



**Lot 13 DP 1188967, No 83 Menangle  
Street, Picton**

**Planning Agreement**

**Under s93F of the Environmental Planning and Assessment  
Act 1979**

TRIM  
EH

**Wollondilly Shire Council**

**&**

**Deemkies Pty Ltd**

SCANNED

Dated *13 November* 2017

WOLLONDILLY SHIRE COUNCIL	
TRIM NO.	<i>8335</i>
PROP. No.	
- 6 NOV 2017	
AUTH. No.	
ASSIGNED TO:	<i>K. Carter</i>

## **Planning Agreement**

### **Parties**

**Wollondilly Shire Council ABN 93 723 245 808** of 62-64 Menangle Street, Picton, New South Wales 2571 (**Council**)

**Deemkies Pty Limited ABN 71 593 183 027** of 55 Victoria Street, Potts Point, New South Wales 2011 (**Owner**)

### **Background**

- A. The Owner wishes to carry out the construction of the Development.
- B. On 14 January 2013, the Council approved a Development Application for the Development on the Land under the provisions of *Wollondilly Local Environmental Plan 1991*.
- C. Council is seeking to acquire the RE1 Land.
- D. The Parties agree that the Owner will dedicate the RE1 Land for public open space, which forms part of the Stonequarry Creek Riparian Corridor. The total area of land to be dedicated is 1074m<sup>2</sup> (refer to plan at Schedule 2). Dedication of the RE1 Land is in accordance with Council's "*Dedication of Land*" Policy PLA0036.
- E. Condition 23(1) of the Development Consent for the Development requires the payment of development contributions under s94 of the Act.
- F. The Owner is desirous to dedicate the RE1 Land to Council in part satisfaction of condition 23(1).
- G. The Owner proposes to lodge an application pursuant to s96 of the Act to modify the Development Consent for the Development to vary condition 23(1). The proposed modification, if granted will permit the dedication of the RE1 Land and the consequent reduction of the s94 Contributions payable by the Owner by the Reduction Amount.
- H. The Parties have agreed to enter into this Deed for the purpose of setting out the terms and conditions upon which the Owner will dedicate the RE1 Land to the Council and it will reduce the amount of the contributions stated in Condition 23(1) of Development Consent to the Development.

- I. Until the Deed operates, this agreement constitutes the Owner's irrevocable offer to make a dedication of the land in connection with the Development Consent to the Development, on the terms and conditions set out in this Deed.

## **Operative provisions**

### 1 Definitions & Interpretation

- 1.1 In this agreement the following definitions apply:

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

**Charge Land** means the RE1 Land.

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

**Construction Certificate** has the same meaning as the Act.

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

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

**Development** means the construction of a staged 36 residential units and strata title subdivision approved pursuant to Development Application ID788/2005 as amended.

**Development Application** has the same meaning as in the Act.

**Development Consent** has the same meaning as in the Act, and includes a development consent as modified from time to time in accordance with the Act.

**Development Contribution** means a monetary contribution, the dedication of land free of cost, the carrying out of a Council Works, or the provision of any other material public benefit, or any combination of them, to be used for, or applied towards, a public purpose.

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

**Drainage Easement** means the easement for drainage that is 3m wide through the RE1 Land.

**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.

**Just Terms Act** means the *Land Acquisition (Just Terms Compensation) Act 1991*.

**Land** means the land legally described as Lot 13 in DP 1188967, No 83 Menangle Street, Picton and shown in Schedule 1.

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

**Public land** has the same meaning as in the *Local Government Act 1993*.

**Note.** The term is defined as follows:

**public land** means any land (including a public reserve) vested in or under the control of the council, but does not include:

- (a) a public road, or
- (b) land to which the *Crown Lands Act 1989* applies, or
- (c) a common, or
- (d) land subject to the *Trustees of Schools of Arts Enabling Act 1902*.

**Public Reserve** has the same meaning as in the *Local Government Act 1993*.

**RE1 Land** means that part of the Land to be dedicated to Council and shown in Green on the map attached to Schedule 2.

**Reduction Amount** means an amount of \$321,500.00, being an amount agreed between the parties based on 2 independent valuations of the RE1 Land.

