

Dated 25 January 2011

13

Planning agreement

Parties

Wollondilly Shire Council (Council)

McDonald's Australia Limited (Developer)

(ACN 008 496 928)

10

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Planning agreement dated

25/1/2011

Parties

Wollondilly Shire Council
of 62-64 Menangle Street Picton NSW 2571
(Council)

McDonald's Australia Limited ACN 008 496 928
of 21 Central Avenue Thornleigh NSW 2010
(Developer)

Introduction

- A** Development Consent No. 010.2008.00000706.001 dated 16 November 2009 granted consent for the "Demolition of a Service Station and Subsequent Construction of a Restaurant and Drive- Through Facility with Associated Signage, Landscaping and Parking" on the Land.
- B** By a Section 96(1A) modification application dated 16 December 2009 submitted to Council on 19 January 2010, the Developer sought the deletion of condition 10(4), as well as certain other amendments.
- C** On 21 June 2010 the Council determined the section 96(1A) Application and modified various conditions in the Development Consent.
- D** On 19 August 2010 the Developer commenced class 1 appeal proceedings in the Land and Environment Court of NSW (being proceedings 10661 of 2010) in respect of that part of Council's decision on 21 June 2010 to modify development consent No 010.2008.00000706.001 which comprises a decision to include a modified form of condition 10(4) rather than to delete condition 10(4).
- E** Council wishes to install traffic control facilities at the intersection of Argyle, Cliffe and Margaret Streets, Picton which is adjacent to the Land, and wishes the Developer to contribute thereto.
- F** The Developer wishes to contribute towards the carrying out by Council of the design, approval and installation of traffic control facilities at the intersection of Argyle, Cliffe and Margaret Streets, by the payment of a Monetary Contribution to Council as provided for in this Agreement.
- G** This Agreement describes the payment and provides for the manner in which, and the terms upon which, the Developer is to provide the Monetary Contribution.

It is agreed

1 Definitions and interpretation

1.1 Definitions

In this Agreement:

- (1) **Act** means the *Environmental Planning and Assessment Act 1979 (NSW)*.
- (2) **Agreement** means this document signed by the parties.

- (3) **Business Day** means a day that is not a Saturday, Sunday or any other day which is a public holiday or a bank holiday in the place where an act is to be performed or a payment is to be made.
- (4) **Development** means the Demolition of a Service Station and Subsequent Construction of a Restaurant and Drive-Through Facility with Associated Signage, Landscaping and Parking on the Land and all other development on the Land as authorised by the Development Consent.
- (5) **Development Consent** means Development Consent No. 010.2008.00000706.001 dated 16 November 2009 including all modifications of the Development Consent made by Council and the Land and Environment Court.
- (6) **Land** means Lot 1 in DP 717582 and is generally known as 69-71 Argyle Street, Picton NSW.
- (7) **Monetary Contribution** means an unendorsed bank cheque in the sum of \$75,000.00 payable to Council.
- (8) **Regulations** mean the *Environmental Planning and Assessment Regulation 2000* (NSW).

1.2 Interpretation

- (1) Reference to:
 - (a) one gender includes the others;
 - (b) the singular includes the plural and the plural includes the singular;
 - (c) a person includes a body corporate;
 - (d) a party includes the party's executors, administrators, successors and permitted assigns;
 - (e) a thing includes the whole and each part of it separately;
 - (f) a statute, regulation, code or other law or a provision of any of them includes:
 - (i) any amendment or replacement of it; and
 - (ii) another regulation or other statutory instrument made under it, or made under it as amended or replaced; and
 - (g) dollars means Australian dollars unless otherwise stated.
- (2) "Including" and similar expressions are not words of limitation.
- (3) Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
- (4) Headings and any table of contents or index are for convenience only and do not form part of this Agreement or affect its interpretation.

- (5) A provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the Agreement or the inclusion of the provision in the Agreement.
- (6) If an act must be done on a specified day which is not a Business Day, it must be done instead on the next Business Day.

2 Planning agreement under the Act

- 2.1 The parties agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

3 Application of this Agreement

This Agreement applies to the Land and to the Development.

