

Voluntary Planning Agreement

Surf All Day Pty Ltd
ACN 627 817 181

Penketham Property Pty Ltd
ACN 654 716 426

Eurobodalla Shire Council
ABN 47 504 455 945

Newcastle

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Contents

Parties	4
Background	4
Operative part	5
1 <i>Definitions</i>	5
2 <i>Interpretation</i>	6
3 <i>Planning Agreement under the Act</i>	8
4 <i>Application of this agreement</i>	8
5 <i>Operation of this agreement</i>	8
6 <i>Contributions to be made under this agreement</i>	8
6.1 Dedication of Land	8
7 <i>Opening of public road and creation of drainage easements</i>	8
8 <i>Proposed Road and Stormwater Infrastructure</i>	9
9 <i>Application of s 7.11, s 7.12 and s 7.24 of the Act to the Development</i>	9
10 <i>Registration of this agreement</i>	9
10.1 Developers' Interest	9
10.2 Registration of this agreement	10
10.3 Removal from Register	10
10.4 Caveat	10
11 <i>Review of this agreement</i>	11
12 <i>Dispute Resolution</i>	11
12.1 Reference to Dispute	11
12.2 Notice of Dispute	11
12.3 Representatives of Parties to Meet	11
12.4 Further Notice if Not Settled	12
12.5 Mediation	12
12.6 Expert determination	13
12.7 Litigation	13
12.8 No suspension of contractual obligations	13
13 <i>Enforcement</i>	13
13.1 Default	13
13.2 Compulsory Acquisition	14
13.3 Restriction on the issue of Certificates	14
13.4 General Enforcement	14

14	<i>Assignment and Dealings</i>	15
14.1	Assignment	15
14.2	Transfer of Land	15
15	<i>Approvals and consents</i>	15
16	<i>No fetter</i>	15
16.1	Discretion	15
16.2	No fetter	16
17	<i>Notices</i>	16
17.1	Notices	16
18	<i>General</i>	17
18.1	Relationship between parties	17
18.2	Time for doing acts	17
18.3	Further assurances	17
18.4	Variation	17
18.5	Counterparts	17
18.6	Legal expenses and stamp duty	18
	Each party is to bear its own costs in connection with negotiation, preparation, execution, carrying into effect and release and discharge of this agreement.	18
18.7	Stamp duty	18
18.8	Entire agreement	18
18.9	Representations and warranties	18
18.10	Severability	18
18.11	Invalidity	18
18.12	Waiver	18
18.13	GST	19
18.14	Governing law and jurisdiction	19
	Schedule 1 Summary of requirements (section 7.4)	20
	Annexure A Road Plan	23
	Annexure B Draft Explanatory note	24

Agreement

Parties

First party

Name	Surf All Day Pty Ltd (Surf All Day)
ACN	627 817 181
Contact	Danny White
Telephone	0411 436 237
Email	danny@baycoastalplumbing.com.au

Second party

Name	Penketham Property Pty Ltd (Penketham)
ACN	654 716 426
Contact	David Penketham
Telephone	0407 073 838
Email	offshoresurfco@bigpond.com

Third Party

Name	Eurobodalla Shire Council (Council)
ABN	47 504 455 945
Contact	Gary Bruce
Telephone	0428 915 805
Email	Gary.Bruce@esc.nsw.gov.au

Background

- A. On 14 April 2022, Surf All Day lodged the Hawdon Street DA seeking Development Consent to carry out the Hawdon Street Development.
- B. On 31 August 2023, Penketham and Surf All Day lodged the Murray Street DA seeking Development Consent to carry out the Murray Street Development.
- C. The Council is the consent authority under Part 4 of the Act for the Murray Street DA and the Hawdon Street DA.
- D. Surf All Day and Penketham have made an offer to enter into this agreement in connection with the Hawdon Street DA and the Murray Street DA to make contributions for public purposes if Development Consent is granted.

Operative part

1 Definitions

In this agreement, unless the context indicates a contrary intention:

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

Address means a party's address set out in the Notices clause of this agreement;

Approval means any certificate, licence, consent, permit, approval or other requirement of any Authority having jurisdiction in connection with the activities contemplated by this agreement;

Authority means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person, agency or entity and includes a certifier accredited under the *Building Professionals Act 2005* (NSW);

Business Day means a day on which banks are open for general banking business in Sydney, excluding Saturdays and Sundays;

Claim means any claim, loss, liability, damage, proceeding, order, judgment or expense arising out of the operation of this agreement;

Construction Certificate means a construction certificate as defined under section 6.4 of the Act;

CPI means the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics;

Damages means all liabilities, losses, damages, costs and expenses, including legal fees and disbursements and costs of investigation, litigation, settlement, judgment, interest and penalties;

