Planning Agreement

The Council of the City of Penrith
ABN 43 794 422 563

Clarendon Residential Group Pty Limited
ABN 87 098 527 390

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Planning Agreement made at PENRITH **on** 2 APRIL **2008**

Parties **The Council of the City of Penrith City Council ABN 43 794 422 562** of 601 High Street, Penrith NSW 2750
("the Council")

Clarendon Residential Group Pty Ltd ABN 87 098 527 390
of 21 Solent Circuit, Baulkham Hills NSW 2153
("the Developer")

Background

A. The Developer owns the Land.

B. The Developer agrees to transfer or dedicate the Transfer Land to Council on the terms of this Agreement.

D. The Developer proposes to make a Development Application to the Council for Development Consent to carry out development on the Development Land.

E. The Developer has offered and the Council has agreed to enter into a planning agreement on the terms of this Agreement.

Operative provisions

1. **Definitions**

"Act" means the *Environmental Planning and Assessment Act 1979.*

Authorised Officer" means, in the case of any Party, a director or secretary or an officer whose title contains the word "manager" or a person performing the functions of any of them or any other person appointed by that Party to act as an Authorised Officer for the purpose of this agreement.

"Authority" means, any governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity and includes an accredited certifier accredited under section 109T of the Act.

"Business Day" means any day except for Saturday or Sunday or a day which is a public holiday in Sydney.

"Commencement Date" means the date of this agreement.

"Commencement Date" means the date of this agreement.

'Contributions Plan" means Claremont Meadows Stage 2 Section 94 Contributions Plan.

"Costs" includes reasonable costs, charges and expenses, including those incurred in connection with advisors.

"Council" means Penrith City Council

"Development Application" has the meaning given to that term in the Act.

"Development Consent" has the meaning given to that term in the Act.

"Development Contribution" means a development contribution under Part IV of the Act.

"Developer" means Clarendon Residential Group ABN 87 098 527 390

"Development Land" means that part of the Land indicated by the words "Development Land" on the plan marked "A" attached to this Agreement.

"Encumbrance" means any mortgage or charge, lease (or other right of occupancy) or profit prendre.

"Explanatory Note" means the Explanatory Note marked "B" attached to this Agreement.

"GST" has the meaning it has in the GST Act.

"GST Act" means the *A new Tax System (Goods and Services Tax) Act 1999 (Cth).*

"Land" means the land comprised in Lot 8 in DP 27107 and Lot 19 in DP 239091.

"Law" means:

(a) the common law including principles of equity; and

(b) the requirements of all statutes, rules, ordinances, codes, regulations, proclamations, by-laws or consents by an Authority.

"Party" means a party to this Agreement, including their respective successors and assigns.

"Related Entity" has the meaning "related entity" has in the Corporations Act.

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

"Services" means water, electricity, stormwater, gas, sewerage, waste water and the like.

"Transfer Land" means that part of the Land indicated by the words "Transfer Land" on the plan marked "A" attached to this Agreement.

2. Planning Agreement under the Act

The parties agree that this Agreement is a Planning Agreement within the meaning of section 93F of the Act.

3. Application of the Planning Agreement

The planning agreement constituted by this Agreement applies to the Land.

4. Operation of this planning agreement

The parties agree that the terms of this Agreement will commence operation and be effective from the Commencement Date and subject to clause 5.2 terminate on the date that both parties fulfil their entire obligations under this agreement.

5. The Land

5.1 Subdivision

Subject to 5.2, the Developer shall undertake to do all things necessary, using reasonable endeavours and within a reasonable time, to subdivide the Land so as to create the Transfer Land (or make it available for dedication) and the Development Land including having all necessary surveying undertaken and obtaining all necessary approvals from the Authorities.

As part of the subdivision the Developer may create any easement or covenant over the Transfer Land reasonably necessary to enable the provision of Services to the Development Land.

The Developer shall pay all costs in relation to the subdivision process.