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

**S94 Contribution** means a monetary contribution or the dedication of land free of costs pursuant to s94 of the Act.

- 1.2 In the interpretation of this agreement, 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 agreement.
  - 1.2.2 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.
  - 1.2.3 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.
  - 1.2.4 A reference in this agreement to dollars or \$ means Australian dollars and all amounts payable under this agreement are payable in Australian dollars.
  - 1.2.5 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.
  - 1.2.6 A reference in this agreement to any agreement, deed or agreement is to that agreement, deed or agreement 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 agreement.
  - 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 agreement includes the agreement recorded in this agreement.
- 1.2.13 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.
- 1.2.14 Any schedules, appendices and attachments form part of this agreement.

**2 Application of this Deed**

- 2.1 This Deed applies to the Development and the Land.

**3 Commencement**

- 3.1 This Deed commences and has force and effect on and from the date upon the grant of consent to the modification application under s96 of the Act to modify condition 23(1) of the Development Consent to the Development.

**4 Status of this agreement**

- 4.1 Until the Deed operates, this agreement constitutes the Owner's irrevocable offer to enter into the Deed in accordance with the Development Consent to the Development, as amended.
- 4.2 The Deed operates only if:
  - 4.2.1 the carrying out of the Development is subject to a condition imposed under s93I(3) of the Act requiring this Deed to be entered into; and
  - 4.2.2 the Deed is:
    - (a) executed by both Parties; or
    - (b) each party has executed separate counterparts of this Deed and exchanged counterparts.
- 4.3 This Deed does not exclude:
  - 4.3.1 the application of s94 of the Act to the Development,

- 4.3.2 the application of s94A of the Act to the Development,
- 4.3.3 the application of s94EF of the Act to the Development.

**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 Surrender of right of appeal, etc**

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

**7 Land Dedication**

- 7.1 The Owner must dedicate the RE1 Land to Council prior to the issue of a Construction Certificate for the Development.
- 7.2 Except as modified by this Deed, the Owner will pay the s94 Contributions as set out in the Development Consent to the Development.
- 7.3 Upon dedication of the RE1 Land the s94 Contribution payable pursuant to the Act and set out in condition 23(1) of the Development Consent to the Development shall be reduced by the Reduction Amount.
- 7.4 This dedication of the RE1 Land is conditional upon the Owner preparing and procuring the registration of:
  - 7.4.1 a plan of subdivision to create the RE1 Land generally in accordance with Schedule 2, and
  - 7.4.2 an instrument pursuant to s88B of the *Conveyancing Act 1919* creating the Drainage Easement on the RE1 Land generally in accordance the map attached to Schedule 2.

**8 Dedication**

- 8.1 Upon notification of registration of the deposited plan and s88B instrument referred to in clause 7.4, Council will confirm in writing to the Owner that the required s94 Contribution stated in Condition 23(1) of the Development Consent to the Development will be reduced by the Reduction Amount.
- 8.2 Council is not required to pay any compensation in respect of the dedication of the RE1 Land.
- 8.3 The Owner must ensure that the RE1 Land is dedicated to Council free of all encumbrances and affectations, other than the Drainage Easement.

**9 Condition of the RE1 Land**

- 9.1 The Owner warrants that the RE1 Land, as at the time of registration of the deposited plan and s88B instrument referred to in clause 7.4, is in a condition that is fit for the purpose of being used as a Public Reserve.
- 9.2 The Council acknowledges the existence of the Drainage Easement.

**10 Licence for Access**

- 10.1 The Owner will grant to Council a licence, at no cost to Council, and procure the agreement of future owners agree to such a licence, for Council to enter the Land:
- 10.1.1 up to 20 times per year for the purpose of gaining access to the RE1 Land to enable the RE1 Land to be maintained, and
- 10.1.2 in the event of any emergency,
- until such time as alternative access is provided along the Stonequarry Creek corridor.
- 10.2 The licence will permit pedestrian and vehicular access for vehicles such as a small truck, utility or ride-on mower access and shall continue until Council notifies the Owner or the owners of the Land at the time, that alternative permanent access to the RE1 Land has been obtained by Council and



access through the Land is no longer required. This right of access does not permit the general public access through the Land.

