

Deed

VPA03/24 – Walter Morris Close Planning Agreement

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Coffs Harbour City Council

Pathfinders LTD

Date:

[Insert Date]

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Coffs Harbour City Council

Pathfinders Ltd

Summary Sheet

Council:

Name: Coffs Harbour City Council ABN 79 126 214 487

Address: Yarrila Place, 27 Gordon Street, Coffs Harbour NSW 2450

Telephone: (02) 6648 4000

Email: coffs.council@chcc.nsw.gov.au

Representative: Natalia Cowley, General Manager

Developer and Landowner

Name: Pathfinders Ltd

Address: Suite 1, Level 1, 215 Beardy Street, Armidale NSW 2350

Telephone: TBC

Email: knh@bwslawyers.com.au

Representative: Kate Holden

Land:

See definition of *Land* in clause 1.1.

Development:

See definition of *Development* in clause 1.1.

Development Contributions:

See Clause 9 and Schedule 1.

Application of s7.11, s7.12 and s7.24 of the Act:

See clause 8.

Security:

See Part 4.

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Registration:

See clause 30.

Restriction on dealings:

See clause 31.

Dispute Resolution:

See Part 3.

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VPA 3/24 – Walter Morris Close

Coffs Harbour City Council

Pathfinders Ltd

VPA 03/24 – Walter Morris Close

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Parties

Coffs Harbour City Council ABN 79 126 214 487 of Corner of Coff and Castle Street, Coffs Harbour NSW 2450 (**Council**)

and

Pathfinders Ltd ACN 146 004 524 of Suite 1, Level 1, 215 Beardy Street, Armidale NSW 2350 (**Land owner & Developer**)

Background

- A On 14 March 2024 Council approved 0020/23DA for housing for seniors and people with a disability – demolition of existing dwellings, construct 7 units (the Development) on Lot 11 Sec O DP 17053 & Lot 12 Sec O DP 17053 & Lot 1 DP 532457, 36 and 40 Walter Morris Close, Coffs Harbour NSW 2450 (Development Site).
- B The Developer owns the Development Site land.
- C To provide a safe and suitable access pathway to facilities and services for the Development is required to construct a footpath from the Development Site land to the existing footpath and traffic refuge on Park Beach Road.
- D A section of this footpath is identified in the Park Beach Area Developer Contribution Plan 2021 and Council is holding a contribution for these works.
- E Council Reimbursement for the section of footpath identified in the Park Beach Area Developer Contribution Plan will be provided to the Developer at the completion of the Developer Works.
- F On 13 April 2024 the Developer offered to enter into a Planning Agreement to carry out the Developer Works for the Public Purpose.
- G This Agreement is consistent with the Developer's offer referred to in recital F.

Operative provisions

Part 1 - Preliminary

1 Interpretation

- 1.1 In this Deed the following definitions apply:

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

Approval includes approval, consent, licence, permission or the like.

Authority means the Commonwealth or New South Wales government, a Minister of the Crown, a government department, a public authority established by or under any Act, a council or county council constituted under the *Local Government Act 1993*, or a person or body exercising functions under any Act including a commission, panel, court, tribunal and the like.

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.

Charge means the charge referred to in clause 24.1.

Charge Land means Lot 11 Sec O DP 17053 & Lot 12 Sec O DP 17053 & Lot 1 DP 532457.

Claim includes a claim, demand, remedy, suit, injury, damage, loss, Cost, liability, action, proceeding or right of action.

Construction Certificate has the same meaning as in the Act and is any construction certificate for the Development.

Cost means a cost, charge, expense, outgoing, payment, fee and other expenditure of any nature.

Cost of Developer Works means the total cost of Developer Works to be carried out by the Developer under this Deed including foot path works required under the Development Consent that do not form part of the Development Contribution herein and is estimated for the purposes of this Deed at \$55,935.

Council Reimbursement means the maximum amount of \$39,150 to be reimbursed to the Developer for the provision of the Developer Works under this Deed.

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

Defect means anything that adversely affects, or is likely to adversely affect, the appearance, structural integrity, functionality or use or enjoyment of the Developer Works or any part of the Developer Works.

Defect Liability Guarantee means a Bank Guarantee for 10% of the Cost of Developer Works estimate, as security for any rectification works to be undertaken by the Developer under clause 19.

