



lawyers

**Main Street Properties Service Road
Planning Agreement**

Under s93F of the *Environmental Planning and Assessment Act 1979*

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

Date: 22 July 2015

lawyers

T 02 8235 9700 • F 02 8235 9799 • W www.lindsaytaylorlawyers.com.au • E mail@lindsaytaylorlawyers.com.au
ABN 15 695 894 345

Liability limited by a scheme approved under Professional Standards Legislation

Main Street Properties Service Road Planning Agreement

Table of Contents

Summary Sheet	4
Parties	6
Background	6
Operative provisions	6
Part 1 - Preliminary	6
1 Definitions & Interpretation	6
2 Application of this Agreement	10
3 Status of Developers' obligations to make Development Contributions	10
4 Further Agreements Relating to this Agreement.....	11
5 Surrender of right of appeal, etc.....	11
6 Application of s94, s94A and s94EF of the Act and Car Park Credit.....	11
Part 2 – Development Contributions	12
7 Provision of Development Contributions	12
8 Procedures relating to payment of monetary Development Contributions	12
Part 3 – Provisions relating to Service Road	13
9 Design and Construction of the Service Road	13
10 Procedures relating to the dedication of the Service Road Land.....	14
11 Restriction on the use of Service Road Batter Land	15
12 Carrying out of Work	15
13 Access to the Land.....	15
14 Storage and Placement of Existing Fill and Suitable Fill.....	16
15 Northern MIBC Land	17
16 Protection of people and property	17
17 Procedures relating to the completion of Work	17
18 Procedures relating to the rectification of defects	18
19 Failure to carry out Work.....	18
20 Completion of construction of the Service Road.....	18
21 Cost of construction of the Service Road.....	18
Part 4 – Other Provisions	19
22 Indemnity and Insurance.....	19
23 Provision of Security.....	20
24 Release & return of Security	21

Main Street Properties Service Road Planning Agreement
Bega Valley Shire Council
Merimbula Nominees Pty Ltd
Merimbula-Imlay Bowling Club Ltd

25	Call-up of Security	21
26	Recovery of cost of Work carried out by the Council	22
27	Compulsory Acquisition	22
28	Enforcement in a court of competent jurisdiction	23
29	Dispute Resolution – expert determination	23
30	Dispute Resolution - mediation	24
31	Registration of this Agreement	24
32	Assignment, Sale of Land, etc	25
33	Review of this Agreement	25
34	Notices	26
35	Costs	26
36	Entire Agreement	26
37	Further Acts	27
38	Notations on section 149(2) Planning Certificates	27
39	Governing Law and Jurisdiction	27
40	Joint and Individual Liability and Benefits	27
41	No Fetter	27
42	Representations and Warranties	27
43	Severability	28
44	Modification	28
45	Waiver	28
46	GST	28
47	Explanatory Note Relating to this Agreement	29
	Schedule 1	30
	Schedule 2	31
	Appendix 1	35

Main Street Properties Service Road Planning Agreement
Bega Valley Shire Council
Merimbula Nominees Pty Ltd
Merimbula-Imlay Bowling Club Ltd

Main Street Properties Service Road Planning Agreement

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: Peter Tegart

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

Land:

See definition of *Land* in clause 1.1.

Main Street Properties Service Road Planning Agreement
Bega Valley Shire Council
Merimbula Nominees Pty Ltd
Merimbula-Imlay Bowling Club Ltd

Development:

See definition of *Development* in clause 1.1.

Development Contributions:

See Schedule 1.

Application of s94, s94A and s94EF of the Act:

See clause 6.

Security:

See clause 23.

Registration:

This planning agreement is to be registered on the title to the MIBC Land, and MN Land. See clause 31.

Restriction on dealings:

See clause 32.

Dispute Resolution:

Expert determination and mediation. See clauses 29 and 30.

Main Street Properties Service Road Planning Agreement
Bega Valley Shire Council
Merimbula Nominees Pty Ltd
Merimbula-Imlay Bowling Club Ltd

Main Street Properties Service Road Planning Agreement

Under s93F of the *Environmental Planning and Assessment Act 1979*

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 Developer has lodged and the Council has determined the Developer's s96 Application.
- B The Developer is prepared to make Development Contributions in connection with the carrying out of the Development in accordance with this Agreement.
- C The Landowner is the owner of the Service Road Land.
- D The Landowner intends to lodge the Car Parking DA and the Fill Works Application with Council.
- E The Landowner is prepared to make Development Contributions in connection with the Car Parking DA in accordance with this Agreement.
- F The Council is prepared to construct the Service Road on the Service Road Land.

Operative provisions

Part 1 - Preliminary

1 Definitions & Interpretation

- 1.1 In this Agreement the following definitions apply:

Main Street Properties Service Road Planning Agreement
Bega Valley Shire Council
Merimbula Nominees Pty Ltd
Merimbula-Imlay Bowling Club Ltd

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

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

Bank Guarantee means an irrevocable and unconditional undertaking without any expiry or end date 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) any other financial institution approved by the Council, in its absolute discretion, in response to a request from the Developer.

Bowling Club Consent means the Development Consents granted in respect of the MIBC Land which requires car spaces to be provided on the MIBC Land.

Car Park Credit means 127 car spaces.

Car Parking DA means a development application within the meaning of the Act to amend the Bowling Club Consent to reduce the number of car spaces required under the conditions of the Bowling Club Consent by 85.

Council Fill Works means the works to be carried out by Council under clauses 14.5, 14.6 and 14.7.

Consent means the Development Consent granted to the Development Application on 3 September 2010.

Construction Certificate has the same meaning as in the Act.

Council Land means Lot 946 in DP 604076.

Developer's s96 Application means an application under s96 of the Act to modify the Consent to include a condition requiring this Agreement to be entered into pursuant to s93I(3) of the Act.

Development means the development the subject of the Development Application.

Development Application means development application DA 2008.0629 for a supermarket made by the Developer in relation to the MN Land

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost, the carrying out of work, or the provision of any other material public benefit, or any combination of them, to be used for, or applied towards a public purpose.

Existing Car Spaces means the number of car parking spaces physically provided on the MIBC Land as at the date of this Agreement.

Existing Fill means the fill located on the MIBC Land as at the date of this Agreement.

Main Street Properties Service Road Planning Agreement
Bega Valley Shire Council
Merimbula Nominees Pty Ltd
Merimbula-Imlay Bowling Club Ltd

Fill Works Application means a development application for the placement and compaction of Suitable Fill or Existing Fill on the part of MIBC Land that is not the Service Road Land or the Northern MIBC Land, to a standard suitable for future commercial development on MIBC Land.

Fill Works Consent means a Development Consent to the Fill Works Application.

