

Planning Agreement

MidCoast Council (***Council***)

AND

Sybury Pty Limited (***Developer***)

Relating to rezoning of land at 391 Diamond Beach Road, Diamond Beach

Prepared under Section 93F of the *Environmental Planning & Assessment Act 1979*

Parties

Council	Name	MidCoast Council
	ABN	44 961 208 161
	Address	2 Pulteney Street, PO Box 482 Taree New South Wales 2430
	Email	tareecouncil@midcoast.nsw.gov.au
	Attention	General Manager
Developer	Name	Sybury Pty Ltd
	ABN	65 083 762 163
	Address	297 Little Nerang Road, Mudgeeraba QLD 4213
	Email	sam@cocoproperties.com.au
	Attention	Salvatore Coco

Background

- A. On 8 August 2016 a Planning Proposal was lodged with Council for the purpose of making a future development application for development consent to carry out the Development on the Site.
- B. The Developer has since provided an offer to enter into this planning agreement including dedication of the Contribution Land to Council, payment of the Monetary Contributions and the carrying out of environmental management works on the Site on the terms of this agreement.
- C. The objective of the planning agreement is to ensure public access along the coastal area adjacent to North Diamond Beach and to conserve and enhance environmentally sensitive land on the Site.

Operative Terms

1. Definitions and Interpretation

- 1.1. In this agreement, unless the context clearly indicates otherwise:

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

Contribution Land means the land to be dedicated by the Developer to Council as identified and described in Schedule 2.

Development means the development of the Site to be carried out or procured by the Developer in accordance with the Planning Proposal for the purpose of tourism facilities and accommodation, which may include a component of permanent residential accommodation.

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).

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

LPI means the Land and Property Information New South Wales or its successor body.

Monetary Contributions means the amounts payable by the Developer to the Council as set out in Schedule 4.

Planning Proposal means the planning proposal for the Site prepared by PDA Planning dated 8 August 2017.

Real Property Act means the *Real Property Act 1900* (NSW) as amended.

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

Site means the land the subject of this planning agreement being Lot 17 DP 576415 known as 391 Diamond Beach Road, Diamond Beach and as shown on the plan in Schedule 2.

Strategy means the strategy which provides for a public link along the coastline of North Diamond Beach.

Vegetation Management Plan means a vegetation management plan for the Site prepared in accordance with the requirements of Schedule 3 and approved by Council in accordance with clause 5 of this agreement.

1.2. In this agreement unless the context clearly indicates otherwise:

- (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 form part of this agreement.
- (o) Neither this agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting.

2. Planning agreement under the Act

- 2.1. The parties agree that this agreement is a planning agreement:
 - (a) within the meaning of section 93F of the Act; and
 - (b) governed by Subdivision 2 of Division 6 of Part 4 of the Act.

3. Application of this Agreement

- 3.1. This agreement applies to:
 - (a) the Site; and
 - (b) the Development.

4. Operation of this Agreement

- 4.1. This agreement operates from the date of execution by both parties.

5. Vegetation Management Plan

- 5.1. The Developer must submit a draft Vegetation Management Plan to Council before the lodgement of any development application relating to the proposed Development on the Site.
- 5.2. Council, acting reasonably and within a reasonable time frame, must give the Developer written notice of whether it approves the draft Vegetation Management Plan or if changes are required to the draft Vegetation Management Plan before the lodgement of any development application relating to the proposed Development on the Site. If changes are required:
 - (a) Council will specify the nature of the changes and the reasons for the changes; and
 - (a) the Developer will amend the draft Vegetation Management Plan accordingly.
- 5.3. The Developer must, at its own cost, carry out and complete the works in accordance with the Vegetation Management Plan to Council's reasonable satisfaction.

6. Public Access Strategy

- 6.1. Council must prepare the Strategy to provide a public link along the coastline of North Diamond Beach by 11 October 2020.
- 6.2. The Strategy will show the extent of the coastal link and will include the Contribution Land. The content of the Strategy will be at Council's absolute discretion.
- 6.3. Council will exhibit the draft Strategy for public consultation and comment.
- 6.4. Council must adopt, by resolution of the elected Council, the final Strategy by 11 October 2020.
- 6.5. Council must give the Developer written notice of adoption of the Strategy including a copy of the relevant Council minute.