**11 Costs**

11.1 The Owner is to pay Council's reasonable costs in regards to the drafting and negotiation of the Deed and any valuation report that is required in relation to the Reduction Amount.

**12 Further agreements relating to this Deed**

12.1 The Parties may, at any time, enter into such other agreements relating to the subject-matter of this Deed that they consider are necessary or desirable in order to give effect to this Deed.

12.2 An agreement referred to in clause 12.1 is not to be inconsistent with this Deed.

**13 Breach of obligations**

13.1 If the Council reasonably considers that the Owner is in breach of any obligation under this Deed, it may give a written notice to the Owner:

13.1.1 specifying the nature and extent of the breach,

13.1.2 requiring the Owner to:

(a) rectify the breach if it reasonably considers it is capable of rectification, or

(b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification,

13.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.

13.2 Any costs incurred by the Council in remedying a breach in accordance with clause 13.1 may be recovered by the Council as a debt due in a court of competent jurisdiction.

13.3 For the purpose of clause 13.2, the Council's costs of remedying a breach the subject of a notice given under clause 13.1 include, but are not limited to:

13.3.1 the costs of the Council's servants, agents and contractors reasonably incurred for that purpose,

13.3.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and

13.3.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.

13.4 Nothing in this clause 13 prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Deed by the Owner, including but not limited to seeking relief in an appropriate court.

#### **14 Enforcement**

14.1 Without limiting any other remedies available to the Parties, this Deed may be enforced by either Party in any court of competent jurisdiction.

14.2 For the avoidance of doubt, nothing in this Deed prevents:

14.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this agreement or any matter to which this Deed relates,

14.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Deed or any matter to which this Deed relates.

#### **15 Registration of this Deed**

15.1 The Parties agree to register this Deed for the purposes of s93H(1) of the Act.

15.2 Not later than 10 days after the execution of this Deed, the Owner is to deliver to the Council in registrable form:

15.2.1 an instrument requesting registration of this Deed on the title to the Land duly executed by the Owner, and

15.2.2 the written irrevocable consent of each person referred to in s93H(1) of the Act to that registration.

15.3 The Owner is to do such other things as are reasonably necessary to enable registration of this Deed to occur.

15.4 The Parties are to do such things as are reasonably necessary to remove any notation relating to this Deed from the title to the Land once the Owner has completed its obligations under this Deed to the reasonable satisfaction of the Council or this Deed is terminated or otherwise comes to an end for any other reason.

**16 Grant of Charge**

16.1 On the date of execution of this Deed, the Owner grants to the Council a fixed and specific charge over the Owner's right, title and interest in the Charge Land, to secure:

16.1.1 the performance of the Owner's obligation under this Deed, and

16.1.2 any damages that may be payable to the Council, or any costs which may be incurred by the Council in the event of a breach of this Deed by the Owner.

16.2 Upon the execution of this Deed, the Owner is to give to the Council an instrument in registrable form under the *Real Property Act 1900* duly executed by the Owner that is effective to register the Charge on the title to the Charge Land.

16.3 If the Charge Land comprises part only of a lot in a deposited plan at the time that the instrument referred to in clause 16.2 is required to be given, the Owner is to give the Council an instrument that charges a greater area of the Land which includes the whole of the Charge Land.

16.4 The Owner is to do all other things necessary, including execute all other documents, to allow for the registration of the Charge.

**17 Caveat and Discharge**

17.1 The Owner agrees that:

17.1.1 the Council may lodge a caveat on the title of the Land to which the Charge applies,

17.1.2 the Council is to release the caveat from any part of the Land to which the Charge applies that is not the Charge Land once that part of the Land is contained in a separate lot to the Charge Land, and

17.1.3 the Council cannot be required to have the caveat removed from the title to the Charge Land other than in accordance with clause 17.2.

17.2 The Council is to release the Charge and withdraw the caveat from the title to the Land on satisfaction by the Owner of its obligations under this Deed.

