

Planning Agreement
33-35 Warradale Road, Silverdale

Wollondilly Shire Council (ABN 93 723 245 808) (**Council**)

T.J. & R.F. Fordham Pty Limited (ABN 56 000 548 354) (**Developer**)

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Planning Agreement

33-35 Warradale Road, Silverdale

Parties

Council	Name	Wollondilly Shire Council
	Address	62 - 64 Menangle Street, Picton NSW 2571
	ABN	93 723 245 808
Developer	Name	T.J. & R.F. Fordham Pty Limited
	Address	200 Springs Road Spring Farm NSW 2570
	ABN	56 000 548 354

Background

- A The Developer owns the Land.
- B The Developer wishes to carry out the Development.
- C The Developer has lodged a Development Application with Council.
- D The Developer has agreed to make the Contributions in connection with the carrying out of the Development in accordance with this document.

Operative Provisions

1 Document

The agreement of the parties is set out in the following provisions of this document, in consideration of, among other things, the mutual promises contained in this document.

2 Definitions

2.1 Defined Terms

In this document, words beginning with a capital letter that are defined in Part 1 of **Schedule 2** have the meaning ascribed to them in that schedule.

2.2 Interpretation

The interpretational rules contained in Part 2 of **Schedule 2** apply in the interpretation of this document.

3 Application and Operation of Document

3.1 Planning Agreement

This document is a planning agreement:

- (1) within the meaning set out in s93F of the Act; and
- (2) governed by Subdivision 2 of Division 6 of Part 4 of the Act.

3.2 Application

This document applies to both the Land and to the Development.

3.3 Operation of this document

This document operates when it is signed by all of the parties.

4 Application of s94 & s94A

4.1 Application

This document does not exclude the application of section 94, section 94A or section 94EF of the Act to the Development.

4.2 Consideration of Benefits

For the purposes of s93F(3)(e) of the Act, section 94(6) of the Act does not apply to the Contributions that are to be carried out or provided pursuant to this document.

5 Provision of Contributions

5.1 Payment of Monetary Contribution

- (1) The Developer must pay the Monetary Contribution to Council by the time specified in **Schedule 3**.
- (2) The parties acknowledge that the Monetary Contribution represents the estimated average annual cost that will be incurred by Council in maintaining the Designated Land for thirty five (35) years and that the Council is to apply the Monetary Contribution towards that public purpose for which it is made and otherwise in accordance with this document unless the Council reasonably considers that the public interest would be better served by applying the contribution towards another such purpose.

5.2 Dedication of Designated Land

- (1) The Developer must dedicate the Designated Land to Council:
 - (a) free of any trusts, estates, interests, covenants and any other Encumbrances; and
 - (b) by the time specified in **Schedule 3**.
- (2) For the purpose of this document, Designated Land is dedicated to Council:

- (a) if the relevant land is dedicated in a plan registered at the Land & Property Information Office of NSW, when that plan is so registered; or
- (b) otherwise when the Developer delivers to Council:
 - (i) a transfer of the relevant land in registrable form;
 - (ii) the original (if any) Certificate of Title for the relevant land; and
 - (iii) any document in registrable form which, when registered, will remove any Encumbrances registered on the title of that land.

5.3 Maintenance of Designated Land

- (1) After the Designated Land is dedicated to Council in accordance with clause 5.2, the Developer must undertake the Maintenance Works during the Maintenance Period.
- (2) Prior to the commencement of the Maintenance Period, the Developer must provide Council with the Maintenance Bank Guarantee.
- (3) A Subdivision Certificate for the creation of the 45th lot in the Development may not be issued prior to the provision of the Maintenance Bank Guarantee.
- (4) The Developer must ensure that if requested by Council (no more frequently than at least once in any twelve (12) month period) the amount of the Maintenance Bank Guarantee at all times equals the indexed amount of the Maintenance Bank Guarantee calculated under clause 6 from time to time.
- (5) If the Developer does not comply with the terms of this clause 5.3, Council may issue the Developer with a notice requiring the Developer to rectify the relevant default within twenty (20) business days from the date of that notice.
- (6) If the Developer fails to comply with a notice issued under paragraph (5), Council, without limiting any other avenues available to it, may call on the Maintenance Bank Guarantee to the extent necessary to reimburse Council for any costs incurred by it in rectifying the relevant default of the Developer.
- (7) Council must return the Maintenance Bank Guarantee provided under this clause 5.3 (if any) to the Developer at the expiration of the Maintenance Period.

