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LAKE MACQUARIE  
CITY COUNCIL

# Voluntary Planning Agreement

Hammersmith Management Pty Limited

*ACN 084 393 644*

Lake Macquarie City Council

*ABN 81 065 027 868*

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# Agreement

**Date** 13 August 2018

## Parties

### First party

**Name** Hammersmith Management Pty Limited  
(Landowner)  
**ACN** 084 393 644  
**Contact** Mr Wes van der Gardner  
**Telephone** 02 9270 6003

### Second party

**Name** Lake Macquarie City Council (Council)  
**ABN** 81 065 027 868  
**Contact** The Chief Executive Officer  
**Telephone** 02 4921 0333

## Background

- A. On 17 August 2005, the Landowner made an application to Council for the Instrument Change for the purpose of making a Development Application to Council for Development Consent to carry out the Development on the Land.
- B. The Landowner has made an offer in connection with the Instrument Change to enter into this agreement to make contributions for public purposes associated with the Instrument Change and the Development.

## Operative part

### 1 Definitions

In this agreement, unless the context indicates a contrary intention:

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

**Approval** means any certificate, licence, consent, permit, approval or other requirement of any Authority having jurisdiction in connection with the activities contemplated by this agreement;

**Authority** means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person;

**Bank Guarantee** means an irrevocable and unconditional undertaking that is not limited in time and does not expire by one of the following trading banks:

- (a) Australia and New Zealand Banking Group Limited;
- (b) Commonwealth Bank of Australia;

- (c) Macquarie Bank;
- (d) National Australia Bank Limited;
- (e) St George Bank Limited;
- (f) Westpac Banking Corporation; or
- (g) other financial institution approved by Council;

to pay an amount or amounts of money to Council on demand and containing terms and conditions reasonably acceptable to Council.

**BioBanking Assessment Methodology** means the methodology used by OEH to assess biodiversity values and calculate the number of credits that can be created from undertaking conservation management under the BioBanking Scheme;

**BioBanking Scheme** means the Biodiversity Banking and Offset Scheme authorised by the OEH, or any other similar scheme replacing it;

**Business Day** means a day on which banks are open for general banking business in Sydney, excluding Saturdays and Sundays;

**Claim** means any claim, loss, liability, damage, proceeding, order, judgment or expense arising out of the operation of this agreement;

**Construction Certificate** means a construction certificate as defined under section 6.4 of the Act;

**Development** means the proposed subdivision of the Land;

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

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

**Final Report** means a written report containing the information in Annexure D and providing evidence confirming that the Offset Land has been maintained or improved during the Maintenance Period by the Landowner in accordance with the Management Plan;

**First CC** means the first Construction Certificate for any Subdivision Work forming part of the Development;

**Governing Body** means OEH, Biodiversity Conservation Trust or the Commonwealth Department of the Environment and Energy (or its successors or assigns);

**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 of or administration of the GST;

**Instrument Change** means an amendment to the LEP in response to the Landowner's rezoning application to Council numbered RZ/9/2005, including the rezoning of the Land or a substantial part of the Land in accordance with the plans at Annexure F;

**Land** means Lot 1 DP 1180029 identified as "development site" as shown on the plan at Annexure A;

**Law** means:

- (a) any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation;
- (b) any Approval, including any condition or requirement under it; and
- (c) any fees and charges payable in connection with the things referred to in paragraphs (a) and (b);

**Law Society of New South Wales** means the Law Society of New South Wales or its successors or assigns.

**LEP** means *Lake Macquarie Local Environmental Plan 2014*;

**Maintain** means carrying out works and management actions for the purposes of improving or maintaining the biodiversity values of the Offset Land in accordance with the Management Plan;

**Maintained and Maintenance** have corresponding meanings;

**Maintenance Period** is the period of time that commences on the grant of any Development Consent for the Development or the removal of any vegetation on the Land, whichever occurs first and ends 10 years from that time or at another date as agreed between the parties in writing, or otherwise determined in accordance with this agreement;

**Management Plan** means the plan setting out management actions for the conservation of the Offset Land during the Maintenance Period prepared under clause 6.3 containing the information anticipated by Part A of Annexure E;

**Monetary Contribution** means the monetary contribution payable by the Landowner under clause 6.5 of this agreement;

**O'Donnelltown Land** means Lot 2 DP 1050996 as shown on the plan at Annexure B;

**OEH** means the NSW Office of Environment and Heritage or its successors or assigns;

**Offset Land** means part of Lot 9 DP 4647, part of Lot 1 DP 1180029 (west of Government Road), whole of Lot 2 DP 1156170 and part of Lot 6000 DP 1238670 to be dedicated to Council in accordance with this agreement, identified as "offset" in Annexure A, and, for the avoidance of doubt, does not include the O'Donnelltown Land shown in Annexure B, the part of Lot 1 DP 1180029 identified as "development site" or the part of Lot 9 DP 4647 identified as "dwelling, APZ, easement" on the plans at Annexure A;

**Permitted Encumbrances** means:

- (a) easements benefitting statutory authorities or for the purpose of utility services,
- (b) encumbrances, agreements or arrangements authorised by an Approval,
- (c) environmental management requirements or other instruments registered for the purposes of the protection of biodiversity or conservation of the land,
- (d) any other encumbrance, agreement or arrangement Council (acting reasonably) agrees in writing is a Permitted Encumbrance; or
- (e) any encumbrance, agreement or arrangement that does not prevent the future use of the relevant land for the public purpose for which it is to be dedicated



under this agreement, unless the encumbrance is a charge arising as a result of unpaid taxes or rates;

**Register** means the Torrens title register maintained under the *Real Property Act 1900* (NSW);

**Regulation** means the *Environmental Planning and Assessment Regulation 2000*;

**Report** means a written report containing information as per Annexure D;

**Revised Management Plan** means the plan setting out management actions for the conservation of the Offset Land in perpetuity prepared under clause 6.4 containing information anticipated by Part B of Annexure E;

**Subdivision Work** has the same meaning as in the Act;

**Suitably Qualified Person** means a person with suitable qualifications and not less than five years' experience having regard to the nature of the action required under this agreement and appointed in accordance with clause 6.8; and

**Total Fund Deposit Worksheet** means the methodology used by OEH to determine the amount of money needed to fund management actions of an offset site in perpetuity, known as the Total Fund Deposit, under the BioBanking Scheme, or any other similar term and/or methodology replacing it.

## 2 Interpretation

In this agreement, unless the context indicates a contrary intention:

- (a) **(documents)** a reference to this agreement or another document includes any document which varies, supplements, replaces, assigns or novates this agreement or that other document;
- (b) **(references)** a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this agreement;
- (c) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this agreement;
- (d) **(person)** a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns;
- (e) **(party)** a reference to a party to a document includes that party's personal representatives, executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) **(president, CEO or managing director)** the president, CEO or managing director of a body or Authority means any person acting in that capacity;
- (g) **(requirements)** a requirement to do any thing includes a requirement to cause that thing to be done, and a requirement not to do any thing includes a requirement to prevent that thing being done;
- (h) **(including)** including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind;

- (i) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (j) **(singular)** the singular includes the plural and vice-versa;
- (k) **(gender)** words importing one gender include all other genders;
- (l) **(parts)** a reference to one or more things includes each part and all parts of that thing or group of things but nothing in this clause implies that part performance of an obligation constitutes performance of that obligation;
- (m) **(rules of construction)** 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;
- (n) **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (o) **(time and date)** a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in , Australia, even if the obligation is to be performed elsewhere;
- (p) **(joint and several)** an agreement, representation, covenant, right or obligation:
  - (i) in favour of two or more persons is for the benefit of them jointly and severally; and
  - (ii) on the part of two or more persons binds them jointly and severally;
- (q) **(writing)** a reference to a notice, consent, request, approval or other communication under this agreement or an agreement between the parties means a written notice, request, consent, approval or agreement;
- (r) **(replacement bodies)** a reference to a body (including an institute, association or Authority) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions;
- (s) **(Australian currency)** a reference to dollars or \$ is to Australian currency;
- (t) **(month)** a reference to a month is a reference to a calendar month; and
- (u) **(year)** a reference to a year is a reference to twelve consecutive calendar months.