Dealing, in relation to the Hawdon Street Land and the Murray Street Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Hawdon Street Land and the Murray Street Land;

Dedication Land means that part of the Murray Street Land that is zoned SP2 Infrastructure under the *Eurobodalla Local Environmental Plan 2012* at the date of this agreement;

Developers means Surf All Day and Penketham;

Development Application has the same meaning as in the Act;

Development Consent has the same meaning as in the Act;

Funding Deed means the Accelerated Infrastructure Fund Funding Deed – Round 3 dated 4 April 2023 between the Crown in right of New South Wales through the Department of Planning and Environment and Eurobodalla Shire Council;

Grant Funding means the funding provided by the Department of Planning and Environment under the Funding Deed;

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 of or administration of the GST;

Hawdon Street DA means development application DA0619/22;

Hawdon Street Development means the development proposed under the Hawdon Street DA described as the Torrens title subdivision lot into two Torrens title lots and the construction of multi dwelling housing on the Hawdon Street Land;

Hawdon Street Land means Lot 82 DP 614216 known as 54 Hawdon Street, Moruya;

Law means:

- (a) any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation;
- (b) any Approval, including any condition or requirement under it; and
- (c) any fees and charges payable in connection with the things referred to in paragraphs (a) and (b);

Modification Application means any application to modify the Development Consent under section 4.55 of the Act;

Murray Street DA means development application DA0090/23;

Murray Street Development means the development proposed under the Murray Street DA being development described as the demolition of an existing dwelling and construction of multi dwelling housing on the Murray Street Land;

Murray Street Land means Lot 102 DP 733139 and known as 34 Murray Street, Moruya;

Proposed Road means the road shown in Road Plan at Annexure A which Council intends to open as a public road under the Roads Act;

Register means the Torrens title register maintained under the *Real Property Act 1900* (NSW);

Stormwater Infrastructure means the stormwater infrastructure shown in the Road Plan at Annexure A.

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

Roads Act means the *Roads Act 1993* (NSW).

2 Interpretation

In this agreement, unless the context indicates a contrary intention:

- (a) **(documents)** a reference to this agreement or another document includes any document which varies, supplements, replaces, assigns or novates this agreement or that other document;
- (b) **(references)** a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this agreement;
- (c) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this agreement;
- (d) **(person)** a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and

their personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns;

- (e) **(party)** a reference to a party to a document includes that party's personal representatives, executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) **(president, CEO or managing director)** the president, CEO or managing director of a body or Authority means any person acting in that capacity;
- (g) **(requirements)** a requirement to do any thing includes a requirement to cause that thing to be done, and a requirement not to do any thing includes a requirement to prevent that thing being done;
- (h) **(including)** including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind;
- (i) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (j) **(singular)** the singular includes the plural and vice-versa;
- (k) **(gender)** words importing one gender include all other genders;
- (l) **(parts)** a reference to one or more things includes each part and all parts of that thing or group of things but nothing in this clause implies that part performance of an obligation constitutes performance of that obligation;
- (m) **(rules of construction)** 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;
- (n) **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (o) **(time and date)** a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in , Australia, even if the obligation is to be performed elsewhere;
- (p) **(joint and several)** an agreement, representation, covenant, right or obligation:
 - (i) in favour of two or more persons is for the benefit of them jointly and severally; and
 - (ii) on the part of two or more persons binds them jointly and severally;
- (q) **(writing)** a reference to a notice, consent, request, approval or other communication under this agreement or an agreement between the parties means a written notice, request, consent, approval or agreement;
- (r) **(replacement bodies)** a reference to a body (including an institute, association or Authority) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions;
- (s) **(Australian currency)** a reference to dollars or \$ is to Australian currency;
- (t) **(month)** a reference to a month is a reference to a calendar month; and

- (u) **(year)** a reference to a year is a reference to twelve consecutive calendar months.

3 Planning Agreement under the Act

- (a) The parties agree that this agreement is a planning agreement within the meaning of section 7.4 of the Act.
- (b) Schedule 1 of this agreement summarises the requirements for planning agreements under section 7.4 of the Act and the way this agreement addresses those requirements.

4 Application of this agreement

This agreement applies to:

- (a) the Hawdon Street Development and the Murray Street Development; and
- (b) the Hawdon Street Land and the Murray Street Land.

5 Operation of this agreement

This agreement commences on and from the date it is executed by all parties.