6 Indexation of Monetary Contribution and Bank Guarantees

The Monetary Contribution and the amount of both the Maintenance Bank Guarantee and the Contributions Bank Guarantee are to be increased in accordance with the following formula:

$$A = B \times \frac{C}{D}$$

where:

- A = the indexed amount;
- B = the relevant amount as set out in this document;
- C = the Index most recently published before the date that the relevant payment or the calculation with respect to the relevant amount is to be made; and
- D = the Index as at 15 March 2016.

Index means the Consumer Price Index (All Groups) for Sydney published by the Australian Bureau of Statistics from time to time.

If **A** is less than **B**, then the relevant amount will not change.

7 Registration of this document

7.1 Registration

This document must be registered on the title of the Land pursuant to s 93H of the Act.

7.2 Obligations of Developer

The Developer must do all things necessary to cause the registration of this document to occur under clause 7.1 and in particular, within seven (7) days of execution, the Developer must provide the Council with a request duly executed by the Developer and otherwise in registrable form containing the consent to that registration of each person who has an estate or interest in the land registered under the *Real Property Act 1900* (NSW).

7.3 Release by Council

Council agrees to provide the Developer with a release and discharge of this document from any part of the Land with respect to which the Developer has complied with its obligations under this document and subject to the Developer meeting all of the Council's costs of complying with the Developer's request.

8 Assignment and security

8.1 Prohibition

Neither party may Assign any part of the Land or their rights under this document without the prior written consent of the other party.

8.2 Assignment of the Land

The Developer must not Assign its interest in the Land or obligations under this document unless:

- (1) Council consents to the Assignment, acting reasonably including that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this document;
- (2) the proposed assignee enters into an agreement to the satisfaction of Council under which the assignee agrees to be bound by the terms of this document; and
- (3) the Developer is not in breach of any terms of this document.

8.3 Delivery to Council of Contributions Bank Guarantee

Within fourteen (14) days after the date of execution of this document, the Developer must deliver to Council the Contributions Bank Guarantee.

8.4 Sale of Land

- (1) Clauses 8.1 and 8.2 do not apply in relation to any sale or transfer of the Land or any part if this document is registered on the title to the relevant Land at the time of the sale.

- (2) The Developer is not to object to the Council lodging a caveat over the Land restricting the sale or transfer of the Land or any part to protect the Council's interests under this clause 8.
- (3) The Council is to do all things reasonably necessary to remove a caveat referred to in paragraph (2) from the title to any part of the Land to which this document is registered pursuant to s93H of the Act.

8.5 Indexation of amount of Contributions Bank Guarantee

The Developer must ensure that if requested by Council (no more frequently than at least once in any twelve (12) month period) the amount of the Contributions Bank Guarantee at all times equals the indexed amount of the Monetary Contribution calculated under clause 6 from time to time.

8.6 Council may call on Bank Guarantee

If the Developer fails to comply with any term of this document or does not pay any amount it is required to pay to Council by the time or times and in the manner set out in this document, Council may, without limiting any other avenues available to it, call on the relevant Bank Guarantee without notice to the Developer to the extent necessary to meet any costs incurred by Council in remedying that breach.

8.7 Return of the Contributions Bank Guarantee

Council must return the Contributions Bank Guarantee within seven (7) days after:

- (1) the Developer has provided the Contributions to Council in full; or
- (2) the determination of this document.