GST has the same meaning as in the GST Law.

GST Law has the same meaning as 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.

Item means the object of a Development Contribution specified in Column 1 of Schedule 1.

Just Terms Act means the *Land Acquisition (Just Terms Compensation) Act 1991*

Land means the MN Land, the Council Land and the MIBC Land.

MIBC Development means the development the subject of the Fill Works Application and the Car Parking DA.

MIBC Land means Lot 912 in DP 855433.

MN Land means Lot 1 in DP37533 and Lot 2 in DP 543333.

Northern MIBC Land means that part of the MIBC Land to the north of the Service Road Land which is not capable of being developed commercially after construction of the Service Road.

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

Proposed Site Plan means the plan contained in Schedule 2.

Real Property Act means the *Real Property Act 1900*.

Rectification Notice means a notice in writing that identifies a defect in a Work and requires rectification of the defect within a specified period of time.

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

Security means a Bank Guarantee, or a bond or other form of security to the satisfaction of the Council.

Service Road means the road shown on the Proposed Site Plan as Service Road No. 1, and Service Road No. 2 and which provides access from Sapphire Coast Drive to the Land.

Service Road Land means a 20 metre wide strip of MIBC Land on which the Service Road is to be constructed.

Service Road Batter Land means the part of the MIBC Land that the Council considers is required for the stability of the Service Road and generally shown as the land within the lines marked as 'Proposed Road Boundary' on the Proposed Site Plan, but not including the Service Road Land.

Subdivision Application means a development application, within the meaning of the Act, for the subdivision of the MIBC Land, other than a subdivision solely to create the Service Road Land as a separate lot.

Main Street Properties Service Road Planning Agreement

Bega Valley Shire Council

Merimbula Nominees Pty Ltd

Merimbula-Imlay Bowling Club Ltd

Subdivision Consent means a Development Consent granted to the Subdivision Application.

Suitable Fill means fill excavated from the MN Land, of a type which Council reasonably considers to be suitable for the construction of the Service Road, and which is reasonably acceptable to the Landowner.

Sunset Date means:

- (a) the date that is 1 year from the date this Agreement is executed by both the Developer and the Landowner, or 1 year from the commencement of construction of the Development, whichever is the earlier, or
- (b) such later date as agreed between the Parties, provided that a Party can only withhold its agreement to a later date if there is a material change of circumstances which significantly affects the commercial viability of the arrangements under this Agreement for that Party.

Work means the physical result of any building, engineering or construction work in, on, over or under land required to be carried out under this Agreement.

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

- 1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- 1.2.2 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.
- 1.2.3 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.
- 1.2.4 A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- 1.2.5 A reference in this Agreement to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
- 1.2.6 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.
- 1.2.7 A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- 1.2.10 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.

Main Street Properties Service Road Planning Agreement
Bega Valley Shire Council
Merimbula Nominees Pty Ltd
Merimbula-Imlay Bowling Club Ltd

- 1.2.11 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.
- 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.13 A reference to this Agreement includes the agreement recorded in this Agreement.
- 1.2.14 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.
- 1.2.15 Any schedules, appendices and attachments form part of this Agreement.
- 1.2.16 Notes appearing in this Agreement are operative provisions of this Agreement.

2 Application of this Agreement

- 2.1 This Agreement applies to the Land, the Development and the MIBC Development.

3 Status of Developers' obligations to make Development Contributions

- 3.1 The Developer and Landowner are under no obligation to make the Development Contributions provided for in this Agreement unless and until:
 - 3.1.1 The Consent is modified to include a condition requiring this Agreement to be entered into,
 - 3.1.2 The Fill Works Consent is granted and is generally consistent with the Fill Works Application and subject to a requirement or condition requiring this Agreement to be entered into,
 - 3.1.3 Development Consent to the Car Parking DA is granted, which reduces the number of car spaces required under the Bowling Club Consent by no less than 85 spaces and which is subject to a requirement or condition requiring this Agreement to be entered into, and
 - 3.1.4 this Agreement is entered into as required by clause 25C(1) of the Regulation and Council executes this Agreement.
- 3.2 Until the Sunset Date, this document, executed only by the Developer and the Landowner, is to be read and construed as containing the Developer's and the Landowner's irrevocable offer to make the Development Contributions once all of the matters specified in clause 3.1 have occurred.
- 3.3 Council must notify the Developer and Landowner immediately after it executes this Agreement and promptly provide the Developer and Landowner with the Agreement as executed by Council.

4 Further Agreements Relating to this Agreement

- 4.1 The Parties may, at any time and from time to time, enter into agreements relating to the subject-matter of this Agreement that are not inconsistent with this Agreement for the purpose of implementing this Agreement.

5 Surrender of right of appeal, etc.

- 5.1 The Developer and the Landowner are each not to commence or maintain, or cause to be commenced or maintained, any proceedings in the Land and Environment Court involving an appeal against, or questioning the validity of, a Development Consent relating to the Development, the Fill Works Consent, or the Car Parking DA, or an approval under s96 of the Act to modify a Development Consent relating to the Development, the Fill Works Consent or the Car Parking DA to the extent that it relates to the existence of this Agreement or requires any aspect of this Agreement to be performed according to the terms of this Agreement.

6 Application of s94, s94A and s94EF of the Act and Car Park Credit

- 6.1 This Agreement excludes the application of s94, s94A of the Act to the Development, and the MIBC Development.
- 6.2 This Agreement does not exclude the application of s94EF of the Act to the Development, or the MIBC Development.
- 6.3 The Council will take the Car Park Credit into consideration in determining the number of car parking spaces required on the MIBC Land under any future Development Consent which the Council may grant to the Landowner in relation to the MIBC Land.
- 6.4 The Landowner and the Council may enter into a further agreement under which Council agrees to provide works in kind to the Landowner in lieu of taking the Car Park Credit into account in accordance with clause 6.3. Any such agreement must set out an agreed value, or process for valuing the Car Park Credit, and any works in kind provided would be to the value of the Car Park Credit.
- 6.5 For the avoidance of doubt, any Existing Car Spaces physically provided on the Service Road Land at the date of this Agreement which will be lost due to the construction of the Service Road are not to be included as a Car Park Credit for the purposes of this Agreement. The Parties agree that if Development Consent is granted to the Car Parking DA, the Landowner will receive credit for those lost Existing Car Spaces in the form of a reduced car parking liability under the Bowling Club Consent.

Part 2 – Development Contributions

7 Provision of Development Contributions

- 7.1 The Developer and the Landowner are each to make Development Contributions to the Council in accordance with this Agreement.
- 7.2 Schedule 1 has effect in relation to Development Contributions to be made by the Developer and the Landowner under this Agreement.
- 7.3 The Developer and the Landowner are each to make such other Development Contributions to the Council as are provided for in this Agreement.
- 7.4 The Council is to apply each Development Contribution made by the Developer and the Landowner under this Agreement towards the public purpose for which it is made and otherwise in accordance with this Agreement.

