

THIS PLANNING AGREEMENT made on

2019

BETWEEN

Parties

**MID – COAST COUNCIL (ABN 44 961 208 161)** of 2 Pulteney Street, Taree New South Wales, 2430 (**Council**); and

**WAYNE PETER GREEN & NANCY JEAN GREEN** of 353-377 Kolodong Road, Taree NSW 2430; and

**BENWAYDAN PTY LTD (ACN 625 484 335)** of Suite 7, 24-30 Wharf Street, Forster NSW 2428, (**Landowner**).

## Background

- A. The Landowner owns the Land. The Land is situated in the area of the Council.
- B. On 14 February 2018 the Council resolved to seek a gateway determination from the Department of Planning and Environment for the Instrument Change for the purpose of rezoning the Land to allow future residential development of the Land with an estimated residential lot yield of approximately 450 lots. A future Development Application/s will be required for the Development of the Land.
- C. Traffic studies carried out in association with the preparation of the Planning Proposal identified that the Development will contribute to the need to upgrade the intersection of Kolodong Road with Wingham Road. The contribution to intersection load during peak hours is roughly 50:50 between the traffic from existing uses and the traffic generated by the Development of the Land.
- D. The Landowner has agreed, in the event that the Council carries out the Intersection Works prior to the Development of the Land, to contribute to the costs of the Intersection Works by funding 55% of the lesser of either the Actual Intersection Cost or the estimated cost of \$1.8 million (\$990,000).
- D. As contemplated by section 7.4 of the Act, the Instrument Change application was accompanied by an offer by the Landowner to enter into this Agreement for the Landowner to provide the Monetary Contributions, in the event that the Instrument Change is made, and the Council carries out the Intersection Works prior to the Development.
- E. The parties have therefore agreed to enter into this Agreement.

## Operative Provisions

### 1. Definitions and interpretation

1.1 In this Agreement, unless the context admits otherwise the following definitions apply:

**Actual Intersection Costs** means the costs expended in upgrading the intersection of Kolodong Road and Wingham Road as recorded in the Council's capital works project status reports.

**Agreement** means this planning agreement.

**CPI** means the Consumer Price Index (All Groups – Sydney) published by the Australian Bureau of Statistics from time to time or if that index ceases to be published, such other index as the parties may agree.

**Dealing**, in relation to the Land, means, without limitation, a sale, transfer, disposal, assignment, novation, mortgage, charge, encumbrance or other dealing with the Land or any part thereof, and "Deal" is to be interpreted accordingly.

**Development** means development of the Land for residential purposes in accordance with the Instrument Change, demonstrated by the granting of:

- a) an Occupation Certificate; or
- b) an approval to install a manufactured home, moveable dwelling or associated structure under section 68 of the Local Government Act 1993; or
- c) a Subdivision Certificate.

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

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

**Development Contribution** means a monetary contribution, the dedication of land free of cost or the provision of a material public benefit.

**EP&A Act or Act** means the *Environmental Planning and Assessment Act 1979* (NSW).

**Explanatory Note** means the explanatory note required by the Regulation.

**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.

**Instrument Change** means the amendment of the *Greater Taree Local Environmental Plan 2010* to give effect to the Planning Proposal.

**Intersection Works** means works to significantly upgrade the intersection of Kolodong Road and Wingham Road Taree.

**Land** means the land the subject of this Agreement, being part of the Site, owned by the Landowner and described in Schedule 1.

**Monetary Contributions** means a Development Contribution in the amount calculated in accordance with clause 5 and payable by the Landowner to the Council in accordance with Schedule 2, for the Public Purpose.

**Occupation Certificate** has the same meaning as in section 6.4 of the Act.

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

**Planning Proposal** – means the Planning Proposal prepared for the Site which was given Gateway Approval under section 3.34 of the Act (Ref: PP\_2018\_MCOAS\_002\_00) and placed on public exhibition from 27 March 2019 to 30 April 2019 which proposes changes to the planning controls applying to part of the Site, including to rezone part of the Land from RU1 (Primary Production) to R1 (General Residential) and E2 (Environmental Conservation) so as to facilitate the Development.

**Public Purpose** means the provision of (or recoupment of the cost of providing) transport infrastructure related to the Development, specifically the Intersection Works, being a purpose that benefits the public or a section of the public as specified in section 7.4(2) of the Act.

**Publication Date** means the date the Instrument Change is published on the NSW legislation website or a later date specified in the Instrument Change.

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

**Registrable Form** means the document is properly executed and witnessed, bears an imprint from the Revenue NSW to the effect that all necessary duties have been paid, and is otherwise capable of immediate registration by the Registrar-General on the title of the relevant piece or parcel of land.