5.2 Inability to subdivide

If a Development Consent to subdivide the Land to create the Transfer Land (or make it available for dedication) cannot be obtained on terms reasonably satisfactory to the Developer, despite the Developer using reasonable endeavours in accordance with clause 5.1, either party may terminate this Agreement by giving the other party fourteen (14) days written notice of its intention to terminate.

If this Agreement is lawfully terminated under this clause 5.2, the parties agree to release each other from any further obligations under this Agreement.

5.3 Transfer or Dedication to Council

Within fourteen (14) days of registration of the plan of subdivision to create the Transfer Land and the Development Land:

(a) the Developer agrees to transfer or dedicate to Council at no cost and free of any Encumbrance all of its interest in the Transfer Land;

(b) if the land is transferred, the Developer shall hand to Council in registrable form an executed LPI transfer form necessary to enable the transfer of Transfer Land to Council;

(c) if the land is transferred, the Developer shall hand to Council the original Certificate of Title to the Transfer Land together with any discharge, surrender or release of any legal or equitable Encumbrance over the Transfer Land.

5.4 Adjustments

If the land is transferred the parties shall adjust council and water rates and land tax (if any) with respect to the Transfer Land as at the date of transfer.

5.5 Developer not to deal with Transfer Land

As from the Commencement Date, the Developer shall not prior to the transfer or dedication of the Transfer Land to Council sell, transfer, mortgage, charge or grant a lease or license or any other right of occupancy to any person over the Transfer Land without first obtaining Council's consent in writing which shall not be unreasonably withheld.

Nothing in this clause in any way limits the obligations of the Developer to Transfer the land to Council free of any encumbrance under clause 5.3 (a).

6. Public purpose

If the Transfer Land is transferred and not dedicated to Council by the Developer, Council shall use its best endeavours to ensure that the Transfer Land is, on and from its transfer to Council, classified as Community Land under the Local Government Act 1993 and made available for any purpose authorised by the Local Government Act 1993 or any law that replaces that Act.

7. Developer's participation voluntary

The Developer acknowledges that:

(a) it has received its own independent legal advice before entering into this Agreement and has entered into it entirely voluntarily;

(b) the Council has not induced or pressured the Developer to enter into this document;

(c) the Council has not made any representations or promises to the Developer about whether or not consent will be granted in respect of any land owned by the Developer, including Land; and

(d) any Development Application for subdivision submitted by the Developer will be considered on its own merits in accordance with the Act.

8. Satisfaction of section 93F of the Act

8.1 To the extent that this Agreement does not specify matters required under s93F of the Act the following provisions apply.

(a) The land to which this agreement applies is:

(i) the Transfer Land; and

(ii) the Development Land.

(b) The parties agree that the Developer:

(i) will submit a Development Application to the Council requesting consent for development of the Development Land and such Development Application will be submitted within a reasonable time of the Commencement Date; and

(ii) will, if the Transfer Land is transferred to Council, make a Development Contribution by transferring the Transfer Land to Council for consideration of $1.00 within 14 days of registration of the plan of subdivision referred to in clause 5.1.

8.2 The parties acknowledge and agree the terms of the Explanatory Note.

9. Application of Section 94 and 94A of the EP&A Act

The parties agree that:

(a) Sections 94, 94A and 93EF of the EP&A Act apply to any development of the Land;

(c) in accordance with the Claremont Meadows Development Contributions Plan, Amendment No. 1 Part 6, the residentially zoned component of the

Development Land will be exempt from paying the contribution under Table 10 for the acquisition of privately owned Conservation/Flood Corridor land under any Notice of Determination for development of the Development Land;

(d) this Agreement does not prevent the parties from entering into other planning agreements within the meaning of Section 93F of the EP&A Act in relation to the Land or any development of the Land.

10. Review of Agreement

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

11. Dispute Resolution

11.1 Determination of disputes

If there is any dispute, difference of opinion or failure to agree relating to or arising from this document (**Dispute**) that dispute must be referred for determination under this clause.

11.2 No legal proceedings

The parties must not bring or maintain any action on any Dispute (except for urgent injunctive relief to keep a particular position) until it has been referred and determined as provided in this clause.