8 Procedures relating to payment of monetary Development Contributions

- 8.1 A monetary Development Contribution is made for the purposes of this Agreement when the Council receives the full amount of the contribution payable under this Agreement in cash or by unendorsed bank cheque or by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by the Council.
- 8.2 The Developer and the Landowner, are each to give the Council not less than 2 business days written notice of their intention to pay a monetary Development Contribution.
- 8.3 The Developer and the Landowner are not required to pay a monetary Development Contribution under this Agreement unless the Council, after having received the Developer or Landowner's notice under clause 8.2, has given to the Developer or Landowner, as the case may be, a tax invoice for the amount of the Development Contribution.
- 8.4 The Developer or the Landowner as the case may be, are not in breach of this Agreement if either of them fails to pay a monetary Development Contribution at the time required by this Agreement by reason only of the Council's failure to give to it a tax invoice in relation to the amount proposed to be paid by it.

Part 3 – Provisions relating to Service Road

9 Design and Construction of the Service Road

- 9.1 The Council, at its own cost, is to design and construct the Service Road in accordance with this clause, if the Landowner and Developer make the Development Contributions required under this Agreement.
- 9.2 The Service Road must be:
- 9.2.1 generally as shown on the Proposed Site Plan,
 - 9.2.2 located as close to the northern extremity of that part of the MIBC Land zoned for residential purposes as possible, and outside the flood zone;
 - 9.2.3 located only on that part of the MIBC Land which is *non-core property* as defined in s41J of the *Registered Clubs Act 1976*;
 - 9.2.4 constructed in accordance with any Development Consent and any other approval, licence or consent for the construction of the Service Road,
 - 9.2.5 constructed in accordance with any Roads and Traffic Authority standards for the construction of a public road; and
 - 9.2.6 designed and constructed:
 - (a) to include kerb and gutter on both sides,
 - (b) so that the pavement is wide enough for two (2) semi-trailers to pass and have parallel parking available along the southern kerb,
 - (c) to a standard to accommodate heavy vehicles,
 - (d) to include stormwater drainage,
 - (e) to include not less than three (3) laybacks in the kerb which will be in locations designed by the Landowner's engineers and provided to Council for its approval, which may not be unreasonably withheld; and
 - (f) to include a footpath.
- 9.3 The Council can determine the final design of the Service Road in its discretion, but must consult with:
- 9.3.1 the Landowner regarding the manner in which entry to and exit from the carpark on the MIBC Land is obtained from the Service Road; and
 - 9.3.2 the Developer to ensure that the design of the Service Road is suitable for the Development.
- 9.4 In the event that the Landowner obtains a Subdivision Consent, the Council will ensure that the design of the Service Road can accommodate utility services to service any lots to be created pursuant to the Subdivision Consent.

Main Street Properties Service Road Planning Agreement

Bega Valley Shire Council

Merimbula Nominees Pty Ltd

Merimbula-Imlay Bowling Club Ltd

- 9.5 Council is not obliged to comply with clause 9.4 if the Subdivision Consent is granted after the final design of the Service Road has been determined by Council and the Council reasonably considers that the design of the Service Road cannot be modified to accommodate services to the lots proposed on the Subdivision Consent without increasing the cost of the Service Road.
- 9.6 Council is responsible for obtaining all necessary approvals, licences and consents to construct the Service Road.
- 9.7 The Service Road must be completed by 12 months after the date on which the Development is opened to the public.
- 9.8 Construction of the Service Road must not commence unless and until the Fill Works Consent is granted.

10 Procedures relating to the dedication of the Service Road Land

- 10.1 A Development Contribution comprising the dedication of the Service Road Land is made for the purposes of this Agreement when:
 - 10.1.1 a deposited plan is registered in the register of plans held at the Land and Property Management Authority that dedicates land as a public road (including a temporary public road) under the *Roads Act 1993* or creates a public reserve or drainage reserve under the *Local Government Act 1993*, or
 - 10.1.2 the Council is given an instrument in registrable form under the *Real Property Act 1900* that is effective to transfer the title to the Service Road Land to the Council when registered.
- 10.2 For the purposes of clause 10.1.2:
 - 10.2.1 the Landowner is to give the Council, for execution by the Council as transferee, an instrument of transfer under the *Real Property Act 1900* relating to the land to be dedicated, and
 - 10.2.2 the Council is to execute the instrument of transfer, and
 - 10.2.3 the Council is to lodge the instrument of transfer for registration at the Land and Property Management Authority within 7 days of Council's execution, and
 - 10.2.4 the Landowner and the Council are to do all things reasonably necessary to enable registration of the instrument of transfer to occur.
- 10.3 If this Agreement requires the Landowner to dedicate land to the Council on which the Landowner is also required to carry out a Work under this Agreement, the Landowner is to give to the Council the instrument of transfer of the land under clause 10.2.1 not later than 7 days after the Work is taken to have been completed in accordance with this Agreement.
- 10.4 Notwithstanding any other provision of this Agreement, the Council will not consider applying the Car Park Credit to the MIBC Land until the Landowner dedicates the Service Road Land to Council.

11 Restriction on the use of Service Road Batter Land

- 11.1 The Landowner agrees for the Council to impose a restriction on the use of the Service Road Batter Land pursuant to s88E of the *Conveyancing Act 1919* in favour of the Council, such that no development may be carried out on the Service Road Batter Land without the written approval of the Council, which shall not be unreasonably withheld if Council is of the opinion that satisfactory arrangements have been made for the security of the Service Road (**Restriction**).
- 11.2 For the purposes of clause 11.1, any deposited plan prepared for the purposes of clause 10.1.1 is to be effective in creating the Restriction upon registration of that deposited plan pursuant to s88B of the *Conveyancing Act 1919*.
- 11.3 Alternatively,
- 11.3.1 within 7 days after the date of dedication of the Service Road Land, the Landowner is to give the Council, for Council's execution, an instrument that would be effective in creating the Restriction upon registration of that instrument, and
- 11.3.2 the Landowner must at the request of the Council, sign any *Real Property Act 1900* dealing, acknowledgement or document, and do all other things reasonably necessary to enable the Council to register the instrument that imposes the Restriction, and
- 11.3.3 the Landowner is to pay the Council's costs in relation to the registration of the instrument that imposes the Restriction.

