



**Shaw Reynolds**  
Lawyers

**PLANNING AGREEMENT**  
**38-42 Tahmoor Road & 30-36 Progress Street, Tahmoor**

**Wollondilly Shire Council**

and

**BLUENITE Pty Ltd**

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23 May 2019

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This Planning Agreement is made on 23 May 2019

## **Parties**

**Wollondilly Shire Council ABN 93 723 245 808**

**62-64 Menangle Street, PICTON NSW 2571**

('Council')

**BLUENITE Pty Ltd**

7 Vineys Lane, Dural NSW 2158

('Bluenite');

## **Background**

- A. BLUENITE Pty Ltd ('Bluenite') owns the Land.
- B. Bluenite intends to develop the Land and has two development consents from Wollondilly Shire Council ('Council') for that purpose. The approved application proposes the subdivision of land that created two lots (lot 102 and lot 400 in stage 1 and 4). Bluenite intends to modify those consents allowing for amendment to stormwater treatment and creating a total of 125 residential lots.
- C. This Deed records an irrevocable offer by Bluenite to the Council pursuant to s.7.7 of the Act to enter into a planning agreement on the terms set out in this Deed if the modifications to both developments are granted consent.
- D. On the date that the modifications to both development consents becomes operable, this Deed constitutes a planning agreement under s.7.4 of the Act between Bluenite and the Council for provision of development contributions.
- E. The development contributions include:
  - a. Construction of storm water infrastructure; and
  - b. Payment of money to Council to be put towards maintenance of the storm water drainage works in the medium term as set out herein.

## Operative Part

### 1. Definitions and interpretation

#### 1.1 Definitions

In this Deed:

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

**"Approval"** means any approvals, consents, modifications, certificates, Construction Certificates, Subdivision Work Certificates, Occupation Certificates, Complying Development Certificates, permits, endorsements, licenses, conditions or requirements (and any modifications or other variations to them) which may be required by law for the commencement and carrying out, as applicable, of the works associated with provision of the Contributions.

**"Assignment and Dealing Provisions"** means the provisions set out in Schedule 4.

**"Authority"** means any governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity and includes an "accredited certifier" as that term is defined in the Act.

**"Authorised Officer"** means in the case of any Party, a director or secretary or an officer whose title contains the word "manager" or a person performing the functions of any of them, or any other person appointed by that Party to act as an Authorised Officer for the purpose of this Deed.

**"Bank Guarantee"** means an irrevocable and unconditional undertaking by a bank or financial institution approved by the Council to pay an amount or amounts of money to the Council on demand and containing terms and conditions reasonably acceptable to the Council.

**"Business Day"** means any day on which banks are open for business generally in NSW, except for Saturday, Sunday or a day which is a public holiday in NSW.

**"Compliance Certificate"** means a certificate referred to in section 6.4(e)(i) of the Act.

**"Complying Development Certificate"** means a complying development certificate referred to in section 4.27 of the Act.

**"Consent Authority"** means, in relation to an Application, the Authority having the function to determine the Application.

**"Construction Certificate"** means a certificate referred to in section 6.4 of the Act.

**"Construction Contract"** means any contract entered into between Bluenite and a third party, requiring the third party to carry out the Construction Works.

**"Construction Costs"** means the costs of constructing the Construction Works, including costs for design, survey, legal costs, valuations, project management and the costs of obtaining any relevant Approvals.

**"Construction Works"** means the construction works identified in clause 3 of Schedule 2 including building, engineering and construction work as well as associated work such as design and survey work.

**"Contributions"** means the development contributions, being stormwater infrastructure and monetary contributions, as identified in clauses 2 and 3 of Schedule 2.

**"Cost"** means a cost, charge, expense, outgoing, payment, fee or other expenditure of any nature.

**"Council"** means Wollondilly Shire Council.

**"Council's Policy"** means the Wollondilly Shire Council's Planning Agreement Policy - PLA0037, adopted by Council on 19 October 2015.

**"Defect"** means anything that adversely affects or is likely to adversely affect the structural integrity, functionality or use of the Construction Works or any part of them.

**"Defects Liability Period"** means the period of 1 year from the date the Construction Works are completed for the purposes for this Deed..

**"Development"** means the developments or any part of the developments approved in accordance with the Development Consents and any subsequent modification of the Development Consents.

**"Development Application"** has the meaning given to that term under the Act.

**"Development Consents"** means consent to the Development Applications:

- (a) Development Application 010.2014.00000413.001 – Staged Residential Subdivision Creating 43 Lots, Tree Removal, Demolition of Existing Structures & Construction of Roads; and
- (b) Development Application 010.2015.00000318.001 - Staged Residential Subdivision Creating 82 Lots.

