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Bayside Council

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Gunlake Concrete Pty Limited

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# Planning Agreement

Section 93F of the Environmental Planning  
and Assessment Act, 1979 (NSW)

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Date

## Parties

**Bayside Council** ABN 80 690 785 443 of 444-446 Princes Highway, Rockdale 2216  
(Council)

**Gunlake Concrete Pty Limited** ACN ABN 36 162 907 575 of PO Box 1665, Double Bay NSW 1360 New South Wales (Developer)

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## Background

- A The Developer owns the Land.
  - B On 17 March 2016, the Developer lodged the Development Application with the Council to carry out the Development on the Land.
  - C On 28 March 2017, the Developer made an offer to enter into this document to provide Development Contributions towards the cost of installation of traffic signals and associated works at the intersection of Baker Street and Wentworth Avenue, Banksmeadow, if Development Consent was granted.
  - D Development Consent was granted on 6 April 2017.
  - E Condition 8 of the Development Consent requires the Developer to enter into a voluntary planning agreement with the Council in accordance with the terms of the Developer's offer dated 28 March 2017.
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## Operative provisions

- 1 **Planning agreement under the Act**  
The Parties agree that this document is a planning agreement governed by subdivision 2 of Division 6 of Part 4 of the Act.
- 2 **Application of this document**  
This document applies to the Land and the Development.
- 3 **Operation of this document**  
This document operates only if it is entered into as required by Clause 25C(1) of the Regulation.

## 4 Interpretation

### 4.1 Definitions

In this document these terms have the following meanings:

<b>Act</b>	The <i>Environmental Planning and Assessment Act 1979</i> (NSW).
<b>Business Day</b>	A day which is not a Saturday, Sunday or bank or public holiday in Sydney.
<b>Development</b>	The construction and operation of a concrete batching plant on the Land.
<b>Development Application</b>	Development Application No. DA 2016/39/1.
<b>Development Consent</b>	The determination by approval of the Development Application.
<b>Development Contribution</b>	To dedicate land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for or applied towards a Public Purpose.
<b>Explanatory Note</b>	The Explanatory Note attached at <b>schedule 2</b> .
<b>GST</b>	Has the same meaning as in the GST Law.
<b>GST Law</b>	Has the meaning given to that term in <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth) and any other Act or regulation relating to the imposition or administration of the GST.
<b>Land</b>	Lot 111 DP 1197295, known as 2 Anderson Street, Banksmeadow NSW.
<b>Monetary Contribution</b>	A monetary contribution of \$75,000.
<b>Occupation Certificate</b>	Has the same meaning as in the Act.
<b>Party</b>	A party to this document, including their successors and assigns.
<b>Public Purpose</b>	Any purpose that benefits the public or a section of the public, specified in section 93F(2) of the Act.
<b>Regulation</b>	The <i>Environmental Planning and Assessment Regulation 2000</i> (NSW).

## 4.2 Construction

Unless expressed to the contrary, in this document:

- (a) headings do not affect the interpretation of this document;
- (b) words in the singular include the plural and vice versa;
- (c) any gender includes the other genders;
- (d) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (e) 'includes' means includes without limitation;
- (f) if the day on or by which any act, must be done under this document is not a Business Day, the act must be done on or by the next Business Day;
- (g) '\$' or 'dollars' is a reference to Australian currency all amounts payable under this document are payable in Australian dollars;
- (h) a reference in this document 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;
- (i) a reference in this document to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced;
- (j) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this document;
- (k) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency; and
- (l) any schedules and attachments form part of this document, and the Parties are to comply with any terms contained in schedules to this document as if those terms were included in the operative part of this document.

## 5 Development Contributions to be made under this document

### 5.1 Developer to provide Development Contributions

- (a) Subject to this document, the Developer agrees to provide Development Contributions in respect of the Development comprising payment of the Monetary Contribution in accordance with this **clause 5**.
- (b) The Developer is to provide the Monetary Contribution to the Council prior to the issue of an Occupation Certificate for the Development.

## **5.2 Application of the Development Contributions**

- (a) The Developer agrees to provide the Monetary Contribution towards installation of traffic signals and associated works at the intersection of Baker Street and Wentworth Avenue, Banksmeadow NSW.
- (b) The Council acknowledges that payment of the Monetary Contribution is made in full and final satisfaction of all costs and expenses required to be borne by the Developer of and incidental to the provision of the Public Purpose specified in **clause 5.2(a)**.

## **5.3 Delivery of Monetary Contribution**

- (a) The Monetary Contribution is made for the purpose of this document when cleared funds are deposited by means of electronic funds transfer into a bank account nominated by the Council.
- (b) The Developer is to give the Council not less than 5 Business Days written notice of its intention to pay the Monetary Contribution.
- (c) The Developer is not required to pay the Monetary Contribution under this document until the Council, having received the Developer's notice under **clause 5.3(b)**, has given to the Developer a tax invoice in respect of the Monetary Contribution.
- (d) The Developer is not in breach of this document if it fails to pay the Monetary Contribution at the time required by this document by reason only of the Council's failure to give to the Developer a tax invoice in respect of the Monetary Contribution.

## **6 Application of sections 94, 94A and 94EF of the Act to the Development**

The application of sections 94, 94A and 94EF of the Act are excluded to the extent set out in **schedule 1**.

## **7 Dispute Resolution**

### **7.1 Reference to dispute**

If a dispute arises between the Parties in relation to this document, then either Party must resolve that dispute in accordance with this clause.