### 3 Planning Agreement under the Act

- (a) The parties agree that this agreement is a planning agreement within the meaning of section 7.4 of the Act.
- (b) Schedule 1 of this agreement summarises the requirements for planning agreements under s 7.4 of the Act and the way this agreement addresses those requirements.

### 4 Application of this agreement

This agreement applies to:

- (a) the Instrument Change,

- (b) the Development,
- (c) the Land,
- (d) the Offset Land, and
- (e) the O'Donnelltown Land.

## 5 Operation of this agreement

- (a) This agreement commences on and from the date it is executed.
- (b) If:
  - (i) the Instrument Change has not occurred within two (2) years after the date of this agreement; or
  - (ii) the Instrument Change has occurred and is declared by a Court to be invalid,either party may terminate this agreement by notice in writing to the other.
- (c) On and from the date of termination of this agreement in accordance with clause 5(b), this agreement will cease to have effect and the Council will immediately return to the Landowner any Bank Guarantee, title documentation or other security it holds under this agreement.

## 6 Contributions to be made under this agreement

### 6.1 *BioBanking O'Donnelltown Land*

- (a) The Landowner must acquire the title to the O'Donnelltown Land prior to the earlier of:
  - (i) 9 months after the date of this agreement; and
  - (ii) prior to any Development Application for the Development being lodged; and
  - (iii) commencement of any clearing of vegetation on the Land.
- (b) The Landowner must register an agreement under the BioBanking Scheme against the title to the O'Donnelltown Land in accordance with relevant legislation.
- (c) The agreement required by clause 6.1(b) must be executed and registered as anticipated by clause 6.1(b) prior to the earlier of:
  - (i) the grant of any Development Consent for the Development;
  - (ii) commencement of any clearing of vegetation on the Land; and
  - (iii) the date that is three (3) years after the date of this agreement, or such later date as may be agreed in writing between the parties.
- (d) The Landowner must give Council not less than 21 days written notice of its intention to clear any vegetation from the Land, where such clearing does not require a Development Consent.
- (e) Prior to the issue of the First CC, the Landowner agrees to retire the following ecosystem credits, or equivalent credits, which will be acquired as a consequence of that agreement:

- (i) 768 HU806 credits equivalent to the Lower Hunter Spotted Gum Ironbark Forest endangered ecological community.
  - (ii) 81 HU807 credits equivalent to the Lower Hunter Spotted Gum Ironbark Forest endangered ecological community.
  - (iii) 335 HU852 credits equivalent to the Smooth-barked Apple – Red Bloodwood – Scribbly Gum grass-shrub woodland.
- (f) The obligations under this clause 6.1 will be taken to have been completed when the Landowner provides to Council written evidence that the Landowner has been registered as the owner of the O'Donnelltown Land and a copy of the executed agreement referred to in clause 6.1(b), evidence that it has been registered against the title to the O'Donnelltown Land and evidence that the credits referred to in clause 6.1(e) have been retired.
  - (g) Nothing in this agreement restricts or prevents the Landowner from obtaining, retiring or transferring any biodiversity credits arising from the registration of an agreement under the Biobanking Scheme against the title to the O'Donnelltown Land that are additional to those specified in clause 6.1(e) .

## 6.2 *Dedication of Offset Land*

- (a) The Landowner must obtain all Approvals required to subdivide the Offset Land so it can be transferred to Council.
- (b) The Landowner must subdivide the Offset Land into a separate title lot or lots at the time of registration of the first plan of subdivision of the Land and must throughout the Maintenance Period keep the Offset Land free of all mortgages, charges and other encumbrances.
- (c) Within 20 Business Days after creation of a separate title lot or lots for the Offset Land ("Offset Lot") as anticipated by clause 6.2(b) the Landowner must deposit with the Council the original Certificates of Title for the Offset Lot, an original executed real property transfers of the Offset Lot in favour of the Council in registrable form and a discharge of any mortgage then affecting the Offset Lot in registrable form.
- (d) Council agrees that the dimensions of the lot(s) created for the Offset Land may vary from those specified in Annexure A, provided that the area of the Offset Land is not reduced by more than 3% in total and provided further that any reduction may not include any of the area within the corridor area contained in Lot 9 DP 4647 identified as "offset" in Annexure A.
- (e) The Landowner must dedicate or cause to be transferred to Council, at no cost to Council, the Offset Land freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, easements, rights, charges, rates and contracts in, over or in connection with the land, including but not limited to, municipal rates and charges, water rates and land tax, except for any Permitted Encumbrances.
- (f) The Offset Land must be dedicated or transferred to Council no later than 6 months from the end of the Maintenance Period, or as otherwise agreed between the parties. The Offset Land can only be dedicated or transferred to Council once the Developer has fulfilled all actions required under clauses 6.4 and 6.5, or Council has waived, in writing, the obligation to fulfil those actions.

- (g) The dedication or transfer of the Offset Land will be taken to have been effected when a Certificate of Title is issued by NSW Land and Property Information for the Offset Land identifying Council as the registered proprietor of that land and the Certificates of Title is held by Council.

### 6.3 *Management Plan*

- (a) The Landowner will, at no cost to Council, cause a Management Plan for the Offset Land to be prepared by a Suitably Qualified Person.
- (b) The Management Plan must set out the works and management actions required to be undertaken on the Offset Land to maintain or improve the biodiversity values of the Offset Land over the Maintenance Period and contain as a minimum the actions specified in Annexure E.
- (c) A draft copy of the Management Plan, which is no more than six (6) months old, must be provided to Council.
- (d) Council will, acting reasonably, advise the Landowner of any suggested changes to the draft Management Plan:
  - (i) within 20 Business Days after receiving the draft Management Plan; or
  - (ii) if another Governing Body is required under any Law to review, comment or approve the draft Management Plan, within 20 Business Days after receiving advice from that Governing Body.
- (e) Provided Council's suggested changes to the draft Management Plan are reasonable the Landowner must accept Council's suggested changes.
- (f) Comments from another Governing Body must be incorporated into the draft Management Plan.
- (g) The Landowner must provide a final version of the Management Plan to Council within 20 Business Days of receiving Council's suggested changes under clause 6.3(d).
- (h) The Landowner must provide a final version of the Management Plan to Council prior to the grant of a Development Consent for the Development or removal of any vegetation, whichever occurs first.

### 6.4 *Maintenance of Offset Land and Revised Management Plan*

- (a) The Offset Land, must be Maintained by the Landowner, at no cost to Council, in accordance with the Management Plan for the Maintenance Period.
- (b) The Landowner must obtain all Approvals necessary to carry out the Maintenance required under this clause.
- (c) At the end of July in each year during the Maintenance Period, the Landowner must provide to Council a Report relating to the immediately preceding year prepared by a Suitably Qualified Person.
- (d) Prior to the end of the Maintenance Period, the Landowner, at no cost to Council, must engage a Suitably Qualified Person to carry out an inspection of the Offset Land and prepare:
  - (i) a Final Report; and

- (ii) a draft Revised Management Plan setting out the works and management actions required to be undertaken on the Offset Land to maintain or improve the biodiversity values of that Land in perpetuity and contains as a minimum the actions specified in Annexure E.
- (e) The Final Report and the draft Revised Management Plan, which must be no more than six (6) months old, must be provided to Council no later than three (3) months prior to the end of the Maintenance Period.
- (f) Council will, acting reasonably, advise the Landowner of any suggested changes to the draft Revised Management Plan:
  - (i) within 20 Business Days after receiving the draft Revised Management Plan; or
  - (ii) if another Governing Body is required under any Law to review, comment or approve the draft Revised Management Plan, within 20 Business Days after receiving advice from that Governing Body.
- (g) Provided Council's suggested changes to the draft Revised Management Plan are reasonable, the Landowner must accept Council's suggested changes.
- (h) Comments from another Governing Body must be incorporated into the draft Revised Management Plan.
- (i) The Landowner must provide a final version of the Revised Management Plan to Council within 20 Business Day of receiving Council's suggested changes under clause 6.4(f).
- (j) The requirement to Maintain the Offset Land under clause 6.4(a) will be taken to have been satisfied when the Maintenance Period has ended and the Landowner has submitted to Council:
  - (i) a Final Report prepared under clause 6.4(d)(i) confirming that all works and actions required under the Management Plan have been completed; and
  - (ii) the final version of the Revised Management Plan under clause 6.4(i).
- (k) The Landowner and Council may agree in writing to extend the Maintenance Period, for a period of no more than 24 months, in the event that the Final Report as required under clause 6.4(d)(i) is not provided to Council or the Revised Management Plan is not finalised between the parties in accordance with clause 6.4(i), prior to the end of the Maintenance Period.