6 Contributions to be made under this agreement

6.1 *Dedication of Land*

- (a) Within six (6) months from the grant of Development Consent for the Hawdon Street DA or the Murray Street DA, whichever occurs later, the Developers must dedicate or cause to be transferred to the Council, at no cost to the Council, the Dedication Land freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, easements, rights, charges, rates and contracts in, over or in connection with the land, including but not limited to, municipal rates and charges, water rates and land tax.
- (b) The obligation to dedicate the Dedication Land will be taken to have been satisfied when either a certificate of title or electronic equivalent is issued by NSW Land Registry Services for the whole of the Dedication Land identifying the Council as the registered proprietor of that land without encumbrances or when the Dedication Land is dedicated to Council by operation of the registration of a plan of subdivision in accordance with section 9 of the Roads Act.
- (c) The parties agree and acknowledge that the dedication of the Dedication Land serves the public purpose of opening and providing for public roads under the Roads Act .

7 Opening of public road and creation of drainage easements

- (a) Subject to clause 7(b), the Council will:
 - (i) take all reasonably necessary steps to open the whole or part of the Proposed Road as a public road under the Roads Act as Council sees fit; and
 - (ii) take all reasonably necessary steps to obtain all required Approvals and construct the whole or part of the Proposed Road, including the Stormwater Infrastructure, by December 2026 or later date as agreed between the parties; and

- (iii) create any necessary easements under either section 88A or section 88B of the *Conveyancing Act 1919* that Council considers are reasonably necessary for the Hawdon Street Land and/or the Murray Street Land to lawfully discharge stormwater via the Stormwater Infrastructure.
- (b) Council is not required to comply with any requirements under clause 7(a)(i) to (iii) unless Council receives payment, or is entitled to receive payment, of the Grant Funding for the Proposed Road under the Funding Deed.
- (c) If clause 7(b) applies, and the Dedication Land has been dedicated or transferred under cl 6.1, the Council must pay compensation for the dedication or transfer of the Dedication Land to the Developers to be determined at the date of dedication or transfer in accordance with s 54(1) of the *Land Acquisition (Just Terms Compensation) Act 1991*.

8 Proposed Road and Stormwater Infrastructure

- (a) The parties acknowledge and agree:
 - (i) The Proposed Road and Stormwater Infrastructure shown in the Road Plan at Annexure A has been prepared by Council as a concept plan.
 - (ii) The concept design for the Stormwater Infrastructure takes into account the stormwater management requirements for the Hawdon Street DA and the Murray Street DA.
 - (iii) The Proposed Road and Stormwater Infrastructure is subject to detailed design and Council may at its sole discretion approve, vary or direct a variation of, the Proposed Road or Stormwater Infrastructure as it considers necessary for the design or construction of the Proposed Road or Stormwater Infrastructure.
 - (iv) The Developers will not oppose or object to the construction of the Proposed Road or Stormwater Infrastructure.

9 Application of s 7.11, s 7.12 and s 7.24 of the Act to the Development

- (a) This agreement does not exclude the application of section 7.11 of the Act to the Hawdon Street Development or the Murray Street Development.
- (b) This agreement does not exclude the application of section 7.12 of the Act to the Hawdon Street Development or the Murray Street Development.
- (c) This agreement does not exclude the application of section 7.24 of the Act to the Hawdon Street Development or the Murray Street Development.
- (d) The benefits under this agreement are not to be taken into consideration in determining a development contribution under section 7.11 of the Act.

10 Registration of this agreement

10.1 Developers' Interest

- (a) Surf All Day represents and warrants to the Council that on the date of this agreement it is the registered proprietor of the Hawdon Street Land.

- (b) Surf All Day and Penkethem jointly and severally represent and warrant to the Council that on the date of this agreement they are the registered proprietors of the Murray Street Land.

10.2 Registration of this agreement

- (a) The Developers agree to procure the registration of this agreement under the *Real Property Act 1900* (NSW) in the relevant folios of the Register of the Hawdon Street Land and the Murray Street Land in accordance with section 7.6 of the Act.
- (b) The Developers at their own expense must, promptly after the execution of this agreement, take all practical steps, and otherwise do anything that the Council reasonably requires to procure:
 - (i) the consent of each person who:
 - (A) has an estate or interest in the Hawdon Street Land and the Murray Street Land registered under the *Real Property Act 1900* (NSW); or
 - (B) is seized or possessed of an estate or interest in the Hawdon Street Land or the Murray Street land,
 - (ii) the execution of any documents; and
 - (iii) the production of the relevant duplicate certificates of title or electronic equivalents,to enable the registration of this agreement in accordance with clause 10.2.
- (c) The Developers, at their own expense, will take all practical steps, and otherwise do anything that the Council reasonably requires:
 - (i) to procure the lodgement of this agreement with the Registrar-General as soon as reasonably practicable after this agreement comes into operation, but in any event, no later than 10 Business Days after that date; and
 - (ii) to procure the registration of this agreement by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this agreement is lodged for registration.

10.3 Removal from Register

The Council will provide a release and discharge of this agreement so that it may be removed from the folios of the Register for the Hawdon Street Land or the Murray Street Land (or any part of it) provided the Council is satisfied the Developers have duly fulfilled their obligations under this agreement and are not otherwise in default of any of the obligations under this agreement.