7. Dedication of Land and Construction of Fence

- 7.1. The Developer must dedicate or transfer the Contribution Land to Council:
 - (a) within one year of adoption of the Strategy by Council (being the date of Council resolution); and
 - (b) at no cost to Council; and
 - (c) free of any trusts, estates, interests, covenants and encumbrances (other than those specified in this agreement).
- 7.2. The Developer agrees that it will, if requested, prepare all documentation to facilitate the subdivision of the Site for the purpose of creating a separate lot to enable the dedication of the Contribution Land under Division 1 Subdivision 38 of the *State Environmental Planning Policy (Exempt and Complying Development Codes 2008)* or any other applicable environmental planning instrument.
- 7.3. Before dedication of the Contribution Land to Council, the Developer must construct a bollard and cable fence along the boundary of the Site and the Contribution Land in accordance with the specifications set out in Schedule 5.

8. Monetary Contributions

- 8.1. The Developer must pay the Monetary Contributions to Council at the same time as dedicating or transferring the Contribution Land to Council. The Monetary Contribution will be increased at the time of payment in accordance with the following formula:

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

Where:

Index means the Consumer Price Index (All Groups – Sydney) as published by the Australia Bureau of Statistics or any replacement index published from time to time.

A = indexed amount

B = the relevant amount set out in this agreement

C = the Index most recently published before the Monetary Contribution is paid

D = the Index most recently published before the commencement date of this agreement.

If A is less than B, then the amount of the Monetary Contribution will not change.

- 8.2. Council must use the Monetary Contributions for the public purposes set out in Schedule 4.

9. Application of s94, s94A and s94EF of the Act

- 9.1. Sections 94, 94A and 94EF of the Act apply to the Development.
- 9.2. Benefits under this agreement are excluded from being taken into consideration under section 94 of the Act in its application to the Development.

10. Bank Guarantee

- 10.1. Within one month of adoption of the Strategy by Council, the Developer must deliver to Council an unconditional bank guarantee (in a form acceptable to Council) for the total amount of Monetary Contributions (being \$88,000).
- 10.2. If the Developer does not pay the Monetary Contributions by the time specified in this agreement, Council may issue the Developer with a notice in accordance with clause 16 requiring the Developer to rectify the relevant default within five business days.
- 10.3. If the Developer fails to comply with a notice issued under clause 10.2 to the reasonable satisfaction of Council, Council may, without limiting any other avenues available to it, call on the bank guarantee to the extent necessary to rectify the default including payment of any outstanding part or whole of the Monetary Contribution.
- 10.4. Within one month after the Developer satisfies its obligation under this agreement to pay the Monetary Contributions, Council must return the amount of the bank guarantee to the Developer.

11. Registration of this Agreement

- 11.1. The Developer represents and warrants that it is the owner of the Site.
- 11.2. As contemplated by section 93H of the Act, the Developer agrees to lodge this agreement with the LPI for registration under the Real Property Act in the relevant folio of the Register no later than 10 business days after Council provides an executed copy of this agreement to the Developer.
- 11.3. The Developer, at its own expense, will take all practical steps and otherwise do anything to procure:
 - (a) the consent of each person who:
 - (i) has an estate or interest in the Site registered under the Real Property Act; or
 - (ii) is seized or possessed or an estate or interest in the Site; and
 - (b) the execution of any documents; and
 - (c) the production of the relevant certificates of title; and
 - (d) the lodgement and registration of this agreement, by the Registrar-General in the relevant folio of the Register.
- 11.4. The Developer will provide Council with a copy of the relevant folios of the Register and a copy of the registered dealing referable to this agreement within 10 business days, or other agreed time, of registration of this agreement in accordance with this clause 11.
- 11.5. Council agrees to do all things reasonably required by the Developer to release and discharge this agreement with respect to any part of the Site upon the Developer satisfying all of its obligations under this agreement in respect of that part of the Site.