## 6.5 Monetary Contribution

- (a) The Landowner will pay a monetary contribution to Council calculated in accordance with the BioBanking Assessment Methodology Total Fund Deposit Worksheet, by reference to the estimated cost of managing and maintaining the Offset Land in perpetuity as provided in the Revised Management Plan. The minimum list of management activities to be included as inputs into the BioBanking Assessment Methodology Total Deposit Fund Worksheet for management in perpetuity is contained in Table B of Appendix E.
- (b) The Landowner must engage a Suitably Qualified Person to calculate the Monetary Contribution and provide to Council a report from that person on the

amount to be paid, together with the final version of the Revised Management Plan as required by clause 6.4(i).

- (c) If either party objects to the amount of the Monetary Contribution determined under this clause 6.5, then that party may seek to have a dispute resolved by referring the matter directly to expert determination under clause 10.7 of this agreement, and is not required to comply with clause 10.3 to 10.6 of this agreement.
- (d) The Monetary Contribution must be paid to Council prior to Council executing any transfer forms or instrument having the effect of dedicating the Offset Land to Council.
- (e) The Monetary Contribution must be paid by way of bank cheque in favour of Council or by electronic funds transfer to an account specified by Council within 20 Business Days after provision of the amount for the Monetary Contribution under clause 6.5(b) or after determination of the Monetary Contribution under clause 10.7.
- (f) The Monetary Contribution will be taken to have been made when the Landowner delivers the bank cheque to Council, or if paid by electronic funds transfer, Council receives the amount in its specified account.
- (g) Council agrees that it will execute any transfer forms dedicating the Offset Land to Council within 5 Business Days of receiving the Monetary Contribution.

#### **6.6 Additional Credits**

- (a) The Landowner acknowledges and agrees that the retirement of credits in connection with the O'Donnelltown Land and the Maintenance and dedication of the Offset Land will not be sufficient to offset the environmental impacts of the Development.
- (b) The Landowner agrees to source or acquire 484 ecosystem credits which are equivalent to the Lower Hunter Spotted Gum Ironbark endangered ecological community, through the BioBanking Scheme to make up the shortfall.
- (c) Should the development area be reduced to increase the offset lands and/or conserve a larger area of Lower Hunter Spotted Gum Ironbark Forest which is contiguous with other patches of native vegetation to be retained, then the number of ecosystem credits sourced or acquired in accordance with this clause 6.6 may be adjusted with Council agreement and in accordance with the BioBanking Assessment Methodology. To avoid doubt this provision does not apply to the Offset Lands and O'Donnelltown Land.
- (d) The Landowner must obtain and retire the credits referred to in clause 6.6(b) prior to the issue of the First CC or removal of any vegetation on the Land, whichever occurs first.

#### **6.7 Public Purposes**

- (a) The parties agree and acknowledge that the contributions made in accordance with this clause 6 serve the public purpose of conserving and enhancing the natural environment.
- (b) Council acknowledges and agrees that the environmental conservation measures proposed under this agreement, being the proposal to retire credits after entering

into an agreement under the BioBanking Scheme for the O'Donnelltown Land, maintenance and dedication of the Offset Land, and the retirement of the additional credits in accordance with clause 6.6:

- (i) constitute, in the Council's opinion at the time of this agreement, an adequate offset for the proposed clearing required for the footprint of the Development identified in the rezoning application to Council numbered RZ/9/2005, and
- (ii) are intended to apply as biodiversity offsets in connection with the Development of the Land, and
- (iii) will be taken into consideration as biodiversity offsets when Council determines any Development Application applying to the Land.

#### 6.8 *Appointment of a Suitably Qualified Person*

- (a) Prior to contracting with any person to carry out actions required to be undertaken by a Suitably Qualified Person under this agreement:
  - (i) the Landowner will advise Council in writing of the name of the person to be retained and the person's relevant qualifications and experience;
  - (ii) within 20 Business Days of receiving that information, Council will notify the Landowner in writing whether it agrees, acting reasonably, to the appointment of that person; and
  - (iii) if Council does not agree to that person being retained, the Landowner will not enter into a contract with that person and will seek to engage the services of another Suitably Qualified Person following the procedure in clauses (i) to (iii) again.
- (b) For the avoidance of doubt, the Landowner will bear the costs of any Suitably Qualified Person appointed in accordance with this agreement, unless the person has been appointed to resolve a dispute in accordance with clause 10.

### 7 Application of s 7.11, s 7.12 and s 7.24 of the Act to the Development

- (a) This agreement does not exclude the application of section 7.11 of the Act to the Development.
- (b) This agreement does not exclude the application of section 7.12 of the Act to the Development.
- (c) This agreement does not exclude the application of section 7.24 of the Act to the Development.
- (d) The benefits under this agreement are not to be taken into consideration in determining a development contribution under section 7.11 of the Act.

### 8 Registration of this agreement

#### 8.1 *Landowner Interest*

The Landowner represents and warrants to Council that on the date of this agreement it is the registered proprietor of the Offset Land.



## 8.2 *Registration of this agreement*

- (a) The Landowner agrees to procure the registration of this agreement under the *Real Property Act 1900* (NSW) in the relevant folios of the Register for the Land, the Offset Land and O'Donnelltown Land in accordance with section 7.6 of the Act.
- (b) The Landowner, at its own expense, will promptly after the execution of this agreement, take all practical steps, and otherwise do anything that Council reasonably requires to procure:
  - (i) the consent of each person who:
    - (A) has an estate or interest in the Land, the Offset Land and O'Donnelltown Land registered under the *Real Property Act 1900* (NSW); or
    - (B) is seized or possessed of an estate or interest in the Land, the Offset Land and the O'Donnelltown Land,
  - (ii) the execution of any documents; and
  - (iii) the production of the relevant certificates of title,to enable the registration of this agreement in accordance with this clause 8.2.
- (c) The Landowner, at its own expense, will take all practical steps, and otherwise do anything that Council reasonably requires:
  - (i) to procure the lodgement of this agreement in registrable form with the Registrar-General against the title to the Land and the Offset Land within three (3) months from the date of this agreement;
  - (ii) to procure the lodgement of this agreement in registrable form with the Registrar-General against the title to the O'Donnelltown Land within nine (9) months from the date of this agreement; and
  - (iii) to procure the registration of this agreement by the Registrar-General in the relevant folios of the Register for the Land, the Offset Land and the O'Donnelltown Land as soon as reasonably practicable after this agreement is lodged for registration.

## 8.3 *Removal from Register*

- (a) At the same time as a subdivision certificate is provided by Council in respect of a stage creating final residential lots within the Development ("Residential Lots") Council will execute and provide to the Landowner documents reasonably required to remove notation of this agreement from the titles to Residential Lots within the relevant stage of the Development.
- (b) Council will provide a release and discharge of this agreement so that it may be removed from the folios of the Register for the O'Donnelltown Land (or any part of it) when so requested to do so after the all the obligations of this agreement have been fulfilled or completion of the Development being the creation of the final residential allotment whichever is the latter.
- (c) Council will provide a release and discharge of this agreement so that it may be removed from the folios of the Register for the Offset Land (or any part of it)

immediately prior to, or at the same time as, the transfer or dedication of the Offset Land to Council.

- (d) After termination of this agreement in accordance with clause 5(b), the Council agrees to do all things reasonably necessary to enable the extinguishment or cancellation of this agreement from the title to the Land.

## 9 Review of this agreement

### 9.1 *General*

- (a) This agreement may be reviewed or modified. Any review or modification of this agreement will be conducted in the circumstances and in the manner determined by the parties.
- (b) No modification or review of this agreement will be of any force or effect unless it is in writing and signed by the parties to this agreement.
- (c) A party is not in breach of this agreement if it does not agree to an amendment to this agreement requested by a party in, or as a consequence of, a review.

### 9.2 *Changes to Legislation*

- (a) In the event there are any legislative or other changes to the BioBanking Scheme that would prevent the Landowner from relying on this agreement for the purposes of providing offsets in connection with the Development, the parties agree that to undertake a review of this agreement.
- (b) The parties agree that the purpose of any review undertaken in accordance with clause 9.2(a) is to ensure that:
  - (i) the biodiversity on the O'Donnelltown Land and the Offset Land will be protected in perpetuity through whatever mechanism is required under the legislative scheme; and
  - (ii) this agreement is converted to an appropriate arrangement under that scheme, so the arrangement will be taken to constitute offsets made in connection with the Development.

