

Planning Agreement

Environmental Planning and Assessment Act 1979

Michael Richard Downes

and

Barrington Tops Developments Pty Ltd
ACN 060 939 077

and

MidCoast Council
ABN 44 961 208 161

Table of Contents

1.	Definitions and Interpretation	3
2.	Operation and application of this deed	6
3.	Application of sections 7.11, 7.12 and 7.24 of the Act	7
4.	Development Provision	7
5.	Enforcement	8
6.	Registration of this Agreement	9
7.	Dispute Resolution	9
8.	Notices	11
9.	General Provisions	11
Schedule 1	– Section 7.4 Requirements	13
Schedule 2	– Subdivision Plan	15

Dated

Parties

Michael Richard Downes

Address: 203/33 Shortland Esplanade, Newcastle East NSW 2300

Email: michael@downes1.com.au

(Downes)

Barrington Tops Developments Pty Ltd ACN 060 939 077

Address: 203/33 Shortland Esplanade, Newcastle East NSW 2300

Email: michael@downes1.com.au

Attention: Michael Downes

(Barrington)

MidCoast Council ABN 44 961 208 161

Address: 2 Birpi Way, Taree NSW 2430

Email: [insert email]

Attention: [insert contact name]

(Council)

Introduction

- A Downes is the registered proprietor of Lot 46 and Lot 82.
- B Barrington and Downes are the registered proprietors of Lot D and Lot 820 as tenants in common in unequal shares.
- C Barrington and Downes (**Developer**) propose to carry out the Subdivision of the Land and have submitted the Development Application for the Development to Council in respect of the Land.
- D The Developer has offered, on a voluntary basis, to enter into this agreement with Council as part of the Development Application to conserve and enhance biodiverse and environmentally sensitive land on Lot 824.

Operative Provisions

It is agreed as follows.

1. Definitions and Interpretation

1.1 Definitions

In this deed, unless the contrary intention appears, the following words have the following meanings:

Term:

Definition:

Act

Environmental Planning and Assessment Act 1979 (NSW).

BCT	means the New South Wales Biodiversity Conservation Trust.
Business Day	any day that is not a Saturday, Sunday, public holiday, or bank holiday in New South Wales.
Conservation Agreement	means an in-perpetuity conservation agreement entered into with BCT in accordance with the <i>Biodiversity Conservation Act 2016</i> (NSW) for the conservation of Lot 824 and substantially in accordance with the Vegetation Management Plan.
Council	MidCoast Council ABN 44 961 208 161.
Dealing	means in relation to the Lot 824, to sell, transfer, assign, mortgage, charge, dispose, encumber, or otherwise deal with Lot 824 in whole or part.
Developer	collectively, Barrington and Downes, unless otherwise specified in this deed.
Development	a four-lot subdivision.
Development Application	means the development application lodged with Council for the Development with reference number DA2021/2166.
Development Consent	has the same meaning as in the Act.
Dispute	has the meaning prescribed to it pursuant to clause 7.1.
Encumbrance	means any security interest or other proprietary interest in the Land or Lot 824 including but not limited to a lease, mortgage, charge, or caveatable interest.
Explanatory Note	the note exhibited with a copy of this deed when this deed is made for available for inspection by the public pursuant to the Act.
Interested Persons	means any person or entity that has a claim or legal or equitable interest over the Land or Lot 824 and includes, without limitation, the holder of an Encumbrance.
Land	collectively, means: <ul style="list-style-type: none"> (a) Lot D; (b) Lot 46; (c) Lot 82; and (d) Lot 820
Lot D	means lot D in deposited plan 162940 with folio identifier D/162940.

Lot 46	means lot 46 in deposited plan 95406 with folio identifier 46/95406.
Lot 82	means lot 82 in deposited plan 95418 with folio identifier 82/95418.
Lot 820	means lot 820 in deposited plan 1277990 with folio identifier 820/1277990.
Lot 824	means the lot identified as Lot 824 in the Subdivision Plan.
LRS	means the New South Wales Land Registry Service.
PCA	means a principal certifying authority under Part 6 of the Act appointed for the purpose of, <i>inter alia</i> , issuing the Subdivision Certificate relating to the Development.
Planning Agreement	has the same meaning as in the Act.
RPA	means the <i>Real Property Act 1900</i> (NSW).
Subdivision	has the same meaning as “subdivision of land” in the Act.
Subdivision Certificate	has the same meaning as in the Act.
Subdivision Plan	means the plan of subdivision of the Land as contained in Schedule 2.
Vegetation Management Plan	means the vegetation management plan prepared by Wildthing Environmental Consultants dated April 2021 and submitted as part of the Development Application.

