

Our ref: DEG: MUS773/625
Your ref: **Matthew Pringle**

22 October 2009

The General Manager
Muswellbrook Shire Council
PO Box 122
MUSWELLBROOK NSW 2333



Dear Matthew,

Voluntary Planning Agreement between Muswellbrook Shire Council & Patarm Pty Ltd – Development Consent DA 462/2007

We enclose the Voluntary Planning Agreement (in triplicate) signed by Patarm Pty Ltd.

Can you please arrange for each document to be dated at the executed clause and affixed with the Council's seal and executed by the General Manager and Mayor in accordance with clause 400 of the *Local Government (General) Regulation 2005*.

Please return original executed copies to us so that we may forward same to Patarm Pty Ltd's solicitors.

Yours faithfully


Alan McKelvey
Special Counsel
Accredited Specialist
Local Government & Planning Law

Contact: Dianna Grant
Senior Associate
02 4924 7697
dianna.grant@sparke.com.au

Encl.

869800 Signed Copy forwarded to Sparke Helmore

MUSWELLBROOK SHIRE COUNCIL	
23 OCT 2009	
DA 462/2007	
File	Name
Complete	Date 2/11/09

MR 2/12/09

Records - please file in legal docs. Thank you

PLANNING AGREEMENT

Parties

MUSWELLBROOK SHIRE COUNCIL of 157 Maitland Street, Muswellbrook, New South Wales (Council)

and

PATARM PTY LIMITED (ACN 115 080 629) care of Rice More and Gibson, 149 Beardy Street, Armidale, New South Wales (Developer)

Background

- A. On 19th December 2007, Mr Rick Bennell of Bennell & Associates on behalf of the Developer made a Development Application (DA No. 462/2007) to Council for Development Consent to carry out the Supermarket Development on the Land.
- B. After lodging the Development Application, Bennell & Associates (on behalf of the Developer) made an offer by letter dated 27 February 2008 to enter into a planning agreement to carry out the Works if the development consent was granted to the Supermarket Development.
- C. On 10 March 2008 the Council approved the Supermarket Development with a deferred commencement condition requiring a planning agreement to be entered into between the parties in relation to the Council's acceptance of the Developer's offer referred to in paragraph B herein.
- D. On 28 November 2008, Mr Brett Cooper on behalf of the Developer made a Development Application (DA No. 325/2008) to the Council for development consent to carry out the Bulky Goods Development on the Land.
- E. Bennell & Associates (on behalf of the Developer) made an offer by letter dated 24 February 2009 to enter into a planning agreement to carry out the Works if development consent was granted to the Bulky Goods Development and on the proviso that the planning agreement offer contained in the letter dated 27 February 2008 referred to in paragraph B herein is not proceeded with.
- F. On 13 March 2009 the Council approved the Bulky Goods Development with a deferred commencement condition requiring a planning agreement to be entered into between the parties in relation to the Council's acceptance of the Developer's offer referred to in paragraph E herein.

Operative Provisions

- 1 Planning agreement under the Act
 - 1.1 The Parties agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

2 Application of this Agreement

2.1 This Agreement relates to the Land and the Development.

3. Operation of this Agreement

3.1 This Agreement shall take effect upon the date hereof.

4. Definitions and Interpretation

4.1 In this Agreement the following definitions apply;

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

Bulky Goods Development means the bulky goods retail development that is the subject of Development Application 325/2008.

Contractor means the Suitably Qualified Contractor selected by the Parties pursuant to Clause 5.2.4 to carry out the Works.**Date for Completion** means the date twelve (12) months after the date on which the contract is entered into with the Contractor to carry out the Works

Dealing, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

GST has the same meaning as in the GST Law.

GST Law has the meaning given to that term 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.

Land means Lot 101 DP 793194 known as Lot 101 Thompson Street, Muswellbrook.

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

Public Facilities means the upgrade of the intersection of Thompson Street and New England Highway by the installation of Traffic Lights to RTA standards.