## 10 Dispute Resolution

### 10.1 *Meaning of Dispute*

- (a) For the purposes of this clause 10 and clause 11, "Dispute" means a dispute between the parties in respect of:
  - (i) whether the Landowner has complied with the Management Plan;
  - (ii) calculation of the Monetary Contributions; or
  - (iii) calculations using the BioBanking Assessment Methodology; or
  - (iv) whether a party has acted reasonably in making a determination, and for the avoidance of doubt, does not include a dispute between the parties about a proposal to review or vary this agreement in any way.
- (b) Nothing in clause 10.1(a) restricts or prevents the parties from mediating or having an expert determine any dispute that is not governed by this clause 10.

### 10.2 *Reference to Dispute*

If a Dispute arises between the parties in relation to this agreement, the parties must not commence any court proceedings relating to the dispute unless the parties have complied with this clause, except where a party seeks urgent interlocutory relief.

### 10.3 *Notice of Dispute*

The party wishing to commence the dispute resolution process must give written notice (**Notice of Dispute**) to the other party of:

- (a) the nature of the Dispute,
- (b) the alleged basis of the Dispute, and
- (c) the position which the party issuing the Notice of Dispute believes is correct.

### 10.4 *Representatives of Parties to Meet*

- (a) The representatives of the parties must promptly (and in any event within 20 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified Dispute.
- (b) The parties may, without limitation:
  - (i) resolve the dispute during the course of that meeting,
  - (ii) agree that further material or expert determination in accordance with clause 10.7 about a particular issue or consideration is needed to effectively resolve the dispute (in which event the parties will, in good faith, agree to a timetable for resolution); or
  - (iii) agree that the parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

### 10.5 *Further Notice if Not Settled*

If the Dispute is not resolved within 20 Business Days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (**Determination Notice**) by mediation under clause 10.6 or by expert determination under clause 10.7.

### 10.6 *Mediation*

If a party gives a Determination Notice calling for the dispute to be mediated:

- (a) The parties must agree to the terms of reference of the mediation within 10 Business Days of the receipt of the Determination Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);
- (b) The mediator will be agreed between the parties, or failing agreement within 10 Business Days of receipt of the Determination Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;

- (c) The mediator appointed pursuant to this clause 10.6 must:
  - (i) have reasonable qualifications and practical experience in the area of the dispute; and
  - (ii) have no interest or duty which conflicts or may conflict with his or her function as a mediator, he or she being required to fully disclose any such interest or duty before his or her appointment;
- (d) The mediator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties;
- (e) The parties must within 15 Business Days of receipt of the Determination Notice notify each other of their representatives who will be involved in the mediation;
- (f) The parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement; and
- (g) In relation to costs and expenses:
  - (i) each party will bear its own professional and expert costs incurred in connection with the mediation; and
  - (ii) the costs of the mediator will be shared equally by the parties unless the mediator determines that a party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that party.

#### 10.7 *Expert determination*

If the Dispute is not resolved under clause 10.4 or clause 10.6, or the parties otherwise agree that the Dispute may be resolved by expert determination, the parties may refer the Dispute to an expert, in which event:

- (a) The Dispute must be determined by an independent expert in the relevant field:
  - (i) agreed upon and appointed jointly by the parties; and
  - (ii) in the event that no agreement is reached or no appointment is made within 10 Business Days of the agreement to refer the Dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales;
- (b) The expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) The determination of the Dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (d) The expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (e) Each party will bear its own costs in connection with the process and the determination by the expert and will share equally the expert's fees and costs; and

- (f) Any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
  - (i) within 20 Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and intends to commence litigation; or
  - (ii) the determination is in respect of, or relates to, termination or purported termination of this agreement by a party, in which event the expert is deemed to be giving a non-binding appraisal.

#### 10.8 *Litigation*

If the Dispute is not *finally* resolved in accordance with this clause 10, then either party is at liberty to litigate the Dispute.

#### 10.9 *No suspension of contractual obligations*

Subject to any interlocutory order obtained under clause 10.1, the referral to or undertaking of a Dispute resolution process under this clause 10 does not suspend the parties' obligations under this agreement.

### 11 Enforcement

#### 11.1 *Default*

- (a) In the event a party considers another party has failed to perform and fulfil an obligation under this agreement, it may give notice in writing to the other party (**Default Notice**) giving all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than 30 days.
- (b) In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (c) If a party disputes the Default Notice it may if the Default Notice relates to a Dispute refer the dispute to dispute resolution under clause 10 of this agreement.

#### 11.2 *Bank Guarantee*

- (a) Prior to the earlier of the issue of the First CC or removal of any vegetation for the purposes of carrying out the Development, whichever occurs first, the Landowner must provide to Council:
  - (i) two Bank Guarantees each in an amount of \$630,897.37 (referred to as "**MP Guarantee 1**" and "**MP Guarantee 2**" respectively) totalling \$1,261,794.74 which total being an amount to be equivalent to the costs of carrying out the actions identified in the Management Plan (**Guarantee Amount**), as determined by a Suitably Qualified Person; and
  - (ii) a Bank Guarantee in an amount of \$2,358,376.49, being the Council's reasonable estimate of the Monetary Contribution ("**MC Guarantee**").
- (b) Except as expressly permitted by this agreement, Council is not to call on a Bank Guarantee provided under this clause 11.2 unless Council considers that the Landowner has failed to comply with its obligations under this agreement in a

timely manner and the Landowner has failed to rectify the non-compliance after having been given a Default Notice.

- (c) At any time following the provision of a Bank Guarantee, the Landowner may provide Council with one or more replacement Bank Guarantees totalling the relevant Bank Guarantee Amount. On receipt of such replacement Bank Guarantee, Council must release and return to the Landowner, as directed, the relevant Bank Guarantees which it holds that have been replaced.
- (d) Subject to this clause, Council may apply any Bank Guarantee in satisfaction of:
  - (i) any obligation to Maintain the Offset Land under this agreement (in which case the Council may carry out the relevant Maintenance and recover the costs by calling on one or both of the Bank Guarantees);
  - (ii) any obligation to pay the Monetary Contribution under this agreement; and
  - (iii) any liability, loss, cost, charge, or expense directly incurred by Council because of the failure by the Landowner to comply with this agreement, including any costs incurred by Council in acquiring the relevant land in accordance with clause 11.3.
- (e) If Council calls on a Bank Guarantee in accordance with this agreement, Council may, by notice in writing to the Landowner, require the Landowner to provide a further Bank Guarantee that, when added to any unused portion of the existing Bank Guarantee, does not exceed the Guarantee Amount.
- (f) The Bank Guarantees or parts thereof if any balance remains, will be returned to the Landowner within 20 Business Days after each of the following dates:
  - (i) MP Guarantee 1, the date 5 years after the date of issue of the First CC, provided that the Landowner has provided evidence to the Council, through the provision of Reports, that it has completed obligations and achieved standards required under the Management Plan as at that date;
  - (ii) MP Guarantee 2, the later of the date of payment of the Monetary Contribution to Council and the date of registration of the transfer of the Offset Land to Council, provided that the Landowner has provided evidence to the Council, through the provision of Reports and a Final Report, that it has completed obligations and achieved standards required under the Management Plan; and
  - (iii) the MC Guarantee, the date of payment of the Monetary Contribution.
- (g) Nothing in this clause 11.2 prevents or restricts Council from taking any enforcement action in relation to:
  - (i) any obligation of the Landowner under this agreement; or
  - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by Council because of a failure by the Landowner to comply with this agreement,

that is not satisfied by calling on a Bank Guarantee.

### **11.3 Compulsory Acquisition**

- (a) If the Landowner does not transfer or dedicate the Offset Land to Council as required by this agreement, Council may compulsorily acquire the relevant land,

in which case the Landowner consents to Council compulsorily acquiring that land for compensation in the amount of \$1.00 without having to follow the pre-acquisition procedures in the *Land Acquisition (Just Terms Compensation) Act 1991* and may recover any costs, including legal costs, incurred by Council in doing so as a debt due from the Landowner.