12. Registration of Caveat

- 12.1. The Developer acknowledges and agrees that:
 - (a) when this agreement comes into operation, Council is deemed to have acquired, and the Developer 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 any 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 to the lodgement of the caveat of each person who has an estate or interest in the Site registered under the Real Property Act.

- 12.2. Council must, at the Developer's cost (with any such cost to be reimbursed to Council promptly on demand), register at the LPI a withdrawal of caveat in respect of the Site within 5 business days after the Developer complies with clause 11.2 and Council must not lodge any other caveats on the titles to any of the Site, providing the withdrawal of the caveat will only apply in respect of such parts of the Site in respect of which registration of the agreement has been procured in accordance with clause 11.2.

13. Compulsory Acquisition

- 13.1. If the Developer fails to transfer the Contribution Land to Council or its nominee in accordance with clause 7, then the Developer:
- (a) consents to Council compulsorily acquiring the relevant item of Contribution Land for compensation in the amount of \$1.10 (including any GST) without having to go through the pre acquisition procedure under the Just Terms Act;
 - (b) agrees that this clause 12 constitutes an agreement for the purposes of section 30 of the Just Terms Act as to Part 2 and Part 3 of the Just Terms Act, including the amount of compensation and the gazettal of an acquisition notice under section 19 of the Just Terms Act;
 - (c) must ensure that the Contribution Land is free of all encumbrances, except those encumbrances which, in Council's reasonable opinion, do not impede the use of the land for the purpose of public access;
 - (d) indemnifies Council for any additional costs associated with the acquisition relating to interests in the relevant item of Contribution Land; and
 - (e) will promptly do all things necessary, and agrees to Council doing all things necessary on its behalf, to give effect to this clause 12, including without limit:
 - (i) signing any documents or forms;
 - (ii) giving land owner's consent for lodgement of any development application;
 - (iii) producing certificates of title to the Registrar-General under the Real Property Act; and
 - (iv) paying Council's costs arising from clause 12.

14. Review of this Agreement

- 14.1. The parties will review this agreement annually.

15. Dispute Resolution

- 15.1. If a dispute between the parties arises in connection with this agreement or its subject matter, then the process and procedures set out in Schedule 6 (Dispute Resolution) will apply.

16. Notices

- 16.1. 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 at the beginning of this agreement; or
 - (b) Emailed to that party at its email address set out at the beginning of this agreement.
- 16.2. If a party gives the other party three business days notice of a change to its address or email address, then any notice, consent, information, application or request is only given or made by that other party if delivered, posted or emailed to the latest address or email address.
- 16.3. Any notice, consent, information, application or request is taken as given or made at the following time:
- (a) If it is delivered, when it is left at the relevant address; or
 - (b) If is sent by post, three business days after it is posted.
- 16.4. If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

17. Approvals and consents

- 17.1. Except as otherwise set out in this agreement, and subject to any statutory obligations, a party may give or withhold an approval or consent to be given under this agreement in the party's absolute discretion and subject to any conditions determined by that party. A party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

18. Assignment and dealings

- 18.1. The Developer may not sell, transfer, assign or novate or similarly deal with (**Dealing**) its right, title or interest in the Site or its rights or obligations under this agreement without Council's consent and unless:
- (a) the Developer gives Council no less than 10 business days notice in writing of the proposed Dealing; and
 - (b) Council gives the Developer notice in writing that it is satisfied (acting reasonably) that the person with whom the Developer wishes to deal (**Transferee**) is financially capable of complying with the terms of this agreement; and
 - (c) a right of Council is not diminished or fettered in any way; and

- (d) the Developer and Transferee execute a deed of novation of this agreement prepared by Council in which the Transferee becomes contractually bound to fulfil the terms of this agreement.

19. Costs

- 19.1. The Developer agrees to pay or reimburse the reasonable external costs of Council in connection with the negotiation, preparation and execution of this agreement within 10 business days after receipt of a tax invoice from Council.

20. Entire Agreement

- 20.1. This agreement contains everything to which the parties have agreed in relation to the matters its 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.

