



lindsaytaylorlawyers

**Main Street Properties Service Road
Planning Agreement**

Deed of Variation

Under cl25C(3) of the Environmental Planning and Assessment Regulation 2000

Bega Valley Shire Council

Merimbula Nominees Pty Ltd

Merimbula Imlay Bowling Club Ltd

Date:

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Main Street Properties Service Road Planning Agreement – Deed of Variation



Bega Valley Shire Council

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Bega Valley Shire Council

Merimbula Nominees Pty Ltd

Merimbula Imlay Bowling Club Ltd

**Main Street Properties Service Road Planning Agreement
Deed of Variation**

Summary Sheet

Council:

Name: Bega Valley Shire Council ABN 26 987 935 332

Address: Administration Centre, Zingel Place, BEGA NSW 2550

Telephone: (02) 6499 2222

Facsimile: (02) 6499 2200

Email: generalmanager@begavalley.nsw.gov.au

Representative: Wayne Sartori

Developer:

Name: Merimbula Nominees Pty Ltd ACN 105 428 813

Address: Suite 5, Level 4, 560 Little Collins Street, Melbourne VIC 3000

Telephone: (03) 9670 0932

Facsimile: (03) 9670 1635

Email: grawson@churchbridge.com.au

Representative: Mr Gerald Rawson

Landowner:

Name: Merimbula-Imlay Bowling Club Ltd ACN 001 064 008

Address: PO Box 52, Merimbula NSW 2548

Telephone: (02) 6495 1306

Facsimile: (02) 6495 1952

Email: dfoley@clubsapphire.com.au

Representative: Mr Damien Foley, Chief Executive Officer

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Bega Valley Shire Council

Merimbula Nominees Pty Ltd

Merimbula Imlay Bowling Club Ltd

Main Street Properties Service Road Planning Agreement

Deed of Variation

Under d25C(3) of the Environmental Planning and Assessment Regulation 2000

Parties

Bega Valley Shire Council ABN 26 987 935 332 of Administration Centre, Zingel Place, BEGA NSW 2550 (**Council**)

and

Merimbula Nominees Pty Ltd ACN 105 428 813 of Suite 5, Level 4, 560 Little Collins Street, MELBOURNE VIC 3000 (**Developer**)

and

Merimbula-Imlay Bowling Club Ltd ACN 001 064 008 of PO Box 52, MERIMBULA NSW 2548 (**Landowner**)

Background

- A The Parties are parties to the Planning Agreement.
- B Pursuant to clause 44 of the Planning Agreement, the Parties agree to amend the Planning Agreement in accordance with this Deed.

Operative provisions

1 Definitions & Interpretation

1.1 In this Deed the following definitions apply:

Deed means this Deed and includes any schedules, annexures and appendices to this Deed.

Gadens Lawyers means Gadens Lawyers Sydney Pty Limited, ACN 100 963 308, with its registered office at 77 Castlereagh Street, Sydney, NSW, Australia 2000.

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Gadens Lawyers Trust Account means the following bank account:

Account name: Gadens Lawyers Sydney Pty Ltd Trust Account

Bank: ANZ Banking Group.

BSB: 012 006

Account Number: 003711932

or held in trust in a controlled money account opened and managed by Gadens Lawyers
Planning Agreement means the Main Street Properties Service Road Planning Agreement pursuant to s93F of the Environmental Planning and Assessment Act 1979 entered into between the Council, Developer and Landowner on [22 July] 2015.

- 1.2 All other capitalised words used in this Deed have the meanings given to those words in the Planning Agreement.
- 1.3 Clauses 1.2, 29, 30 and 34 to 46 of the Planning Agreement apply as if they form part of this Deed with any necessary changes.

2 Status of this Deed

- 2.1 This Deed is an amendment to the Planning Agreement within the meaning of clause 25C(3) of the Regulation.
- 2.2 This Deed is not a planning agreement within the meaning of s93F(1) of the Act.

3 Commencement

- 3.1 This Deed takes effect on the date when the Parties have executed this Deed.
- 3.2 The Party who executes this Deed last is to insert on the front page the date they did so and provide a copy of the fully executed and dated Deed to the other Party.

4 Warranties

- 4.1 The Parties warrant to each other that they:
 - 4.1.1 have full capacity to enter into this Deed, and
 - 4.1.2 are able to fully comply with their obligations under this Deed and the Planning Agreement as modified by this Deed.

