
PLANNING AGREEMENT

**BYRON SHIRE COUNCIL
(Council)**

and

**2222 PTY LTD ATF THE BRAINS TRUST &
26 SWALES PTY LTD ATF THE CHALK TRUST
(Developer)**

PLANNING AGREEMENT

Parties

BYRON SHIRE COUNCIL of 70 Station Street, Mullumbimby
NSW 2482

(Council)

And

**2222 PTY LTD (ACN 630 648 145) ATF THE BRAINS TRUST
& 26 SWALES PTY LTD (ACN 107 125 057) ATF THE CHALK
TRUST** of PO Box 40, Mermaid Beach QLD 4218

(Developer)

Background

- A. The Developer has lodged a Development Application to Council for Development Consent for the Development, being DA 10.2020.513.1.
- B. The Developer has made an offer to Council to make the Development Contribution if Development Consent is granted.

Operative Provisions

1. Planning agreement under the Act

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

2. Operation and Application of this Agreement

- 2.1. This Agreement:

- (a) commences when the Development Consent is issued; and
- (b) applies to the carrying out of the Development on the Land.

3. Definitions and interpretation

- 3.1. In this Agreement the following definitions apply:

- (a) **Act** means the *Environmental Planning and Assessment Act 1979* (NSW).
- (b) **Development** means Alterations and Additions to Existing Motel including Five (5) Additional Guest Rooms, Restaurant/Bar, Swimming Pool and Car Parking Spaces on the Land, as set out in the Development Application.
- (c) **Development Application** means DA 10.2020.513.1.
- (d) **Development Consent** means a development consent issued under the Act for the Development.
- (e) **Development Contribution** means the amount of \$60,000.00 (inclusive of any GST) for the purposes of Council providing public art.
- (f) **Explanatory Note** means the explanatory note annexed to this Agreement at Schedule 1.
- (g) **GST** has the same meaning as in the GST Law.

- (h) **Land** means Lot 10 in Deposited Plan 805193, known as 84 Harbour Way, Brunswick Heads.
- (i) **Occupation Certificate** means an occupation certificate within the meaning of section 6.4 of the Act.
- (j) **Party** means a party to this agreement, including their successors and assigns.
- (k) **Public Purpose** means any purpose that benefits the public or a section of the public, including but not limited a purpose specified in section 7.4(2) of the Act.
- (l) **Regulation** means the *Environmental Planning and Assessment Regulation 2021*.

3.2. In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or reenactment, 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.

4. Development Contributions to be made under this Agreement

- 4.1. The Developer must make the Development Contribution in accordance with this Agreement.
- 4.2. The Developer is not required to make the Development Contribution until prior to the issue of an Occupation Certificate for the Development.

5. Application of the Development Contributions

- 5.1. The Council must apply any Development Contribution made under this Agreement towards the Public Purpose for which it is made, in the manner and to the standards required by or under this Agreement.

- 5.2. The Parties agree that if the Development Contribution is made in accordance with this Agreement then clause 5.1 is satisfied.

6. Application of s7.11 and s7.12 of the Act to the Development

- 6.1. This Agreement does not exclude the application of s7.11 of the Act to the Development.
- 6.2. This Agreement does not exclude the application of s7.12 of the Act to the Development.
- 6.3. The Development Contribution provided under this Agreement is to be taken into consideration in Council determining any development contributions relevant to the Development under sections 7.11 and 7.12 of the Act.

7. Registration of this Agreement

- 7.1. This Agreement is not required to be registered.

8. Review of this Agreement

- 8.1. The Parties, acting in good faith and using their best endeavours, agree to review this Agreement if either Party is of the opinion that any change of circumstance has occurred that materially affects the operation of this Agreement.
- 8.2. For the purposes of clause 8.1, the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development.
- 8.3. A failure by a Party to agree to participate in, or to take action requested by the other Party as a consequence of, a review under clause 8.1 is taken to be a dispute for the purposes of clause 9.

9. Dispute Resolution

- 9.1. Should a dispute arise under this Agreement, the Parties shall firstly meet in an attempt to resolve the dispute.
- 9.2. If the dispute is not resolved within 28 days of the date that a Party first raises the issue about which there is a dispute, the Parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales that

are current at the time the dispute is mediated, and must request the President of the Law Society, or the President's nominee, to select a mediator.

- 9.3. If the dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.

10. Carrying Out & Hand-over of Development Contribution

- 10.1. The Developer is to carry out and complete the Development Contribution in accordance with this Agreement.
- 10.2. The Development Contribution is made for the purposes of this Agreement when the Developer provides Council with a monetary payment for no less than the Development Contribution.