- (b) The Landowner must pay Council, promptly on demand, an amount equivalent to all costs, including legal costs, incurred by Council acquiring the whole or any part of the relevant land under clause 11.3(a), together with any Monetary Contribution calculated in accordance with clause 6.5.
- (c) Clause 11.3(a) constitutes an agreement for the purposes of section 30 of the *Land Acquisition (Just Terms Compensation) Act 1991*.
- (d) Except as otherwise agreed between the Landowner and Council, the Landowner must ensure the Offset Land is freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, rights, charges, rates, strata levies and contracts, except as may be permitted by this agreement on the date that Council will acquire the land in accordance with clause 11.3(a).

#### 11.4 *General Enforcement*

- (a) Without limiting any other remedies available to the parties, this agreement may be enforced by a party in any Court of competent jurisdiction.
- (b) Notwithstanding any other provision of this agreement:
  - (i) Subject to clause 10, a party from bringing proceedings in the Land and Environment Court to enforce any aspect of this agreement or any matter to which this agreement relates; and
  - (ii) Council may exercise any function under the Act or any other Act or law relating to the enforcement of any aspect of this agreement or any matter to which this agreement relates.

## 12 Assignment and Dealings

### 12.1 *Assignment*

- (a) A party must not assign or deal with any right under this agreement without the prior written consent of the other parties.
- (b) Any change of ownership or control (as defined in section 50AA of the *Commonwealth Corporations Act 2001*) of a party (excluding Council) shall be deemed to be an assignment of this agreement for the purposes of this clause.
- (c) Any purported dealing in breach of this clause is of no effect.

### 12.2 *Transfer of Land*

The Landowner may not transfer, assign or dispose of the whole or any part of its right, title or interest in the Offset Land (present or future) or the O'Donnelltown Land to another person (**Transferee**) unless before it sells, transfers or disposes of that right, title or interest:

- (a) the Landowner satisfies Council that this agreement, or in the case of the O'Donnelltown Land an agreement under the BioBanking Scheme, is registered against the title to the Offset Land or the O'Donnelltown Land as the case requires;

- (b) the Landowner satisfies Council that the proposed Transferee is financially capable of complying with the Landowner obligations under this agreement and the Management Plan;
- (c) the Landowner satisfies Council that the rights of Council will not be diminished or fettered in any way;
- (d) the Transferee delivers to Council a novation deed signed by the Transferee in a form and of such substance as is acceptable to Council containing provisions under which the Transferee agrees to comply with all the outstanding obligations of the Landowner under this agreement and the Management Plan;
- (e) the Transferee provides to Council any Bank Guarantee required under this agreement, in which case any Bank Guarantee provided by the Landowner must be released to the Landowner;
- (f) any default under any provisions of this agreement by the Landowner has been remedied or waived by Council, on such conditions as Council may determine; and
- (g) the Landowner and the Transferee pay Council's reasonable costs in relation to the assignment.

### 13 Approvals and consents

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 obligated to give its reasons for giving or withholding consent or for giving consent subject to conditions.

### 14 No fetter

#### 14.1 Discretion

This agreement is not intended to operate to fetter, in any manner, the exercise of any statutory power or discretion of Council, including, but not limited to, any statutory power or discretion of Council relating to the Instrument Change or a Development Application or any other application for Development Consent (all referred to in this agreement as a "**Discretion**").

#### 14.2 No fetter

No provision of this agreement is intended to constitute any fetter on the exercise of any Discretion. If, contrary to the operation of this clause, any provision of this agreement is held by a court of competent jurisdiction to constitute a fetter on any Discretion, the parties agree:

- (a) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause is substantially satisfied,
- (b) in the event that (a) cannot be achieved without giving rise to a fetter on the exercise of a Discretion, the relevant provision is to be severed and the remainder of this agreement has full force and effect, and
- (c) to endeavour to satisfy the common objectives of the parties in relation to the provision of this agreement which is to be held to be a fetter to the extent that is possible having regard to the relevant court judgment.



## 15 Contamination

### 15.1 Definitions

In this clause 15, the following definitions apply:

**Competent and Qualified Contamination Land Consultant** means a consultant that is certified with one of the following certification schemes:

- (a) the Site Contamination Practitioners Australia (SCPA) scheme;
- (b) the Environment Institute of Australia and New Zealand's (EIANZ) Contaminated Land Assessment Specialist Certified Environmental Practitioner (CLA Specialist CEnvP) scheme; and
- (c) the Soil Science Australia (SSA) Certified Professional Soil Scientist Contaminated Site Assessment and Management (CPSS CSAM) certification.

**Contamination** has the same meaning as contamination in Section 5 of the Contaminated Land Management Act 1997, being the presence in, on or under the land of a substance at a concentration above the concentration at which the substance is normally present in, on or under (respectively) land in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the environment.

**Detailed Site Investigation Report** means a report as anticipated by sub-clause 15(a)(i)(B).

**Site Auditor** means a suitably qualified site auditor duly accredited under the Contaminated Land Management Act 1997.

**Site Audit Report** means a Site Audit Report prepared by the Site Auditor under the Contaminated Land Management Act 1997.

**Site Audit Statement** means a Section B Site Audit Statement issued by the Site Auditor pursuant to the Contaminated Land Management Act 1997 which states that the property can be made suitable for the proposed use and associated Site Audit Report.

### 15.2 Contamination and Remediation

Prior to dedication or transfer of the Offset Land to Council:

- (a) the Landowner is required to comply with the State Environmental Planning Policy 55 – Remediation of Land (SEPP55), the Managing Land Contamination Planning Guidelines SEPP55 – Remediation of Land, the Contaminated Land Management Act 1997, and all other relevant legislation and standards; and consultants are required to comply with the Guidelines for Consultants Reporting on Contaminated Sites (NSW Office of Environment and Heritage). This will include, but is not limited to, the following prescriptions:
  - (i) Landowner, at no cost to Council, commission a:
    - (A) Stage 1 – Preliminary Investigation Report ("PI") of the proposed dedication area. The PI must be prepared by a Competent and Qualified Contaminated Land Consultant. The PI must be submitted to Council for review by appropriate staff. Council's staff may submit the PI report for a third-party desktop review by a Competent and Qualified Contaminated Land Consultant. The desktop review costs will be at nil cost to Council and all costs reimbursed by the

Landowner to Council, provided that Council first notifies the Developer of the estimated costs of the review.

1. If, after the review of the report, Council, acting reasonably, deems that the Offset Land is not suspected of being contaminated no further contamination assessments are required, or
2. If, after review of the report, Council reasonably suspects that the Offset Land is contaminated, the Landowner will be instructed to progress the assessment of contamination on the Offset Land to Stage 2.

(B) Stage 2 – Detailed Site Investigation Report (“DSI”) of the proposed dedication area. The DSI must be prepared by a Competent and Qualified Contaminated Land Consultant, including a full (EPA) suite chemical analysis, and the assessment of all contaminants against appropriate Investigation Criteria in the National Environment Protection (Assessment of Site Contamination) Measure (NEPM – Contamination). The DSI must be submitted to Council for review by appropriate staff. Council’s staff may submit the DSI report for third-party desktop review by a Competent and Qualified Contaminated Land Consultant. The document review costs will be at nil cost to Council and all costs reimbursed by the Landowner to Council, provided that Council first notifies the Developer of the estimated costs of the review.

1. If, after review of the report, Council considers, acting reasonably, that the Offset Land is suitable for its intended use as environmental offset land, no further contamination assessments are required, or
2. If, after review of the report, Council considers, acting reasonably, that the Offset Land is contaminated and unsuitable for its intended use as environmental offset land, the Landowner will be required to progress the assessment and management of contamination to Stage 3.

(C) Stage 3 – Remedial Action Plan (“RAP”) for the proposed area, including a Site Audit Report and Site Audit Statement. The RAP must be prepared by a Competent and Qualified Contaminated Land Consultant, and the Site Audit Report and Site Audit Statement must be undertaken by a contaminated site auditor, accredited by the NSW Site Auditor Scheme (administered by the NSW EPA under Part 4 of the Contaminated Land Management Act 1997). Unless written approval is provided by Council, the RAP must only consider the removal of contaminated material, and reinstatement of the site, to below the appropriate Investigation Criteria in the NEPM – Contamination. The RAP, the Site Audit Report and Site Audit Statement must be submitted to Council for review.