1.2 Interpretation

In this agreement, headings and bold text are for ease of reference only and do not affect the interpretation of this deed and, unless the context otherwise requires:

- (a) a reference to **this agreement** or another document means this agreement or that other document and any document which varies, supplements, replaces, assigns, or novates this agreement or that other document;
- (b) a reference to **legislation** or a **legislative provision** includes any statutory modification, or substitution of that legislation or legislative provision and any subordinate legislation made under that legislation or legislative provision;
- (c) a reference to a **body** or **authority** which ceases to exist is a reference to either a body or authority that the parties agree to substitute for the named body or authority or, failing agreement, to a body or authority having substantially the same objects as the named body or authority;

- (d) a reference to the **introduction**, a **clause**, a **schedule**, or an **annexure** is a reference to the introduction, a clause, a schedule, or an annexure to or of this agreement;
- (e) **clause headings**, the **introduction** and the **table of contents** are inserted for convenience only and do not form part of this agreement;
- (f) the **schedules** and **annexures** form part of this agreement;
- (g) a reference to a **person** includes a natural person, corporation, statutory corporation, partnership, the Crown or any other organisation or legal entity;
- (h) a reference to a **natural person** includes their personal representatives, successors and permitted assigns;
- (i) a reference to a **corporation** includes its successors and permitted assigns;
- (j) a reference to a right or obligation of a party is a reference to a right or obligation of that part under this agreement;
- (k) an **obligation** or **warranty** on the part of 2 or more persons binds them jointly and severally and an obligation or warranty in favour of 2 or more persons benefits them jointly and severally;
- (l) a requirement to do any thing includes a requirement to cause that thing to be done and a requirement not to do anything includes a requirement to prevent that thing being done;
- (m) **including** and **includes** are not words of limitation;
- (n) a word that is derived from a defined word has a corresponding meaning;
- (o) **monetary amounts** are expressed in Australian dollars;
- (p) the singular includes the plural and vice-versa;
- (q) words importing one gender include all other genders;
- (r) a reference to a thing includes each part of that thing;
- (s) neither this agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting; and
- (t) nothing in this agreement affects the operation of any other planning agreement that applies to the Land (or part of the Land) at the time this agreement commences.

2. Operation and application of this deed

2.1 Operation

This agreement commences on the date that this agreement is signed by all the parties.

2.2 Planning agreement under the Act

This agreement constitutes a planning agreement within the meaning of section 7.4 of the Act and the parties agree on the matters set out in Schedule 1.

2.3 Application

This deed applies to:

- (a) Lot 824; and
- (b) the Development.

2.4 Explanatory Note

The Explanatory Note must not be used to assist in construing this agreement.

3. Application of sections 7.11, 7.12 and 7.24 of the Act

- (a) Sections 7.11, 7.12 and 7.24 of the Act apply to the Development.
- (b) Benefits under this agreement are excluded from being taken into consideration under section 7.11 of the Act in its application to the Development.

4. Development Provision

4.1 Vegetation Management Plan

- (a) As part of the Development Application, the Developer has submitted the Vegetation Management Plan.

4.2 Biodiversity Conservation Agreement

- (a) Following approval of the Development Application, the Developer must, at its cost and within a reasonable time, enter into a Conservation Agreement with the BCT for the ongoing protection of biodiversity and native vegetation of Lot 824.
- (b) The Conservation Agreement should be substantially in accordance with the Vegetation Management Plan or as required by the BCT.
- (c) The Developer agrees to comply with the terms of the Conservation Agreement to BCT's reasonable satisfaction.
- (d) The Developer will provide Council with a copy of the executed Conservation Agreement within ten (10) Business Days of it being executed by the Developer and BCT.
- (e) The Developer must register the BCT on the title to Lot 824 pursuant to clause 6.2.