10.4 Caveat

- (a) The Developers acknowledge and agree that:
 - (i) when this agreement is executed, the Council will have acquired and the Developers will have granted, an equitable estate and interest in the Hawdon Street Land and the Murray Street Land for the purposes of section 74F(1) of the *Real Property Act 1900* (NSW) and consequently the Council will have a sufficient interest in the Hawdon Street Land and the

Murray Street Land in respect of which to lodge a caveat over the Hawdon Street Land and the Murray Street Land notifying that interest; and

- (ii) they will not object to the Council lodging a caveat in the relevant folios of the Register for the Hawdon Street Land and the Murray Street Land nor will they seek to remove any caveat lodged by the Council provided the caveat does not prevent registration of any dealing or plan other than a transfer.
- (b) The Council must, at the Developers' cost, register a withdrawal of any caveat in respect of the Hawdon Street Land or the Murray Street Land within five Business Days after this agreement is registered in the relevant folios of the Register for the Land in accordance with clause 10.2.

11 Review of this agreement

- (a) This agreement may be reviewed or modified. Any review or modification of this agreement will be conducted in the circumstances and in the manner determined by the parties.
- (b) No modification or review of this agreement will be of any force or effect unless it is in writing and signed by the parties to this agreement.
- (c) A party is not in breach of this agreement if it does not agree to an amendment to this agreement requested by a party in, or as a consequence of, a review.

12 Dispute Resolution

12.1 Reference to Dispute

If a dispute arises between the parties in relation to this agreement, the parties must not commence any court proceedings relating to the dispute unless the parties have complied with this clause, except where a party seeks urgent interlocutory relief.

12.2 Notice of Dispute

The party wishing to commence the dispute resolution process must give written notice (**Notice of Dispute**) to the other parties of:

- (a) the nature of the dispute,
- (b) the alleged basis of the dispute, and
- (c) the position which the party issuing the Notice of Dispute believes is correct.

12.3 Representatives of Parties to Meet

- (a) The representatives of the parties must promptly (and in any event within five Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.
- (b) The parties may, without limitation:
 - (i) resolve the dispute during the course of that meeting,
 - (ii) agree that further material or expert determination in accordance with clause 12.6 about a particular issue or consideration is needed to effectively resolve the dispute (in which event the parties will, in good faith, agree to a timetable for resolution); or

- (iii) agree that the parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

12.4 *Further Notice if Not Settled*

If the dispute is not resolved within ten Business Days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (Determination Notice) by mediation under clause 12.5 or by expert determination under clause 12.6.

12.5 *Mediation*

If a party gives a Determination Notice calling for the dispute to be mediated:

- (a) the parties must agree to the terms of reference of the mediation within five Business Days of the receipt of the Determination Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply;
- (b) the mediator will be agreed between the parties, or failing agreement within five Business Days of receipt of the Determination Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (c) the mediator appointed pursuant to this clause 12.5 must:
 - (i) Have reasonable qualifications and practical experience in the area of the dispute; and
 - (ii) Have no interest or duty which conflicts or may conflict with his, her or their function as a mediator he, she or they being required to fully disclose any such interest or duty before his, her or their appointment;
- (d) the mediator shall be required to undertake to keep confidential all matters coming to his, her or their knowledge by reason of his, her or their appointment and performance of his, her or their duties;
- (e) the parties must within three Business Days of receipt of the Determination Notice notify each other of their representatives who will be involved in the mediation (except if a resolution of the Council is required to appoint a representative, the Council must advise of the representative within two Business Days of the resolution);
- (f) the parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement; and
- (g) in relation to costs and expenses:
 - (i) each party will bear its own professional and expert costs incurred in connection with the mediation; and
 - (ii) the costs of the mediator will be shared equally by the parties unless the mediator determines that a party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that party.

12.6 *Expert determination*

If the dispute is not resolved under clause 12.3 or clause 12.5, or the parties otherwise agree that the dispute may be resolved by expert determination, the parties may refer the dispute to an expert, in which event:

- (a) the dispute must be determined by an independent expert in the relevant field:
 - (i) agreed upon and appointed jointly by the parties; and
 - (ii) in the event that no agreement is reached or no appointment is made within five Business Days of the agreement to refer the dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales;
- (b) the expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) the determination of the dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (d) the expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (e) each party will bear its own costs in connection with the process and the determination by the expert and will share equally the expert's fees and costs; and
- (f) any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
 - (i) within five Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and commences litigation; or
 - (ii) the determination is in respect of, or relates to, termination or purported termination of this agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal.

12.7 *Litigation*

If the dispute is not *finally* resolved in accordance with this clause 12, then either party is at liberty to litigate the dispute.