Defects Liability Period means the period of 1 year commencing on the day immediately after the Development Contribution has been delivered in full to Council in accordance with the terms of this Deed.

Development means housing for seniors and people with a disability – demolition of existing dwellings, construct 7 units.

Development Application has the same meaning as in the Act and herein is 0020/23DA.

Development Consent has the same meaning as in the Act and is the development consent granted in respect to the Development Application.

Development Contribution means the provision of the Developer Works for the public purpose in accordance with this Deed

Developer Works means the footpath works the Developer is required to provide under this Deed in accordance with Schedule 1.

Dispute means a dispute or difference between the Parties under or in relation to this Deed.

ELNO has the meaning given to that term in the Participation Rules.

Equipment means any equipment, apparatus, vehicle or other equipment or thing to be used by or on behalf of the Developer in connection with the performance of its obligations under this Deed.

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 specified in Column 1 of Schedule 1.

Land means the section of Park Beach Road reserve identified in Schedule 2.

Maintain, in relation to a Work, means keep in a good state of repair and working order, and includes repair of any damage to the Work.

Occupation Certificate has the same meaning as in the Act and is any occupation certificate for the Development.

Party means a party to this Deed.

Practical Completion Certificate means a certificate issued by the Developer's Project Manager for the Developer Works, stating that Developer Works have been satisfactorily completed in accordance with this Deed and all relevant Approvals.

Public Purpose means public infrastructure improvements, specifically, public footpath for access.

Rectification Notice means a notice in writing:

- (a) identifying the nature and extent of a Defect,
- (b) specifying the works or actions that are required to Rectify the Defect,
- (c) specifying the date by which or the period within which the Defect is to be rectified.

Rectify means rectify, remedy or correct.

Regulation means the *Environmental Planning and Assessment Regulation 2021*.

Security means a Bank Guarantee to the satisfaction of the Council indexed in accordance with Consumer Price Index from the date of this Deed.

Work means the physical result of any building, engineering or construction work in, on, over or under land.

- 1.2 In the interpretation of this Deed, 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 Deed.
 - 1.2.2 A reference in this Deed 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 Deed 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 Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
 - 1.2.5 A reference in this Deed to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
 - 1.2.6 A reference in this Deed 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 Deed 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 Deed.
 - 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.
 - 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 Deed includes the agreement recorded in this Deed.
 - 1.2.14 A reference to a Party to this Deed includes a reference to the employees, agents and contractors of the Party, the Party's successors and assigns.
 - 1.2.15 A reference to 'dedicate' or 'dedication' in relation to land is a reference to dedicate or dedication free of cost.

1.2.16 Any schedules, appendices and attachments form part of this Deed.

1.2.17 Notes appearing in this Deed are operative provisions of this Deed.

2 Status of this Deed

2.1 This Deed is a planning agreement within the meaning of s7.4(1) of the Act.

3 Commencement

3.1 This Deed commences and has force and effect on and from the date when the Parties have:

3.1.1 both executed the same copy of this Deed, or

3.1.2 each executed separate counterparts of this Deed and exchanged the counterparts.

3.2 The Parties are to insert the date when this Deed commences on the front page and on the execution page.

4 Application of this Deed

4.1 This Deed applies to the Land, Charge Land and to the Development proposed in the Development Consent, as may be modified.

5 Warranties

5.1 The Developer warrants that they:

5.1.1 have full capacity to enter into this Deed,

5.1.2 are able to fully comply with their obligations under this Deed, and

5.1.3 have obtained all necessary Approvals to carry out the Developer Works, including but not limited to, consent under section 138 of the Roads Act 1993.

6 Further agreements

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

7 Surrender of right of appeal, etc.

7.1 The Developer is not to commence or maintain, or to cause or procure the commencement or maintenance, of any proceedings in any court or tribunal or similar body appealing against, or questioning the validity of this Deed, or an Approval relating to the Development in so far as the subject-matter of the proceedings relates to this Deed.

8 Application of s7.11, s7.12 and s7.24 of the Act to the Development

- 8.1 This Deed does not exclude the application of s7.11 to the Development.
- 8.2 This Deed does not exclude the application of s7.12 of the Act to the Development.
- 8.3 This Deed does not exclude the application of s7.24 to the Development.