Register means the Torrens tile register maintained under the *Real Property Act 1900 (NSW)*.

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

RTA means the Roads and Traffic Authority, NSW.

Suitably Qualified Contractor means a contractor who is prequalified to carry out the Works under the RTA's Prequalification Scheme for Construction Industry Contractors.

Supermarket Development means supermarket, specialty shops and two (2) lot commercial subdivision, that is the subject of Development Application 462/2007.

Works means the design and construction of the Public Facilities.

Works Authorisation Deed means the formally executed agreement between the RTA and the Developer, authorising the Developer to implement the Public Facilities.

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

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) 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.
- (j) 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.
- (k) Reference to the word 'include' or 'including' are to be construed without limitation.
- (l) A reference to this Agreement includes the agreement recorded in this Agreement.
- (m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- (n) Any scheduled and attachments form part of this Agreement.

5. The Works

- 5.1 The Developer agrees to carry out the Works in accordance with and subject to the terms of this Agreement.
- 5.2 For the avoidance of doubt entry into this Agreement constitutes satisfaction of the deferred commencement condition requiring entry into a planning agreement contained in the Development Consent for the Bulky Goods Development and the Supermarket Development.
- 5.3 The Works shall be undertaken by the Developer in the following stages:
 - 5.3.1 Within sixty (60) days of the date of this Agreement, the Developer is to contact the RTA in relation to the concept design for the Works.
 - 5.3.2 Within twelve (12) months of the date of this Agreement, the Developer must enter into a Works Authorisation Deed with the RTA with respect to the Works. A copy of the executed Works Authorisation Deed is to be provided to the Council within two days of it being entered into.
 - 5.3.3 Within ninety (90) days of the Works Authorisation Deed being executed, the Developer is to obtain at least two (2), but no more than three(3), lump sum quotations from Suitably Qualified Contractors to carry out the Works in accordance with the requirements of the Works Authorisation Deed.
 - 5.3.4 Within 28 days of receiving quotations from the Suitably Qualified Contractors, the Developer is to attend a meeting with the Council to discuss the quotations. If all of the quotations exceed \$600,000 (excluding GST) then this Agreement may be terminated by either Party by notice given in writing and within 14 days of the meeting held by the Parties to discuss the quotations. If all of the quotations do not exceed \$600,000 (excluding GST) then the Parties will jointly evaluate the quotes in good faith and select a Contractor to carry out the Works.
 - 5.3.5 The Developer must, within ninety (90) days of selecting the Contractor, enter into a written contract with the Contractor to carry out the Works.
 - 5.3.6 The Works are to be completed by the Developer in accordance with the Works Authorisation Deed and by the Date for Completion.
 - 5.3.7 Should the performance of the Works be delayed by reason of:
 - 5.3.7.1 any instructions of any of the Council or the RTA;
 - 5.3.7.2 any alterations to the Works required by the Council or the RTA;

- 5.3.7.3 any act of God, fire explosion, earthquake, civil commotion, act of war, inclement weather affecting directly or indirectly the Developer and sub-contractors of the Developer or the suppliers of materials for the Works;
- 5.3.7.4 the period known as "Industry Shutdown" during the two (2) week period commencing on or about 22 December in each year;
- 5.3.7.5 the failure by any of the Council or RTA to do any act or sign any document required pursuant to the terms of this Agreement;
- 5.3.7.6 strikes, lockouts or other industrial action and disputation affecting directly or indirectly the Developer, his sub-contractors or suppliers,

THEN in every such case the Developer shall be entitled to a fair and reasonable extension of the Date for Completion.

- 5.3.8 The Developer shall within fourteen (14) days of the completion of each of any of the events referred to in clause 5.2.7 notify the Council in writing of:

- 5.3.8.1 the reason for the delay;

- 5.3.8.2 the extension of time claimed by the Developer for that event.

- 5.3.9 In the event that the Council does not, by notice in writing within twenty eight (28) days of the date of any notice given pursuant to clause 5.2.8 herein dispute the extension of time claimed by the Developer then such extension of time shall be granted.