12 Carrying out of Work

- 12.1 Any Work that is required to be carried out by the Developer or the Landowner under this Agreement is to be carried out in accordance with any design or specification reasonably specified by the Council, any relevant development consent and any other applicable law, and otherwise to the reasonable satisfaction of the Council.
- 12.2 If the Developer or the Landowner is reasonably required by the Council to prepare or modify a design or specification relating to a Work for approval by the Council under clause 12.1, the Developer or the Landowner is to bear all costs relating to the preparation or modification and approval of the design and specification.

13 Access to the Land

- 13.1 The Council is to permit the Developer or Landowner to enter and occupy any land owned or controlled by the Council for the purpose of enabling the Developer or Landowner to carry out any Work under this Agreement that is required to be carried out on such land or to perform any other obligation imposed on the Developer or Landowner by or under this Agreement.
- 13.2 The Landowner is to permit the Council, its officers, employees, agents and contractors to enter the MIBC Land or any other land owned by the Landowner at any time, upon giving reasonable prior notice, in order to do

Main Street Properties Service Road Planning Agreement
Bega Valley Shire Council
Merimbula Nominees Pty Ltd
Merimbula-Imlay Bowling Club Ltd

- anything reasonably necessary in order to design and construct the Service Road.
- 13.3 Any construction traffic entering land owned by the Landowner for the purposes of construction of the Service Road, must only access that part of the land owned by the Landowner which is *non-core property* as defined in s41J of the *Registered Club Act 1976*.
- 13.4 The Council and the Developer agree to enter into negotiations in good faith in relation to the provision of access from the basement level of the Development to the Council Land, provided that should that access require any modification to the Development, the Council will bear the costs of that modification.
- 13.5 Until the Service Road is complete, the Landowner is to permit the Developer, its agents and contractors to enter, upon giving reasonable prior notice, so much of the Northern MIBC Land which is '*non-core property*' as defined in s41J of the *Registered Club Act 1976*, as reasonably necessary in order to gain access to the MN Land to enable the carrying out of the Development.

14 Storage and Placement of Existing Fill and Suitable Fill

- 14.1 The Landowner is to permit the Developer to store Suitable Fill on the MIBC Land in a location designated by the Landowner, and for a period agreed between the Landowner and the Developer, not exceeding 12 months prior to the commencement of construction of the Service Road.
- 14.2 The Suitable Fill placed on the MIBC Land is to be used for the purposes of construction of the Service Road, after any Existing Fill is used for that purpose.
- 14.3 Any surplus Suitable Fill not used for construction of the Service Road pursuant to clause 14.2 can be placed in a location on the MIBC Land designated by the Landowner, and must be compacted:
- 14.3.1 in a manner acceptable to the Landowner, and
 - 14.3.2 in accordance with the Fill Works Consent, and
 - 14.3.3 in a location within the MIBC Land as specified by MIBC.
- 14.4 The placement and compaction of the surplus Suitable Fill on the MIBC Land is to be carried out at the cost of the Developer.
- 14.5 The Council will, at its own cost, rework, and compact the Existing Fill for the purposes of construction of the Service Road.
- 14.6 If there is any surplus Existing Fill following Work done under clause 14.5, the Council will, at its own cost, rework, and compact surplus Existing Fill:
- 14.6.1 to the Landowner's reasonable satisfaction, and
 - 14.6.2 in accordance with the Fill Works Consent.
- 14.7 If there is any remaining surplus Existing Fill following the Work done under clause 14.6, the Council agrees to remove the remaining surplus Existing Fill from the MIBC Land at Council's cost, calculated at a rate of \$10/m3.
- 14.8 In the event that the sum of the cost of the Council Fill Works and the cost of construction of the Service Road, determined in accordance with clause 21, exceeds \$1,200,000, then the Landowner will reimburse Council for its costs

Main Street Properties Service Road Planning Agreement

Bega Valley Shire Council

Merimbula Nominees Pty Ltd

Merimbula-Imlay Bowling Club Ltd

over \$1,200,000, provided that the maximum amount that the Landowner must pay to Council under this clause is the lesser of:

14.8.1 the cost of the Council Fill Works, or

14.8.2 \$100,000.00.

15 Northern MIBC Land

- 15.1 The Council acknowledges that the Landowner has offered to enter into a further planning agreement in connection with the Subdivision Application to provide for the dedication of the Northern MIBC Land in return for the Council carrying out works on the MIBC Land to the value of the Northern MIBC Land (**Subdivision VPA**).
- 15.2 In the event that the Landowner lodges the Subdivision Application, the Council agrees to negotiate in good faith, the terms of the Subdivision VPA.
- 15.3 The Landowner and Council acknowledge that the Subdivision VPA may contain further provisions regarding the cost of the Council Fill Works.

16 Protection of people and property

- 16.1 The Developer and Council are to ensure to the fullest extent reasonably practicable in relation to the carrying out of any Work on Land owned by the Council or Landowner that:
 - 16.1.1 all necessary measures are taken to protect people and property, and
 - 16.1.2 unnecessary interference with the passage of people and vehicles is avoided, and
 - 16.1.3 nuisances and unreasonable noise and disturbances are prevented.

17 Procedures relating to the completion of Work

- 17.1 A Development Contribution comprising the carrying out of a Work is made for the purposes of this Agreement when the Council accepts the completion of the Work in accordance with this clause.
- 17.2 Subject to this Agreement, when the Developer considers that a Work required to be carried out by the Developer under this Agreement is complete, the Developer is to give to the Council a notice in writing to that effect.
- 17.3 The Council is taken to have accepted the completion of a Work that is the subject of a notice referred to in clause 17.2:
 - 17.3.1 where the Council has not given the Developer a Rectification Notice under clause 18.1 – 28 days after receipt of the notice under clause 17.2, or
 - 17.3.2 where the Council has given the Developer a Rectification Notice under clause 18.1 – on the date on which the Council gives the Developer a written notice stating that the defect the subject of the Rectification Notice has been rectified to the Council's satisfaction.
- 17.4 On completion of the Work, the Council accepts responsibility for the Work subject to anything to the contrary in this Agreement.

18 Procedures relating to the rectification of defects

- 18.1 On receipt of a notice pursuant to clause 17.2, the Council must inspect the Work, and may give to the Developer a Rectification Notice no later than 28 days after the receipt of the notice under clause 17.2.
- 18.2 The Developer is to comply with a Rectification Notice at its own cost according to its terms and to the reasonable satisfaction of the Council.
- 18.3 If the Developer breaches clause 18.2, the Council may have the relevant defect rectified and may recover its costs of so doing as a debt due in a court of competent jurisdiction.