17.3 For the purposes of clause 17.2 the Council is to use its reasonable endeavours to provide any documentation necessary to enable the release of the Charge and withdrawal of the caveat from the title of the Land.

17.4 Nothing in this Deed prevents the registration of a plan of subdivision in respect of the Charge Land.

**18 Acquisition of land required to be dedicated**

18.1 If the Owner does not dedicate the RE1 Land under this Deed at the time at which it is required to be dedicated, the Owner consents to the Council compulsorily acquiring the land for compensation in the amount of \$1 without having to follow the pre-acquisition procedure under the Just Terms Act.

18.2 The Council is to only acquire land pursuant to clause 18.1 if it considers it reasonable to do so having regard to the circumstances surrounding the failure by the Owner to dedicate the land required to be dedicated under this Deed.

18.3 Clause 18.1 constitutes an agreement for the purposes of s30 of the Just Terms Act.

18.4 If, as a result of the acquisition referred to in clause 18.1, the Council is required to pay compensation to any person other than the Owner the Owner is to reimburse the Council that amount, upon a written request being made by the Council.

18.5 The Owner indemnifies and keeps indemnified the Council against all Claims made against the Council as a result of any acquisition by the Council of the whole or any part of the land concerned except if, and to the extent that, the Claim arises because of the Council's negligence or default.

- 18.6 The Owner is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 18, including without limitation:
- 18.6.1 signing any documents or forms,
  - 18.6.2 giving land owner's consent for lodgement of any Development Application,
  - 18.6.3 producing certificates of title to the Registrar-General under the *Real Property Act 1900*, and
  - 18.6.4 paying the Council's costs arising under this clause 18.

**19 Sale of the Land**

- 19.1 The Owner must not to sell, transfer or otherwise deal with the Land or part of the Land unless:
- 19.1.1 The Owner has, at no cost to the Council, first procured the execution by the person with whom the Owner are dealing of a deed with the Council (on terms reasonably acceptable to the Council, including in respect of the provision of security) under which that person agrees to be bound by this agreement in the same way as the Owner, and
  - 19.1.2 the Council, by notice in writing to the Owner, has stated that evidence satisfactory to the Council has been produced by the Owner to show that the person with whom the Owner is dealing is reasonably capable of performing its obligations under this Deed,
  - 19.1.3 the Owner is not in breach of this Deed,
- 19.2 the Owner remains liable to perform its obligations under this Deed until it has complied with clause 19.1.

**20 Transfer, assignment or novation of rights and obligations by Owner under this agreement**

- 20.1 The Owner must not, assign, novate or otherwise deal with its rights and obligations under this Deed unless:

- 20.1.1 the Owner has, at no cost to the Council, first procured the execution by the person with whom the Owner is dealing of a Deed with the Council (on terms reasonably acceptable to the Council, including in respect of the provision of security) under which that person agrees to perform the Owner's obligations under this agreement, and
- 20.1.2 the Council, by notice in writing to the Owner, has stated that evidence satisfactory to the Council has been produced by the Owner to show that the person with whom the Owner is dealing is reasonably capable of performing its obligations under this agreement, and
- 20.1.3 the Owner is not in breach of this agreement.
- 20.2 The Owner remains liable to perform its obligations under this Deed until it has complied with clause 20.1.

**21 Dispute resolution – expert determination**

- 21.1 This clause applies to a Dispute between any of the Parties to this Deed concerning a matter arising in connection with this Deed that can be determined by an appropriately qualified expert if:
- 21.1.1 the Parties to the Dispute agree that it can be so determined, or
- 21.1.2 the Chief Executive Officer of the professional body that represents persons who appear to have the relevant expertise to determine the Dispute gives a written opinion that the Dispute can be determined by a member of that body.
- 21.2 A Dispute to which this clause applies is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 21.3 If a notice is given under clause 21.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 21.4 If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.

- 21.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 21.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 21.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

## **22 Dispute Resolution - mediation**

- 22.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute to which clause 21 applies.
- 22.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 22.3 If a notice is given under clause 22.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 22.4 If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.
- 22.5 If the Dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the Dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.
- 22.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 22.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

## **23 Release**

- 23.1 The Owner releases the Council from any Claim it may have against the Council arising in connection with the performance of the Owner's obligations

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

**24 Indemnity**

24.1 The Owner indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in connection with the performance of the Owner's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

**25 Annual report by Owner**

25.1 The Owner is to provide to the Council by not later than each anniversary of the date on which this Deed is entered into a report detailing the performance of its obligations under this Deed.