4 Operation and public notice of this Agreement

- 4.1 This Agreement commences on the later of the following two dates:

- (1) The date on which the Development Consent is modified by the Land and Environment Court of NSW in proceedings No. 10661 of 2010 by:
- (a) the deletion of condition 10(4);
 - (b) the imposition of a condition which requires the Developer to enter into this Agreement; and
 - (c) deletion of the note at Advices "B" on page 20 of the Development Consent; and
- (2) The date on which all the parties have signed this Agreement.

- 4.2 Council must give public notice of this Agreement in accordance with the Act and Regulations, in a timely manner.

5 Monetary Contribution to be made by the Developer

- 5.1 The Developer must pay the Monetary Contribution to the Council upon execution of this Agreement by the parties.

6 Application of the Monetary Contribution by the Council

- 6.1 Council must apply the Monetary Contribution towards the carrying out by Council of the design, approval and installation of traffic control facilities at the intersection of Cliffe, Margaret and Argyle Streets, Picton NSW.
- 6.2 Following the expiry of five years from the date of this Agreement and upon written request by the Developer, Council must provide the Developer with a written statement setting out the extent to which Council has expended the Monetary Contribution towards the purpose described in clause 6.1 above.
- 6.3 If the Monetary Contribution or any part of the Monetary Contribution has not been expended by Council within five years of the date of this Agreement towards the purpose described in clause 6.1, the Monetary Contribution or such part of the Monetary

Contribution which has not been expended must be refunded to the Developer by Council without delay.

7 Application of s94, s94A and 94EF of the Act to the Development

- 7.1 This Agreement does not exclude the application of sections 94, 94A or 94EF of the Act to the Development.
- 7.2 The Monetary Contribution is not to be taken into consideration in determining any development contributions payable under section 94 of the Act as there are no section 94 contributions payable under the Act in respect of the Development.

8 Acknowledgement

- 8.1 Council acknowledges that the payment by the Developer of the Monetary Contribution satisfies the request made by Council in its letter dated 23 June 2010 to the Developer for the Developer to contribute towards the design, approval and installation of traffic control facilities at the intersection of Argyle, Cliffe and Margaret Streets Picton.

9 Registration of this Agreement

- 9.1 The parties agree that this Agreement shall not be registered on the title to the Land.

10 Dispute resolution and enforcement

- 10.1 If a dispute arises in connection with this Agreement, a party at any time may commence proceedings in a Court of competent jurisdiction in relation to any dispute or claim arising under or in connection with this Agreement, or to enforce this Agreement.
- 10.2 Having regard to the time for payment of the Monetary Contribution as set out in clause 5, the parties agree that it is unnecessary for this Agreement to require the provision of a bond or guarantee.

11 Confidentiality

- 11.1 The terms of this Agreement are not confidential. This Agreement may be exhibited by either party.
- 11.2 If requested by a party, the other party must:
- (1) not issue, publish or authorise any media release, advertisement or publicity concerning this Agreement without obtaining the prior written consent of the other party; and
 - (2) ensure that its officers, employees, agents, contractors and related companies do the same.
- 11.3 This clause 11 does not apply to any information which:
- (1) is generally available to the public (other than as a result of the wrongful disclosure by a party); or
 - (2) is required to be disclosed by any law.

12 Severability

- 12.1 If any provision in this Agreement is unenforceable, illegal or void or makes this Agreement or any part of it unenforceable, illegal or void, then that provision is severed and the rest of this Agreement remains in force.

13 Goods and services tax

13.1 Definitions

In this clause 13:

- (1) **GST** means GST as defined in *A New Tax System (Goods and Services Tax) Act 1999* as amended (**GST Act**) or any replacement or other relevant legislation and regulations; and
- (2) words or expressions used in this clause which have a particular meaning in the **GST law** (as defined in the GST Act, and also including any applicable legislative determinations and Australian Taxation Office public rulings) have the same meaning, unless the context otherwise requires.