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

**"Dispute Resolution Procedures"** means the procedures under Schedule 3.

**"Explanatory Note"** means the explanatory note in relation to the Planning Agreement, as required by Clause 25E of the Regulations, and attached as the Appendix to this Deed.

**"Land"** means the land known as: Lot 4 in DP 262132, Lot 222 in DP 10669, Lot 1 in DP 623127, Lot A in DP 365411, 38-42 Tahmoor Road, Tahmoor and 30-36 Progress Street, Tahmoor being in the Local Government area of Wollondilly.

**"Law"** means

- (a) the common law including principles of equity; and
- (b) the requirements of all statutes, rules, ordinances, codes, regulations, proclamations, by-laws or consents by an Authority,
- (c) presently applying or as they may apply in the future.

**"Legislation"** means any statute, rule, ordinance, code, regulation, proclamation, bylaw or consent by an Authority.

**"Modification Applications"** means the applications lodged with the Council on 20/02/2017 and 22/02/2017 to amend DA 318/2015 and DA 413/2014 respectively for the purpose of amending the stormwater treatment

**"Party"** means a party to this Deed, including their respective successors and assigns.

**"Planning Agreement"** means the provisions of this Deed under which Bluenite is required to make the Contributions and includes any provisions that are incidental or supplementary to those provisions.

**"Real Property Act"** means the *Real Property Act 1900* (NSW).

**"Register"** means the Torrens title register maintained under the *Real Property Act*.

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

**"State"** means the State of New South Wales.

**"Subdivision Works Certificate"** means a certificate referred to in section 6.4 of the Act.

**"Subdivision Certificate"** means a certificate referred to in section 6.4 of the Act.

## 1.2 Interpretation

For the purpose of this Deed, unless the subject or context otherwise requires:

- (a) headings are for convenience only and do not affect interpretation;  
and unless the context indicates a contrary intention:
- (b) "person" includes an individual, the estate of an individual, a corporation, an Authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (c) a reference to a Party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation;
- (d) a reference to a document (including this Deed) is to that document as varied, novated, ratified or replaced from time to time;
- (e) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (f) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;
- (g) a reference to a party, clause, schedule, appendix, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this Deed, and a reference to this Deed includes all schedules, appendices, attachments and annexures to it;
- (h) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (i) "includes" in any form is not a word of limitation;
- (j) The Schedules and Annexures referred to in this Deed form part of this Deed.

## 2. Status of this Deed

- (a) Subject to clause 2(c), the Planning Agreement operates, and becomes legally binding on both parties after all of the following have occurred:
  - (i) The Deed is executed by all Parties; and
  - (ii) Consent is granted to the Modification Applications consistent with this Planning Agreement.

- (b) The Parties will execute this Deed in accordance with a condition imposed on the consents to the Modification Applications, or otherwise within 7 days of the granting of those consents.
- (c) Until the Planning Agreement operates pursuant to clause 2(a), this Deed constitutes an irrevocable offer to the Council from Bluenite to enter into the Planning Agreement.
- (d) The Council must notify Bluenite immediately after it executes this Deed and promptly provide Bluenite with the Deed as executed by the Council.
- (e) This Deed ceases to have effect if:
  - (i) consent is refused to the Modification Applications (including by a Court if Bluenite elects to appeal); or
  - (ii) Bluenite has completed all of its obligations under this Deed.

### 3. Planning Agreement under the Act

- (a) The Planning Agreement constitutes a planning agreement within the meaning of section 7.4 of the Act and is governed by Subdivision 2 of Part 7 of the Act.
- (b) Schedule 1 of this Deed summarises the requirements for planning agreements under section 7.4 of the Act and explains how this Deed addresses those requirements.

### 4. Application of this Deed

This Deed applies to:

- (a) the Land; and
- (b) the Development.

### 5. Contributions

#### 5.1. The Contributions

- (a) Bluenite will provide the Contributions, and security in the form of a Bank Guarantee, in accordance with the terms of Schedule 2. The Council may draw on the security in the event that the Council considers there is a breach by Bluenite of its obligations under this Deed.
- (b) The Council is to apply each monetary contribution made under this Deed towards the public purpose for which it is made as specified in Schedule 2 and otherwise in accordance with this Deed.
- (c) Despite clause 5.1(b) the Council may apply the Contributions made under this Deed towards public purposes other than the public purposes specified in this Deed if the Council reasonably considers that the public interest would be better served by applying the Contributions towards those other purpose rather than the purposes so specified.

## 5.2. Access to land by Council

- (a) The Council may enter the Land in order to inspect, examine or test any Construction Works, or to remedy any breach by Bluenite of its obligations under this Deed relating to the work. The Council is to give Bluenite 2 Business Days prior notice before it enters the Land under clause 5.2(a).
- (b) If Council is of the view that there is an emergency, the Council may enter the Land when it reasonably considers such entry is warranted. The Council is to notify Bluenite that it has entered the Land as soon as reasonably practicable.