**Registrar-General** means the Registrar-General, under the Real Property Act.

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

**Site** means the land the subject of the Planning Proposal and includes the Land.

**Subdivision Certificate** has the same meaning as in section 6.4 of the Act.

- 1.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:
- a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
  - b) 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.
  - c) 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.
  - d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
  - e) 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.
  - f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
  - g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
  - h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
  - i) 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.
  - j) 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.
  - k) References to the word 'include' or 'including' are to be construed without limitation.
  - l) A reference to this Agreement includes the agreement recorded in this Agreement.

- m) 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.
- n) Any schedules and attachments form part of this Agreement.
- o) Any dimension given is approximate.
- p) Nothing contained in this Agreement will be deemed or construed as creating the relationship of partnership.
- q) No waiver of any breach of this Agreement or of any of its terms will be effective unless the waiver is in writing and signed by the party against whom the waiver is claimed, and no waiver of any breach will operate as a waiver of any other breach or subsequent breach.
- r) In the interpretation of this agreement no rule of construction shall apply to disadvantage one party on the basis that that party put forward the particular covenant, term or provision.

## 2. Planning Agreement under the Act

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

## 3. Application of this Agreement

This Agreement applies to the Land and the Development.

## 4. Operation of this Agreement

4.1 This Agreement operates from the latter of:

- (a) The date the Agreement is executed by all parties, as required by clause 25C(1) of the Regulation; and
- (b) The Publication Date.

4.2 This Agreement remains in force until:

- (a) terminated by operation of law;
- (b) the Parties agree in writing to terminate this Agreement;
- (c) all the Landowner's obligations under this Agreement have been performed to the written satisfaction of the Council.

## 5. Monetary Contributions

5.1 If the Council carries out the Intersection Works, upon completion of construction of the Intersection Works, the Landowner must pay the Monetary Contributions calculated in accordance with clauses 5.2 and 5.3 to Council in

five (5) instalments, in the amounts provided for in column 2 of Schedule 2 and at the times specified in column 3 of Schedule 2.

5.2 The Monetary Contributions payable by the Landowner to the Council is the lesser of (subject to CPI):

- (a) 55% of the Actual Intersection Costs; and
- (b) \$990,000 (the **Cap**).

5.3 Where this Agreement provides that an amount is subject to CPI, then the amount will be increased in accordance the following formula:

$$A = B \times C/D$$

Where:

- A = the indexed amount at the time the payment is to be made.
- B = the contribution amount rate stated in clause 5.2 of this Agreement.
- C = the CPI most recently published before the date of payment.
- D = in respect of the Actual Intersection Costs (in clause 5.2(a) of this Agreement), the CPI most recently published before the date the Intersection Works are completed;  
in respect of the Cap (in clause 5.2(b)) of this Agreement) the CPI most recently published before this Agreement operates in accordance with clause 4.1.

For the avoidance of doubt, if C is less than D (that is, if there has been deflation over the relevant period), then A will not change.

5.4 The Council shall utilise the Monetary Contributions to recoup part of the costs of the Public Purpose.

5.5 For the avoidance of doubt, the Landowner is only required to pay the Monetary Contributions under this Agreement if and when the Council completes the construction of the Intersection Works.

## 6. Application of sections 7.11 and 7.12 of the Act to the Development.

Sections 7.11, 7.12 and 7.24 of the Act shall apply to Development of the Land, however if the Landowner pays the Monetary Contributions in accordance with this Agreement, the Landowner is not liable to pay any Development Contributions for road upgrades required in respect of the Development under any Development Contribution plan made by the Council applicable at the time.

## 7. Assignment and other dealings

### 7.1 Dealings by Landowner

The Landowner must not Deal with its right, title or interest in the whole or any part of the Land or its rights or obligations under this Agreement to another person (Transferee), unless before such Dealing:

- (a) the Landowner gives to Council at least 20 Business Days prior notice in writing of the proposed Dealing;
- (b) any default by the Landowner has been remedied by the Landowner or waived by Council;
- (c) the Landowner delivers to the Council a Deed of Assignment executed by the Landowner and the Transferee in form and substance acceptable to Council containing provisions under which:
  - i. the Landowner's rights and obligations under this Agreement are assigned to the Assignee on and from the date of the assignment or any other date specified in the deed;
  - ii. the Transferee undertakes to comply with the Landowner's obligations under this Agreement as if it were the Landowner (including obligations which arose before the transfer or assignment) with respect to the Land or other interest being dealt with; and the Assignee undertakes to pay the Council's reasonable costs in relation to the assignment.

