COSS which is a public asset for use by all in the community. The protection of this environmentally significant land in its natural state is considered to contribute to the conservation of natural resources and the protection of native fauna and flora, ecological communities and habitat.

How the Draft Planning Agreement Promotes the Council's Charter (cl 25E(2)(d))

The Draft Planning Agreement promotes the elements of the Council's Charter by:

- enabling the provision of adequate, equitable and appropriate services and facilities for the community
- enabling the proper management, development and enhancement of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development
- enabling it as the custodian and trustee of public assets to effectively plan for, account for and manage the assets for which it is responsible
- keeping the local community and the State government (and through it the wider community) informed about its activities

The Draft Planning Agreement provides Council with funds to assist in the acquisition and/or management of the COSS which is an extensive area of native vegetation and wildlife habitat. The protection of such land in its natural state is an ecologically sustainable use of the land and an effective and appropriate management tool for a significant natural bushland asset available for use by all in the community.

How the Draft Planning Agreement Conforms with Council's Capital Works Program (cl 25E(2)(f))

Council's Operational Plan identifies the following objectives under the focus area of Cherished and Protected Natural Beauty:

F1 Protect our rich environmental heritage by conserving beaches, waterways, bushland, wildlife corridors and inland areas and the diversity of local native species.

F2 Promote greening and ensure the wellbeing of communities through the protection of local bushland, urban trees, tree canopies and expansion of the COSS.

The Delivery Program consistent with these objectives is:

To identify high priority conservation value lands within Central Coast Council's LGA to:

- a) Preserve and enhance local and regional biodiversity
- b) Invest in generating biodiversity credits on Council land that:
 - i. Serve as a valuable financial commodity for Council
 - ii. Enable progression of priority Council projects under the Biodiversity Offset Scheme
- c) Expand and strengthen the COSS network

The draft Planning Agreement conforms with Council's current capital works program as it includes expanding and strengthening the COSS.

Whether the Draft Planning Agreement specifies that certain requirements be complied with before issuing a Construction Certificate, Subdivision Certificate or Occupation Certificate (cl 25E(2)(g))

The Draft Planning Agreement specifies that the Developer must pay the required Development Contributions prior to the issue of a subdivision certificate for the subdivision of the land.