1. If, after review of the report, Council considers, acting reasonably, that the RAP does not propose adequate remediation measures for the Offset Land, the Landowner will

be required to seek another RAP in accordance with Council's requirements, or

2. If, after review of the report, Council considers, acting reasonably, that the RAP is appropriate for the Offset Land, the Landowner will undertake remediation, strictly in accordance with the RAP.

(D) Stage 4 – Validation Report for the proposed area, including a Site Audit Report and Site Audit Statement. The Validation Report must be prepared by a Competent and Qualified Contaminated Land Consultant, and the Site Audit Report and Site Audit Statement must be undertaken by a contaminated site auditor, accredited by the NSW Site Auditor Scheme (administered by the NSW EPA under Part 4 of the Contaminated Land Management Act 1997). The Validation Report, Site Audit Report and Site Audit Statement must be submitted to Council for review.

1. If, after review of the report, Council considers, acting reasonably, that contamination has not been managed in accordance with the RAP, the Landowner will be required to undertake additional remediation works and seek another Validation Report.
2. If, after review of the report, Council considers, acting reasonably, that the Validation Report is appropriate for the site, no further contamination assessments are required.

(b) Despite anything else in this clause 15 if the Environment Protection Authority (**EPA**) declares any part of the Offset Land to be significantly contaminated land under the *Contaminated Land Management Act 1997*, the actions required to remediate the land will be governed by that Act and any directions or orders issued by the EPA.

(c) For the avoidance of doubt, this clause 15 applies only to the Offset Land that will be dedicated to Council under this agreement.

## 16 Notices

### 16.1 Notices

Any notice given under or in connection with this agreement (**Notice**):

- (a) must be in writing and signed by a person duly authorised by the sender;

- (b) must be addressed as follows and delivered to the intended recipient by hand, by prepaid post or by email at the address below, or at the address last notified by the intended recipient to the sender after the date of this agreement:
- (i) to Hammersmith Management Pty Ltd: Address: 365 New South Head Road, Double Bay NSW 2028  
Email: wes@rochegroup.com.au  
Attention: Mr Wes van der Gardner, General Manager - Development
  - (ii) to Lake Macquarie City Council: Address: 126 – 138 Main Road, Speers Point NSW 2284  
Email: council@lakemac.nsw.gov.au  
Attention: The Chief Executive Officer
- (c) is taken to be given or made:
- (i) in the case of hand delivery, when delivered; and
  - (ii) in the case of delivery by post, five Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country); and
- (d) if under clause (c) a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it is taken to have been given or made at the start of business on the next Business Day in that place.

**16.2 Notices sent by email:**

- (a) A party may serve a Notice by email if the Notice:
  - (i) includes a signature block specifying:
    - (A) the name of the person sending the Notice; and
    - (B) the sender's position within the relevant party;
  - (ii) states in the body of the message or the subject field that it is sent as a Notice under this agreement;
  - (iii) contains an express statement that the person sending the Notice has the authority to serve a Notice under this agreement; and
  - (iv) is sent to the email address specified in clause 16.1(b) or the email address last notified by the intended recipient to the sender;
- (b) The recipient of a Notice served under this clause 16.2 must:
  - (i) promptly acknowledge receipt of the Notice; and
  - (ii) keep an electronic copy of the Notice.
- (c) Failure to comply with clause 16.2 does not invalidate service of a Notice under this clause.

### 16.3 *Receipt of Notices sent by email*

- (a) A Notice sent under clause 16.2 is taken to be given or made:
  - (i) when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above;
  - (ii) when the Notice enters an information system controlled by the recipient;  
or
  - (iii) when the Notice is first opened or read by the recipient,  
whichever occurs first.
- (b) If under clause 16.3 a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it will be taken to have been given or made at the start of business on the next Business Day in that place.

## 17 General

### 17.1 *Relationship between parties*

- (a) Nothing in this agreement:
  - (i) constitutes a partnership between the parties; or
  - (ii) except as expressly provided, makes a party an agent of another party for any purpose.
- (b) A party cannot in any way or for any purpose:
  - (i) bind another party; or
  - (ii) contract in the name of another party.
- (c) If a party must fulfil an obligation and that party is dependent on another party, then that other party must do each thing reasonably within its power to assist the other in the performance of that obligation.

### 17.2 *Time for doing acts*

- (a) If the time for doing any act or thing required to be done or a notice period specified in this agreement expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.
- (b) If any act or thing required to be done is done after 5.00 pm on the specified day, it is taken to have been done on the following Business Day.

### 17.3 *Further assurances*

Each party must promptly execute all documents and do all other things reasonably necessary or desirable to give effect to the arrangements recorded in this agreement.

### 17.4 *Variation*

A provision of this agreement can only be varied by a later written document executed by or on behalf of all parties and in accordance with the provisions of the Act.

**17.5 No assignment**

The Landowner cannot assign or otherwise transfer its rights under this agreement without:

- (a) satisfying the provisions of clause 12.2 in relation to the Offset Land and the O'Donnelltown Land; and
- (b) rectifying any pre-existing defaults under this agreement.

**17.6 Counterparts**

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

**17.7 Legal expenses and stamp duty**

The Landowner must pay Council's reasonable legal costs and disbursements in connection with the negotiation, preparation, execution, registration and release and discharge of this agreement.

**17.8 Entire agreement**

The contents of this agreement constitute the entire agreement between the parties and supersede any prior negotiations, representations, understandings or arrangements made between the parties regarding the subject matter of this agreement, whether orally or in writing.

**17.9 Representations and warranties**

The parties represent and warrant that they have the power and authority 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.

**17.10 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.

**17.11 Invalidity**

- (a) A word or provision must be read down if:
  - (i) this agreement is void, voidable, or unenforceable if it is not read down;
  - (ii) this agreement will not be void, voidable or unenforceable if it is read down; and
  - (iii) the provision is capable of being read down.
- (b) A word or provision must be severed if:
  - (i) despite the operation of clause (a), the provision is void, voidable or unenforceable if it is not severed; and
  - (ii) this agreement will be void, voidable or unenforceable if it is not severed.
- (c) The remainder of this agreement has full effect even if clause 17.11(b) applies.

#### 17.12 Waiver

- (a) A right or remedy created by this agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.
- (b) 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.

#### 17.13 GST

- (a) Words and expressions which are not defined in this agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this agreement are exclusive of GST.
- (c) If GST is payable on any supply made under this agreement, the recipient will pay to the supplier an amount equal to the GST payable on the supply.
- (d) The supplier must deliver a tax invoice or an adjustment note to the recipient before the supplier is entitled to payment under clause 17.13(c). The recipient can withhold payment of the amount until the supplier provides a tax invoice or adjustment note as appropriate.

#### 17.14 Governing law and jurisdiction

- (a) The laws applicable in New South Wales govern this agreement.
- (b) The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

Schedule 1

Summary of requirements (section 7.4)

Subject and subsection of the Act	Planning Agreement
<p><b>Planning instrument and/or Development Application – Section 93F(1)</b></p> <p>The Landowners have:</p> <p>(a) Sought a change to an environmental planning instrument</p> <p>(b) Made, or propose to make a Development Application</p> <p>(c) Entered into an agreement with, or are otherwise associated with, a person to whom paragraph (a) or (b) applies</p>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>
<p><b>Description of the land to which the planning Agreement applies – Section 7.4(3)(a)</b></p>	<p>See the definitions of Land and Offset Land in clause 1.</p>
<p><b>The scope, timing and manner of delivery of contribution required by the Planning Agreement – Section 7.4(3)(b)</b></p>	<p>See clause 6.</p>
<p><b>Applicability of section 7.11 of the Act – Section 7.4(3)(d)</b></p>	<p>Not excluded. See clause 7.</p>
<p><b>Applicability of section 7.12 of the Act – Section 7.4(3)(d)</b></p>	<p>Not excluded. See clause 7.</p>
<p><b>Applicability of section 7.24 of the Act – Section 7.4(3)(d)</b></p>	<p>Not excluded. See clause 7.</p>
<p><b>Mechanism for dispute resolution – Section 7.4(3)(f)</b></p>	<p>See clause 10.</p>
<p><b>Enforcement of the Planning Agreement – Section 7.4(3)(g)</b></p>	<p>See clause 11.</p>
<p><b>Registration of the Planning Agreement – Section 7.4(3)(g)</b></p>	<p>To be registered against the Land, the Offset Land and the O'Donnelltown Land, see clause 8.</p>
<p><b>Provisions for Enforcement by suitable means, such as provision of a bond or guarantee- Section 7.4(3)(g)</b></p>	<p>See clause 11.2</p>
<p><b>No obligation to grant consent or exercise functions – Section 7.4(9)</b></p>	<p>See clause 14 (no fetter).</p>