11.3 Notice of disputes

A party referring a Dispute for determination must do so by written notice to the other parties (**Dispute Notice**) which must specify the nature of the Dispute and a nominated officer of the referring party with sufficient authority to determine the Dispute.

11.4 Negotiated resolution and selection of expert

(a) On service of the Dispute Notice the receiving parties must refer the Dispute to an officer with sufficient authority to determine the Dispute. The nominated officers of each party must meet at least once and use reasonable endeavours to resolve the Dispute by negotiation within seven days of service of the Dispute Notice. Any resolution must be recorded in writing and signed by each nominated officer. By agreement, the nominated officers may employ the services of a mediator to assist them in resolving the Dispute.

(b) If the nominated officers are unable to resolve the Dispute within seven days of service of the Dispute Notice they must endeavour within the following seven-day period to appoint an expert by agreement. That appointment must be recorded in writing and signed by each nominated officer.

(c) If the nominated officers do not record the appointment of an expert within that second seven day period, the expert must be appointed, at the request of any party, by the President for the time being (or if none, the senior elected member) of the Law Society of New South Wales.

11.5 Assistance to the Expert

Once the Expert has been appointed (the **Expert**), the parties must:

(i) each use their best endeavours to make available to the Expert all information the Expert requires to settle or determine the Dispute; and

(ii) ensure that their employees, agents or consultants are available to appear at any hearing or enquiry called by the Expert.

The parties may give written submissions to the Expert but must provide copies to the other parties at the same time.

11.6 Expert's decision

(a) The decision of the Expert must:

(i) be in writing and give reasons; and

(ii) be made and delivered to the parties within one month from the date of submission of the dispute to the Expert or the date of completion of the last hearing or enquiry called by the Expert, if later.

(b) The Expert may conduct the determination of the Dispute in any way it considers appropriate but the Expert may, at its discretion, have regard to the Australian Commercial Disputes Centre's guidelines for expert determination of disputes or such other guidelines as it considers appropriate.

(c) The Expert's decision is final and binding on the parties.

(d) The Expert must act as an expert and not as an arbitrator.

11.7 Expert's costs

The Expert must also determine how the expenses relating to the reference of the Dispute (including the Expert's remuneration) should be apportioned between the parties and in default of a decision by the Expert those expenses must be borne by the parties equally.

In determining the apportionment of costs the Expert may have regard to what the Expert, in its reasonable opinion, considers to be a lack of good faith or a failure to use reasonable endeavours by any party in assisting the Expert or resolving the dispute between the parties' nominated officers as required by this clause.

11.8 Continual performance

Each party must continue to perform its obligations under this document while any dispute is being determined under this clause.

12. Enforcement

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

13. Notices

13.1 Form

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 the address set out below; or

(b) faxed to that Party at its fax number set out below;

Council

Address:	601 High Street, Penrith NSW 2750
Telephone:	(02) 4732 7625
Fax:	(02) 4732 7958
Attention:	Legal Services

Developer

Address:	21 Solent Circuit, Baulkham Hills NSW 2153
Telephone:	8850 9000
Fax:	8850 9905
Attention:	Mark Driscoll - Legal Department

14. Assignment and dealings

a) A party must not transfer any right or liability under this Agreement without the prior consent of the other party which shall not be unreasonably withheld except where this document provides otherwise.

b) As from the Commencement Date, the Developer agrees that in the event of its selling, transferring, mortgaging, leasing or otherwise alienating the Land or any part thereof it will, at its own cost, prior to completing any such sale, transfer, mortgage, lease or alienation procure from the Purchaser, Transferee, Mortgagee or Lessee a Planning Agreement whereby such Purchaser, Transferee, Mortgagee or Lessee covenants with the Council to observe and perform the covenants contained in this Planning Agreement as they had been named in this Planning Agreement instead of the Developer and any such Planning Agreement shall contain a further covenant by any subsequent Purchaser, Transferee, Mortgagee or Lessee that they will, at their own cost, procure a similar Planning Agreement from any subsequent Purchaser, Transferee, Mortgagee or Lessee.