## 5.3. Assignment of Intellectual Property

At the time any Construction Works are to be dedicated to the Council Bluenite must also provide:

- (a) any relevant works-as-executed plans to the Council; and
- (b) a non-exclusive licence to the Council which allows the Council to use the copyright in those plans for the purposes of using and maintaining those works, exercising any of its statutory powers and performing any of its statutory functions.

## 5.4. Defects in Contributions

- (a) The Council may give Bluenite a Notice during the Defects Liability Period that a Contribution contains a Defect and needs to be rectified.
- (b) Bluenite, at its cost, must rectify any such Defects promptly, in accordance with the terms of the Defect notice and to the reasonable satisfaction of Council.
- (c) The Council must provide all reasonable assistance (excluding financial assistance) to Bluenite and its contractors to enable the defect to be rectified, including allowing access to Council land.

## 6. Application of sections 7.11, 7.12 and 7.24 of the Act

This Deed does not exclude the application of sections 7.11, 7.12 and 7.24 of the Act to the Development. No offset will be given for future developer contributions required to be paid under sections 7.11 or 7.12 of the Act for the Development to which the Contributions relate.

## 7. Interests in the Land

### 7.1. Ownership

Bluenite represents and warrants to the Council that it is the legal owner of the Land and holds the Land in its capacity as registered proprietor.

### 7.2. Registration of this Planning Agreement

- (a) In accordance with Council's Policy, Bluenite will produce the certificates of title to the Land to enable Council to procure the registration of the Planning Agreement, under the *Real Property Act* in the relevant folios of the Register for the Land in accordance with s.7.6 of the Act.



- (b) Bluenite at its own expense will, upon the coming into operation of the Planning Agreement, take all steps reasonably necessary to procure:
  - (i) the consent of each person who:
    - a) has an estate or interest in the Land registered under the *Real Property Act*; or
    - b) is seized or possessed of an estate or interest in the Land; and
  - (ii) the execution of any documents; and
  - (iii) the production of the relevant duplicate certificates of title,
 to enable the registration of the Planning Agreement in accordance with clause 7.2(a).
- (c) Bluenite will do all things reasonably necessary to assist the Council, and otherwise do anything that the Council reasonably requires:
  - (i) to procure the lodgement of the Planning Agreement with the Registrar-General as soon as reasonably practicable after the Planning Agreement comes into operation but in any event, no later than 90 Business Days after that date; and
  - (ii) to procure the registration of the Planning Agreement by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after the Planning Agreement is lodged for registration.

### 7.3. Release and Discharge

- (a) Once Bluenite has made the Contributions in accordance with this Deed and to the satisfaction of the Council and any default by Bluenite under this Deed has been remedied by Bluenite or waived by the Council, the Council must, within 20 Business Days after a written request from Bluenite, and at the cost of Bluenite:
  - (i) provide a release and discharge of this Deed to the extent that this Deed affects the Land; and
  - (ii) do all things necessary to enable the extinguishment of this Deed from the title of the Land.
- (b) From time to time, Bluenite may request the Council to provide a release and discharge of this Deed to the extent that this Deed affects any part of the Land on which the Development has been completed and that Bluenite proposes to sell to a third party.
- (c) The Council must provide a release and discharge of this Deed in accordance with any request made under clause 7.3(b) within 20 Business Days after Bluenite has so requested in writing provided it is satisfied that acting reasonably Bluenite has duly satisfied its obligations under this Deed in respect of that part of the Land and Bluenite is not otherwise in default of any of its obligations under this Deed.

## **8. Enforcement of Obligations**

### **8.1. Enforcement**

- (a) This Deed may be enforced by any Party in any court of competent jurisdiction.
- (b) Bluenite covenants with the Council that Bluenite will not attempt to rescind or terminate this Deed or make a claim that this Deed is void, voidable, illegal or unenforceable because a condition of a Development Consent requires Bluenite to enter into a planning agreement on the terms of this Deed.
- (c) Nothing in clause 8.1 prevents:
  - (i) A Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Deed or any matter to which this Deed relates; or
  - (ii) The Council from exercising any function under any Legislation, including the Act, or any other Law relating to the enforcement of any aspect of this Deed or any matter to which this Deed relates.

## **9. Review or Replacement of this Deed**

The Parties may agree to review this Deed. Any review or modification will be conducted in the circumstances and in the manner determined in writing by the Parties.

## **10. Dispute Resolution**

The Parties agree that any disputes under or in relation to this Deed will be resolved in accordance with the Dispute Resolution Procedures.

