

VOLUNTARY PLANNING AGREEMENT

PARTIES

HORNSBY SHIRE COUNCIL

(Council)

AND

CECIL GILBERT CHENG

(Developer)

DATED

27 July 2011

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Ref: RJG.CW.21029394

VOLUNTRAY PLANNING AGREEMENT No. of 2010

Section 93F of the Environmental Planning and Assessment Act 1979

THIS AGREEMENT dated 27 July 2011 ~~2010~~

Parties

Hornsby Shire Council of 296 Pacific Highway, Hornsby New South Wales 2077 (Council)

and

Cecil Gilbert Cheng of 39 Hannah Street, Beecroft New South Wales 2119 (Developer).

Background

- A. On, 19 November, 2009 the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land situate at 39 Hannah Street, Beecroft
- B. That Development Application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the replacement of 400m² of Blue Gum High Forest lost from the site at 39 Hannah Street, Beecroft as a result of the development and off-set the loss of the Blue Gum High Forest under Council's Green Offset Code (2007) with a Voluntary Contribution of \$20,000.00 towards the replacement of 400m² of Blue Gum High Forest.
- C. The Council agrees to provide an area of 2000m² in Ray Park, Carlingford being the land contained in Lot 44 in DP210615, for revegetation, restoration and enhancement of the Blue Gum High Forest.

Operative provisions

1 Planning agreement under the Act

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

2 Application of this Agreement

This Voluntary Planning Agreement applies to the land which forms the subject matter of the Development Application No. 1470/2009 situate at 39 Hannah Street, Beecroft (Folio Identifier 9/7484) and the area of land which is to contain the regrowth of Blue Gum High Forest is situated at Ray Park, Carlingford being the land referred in Lot 44 in DP210615.

3 Operation of this Agreement

This Agreement shall take effect from the date this Agreement is entered into.

4 Definitions and interpretation

4.1 In this Agreement the following definitions apply:

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

Dealing, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.

Development means the subdivision approval granted pursuant to DA No. 1470/2009 dated 6th October 2010

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 of \$20,000.00 towards the replacement of 400m² of Blue Gum High Forest.

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 Hornsby Shire Local Environmental Plan 1994.

Land means Lot 9 DP 7484 situate at 39 Hannah Street, Beecroft NSW 2119

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

Public Facilities means public infrastructure, facilities, amenities and services and more specifically referred to as Ray Park, Carlingford which is the location for the regrowth planting.

Regulation means the Environmental Planning and Assessment Regulation 2000.

4.2 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.

5 Development Contributions to be made under this Agreement

Upon execution of this agreement the Developer agrees to pay to the Council a monetary contribution in the amount of \$20,000.00 towards the replacement of 400m² of Blue Gum High Forest lost from the site in Hannah Street, Beecroft as a result of the development, by way of a bank cheque in favour of Hornsby Shire Council.

6 Application of the Development Contributions

6.1 The Council must upon receipt of the monetary contribution paid by the Developer in accordance with clause 5 hereof and within a reasonable time after the date of this agreement.

- (i) Provide an area of 2000m² within Ray Park, Carlingford being Lot 44 in DP 210615 for revegetation, restoration and enhancement of Blue Gum High Forest.
- (ii) Attend to the plating of 400m² of Blue Gum High Forest in the area provided within Ray Park.
- (iii) Nurture and care for and maintain the said trees from the date that they are planted by the Council.

7 Application of s94 and s94A of the Act to the Development

Pursuant to clause 27 of the Development Approval DA 1470/2009 the Developer shall make a Section 94 Infrastructure Contribution of \$19,827.80 for one additional lot towards the cost of infrastructure identified in Council's Development Contribution Plan 2007/2011. The Section 94 Contribution is based on a rate of \$19,827.80 per additional lot and is current as at the 16th August 2010. The Contribution will be adjusted from this date in accordance with the underlying Consumer Price Index for subsequent financial quarters.

8 Registration of this Agreement

This Planning Agreement is not required to be registered on the title to the land.

9 Review of this Agreement

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

10 Dispute Resolution

10.1 Dispute

If any dispute arises out of this Agreement (*Dispute*) a party to the agreement must not commence any court or arbitration proceedings unless the parties to the Dispute have complied with the following paragraphs of this clause except where a party seeks urgent interlocutory relief.