8.8 Compulsory acquisition of the Designated Land

- (1) The Developer consents to the compulsory acquisition of the Designated Land:
 - (a) in accordance with *the Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Acquisition Act**); and
 - (b) on the terms set out in this clause 8.8.
- (2) Council may only acquire the Designated Land compulsorily in accordance with the Acquisition Act if the Developer fails to dedicate the Designated Land in accordance with clause 5.2 (**Default Event**).
- (3) If Council acquires the Designated Land compulsorily in accordance with the Acquisition Act the Developer agrees that the compensation payable to it on account of that acquisition under the Acquisition Act is \$1.00.
- (4) The parties agree that the provisions of this clause 8.8 are an agreement with respect to the compulsory acquisition of the Designated Land for the purpose of s30 of the Acquisition Act.

9 Review & Amendment

9.1 Negotiation of review

If either party requests a review of the whole or any part of this document then the parties must use their reasonable endeavours, acting in good faith, to review this document in accordance with that request. Nevertheless, a failure by a party to agree to take action requested by the other party as a consequence of a review is not a Dispute for the purposes of this document and is not a breach of this document.

9.2 Amendment to be in writing

If the parties agree to amend this document as a result of a review conducted under clause 9.1 then any such amendment must be made in writing signed by both parties.

10 Dispute resolution

10.1 Notice of Dispute

If a party believes that there is a dispute in respect of this document (**Dispute**) then:

- (1) that party must give notice (**Dispute Notice**) in writing to the other party stating that there is a Dispute; and
- (2) the Dispute Notice must outline:
 - (a) what the party believes the dispute to be;
 - (b) what the party wants to achieve;
 - (c) what the party believes will settle the Dispute; and
 - (d) who will be the party's representatives to negotiate the dispute.

10.2 Consultation between the Representatives

Within fifteen (15) Business Days of a notice served in accordance with clause 10.1(1) the representatives (**Representatives**) of each of the parties must meet in order to resolve the Dispute.

10.3 Exclusivity of dispute resolution procedure

- (1) Both parties must adhere to the dispute resolution procedure set out in this document.
- (2) The only time that either party may depart from the dispute resolution procedure set out in this clause is when urgent interlocutory relief is required to restrain a breach or threatened breach of this document.

10.4 Settlement of Dispute

If the parties cannot resolve the Dispute after adhering to the dispute resolution procedure set out in this document then either party may seek any other avenues available to it in order to resolve the Dispute.

11 Breach of this document

11.1 Breach Notice

If the Developer breaches this document, Council may serve a notice on the Developer (**Breach Notice**) specifying:

- (1) the nature and extent of the alleged breach;
- (2) if:

- (a) the breach is capable of being rectified other than by the payment of compensation, what Council requires the Developer to do in order to rectify the breach; or
- (b) the breach is not capable of being rectified other than by payment of compensation, the amount of compensation Council requires the Developer to pay in order to rectify the breach, and
- (3) if applicable, the time within which Council reasonably requires the breach to be rectified.

11.2 Events of Default

The Developer commits an “**Event of Default**” if it:

- (1) fails to comply with a Breach Notice; or
- (2) becomes subject to an Insolvency Event.

11.3 No Restriction

Nothing in this clause restricts the Council from taking any other action under this document or the Act to require the Developer to compensate it for or remedy a breach of this document.

12 Termination

12.1 Termination

This document terminates in the following events:

- (1) The parties agree in writing to terminate the operation of this document at any time.
- (2) Council serves notice on the Developer terminating this document where the Developer has committed an Event of Default.

12.2 Consequence of termination

Upon termination of this document:

- (1) all future rights and obligations of the parties are discharged; and
- (2) all pre-existing rights and obligations of the parties continue to subsist.

13 Position of Council

13.1 Consent authority

The parties acknowledge that Council is a consent authority with statutory rights and obligations pursuant to the terms of the Planning Legislation.