5 Further agreements

- 5.1 On and from the date of this Deed, the Planning Agreement is amended as follows:
 - 5.1.1 Insert in clause 1.1 the following definitions

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'Defects Liability Period' for a Work means the period of 12 months commencing the date after the Work is taken to have been completed under clause 17'; and

and the definitions of *Gadens Lawyers an Gadens Lawyers Trust Account as set out in Clause 1-1 of this Deed.*

5.1.2 Delete clause 3.1.2 and replace with:

'The Fill Works Consent and the Subdivision Consent are granted and are generally consistent with the Fills Work Application and the Subdivision Application and subject to a requirement or condition requiring this Agreement to be entered into.';

5.1.3 Insert a new clause 3.2 as follows:

'Nothing in this Agreement prevents the Fill Works Application and Subdivision Application being part of the same development application nor Council granting the one development consent which comprises the Fill Works Consent and Subdivision Consent.'

5.1.4 Amend the heading to clause 8 to read 'Procedures for payment of money';

5.1.5 Amend clause 8.1 to replace the words 'A monetary Development Contribution' with the words 'A payment of money' and to replace to the word 'Council' with 'recipient';

5.1.6 Amend clause 8.2 to read:

'Council and the Landowner are each to give the Developer not less than 2 business days notice of their intention to pay an amount under clause 21.5';

5.1.7 Amend clause 8.3 to read:

'The Council and the Landowner are not required to pay any amount pursuant to clause 21.5 unless the Developer first gives them a tax invoice for the amount of the payment';

5.1.8 Amend clause 8.4 to read:

'The Council and Landowner are not in breach of this Agreement if either of them fails to pay an amount under clause 21.5 at the time required by this Agreement by reason only of the Developer's failure to give to it a tax invoice in relation to the amount proposed to be paid';

5.1.9 Amend clause 9.1 to read:

'The Council, at its own cost, is to design, and the Developer is to construct the Service Road in accordance with this clause if the Landowner and the Developer make the monetary Development Contributions required under this Agreement.';

5.1.10 Amend clause 9.8 by inserting the words 'and the Subdivision Consent are' after the words 'Fill Works Consent', and delete the word 'is' before the word 'granted'.

5.1.11 Amend clause 13.2 by deleting the word 'its' in the first line and including in its place the words 'and Developer and their';

5.1.12 Amend clause 14.7 by inserting the '(Waste)' after the words 'clause 14.6' and replace the words 'remaining surplus Existing Fill' where secondly occurring with 'Waste';

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5.1.13 Delete clause 14.8 and replace with:

'In the event that the cost of the construction of the Service Road and the cost of the Waste removal, determined in accordance with clause 21, exceeds \$1,200,000, then the Landowner will reimburse Council for the costs of the Waste removal provided that the maximum amount that the Landowner must pay to Council under this clause is the lesser of the cost of the Waste removal and \$100,000';

5.1.14 Include a new clause 14.9 as follows:

'The Council and Developer will use their reasonable endeavours to co-ordinate the construction of the Service Road and the Council Fill Works, including, subject to any legislative requirements of Council relating to tendering, engaging a supervising engineer to coordinate the construction of the Service Road and the Council Fill Works.';

5.1.15 Include a new clause 14.10 to read:

'Prior to the commencement of the Council Fill Works, Council and the Landowner are to agree on a final schedule of fill works and earthworks plan which estimates the volumes of the Existing Fill and Suitable Fill (Final Schedule of Fill Works and Earthworks Plan).'

5.1.16 Include a new clause 14.11 to read:

'On the completion of the Council Fill Works, the Council is to provide the Parties with a document certifying that the Council Fill Works have been carried out to a satisfactory standard in accordance with the Final Schedule and Earthworks Plan and in accordance with the Agreement.';

5.1.17 Include at the end of clause 18.1 the words 'Council may also issue a Rectification Notice during the Defects Liability Period';

5.1.18 Amend clause 20 by inserting the words 'subject to clause 17' at the end of the clause;

5.1.19 Amend clauses 21.1 and 21.2 by deleting 'Council' wherever occurring and replacing with 'Developer';

5.1.20 Include a new clause 21.5 as follows:

'No later than 30 days after the dedication of the Service Road Land pursuant to clause 10, the Council must pay \$400,000 to the Developer and the Landowner must pay \$400,000 to the Developer to meet part of the costs of construction of the Service Road';

5.1.21 Delete clauses 23, 24 and 25 and replace with the version of those clauses in Schedule 1 of this Deed; and

5.1.22 Amend Schedule 1 of the Planning Agreement by deleting the heading 'Monetary Contributions' and deleting items 2 and 3, and deleting the words in Column 4 in respect of Item 4 and replacing them with the words "On a date or dates as agreed between the Parties subject to Clause 9.7"

6
Costs

6.1 Each party is to bear its own costs of preparing, negotiating, executing and stamping this Deed, and any document related to this Deed.