5. Enforcement

5.1 Restriction on the issue of Subdivision Certificate

The Developer agrees that:

- (a) it will not seek a Subdivision Certificate relating to any part of the Land until:
 - (i) this agreement has been signed by both the Developer and Council;
 - (ii) the Vegetation Management Plan has been approved by Council as part of the Development Application approval; and
 - (iii) it has complied with clause 4.2(d).
- (b) with any application for a Subdivision Certificate relating to any part of the Land, it will provide the PCA with evidence that:
 - (i) this agreement has been signed; and
 - (ii) the Conservation Agreement has been signed and a copy provided to Council pursuant to clause 4.2(d).
- (c) Council acknowledges and agrees that the measures detailed in this clause 5.1 are sufficient security for enforcing the Developer's obligations under this agreement.

5.2 Caveat

- (a) The Developer acknowledges and agrees that:
 - (i) when this agreement comes into operation, Council is deemed to have acquired and the Developer is deemed to have granted, an equitable estate and interest in the Land for the purposes of section 74F of the RPA and consequently Council has a sufficient interest in the Land to lodge with the LRS a caveat notifying that interest;
 - (ii) it will not object to Council lodging a caveat over the Land nor will it seek to remove any caveat lodged by Council provided that the caveat does not prevent registration of any dealing or plan (including a Subdivision Plan, this agreement, or a Conservation Agreement) other than a transfer; and
 - (iii) it will obtain the consent to the lodgement of the caveat of each Interested Person.
- (b) Council acknowledges and agrees that the caveatable interest detailed in this clause 5.2 is sufficient security for enforcing the Developer's obligations under this agreement.
- (c) Council must, at the Developer's cost (with any such cost to be reimbursed to Council promptly on demand), register at the LRS a withdrawal of caveat

in respect of all the Land within five (5) Business Days of the Developer complying with all of the following clauses:

- (i) 6.1(c); and
- (ii) 6.2(b).

6. Registration of this Agreement

6.1 Registration of agreement

- (a) The Developer represents and warrants that it is the owner of the Land and will be the owner of Lot 824 following registration of the Subdivision Plan.
- (b) As contemplated by section 7.6 of the Act, the Developer agrees to lodge this agreement with the LRS for registration under the RPA over the Land within five (5) Business Days of this agreement being executed by all parties.
- (c) The Developer will provide Council with a copy of the registered agreement within ten (10) Business Days, or such other time as agreed between the parties, of registration of this agreement in accordance with this clause 6.1.

6.2 Registration of Conservation Agreement

- (a) The Developer agrees to lodge the Conservation Agreement with the LRS for registration under the RPA over the title to Lot 824 within ten (10) Business Days of the Subdivision Plan being registered with the LRS.
- (b) The Developer will provide Council with a copy of the registered Conservation Agreement within ten (10) Business Days, or such other time as agreed between the parties, of registration of the Conservation Agreement in accordance with this clause 6.2.
- (c) Once the Developer has complied with clause 6.2(b), the Council agrees that this agreement can be removed from the title to the Land (as subdivided). Council will provide the Developer with all reasonable assistance to allow for the appropriate removal or surrender form to be executed and lodged with the LRS.

6.3 Consent to Registration

The Developer warrants that it is obtained prior written approval from each Interested Person to the registration of this agreement as a Planning Agreement on the title to the Land pursuant to the Act.

7. Dispute Resolution

7.1 Prerequisites to litigation

If a dispute arises out of or relates to this agreement (including any dispute as to the meaning, performance, validity, subject matter, breach or termination of the agreement or as to any claim in tort, in equity or pursuant to any statute) (**Dispute**) the Developer or Council may not commence any court or arbitration proceedings

relating to the Dispute unless it has complied with this clause except where the party seeks urgent interlocutory relief.

7.2 Notice of dispute

The party claiming that a Dispute has arisen under or in relation to this agreement must give written notice to the other party specifying the nature of the Dispute.

7.3 Endeavour to resolve dispute

On receipt of that notice, the parties must use reasonable endeavours in good faith to resolve the Dispute expeditiously using informal dispute resolution techniques such as mediation, expert evaluation or determination or similar techniques agreed by them.

7.4 Mediation

If the parties do not agree within 7 days of receipt of the notice (or such further period as agreed in writing by them) as to:

- (a) the dispute resolution technique and procedures to be adopted;
- (b) the timetable for all steps in those procedures; and
- (c) the selection and compensation of the independent person required for such technique,

then parties must mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales and the President of the Law Society of New South Wales or the President's nominee will select the mediator and determine the mediator's remuneration.