13.2 Document does not fetter discretion

This document is not intended to operate to fetter, in any unlawful manner:

- (1) the power of Council to make any Law; or
- (2) the exercise by Council of any statutory power or discretion,

(Discretion).

13.3 Severance of provisions

- (1) No provision of this document is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this document is held by a court of competent jurisdiction to constitute an unlawful fetter on any Discretion, the parties agree:
 - (a) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause 13 is substantially satisfied;
 - (b) in the event that paragraph (1)(a) cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this document has full force and effect; and
 - (c) to endeavour to satisfy the common objectives of the parties on relation to the provision of this document which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.
- (2) Where the Law permits Council to contract out of a provision of that Law or gives Council power to exercise a Discretion, then if Council has in this document contracted out of a provision or exercised a Discretion under this document, then to the extent of this document is not to be taken to be inconsistent with the Law.

13.4 No Obligations

Nothing in this document will be deemed to impose any obligation on Council to exercise any of its functions under the Act in relation to the Development Consent, the Land or the Development in a certain manner.

14 Document not Confidential

The terms of this document are not confidential and this document may be treated as a public document and exhibited or reported without restriction by any party.

15 Costs

The Developer will reimburse Council for the costs incurred by Council in relation to the negotiation, preparation and execution of this document.

16 Administrative Provisions

16.1 Notices

- (1) Any notice, consent or other communication under this document must be in writing and signed by or on behalf of the person giving it, addressed to the person to whom it is to be given and:
 - (a) delivered to that person's address;
 - (b) sent by pre-paid mail to that person's address; or
 - (c) transmitted by facsimile to that person's address.
- (2) A notice given to a person in accordance with this clause is treated as having been given and received:

- (a) if delivered to a person's address, on the day of delivery if a Business Day, otherwise on the next Business Day;
 - (b) if sent by pre-paid mail, on the third Business Day after posting; and
 - (c) if transmitted by facsimile to a person's address and a correct and complete transmission report is received, on the day of transmission if a Business Day, otherwise on the next Business Day.
- (3) For the purpose of this clause the address of a person is the address set out in this document or another address of which that person may from time to time give notice to each other person.

16.2 Entire Document

This document is the entire agreement of the parties on the subject matter. All representations, communications and prior agreements in relation to the subject matter are merged in and superseded by this document.

16.3 Waiver

The non-exercise of or delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the parties to be bound by the waiver and may be conditional.

16.4 Cooperation

Each party must sign, execute and deliver all agreements, documents, instruments and act reasonably and effectively to carry out and give full effect to this document and the rights and obligations of the parties under it.

16.5 Counterparts

This document may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

16.6 Amendment

This document may only be amended or supplemented in writing signed by the parties.

16.7 Unenforceability

Any provision of this document which is invalid or unenforceable in any jurisdiction is to be read down for the purposes of that jurisdiction, if possible, so as to be valid or enforceable, and is otherwise capable of being severed to the extent of the invalidity or enforceability, without affecting the remaining provisions of this document or affecting the validity or enforceability of that provision in any other jurisdiction.

16.8 Power of Attorney

Each attorney who executes this document on behalf of a party declares that the attorney has no notice of:

- (1) the revocation or suspension of the power of attorney by the grantor; or
- (2) the death of the grantor.

16.9 Governing law

The law in force in the State of New South Wales governs this document. The parties:

- (1) submit to the exclusive jurisdiction of the courts of New South Wales and any courts that may hear appeal from those courts in respect of any proceedings in connection with this document; and
 - (2) may not seek to have any proceedings removed from the jurisdiction of New South Wales on the grounds of *forum non conveniens*.
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Schedule 1– Requirements Under Section 93F