Part 2 – Development Contributions

9 Provision of Development Contributions

- 9.1 The Developer is to make the Development Contribution to the Council in accordance with clause 10, Schedule 1, any other provision of this Deed relating to the making of the Development Contribution and otherwise to the satisfaction of the Council.
- 9.2 The Cost of Developer Works and Council Reimbursement amounts specified in this Deed in relation to a Development Contribution do not serve to define the extent of the Developer's obligation to make the Development Contribution.
- 9.3 The Council is to apply the Development Contribution made by the Developer under this Deed towards the Public Purpose for which it is made and otherwise in accordance with this Deed.

10 Design of Developer Works

- 10.1 Prior to the issue of any Construction Certificate for the Development, the Developer must at its own cost:
 - 10.1.1 obtain Council's design requirements for the Developer Works.
 - 10.1.2 design the Developer Works which are to be located as shown in Schedule 2.
 - 10.1.3 prepare and submit to Council for its approval:
 - a. all necessary plans and drawings of the Developer Works in accordance with Council's design requirements, including but not limited to, Council's design requirements provided under clause 10.1.1, all relevant Council policies, the Development Consent and otherwise to the satisfaction of Council, and
 - b. an estimate of the Cost of Developer Works prepared and certified by an independent and suitably qualified registered quantity surveyor.
- 10.2 The Council may reasonably require the Developer to make any change to the plans and drawings of the Developer Works that it reasonably considers necessary or desirable. The Developer acknowledges and agrees it will comply with Council's reasonable requests in this regard at its own cost.

- 10.3 The Council is to inform the Developer in writing if it approves the plans and drawings for the Developer Works and the estimate of the Cost of Developer Works.
- 10.4 For the avoidance of doubt, the Developer shall not commence construction of the Developer Works unless the Developer Works are designed and approved by Council in accordance with this Deed and all relevant Approvals.
- 10.5 Notwithstanding any other provision herein, the Council shall be entitled to reduce the amount of the Council Reimbursement should the estimate of/or the Cost of Developer Works decrease in proportion to such decrease.

11 Payment of Council Contribution

- 11.1 Subject to clause 10.5 and 18 herein and the Developer complying with all of its obligations under this Deed, Council will pay the Council Reimbursement within 30 days of the last of the following requirements being met:
 - 11.1.1 The date the Developer gives the Council the Practical Completion Certificate in respect to the Developer Works.
 - 11.1.2 The date the Council gives a written notice to the Developer that the Developer Works required to be carried out under this Deed are satisfactorily completed in accordance with this Deed and all relevant Approvals.
 - 11.1.3 The date Council receives a tax invoice for the Council Reimbursement from the Developer in form acceptable to Council and including a detailed breakdown of the Developer Works that evidences to the satisfaction of Council the full cost of the Developer Works.

12 Carrying out of Work

- 12.1 Without limiting any other provision of this Deed, any Developer Works that are required to be carried out by the Developer under this Deed are to be carried out in accordance with any design or specification specified or approved by the Council, the Development Consent and any relevant Approval and any other applicable law.
- 12.2 The Developer, at its own cost, is to comply with any reasonable direction given to it by the Council to prepare or modify a design or specification relating to the Developer Works required to be carried out under this Deed.

13 Access to land by Developer

- 13.1 Subject to all other relevant provisions of this Deed including clauses 13.2 – 13.4 and 31 - 34, the Council authorises the Developer to enter, occupy and use the section of Park Beach Road reserve identified in Schedule 2 as is reasonably necessary for the purpose of performing its obligations under this Deed.
- 13.2 The Council is to permit the Developer, upon receiving reasonable prior notice from the Developer, to enter any other Council owned or controlled land in

order to enable the Developer to properly perform its obligations under this Deed.

- 13.3 The Developer is to carry out the Developer Works on the Land in accordance with this Deed, the Development Consent and any other necessary Approvals including, but not limited to, under section 138 of the Roads Act 1993.
- 13.4 Nothing in this Deed creates or gives the Developer any estate or interest in any part of the land referred to in clause 13.1 or 13.2.

14 Access to land by Council

- 14.1 The Council may enter any land on which the Developer Works are being carried out by the Developer or the Charge Land adjacent to the Developer Works under this Deed in order to inspect, examine or test the Developer Works, or to remedy any breach by the Developer of its obligations under this Deed relating to the Work.
- 14.2 The Council is to give the Developer prior reasonable notice before it enters Charge Land under clause 14.1.