## **11. Assignment and Dealing**

Bluenite agrees that it will not sell, transfer, or dispose of the whole or any part of its right, title or interest in the Land or the Development otherwise than in accordance with the Assignment and Dealing Provisions.

## **12. Costs**

Bluenite will bear the Council's reasonable Costs and disbursements of negotiating, preparing and executing this Deed .

## **13. Explanatory Note**

The Explanatory Note must not be used to assist in construing this Deed.

## **14. Indemnity and Release**

- 14.1. Bluenite indemnifies the Council from and against all damage, expense, loss or liability of any nature suffered or incurred by the Council arising from any act or omission by Bluenite in connection with the performance of Bluenite's obligations under this document, except if, and to the extent that, the damage, expense, loss or liability suffered or incurred is caused by, or

contributed to by, any wilful or negligent act or omission of the Council (or any person engaged by the Council).

- 14.2. Bluenite releases the Council from any claims for damage, expense, loss or liability of any nature suffered or incurred arising from any act or omission by Council in connection with the performance of Bluenite's obligations under this document, except if, and to the extent that, the damage, expense, loss or liability suffered or incurred is caused by, or contributed to by, any wilful or negligent act or omission of the Council (or any person engaged by the Council).

## 15. General Provisions

### 15.1. Notices

- (a) Any notice, consent, information, application or request that must or may be given or made to a party under this Deed must be in writing. They must be sent to the address or fax number advised by either party from time to time.
- (b) Any notice, consent, information, application or request is to be treated as given or made at the following time:
  - (i) If it is delivered, when it is left at the relevant address;
  - (ii) If it is sent by post, 2 Business days after it is posted

### 15.2. Further Acts

Each Party must promptly execute all documents and do all things that the other Party from time to time reasonably requests to give effect to, perfect or complete this Deed and all transactions incidental to it.

### 15.3. Governing law

This Deed is governed by the law in force in New South Wales.

### 15.4. No Fetter

Nothing in this Deed is to be construed as requiring an authority to do anything that would cause it to be in breach of any of its obligations at Law, and without limitation:

- (a) Nothing in this Deed is to be construed as limiting or fettering in any way the exercise of any statutory discretion or duty; and
- (b) Nothing in this Deed imposes any obligation on the Council to:
  - i. grant development consent or any approval; or
  - ii. exercise any function or power under the Act in relation to a change, or a proposed change, in an environmental planning instrument.

### 15.5. Waiver

The non-exercise of or delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the party to be bound by the waiver.

#### 15.6. Amendment

This Deed may only be amended or supplemented in writing, signed by the parties.

#### 15.7. Severability

Any provision in this Deed which is invalid or unenforceable in any jurisdiction is to be read down for the purposes of that jurisdiction, if possible, so as to be valid and enforceable, and is otherwise capable of being severed to the extent of the invalidity or unenforceability, without affecting the remaining provisions of this Deed or affecting the validity or enforceability of that provision in any other jurisdiction.

#### 15.8. Counterparts

This Deed may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

#### 15.9. Entire agreement

All oral representations, communications and prior agreements in relation to the subject matter are merged in and superseded by this Deed.

#### 15.10. Rights cumulative

The rights and remedies provided in this Deed are cumulative with and do not exclude any rights or remedies provided by law.

EXECUTED for and on behalf of Wollondilly  
Shire Council by its authorised delegate, in  
accordance with a resolution of the Council



Signature of Witness

Print name: Ron Dowd



Signature of Authorised Delegate

Name of Authorised Delegate (in full)

Michael Malone

EXECUTED by Bluenite Pty Limited ACN 109  
439 465 in accordance with section 127 of the  
Corporations Act 2001



Signature of Witness

Print name: PETER Dawson



Signature of Authorised Delegate

Name of Authorised Delegate (in full)