REQUIREMENT UNDER THE ACT	THIS PLANNING AGREEMENT
Planning instrument and/or development application – (Section 93F(1)) The Developer has: <ul style="list-style-type: none"> (a) sought a change to an environmental planning instrument. (b) made, or proposes to make, a Development Application. (c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies. 	<ul style="list-style-type: none"> (a) No. (b) Yes. (c) No.
Description of land to which this document applies – (Section 93F(3)(a))	The land contained in Certificate of Title Folio Identifier 5/261728 and located at 33-35 Warradale Road, Silverdale.
Description of change to the environmental planning instrument to which this document applies – (Section 93F(3)(b))	N/A.
Application of section 94 of the Act – (Section 93F(3)(d))	See clause 4.1
Applicability of section 94A of the Act – (Section 93F(3)(d))	See clause 4.1
Applicability of section 94EF of the Act (Section 93F(3)(d))	See clause 4.1
Consideration of benefits under this document if section 94 applies – (Section 93F(3)(e))	See clause 4.2.
Mechanism for Dispute resolution – (Section 93F(3)(f))	See clause 10.
Enforcement of this document (Section 93F(3)(g))	See clause 5, 5.3, 7 and 8.
No obligation to grant consent or exercise functions – (Section 93F(3)(9))	See clause 13.

Schedule 2 – Defined Terms and Interpretation

Part 1 – Definitions

Act	means the <i>Environmental Planning and Assessment Act 1979</i> (NSW).
Assign	as the context requires refers to any assignment, sale, transfer, disposition, declaration of trust over or other assignment of a legal and/or beneficial interest.
Authority	means (as appropriate) any: (1) federal, state or local government; (2) department of any federal, state or local government; (3) any court or administrative tribunal; or (4) statutory corporation or regulatory body.
Bank Guarantee	means an irrevocable and unconditional undertaking without any expiry or end date in favour of the Council to pay an amount or amounts of money to the Council on demand issued by: (a) one of the following trading banks: (i) Australia and New Zealand Banking Group Limited, (ii) Commonwealth Bank of Australia, (iii) Macquarie Bank Limited, (iv) National Australia Bank Limited, (iv) St George Bank Limited, (v) Westpac Banking Corporation, or (b) any other financial institution approved by the Council in its absolute discretion.
Claim	against any person any allegation, action, demand, cause of action, suit, proceeding, judgement, debt, damage, loss, cost, expense or liability howsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at law, in equity, under statute or otherwise.
Contributions Bank Guarantee	means a Bank Guarantee in the amount of \$5,000.00.
Confidential Information	means any information and all other knowledge at any time disclosed (whether in writing and orally) by the parties to each other, or acquired by the parties in relation to the other's activities or services which is not already in the public domain and which: (1) is by its nature confidential; (2) is designated, or marked, or stipulated by either party as confidential (whether in writing or otherwise);

- (3) any party knows or ought to know is confidential; and
- (4) is information which may be reasonably considered to be of a confidential nature.

Contributions

means the:

- (1) dedication of the Designated Land; and
- (2) payment of the Monetary Contribution,

to Council in accordance with this document, and the carrying out of the Maintenance Works during the Maintenance Period.

Designated Land

means that part of the Land shaded in dark green and labelled as *"open space and drainage reserves lots 201 and 202 to be dedicated to Council"* on the plan attached as **Annexure 1**.

Development

means the subdivision of the Land into residential allotments and associated works.

Development Application

means an application for the Development Consent.

Development Consent

means the consent issued under the Act for the Development.

Dispute

has the meaning ascribed to it in clause 10.

Encumbrance

means an interest or power:

- (1) reserved in or over an interest in any asset;
- (2) created or otherwise arising in or over any interest in any asset under any mortgage, charge (whether fixed or floating), pledge, lien, hypothecation, title retention, conditional sale agreement, hire or hire purchase agreement, option, restriction as to transfer, use or possession, easement, subordination to any right of any other person and any other encumbrance or security interest, trust or bill of sale; or
- (3) by way of security for the payment of a debt or other monetary obligation or the performance of any obligation.

Encumber means to grant an Encumbrance.

Event of Default

has the meaning ascribed to it in clause 11.2.