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7 Counterparts

- 7.1 This Deed may consist of a number of counterparts and the counterparts taken together constitute one and the same instrument.

8 Explanatory Note

- 8.1 The Appendix contains the Explanatory Note relating to this Deed required by clause 25E of the Regulation.
- 8.2 Pursuant to clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Deed.



Schedule 1

(Clause 5.1.21)

Security Provisions

23 Provision of Security

- 23.1 Upon the execution of this Agreement by all of the Parties:
- 23.1.1 the Developer is to provide the Council with Security in the amount of \$283,750.00, and
 - 23.1.2 the Landowner is to provide the Developer with Security in the amount of \$400,000.00 (**Landowner's Security**).
- 23.2 The amount of the Security is to be indexed quarterly in accordance with the Consumer Price Index (All Groups - Sydney) as provided by the Australian Bureau of Statistics and the Developer and Landowner must ensure that the Security held at all times equals the indexed amount notified to the Developer or Landowner by Council or the Developer.
- 23.3 Despite the definition of Security in clause 1.1, the Landowner's Security provided under clause 23 is to be in the form of cash to be held on trust by Gadens Lawyers in the Gadens Lawyers Trust Account, and the Landowner's Security may only be used in accordance with this Agreement.
- 23.4 Gadens Lawyers is to provide to the Landowner and the Developer a copy of all transaction documents and statements relating to the holding of the Landowner's Security in the Gadens Lawyers Trust Account as soon as practicable after Gadens Lawyers receives such documents.
- 23.5 Any interest earned on the Landowner's Security is to be held by Gadens Lawyers in the account referred to in clause 23.3.
- 23.6 On the completion of the Landowner's obligations under this Agreement, to the reasonable satisfaction of the Developer, Gadens Lawyers at the request of the Developer must promptly refund to the Landowner, the balance of the Landowner's Security and any interest earned on that Security.

24 Release & return of Security

- 24.1 A Party which holds Security under clause 23 (**Security Holder**) may but is not obliged to progressively release and return the Security provided by the Landowner or Developer to the Landowner or the Developer, as relevant, as and when the Landowner or the Developer perform their obligations under this Agreement to the satisfaction of the Security Holder but may only do so if:
- 24.1.1 the Security Holder considers that the remaining amount of the Security is adequate having regard to the Landowner or Developer's remaining obligations under this Agreement, and

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- 24.1.2 the Landowner or Developer is not in breach of this Agreement at the time the Security is to be returned.
- 24.2 The Security Holder is to return the Security or any remaining part of it to the Landowner or Developer within 28 days of the completion by the Landowner or Developer of all of its obligations under this Agreement to the reasonable satisfaction of the Security Holder.
- 24.3 For the purposes of this clause and clause 25 the Security Holder of the Landowner's Security is the Developer.
- 24.4 In accordance with clause 24.2:
- 24.4.1 Within 14 days of the completion by the Landowner of all of its obligations under this Agreement, the Developer is to notify Gadens Lawyers in writing as to whether the Developer consents to Gadens Lawyers releasing the Security or any remaining part of it to the Landowner, and
- 24.4.2 Subject to obtaining the Developer's consent referred to in clause 24.4.1, Gadens Lawyers shall return the Security or any remaining part of it to the Landowner within 14 days of receiving the Developer's consent to do so.
- 24.5 At any time following the provision of the Security, the Landowner or Developer may provide the Security Holder with a replacement Security in the amount of the Security required to be provided under clause 23.1.
- 24.6 On receipt of a replacement Security, the Security Holder is to release and return to the Landowner or Developer as directed, the Security it holds which has been replaced.

25 Call-up of Security

- 25.1 The Security Holder may call-up the Security provided by the Landowner or Developer if, in its reasonable opinion and despite clauses 29 and 30, it considers that the Landowner or Developer, as the case may be has breached this Agreement.
- 25.2 If the Security Holder calls on the Security, it may use the amount so paid to it in satisfaction of any costs incurred by it in remedying the Landowner or Developer's breach being:
- 25.2.1 the reasonable costs of the Security Holder's servants, agents and contractors reasonably incurred for that purpose,
- 25.2.2 all fees and charges necessarily or reasonably incurred by the Security Holder in order to have the Work carried out, completed or rectified, and
- 25.2.3 without limiting clause 25.2.2, all legal costs and expenses reasonably incurred by the Security Holder, by reason of the Landowner or Developer's breach.
- 25.3 If the Security Holder calls on the Security in accordance with this Agreement, the Security Holder may, by notice in writing to the Landowner or the Developer, require the Landowner or Developer to provide a further or replacement Security in an amount that, when added to any unused portion of any existing Security, does not exceed the amount of the Security the Landowner or Developer was required to provide under clause 23.1.
- 25.4 If the Developer decides to call-up the Security provided by the Landowner in accordance with clause 25.1:
- 25.4.1 the Developer is to notify Gadens Lawyers in writing:

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- 25.4.1.1 why the Developer has formed the reasonable opinion that the Landowner has breached this Agreement, and
- 25.4.1.2 the amount of the Security that the Developer is calling-up;
- 25.4.2 following receipt of the Developer's notice referred to in clause 25.4.1, Gadens Lawyers shall release the amount of the Security called-up by the Developer to the Developer within 14 days of receiving the Developer's notice to do so.

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Execution

Executed as a Deed

Dated: 23 October 2015

Executed on behalf of the Council

General Manager

Martin GENERAL MANAGER INFRASTRUCTURE

Witness/Name/Position

Executed on behalf of the Developer in accordance with s127(1) of the Corporations Act (Cth) 2001

Director/Secretary GERALD RAWSON

Director PATRICIA RAWSON

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Bega Valley Shire Council

Merimbula Nominees Pty Ltd

Merimbula Imlay Bowling Club Ltd

Executed on behalf of the Landowner in accordance with s127(1) of the Corporations Act (Cth) 2001

Director/Secretary *RONALD JAMES CHRISTIE (DIRECTOR)*

Director

PETER JAMES MOORE (DIRECTOR)

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Bega Valley Shire Council
Merimbula Nominees Pty Ltd
Merimbula Imlay Bowling Club Ltd

Appendix

(Clause 7)

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Deed of Variation to Planning Agreement

Under cl25C(3) of the *Environmental Planning and Assessment Regulation 2000*

Parties

Bega Valley Shire Council ABN 26 987 935 332 of Administration Centre, Zingel Place, BEGA NSW 2550 (**Council**)

Merimbula Nominees Pty Ltd ACN 105 428 813 of Suite 5, Level 4, 560 Little Collins Street, MELBOURNE VIC 3000 (**Developer**)

Merimbula-Imlay Bowling Club Ltd ABN 001 064 008 of PO Box 52, MERIMBULA NSW 2548 (**Landowner**)

Description of the Land to which the Draft Deed Applies

Lot 912 in DP 855433, Lot 1 in DP37533, Lot 2 in DP 543333 and Lot 946 in DP 604076.

Description of Proposed Change to Environmental Planning Instrument/Development

The Development contained in Development Application DA 2008.0629 for a supermarket to be constructed on the MN Land.

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Summary of Objectives, Nature and Effect of the Draft Deed

Objective of Draft Deed

The objective of the Draft Deed is to amend the Planning Agreement.

Nature of Draft Deed

The Draft Deed is a deed of variation to the Planning Agreement under cl25C(3) of the *Environmental Planning and Assessment Regulation 2000*.

Effect of the Draft Deed

The Draft Deed has the effect of imposing the obligation to construct the Service Road on the Developer, rather than the Council.

Assessment of the Merits of the Draft Deed

The Planning Purposes Served by the Draft Deed

The Draft Deed:

- promotes and co-ordinates the orderly and economic use and development of the Land to which the Agreement applies,
- provides increased opportunity for public involvement and participation in environmental planning and assessment of the Development.

How the Draft Deed Promotes the Public Interest

The Draft Deed promotes the objects of the Act as set out in s5(a)(ii) and (c).

For Planning Authorities:

Development Corporations - How the Draft Deed Promotes its Statutory Responsibilities

N/A

Other Public Authorities - How the Draft Deed Promotes the Objects (if any) of the Act under which it is Constituted

N/A

Councils - How the Draft Deed Promotes the Elements of the Council's Charter

The Draft Deed promotes the following elements of the Council's charter:

- providing public facilities for the community,

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- ensuring that public facilities provided by the Landowner under the Agreement are transferred to and managed by the Council or are otherwise subject to the Council's control,
 - by providing a means for the private funding of public facilities for the benefit of the Development and the wider community, and
 - providing a means that allows the wider community to make submissions to the Council in relation to the Agreement.

All Planning Authorities – Whether the Draft Deed Conforms with the Authority's Capital Works Program

The Draft Deed does not conform with the Council's Capital Works Program.

All Planning Authorities – Whether the Draft Deed specifies that certain requirements must be complied with before issuing of a construction certificate, occupation certificate or subdivision certificate

No.