21. Further acts

- 21.1. 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.

22. Governing law and jurisdiction

- 22.1. This agreement is governed by the law of New South Wales. Each party submits 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 of any basis.

23. Joint and individual liability and benefits

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

24. No fetter

- 24.1. Nothing in this agreement will be construed as requiring Council to do anything that would cause it to be in breach of any obligations at law, and without limitation, nothing will be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

25. Representations and warranties

- 25.1. The parties represent and warrant that they have the 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.

26. Severability

- 26.1. 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 the agreement is not affected.

27. Modification

- 27.1. No modification of this agreement will be of any force or effect unless it is in writing and signed by the parties.

28. Waiver

- 28.1. 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 a breach of obligation by, another party.
- 28.2. A waiver by a party is only effective if it is in writing.
- 28.3. 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.

29. GST

- 29.1. If any party reasonably decides that it is liable to pay GST on a supply made to the other party under this agreement and the supply was not priced to include GST, then recipient of the supply must pay an additional amount equal to the GST on that supply.

30. Confidentiality

- 30.1. The parties agree that the terms of this agreement are not confidential and this agreement may be treated as a public document and exhibited or reported without restriction by any party.

31. Termination

- 31.1. This agreement is terminated on the date the Developer is released and discharged in accordance with clause 31.2.
- 31.2. Council agrees to:
- (a) provide a release and discharge of this agreement:
 - (i) upon the dedication or transfer of the Contribution Land in accordance with this agreement; and
 - (ii) upon payment of the Monetary Contributions in accordance with agreement, and
 - (iii) completion of the works under the Vegetation Management Plan.

OR

- (iv) if Council does not adopt the Strategy in accordance clause 6.4 of this agreement,
- (b) do all things necessary to enable the Developer to arrange for the release and discharge to be registered by the Register-General in the relevant folio of the Register.

32. Explanatory Note

32.1. The explanatory note prepared for this agreement in accordance with the *Environmental Planning and Assessment Regulation 2000* (NSW) must not be used to assist in construing this agreement.

Executed as an Agreement this day of

2017.

Executed by **MidCoast Council**)

.....
General Manager

.....
Mayor

.....
(print name)

.....
(print name)

Executed by **Sybury Pty Ltd**)

(ABN 65 083 762 163) in)

accordance with Section 127 of)

the Corporations Act 2001 by:)

.....
Director

.....
Director

Schedule 1

S93F Requirements

Sub-section of Act	Subject	Planning Agreement
Section 93F(1)	<p>Planning instrument and/or development application –</p> <p>The Developer has:</p> <p>(a) sought a change to an environmental planning instrument.</p> <p>(b) made, or proposes to make, a development application.</p> <p>(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.</p>	<p>(a) Yes</p> <p>(b) Yes</p> <p>(c) Not applicable</p>
Section 93F(3)(a)	The land affected by this planning agreement	Lot 17 DP 576415
Section 93F(3)(b)	The environmental planning instrument or the development affected by this planning agreement	Greater Taree Local Environmental Plan 2010
Section 93F(3)(c)	The scope, timing and manner of delivery of contribution required by this Agreement	See clauses 5, 7, 7 and 8 and Schedules 2, 3,4 and 5.
Section 93F(3)(d)	Applicability of sections 94, 94A and 94EF of the Act	This agreement does not exclude the operation of sections 94, 94 and 94EF. See clause 9.1.
Section 93F(3)(e)	Consideration of benefits under this Agreement if section 94 applies	The benefits under this agreement are not to be taken into consideration in determining a development contribution under section 94. See clause 9.2.
Section 93F(3)(f)	Dispute resolution	See clause 15 and Schedule 6.
Section 93F(3)(g)	Enforcement and security	See clauses 10, 11, 12 and 13
Section 93H	Registration	See clause 11.
Section 109J(1)(c1)	Requirements relating to the issue of subdivision certificates	Not applicable

Schedule 2

Site and Contribution Land

Contribution Land means the strip of land being 5 metre wide on the eastern boundary of the Site which must be dedicated by the Developer to the Council in accordance with this agreement as shown on the plan below.