15 Protection of people, property & utilities

- 15.1 The Developer is to ensure to the fullest extent reasonably practicable in relation to the performance of its obligations under this Deed that:
- 15.1.1 all necessary measures are taken to protect people and property,
- 15.1.2 unnecessary interference with the passage of people and vehicles is avoided, and
- 15.1.3 nuisances and unreasonable noise and disturbances are prevented.
- 15.2 Without limiting clause 15.2, the Developer is not to obstruct, interfere with, impair or damage any public road, public footpath, public cycleway or other public thoroughfare, or any pipe, conduit, drain, watercourse or other public utility or service on any land except as authorised in writing by the Council or any relevant Authority.

16 Repair of damage

- 16.1 The Developer is to appropriately insure and maintain the Developer Works required to be carried out by the Developer under this Deed until the Developer Works are completed for the purposes of this Deed or such later time as agreed between the Parties.
- 16.2 The Developer is to carry out its obligation under clause 16.1 at its own cost and to the satisfaction of the Council.

17 Completion of Work

- 17.1 The Developer is to give the Council written notice of the date on which it will complete the Developer Works required to be carried out under this Deed.

- 17.2 The Council is to inspect the Developer Works the subject of the notice referred to in clause 17.1 within 14 days of the date specified in the notice for completion of the Developer Work.
- 17.3 The Developer Works required to be carried out by the Developer under this Deed, are completed for the purposes of this Deed when the Council, acting reasonably, gives a written notice to the Developer that the Developer Works are satisfactorily completed in accordance with this Deed and all relevant Approvals..
- 17.4 If the Council is the owner of the Land on which the Developer Works the subject of a notice referred to in clause 17.3 is issued, the Council assumes responsibility for the Developer Works upon the issuing of the notice, but if it is not the owner at that time, it assumes that responsibility when it later becomes the owner.
- 17.5 Before the Council gives the Developer a notice referred to in clause 17.3, it may give the Developer a written direction to complete, rectify or repair any specified part of the Developer Works to the reasonable satisfaction of the Council.
- 17.6 The Developer, at its own cost, is to promptly comply with a direction referred to in clause 17.5.

18 Rectification of defects

- 18.1 The Developer acknowledges and agrees to the Defect Liability Period and the Defect Liability Guarantee to be provided in accordance with clause 23 herein in respect to the Developer Works.
- 18.2 The Council may give the Developer a Rectification Notice during the Defect Liability Period.
- 18.3 The Developer, at its own cost, is to comply with a Rectification Notice according to its terms and to the reasonable satisfaction of the Council.
- 18.4 The Council is to do such things as are reasonably necessary to enable the Developer to comply with a Rectification Notice that has been given to it under clause 18.1
- 18.5 The Council may call-up and apply the Defect Liability Guarantee in accordance with this clause to remedy any Defect notwithstanding any other remedy it may have under this Deed, under any Act or otherwise at law or in equity.
- 18.6 The Council is to release and return the Defect Liability Guarantee or any unused part of it to the Developer when Council is satisfied that all Defects the subject of a Rectification Notice, if any, have been appropriately rectified to the satisfaction of Council.

19 Works-As-Executed-Plan

- 19.1 No later than 60 days after Work is completed for the purposes of this Deed, the Developer is to submit to the Council a full works-as-executed-plan in respect of the Developer Works.

- 19.2 The Developer, being the copyright owner in the plan referred to in clause 19.1, gives the Council a non-exclusive licence to use the copyright in the plans for the purposes of this Deed.

20 Removal of Equipment and Make Good

- 20.1 When the Developer Works are completed for the purposes of this Deed, the Developer, without delay, is to:
- 20.1.1 remove any Equipment from Land and make good any damage (or ancillary damage) or disturbance to the Land as a result of that removal, and
- 20.1.2 leave the land in a neat and tidy state, clean and free of rubbish, to the satisfaction of Council.