FELIX ANTHONY BIGEWI,

## Schedule 1 - Section 7.4 Requirements

SUBJECT AND SUBSECTION OF THE ACT	THIS PLANNING AGREEMENT
<p>Planning Agreement and/or Development Application – section 7.4(1)</p> <p>Bluenite has:</p> <p>(a) sought a change to an environmental planning instrument</p> <p>(b) made, or proposes to make, a Development Application</p> <p>(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies</p>	<p>No.</p> <p>Yes</p> <p>Yes. Development Applications were lodged by Group Development Services on behalf of Bluenite Pty Limited</p>
Description of the land to which this Planning Agreement applies – s.7.4(3)(a)	Lot 4 in DP 262132, Lot 222 in DP 10669, Lot 1 in DP 623127, Lot A in DP 365411, 38-42 Tahmoor Road, Tahmoor and 30-36 Progress Street, Tahmoor being in the Local Government area of Wollondilly
Description of change to the environmental planning instrument to which this Planning Agreement applies – s.7.4(3)(b)(i)	Not applicable
Description of the development to which this Planning Agreement applies – s.7.4(3)(b)(ii)	Refer to the definition of Development, set out in clause 1 of the Planning Agreement.
The nature and extent, timing, and manner of delivery of contribution required by this Planning Agreement – s.7.4(3)(c)	Refer to Schedule 2 of the Planning Agreement
Applicability of Section 7.11 of the Act – s.7.4(3)(d)	The application of Section 7.11 of the Act is not excluded in respect of the Development (see clause 6)
Applicability of Section 7.12 of the Act – s.7.4(3)(d)	The application of Section 7.12 of the Act is not excluded in respect of the Development (see clause 6)
Applicability of Section 7.24 of the Act – s.7.4(3)(d)	The application of Section 7.24 of the Act is not excluded in respect of the Development (see clause 6)
Consideration of benefits under this Deed if Section 7.11 applies – s.7.4(3)(e)	The contributions do not provide an offset in relation to contributions under s.7.11 (see clause 6)
Mechanism for dispute resolution – s.7.4(3)(f)	Yes. Refer clause 10 and Schedule 3

Enforcement of this Planning Agreement – s.7.4(3)(g)	Yes. Refer clause 8.1 and Schedule 3
Registration of this Planning Agreement – s.7.6	Yes Refer clause 7.2
<b>SUBJECT AND SUBSECTION OF THE ACT</b>	<b>THIS PLANNING AGREEMENT</b>
No obligation to grant consent or exercise functions – s.7.4(9)	See clause 15.4

## **Schedule 2 - The Contributions**

### **1. Interpretation**

In this Schedule 2, where an obligation is imposed on Bluenite to carry out Construction Works, that obligation may be satisfied by Bluenite engaging suitably qualified consultants and contractors to design and carry out the works.

### **2. Monetary Contributions**

Bluenite is to pay a monetary contribution of \$189,254.00 to the Council to be applied towards the future maintenance of the storm water infrastructure described in clause 3 of this Schedule 2. The monetary contribution is to be indexed from the date of this Deed to the date of payment in accordance with the *Consumer Price Index (All Groups-Sydney)* published by the Australian Bureau of Statistics.

### **3. Construction Works – Material Public Benefits**

Bluenite is to carry out and complete storm water infrastructure as set out in the Storm Water Concept Plan SK1, Sheets 1-3, dated 19-9-2017 and accompanying the Modification Applications, as approved in the Development.

### **4. Timing of Contributions**

The Contributions are to be made in accordance with the following timeframe:

- i. Payment of monetary contributions towards maintenance of the storm water infrastructure (clause 2 of this Schedule 2) shall be made by Bluenite as a lump sum prior to the issue of the first Subdivision Certificate for the Development.
- ii. The part of the Construction Works the subject of Development Consent to Development Application 010.2014.00000413.001 is to be completed before any Subdivision Certificate is issued for any part of the Development the subject of that Development Consent.
- iii. The part of the Construction Works the subject of Development Consent to Development Application 010.2015.00000318.001 is to be completed before any Subdivision Certificate is issued for any part of the Development the subject of that Development Consent.



## **5. Manner of Delivery of Contributions**

### **5.1 Construction Works**

- i. The Construction Works are to be completed in accordance with any Approval for the work and any other applicable law.
- ii. A Construction Work, or part, is taken to be completed for the purposes of this Deed when a certificate of practical completion is issued for the work, or part, pursuant to the relevant Development Consent for the Construction Work, or part.
- iii. Any land on which a Construction Work is located and which is not owned by the Council is to be dedicated to the Council free of cost to the Council concurrently with the completion of the Construction Work.
- iv. If Bluenite does not dedicate land required to be dedicated under this Deed at the time at which it is required to be dedicated, Bluenite 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 *Land Acquisition (Just Terms Compensation) Act 1991* (Just Terms Act).
- v. Clause 5.1(iv) constitutes an agreement for the purposes of s30 of the Just Terms Act.
- vi. If, as a result of the acquisition referred to in clause 5.1(iv), the Council is required to pay compensation to any person other than Bluenite, Bluenite is to reimburse the Council that amount, upon a written request being made by the Council, or the Council can call on any Bank Guarantee provided under this Deed.
- vii. Bluenite 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.
- viii. Bluenite is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 5.1, including without limitation:
  - a. signing any documents or forms,
  - b. giving land owner's consent for lodgement of any Development Application,
  - c. producing certificates of title to the Registrar-General under the Real Property Act 1900, and
  - d. paying the Council's costs arising under this clause 5.1.