- 5.3.10 Within twenty eight (28) days of any notice given to the Council pursuant to clause 5.2.8, the Council must give the Developer a written notice which shall specify:

- 5.3.10.1 whether the reason for the extension of time is accepted or otherwise; and

- 5.3.10.2 whether the length of the extension of time claimed is accepted or not.

- 5.3.11 The Developer agrees to make no monetary claim for delays, interferences or hindrances of any kind in the performance of the Works and agrees that any such claim shall be fully compensated for by an extension of time claimed under clause 5.2.8 or granted under clause 5.2.9 and 5.2.10, except where such increase in costs has occurred as a result of any act of the Council, RTA or any of their agents.

5.3.12 Any works in Thompson Street required to complete the Works must be the subject of a section 138 approval obtained by the Developer pursuant to section 138 of the *Roads Act 1993 (NSW)*.

6. Costs of the Works

- 6.1 The Council will pay 50% of the costs incurred by the Developer, including any project management fees payable to an independent project manager engaged by the Developer, in carrying out the Works up to a maximum amount of \$300,000 (excluding GST).
- 6.2 The Developer shall claim payment for the Works by notice given in writing to the Council on the 10th and 24th of each month.
- 6.3 Each progress claim must be given in writing to the Council and must include details for the value of the Works carried out. Claims for payments will contain sufficient details to justify costs.
- 6.4 The Council must pay the payment required by this clause to be made within 14 days of the claim for payment being made by the Developer. If the Council does not pay the amount claimed in the Developer's progress claim, the Council shall with the payment, give the Developer reasons for any difference.
- 6.5 Within twenty eight (28) days after a Final Certificate and acceptance of the Works by the RTA has been served upon the Developer by the RTA, the Developer shall give the Council a written final payment claim endorsed "Final Payment Claim" being a progress claim together with all other claims whatsoever in connection with the subject matter of this Agreement. Those monies shall be paid by the Council to the Developer within 14 days after the Council receives the final payment claim.
- 6.6 If the Council defaults in making payment in accordance with clause 6.4 and 6.5, the Council must pay interest on the outstanding amount at the rate prescribed by section 101(7) of the *Civil Procedure Act 2005*. Interest will only be payable for payments which are more than 30 days overdue.

7 Application of s94 and s94A of the Act to the Development

- 7.1 The application of section 94 and 94A of the Act to the Development are excluded by this Agreement.

8 Registration of this Agreement

- 8.1 The Developer agrees to procure registration of this Agreement on the relevant folio of the Register pertaining to the Land upon commencement of this Agreement

9. Dispute Resolution

9.1 Scope of clause

This clause applies in respect of any dispute, disagreement or difference between the Parties relating to the interpretation of the purpose, and implementation of, this agreement ("the Dispute").

9.2 Dispute Resolution

If the Parties are unable to resolve a Dispute then this clause 9 will apply.

9.3 Dispute handling procedure

A Party to this Agreement who has a Dispute with any other Party may start the dispute procedure provided for in this clause 9.

9.4 Dispute Procedure

The Complainant must give the Respondent a Notice setting out the following;

- (a) the nature of the Dispute;
- (b) the outcome the Complainant wants; and
- (c) what action the Complainant thinks will settle the Dispute.

9.5 Failure to resolve dispute

As soon as is reasonably practicable after a Respondent receives a Notice from a Complainant pursuant to clause 9.4, the Respondent and Complainant must try to agree about how to resolve the Dispute. If within 21 days after the service of the Complainant's Notice on the Respondent pursuant to clause 9.4 the Complainant and the Respondent have either not met and resolved the Dispute or, alternatively, have met but not resolved the Dispute, then the Dispute must be submitted to determination in accordance with clause 9.6.