12.8 *No suspension of contractual obligations*

Subject to any interlocutory order obtained under clause 12.1, the referral to or undertaking of a dispute resolution process under this clause 12 does not suspend the parties' obligations under this agreement.

13 *Enforcement*

13.1 *Default*

- (a) In the event a party considers another party has failed to perform and fulfil an obligation under this agreement, it may give notice in writing to the other party (**Default Notice**) giving all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than 21 days.

- (b) In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (c) If a party disputes the Default Notice it may refer the dispute to dispute resolution under clause 12 of this agreement.

13.2 *Compulsory Acquisition*

- (a) If the Developers do not dedicate the Dedication Land to Council as required by this agreement, the Council may compulsorily acquire the relevant land, in which case the Developers consent to the Council compulsorily acquiring that land for compensation in the amount of \$1.00 without having to follow the pre-acquisition procedures in the *Land Acquisition (Just Terms Compensation) Act 1991*.
- (b) Clause 13.2(a) constitutes an agreement for the purposes of section 30 of the *Land Acquisition (Just Terms Compensation) Act 1991*.
- (c) Except as otherwise agreed between the Developers and Council, the Developers must ensure the Dedication Land is freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, rights, charges, rates, strata levies and contracts, except as may be permitted by this agreement on the date that the Council will acquire the land in accordance with clause 13.2(a).
- (d) The Developers indemnify and keep indemnified the Council against all Claims made against the Council as a result of any acquisition by the Council of the whole or any part of the relevant land under clause 13.2(a).
- (e) The Developers must pay the Council, promptly on demand, an amount equivalent to all costs, including legal costs, incurred by the Council acquiring the whole or any part of the relevant land under clause 13.2(a).

13.3 *Restriction on the issue of Certificates*

In accordance with section 6.10(2) of the Act a Construction Certificate for any part of the Hawdon Street Development or the Murray Street Development must not be issued until the obligation in this agreement to dedicate the Dedication Land has been satisfied.

13.4 *General Enforcement*

- (a) Without limiting any other remedies available to the parties, this agreement may be enforced by any party in any Court of competent jurisdiction.
- (b) Nothing in this agreement prevents:
 - (i) a party from bringing proceedings in the Land and Environment Court to enforce any aspect of this agreement or any matter to which this agreement relates; and
 - (ii) 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.

14 Assignment and Dealings

14.1 Assignment

- (a) A party must not assign or deal with any right under this agreement without the prior written consent of the other parties.
- (b) Any change of ownership or control (as defined in section 50AA of the *Commonwealth Corporations Act 2001*) of a party (excluding the Council) shall be deemed to be an assignment of this agreement for the purposes of this clause.
- (c) Any purported dealing in breach of this clause is of no effect.

14.2 Transfer of Land

- (a) The Developers may not transfer, assign or dispose of the whole or any part of its right, title or interest in the Hawdon Street Land or the Murray Street Land (present or future) or in the Hawdon Street Development or the Murray Steet Development to another person (**Transferee**) unless before they sell, transfer or dispose of that right, title or interest:
 - (i) the Developers satisfy the Council that the proposed Transferee is financially capable of complying with the Landowners obligations under this agreement;
 - (ii) the Developers satisfy the Council that the rights of the Council will not be diminished or fettered in any way;
 - (iii) the Transferee delivers to the Council a novation deed signed by the Transferee in a form and of such substance as is acceptable to the Council containing provisions under which the Transferee agrees to comply with all the outstanding obligations of the Developers (or the relevant Developer) under this agreement;
 - (iv) any default under any provisions of this agreement has been remedied or waived by the Council, on such conditions as the Council may determine, and
 - (v) the Developers and the Transferee pay the Council's reasonable costs in relation to the assignment.

15 Approvals and consents

Except as otherwise set out in this agreement, and subject to any statutory obligations, a party may give or withhold an approval or consent to be given under this agreement in that party's absolute discretion and subject to any conditions determined by the party. A party is not obligated to give its reasons for giving or withholding consent or for giving consent subject to conditions.

16 No fetter

16.1 Discretion

This agreement is not intended to operate to fetter, in any manner, the exercise of any statutory power or discretion of the Council, including, but not limited to, any statutory power or discretion of the Council relating to the Development Application or any other application for Development Consent (all referred to in this agreement as a '**Discretion**').

16.2 No fetter

No provision of this agreement is intended to constitute any fetter on the exercise of any Discretion. If, contrary to the operation of this clause, any provision of this agreement is held by a court of competent jurisdiction to constitute a fetter on any Discretion, the parties agree:

- (a) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause is substantially satisfied,
- (b) in the event that (a) cannot be achieved without giving rise to a fetter on the exercise of a Discretion, the relevant provision is to be severed and the remainder of this agreement has full force and effect, and
- (c) to endeavour to satisfy the common objectives of the parties in relation to the provision of this agreement which is to be held to be a fetter on the extent that is possible having regard to the relevant court judgment.