### **5.2 Monetary Contribution**

A monetary contribution is made for the purposes of this Deed when cleared funds are deposited by means of electronic funds transfer into a bank account nominated by the Council.

## **6. Public Purposes**

The Parties agree and acknowledge that the Contributions are intended to be used for public purposes including:

- Provision of Infrastructure relating to the land (storm water infrastructure)
- Funding of recurrent expenditure relating to the provision of infrastructure (maintenance costs).

## **7. Security**

Upon execution of this Deed, Bluenite is to provide the Council with a Bank Guarantee to secure the Contributions.

Bluenite will provide a Bank Guarantee to the Council for a face value equivalent to \$151,403. From the date of execution of this Deed until the date that Bluenite has provided the Contributions in full, the Council will be entitled to retain the Bank Guarantee.

Council will return the Bank Guarantee to Bluenite within 5 working days of when:

- i. the parties agree that Bluenite has provided the Contributions in full; or
- ii. a new bank guarantee is provided due to an assignment under Schedule 4.

## **8. Insurance**

- i. Bluenite is to take out and keep current to the satisfaction of the Council the following insurances in relation to the Construction Works required to be carried out by Bluenite under this Deed up until the Construction Works are taken to have been completed in accordance with this Deed:
  - a. contract works insurance, noting the Council as an interested party, for the full replacement value of the Construction Works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover Bluenite's liability in respect of damage to or destruction of the Construction Works,
  - b. public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, Bluenite and any subcontractor of Bluenite, for liability to any third party,
  - c. workers compensation insurance as required by law, and
  - d. any other insurance required by law.
- ii. If Bluenite fails to comply with clause 8(i), the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from Bluenite to the Council and may be recovered by the Council as it deems appropriate including:

- a. by calling upon the Bank Guarantee provided by Bluenite to the Council under this Deed, or
  - b. recovery as a debt due in a court of competent jurisdiction.
- iii. Bluenite is not to commence to carry out any Construction Works unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 8(i).

## **Schedule 3 - Dispute Resolution**

### **1. Notice of Dispute**

If a Dispute between any of the Parties arises in connection with this Deed or its subject matter, then any Party may give to the other Parties a notice of Dispute in writing adequately identifying and providing details of the Dispute.

The Parties must continue to perform their respective obligations under this Deed if there is a Dispute but will not be required to complete the matter the subject of the Dispute.

### **2. Mediation**

(a) If a notice is given under clause 1 of Schedule 3, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.

(b) If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Law Society Mediation Program and are to request the President of the Law Society to select a Mediator for this purpose.

(c) The Parties are to share equally the costs of the President, the mediator and the mediation and each Party is to bear its own costs arising from or in connection with the appointment of a mediator and mediation.

### **3. Disputes for Expert Determination**

If the mediation referred to in clause 2 of this Schedule 3 has not resulted in settlement of the dispute, Bluenite or the Council may, with the prior written consent of the other Party, refer the matter to expert determination in accordance with clause 4 of this Schedule 3, such expert to act in accordance with clause 6 of this Schedule 3.

### **4. Choice of Expert**

A Dispute to be referred to an expert in accordance with clause 3 of this Schedule 3 must be determined by an independent expert in the relevant field:

(a) Agreed between and appointed jointly by the Parties; or

(b) In the absence of agreement within 5 Business Days of the agreement of the Parties to refer the matter to expert determination under clause 3 of this Schedule 3, appointed by the President or other senior officer for the time being of the body administering the relevant field.

If the Parties cannot agree as to the relevant field, any one Party may refer the matter to the President of the New South Wales Bar Association (or the President's nominee) whose decision as to the relevant field is final and binding on the Parties.

## **5. Requirements for Expert**

The expert appointed to determine a Dispute:

- (a) must have a technical understanding of the issues in contest;
- (b) must not have a significantly greater understanding of one Party's business or operations which might allow the other side to construe this greater understanding as bias or a conflict of interest;
- (c) must inform the Parties before being appointed to the extent of the expert's understanding of each Party's business or operations and, if that information indicates a possible bias, then that expert must not be appointed except with the written approval of the Parties.

The Parties must enter into an agreement with the expert appointed under this Schedule 3 setting out the terms of the expert's determination and the fees and expenses payable to the expert.

The Parties are to share equally the costs of the President, the expert and the expert determination and each Party is to bear its own costs arising from or in connection with the appointment of an expert and the expert determination.

## **6. Directions to Expert**

In reaching a determination in respect of a dispute under paragraph 3, the independent expert must give effect to the intent of the Parties entering into this Deed.