13.2 No taxable supply

The parties believe that there is no GST liability in respect of the payment or provision of the Monetary Contribution because the Monetary Contribution:

- (1) it is not consideration for the grant or modification of the Development Consent by Council or the Land and Environment Court in accordance with section 81-5(2) of the GST Act; and
- (2) the payment of the Monetary Contribution is not a supply by the Developer under section 9-10(4) of the GST Act; and

13.3 If supply is a taxable supply

Despite clause 13.2, to the extent that the Commissioner of Taxation, a court or tribunal determines that any supply made under or in connection with this Agreement is a taxable supply, the GST exclusive consideration otherwise to be paid or provided for that taxable supply is increased by the amount of any GST payable in respect of that taxable supply and that amount must be paid at the same time and in the same manner as the GST exclusive consideration is otherwise to be paid or provided. A party's right to payment under this clause is subject to a valid tax invoice being delivered to the recipient of the taxable supply.

14 Further assurance

- 14.1 Each party must promptly at its own cost do all things (including executing and if necessary delivering all documents) necessary or desirable to give full effect to this Agreement.

15 Entire understanding

15.1 Subject to clause 15.2, this Agreement:

- (1) is the entire agreement and understanding between the parties on everything connected with the subject matter of this Agreement; and

- (2) supersedes any prior agreement or understanding on anything connected with that subject matter.

15.2 The explanatory note prepared in relation to this Agreement under clause 25E(1) of the *Environmental Planning and Assessment Regulation 2000* (NSW) may be used to assist in construing this Agreement.

16 Variation

16.1 An amendment or variation to this Agreement is not effective unless it is in writing and signed by the parties.

17 Waiver

17.1 A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right.

17.2 The exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right.

17.3 A waiver is not effective unless it is in writing.

17.4 Waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

18 Costs and outlays

18.1 Each party must pay its own costs and outlays connected with the negotiation, preparation and execution of this Agreement.

19 Notices

19.1 A notice or other communication connected with this Agreement (**Notice**) has no legal effect unless it is in writing.

19.2 In addition to any other method of service provided by law, the Notice may be:

- (1) sent by prepaid ordinary post to the address for service of the addressee, if the address is in Australia and the Notice is sent from within Australia;
- (2) sent by prepaid airmail to the address for service of the addressee, if the address is outside Australia or if the Notice is sent from outside Australia;
- (3) sent by facsimile to the facsimile number of the addressee; or
- (4) delivered at the address for service of the addressee.

19.3 If a Notice is served by a method which is provided by law but is not provided by clause 19.2, and the service takes place after 5pm on a Business Day, or on a day which is not a Business Day, it must be treated as taking place on the next Business Day.

19.4 A Notice sent or delivered in a manner provided by clause 19.2 must be treated as validly given to and received by the party to which it is addressed even if:

(1) the addressee has been liquidated or deregistered or is absent from the place at which the Notice is delivered or to which it is sent; or

(2) the Notice is returned unclaimed.

19.5 Council's address for service and facsimile number are:

Name : General Manager
Attention : PO Box 21
Address : Picton NSW 2571
Facsimile no : (02) 4677 2339

19.6 Developer's address for service and facsimile number are:

Name : McDonald's Australia Limited
Attention : General Counsel
Address : 21 Central Avenue Thornleigh NSW 2120
Facsimile no : (02) 9875 6568

19.7 A party may change its address for service or facsimile number by giving Notice of that change to each other party.

19.8 If the party to which a Notice is intended to be given consists of more than 1 person then the Notice must be treated as given to that party if given to any of those persons.

19.9 Any Notice by a party may be given and may be signed by its solicitor.

20 Governing law and jurisdiction


20.1 The law of New South Wales governs this Agreement.

20.2 The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and of the Commonwealth of Australia.

Executed as an agreement.


The Common Seal of McDonald's Australia Limited, ACN 008 496 928 was affixed by authority of its board of directors on in the presence of:




Signature of Authorised Person

STUART SPICER
Name of Authorised Person in full
COMPANY SECRETARY

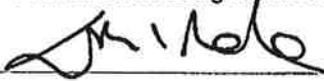
20/01/2011
Date


Signature of Authorised Person
DEAN THOMPSON
ALTERNATIVE SIGNATORY
AS DIRECTED
BY THE BOARD.

Name of Authorised Person in full

20/01/2011
Date

The common seal of Wollondilly Shire Council was hereunto affixed on 25/1/2011 pursuant to resolution no. # of Mc Donald's Australia Limited v Wollondilly Shire Council Council's # Meeting Minutes made on # Land and Environment Court Proceedings No. 10661 of 2010.