25.2 The report referred is to be in such a form and to address such matters as required by the Council from time to time.

**26 Review of Deed**

26.1 The Parties agree to review this Deed if either party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Deed.

26.2 For the purposes of clause 26.1, the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development.

26.3 For the purposes of addressing any matter arising from a review of this Deed referred to in clause 26.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Deed.

26.4 If this Deed becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that



an enforceable agreement of the same or similar effect to this Deed is entered into.

- 26.5 A failure by a Party to agree to take action requested by the other Party as a consequence of a review referred to in clause 26.1 (but not 26.4) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.

## **27 Notices**

- 27.1 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:
- 27.1.1 delivered or posted to that Party at its address set out in Schedule 3.
  - 27.1.2 faxed to that Party at its fax number set out in Schedule 3.
  - 27.1.3 emailed to that Party at its email address set out in Schedule 3.
- 27.2 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.
- 27.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 27.3.1 delivered, when it is left at the relevant address.
  - 27.3.2 sent by post, 2 business days after it is posted.
  - 27.3.3 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.
- 27.4 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 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

**28 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 agreement, 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.

**29 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.

**30 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.

**31 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.

**32 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.

**33 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.

34 **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.

35 **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.

36 **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.

37 **GST Provisions**

37.1 In this clause:

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

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

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

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

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

- 37.2 Subject to clause 37.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this agreement, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- 37.3 Clause 37.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this agreement to be GST inclusive.
- 37.4 No additional amount shall be payable by the Council under clause 37.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.
- 37.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this agreement by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:
- 37.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;
- 37.5.2 that any amounts payable by the Parties in accordance with clause 37.2 (as limited by clause 37.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 37.6 No payment of any amount pursuant to this clause 37, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 37.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred

by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.

37.8 This clause continues to apply after expiration or termination of this agreement.

**38 Explanatory Note Relating to this agreement**

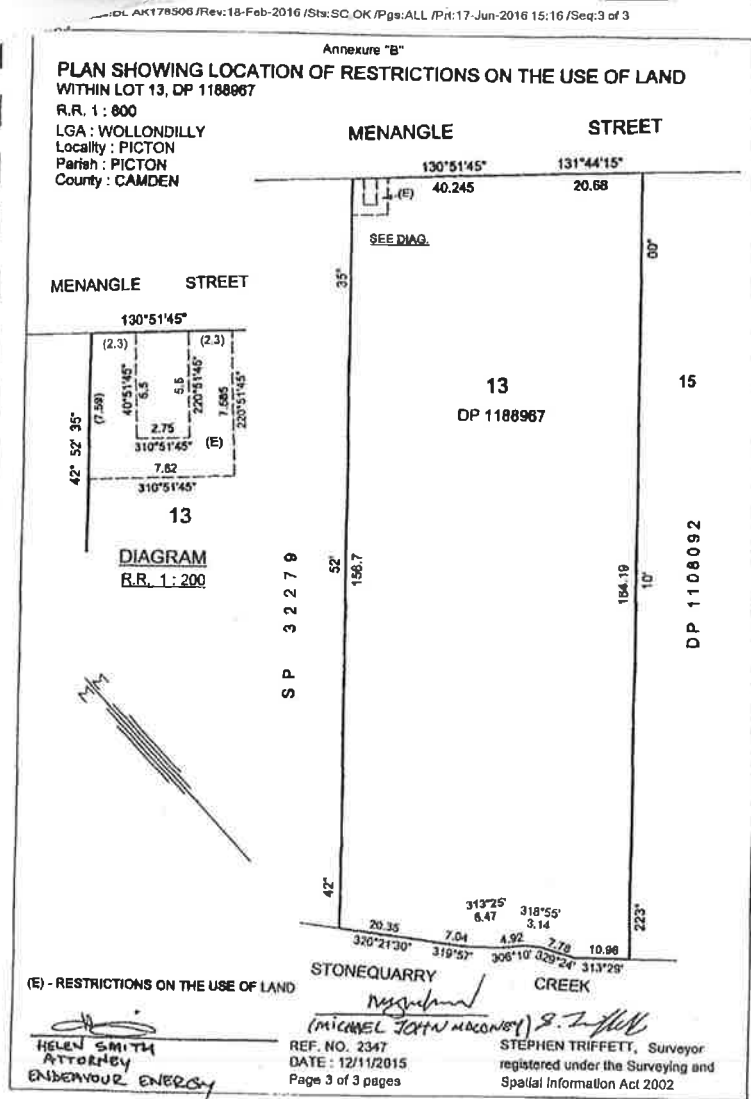
38.1 The Appendix contains the Explanatory Note relating to this Deed required by clause 25E of the Regulation.