19 Failure to carry out Work

- 19.1 If the Council considers that the Developer is in breach of any obligation under this Agreement relating to the carrying out of any Work, the Council must give the Developer a notice requiring:
 - 19.1.1 the carrying out of further work relating to the Work to immediately cease except in relation to the rectification of the breach, and
 - 19.1.2 the breach to be rectified to the Council's satisfaction.
- 19.2 The Council may call-up the Security referred to in clause 23 provided 28 days' notice has been given to the Developer under clause 19.1.
- 19.3 A notice given under clause 19.1 is to allow the Developer a period of not less than 28 days or such further period as is reasonable in the circumstances to rectify the breach.
- 19.4 Notwithstanding any other clause, and without limiting any other rights the Council has to enforce this Agreement, the Council may, if the Developer does not comply with a notice given under clause 19.1:
 - 19.4.1 call upon the Security referred to in clause 23, and
 - 19.4.2 carry out and complete the Work the subject of the Developer's breach.
- 19.5 Clauses 29 and 30 do not prevent a notice being given under clause 19.1 and do not apply to such a notice or the circumstances relating to the giving of that notice, and any procedure commenced under clause 29 or clause 30 ceases to apply when such a notice is given.

20 Completion of construction of the Service Road

- 20.1 The Service Road is taken to have been completed when the Service Road is opened as a public road.

21 Cost of construction of the Service Road

- 21.1 On completion of the construction of the Service Road, the Council is to determine the total cost of the construction of the Service Road.
- 21.2 The total cost of construction of the Service Road is to include:

Main Street Properties Service Road Planning Agreement

Bega Valley Shire Council

Merimbula Nominees Pty Ltd

Merimbula-Imlay Bowling Club Ltd

- 21.2.1 the costs of the construction of the Service Road, including the reasonable costs of servants, agents, and contractors of the Council;
 - 21.2.2 the costs of obtaining all necessary approvals, licences authorities, permissions and consents for the Service Road, including the reasonable costs of servants, agents and contractors of the Council; and
 - 21.2.3 the fees and charges reasonably or necessarily incurred in order to obtain the approvals, licences authorities, permissions and consents for the Service Road and to construct the Service Road.
- 21.3 If the total cost of construction of the Service Road is less than \$1,200,000.00, the Council is to give to the Developer and the Landowner each, an amount calculated as follows:

$$\text{Amount} = \frac{\$1,200,000 - \text{TC}}{3}$$

3

Where:

Amount is the amount to be paid to the Developer and the Landowner; and

TC is the total cost of construction of the Service Road.

- 21.4 For the avoidance of doubt, the total cost of construction of the Service Road does not include the cost of the Council Fill Works.

Part 4 – Other Provisions

22 Indemnity and Insurance

- 22.1 The Developer and the Landowner each indemnify the Council, its employees, officers, agents, contractors and workmen from and against all losses, damages, costs (including legal costs on a full indemnity basis), charges, expenses, actions, claims and demands whatsoever which may be sustained, suffered, recovered or made arising in connection with the carrying out by the Developer or the Landowner of any Work and the performance by the Developer and the Landowner of any other obligation under this Agreement.
- 22.2 The Landowner indemnifies the Council, its employees, officers, agents, contractors and workmen from and against all losses, damages, costs (including legal costs on a full indemnity basis), charges, expenses, actions, claims and demands whatsoever which may be sustained, suffered, recovered or made arising in connection with the carrying out by the Council of the Council Fill Works.
- 22.3 The Developer and the Landowner are to take out and keep current to the satisfaction of the Council the following insurances in relation to Work required to be carried out by the Developer and the Landowner under this Agreement up until the Work is taken to have been completed in accordance with this Agreement:
 - 22.3.1 contract works insurance, noting the Council and the Landowner or the Developer, as the case may be, as an interested party, for the full replacement value of the Works (including the cost of demolition and

Main Street Properties Service Road Planning Agreement

Bega Valley Shire Council

Merimbula Nominees Pty Ltd

Merimbula-Imlay Bowling Club Ltd

- removal of debris, consultants' fees and authorities' fees), to cover the Developer's or Landowner's liability in respect of damage to or destruction of the Works,
- 22.3.2 public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer or the Landowner, as the case may be, and any subcontractor of the Developer or Landowner, for liability to any third party,
 - 22.3.3 workers compensation insurance as required by law, and
 - 22.3.4 any other insurance required by law.
- 22.4 If the Developer or Landowner fails to comply with clause 22.3, the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Developer or the Landowner to the Council and may be recovered by the Council as it deems appropriate including:
- 22.4.1 by calling upon the Security provided by the Developer and the Landowner to the Council under this Agreement, or
 - 22.4.2 recovery as a debt due in a court of competent jurisdiction.
- 22.5 The Developer and the Landowner are not to commence to carry out any Work unless they have first provided to the Council satisfactory written evidence of all of the insurances specified in clause 22.3.

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 Council 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 by the Council at all times equals the indexed amount notified to the Developer by Council.
- 23.3 The Landowner's Security provided under clause 23 is, if in the form of cash, to be deposited into the Council's trust fund referred to in s411 of the *Local Government Act 1993* in an account styled '*MIBC Security – Main Street Properties Service Road VPA*', and the Security may only be used in accordance with this Agreement.
- 23.4 The Council is to provide the Landowner with a copy of all transaction documents and bank statements relating to the account in which the Landowner's Security is held as soon as practicable after the Council receives such documents.
- 23.5 Any interest earned on the Landowner's Security is to be held by the Council in the account referred to in clause 23.3.
- 23.6 On the completion of the Landowner's obligations under this Agreement, the Council must promptly refund to the Landowner on request, the balance of the Landowner's Security and any interest earned on that Security.

24 Release & return of Security

- 24.1 The Council 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 Council but may only do so if:
- 24.1.1 the Council considers that the remaining amount of the Security is adequate having regard to the Landowner or Developer's remaining obligations under this Agreement, and
 - 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 Council 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 Council.
- 24.3 At any time following the provision of the Security, the Landowner or Developer may provide the Council with a replacement Security in the amount of the Security required to be provided under clause 23.1.
- 24.4 On receipt of a replacement Security, the Council 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 Council 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 Council 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 Council's servants, agents and contractors reasonably incurred for that purpose,
 - 25.2.2 all fees and charges necessarily or reasonably incurred by the Council 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 Council, by reason of the Landowner or Developer's breach.
- 25.3 If the Council calls on the Security in accordance with this Agreement, the Council 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.

26 Recovery of cost of Work carried out by the Council

- 26.1 If the Council incurs a cost in carrying out, completing or rectifying a defect in a Work that is not met by the Security referred to in clause 23, the Council may recover the cost from the Developer in a court of competent jurisdiction.
- 26.2 For the purpose of clause 26.1, the Council's costs of carrying out, completing or rectifying a defect in a Work includes, but is not limited to:
- 26.2.1 the reasonable costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
 - 26.2.2 all fees and charges necessarily or reasonably incurred by the Council in order to have the Work carried out, completed or rectified, and
 - 26.2.3 without limiting clause 26.2.2, all legal costs and expenses reasonably incurred by the Council, by reason of the Developer's failure to comply with this Agreement.