17 Notices

17.1 Notices

Any notice given under or in connection with this agreement (**Notice**):

- (a) must be in writing and signed by a person duly authorised by the sender;
- (b) must be addressed as follows and delivered to the intended recipient by hand, by prepaid post or by email at the address, or at the address last notified by the intended recipient to the sender after the date of this agreement:
 - (i) to Surf All Day : Level 1, Kamy Saeedi Law Building
1 University Avenue
Canberra ACT 2601
Email: mascitti@kslawyers.com.au
Attention: Michael Mascitti
 - (ii) to Penketham: Level 1, Kamy Saeedi Law Building
1 University Avenue
Canberra ACT 2601
Email: mascitti@kslawyers.com.au
Attention: Michael Mascitti
 - (iii) to Council: PO Box 99 Moruya NSW 2537
Email: Council@esc.gov.au
Attention: General Manager
- (c) is taken to be given or made:
 - (i) in the case of hand delivery, when delivered;
 - (ii) in the case of delivery by post, three Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country); and
 - (iii) in the case of email:

- (A) when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above;
 - (B) when the Notice enters an information system controlled by the recipient; or
 - (C) when the Notice is first opened or read by the recipient, whichever occurs first.
- (d) if under clause (c) a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4:00 pm (local time), it is taken to have been given or made at the start of business on the next Business Day in that place.

18 General

18.1 *Relationship between parties*

- (a) Nothing in this agreement:
 - (i) constitutes a partnership between the parties; or
 - (ii) except as expressly provided, makes a party an agent of another party for any purpose.
- (b) A party cannot in any way or for any purpose:
 - (i) bind another party; or
 - (ii) contract in the name of another party.
- (c) If a party must fulfil an obligation and that party is dependent on another party, then that other party must do each thing reasonably within its power to assist the other in the performance of that obligation.

18.2 *Time for doing acts*

- (a) If the time for doing any act or thing required to be done or a notice period specified in this agreement expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.
- (b) If any act or thing required to be done is done after 5:00 pm on the specified day, it is taken to have been done on the following Business Day.

18.3 *Further assurances*

Each party must promptly execute all documents and do all other things reasonably necessary or desirable to give effect to the arrangements recorded in this agreement.

18.4 *Variation*

A provision of this agreement can only be varied by a later written document executed by or on behalf of all parties and in accordance with the provisions of the Act.

18.5 *Counterparts*

This agreement may be executed in any number of counterparts. All counterparts taken together constitute one instrument.

18.6 Legal expenses and stamp duty

Each party is to bear its own costs in connection with negotiation, preparation, execution, carrying into effect and release and discharge of this agreement.

18.7 Stamp duty

The Developers agree to pay any stamp duty assessed on or in relation to this agreement and any instrument or transaction required by or necessary to give effect to this agreement.

18.8 Entire agreement

The contents of this agreement constitute the entire agreement between the parties and supersede any prior negotiations, representations, understandings or arrangements made between the parties regarding the subject matter of this agreement, whether orally or in writing.

18.9 Representations and warranties

The parties represent and warrant that they have the power and authority 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.

18.10 Severability

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 this agreement is not affected.

18.11 Invalidity

- (a) A word or provision must be read down if:
 - (i) this agreement is void, voidable, or unenforceable if it is not read down;
 - (ii) this agreement will not be void, voidable or unenforceable if it is read down; and
 - (iii) the provision is capable of being read down.
- (b) A word or provision must be severed if:
 - (i) despite the operation of clause (a), the provision is void, voidable or unenforceable if it is not severed; and
 - (ii) this agreement will be void, voidable or unenforceable if it is not severed.
- (c) The remainder of this agreement has full effect even if clause 18.11(b) applies.

18.12 Waiver

- (a) A right or remedy created by this agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.
- (b) 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.

18.13 GST

- (a) Words and expressions which are not defined in this agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this agreement are exclusive of GST.
- (c) If GST is imposed on any supply made under or in accordance with this agreement, the Developer must pay the GST or pay to the Council an amount equal to the GST payable on or for the taxable supply, whichever is appropriate in the circumstances.