15. Costs

Each party must pay its own costs in relation to:

(i) the negotiation, preparation, execution, performance, amendment or registration of, or any consent given or made; and

(ii) the performance of any action by that party in compliance with any liability arising,

under this document, or any agreement or document executed or effected under this Agreement, unless this Agreement provides otherwise.

16. Entire Agreement

This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. Neither party can rely on an earlier document, anything said or done by the other Party, or by an Authorised Officer, agent or employee of that party, before this agreement was executed, except as permitted by law.

17. Further Acts

Each party must promptly execute all documents and do all things that another party from time to time reasonably request to affect, perfect or complete this Agreement and all transactions incidental to it.

18. 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.

19. No fetter

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

20. Representations and warranties

(a) The parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under this Agreement and that entry into this Agreement will not result in the breach of any law.

(b) If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of the Agreement is not affected.

21. Severability

(a) 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.

(b) If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of the Agreement is not affected.

22. Modification

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

23. Waiver

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

(b) A waiver by a party is only effective if it is in writing.

(c) A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

24. Enforceability

The parties acknowledge that this agreement is an enforceable agreement in a Court of competent jurisdiction.

25. GST

25.1 Consideration does not include GST

Any consideration expressed in this Agreement is, unless otherwise specified, GST exclusive and does not include any amount for, or on account of, GST.

25.2 GST payable

If any supply under or in connection with this Agreement constitutes a taxable supply made for GST exclusive consideration, the supplier may, subject to issuing a tax invoice, recover from the recipient of the supply an amount on account of the GST payable in respect of that taxable supply ("**GST Amount**").

The GST Amount is:

(a) equal to the value of the supply calculated in accordance with the GST Act multiplied by the applicable GST rate; and

(b) payable at the same time and in the same manner as any monetary consideration for the supply concerned but no later than the end of the tax period to which the GST payable on the relevant taxable supply is attributable under the GST Act.

The supplier of a taxable supply made under or in connection with this Agreement must issue a tax invoice for the supply in accordance with the GST Act to the recipient of the supply.

25.3 Reimbursement

Despite any other provision of this Agreement, any amount payable under or in connection with this Agreement, which is calculated by reference to a cost, expense or amount paid or incurred by a Party, will be reduced by an amount equal to any input tax credit to which that party, or the representative member of a GST Group of which the party is a member, is entitled in respect of that cost, expense or amount.

25.4 Defined GST terms

Words and expressions used in this clause 25 have the meaning given to them in the GST Act.

The common seal of **The Council of The City of Penrith** was affixed under a resolution passed by council on 3 December 2007 in the presence of:

General Manager – Alan Travers

Mayor – Greg Davies

Signed for and on behalf of **Clarendon** as delegate of Clarendon who declares that they have no notice of revocation of such delegation

