

PLANNING AGREEMENT

Section 93L of the Environmental Planning and Assessment Act 1979

Parties

Parkes Shire Council of 2 Cecile Street, Parkes, New South Wales (**Council**)

and

PS Marine Pty Ltd (ACN 085 699 752) of 7 Westlink Court, Altona, Victoria (**Developer**).

Background

- A. On, 23 rd December 2005, the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.
- B. That Development Application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities if that Development consent was granted.

Operative provisions

1. Definitions and interpretation

- a. 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

Stage 1 & 2 (incorporating SCT Logistics Rail Terminal)

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

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 Parkes Local Environmental Plan 1990.

Land means Lot 4 and Lot 5 DP 840130

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

Public Facilities means extension of Water Main and upgrade of Brolgan road from Railway line to the western boundary of Lot 4

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

- b. 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.

2. 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.

3. Further Agreements Relating to this Agreement

3.1 The Parties are to enter into such further agreements as are expressly required to be entered into by this Agreement.

3.2 The Parties may enter into such other agreements relating to any matter the subject of this Agreement that they consider are necessary or desirable in order to give effect to this Agreement.

3.3 An agreement referred to in clause 3.1 or 3.2 is not to be inconsistent with this Agreement.

4. Application of this Agreement

This Agreement applies to the Development.

5. Operation of this Agreement

5.1 This Agreement commences when it is properly executed by both Parties.

5.2 For the purposes of clause 5.1, this Agreement is properly executed if each Party executes either this Agreement or an identical document. In the latter case, this Agreement is properly executed when the separately executed documents are exchanged between the Parties.

6. Development Contributions to be made under this Agreement

6.1 The development contributions to be made under the agreement will constitute a monetary contribution. The contribution is to be made as follows:

- (a) An Initial payment of \$100,000 has been made by the Developer to Council. The Second Payment is to be an additional \$100,000 contribution to Brolgan Road works plus \$45000, being 50% contribution to water main extensions.
- (b) The Limit of the Developers local road contributions for the Brolgan Road works to the western boundary of Lot 4 on DP840130 shall be \$200,000 for Stage 1 & 2 and 3 as shown on the Development plan.

6.2 The Second Payment will be 30 days after date hereof or as otherwise agreed between the parties.

6.3 If the Second Payment is not made by the due date, penalty interest at the rate of 10% per annum will apply until the time of the payment to the Council.

7. Application of the Development Contributions

The development contributions to be made under the agreement will be expended for the purposes as described in Clause 6

8. Application of s94 and s94A of the Act to the Development

Not Applicable

9. Registration of this Agreement

The Agreement is not to be registered as provided for in s93H of the Act.

10. Review of this Agreement

10.1 The Parties, acting in good faith and using their best endeavors, agree to review this Agreement if any change of circumstance occurs that materially affects the operation of this Agreement.

10.2 For the purposes of clause 10.1, the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables Parkes Council to restrict or prohibit any aspect of the Development.

11. Dispute Resolution

11.1 Any dispute between the Parties in connection with the Project must be dealt with in accordance with the provisions of this clause 11.

11.2 If:

11.2.1 a Party has given to the other two Parties notice of a dispute in connection with this Agreement; and

11.2.2 the Parties in good faith are unable to settle the dispute within 14 days after that notice has been received by the other two Parties,

then the dispute must be referred to the Parties' respective chief executive officers or general managers or other equivalent who must meet and use reasonable endeavors to attempt to resolve the matter by consensus between themselves.

11.3 Failing resolution of the dispute in accordance with clause 11.2 within 14 days after the matter is referred, the Parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales, a copy of which is attached in Schedule 4, and must request the President of the Law Society (or the President's nominee) to select a mediator.

11.6 If the dispute is resolved pursuant to this clause 11 then that resolution shall bind all Parties.

12. Enforcement

12.1 This Agreement may be enforced by either Party in any court of competent jurisdiction.

12.2 For the avoidance of doubt, nothing in this Agreement prevents:

- (a) 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,
- (b) in addition, Parkes Council from exercising 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.

13. Notices

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

- (a) Delivered or posted to that Party at its address set out below.
- (b) Faxed to that Party at its fax number set out below.
- (c) Emailed to that Party at its email address set out below.