10.2 Notice of Dispute

A party to this Agreement claiming that a dispute has arisen out of or in relation to this Agreement must give written notice (*Notice*) to the other party to this Agreement specifying the nature of the dispute.

10.3 Dispute resolution

If the parties do not agree within 7 days of receipt of the Notice (or such further period as agreed in writing by them) as to:

10.3.1 the dispute resolution technique (eg expert determination) and procedures to be adopted.

10.3.2 the timetable for all steps in those procedures; and

10.3.3 the selection and compensation of the independent person required for such technique.

The parties must mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales as published by the Law Society of New South Wales from time to time, and, the President of the Law Society of New South Wales or the President's nominee will select the mediator and determine the mediator's remuneration.

11 Notices

11.1 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. Faxed to that party at its fax number set out below.
- c. Emailed to that party at its email address set out below.

Council Hornsby Shire Council A.B.N. 20 706 996 972
Attention: Senior Planning & Development Officer
Address: 296 Pacific Highway, Hornsby NSW 2077
Phone: 9847 6666
Fax Number: (02) 9847 6999
Email: hsc@hornsby.nsw.gov.au

Developer Mr Cecil Gilbert Cheng
Address: 39 Hannah Street, Beecroft NSW 2119
Ph: 9484 6611

- 11.2 If a party gives the other party 3 business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that party if it is delivered, posted or faxed to the latest address or fax number.
- 11.3 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 it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.
- 11.4 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.

12 Approvals and consent

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 that Party's absolute discretion and subject to any conditions determined by the Party. A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

13 Assignment and Dealings

The Developer may not assign or in any way deal with its rights or obligations under the terms of this agreement to any third party unless:

- (i) The developer has, at no cost to Council, first procured the execution by that person of all necessary documents in favour of Council by which that person agrees to be bound by the Agreement as if they were a party to the original Agreement; and
- (ii) The party is not in breach of this Agreement.

14 Costs

Pursuant to the terms of the Development Approval 1470/2009 the Developer agrees to pay all costs (including Council's costs) associated with the preparation, public notification, legal costs, stamp duty, registration & administration costs of the Voluntary Planning 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 nonexclusive 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 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.

22 Modification

No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

23 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.

24 GST

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.

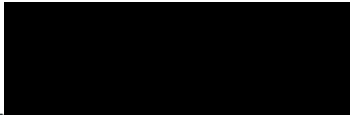
25 Discharge of Developers Obligations

The Developer's obligations under this agreement shall be discharged on the occurrence of any of the following:

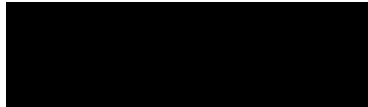
- a. The developer's obligations have been fully carried out in accordance with the agreement; or
- b. The development consent to which the agreement relates has lapsed; or
- c. The development consent to which the agreement relates has been modified to such an extent that the planning obligations may not be appropriate; or
- d. The performance of the planning agreement has been frustrated by an event or events beyond the reasonable control of the parties; or
- e. The developer has fully and completely assigned the developer's interest under the agreement in accordance with its terms; or
- f. Other material changes affecting the operation of the planning agreement have occurred; or
- g. Council and the developer otherwise agree to the modification or discharge of the agreement.

EXECUTED AS AN AGREEMENT

**SIGNED BY THE COUNCIL OF THE SHIRE OF HORNSBY
BY ITS DULY CONSTITUTED ATTORNEY ROBERT JOHN BALL PURSUANT TO
POWER OF ATTORNEY REGISTERED No 500 BOOK 4218**

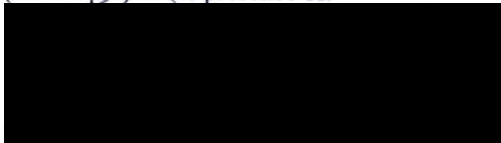


Robert John Ball
General Manager

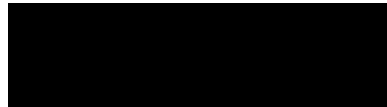


WITNESS

SIGNED by CECIL GILBERT CHENG
(Developer) in the presence of:



Signature of witness



Cecil Gilbert Cheng



Name of Witness