Part 3 – Dispute Resolution

21 Dispute resolution – expert determination

- 21.1 This clause applies to a Dispute between any of the Parties to this Deed concerning a matter arising in connection with this Deed that can be determined by an appropriately qualified expert if:
- 21.1.1 the Parties to the Dispute agree that it can be so determined, or
- 21.1.2 the Chief Executive Officer of the professional body that represents persons who appear to have the relevant expertise to determine the Dispute gives a written opinion that the Dispute can be determined by a member of that body.
- 21.2 A Dispute to which this clause applies is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 21.3 If a notice is given under clause 21.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 21.4 If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 21.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 21.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 21.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

22 Dispute Resolution - mediation

- 22.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute to which clause 21 applies.
- 22.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 22.3 If a notice is given under clause 22.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 22.4 If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.
- 22.5 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.
- 22.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 22.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

Part 4 - Enforcement

23 Security for performance of obligation

- 23.1 The Developer is to provide Security to the Council in the amount of 125% of the cost of the Development Contribution and a Defect Liability Guarantee to secure the performance of its obligations under this Deed including relating to the delivery of the Development Contribution and the Defect Liability Period.
- 23.2 The Developer is to provide the Security to the Council before any Construction Certificate for any part of the Development. The Defect Liability Guarantee is to be provided in accordance with clause 18.
- 23.3 The Council, in its absolute discretion and despite clause 13, may refuse to allow the Developer to enter, occupy or use the Land or any other land owned or controlled by the Council or refuse to provide the Developer with any plant, equipment, facilities or assistance relating to the carrying out the Development if the Developer has not provided the Security to the Council in accordance with this Deed.
- 23.4 The Council may call-up and apply the Security in accordance with clause 27 to remedy any breach of this Deed notwithstanding any other remedy it may have under this Deed, under any Act or otherwise at law or in equity.
- 23.5 The Council is to release and return the Security or any unused part of it to the Developer within 14 days of the delivery of the Development Contribution to Council in accordance with this Deed provided the Security is simultaneously replaced with the Defect Liability Guarantee.

- 23.6 If the Council calls-up the Security or any portion of it, it may, by written notice to the Developer, require the Developer to provide a further or replacement Security to ensure that the amount of Security held by the Council equals the amount it is entitled to hold under this Deed.
- 23.7 The Developer is to ensure that the Security provided to the Council is at all times maintained to the full current indexed value.

24 Grant of Charge

- 24.1 On the date of execution of this Deed, the Developer grants to the Council a fixed and specific charge over the Developer's right, title and interest in the Charge Land, to secure:
- 24.1.1 the performance of the Developer's obligation to the Development Contributions under this Deed,
- 24.1.2 costs payable by the Developer under clause 38 herein, and
- 24.1.3 any damages that may be payable to the Council, or any costs which may be incurred by the Council in the event of a breach of this Deed by the Developer.

25 Caveat and Discharge

- 25.1 The Developer agrees that:
- 25.1.1 the Council may lodge a caveat on the title of the Charge Land,
- and
- 25.1.2 the Council cannot be required to have the caveat removed from the title to the Charge Land unless the Development Contribution has been delivered to Council in accordance with this Deed, the Developer has met its obligations under clause 38 and the Developer is not in breach of this Deed.

26 Priority

- 26.1 The Developer is not to create any mortgage or charge over the Charge Land or grant any other interest in the Charge Land ranking in priority equal with or ahead of the Charge created under this Deed without the prior written approval of the Council.

27 Breach of obligations

- 27.1 If the Council reasonably considers that the Developer is in breach of any obligation under this Deed, it may give a written notice to the Developer:
- 27.1.1 specifying the nature and extent of the breach,
- 27.1.2 requiring the Developer to:
- (a) rectify the breach if it reasonably considers it is capable of rectification, or

- (b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification,
- 27.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 27.2 If the Developer fails to fully comply with a notice referred to in clause 27.1, the Council may, without further notice to the Developer, call-up the Security or Defect Liability Guarantee (as applicable) provided by the Developer under this Deed and apply it to remedy the Developer's breach.
- 27.3 If the Developer fails to comply with a notice given under clause 27.1 relating to the carrying out of Work under this Deed, the Council may step-in and remedy the breach and may enter, occupy and use any land owned or controlled by the Developer and any Equipment on such land for that purpose.
- 27.4 Any costs incurred by the Council in remedying a breach in accordance with clause 27.2 or clause 27.3 may be recovered by the Council by either or a combination of the following means:
 - 27.4.1 by calling-up and applying the Security or Defect Liability Guarantee provided by the Developer under this Deed, or
 - 27.4.2 as a debt due in a court of competent jurisdiction.
- 27.5 For the purpose of clause 27.4, the Council's costs of remedying a breach the subject of a notice given under clause 27.1 include, but are not limited to:
 - 27.5.1 the costs of the Council's employees, agents and contractors reasonably incurred for that purpose,
 - 27.5.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
 - 27.5.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- 27.6 Nothing in this clause 27 prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Deed by the Developer, including but not limited to seeking relief in an appropriate court.