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

Schedule 1

(Clause 1.1)

The Land

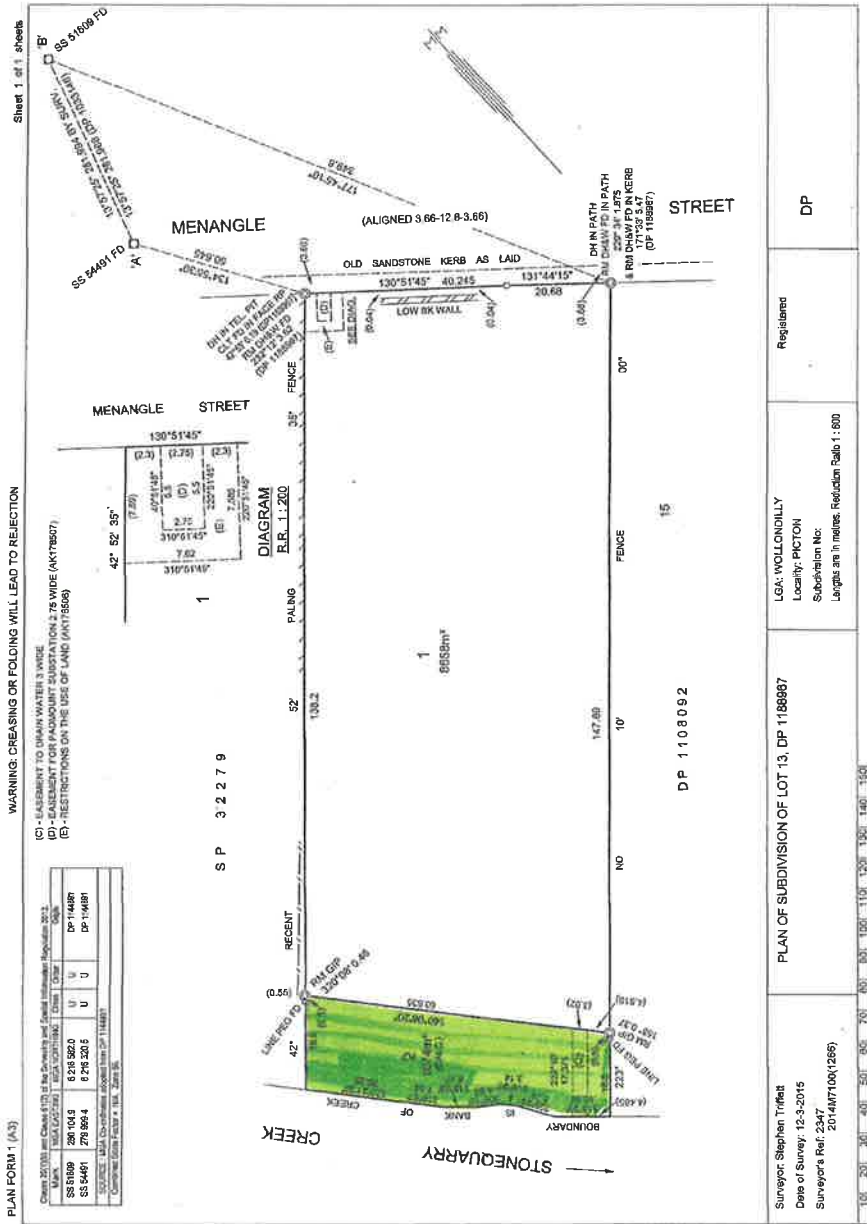


**Schedule 2**

**Subdivision Plan**

PLAN FORM 6 (2013) <span style="float: right;">WARNING: Creasing or folding will lead to rejection</span>	
<b>DEPOSITED PLAN ADMINISTRATION SHEET</b>	
Office Use Only	Sheet 1 of 2 sheet(s)
Registered:	Office Use Only
Title System: TORRENS	
Purpose: SUBDIVISION	
<b>PLAN OF SUBDIVISION OF LOT 13, DP 1188967</b>	LGA: WOLLONDILLY Locality: PICTON Parish: PICTON County: CAMDEN
Crown Lands NSW/Western Lands Office Approval I, ..... (Authorised Officer) in approving this plan certify that all necessary approvals in regard to the allocation of the land shown herein have been given. Signature: ..... Date: ..... File Number: ..... Office: .....	Survey Certificate I, STEPHEN TRIFFETT of 33 Folkes Street, Elderslie, NSW, 2570 a surveyor registered under the <i>Surveying and Spatial Information Act 2002</i> , certify that: *(a) The land shown in the plan was surveyed in accordance with the <i>Surveying and Spatial Information Regulation 2012</i> , is accurate and the survey was completed on 12-3-2015. <del>*(b) The part of the land shown in the plan (*being*excluding ^ ..... ) was surveyed in accordance with the <i>Surveying and Spatial Information Regulation 2012</i>, is accurate and the survey was completed on, ..... the part not surveyed was compiled in accordance with that Regulation. *(c) The land shown in this plan was compiled in accordance with the <i>Surveying and Spatial Information Regulation 2012</i>.</del> Signature: <i>S. Triffett</i> Dated: 16-3-2015 Surveyor ID: 2118 Datum Line: 'A' - 'B' Type: Urban *Strike through if inapplicable. *Specify the land actually surveyed or specify any land shown in the plan that is not the subject of the survey.