9.6 Determination

A determination, in accordance with clause 9.5, will be obtained in accordance with the following provisions:

- (a) the Complainant must send a Notice to the Respondent requiring a determination of the matter;
- (b) the determination will be made by:
 - (i) a Person agreed upon by the interested parties; or
 - (ii) if such agreement cannot be reached, a Person nominated by the President of the New South Wales Law Society and if so determined by the President or Acting President of the New South Wales Law Society, an appropriate expert with at least 5 years experience dealing with similar Disputes;
- (c) the determination will be made in the form of a written opinion, expressing conclusions as to:

- (i) the outcome of the Dispute; and
 - (ii) which Party should bear the Costs of the determination, or the proportions in which the Costs of the determination should be borne amongst the Parties;
- (d) for the purpose of making the termination, each Party will be at liberty to furnish to the Person making the determination ("Referee"):
 - (i) a written submission; and
 - (ii) documents which the Party regards as relevant to the making of the determination;
- (e) either Party may request that the Referee meet with the Parties in conference, in which event:
 - (i) the conference will be held at a time and place nominated by the Referee;
 - (ii) the conference will be conducted informally;
 - (iii) the Parties will be entitled, but not obliged, to attend the conference;
 - (iv) the Parties will be entitled, but not obliged, to have legal representation at the conference;
 - (v) the Parties will be entitled, but not obliged, to make oral submissions at the conference;
 - (vi) the Parties will be entitled, but not obliged, to make statements of fact in course of the conference, either under oath or in such other way as the Referee thinks fit;
 - (vii) in the event that statements of fact are made at the conference by or on behalf of any of the Parties, the Person making such statement will be subject to cross-questioning by or on behalf of the other Party, in the discretion of the Referee;
 - (viii) no formal rules of evidence will apply to such conference, and
 - (ix) the conference will be conducted in private;
- (f) the Referee may give directions to the relevant Parties of a procedural nature;
- (g) the Referee will be entitled to inform himself or herself of any matter, in whatever manner the Referee thinks fit;
- (h) the Referee will make the determination in accordance with her or her understanding of the law, including his or her understanding of the true construction of this Agreement and evidence of the negotiations

leading up to the execution of this Agreement can be submitted by either Party as evidence of the true construction of this Agreement;

- (i) subject to applying his or her understanding of the law, including his or her understanding of the true construction of this Agreement, the Referee will make the determination in accordance with equity and good conscience;
- (j) the Referee's fees will be payable by the Parties jointly and severally, but, amongst the relevant Parties, will be borne in accordance with the determination;
- (k) if the Referee thinks fit, he or she may determine that a Party recover from another Party their own Costs or and incidental to the determination, in which event:
 - (i) such Costs will be assessed in accordance with the determination by a legal cost assessor practicing in New South Wales; and
 - (ii) the amount so assessed will be debt due and payable between the parties in accordance with the determination.

9.7 Effect of determination

A determination made in accordance with clause 9.6 will be final and binding on the Parties, such that:

- (a) any amount found to be due and payable by one of the Parties to another Party may be enforced as a debt;
- (b) any other Obligation owed by a Party to another Party under the determination will have effect and be enforceable as a contractual Obligation, whether by way of specific performance or injunctive relief, or an action for damages; and
- (c) the determination may be pleaded as a bar to, and will constitute a lawful accord in respect of, any Claim in respect of the same matter;
- (d) no Party will commence proceedings in any court in respect of a Dispute to which this clause relates, unless and until a determination has been obtained in accordance with clause 9.6;
- (e) all Rights existing between the Parties prior to the making of a determination in accordance with clause 9.6 will be merged in determination, to the intent that in any subsequent proceedings the relevant Parties' Rights and Obligations will be fixed by the determination rather than by their Rights and Obligations antecedent to the determination.
- (f) neither Party will challenge a determination under clause 9.6 except on the grounds of;

- (i) non-compliance with the provisions of this clause;
- (ii) want of, or excess of, jurisdiction;
- (iii) non-compliance with the applicable rules of natural justice; or
- (iv) fraud or misrepresentation.