Land

means the land contained in Certificate of Title Folio Identifier 5/261728 and known as 33-35 Warradale Road, Silverdale.

Law

means all legislation, regulations, by-laws, common law and other binding order made by any Authority.

Maintenance Bank Guarantee

means a Bank Guarantee in the amount of \$6,600.00.

Maintenance Period

means two (2) years from the date that the Designated Land is dedicated to Council in accordance with this document.

Maintenance Works

means the maintenance of the Designated Land in accordance

with the reasonable requirements of Council.

Monetary Contribution

means the amount specified in the third column corresponding to Item No. 3 of the table in **Schedule 3** as indexed in accordance with clause 6.

Planning Legislation

means the Act, the *Roads Act 1993* (NSW) and the *Local Government Act 1993* (NSW).

Subdivision Certificate

has the meaning ascribed to that term in s109C(1)(d) of the Act.

Part 2 - Interpretational Rules

clauses, annexures and schedules

a clause, annexure or schedule is a reference to a clause in or annexure or schedule to this document.

reference to statutes

a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them.

singular includes plural

the singular includes the plural and vice versa.

person

the word "person" includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association or any government agency.

executors, administrators, successors

a particular person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns.

dollars

Australian dollars, dollars, \$ or A\$ is a reference to the lawful currency of Australia.

calculation of time

if a period of time dates from a given day or the day of an act or event, it is to be calculated exclusive of that day.

reference to a day

a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later.

accounting terms

an accounting term is a reference to that term as it is used in accounting standards under the Corporations Act or, if not inconsistent with those standards, in accounting principles and practices generally accepted in Australia.

reference to a group of persons

a group of persons or things is a reference to any two or more of them jointly and to each of them individually.

meaning not limited

the words "include", "including", "for example" or "such as" are not used as, nor are they to be interpreted as, words of limitation, and, when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind.

next day

if an act under this document to be done by a party on or by a given day is done after 4.30pm on that day, it is taken to be done on the next day.

next Business Day

if an event must occur on a stipulated day which is not a Business Day then the stipulated day will be taken to be the next Business Day.

time of day

time is a reference to Sydney time.

headings

headings (including those in brackets at the beginning of paragraphs) are for convenience only and do not affect the interpretation of this document.

agreement

a reference to any agreement, Agreement or instrument includes the same as varied, supplemented, novated or replaced from time to time.

Schedule 3 – Description and Timing of Contributions

Item No.	Description of Contribution	Value	Timing	Public Purpose
1.	Dedication of Designated Land – Lot 201	\$911,400.00 (calculated based on \$300.00 x 3038sqm)	Prior to the issue of a Subdivision Certificate creating the 45 th lot in the Development	Open Space and Drainage
2.	Dedication of Dedicated Land – Lot 202	\$398,700.00 (calculated based on \$300.00 x 1329sqm)	Prior to the issue of a Subdivision Certificate creating the 45 th lot in the Development	Open Space and Drainage
3.	Monetary Contribution	\$230,040.00	Prior to the first dedication of the Designated Land	Maintenance of the Designated Land

Annexure 1- Plan of Designated Land

Execution page

Executed as a deed

Dated:

Signed, sealed and delivered by Wollondilly Shire Council (ABN 93 723 245 808) in accordance with clause 400 of the Local Government (General) Regulation 2005 by the affixation of its common seal in the presence of the General Manager and Mayor who attest by their signatures that the seal was affixed in their presence in accordance and as authorised by the resolution of the Council on [date] that the seal be so affixed.

General Manager (Signature)

Mayor (Signature)

Name of General Manager (Print Name)

Name of Mayor (Print Name)

Signed, sealed and delivered by T.J. & R.F. Fordham Pty Limited (ABN 56 000 548 354) in accordance with section 127(1) of the *Corporations Act 2001* (Cth) by authority of its directors.

Director/Secretary (Signature)

Director (Signature)

Name of Director/ Secretary (Print Name)

Name of Director (Print Name)