General Manager

Mayor

Print Name LES McMAHON

Print Name Michael Banasik

Explanatory Note

Draft Planning Agreement

Under section 93F of the Environmental Planning & Assessment Act 1979

1. Parties

Wollondilly Shire Council (**Council**)

McDonald's Australia Limited (**Developer**)
(ACN 008 496 928)

2. Description of the Land to which the Draft Planning Agreement Applies

2.1 The Draft Planning Agreement applies to the land described as Lot 1 in DP 717582 and generally known as 69-71 Argyle Street, Picton (**Land**).

3. Description of proposed development

3.1 The proposed development is described as the demolition of a service station and subsequent construction of a restaurant and drive-thru facility and associated signage, landscaping and parking on the Land and other development on the Land.

4. Summary of Objectives, Nature and Affect of the Draft Planning Agreement

4.1 The objective of the Draft Planning Agreement is to provide for:

- (1) the payment of a Monetary Contribution in the sum of \$75,000.00 by the Developer to Council; and
- (2) the use of the Monetary Contribution by Council towards the carrying out by Council of the design, approval and installation of traffic control facilities at the intersection of Cliffe, Margaret and Argyle Streets, Picton, New South Wales.

4.2 Upon the signing of the Planning Agreement, Council will receive \$75,000.00 from the Developer to assist with the funding of traffic control facilities at the intersection of Cliffe, Margaret and Argyle Streets, Picton.

4.3 The Draft Planning Agreement states that if Council does not expend the Monetary Contribution within 5 years of the date of the Planning Agreement, Council will be required to repay the Monetary Contribution to the Developer.

5. Assessments of the merits of the Draft Planning Agreement

5.1 Council wishes to install traffic control facilities at the intersection of Cliffe, Margaret and Argyle Streets to respond to the current and forecast intensification of use of the intersection.

5.2 The payment of the Monetary Contribution which is proposed pursuant the Draft Planning Agreement cannot be required by means of a condition of development consent, as

Council's Development Contributions Plan does not make provision for such a payment to be required as a condition of development consent.

- 5.3 The voluntary offer to pay the monetary contribution by the Developer, if accepted by Council, will assist Council to deliver traffic control facilities at this location.

6. How the Draft Planning Agreement promotes the Public's Interest

- 6.1 The Draft Planning Agreement promotes the public's interest by payment of a monetary contribution which will assist Council in funding the provision of transport infrastructure at an intersection in the vicinity of the Land.
- 6.2 The provision of traffic control facilities at the intersection will enable Council to continue to ensure the safety and wellbeing of pedestrians and motorists in the vicinity of the intersection.
- 6.3 Upgrading of this intersection will also maintain traffic congestion at an acceptable level.

7. For Planning Authorities:

- 7.1 *Development Corporations – How the Draft Planning Agreement promotes its statutory responsibilities*

Not applicable

- 7.2 *Other public authorities – How the Draft Planning Agreement promotes the objectives (if any) of the Act under which it is constituted*

Not applicable

- 7.3 *Councils – How the Draft Planning Agreement promotes the elements of the Council's Charter*

The Draft Planning Agreement is consistent with the following elements of Council's Charter:

- (1) to bear in mind that it is the custodian and trustee of public assets and to effectively plan for, account for and manage the assets for which it is responsible,
- (2) to engage in long-term strategic planning on behalf of the local community,
- (3) to raise funds for local purposes by the fair imposition of rates, charges and fees, by income earned from investments and, when appropriate, by borrowings and grants, and
- (4) to promote and to provide and plan for the needs of children.

This is achieved by consideration of provisions for pedestrians and traffic management in the forward planning of this traffic control facility.

- 7.4 *All Planning Authorities, whether the Draft Planning Agreement conforms with the Authority's Work Program.*

The action relating to major projects in Council's 2010/2011 Council Management Plan includes the establishment of traffic facilities at the intersection of Argyle Street & Cliff Street and the coordination of design and delivery.

Council's draft section 94A Contributions Works Program identifies the upgrade of the intersection at Argyle Street & Cliff St as a Priority 1 project.

8. The planning purpose served by the Draft Planning Agreement

- 8.1 This planning agreement will aid in the provision of a traffic control facility at the intersection of Margaret & Argyle Streets, Picton.