28 Enforcement in a court of competent jurisdiction

- 28.1 Without limiting any other provision of this Deed, the Parties may enforce this Deed in any court of competent jurisdiction.
- 28.2 For the avoidance of doubt, nothing in this Deed prevents:
 - 28.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Deed or any matter to which this Deed relates, or
 - 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 Deed or any matter to which this Deed relates.

Part 5 – Registration & Restriction on Dealings

29 Registration of this Deed

- 29.1 The Parties agree to register this Deed for the purposes of s7.6(1) of the Act.
- 29.2 Upon commencement of this Deed and prior to any Construction Certificate for the Development, the Developer is to deliver to the Council in registrable form:
- 29.2.1 an instrument requesting registration of this Deed on the title to the Charge Land duly executed by the Developer, and
- 29.2.2 the written irrevocable consent of each person referred to in s7.6(1) of the Act to that registration.
- 29.3 The Developer is to do such other things as are reasonably necessary to enable registration of this Deed to occur.
- 29.4 The Parties are to do such things as are reasonably necessary to remove any notation relating to this Deed from the title to the Charge Land once the Developer has completed its obligations under this Deed to the reasonable satisfaction of the Council or this Deed is terminated or otherwise comes to an end for any other reason.

30 Restriction on dealings

- 30.1 The Developer is not to:
- 30.1.1 sell or transfer the Charge Land, or
- 30.1.2 assign the Developer's rights or obligations under this Deed, or novate this Deed,
- to any person unless:
- 30.1.3 the Developer has, at no cost to the Council, first procured the execution by the person to whom the Charge Land or part is to be sold or transferred or the Developer's rights or obligations under this Deed are to be assigned or novated, of a deed in favour of the Council on terms reasonably satisfactory to the Council, and
- 30.1.4 the Council has given written notice to the Developer stating that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this Deed, and
- 30.1.5 the Developer is not in breach of this Deed, and
- 30.1.6 the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.
- 30.2 **Error! Reference source not found.**, the Developer acknowledges and agrees that it remains liable to fully perform its obligations under this Deed unless and until it has complied with its obligations under clause 30.1.

Part 6 – Indemnities & Insurance

31 Risk

- 31.1 The Developer performs this Deed and carries out the Developer Works and any works pursuant to clause 18 at its own risk and its own cost.

32 Release

- 32.1 The Developer releases the Council from any Claim it may have against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

33 Indemnity

- 33.1 The Developer indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

34 Insurance

- 34.1 The Developer is to take out and keep current to the satisfaction of the Council the following insurances in relation to Developer Works required to be carried out by the Developer under this Deed up until the Work is taken to have been completed in accordance with this Deed:
- 34.1.1 contract works insurance, noting the Council as an interested party, for the full replacement value of the Developer Works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover the Developer's liability in respect of damage to or destruction of the Developer Works,
 - 34.1.2 public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party,
 - 34.1.3 workers compensation insurance as required by law, and
 - 34.1.4 any other insurance required by law.
- 34.2 If the Developer fails to comply with clause 34.1, 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 to the Council and may be recovered by the Council as it deems appropriate including:
- 34.2.1 by calling upon the Security or the Defect Liability Guarantee provided by the Developer to the Council under this Deed, or
 - 34.2.2 recovery as a debt due in a court of competent jurisdiction.

- 34.3 The Developer is not to commence to carry out any Work unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 34.1.
- 34.4 The Developer's obligations to insure under this clause extend to any works to be carried out by the Developer pursuant to clause 18.

Part 7 – Other Provisions

35 Review of Deed

- 35.1 The Parties agree to review this Deed every two 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 Deed.
- 35.2 For the purposes of clause 35.1, 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.
- 35.3 For the purposes of addressing any matter arising from a review of this Deed referred to in clause 35.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Deed.
- 35.4 If this Deed 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 Deed is entered into.
- 35.5 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 35.1 (but not 35.4) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.