7.5 Arbitration

In the event that the Dispute is not resolved by mediation within 21 days of written notice by one party to the other of the dispute (or such further period agreed in writing between the parties), either party may refer the Dispute to arbitration. The arbitrator must be agreed between the parties within 10 days of written notice of the referral by the referring party to the other or failing agreement appointed by the President of the Law Society of New South Wales or the President's nominee. In either case, the arbitrator must not be a person who has participated in an informal resolution procedure in respect of the Dispute.

7.6 Conduct of arbitration

The arbitration must be conducted in accordance with the Rules for the Conduct of Commercial Arbitrations of the Institute of Arbitrators Australia and, subject to those Rules, in accordance with the provisions of the *Commercial Arbitration Act 2010* (NSW).

7.7 Litigation

If the Dispute is not finally resolved by the process detailed above, either party is at liberty to litigate the Dispute.

7.8 Continue to perform obligations

Each party must continue to perform its obligations under this agreement despite the existence of a Dispute.

8. Notices

8.1 Service and notices

- (a) A notice, demand, consent, approval, or communication under this agreement (**Notice**) must be:
 - (i) in writing, in English and signed by a person duly authorised by the sender; and
 - (ii) marked for the attention of the person, and hand delivered or sent by prepaid post or email to the recipient's address specified in the Parties section of this agreement, as varied by any Notice given by the recipient to the sender.
- (b) Communications by email need not be marked for the attention in the way required by clause 8.1(a)(ii). However, the email must state the first and last name of the sender. Communications sent by email are taken to be signed by the named sender.

8.2 Effective on receipt

A Notice given in accordance with clause 8.1 takes effect when taken to be received (or at a later time specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by prepaid post, seven days after the date of posting (or twenty days after the date of posting if posted to or from a place outside Australia); or
- (c) if sent by email, at the time the email was sent unless the sender receives an automated message that the email has not been delivered,

but if receipt is not on a Business Day or is after 5.00pm on a Business Day (in the time zone of the addressee), the Notice is taken to be received at 9.00am on the next Business Day.

9. General Provisions

9.1 Costs

- (a) The Developer will pay:
 - (i) its own costs and the reasonable costs of Council associated with the preparation, negotiation, and execution of this agreement; and
 - (ii) the costs of registration of this agreement as a Planning Agreement on the title to Lot 824, obtaining mortgagee consent to that registration and any stamp duty.

- (b) Council will pay all costs associated with compliance with the Act in relation to the advertising of this agreement as a Planning Agreement.

9.2 Severability

Part or all of any provision of this agreement that is illegal or unenforceable will be severed from this agreement and will not affect the continued operation of the remaining provisions of this agreement.

9.3 Waiver

Waiver of any power or right under this agreement must be in writing signed by the party entitled to the benefit of that power or right and is effective only to the extent set out in that written waiver.

9.4 Rights, remedies additional

Any rights and remedies that a person may have under this agreement are in addition to and do not replace or limit any other rights or remedies that the person may have.

9.5 Further assurances

Each party must do or cause to be done all things necessary or reasonably desirable to give full effect to this agreement and the transactions contemplated by it (including the execution of documents).

9.6 Confidentiality

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

9.7 Governing law and jurisdiction

This agreement will be governed by and construed in accordance with the laws in force in the State of New South Wales and each party submits to the non-exclusive jurisdiction of the courts of that State.