7.2 Any purported Dealing in breach of this clause is of no effect.

### 7.3 Release

If the Landowner sells, transfers or disposes of the whole or any part of the Land and fully satisfies the requirements of clause 7.1, the Landowner will be deemed to be released from any further obligation under this Agreement with respect to the land being sold, transferred or disposed of on and from the date of assignment.

## 8. Ownership of the Land and Registration of this Agreement – Section 7.6 of the Act

8.1 Subject to clause 9 of this Agreement, the Landowner represents and warrants to Council that as at the date of this Agreement, they are the legal and beneficial owners of the Land.

8.2 As contemplated by s7.6 of the Act, the Landowner agrees to lodge this Agreement for registration under the Real Property Act 1900 on the relevant folios of the Register for all of the Land, within 1 month of the date

of this Agreement, and to do all things required to procure registration as soon as practicable thereafter and prior to the Publication Date.

8.3 The Landowner shall provide to Council a copy of the relevant folios of the Register within 20 Business Days after the date of registration of this Agreement.

8.4 If:

- (a) the Landowner has made the Monetary Contributions in respect of part of the Land, or
- (b) this Agreement is rescinded or terminated, or
- (c) the matters referred to in clause 4.1 have not occurred and this Agreement does not commence to operate,

then within 28 days of the Landowner submitting to Council the documentation necessary to remove this Agreement from the relevant folio of the Register, the Council must promptly execute the documentation and do all things reasonably requested by the Landowner to have this Agreement removed from the relevant folio of the Register.

## 9. Limitation of Liability

The Landowner discloses and the Council acknowledges that Benwaydan Pty Limited acts as trustee for the beneficial owner of the Land and not in its own right. Council agrees that should they for any reason be entitled to recover any sum from Benwaydan Pty Limited then Benwaydan Pty Limited will only be liable to the extent of the assets of the trust.

## 10. Variation of this Agreement

Any amendment to this Agreement shall only be effective if in writing and signed by all parties and registered under section 7.6 of the Act.

## 11. Dispute Resolution

11.1 If a dispute arises out of or relates to this Agreement, including any dispute as to breach or termination of this agreement or as to any claim in tort, in equity or under any legislation, a party cannot commence any court proceedings relating to the dispute unless that party has complied with the following clauses except where that party seeks urgent interlocutory relief.

11.2 A party claiming that a dispute has arisen must serve a notice on the other parties specifying the nature of the dispute.

11.3 On receipt of that notice by the other parties, all of the parties must endeavour in good faith to resolve the dispute expeditiously using informal dispute



resolution techniques such as mediation, expert evaluation or similar techniques agreed by them.

11.4 If the parties do not agree within 21 days of service of the notice, or any further period agreed in writing by them, as to:

- (a) the dispute resolution technique and procedures to be adopted;
- (b) the timetable for all steps in those procedures;
- (c) the selection and compensation of the independent person required for that technique; and

the parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales and must request the President of the Law Society of New South Wales or the President's nominee to select the mediator and determine the mediator's remuneration.

## 12. Security and Enforcement

12.1 The Landowner acknowledges and agrees that:

- a) When this agreement comes in to operation, Council is deemed to have acquired, and the landowner is deemed to have granted, an equitable estate and interest in the site for the purposes of Section 74F(1) of the Real Property Act and consequently Council has a sufficient interest in the site with respect of which to lodge with the LPI a caveat notifying that interest.
- b) It will not object to Council lodging a caveat in the relevant folio of the register for the site nor will it seek to remove the caveat lodged by Council provided the caveat does not prevent registration of any dealing or plan other than a transfer; and
- c) It will obtain the consent of the lodgement of the caveat of each person who has an interest in the site registered under the Real Property Act.

## 13. Notices

13.1 Any notice, consent, information, application or request that must or may be given or made to a party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

- (a) delivered or posted to that party at its address set out below.
- (b) sent by electronic mail to the electronic mail address of the addressee.

### **Council**

Attention: General Manager

Mid – Coast Council

Address: PO Box 482, TAREE, NSW 2430

Email: council@midcoast.nsw.gov.au

**Landowner**

Attention: W & N Green and Benwaydan Pty Limited

Address: 353-377 Kolodong Road, Taree NSW 2430

13.2 If one party gives to another party 3 business days notice of a change of its address or email address, any notice, consent, information, application or request is only given or made by that other party if it is delivered, posted or emailed to the latest address or email.