11. Security and Enforcement

- 11.1. An Occupation Certificate must not be issued for the Development until the Developer has provided the Development Contribution pursuant to clause 10.2. The parties may enter into further written agreements and/or agree on the payment of security in substitution for the issuing of an Occupation Certificate under this clause 11.1.
- 11.2. Without limiting any other remedies available to the Parties, this Agreement may be enforced by either Party in any court of competent jurisdiction.
- 11.3. 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) the 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.

12. Notices

12.1. 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) Emailed to that Party at its email address set out below.

Council

Attention: The General Manager

Address: PO Box 219, Mullumbimby NSW 2482

Email: council@byron.nsw.gov.au

Developer

Attention: Stephen Rakemann

Address: PO Box 40 Mermaid Beach QLD 4218

Email: rackemann@me.com

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

12.3. 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 email, at the time the email is sent provided that the sender does not subsequently receive a mail delivery error message; and
- (d) at the earliest time it is served, if it is served more than once.

12.4. 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.

13. Approvals and consent

13.1. Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in 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.

14. Assignment

14.1. The Developer may assign or transfer this Agreement, provided that the assignee or transferee delivers to Council a deed signed by the assignee or transferee under which it agrees to comply with all the obligations of the Developer under this Agreement as if it were joined as a party to this Agreement in the place of the Developer.

15. Costs

15.1. The Developer must pay Council's legal costs of negotiating and executing this Agreement (if any) to a maximum sum of \$1,500.00 (including GST).

16. Entire agreement

16.1. 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.

17. Further acts

17.1. Each Party must promptly execute all documents and do all things that another Party from time to time reasonably

requests to affect, perfect or complete this Agreement and all transactions incidental to it.

18. Governing law and jurisdiction

18.1. 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.

19. Authorisation of servants, agents and contractors

19.1. The Developer is not to suffer or permit their servants, agents or contractors to do or refrain from doing anything which this Agreement prohibits the Developer from doing or requires the Developer to do (as the case may be).

20. Joint and individual liability and benefits

20.1. 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

21.1. 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. Approvals and Consent

22.1. Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in 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.

23. Representations and warranties

23.1. 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.

24. Severability

24.1. If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

25. Modification

25.1. 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.

26. Waiver

26.1. The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or 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.

27. GST

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

28. Explanatory Note Relating to this Agreement

28.1. Schedule 1 contains the Explanatory Note relating to this Agreement pursuant to section 205 of the Regulation.

28.2. Pursuant to section 205(5) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Agreement.

Execution

Dated:

Executed as an Agreement:

EXECUTED for and on behalf of)
BYRON SHIRE COUNCIL)
by its authorised delegate:)

.....
Signature of witness

.....
Signature of delegate

.....
Name of witness

.....
Name and Position of Delegate

EXECUTED by **2222 PTY LTD (ACN**)
630 648 145) ATF THE BRAINS)
TRUST in accordance with section)
127 of the Corporations Act 2001:

.....
Signature of Stephen Charles
Rackemann
Sole Director/Secretary

EXECUTED by **26 SWALES PTY**)
LTD (ACN 107 125 057) ATF THE)
CHALK TRUST in accordance with)
section 127 of the Corporations Act
2001:

.....
Signature of Kylie Pamela Anning
Sole Director/Secretary

Schedule 1 – Explanatory Note

Pursuant to section 205 of the Environmental Planning and Assessment Regulation 2021

In accordance with the provisions of section 205 of the *Environmental Planning and Assessment Regulation 2021*, the following explanatory notes are provided in relation to the proposed planning agreement between 2222 Pty Ltd & 26 SWALES Pty Ltd and Byron Shire Council.

1. *How does the proposed planning agreement promote the public interest and one or more of the objects of the Act?*

The proposed planning agreement is considered to be in the public interest because it will facilitate the provision of high value, unique public art for the benefit and enjoyment of the community.

2. *How does the proposed planning agreement, promote one or more of the elements of the Council's charter under section 8 of the Local Government Act 1993?*

In accordance with the above Charter, the proposed planning agreement will contribute to a built environment that is reflective of and sensitive to the diverse needs and interests of the local community.

3. *Identifying a planning purpose or purposes served by the proposed planning agreement, and an assessment of whether the agreement, provides for a reasonable means of achieving that purpose.*

The planning purpose served by the proposed planning agreement is the provision of a high quality public art for the benefit and enjoyment of the community through improved amenity of public spaces.

4. *Identifying whether the proposed planning agreement, conforms with the planning authority's capital works program (if any)*

Not applicable.

5. *Statements on whether the agreement, amendment or revocation specifies that certain requirements of the agreement must be complied with before a construction*

certificate, occupation certificate or subdivision certificate is issued.

These statements are included in the body of this planning agreement.