18.14 Governing law and jurisdiction

- (a) The laws applicable in New South Wales govern this agreement.
- (b) The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

Schedule 1 Summary of requirements (section 7.4)

Subject and subsection of the Act	Planning Agreement
Planning instrument and/or Development Application – Section 7.4(1) The Landowners have: <ul style="list-style-type: none"> (a) Sought a change to an environmental planning instrument <div> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No </div> (b) Made, or propose to make a Development Application <div> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No </div> (c) Entered into an agreement with, or are otherwise associated with, a person to whom paragraph (a) or (b) applies <div> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No </div> 	
Description of the land to which the planning Agreement applies – Section 7.4(3)(a)	The Hawdon Street Land and the Murray Street Land as defined in Clause 1
Development to which the Planning Agreement applies – Section 7.4(3)(b)(ii)	Refer to Clause 4 and the definitions of the Hawdon Street Development and the Murray Street Development as defined in Clause 1.
The scope, timing and manner of delivery of contribution required by the Planning Agreement – Section 7.4(3)(c)	Refer to Clause 6
Applicability of section 7.11 of the Act – Section 7.4(3)(d)	Refer to Clause 9
Applicability of section 7.12 of the Act – Section 7.4(3)(d)	Refer to Clause 9
Applicability of section 7.24 of the Act – Section 7.4(3)(d)	Refer to Clause 9
Mechanism for dispute resolution – Section 7.4(3)(f)	Refer to Clause 12
Enforcement of the Planning Agreement – Section 7.4(3)(g)	Refer to Clause 13
Registration of the Planning Agreement	Refer to Clause 10
No obligation to grant consent or exercise functions – Section 7.4(9)	See clause 16 (no fetter)

Executed as an agreement

Executed by Surf All Day Pty ACN 627
817 181 in accordance with section 127 of
the *Corporations Act 2001* (Cth) by:



Signature of Sole Director and Sole
Secretary

24-05-2024

Date

Danny White

Print name of Sole Director and Sole
Secretary

Executed by Penketham Property Pty
Ltd ACN 654 716 426 in accordance with
section 127 of the *Corporations Act 2001*
(Cth) by:



Signature of Sole Director and Sole
Secretary

26/05/2024

Date

DAVID PENKETHMAN

Print name of Sole Director and Sole
Secretary

Signed by **Warwick Winn** as authorised)
representative for Eurobodalla Shire)
Council ABN 47 504 455 945 who)
warrants that they are duly authorised to)
execute this document on behalf of)
Eurobodalla Shire Council in the)
presence of:)
)



.....
Signature of Witness



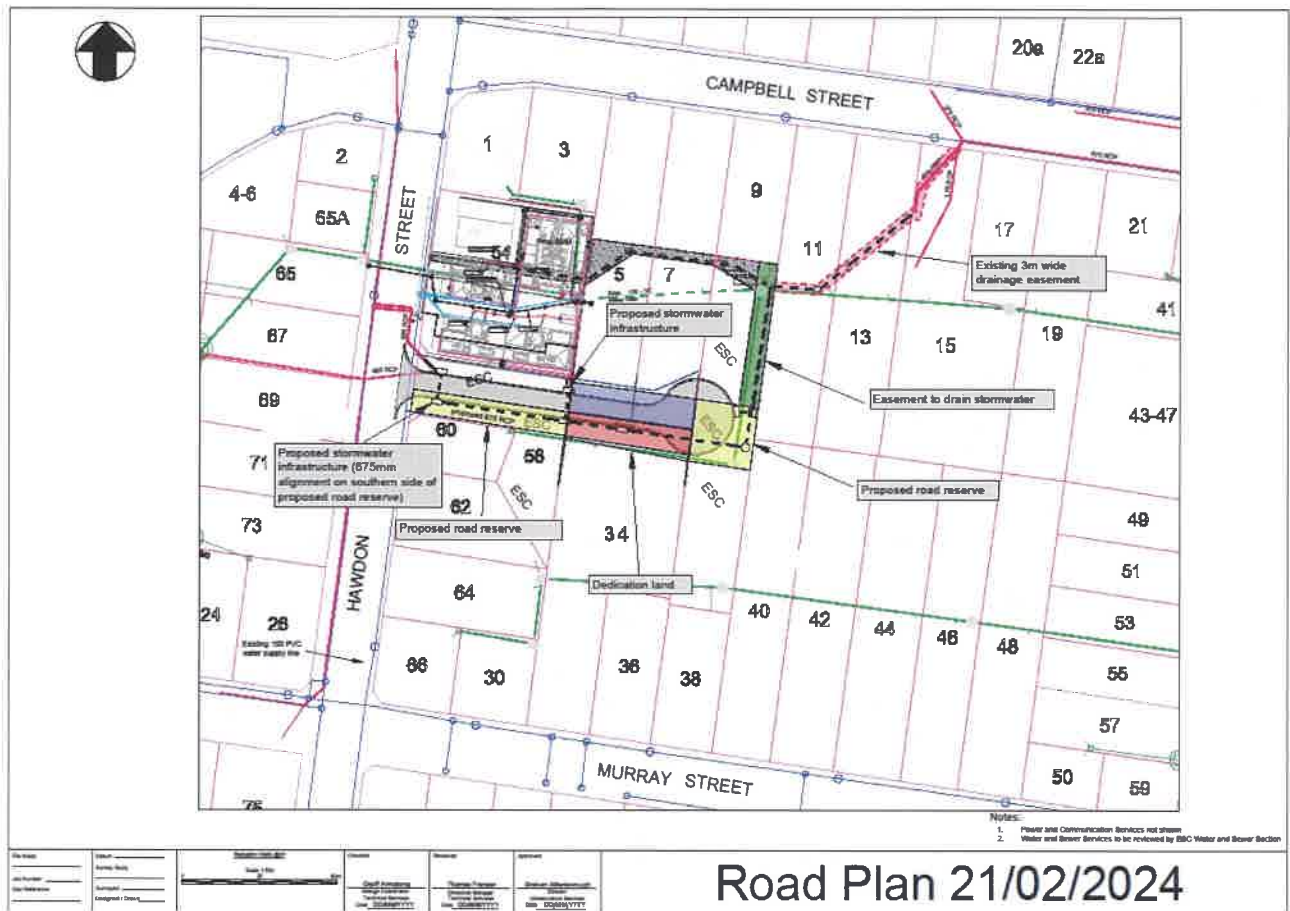
.....
Signature of Authorised Representative