36 Notices

- 36.1 Any notice, consent, information, application or request that is to or may be given or made to a Party under this Deed is only given or made if it is in writing and sent in one of the following ways:
 - 36.1.1 delivered or posted to that Party at its address set out in the Summary Sheet, or
 - 36.1.2 emailed to that Party at its email address set out in the Summary Sheet.
- 36.2 If a Party gives the other Party 3 business days' notice of a change of its address or email, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or emailed to the latest address.
- 36.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
 - 36.3.1 delivered, when it is left at the relevant address,
 - 36.3.2 sent by post, 2 business days after it is posted, or

36.3.3 sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.

36.4 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.

37 Approvals and Consent

37.1 Except as otherwise set out in this Deed, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Deed in that Party's absolute discretion and subject to any conditions determined by the Party.

37.2 A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

38 Costs

38.1 The Developer is to pay to the Council the Council's costs related to preparing, negotiating, executing, stamping, registering and removal of registration of this Deed, and any document related to this Deed within 7 days of a written demand by the Council for such payment.

38.2 The Developer is also to pay to the Council the Council's reasonable costs of enforcing this Deed within 7 days of a written demand by the Council for such payment.

39 Entire Deed

39.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with.

39.2 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 Deed was executed, except as permitted by law.

40 Further Acts

40.1 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 Deed and all transactions incidental to it.

41 Governing Law and Jurisdiction

41.1 This Deed is governed by the law of New South Wales.

41.2 The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.

41.3 The Parties are not to object to the exercise of jurisdiction by those courts on any basis.

42 Joint and Individual Liability and Benefits

42.1 Except as otherwise set out in this Deed:

42.1.1 any agreement, covenant, representation or warranty under this Deed by 2 or more persons binds them jointly and each of them individually, and

42.1.2 any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

43 No Fetter

43.1 Nothing in this Deed 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.

44 Illegality

44.1 If this Deed or any part of it becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties are to co-operate and do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.

45 Severability

45.1 If a clause or part of a clause of this Deed 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.

45.2 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 Deed, but the rest of this Deed is not affected.

46 Amendment

46.1 No amendment of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed in accordance with section 203(5) of the Regulation.

47 Waiver

- 47.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- 47.2 A waiver by a Party is only effective if it:
- 47.2.1 is in writing,
 - 47.2.2 is addressed to the Party whose obligation or breach of obligation is the subject of the waiver,
 - 47.2.3 specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,
 - 47.2.4 is signed and dated by the Party giving the waiver.
- 47.3 Without limitation, a waiver may be expressed to be conditional on the happening of an event, including the doing of a thing by the Party to whom the waiver is given.
- 47.4 A waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given, and 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.
- 47.5 For the purposes of this Deed, an obligation or breach of obligation the subject of a waiver is taken not to have been imposed on, or required to be complied with by, the Party to whom the waiver is given.

48 GST

- 48.1 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.
- 48.2 Subject to clause 48.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- 48.3 Clause 48.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.

- 48.4 No additional amount shall be payable by the Council under clause 48.2 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.
- 48.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed 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:
- 48.5.1 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;
- 48.5.2 that any amounts payable by the Parties in accordance with clause 48.2 (as limited by clause 48.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 48.6 No payment of any amount pursuant to this clause 48, 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.
- 48.7 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.
- 48.8 This clause continues to apply after expiration or termination of this Deed.

49 Explanatory Note

- 49.1 The Appendix contains the Explanatory Note relating to this Deed required by section 205 of the Regulation.
- 49.2 Pursuant to section 205(5) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Planning Deed.

Schedule 1

(Clause 9)

Development Contributions

Column 1	Column 2	Column 3	Column 4
Item/ Contribution	Public Purpose	Manner & Extent	Timing

A. Carrying out of Work

1. Footpath	Public infrastructure improvements, specifically, public footpath for access	<p>The Developer is to design, construct and complete 82.5m of 1.5m wide footpath along Park Beach Road in accordance with the Footpath Plan in Schedule 2.</p> <p>Note: Provided the Developer meets its obligations under this Deed it will be eligible for the Council Reimbursement.</p>	Works to be completed before the issuing of an Occupation Certificate for the Development.
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Schedule 2

Footpath Plan



VPA 3/24 – Walter Morris Close

Coffs Harbour City Council

Pathfinders Ltd

Execution

Executed as a Deed

Dated:

Executed on behalf of the Council

General Manager

Witness

Mayor

Witness

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

Name/Position

Name/Position