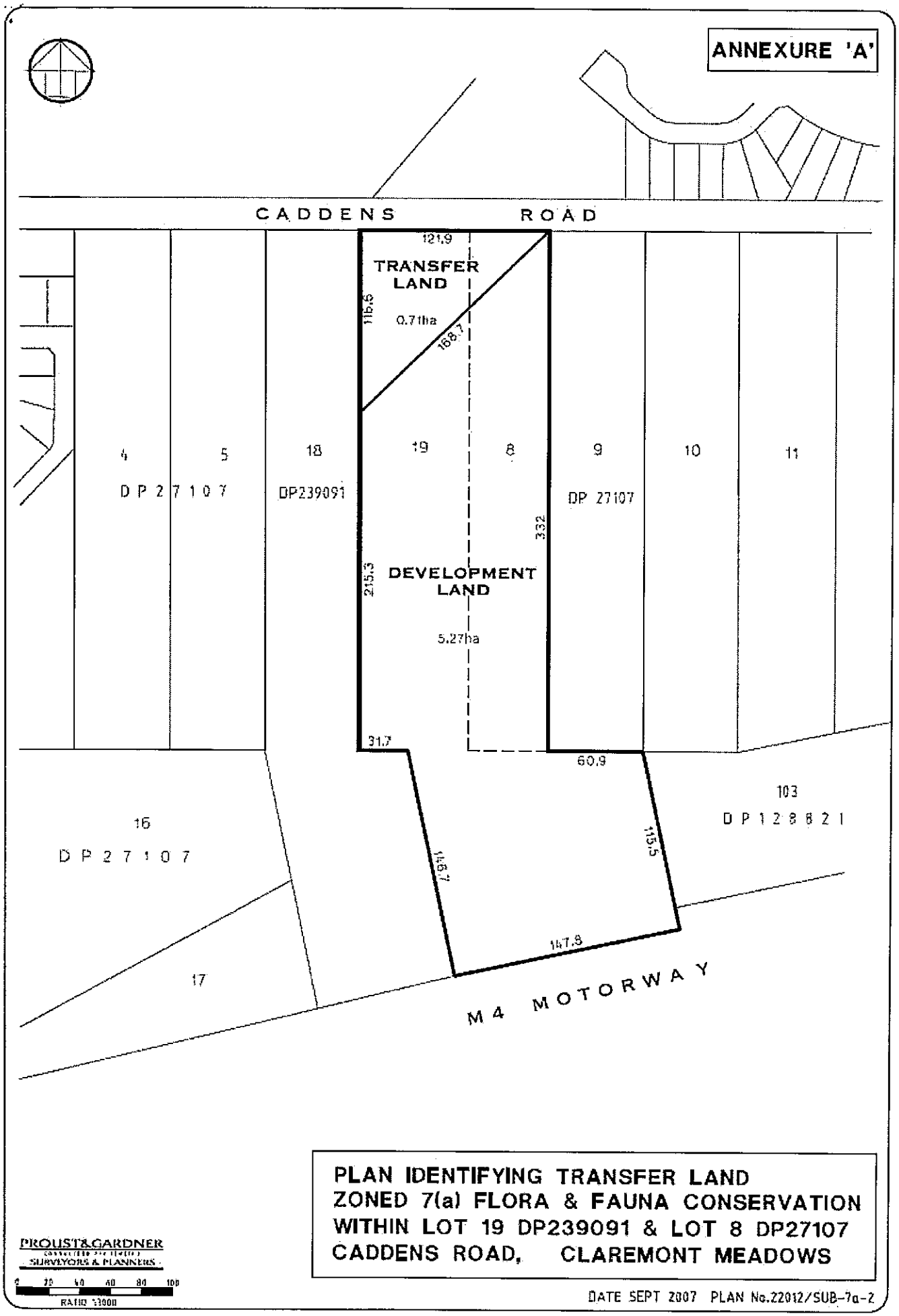
Signature of Authorised Person

Robert Lynch - Director

Office held

Name of authorised person (block letters)

Annexure A – Transfer Land/Development Land



PLAN IDENTIFYING TRANSFER LAND
ZONED 7(a) FLORA & FAUNA CONSERVATION
WITHIN LOT 19 DP239091 & LOT 8 DP27107
CADDENS ROAD, CLAREMONT MEADOWS

PROUST&GARDNER
SURVEYORS & PLANNERS

0 20 40 60 80 100
RATIO 1:3000

DATE SEPT 2007 PLAN No.22012/SUB-7a-2

Annexure B – Explanatory Note

Environmental Planning and Assessment Regulation 2000 (Clause 25E)

Explanatory Note
Draft Planning Agreement under Environmental Planning and Assessment Act 1979 (Section 93F)

1. Parties

(a) ***Penrith City Council*** (ABN 43 794 422 563) of 601 High Street, Penrith, New South Wales (***Penrith Council***); and

(b) ***Clarendon Residential Group*** (ABN 87 098 527 390) of 21 Solent Circuit, Baulkham Hills New South Wales (***Land Owner***).

2. Land

The land comprises the part of the land to which the *Penrith Local Environmental Plan No 96* (the ***LEP***) applies that is located within Penrith Council's Local Government Area.

The land is subject to draft Amendment 14 (Claremont Meadow Stage2) to Penrith Local Environmental Plan 1998 (Urban land) that is located within Penrith Councils Local Government Area.