Schedule 3

Vegetation Management Plan

Objectives of the Vegetation Management Plan

The Vegetation Management Plan will apply to the land included in the E2 Environmental Conservation zone on the western portion of the site for the purposes of restoring the existing native vegetation community (as shown outlined in red on the plan in Schedule 2).

The objectives of the Plan are to:

- o protect existing remnant native vegetation;
- o plant new vegetation to enhance the vegetation community;
- o encourage the regeneration of native vegetation;
- o control invasive weeds;
- o minimise the impact of the Development on the native vegetation; and
- o perform monitoring and maintenance activities to ensure that implementation of the mitigation measures are adequate and a satisfactory restoration outcome is achieved.

Regeneration

The regeneration of the habitat should be undertaken by promoting natural ecological processes under an assisted natural regeneration regime with the aim being to accelerate, rather than replace, natural successional processes by removing or reducing barriers to natural forest regeneration such as soil degradation, competition with weedy species, and edge impacts.

For the purposes of assisted natural regeneration of the habitat, the following measures should be adopted by the Developer (the Works):

- o avoid further unnecessary disturbance of the remnant vegetation communities;
- o undertake appropriate weed control measures;
- o supplement plantings and allow natural regeneration of plants including groundcover, understorey and canopy; and
- o install temporary or permanent fencing between the land the subject of the Vegetation Management Plan and tourism zoned land on the Site to control access during regeneration.

Schedule 4

Monetary Contributions

Monetary Contributions means the amounts payable by the Developer to the Council in accordance with this agreement as follows:

Purpose of Contribution	Amount	Due Date
Construction of a 3 metre wide concrete pathway within the Contribution Land	\$72,900	On dedication or transfer of the Contribution Land
Construction of fencing along the eastern boundary of the Contribution Land to control access to the coastal area, and for installation of directional and control signage	\$15,100	On dedication or transfer of the Contribution Land

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Schedule 5

Bollard and Cable Fence

The Developer is to construct a bollard and cable fence along the boundary of the Site and the Contribution Land as follows:

- 200mm x 1.8m eco wood posts
- 16mm galvanised cable with clamps for ends of the cable
- Posts to be set half in the ground and 4m apart along the boundary
- One gap in the fence (maximum 3m wide) is permitted to facilitate access between the Site and Contribution Land to facilitate access between the Site and public land.

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Schedule 6

Dispute Resolution

1.1 Dispute

Before court proceedings (other than for urgent interlocutory relief) may be commenced, the following steps must be taken to attempt to resolve any dispute that arises out of or in connection with this agreement.

1.2 Notice of Dispute

Notice (the notice of dispute) must be given in writing by the party claiming that a dispute has arisen to the other party (or parties) to this agreement specifying the nature of the dispute.

1.3 Negotiation

Within 10 business days or receipt of notice of dispute, the parties must meet to discuss the matter in good faith and use reasonable endeavours to settle or resolve the dispute (including attempting to agree upon an appropriate procedure for resolving the dispute).

1.4 Resolution Institute

If within 10 business days of the parties meeting to discuss the dispute:

- (a) the dispute is not resolved; or
- (b) an appropriate alternative dispute resolution process is not agreed,

then the parties will refer the dispute to the:

Resolution Institute
Level 1, 13-15 Bridge Street
Sydney NSW 2000
Telephone: (61-2) 9251 3366
Fax (61-2) 9251 3733

for facilitation of a mediation in accordance with Resolution Institute's Mediation Rules.

1.5 Mediator

The mediator appointed under this process must have reasonable qualifications and practical experience in the area of the dispute. If within 10 business days after referral of the dispute to the Resolution Institute the parties have not agreed upon the mediator or other relevant particular, the mediator and any other particular will be determined in accordance with the Resolution Institute's Mediation Rules.

1.6 Litigation

If the dispute is not finally resolved in accordance with this process, either party is at liberty to litigate the dispute.

1.7 Continue to perform obligations

Each party must continue to perform its obligations under this agreement despite the existence of a dispute.

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