27 Compulsory Acquisition

- 27.1 In the event that the Landowner does not dedicate the Service Road Land, or any part thereof, at the time at which it is required to be dedicated under this Agreement, the Landowner consents to the Council compulsorily acquiring that land, for compensation in the amount of \$1, without having to follow the pre-acquisition procedures under the Just Terms Act.
- 27.2 Clause 27.1 constitutes an agreement for the purposes of section 30 of the Just Terms Act.
- 27.3 If, as a result of the acquisition referred to in clause 27.1, the Council must pay compensation to any person other than the Landowner, the Landowner must reimburse the Council for that amount, upon a written request being made by the Council, or the Council can call on any Security for that purpose.
- 27.4 Except as otherwise agreed between the Parties, the Landowner must ensure that the land to be dedicated under this Agreement is free of all encumbrances and affectations (whether registered or unregistered and including without limitation any charge or liability for rates, taxes and charges), on both the date that the Landowner is liable to transfer that land to the Council under this Agreement, and the date on which the Council compulsorily acquires the whole or any part of that land in accordance with the Just Terms Act.
- 27.5 The Landowner indemnifies and keeps indemnified the Council against all claims made against the Council as a result of any acquisition by the Council of the whole or any part of the Service Road Land.
- 27.6 The Landowner will promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 27, including without limitation:
- 27.6.1 signing any documents or forms;
 - 27.6.2 giving land owner's consent for lodgment of any development application;

Main Street Properties Service Road Planning Agreement
Bega Valley Shire Council
Merimbula Nominees Pty Ltd
Merimbula-Imlay Bowling Club Ltd

- 27.6.3 producing certificates of title to the Registrar-General under the Real Property Act; and
- 27.6.4 paying the Council's costs arising from clause 27.
- 27.7 Notwithstanding clause 27.4, if, despite having used its best endeavours, the Landowner cannot ensure that the land to be dedicated is free from all encumbrances and affectations, then the Landowner may request that Council agree to accept the land subject to those encumbrances and affectations, and:
 - 27.7.1 Council cannot withhold its agreement unreasonably if the encumbrance or affectation does not prevent the future use of the land for the public purpose for which it is to be dedicated under this Agreement, unless the encumbrance or affectation is a charge arising as a result of unpaid taxes or charges; and
 - 27.7.2 in all other cases, Council may withhold its agreement in its absolute discretion.

28 Enforcement in a court of competent jurisdiction

- 28.1 Without limiting any other provision of this Agreement, the Parties may enforce this Agreement in any court of competent jurisdiction.
- 28.2 For the avoidance of doubt, nothing in this Agreement prevents:
 - 28.2.1 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,
 - 28.2.2 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.

29 Dispute Resolution – expert determination

- 29.1 This clause applies to a dispute under this Agreement which relates to a matter that can be determined by an appropriately qualified expert.
- 29.2 Any dispute between the Parties as to whether a dispute to which this clause applies can be determined by an appropriately qualified expert is to be referred to the Chief Executive Officer of the professional body that represents persons with the relevant expertise for determination, which is to be final and binding on the Parties.
- 29.3 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 29.4 If a notice is given under clause 29.3, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- 29.5 If the dispute is not resolved within a further 28 days, the dispute must be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 29.6 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.

Main Street Properties Service Road Planning Agreement
Bega Valley Shire Council
Merimbula Nominees Pty Ltd
Merimbula-Imlay Bowling Club Ltd

- 29.7 Each Party must bear its own costs arising from or in connection with the appointment of the expert and the expert determination.

30 Dispute Resolution - mediation

- 30.1 This clause applies to any dispute under this Agreement other than a dispute to which clause 29 applies.
- 30.2 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 30.3 If a notice is given under clause 30.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- 30.4 If the dispute is not resolved within a further 28 days, the Parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and must request the President of the Law Society, or the President's nominee, to select a mediator.
- 30.5 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.

31 Registration of this Agreement

- 31.1 The Parties agree to register this Agreement on the MIBC Land and MN Land within 30 days of the date of this Agreement, subject to obtaining the agreement of the persons specified in s93H(1) of the Act.
- 31.2 The Parties acknowledge that on registration by the Registrar-General, this Agreement will be binding on and enforceable against the owners of the MIBC Land and MN Land from time to time as if each owner for the time being had entered into this Agreement.
- 31.3 Within 14 days after the date of this Agreement, the Developer and Landowner are to obtain the consent to the registration of this Agreement on the MIBC Land and MN Land from each person who has an estate or interest in the MIBC Land and MN Land.
- 31.4 The Council must at the request of the Landowner or Developer, or both, sign any *Real Property Act 1900* dealing, acknowledgement or document, and do all other things reasonably necessary to enable the Landowner and the Developer to register this Agreement pursuant to section 93H of the Act.
- 31.5 If the Landowner or Developer or both, so requests in writing, the Council is to execute the relevant forms to enable the removal of the registration of this Agreement from the title to the MIBC Land and MN Land provided the Landowner and the Developer have complied with their obligations under this Agreement.
- 31.6 The Developer and Landowner are to pay their own costs in relation to the registration and removal of registration of this Agreement from the title to the MIBC Land and MN Land.

32 Assignment, Sale of Land, etc

- 32.1 Unless the matters specified in clause 32.2 are satisfied, the Landowner and the Developer are not to do any of the following:
- 32.1.1 to transfer the Land to any person, or
 - 32.1.2 assign or novate to any person the Landowner's or Developer's rights or obligations under this Agreement.
- 32.2 The matters required to be satisfied for the purposes of clause 32.1 are as follows:
- 32.2.1 the Landowner or the Developer, as the case may be, has, at no cost to the Council, first procured the execution by the person to whom the Landowner's or Developer's rights or obligations under this Agreement are to be assigned or novated, of an agreement in favour of the Council on terms satisfactory to the Council, and
 - 32.2.2 the Council, by notice in writing to the Landowner or the Developer, as the case may be, has stated that evidence satisfactory to the Council has been produced to show that the assignee or novatee, is reasonably capable of performing its obligations under the Agreement,
 - 32.2.3 the Landowner or the Developer, as the case may be, is not in breach of this Agreement, and
 - 32.2.4 the Landowner or Developer, as the case may be, otherwise consents to the transfer, assignment or novation.