3. Description of Development

The development (as defined by the Environmental Planning and Assessment Act 1979 (the EP&A Act)) of the land in accordance with the LEP.

4. Introduction

Division 6 of part 4 of the EP&A Act and the *Environmental Planning and Assessment Regulation 2000* (the ***Regulation***) requires this explanatory note to be prepared and exhibited together with the draft *Clarendon and Penrith Council Planning Agreement* (the ***Agreement***).

This explanatory note is only a summary of the Agreement and is not to be used to assist in construing the Agreement.

Capitalised terms used in this explanatory note have the meaning given to them in the Agreement.

5. Summary of objectives, nature and effect of the draft Agreement

Clause 25E(1)(a) of the Regulation requires a written statement that summarises the objectives, nature and effect of the Agreement.

5.1 Objective

The objective of the agreement is to make provision for flora and fauna conservation:

(a) to reserve and manage lands for the purpose of biodiversity protection;

(b) to conserve, restore and enhance native fauna and flora habitat and the ecological viability of the land identified for biodiversity protection purposes; and

(c) to conserve any Aboriginal heritage values of the land.

5.2 Nature

The nature of the Agreement is a contractual relationship between the Clarendon and the Penrith Council for the provision of lands set aside for Flora and Fauna conservation.

The Agreement is a planning agreement governed by Subsection 2 of Division 6 of Part 4 of the EP&A Act.

5.3 Effect

The Effect of the Agreement is that Clarendon must contribute towards providing the community with land for the purpose of flora and fauna conservation,

6. Assessment of the merits and impact of the draft Agreement

Clause 25E (1) (b) of the Regulation requires a written statement that assesses the merits of the agreement including the impact (positive or negative) of the Agreement on the public or any relevant section of the public.

6.1 Assessment of the merits

The Agreement satisfies the objective of making provision for public facilities to meet certain demands created by the Development and to ensure existing communities which may be affected by the environmental, social and economic impacts of the development do not bear the cost of the public amenities and services.

6.2 Positive impact on public

Arising from the agreement, the public will gain the benefit of the Contributions being land for the purpose of flora and fauna conservation.

6.3 Negative impact on the public

Arising from the Agreement, Penrith City Council will need to maintain the land contributed for the purpose of flora and fauna conservation.

7. Promotion of the Council's functions

Clause 25E(2) of the Regulation requires an assessment of how the Agreement promotes the functions of Penrith Council and one or more of the objects of the EP&A Act.

7.1 Public interest and objects of the EP&A Act

(a) The public interest is served through the co-coordinated provision of land for the purpose of conservation provided by the Contributions under the Agreement.

(b) Through the co-ordinated provision of the land for flora and fauna conservation provided by the Contributions, the Agreement satisfies the objects of the EP&A Act, including:

(i) the promotion and co-ordination of the orderly and economic use and development of land;

(ii) the provision of land for public purposes;

(ii) the provision and co-ordination of community services facilities;

(iv) 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

(v) ecologically sustainable development.

7.2 Council's charter under section 8 of the Local Government Act 1993

The Agreement is consistent with the charter of the Council:

(a) to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development;

(b) to have regard to the long term and cumulative effects of its decisions; and

(c) to bear in mind that it is the custodian and trustee of public assets and to effectively account for and manage the assets for which it is responsible.

7.3 Planning purpose served by the draft Agreement

The planning purpose served by the Agreement is the Development described in clause 3 of this Explanatory Note to which the Planning Agreement applies.

The Agreement provides for a reasonable means of achieving that purpose by the co-ordinated provision of public services and infrastructure to enable that Development to occur.

Dated: 2 APRIL **2008**

Signed for **Penrith City Council** in the presence of:

Witness Signature

CRIS DAVIES MAYOR

Print Name

Print Position

Alan Travers

Print Name Alan Travers
General Manager

Signed for **Clarendon Residential Group** in the presence of:

B O'Hanna

Witness Signature

BRIE HANNA

Print Name

Print Position

Robert Lynch - Director

Print Name