9.8 Continuity

This clause 9 will continue in full force and effect between the Parties to this Agreement notwithstanding the termination or rescission (or purported termination or rescission) of this Agreement, whether before or after a matter has arisen to which this clause relates, and notwithstanding that the matter concerns the termination or rescission (or purported termination or rescission) of this Agreement.

10. Enforcement

10.1 Without limiting any other remedies available to the Parties, this Agreement may be enforced by either Party in any court of competent jurisdiction.

10.2 For the avoidance of doubt, nothing in this Agreement prevents:

- (a) a Party from bringing proceedings in the Land & Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates; and
- (b) the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

11. Notices

11.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

- (a) Delivered or posted to that Party at its address set out below.
- (b) Faxed to that Party at its fax number set out below.
- (c) Emailed to that Party at its email address set out below.

Council

Attention: The General Manager

Address: P O Box 122, Muswellbrook NSW 2333

Fax No: 02 65 49 3701

Email: council@muswellbrook.nsw.gov.au

Developer

Attention: Brett Cooper

Address: PO Box 2833, Taren Point NSW 2229

Fax No: 9524 5559

Email: brett@cooperwilson.com.au

- 11.2 If a Party gives the other Party 3 business days notice of a change of its address or fax number, any notice, consent, information, application or request only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.
- 11.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:
- (a) If it is delivered, when it is left at the relevant address.
 - (b) If it is sent by post, 2 business days after it is posted.
 - (c) If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.
- 11.4 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.
12. Approvals and consent
- 12.1 Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may not unreasonably refuse to give its approval or consent and if consent is to be given can be subject to any conditions determined by that party acting reasonably..
13. Assignment and Dealings
- 13.1 In the event that the Developer shall enter into a contract of sale of the Land whilst ever this Agreement is in force then the Developer shall include in such contract for sale a clause requiring any Purchaser of the Land to enter into an Agreement with the Council on the same terms as this Agreement.
14. Costs
- 14.1 Each party is to be responsible for their own legal costs in relation to the negotiation and entering into of this Agreement.
15. Entire agreement

- 15.1 This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.
16. Further acts
- 16.1 Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.
17. Governing law and jurisdiction
- 17.1 This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by these courts on any basis.
- 18 Joint and individual liability and benefits
- 18.1 Except as otherwise set out in this Agreement, any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.
19. No fetter
- 19.1 Nothing in this Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any 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.
- 20 Representations and warranties
- 20.1 The Parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under the Agreement and that entry into this Agreement will not result in the breach of any law.
- 21 Severability
- 21.1 If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of the Agreement is not affected.
22. Modification
- 22.1 No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

23 Waiver

23.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party. A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

24. GST

24.1 If any Party reasonably decides that it is liable to pay GST on a supply made to the other Party under this Agreement and the supply was not priced to include GST, then recipient of the supply must pay an additional amount equal to the GST on that supply.

25. Termination

25.1 Subject to clause 5.2.4, this Agreement is terminated on the date the Developer is released and discharged in accordance with clause 25.2.

25.2 The Council agrees to provide a release and discharge of this Agreement upon the acceptance of the Works by the RTA and to do all things necessary to have such release and discharge registered by the Register-General in the relevant folio of the Register.

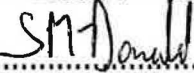
26 Explanatory Memorandum

26.1 The Explanatory Memorandum relating to this Agreement must not be used to assist in construing this Agreement.

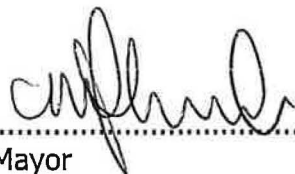
Execution

Executed as an Agreement this 27 day of November 2009.

The Seal of)
Muswellbrook Shire Council)
was affixed in accordance)
with the resolution dated:)


.....
General Manager


Steve McDonald
.....
(print name)



.....
Mayor


Martin Rush
.....
(print name)

Executed by Patarm Pty Limited
(CAN 115 080 629) in accordance
With Section 127 of the Corporations
Act 2001 by:


.....
Signature – Director


.....
Name


.....
Signature – Director


.....
Name