33 Review of this Agreement

- 33.1 The Parties agree to review this Agreement every 2 years, and otherwise if either party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Agreement.
- 33.2 For the purposes of clause 33.1, 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.
- 33.3 For the purposes of addressing any matter arising from a review of this Agreement referred to in clause 33.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Agreement.
- 33.4 If this Agreement becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Agreement is entered into.
- 33.5 A failure by a Party to agree to take action requested by the other Party as a consequence of a review referred to in clause 33.1 is not a dispute for the purposes of clauses 29 and 30 and is not a breach of this Agreement.

34 Notices

- 34.1 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:
- 34.1.1 delivered or posted to that Party at its address set out in the Summary Sheet, or
 - 34.1.2 faxed to that Party at its fax number set out in the Summary Sheet.
- 34.2 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.
- 34.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 34.3.1 delivered, when it is left at the relevant address,
 - 34.3.2 sent by post, 2 business days after it is posted, or
 - 34.3.3 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.
- 34.4 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.

35 Costs

- 35.1 A Party in breach of this Agreement is to pay a non-breaching Party's costs of enforcing this Agreement within 7 days of a written demand by the non-breaching Party for such payment.
- 35.2 The Parties agrees to pay their own costs of preparing, negotiating and executing this Agreement,

36 Entire Agreement

- 36.1 This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with.
- 36.2 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.

37 Further Acts

- 37.1 Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to effect, perfect or complete this Agreement and all transactions incidental to it.

38 Notations on section 149(2) Planning Certificates

- 38.1 The Parties agree that the Council may, in its absolute discretion, make a notation under section 149(5) of the Act regarding this Agreement on any certificate issued under section 149(2) of the Act relating to the Land.

39 Governing Law and Jurisdiction

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

40 Joint and Individual Liability and Benefits

- 40.1 Except as otherwise set out in this Agreement:
- 40.1.1 any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and
- 40.1.2 any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

41 No Fetter

- 41.1 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.

42 Representations and Warranties

- 42.1 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.

43 Severability

- 43.1 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.
- 43.2 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.

44 Modification

- 44.1 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.

45 Waiver

- 45.1 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.
- 45.2 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.
- 45.3 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.

46 GST

- 46.1 In this clause:
- Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice** have the meaning given by the GST Law.
- GST Amount** means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.
- GST Law** has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- Input Tax Credit** has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.
- Taxable Supply** has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.
- 46.2 Subject to clause 46.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Agreement, the Party providing the

Main Street Properties Service Road Planning Agreement

Bega Valley Shire Council

Merimbula Nominees Pty Ltd

Merimbula-Imlay Bowling Club Ltd

Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.

- 46.3 Clause 46.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Agreement to be GST inclusive.
- 46.4 No additional amount shall be payable by the Council under clause 46.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.
- 46.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Agreement by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:
- 46.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;
- 46.5.2 that any amounts payable by the Parties in accordance with clause 46.2 (as limited by clause 46.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 46.6 No payment of any amount pursuant to this clause 46, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 46.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- 46.8 This clause continues to apply after expiration or termination of this Agreement.

47 Explanatory Note Relating to this Agreement

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

Schedule 1

(Clause 7)

Development Contributions

Column 1	Column 2	Column 3	Column 4
Item	Public Purpose	Manner & Extent	Timing
Dedication of land			
1	Construction of Service Road.	Dedication by Landowner to the Council of the Service Road Land	No later than 90 days after determination of the design of the Service Road in accordance with clause 9.3.
Monetary Contributions			
2	Provision of funding for construction of Service Road.	Payment by the Landowner to the Council of \$400,000.00	No later than 30 days after the dedication of the Service Road Land pursuant to clause 10.
3	Provision of funding for construction of Service Road.	Payment by the Developer to the Council of \$200,000.00	No later than 30 days after the dedication of the Service Road Land pursuant to clause 10.
Carrying out of Work			
4	Construction of Service Road.	Placement and shaping of Suitable Fill by the Developer in accordance with the final design for the Service Road, and in a manner approved by the Council and the Landowner.	On a date or dates as agreed between the Parties following the date on which the Council determines, under Part 5 of the Act, that it will proceed to construct the Service Road.

Schedule 2

(Clause 1.1)

Proposed Site Plan

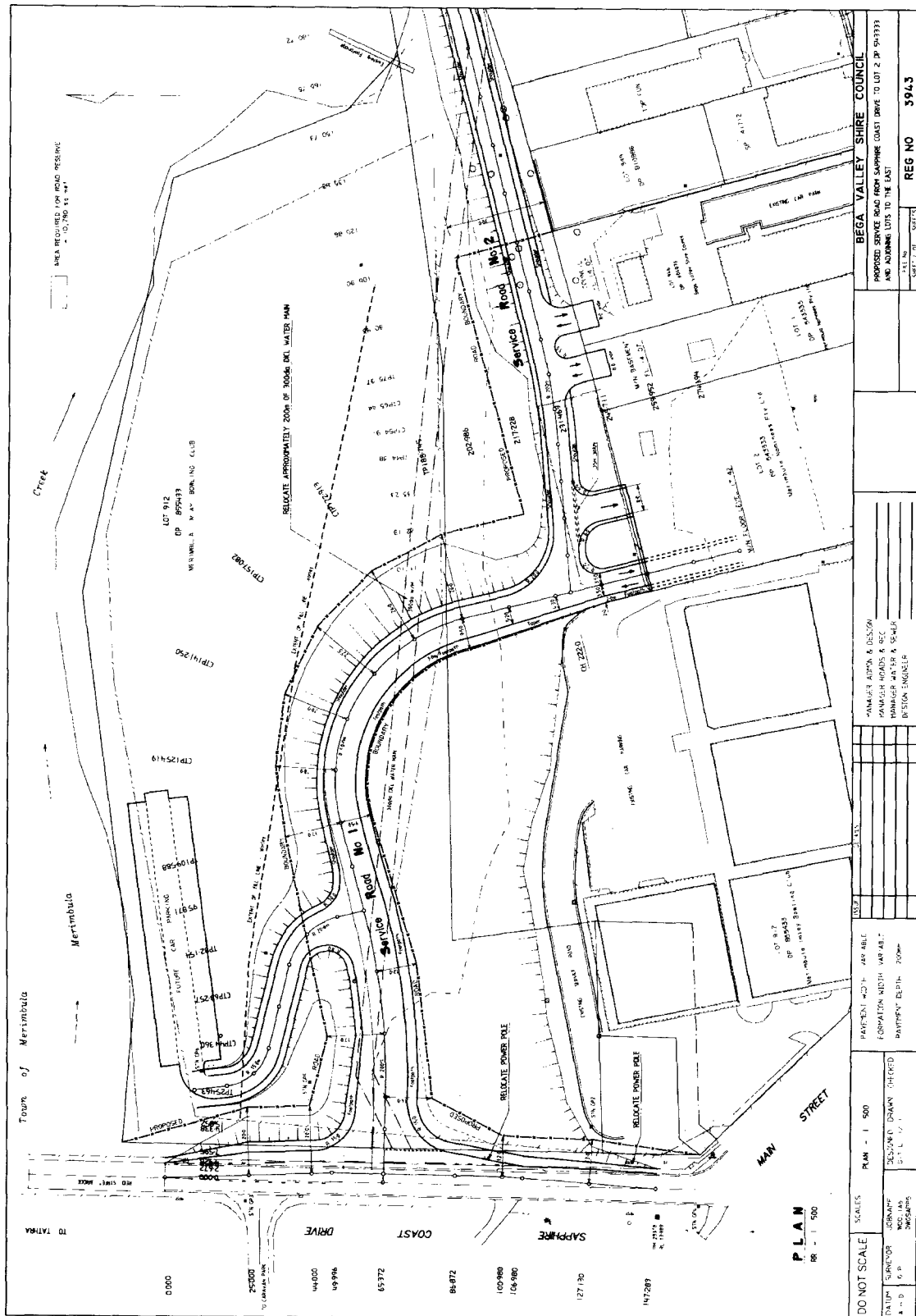
The Proposed Site Plan is on the following page.