Schedule 1 – Section 7.4 Requirements

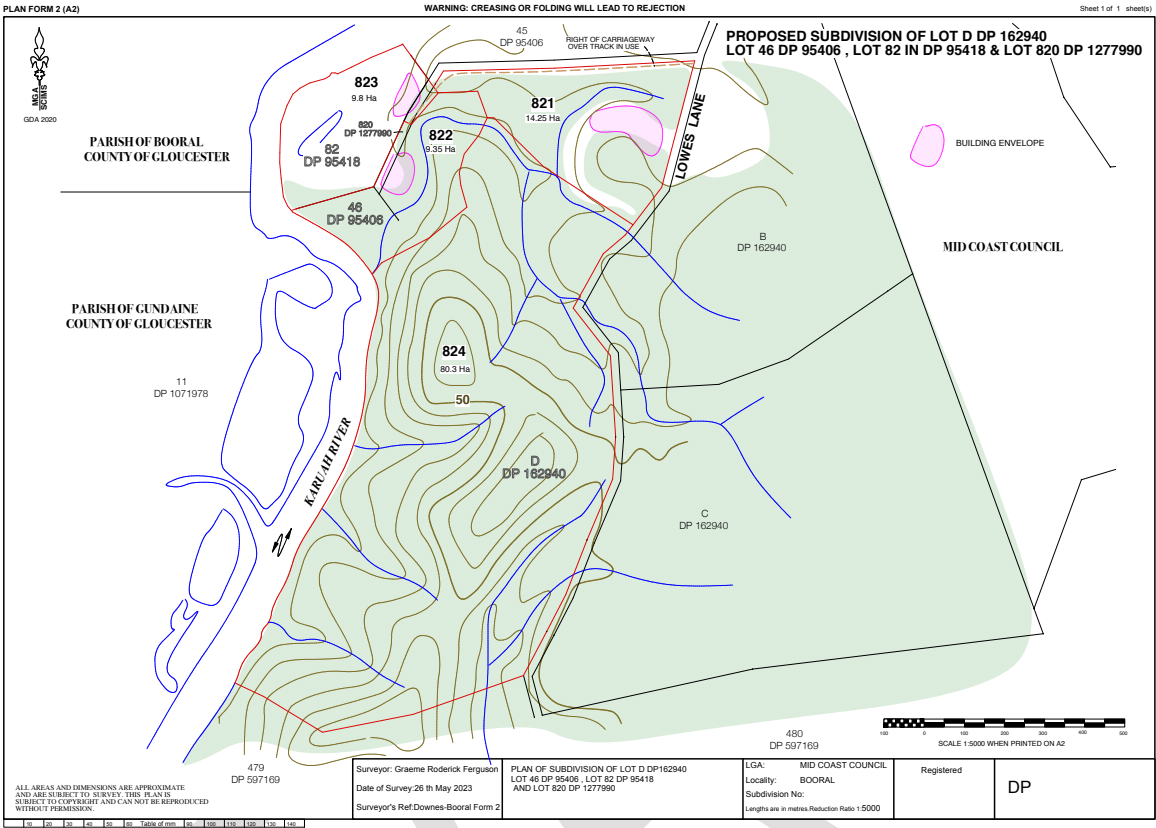
Requirements under section 7.4 of the Act (clause 2.2)

The parties acknowledge and agree that the table set out below provides for certain terms, conditions, and procedures for the purpose of the agreement complying with the Act.

Section of the Act	Subject	Planning Agreement
6.15(1)(d)	Requirements relating to the issue of subdivision certificates	See clause 5.1.
7.4(1)	Planning instrument and/or development application – The Developer has: (a) sought a change to an environmental planning instrument; or (b) made, or proposes to make, a development application; or (c) entered into an agreement with, or is associated with, a person to whom paragraph (a) or (b) applies.	(a) no; (b) yes; and (c) not applicable.
7.4(3)(a)	The land affected by this planning agreement	Proposed Lot 824 in a plan of subdivision of Lot 46 DP95406, Lot D DP162940, Lot 82 DP95418 and Lot 820 in DP95418.
7.4(3)(b)	The environmental planning instrument or the development affected by this planning agreement	Development application DA2021/2166.
7.4(3)(c)	The scope, timing, and manner of delivery of contribution required by this agreement	See clauses 4.2(a) and 4.2(c).
7.4(3)(d)	Applicability of sections 7.11, 7.12 and 7.24 of the Act	This agreement does not exclude the operation of sections 7.11, 7.12 and 7.24 of the Act. See clause 3(a).
7.4(3)(e)	Consideration of benefits under this agreement if section 7.11 applies	The benefits under this agreement are not to be taken into consideration in determining a development contribution under section

		7.11 of the Act. See clause 3(b).
7.4(3)(f)	Dispute resolution	See clause 7.
7.4(3)(g)	Enforcement and security	See clause 5.
7.6	Registration	See clause 6.

Schedule 2 – Subdivision Plan



EXECUTED as an agreement

**SIGNED by Michael Richard
Downes:**

)
)
)
)
)

Signature of Witness

Signature of Michael Richard Downes

Name of Witness

**EXECUTED by Barrington Tops
Development Pty Ltd ACN 060 939
077** in accordance with section 127 of
the *Corporations Act 2001* (Cth):

)
)
)
)
)

Signature of Director

Signature of Director/Secretary

Name of Director

Name of Director/Secretary

**EXECUTED by MidCoast Council
ABN 44 961 208 161** pursuant to the
authority specified:

)
)
)
)
)

Witness signature

Signature

Witness name

Name of signatory

Authorisation of signatory