## **7. Expert not Arbitrator**

The expert must:

- (a) act as an expert and not as an arbitrator; and
- (b) proceed in any manner as the expert thinks fit but must observe the rules of natural justice but not the rules of evidence, not accept oral submissions unless both Parties are present and on receipt of written submissions from one Party ensure that a copy of such submission is given promptly to the other party;
- (c) take into consideration all documents, information and other material which the Parties give the expert and which the expert in its absolute discretion considers relevant to the determination of the dispute;

- (d) not be expected or required to obtain or refer to any other documents, information or material (but may do so if the expert so wishes);
- (e) issue a draft certificate stating the expert's intended determination giving each Party 15 business days to make further submissions;
- (f) issue a final certificate stating the expert's determination; and
- (g) act with expedition with a view to issuing the final certificate as soon as practicable.

## **8. Compliance with Directions**

The Parties must comply with all directions given by the expert in relation to resolution of the Dispute and must within a time period specified by the expert give the expert:

- (a) a short statement of facts;
- (b) a description of the dispute; and
- (c) any other documents, records or information the expert requests.

## **9. Expert may convene Meetings**

- (a) The expert will hold a meeting with all Parties present to discuss the Dispute. The meeting must be conducted in a manner which the expert considers appropriate. The meeting may be adjourned to, and resumed at, a later time in the expert's discretion.
- (b) The Parties agree that a meeting under this paragraph is not a hearing and is not an arbitration.

## **10. Final Determination of Expert**

- (a) The Parties agree that the final determination by an expert will be final and binding upon them.
- (b) The expert or mediator will not be liable in respect of the expert determination or mediation, except in the case of fraud or misfeasance by the expert or mediator.
- (c) The Parties agree to release and indemnify the expert from and against all claims, except in the case of fraud or misfeasance by the expert, which may be made against the expert by any person in respect of the expert's appointment to determine the Dispute.

## **11. Other Courses of Action**

If the mediation referred to in clause 2 of this Schedule 3, or the expert determination required or agreed under clause 3 of this Schedule 3, has not resulted in resolution of the Dispute, any Party may take whatever course of action is deemed appropriate for the purpose of resolving the dispute.

## **12. Confidentiality of Information**

The Parties must obtain the written agreement of the mediator/expert, as a condition of their appointment:

(a) subject to clause 12(b) of this Schedule 3, to keep confidential all documents, information and other material disclosed to them during or in relation to the mediation or expert determination respectively; and

(b) not to disclose any confidential documents, information and other material except:

(i) to a Party or adviser who has signed a confidentiality undertaking to the same effect as this paragraph 12; or

(ii) if required by Law to do so; or

(iii) not to use confidential documents, information or other material disclosed to them during or in relation to the mediation or expert determination for a purpose other than the mediation or expert determination respectively.

## **Schedule 4 - Assignment and Dealing Provisions**

### **1. Right to assign interest**

Except in respect of any part of the Land where this Deed has been released and discharged, Bluenite must not enter into any agreement or other arrangement for the sale, transfer, or disposal of the whole or any part of its right, title or interest in the Land to another person (Transferee), unless before it does so:

- (a) it complies with clause 4.7.13 of Council's Policy;
- (b) it satisfies the Council acting reasonably that the proposed Transferee is financially capable of complying with Bluenite's obligations under this Deed;
- (c) the rights of the Council are not diminished or fettered in any way;
- (d) the Transferee executes a novation deed agreeing to perform the obligations of Bluenite under this Deed;
- (e) any default by Bluenite has been remedied by Bluenite or waived by the Council; and
- (f) Bluenite and the Transferee pay the Council's reasonable costs in relation to the assignment.

### **2. Purpose of the Assignment and Dealing Provisions**

Other than in accordance with clause 1 of this Schedule 4, this Schedule 4 operates to prevent Bluenite from entering into any agreement or other arrangement for the sale, transfer, or disposal of the whole or any part of its right, title or interest in the Land to a Transferee

### **3. Release**

If Bluenite complies with clause 1 of this Schedule 4, Bluenite will be released from all obligations under this Deed in respect to that part of the Land, which arise after the date of sale, transfer or disposal.



#### **4. Further documents**

The Parties must, and Bluenite will cause any Transferee to, enter into all such further documents as are reasonably required to implement the provisions set out in this Schedule 4.