Main Street Properties Service Road Planning Agreement

Bega Valley Shire Council

Merimbula Nominees Pty Ltd

Merimbula-Imlay Bowling Club Ltd



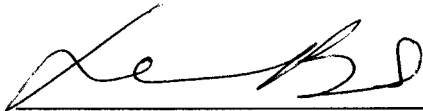
Main Street Properties Service Road Planning Agreement
Bega Valley Shire Council
Merimbula Nominees Pty Ltd
Merimbula-Imlay Bowling Club Ltd

Execution

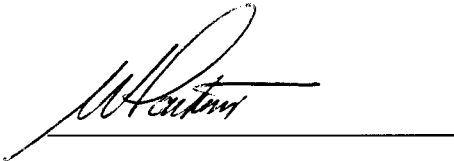
Executed as an Agreement

Dated: 22 JULY 2015

Executed on behalf of the Council



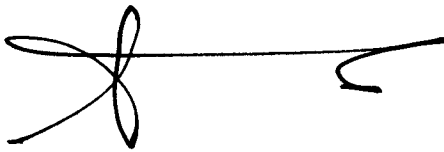
General Manager



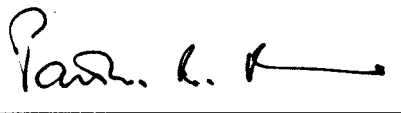
Witness/Name/Position

WAYNE SARTORI / GROUP MANAGER TRANSPORT

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




Name/Position GERALD RAWSON / DIRECTOR




Name/Position PATRICIA RAWSON / DIRECTOR

Main Street Properties Service Road Planning Agreement
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



Name/Position *RONALD JAMES CHRISTIE (DIRECTOR)*



Name/Position *PETER JAMES MOORE (DIRECTOR)*

Appendix 1

(Clause 47)

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Planning Agreement

Under s93F of the *Environmental Planning and Assessment Act 1979*

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 Planning Agreement Applies

Land means the MN Land, the Council Land and the MIBC Land, being Lot 912 in DP 855433, Lot 1 in DP37533, Lot 2 in DP 543333 and Lot 946 in DP 604076.

Description of Proposed Development

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

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

Objectives of Draft Planning Agreement

The objective of the Draft Planning Agreement is to secure funding, land and the carrying out of work for the provision of infrastructure to meet the Development.

Nature of Draft Planning Agreement

The Draft Planning Agreement is a planning agreement under s93F of the *Environmental Planning and Assessment Act 1979 (Act)*. The Draft Planning Agreement is a voluntary agreement under which Development Contributions (as defined in clause 1.1 of the Draft Planning Agreement) are made by the Landowner for various public purposes (as defined in s93F(3) of the Act).

Effect of the Draft Planning Agreement

The Draft Planning Agreement:

- relates to the carrying out of the Development on the Land by the Developer,
- relates to the carrying out of works on the Landowner's land and clarifies the number of car spaces to be provided on the Landowner's land.
- imposes obligations on the Developer and Landowner to make Development Contributions only if approval is granted to the modification of the Consent and the Fill Works Consent and only if such approval is subject to a condition requiring the Planning Agreement to be entered into,
- excludes the application of s94, 94A and s94EF of the Act to the Development,
- does not exclude the application of s94EF of the Act to the Development.
- provides for benefits against contributions required under s94 and 94A of the Act for future development on the MIBC Land.
- makes provision for the dedication of the Service Road Land
- makes provision for the Council to design and construct the Service Road
- requires the Council to apply Development Contributions made under the agreement towards the specified purpose for which they were made,
- imposes obligations on the Landowner in relation to the carrying out of specified Works, and the rectification of defects in those Works,
- is to be registered on the title to the MIBC Land and MN Land,
- imposes restrictions on the Parties transferring the Land or part of the Land or assigning, or novating an interest under the agreement,
- provides for Security to secure the performance of the Developer's and Landowner's obligations under the Agreement
- provides two dispute resolution methods for a dispute under the agreement, being expert determination and mediation,
- provides that the agreement is governed by the law of New South Wales, and

Main Street Properties Service Road Planning Agreement
Bega Valley Shire Council
Merimbula Nominees Pty Ltd
Merimbula-Imlay Bowling Club Ltd

- provides that the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) applies to the agreement.

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

This Draft Planning agreement does not contain any requirement that must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued.

Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

The Draft Planning Agreement:

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

How the Draft Planning Agreement Promotes the Public Interest

The draft Planning Agreement promotes the public interest by promoting the objects of the Act as set out in s5(a)(i), (ii), (iv) and (v) and 5(c) of the Act.

For Planning Authorities:

Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities

N/A

Other Public Authorities – How the Draft Planning Agreement Promotes the Objects (if any) of the Act under which it is Constituted

N/A

Councils – How the Draft Planning Agreement Promotes the Elements of the Council's Charter

The Draft Planning Agreement promotes the elements of the Council's charter by:

- providing public facilities for the community,

Main Street Properties Service Road Planning Agreement
Bega Valley Shire Council
Merimbula Nominees Pty Ltd
Merimbula-Imlay Bowling Club Ltd

- 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 Planning Agreement Conforms with the Authority's Capital Works Program

The Draft Planning Agreement provides for the construction of a service road to service the MN Development, MIBC Land and Council Land. This Work is to be partly funded by the Developer and Landowner under the Draft Planning Agreement. This Work is not included in the Council's current capital works program. However it will be included in the Council's 2011/12 Operational Plan subject to execution of this Draft Planning Agreement by the parties and therefore will be identified in the Council's management plan.