Subdivision Certificate I, ..... *Authorised Person*/General Manager*/Accredited Certifier, certify that the provisions of s.109J of the <i>Environmental Planning and Assessment Act 1979</i> have been satisfied in relation to the proposed subdivision, new road or reserve set out herein. Signature: ..... Accreditation number: ..... Consent Authority: ..... Date of endorsement: ..... Subdivision Certificate number: ..... File number: .....  *Strike through if inapplicable.	
Statements of intention to dedicate public roads create public reserves and drainage reserves, acquire/resume land. IT IS INTENDED THAT LOT 2 WILL BE DEDICATED TO WOLLONDILLY SHIRE COUNCIL AS PUBLIC RESERVE.	Plans used in the preparation of survey. DP 1188967
	if space is insufficient continue on PLAN FORM 6A
Signatures, Seals and Section 88B Statements should appear on PLAN FORM 6A	Surveyor's Reference: 2347

Planning Agreement  
Wollondilly Shire Council  
Deemkies Pty Limited





**Schedule 3**

(Clause 27)

**Contact for Notices**

**Council**

Attention: The General Manager  
Address: 62-64 Menangle Street, Picton, New South Wales  
2571  
Fax Number: (02) 46771100

**Owner**

Attention: Mr Michael Moloney  
Address: 55 Victoria Street, Potts Point, New South Wales  
2011

**Planning Agreement  
Wollondilly Shire Council  
Deemkies Pty Limited**

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**Execution**

**Dated:** *13 November* 2017

**Executed as an agreement:**

**On behalf of the Council:**

Signed by **WOLLONDILLY SHIRE COUNCIL** )  
(ABN 93 723 245 808), by the General Manager )  
pursuant to delegation granted pursuant to )  
Council resolution on *18th April, 2017* )  
[        ] )