Executed as an agreement

Executed by Hammersmith  
Management Pty Limited ACN 084 393  
644 in accordance with section 127 of the  
Corporations Act 2001 (Cth) by:

*[Handwritten Signature]*

Signature of Director

*[Handwritten Signature]*

Signature of Director/Secretary

*Dominic Roche*

Print name of Director

*IAN CRAIGHILL*

Print name of Director/Secretary

THE COMMON SEAL OF COUNCIL OF  
THE CITY OF LAKE MACQUARIE WAS  
HEREUNTO AFFIXED PURSUANT TO  
RESOLUTION MADE BY COUNCIL ON:

*23/7/18*



*[Handwritten Signature]*

Signature of Chief Executive Officer

*[Handwritten Signature]*

Signature of Mayor

*MORVEN CAMERON*

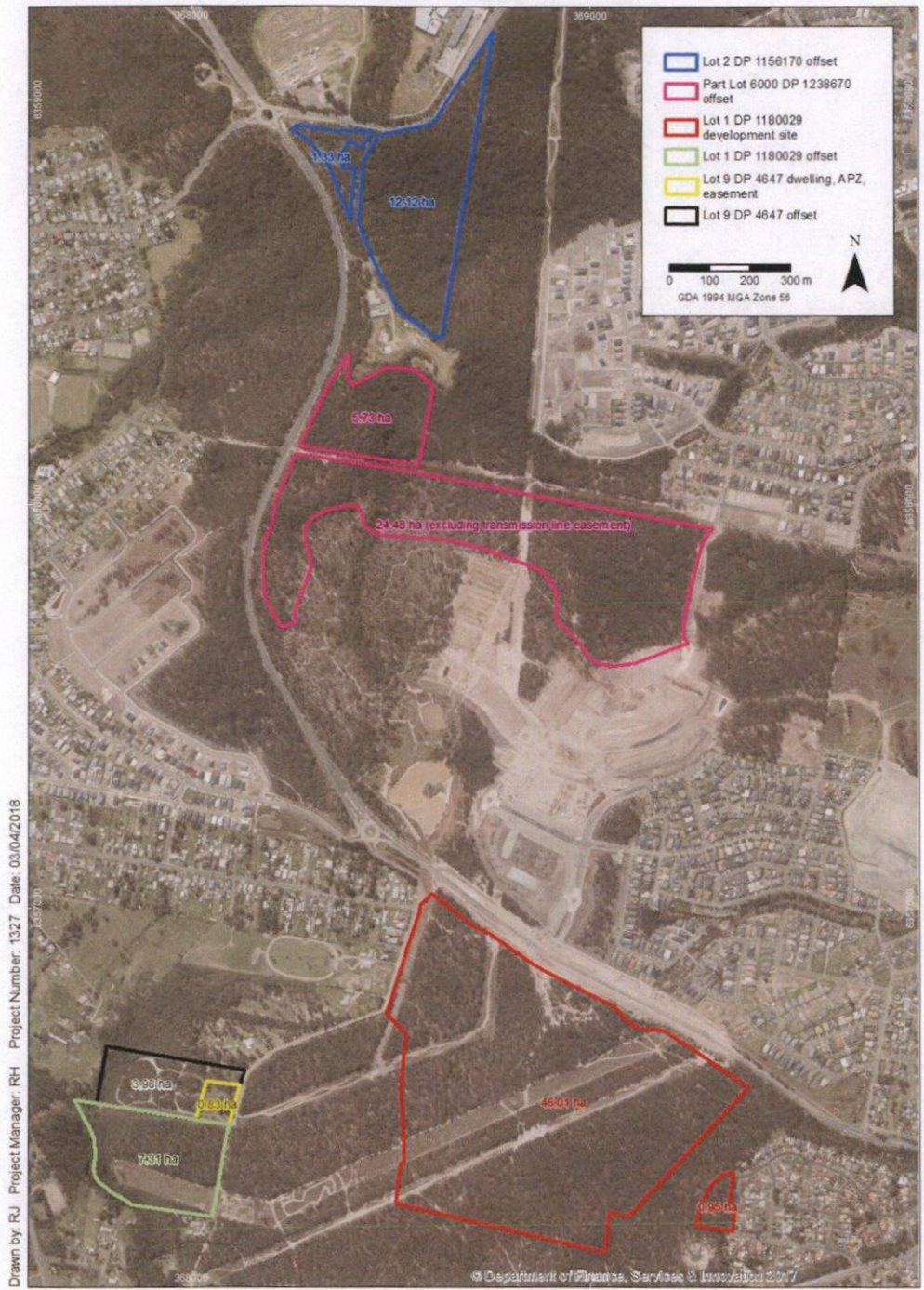
Name

*LUKE CURIS*

Name

Annexure A

Plan showing location of Land and Offset Land



Drawn by: RJ Project Manager: RH Project Number: 1327 Date: 03/04/2018

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Imagery: (c) LPI 2016-10-01



Annexure B

Plan showing O'Donnelltown Land



Lot 2 DP 1050996, O'Donnelltown proposed offset site



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FIGURE 4

Imagery: (c) LPI 2014-05-15

## Annexure C Explanatory note

### **Explanatory Note Exhibition of draft Voluntary Planning Agreement**

**Lot 1 DP 1180029** *Environmental Planning & Assessment Regulation 2000 (clause 25E)*

#### **Planning Agreement**

The purpose of this Explanatory Note is to provide a plain English summary to support the notification of a draft voluntary Planning Agreement (**the Planning Agreement**) under Section 7.4 of the *Environmental Planning and Assessment Act 1979 (the Act)*.

The Planning Agreement will require the provision of biodiversity offset land in relation to a proposed change to provisions of the *Lake Macquarie Local Environmental Plan 2014 (LEP)* that affect land in Lot 1 DP 1180029.

This Explanatory Note has been prepared jointly between the parties as required by clause 25E of the *Environmental Planning and Assessment Regulation 2000 (the Regulations)*.

This Explanatory Note is not to be used to assist in construing the Planning Agreement.

#### **Parties**

Hammersmith Management Pty Ltd (**the Landowner**) made an offer to Lake Macquarie City Council (**the Council**) to enter into a voluntary Planning Agreement, in connection with a planning proposal relating to the subject land.

#### **Description of subject land**

The land to which the Planning Agreement applies is described as Lot 1 DP 1180029 (**the Land**).

#### **Description of the Planning Proposal to which the Planning Agreement applies**

An amendment to the Lake Macquarie Local Environmental Plan 2014 in response to the Landowner's rezoning application to Council numbered RZ/9/2005, including the rezoning of the Land in accordance with the plans shown in Annexure F of the Planning Agreement.

#### **Summary of Objectives, Nature and Effect of the Planning Agreement**

##### **Offset Land**

The Planning Agreement requires the Landowner to improve or maintain the biodiversity values of the Offset Land for a period of 10 years (or as otherwise agreed between the parties) from the date a construction certificate is granted for subdivision work on the Land.

Once that maintenance period is complete, the Landowner will dedicate the Offset Land to Council.

When the land is dedicated to Council, the Landowner will pay a monetary contribution to Council for the maintenance in perpetuity of the Offset Land from the date it is dedicated.

The Landowner has also agreed to register a BioBanking agreement for land within Lot 2 DP 1050996 and to acquire and retire biodiversity credits in connection with the Development of the Land.

## **Assessment of the Merits of the Planning Agreement**

### **How the Planning Agreement Promotes the Objects of the Act and the public interest**

The draft Planning Agreement promotes the following objectives of the *Environmental Planning and Assessment Act 1979*:

- to encourage the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
- to encourage the promotion and co-ordination of the orderly and economic use and development of land,
- to encourage the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and
- to encourage ecologically sustainable development.

The draft Planning Agreement contributes to the above objectives and promotes the public interest by requiring the improvement or maintenance of biodiversity values that will offset impacts caused by future development of the Land once it is rezoned. In accordance with the principles of intergenerational equity, this will contribute to ensuring that some land is conserved for future generations, while allowing development and growth in other appropriate locations.