13.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:

- (a) if it is delivered, when it is left at the relevant address.
- (b) if it is sent by post, 2 business days after it is posted.
- (c) if sent by electronic mail before 5pm on a Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of receipt. However, electronic mail is not treated as given or received if it is not received in full and in legible form and the addressee notifies the sender of that fact within 3 hours after the email is received or by 12 noon on the Business Day on which it would otherwise be treated as given and received, whichever is later.

13.4 If any notice, consent, information, application or request is delivered, or an electronic mail 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.

**14. Expenses and stamp duty**

Each party shall bear its own legal costs and disbursements in connection with the negotiation, preparation and execution of this Agreement.

**15. Entire Agreement**

This Agreement contains everything to which the parties have agreed in relation to the matters it deals with. No party can rely on an earlier document, or anything said or done by another party, or by a director, officer, agent or employee of that party, before this Agreement was executed, except as permitted by law.

## 16. Further acts

Each party must promptly execute all documents and do all things that another party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.

## 17. 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.

## 18. 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.

## 19. No fetter

Nothing in this Agreement shall be construed as requiring Council or the 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.

## 20. 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.

## 21. 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.

Note: This clause does not void the ability of either party to undertake mediation under clause 10.

## 22. 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.

## 23. Explanatory Note

The Explanatory Note shall not be used to assist in construing this Agreement.

## 24. GST

### 24.1 Interpretation

Words used in this clause that are defined in the GST Law have the meaning given in that legislation.

### 24.2 Consideration GST exclusive

Unless expressly stated, all prices or other sums payable or consideration to be provided under this document are exclusive of GST.

### 24.3 Payment of GST

If GST is payable on any supply made under this document, the recipient will pay to the supplier an amount equal to the GST payable on the supply.

### 24.4 Timing of GST payment

The recipient will pay the amount referred to in clause 24.3 in addition to and at the same time that the consideration for the supply is to be provided under this document.

### 24.5 Tax Invoice

The supplier must deliver a tax invoice or an adjustment note to the recipient before the supplier is entitled to payment of an amount under clause 24.3. The recipient can withhold payment of the amount until the supplier provides a tax invoice or adjustment note as appropriate.

### 24.6 Adjustment event

If an adjustment event arises in respect of a taxable supply made by a supplier under this document, the amount payable by the recipient under clause 24.3 will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the supplier or by the supplier to the recipient as the case requires.

### 23.7 No merger

This clause 23 will not merge on completion or termination of this Agreement.

**25. Execution by counterparts**

This Agreement may be executed in any number of counterparts. All counterparts taken together constitute one instrument.

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## **THE FIRST SCHEDULE – THE LAND**

The Land is:

Lot 54 DP 1042462, known as 353 – 377 Kolodong Road, Taree NSW 2430 owned by Wayne Peter Green and Nancy Jean Green (but excluding the part of the Land subject to boundary adjustment in DA 113/2020);

and

Lot 61 DP 1252146, known as 327 Kolodong Road, Taree NSW 2430, owned by Benwaydan Pty Ltd (ACN 625 484 335).

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**THE SECOND SCHEDULE – MONETARY CONTRIBUTIONS**

<b>Column 1 Payment Number</b>	<b>Column 2 % of Monetary Contributions</b>	<b>Column 3 Timing</b>
1	20% of the Monetary Contributions	Prior to the Development of between 10% to 19% of the Land zoned for residential purposes in the Instrument Change.
2	20% of the Monetary Contributions	Prior to the Development of between 20% to 29% of the Land zoned for residential purposes in the Instrument Change.
3	20% of Monetary Contributions	Prior to the Development of between 30% to 39% of the Land zoned for residential purposes in the Instrument Change.
4	20% of Monetary Contributions	Prior to the Development of between 40% to 49% of the Land zoned for residential purposes in the Instrument Change.
5	20% of Monetary Contributions	Prior to the Development of between 50% to 100% of the Land zoned for residential purposes in the Instrument Change.

**Executed as a Deed**

**Executed by MIDCOAST COUNCIL**  
by its authorised delegate, pursuant to resolution  
made on  
in the presence of:

.....  
.....

.....  
Signature of Witness

.....  
General Manager

.....  
Name of Witness in full

Signed by **WAYNE PETER GREEN**

.....

.....  
Name of Witness in full

.....  
Signature of Witness

Signed by **NANCY JEAN GREEN**

.....

.....  
Name of Witness in full

.....  
Signature of Witness

Executed by **Benwaydan Pty Limited**  
**ACN 625 484 335** pursuant to s127 of  
the *Corporations Act 2001* in the  
presence of:

.....  
Wayne Peter Green  
Director

.....  
Nancy Jean Green  
Director

.....  
Name of Witness in full

.....  
Signature of Witness