## APPENDIX

*Environmental Planning and Assessment Regulation 2000 (Clause 25E)*

### Explanatory Note

#### ~~Draft~~ Planning Agreement

under s.7.4 of the *Environmental Planning and Assessment Act 1979*

#### Parties

**Wollondilly Shire Council** ABN 93 723 245 808 of 62-64 Menangle Street PICTON NSW 2571  
(Council)

**Bluenite Pty Ltd** ABN 35 109 439 465 of 7 Vineys Lane Dural NSW 2158 (**Developer**)

#### Description of the Land to which the ~~Draft~~ Planning Agreement Applies

Lot 4 in DP 262132, Lot 222 in DP 10669, Lot 1 in DP 623127, Lot A in DP 365411, 38-42 Tahmoor Road, Tahmoor and 30-36 Progress Street, Tahmoor

#### Description of Proposed Development

Modification of consents for the purpose of amending stormwater treatment for:

- A Staged Residential Subdivision Creating 43 Lots, Tree Removal, Demolition of Existing Structures & Construction of Roads; and
- A Staged Residential Subdivision Creating 82 Lots

#### Objectives, nature and effect of the proposed voluntary planning agreement

*(Environmental Planning and Assessment Regulation 2000, cl 25E(1)(a))*

This Explanatory Note relates to a proposed Voluntary Planning Agreement between the Developer and Council to provide storm water infrastructure for the land and to provide a monetary contribution towards maintenance of that infrastructure into the medium term. The storm water infrastructure is necessary due to the fact that the Council has approved the residential subdivision of the land by the developer for a total of 125 lots.

#### How the agreement promotes the public interest and one or more of the objects of the Act

*(Environmental Planning and Assessment Regulation 2000, cl 25E(2)(a))*

The ~~Draft~~ Planning Agreement promotes the public interest by promoting the objects of the Act, as set out in s.1.3(a)-(c), (g)-(h) and (j).

The proposed storm water infrastructure will assist with a better environment by properly managing storm water flows on the land.

In particular, the agreement promotes the orderly and economic use and development of land by providing for storm water infrastructure and contributions to the medium term maintenance of that infrastructure. The infrastructure will provide enhanced support to a residential subdivision that is already the subject of development consent and provides long term infrastructure to support the future community on the land the subject of this agreement.

Further, the public exhibition of this ~~Draft~~ agreement will provide the community an opportunity to participate in planning outcomes for the land.

### **How the agreement promotes elements of the council's charter under section 8 of the Local Government Act 1993**

*(Environmental Planning and Assessment Regulation 2000, cl 25E(2)(d))*

The Council's Charter has been replaced by Principles for Local Government. The ~~Draft~~ Planning Agreement meets these Principles by:

#### ***Guiding principles (s.8A)***

- Providing best possible value for residents and rate payers in the provision of stormwater infrastructure;
- Providing effective and efficient services to meet the needs of the local community;
- Meeting future local community needs in an affordable way;
- Working with others to secure appropriate services for local community needs;
- Active engagement with the local community

#### ***Sound financial management (s.8B)***

- Investment in responsible and sustainable infrastructure;
- Supporting asset maintenance

### **Identifying a planning purpose or purposes served by the agreement and an assessment of whether the agreement provides for a reasonable means of achieving that purpose**

*(Environmental Planning and Assessment Regulation 2000, cl 25E(2)(e))*

The ~~Draft~~ Planning Agreement provides storm water infrastructure relating to the land and assists with the funding of recurrent expenditure for maintenance of that infrastructure (s.7.4(2)(c), (d)). Storm

water infrastructure will be needed for the land due to the residential subdivision for which consent has already been obtained. The ~~Draft~~ Planning Agreement therefore contributes to the orderly development of the land, as described above.

The ~~Draft~~ Planning Agreement provides for the developer to prepare those works and provide them to the ~~Council~~ free of defects and also to provide a contribution towards funding of maintenance of the works, which will be necessary for the local community. It is therefore considered a reasonable means of achieving the planning purpose.

**Does the agreement conform with the planning authority's capital works program (if any)?**

*(Environmental Planning and Assessment Regulation 2000, cl 25E(2)(f))*

The ~~Draft~~ Planning Agreement will support Wollondilly Shire Council's Capital Works Program. The ~~Draft~~ Planning Agreement is consistent with and supports Council's Operational Plan.

**Does the agreement specify that certain requirements of the agreement must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued?**

*(Environmental Planning and Assessment Regulation 2000, cl 25E(2)(g))*

The ~~Draft~~ Planning Agreement specifies that works are to be completed and the monetary contribution paid before the issuing of subdivision certificates.

**Merits of the Agreement and Impact on the public**

*(Environmental Planning and Assessment Regulation 2000, cl 25E(1)(b))*

The merits of the ~~Draft~~ Planning Agreement are reflected within the discussion of the objectives, nature and effect of the agreement above.

The ~~Draft~~ Planning Agreement will have a positive impact on the local community by providing necessary infrastructure before residential development on the land begins. This infrastructure will assist with protection of the environment from stormwater flows.

The ~~Draft~~ agreement will also provide an economic benefit, in that the construction of this capital infrastructure will occur at no cost to ratepayers and there will be a contribution towards any ongoing maintenance costs.

There is no negative impact on the public from this ~~Draft~~ Planning Agreement.

M.  
MCE