### **The Planning Purposes served by the Planning Agreement and whether the Planning Agreement provides for a reasonable means of achieving the planning purpose**

All contributions will be made for the purposes of the conservation or enhancement of the natural environment.

The Planning Agreement is a reasonable means for achieving the planning purpose, as it provides for the maintenance of the Offset Land for a period of 10 years, the acquisition and retirement of additional biodiversity credits, and the payment of a monetary contribution to maintain the Offset Land in perpetuity.

### **How the Planning Agreement promotes the objectives of the *Local Government Act 1993* and the elements of the Council's Charter (now "Guiding Principles for Councils")**

The Planning Agreement is consistent with the following purpose of the *Local Government Act 1993*:

- to provide for a system of local government that is accountable to the community and that is sustainable, flexible and effective.

The Planning Agreement promotes the following guiding principles now in section 8A of the *Local Government Act 1993*:

- Councils should plan strategically, using the integrated planning and reporting framework, for the provision of effective and efficient services and regulation to meet the diverse needs of the local community.
- Councils should manage lands and other assets so that current and future local community needs can be met in an affordable way.
- Councils should consider the long term and cumulative effects of actions on future generations.

- Councils should consider the principles of ecologically sustainable development.

These Guiding Principles are met through the requirement to set aside land that is appropriate for conservation in perpetuity, so that other land can be properly developed in accordance with Council's strategic planning. The current and future needs of the community will be met through Council's involvement in this agreement, which will ensure that the natural environment is conserved for the enjoyment and benefit of future generations.

**Whether the Planning Agreement Conforms with the Council's Capital Works Program**

Council will need to consider the maintenance of the Offset Land when determining the annual Capital Works Program at the time the Offset Land is to be dedicated to Council, utilising the monetary contribution paid to Council for this purpose.

**Whether the Planning Agreement specifies that certain requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued**

The following must be completed before the first construction certificate relating to any subdivision work on the Land is issued:

- (a) A Management Plan for the maintenance of the Offset Land for a period of 10 years.
- (b) The acquisition and retirement of additional biodiversity credits.
- (c) The provision of a bank guarantee to Council to secure the maintenance obligations and the proposed monetary contribution that will be payable at the end of the 10 year maintenance period.



## Annexure D      Annual Reports

The annual report will include, but not be limited to, the following information:

### **A. Minimum requirements for the Annual Reports (during the maintenance period)**

The content of the Annual Report is to include but not be limited to:

- Progress on achieving the objectives of the management plan
- Document condition of areas before and after rehabilitation and over time
- Photo records of progress and growth
- Condition and use of any nest boxes
- Results of fauna monitoring
- Results of flora monitoring
- Works undertaken during the reporting period
- Weeding areas including extent and intensity of weed infestations, areas treated, type of treatment, monitoring over time
- Numbers and species of plantings and success
- Progress of any rehabilitation work including treatments, location, spatial extent area treated, and monitoring over time
- Any matters that affect the successful implementation of the management plan

### **B. Minimum requirements for the Final Annual Report (to be prepared at the conclusion of the maintenance period)**

The Final Annual Report is to include but not be limited to:

- Documents the final year implementation of the management plan
- Compile the results of all monitoring and works over the maintenance period for the matters included in each Annual Report
- Assess suitability for dedication to Council
  - Assess in detail the condition of the site at the end of the maintenance period and the degree to which the objectives of the management plan have been met.
  - Document any outstanding works i.e. works not completed or where progress has not been sufficient to meet objectives and reasons for this
  - Make recommendations for the management actions into the future (in perpetuity) for inclusion in the Revised Management Plan

## Annexure E Contents of Management Plan and Revised Management Plan

### George Booth and Cameron Park Drives, Cameron Park

#### A. Minimum management actions for the Biodiversity Offset Land to be included in the Management Plan for the Maintenance Period

MANAGEMENT ACTIONS COSTS for Maintenance Period	Start year	End year
<b>INFRASTRUCTURE COSTS</b>		
Internal fence removal	1	9.5
Rubbish removal (primary)	1	9.5
Installation of access/management gates & associated posts & cable fencing	1	9.5
Installation of boundary posts on RFS boarder	1	9.5
Construction of roads or tracks, including walking and bushfire trails	1	9.5
Perimeter Fencing	1	9.5
Interpretative signage (Minimum of 8)	1	9.5
<b>BUSH FIRE HAZARD REDUCTION AND ECOLOGICAL BURNING</b>		
Management of bush fire asset protection zones (APZ)	1	9.5
Planning ecological burns	1	9.5
Implementation of ecological burns	1	9.5
<b>BUSH REGENERATION AND WEED MANAGEMENT</b>		
Years 1-5 (XXX days in first 5 years)	1	5
Years 6-10 (XXX days in years 6-10)	1	10
Revegetation/supplementary planting trees/shrubs/ground cover	1	9.5
<b>OTHER RECURRING COSTS</b>		
FERAL AND PEST ANIMAL CONTROL	1	9.5
EROSION CONTROL	1	10
NEST BOX MAINTENANCE	1	10
<b>COMMUNITY ENGAGEMENT</b>		
Neighbour relations	1	10
Community consultation	1	10
<b>MONITORING</b>		



Monitoring surveys	1	10
Annual Report	1	10

**Notes:**

1. All infrastructure is to be designed and constructed in accordance with LMCC Guidelines.
2. Where no LMCC guidelines exist, other Guidelines may be used with Council agreement such as OEH or RFS guidelines for track construction.
3. The start year coincides with commencement of the maintenance period and end year is the year of the approval of the revised management plan in the event the period is extended
4. The start year coincides with end of the maintenance period and approval of the draft Revised Management Plan
5. Lake Macquarie Flora and Fauna Guidelines contain guidelines for the preparation of Vegetation Management Plans.

**B. Minimum management actions for the Biodiversity Offset Land for the Revised Management Plan (management in perpetuity after the Maintenance Period)**

MANAGEMENT ACTIONS COSTS for Revised Management Plan and Ongoing Management in perpetuity	Start year	End year	Frequency in years (i.e. repeat action every XX years)
<b>INFRASTRUCTURE MAINTENANCE COSTS</b>			
Fence maintenance	17	perpetuity	17
Maintenance of gates	17	perpetuity	17
Maintenance of boundary posts	17	perpetuity	10
Interpretative signage	10	perpetuity	10
Rubbish removal (ongoing)	10	perpetuity	1
Track maintenance including bush fire trails	15	perpetuity	5
<b>BUSH FIRE HAZARD REDUCTION AND ECOLOGICAL BURNING</b>			
Management of bush fire asset protection zones (APZ)	11	perpetuity	6
Planning ecological burns	11	perpetuity	6
Implementation of ecological burns	11	perpetuity	6
<b>BUSH REGENERATION AND WEED MANAGEMENT</b>			
Years 11+ (XXX days in each subsequent 5 year period)	11	perpetuity	1
<b>OTHER RECURRING COSTS</b>			
Feral and pest animal control	11	perpetuity	5
Erosion control	11	perpetuity	3
Nest box maintenance	11	perpetuity	5
<b>COMMUNITY ENGAGEMENT</b>			
Neighbour relations	11	perpetuity	1
Community consultation	11	perpetuity	1
<b>ADMINISTRATION COSTS</b>			
Professional services, annual management planning and works program & on costs etc	11	perpetuity	1
Management planning, monitoring, review and revision (5 yearly)	15	perpetuity	5

Contingencies (0.05% of total of year 11 costs)		perpetuity	
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**Notes:**

1. All infrastructure is to be designed and constructed in accordance with LMCC Guidelines.
2. Where no LMCC guidelines exist other Guidelines may be used with Council agreement such as OEH or RFS guidelines for track construction.
3. Frequency of replacement of infrastructure that becomes assets of LMCC is determined in accordance with Council's Natural Areas Asset management Plan. Modification of the frequency of other actions may be justified in order to meet the targets and criteria in the management plan or other agency requirements.
4. The start year coincides with end of the maintenance period and approval of the draft Revised Management Plan
5. Lake Macquarie Flora and Fauna Guidelines contain guidelines for the preparation of Vegetation Management Plans.



Annexure F Plans showing rezoning proposal