24/05/2024
.....
Date

Megan Weyman
.....
Print name of Witness

89 Vulcan Street Moruya
.....
Address of Witness

Annexure A Road Plan



Annexure B Draft Explanatory note

Explanatory Note

Exhibition of draft Voluntary Planning Agreement

Lot 82 DP 614216 known as 54 Hawdon Street, Moruya and Lot 102 DP 733139 known as 34 Murray Street, Moruya

Environmental Planning and Assessment Regulation 2021 (clause 205)

Planning Agreement

The purpose of this Explanatory Note is to provide a plain English summary to support the notification of a draft voluntary Planning Agreement (**the Planning Agreement**) under Section 7.4 of the *Environmental Planning and Assessment Act 1979 (the Act)*.

The Planning Agreement will require the dedication of land in connection with proposed development of land described as Lot 82 DP 614216 known as 54 Hawdon Street, Moruya and Lot 102 DP 733139 known as 34 Murray Street, Moruya.

This Explanatory Note has been prepared jointly between the parties as required by clause 205 of the *Environmental Planning and Assessment Regulation 2021 (the Regulation)*.

This Explanatory Note is not to be used to assist in construing the Planning Agreement.

Parties

Surf All Day Pty Ltd and Penketham Property Pty Ltd (**the Developers**) made an offer to the Council to enter into a voluntary Planning Agreement in connection with development applications DA0619/22 and DA0090/23 relating to 54 Hawdon Street and 34 Murray Street, Moruya, respectively.

Description of subject land

The land to which the Planning Agreement applies is described as Lot 82 DP 614216 known as 54 Hawdon Street, Moruya and Lot 102 DP 733139 known as 34 Murray Street, Moruya (**the Land**).

Description of the Development Application to which the Planning Agreement applies

Development application DA0619/22 seeks development consent for development described as the Torrens title subdivision of the existing lot into two Torrens title lots and the construction of multi dwelling housing at 54 Hawdon Street, Moruya.

Development application DA0090/24 seeks development consent for development described as the demolition of an existing dwelling and construction of multi dwelling housing at 34 Murray Street, Moruya.

Summary of Objectives, Nature and Effect of the Planning Agreement

Land

The Planning Agreement requires dedication of part of Lot 102 DP 733139 known as 34 Murray Street, Moruya which is zoned SP2 Infrastructure under the Eurobodalla Local Environmental Plan 2012.

Council intends to construct a public road on the land to be dedicated which will include stormwater infrastructure. The provision of the public road and stormwater infrastructure will support the development of surrounding land and provide public infrastructure to meet the needs of current future residential development.

Assessment of the Merits of the Planning Agreement

How the Planning Agreement Promotes the Objects of the Act and the public interest

The draft Planning Agreement promotes the objectives of the *Environmental Planning and Assessment Act 1979* because it:

- promotes the orderly and economic use and development of land; and
- promotes good design and amenity of the built environment,

The draft Planning Agreement promotes the public interest by requiring the dedication of land for the purpose of opening a public road to facilitate the progressive development of adjoining land for residential purposes.

The Planning Purposes served by the Planning Agreement

The land to be dedicated under the Planning Agreement will be used for the purposes of opening and constructing a public road, which will facilitate the orderly development of the surrounding land, contributing to the housing needs of a growing population in the local government area. This purpose is consistent with the adopted planning strategy for the area. The local environmental plan currently zones the proposed dedication land as S2 Infrastructure.

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

The dedication of the land under the Planning Agreement must occur prior to any Construction Certificate being issued for the Development.