  
\_\_\_\_\_  
\_\_\_\_\_

Witness *ARuel*  
\_\_\_\_\_

**On behalf of the Owner:**

**Signed for DEEMKIES PTY LIMITED** in  
accordance with section 127 of the  
Corporations Act 2001 (Cth)

\_\_\_\_\_  
\_\_\_\_\_

  
\_\_\_\_\_  
Signature of Sole Director/Secretary

Michael Moloney  
\_\_\_\_\_  
Name of Sole Director/Secretary (print)

## **Appendix 1**

(Clause 38)

*Environmental Planning and Assessment Regulation 2000*

### **Explanatory Note**

#### **Draft Planning Agreement**

Under s93F of the Environmental Planning and Assessment Act 1979

#### **Parties**

**Wollondilly Shire Council** of 62-64 Menangle Street, Picton, New South Wales, 2571 (**Council**)

**Deemkies Pty Limited** of c/- 55 Victoria Street, Potts Point NSW 2011(**Owner**)

#### **1 Description of Subject Land**

Lot 13 in DP 1188967, No 83 Menangle Street, Picton

#### **2 Description of Proposed Change to Environmental Planning Instrument/Development Application**

The planning agreement relates to Development Application numbered **ID788/2005** for the staged 36 residential units and strata subdivision (**Development Application**).

#### **3 Summary of Objectives, Nature and Effect of the Draft Planning Agreement**

The Planning Agreement will allow:

- the dedication of the part of the subject land, which is has an area of 1074m<sup>2</sup> and forms part of the Stonequarry Creek Riparian Corridor (**RE1 Land**), and
- the reduction of the s94 Contribution payable in accordance with condition 23(1) to the Development Consent to the Development Application

**4 Assessment of the Merits of the Draft Planning Agreement**

**4.1 The Planning Purposes Served by the Draft Planning Agreement**

The following planning purposes are served by the proposed agreement:

Dedication of the RE1 Land to the public and provide public access to the Stonequarry Creek environs.

**4.2 How the Draft Planning Agreement Promotes the Public Interest**

The proposed agreement promotes the public interest by addressing the objects of the EP&A Act, LG Act and the Council Charter. It provides certainty for Council through a contractual relationship. The end use of the dedicated land will provide benefits through improved access to public open space along the Stonequarry Creek riparian corridor to the local community.

**4.3 For Planning Authorities:**

**4.3.1 Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities**

N/A

**4.3.2 Other Public Authorities – How the Draft Planning Agreement Promotes the Objects (if any) of the Act under Which it is Constituted**

N/A

**4.3.3 Councils – How the Draft Planning Agreement Promotes the Elements of the Council's Charter**

The following elements of the Council's Charter are promoted by the proposed agreement:

- to provide directly or on behalf of other levels of government, after due consultation, adequate, equitable and appropriate access to public open space for the community and to ensure that the public open space is managed efficiently and effectively;

The contributions made under the proposed agreement will promote improved public access to the Stonequarry Creek environs for existing and future residents and provide an open space corridor network within the Picton Town Centre.

**4.3.4 All Planning Authorities – Whether the Draft Planning Agreement Conforms with the Authority’s Capital Works Program**

The dedication of the RE1 Land is not listed in Council's Capital Works Program, however, the dedication of this land is supported by Council as it will contribute to the provision of a public walkway along Stonequarry Creek, thereby providing some important open space in and adjacent to the Picton town centre;

**4.3.5 All Planning Authorities – Whether the Draft Planning Agreement specifies that certain requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued**

The RE1 Land must be dedicated to Council before a construction certificate is issued in relation to the Development.

**Dated: 2016**

**On behalf of the Council:**

Signed by **WOLLONDILLY SHIRE COUNCIL**, )  
by the General Manager )

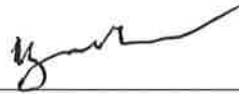
Witness )  
\_\_\_\_\_ )  
\_\_\_\_\_ )

**Planning Agreement  
Wollondilly Shire Council  
Deemkies Pty Limited**

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**On behalf of the Owner:**

**Signed for DEEMKIES PTY LIMITED** in  
accordance with section 127 of the  
Corporations Act 2001 (Cth)



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Signature of Sole Director/Secretary

Michael Moloney

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Name of Sole Director/Secretary (print)