Council

Attention:	Alan McCormack, General Manager
Address:	PO BOX 337, PARKES, NSW 2870
Fax Number:	02 68623946
Email:	council@parkes.nsw.gov.au

Developer

Attention:	Michael Zerbst
Address:	PO Box 373 Laverton 3028
Fax Number:	03 9369 9747
Email:	[REDACTED]@u

13.2 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 other Party if it is delivered, posted or faxed to the latest address or fax number.

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

- (a) If it is delivered, when it is left at the relevant address.
- (b) If it is sent by post, 2 business days after it is posted.
- (c) If 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.

13.4 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.

14. 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.

15. Assignment and Dealings

The parties agree not to assign their rights or obligations under this Agreement and not to have any dealing in relation to the Land, unless:

- (a) The party who is assigning their rights or dealing with the Land has, at no cost to the other parties, first procured the execution by the person with whom it is dealing of all necessary documents in favour of the other parties by which that person agrees to be bound by this Agreement as if they were a Party to this Agreement,
- (b) if the proposed dealing involves a mortgage, charge or other encumbrance in relation to the party's right, title and interest in the Land, such documents provide for an agreement by the person to the effect that they, and any receiver appointed by them, will not enjoy rights greater than those of that party, and
- (c) the party is not in breach of this Agreement.
- (d) this Agreement was executed, except as permitted by law.

16. Costs

The Parties agree to bear their own costs in preparing, negotiating, executing and stamping this Agreement and any document related to this Agreement.

17. 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.

18. 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.

19. Governing law and jurisdiction

This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

Execution

Dated: _____

Executed as an Agreement: _____

Schedule 1

Clause 1.1)

The Land

[To be completed— include schedule]

Not Applicable

[To be completed]

Item No.	Public Work	Stage	Estimated Value
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			

Schedule 4

(Clause 10.3)

Law Society of NSW – Mediation Rules

[To be included]

Appendix A

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

[To be completed upon finalisation of Planning Agreement]

Planning Agreement

Under s93F of the Environmental Planning and Assessment Act 1979

1 Parties

Parkes Shire Council of 2 Cecile Street, Parkes, New South Wales (Parkes Council)

PS Marine Pty Ltd of PO Box 373 Laverton , Vic 3028

2 Description of Subject Land

Lot 4 and 5 of DP 840130

3 Summary of Objectives, Nature and Effect of the Planning Agreement

The objectives of the Planning Agreement are to:

- Enhance road and traffic networks; and
- Extension of the Water Main

The effect of the Planning Agreement is to require PS Marine Pty Ltd to provide the public services and facilities described in the Planning Agreement, in a staged manner, with the facilities and services being provided if and when approval is granted for the development.

4 Assessment of the Merits of the Planning Agreement

The Planning Purposes Served by the Planning Agreement

The planning purpose served by the Planning Agreement is to meet the demand for public services and facilities which is expected to be generated by the development

5 How the Planning Agreement Promotes the Objects of the Environmental Planning and Assessment Act 1979

The Planning Agreement promotes the objects of the Environmental Planning & Assessment Act 1979 by encouraging:

- the proper management, development and conservation of natural and artificial resources, including...cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment;
- the promotion and co-ordination of the orderly and economic use and development of land,
- the provision of land for public purposes, and
- the provision and co-ordination of community services and facilities.

It does this by:

- reconfiguring the road layout and providing appropriate road layouts and capacity;
- ensuring that the provision of services and facilities is carried out in a co-ordinated and orderly fashion, in conjunction with the development of the site;

6 How the Planning Agreement Promotes the Public Interest

The Planning Agreement promotes the public interest by ensuring that the public services and facilities which are expected to be required to service the development on the site are provided in a timely fashion.

7 For Planning Authorities:

(a) How the planning Agreement Promotes the Elements of the Council's Charter

The Planning Agreement promotes the following elements of the Council's Charter contained in section 8 of the Local Government Act 1993:

- to provide directly or on behalf of other levels of government, after due consultation, adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively; and

(b) Whether the Planning Agreement Conforms with the Authority's Capital Works Program

[to be completed by PSC]

8 The Impact of the Planning Agreement on the Public or Any Section of the Public

The Planning Agreement has no adverse impact on the public or any section of the public.

9 Other Matters

Nil

Dated: 7 JULY 2008

Signed on behalf of Parkes Shire Council:

General Manager

Alan McCormack

Mayor

Robert Wilson

Signed on behalf of ~~P3~~ Marine Pty Ltd:

Witness

Witness