### **7.2 Notice of dispute**

The Party wishing to commence the dispute resolution processes must notify the other in writing of:

- (a) the intent to invoke this clause;
- (b) the nature or subject matter of the dispute, including a summary of any efforts made to resolve the dispute other than by way of this clause; and
- (c) the outcomes which the notifying Party wishes to achieve (if practicable).

### **7.3 Representatives of Parties to meet**

On receipt of notice under **clause 7.2**, the Parties must endeavour in good faith to resolve the dispute expeditiously using informal dispute resolution techniques such as mediation, expert determination or other techniques agreed between them to be appropriate for resolution of the relevant dispute.

### **7.4 Neither Party may constrain**

If:

- (a) at least one meeting has been held in accordance with **clause 7.3**; and
- (b) the Parties have been unable to reach an outcome; and
- (c) either of the Parties, acting in good faith, forms the view that the dispute is reasonably unlikely to be resolved in accordance with a process agreed under **clause 7.3**,

then, that party may, by 10 Business Days written notice to the other Party, terminate the dispute resolution process in respect of that dispute. The termination of the process set out in this clause does not of itself amount to a breach of this document.

## **8 Enforcement**

Without limiting any other remedies available to the Parties, this document may be enforced by any part in any court of competent jurisdiction. Nothing in this document prevents a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this document or any matter to which this document relates.

## **9 Notices**

### **9.1 Delivery**

Any notice, consent, information, application or request that must or may be given or made to a Party under this document is only given or made if it is in writing and:

- (a) delivered or posted to that Party at its address set out below;
- (b) or emailed to that Party at its email address set out below.

#### **Bayside Council**

Attention:                      Manager Strategic Planning  
Address:                        444-446 Princes Highway, Rockdale NSW  
2216  
Email:                            council@bayside.nsw.gov.au

#### **Gunlake Concrete Pty Limited**

Attention:                      Ed O'Neil

Address: PO Box 1665, Double Bay NSW 1360  
Email: ed@gunlake.com.au

## 9.2 Change of details

If a Party gives the other Party 3 Business Days' notice of a change of its address or email address, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted to the latest address or email address.

## 9.3 Giving of notice

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, two business days after it is posted.
- (c) If it is emailed, at the time the email was sent, provided it was received by the recipient.

## 9.4 Delivery outside of business hours

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 5.00 pm 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.

# 10 GST

## 10.1 Construction

In this clause 10:

- (a) unless there is a contrary indication, words and expressions which are not defined in this document but which have a defined meaning in the GST Law have the same meaning as in the GST Law;
- (b) **GST Law** has the same meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* or, if that Act does not exist for any reason, means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulation made under that Act; and
- (c) references to GST payable and input tax credit entitlements include:
  - (i) notional GST payable by, and notional input tax credit entitlements of the Commonwealth, a State or a Territory (including a government, government body, authority, agency or instrumentality of the Commonwealth, a State or a Territory); and
  - (ii) GST payable by, and the input tax credit entitlements of, the representative member of a GST group of which the entity is a member.

## **10.2 Consideration GST exclusive**

Unless otherwise expressly stated, all consideration, whether monetary or non-monetary, payable or to be provided under or in connection with this document is exclusive of GST (**GST-exclusive consideration**).

## **10.3 Payment of GST**

If GST is payable on any supply made by:

- (a) a Party; or
- (b) an entity that is taken under the GST Law to make the supply by reason of the capacity in which a Party acts,

(Supplier) under or in connection with this document, the recipient of the supply, or the Party providing the consideration for the supply, must pay to the Supplier an amount equal to the GST payable on the supply.

## **10.4 Timing of GST payment**

The amount referred to in **clause 10.3** must be paid in addition to and at the same time and in the same manner (without any set-off or deduction) that the GST-exclusive consideration for the supply is payable or to be provided.

## **10.5 Tax invoice**

The Supplier must deliver a tax invoice or an adjustment note to the recipient of a taxable supply before the Supplier is entitled to payment of an amount under **clause 10.3**.

## **10.6 Adjustment event**

If an adjustment event arises in respect of a supply made by a Supplier under or in connection with this document, any amount that is payable under **clause 10.3** will be calculated or recalculated to reflect the adjustment event and a payment will be made by the recipient to the Supplier or by the Supplier to the recipient as the case requires.

## **10.7 Reimbursements**

- (a) Where a Party is required under or in connection with this document to pay for, reimburse or contribute to any expense, loss, liability or outgoing suffered or incurred by another Party or indemnify another Party in relation to such an expense, loss, liability or outgoing (**Reimbursable Expense**), the amount required to be paid, reimbursed or contributed by the first Party will be reduced by the amount of any input tax credits to which the other Party is entitled in respect of the Reimbursable Expense.
- (b) This **clause 10.7** does not limit the application of **clause 10.3**, if appropriate, to the Reimbursable Expense as reduced in accordance with **clause 10.7(a)**.

## **11 General**

### **11.1 Approvals and consents**

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

### **11.2 Assignment and dealings**

The Developer may not transfer, assign or dispose of its obligations under this document to a transferee (Transferee) unless:

- (a) the Developer procures execution by the Transferee and delivery to the Council of a deed signed by the Transferee in a form and of such substance as is acceptable to the Council, acting reasonably, containing provisions under which the Transferee agrees to comply with all the obligations of the Developer under the Agreement; and
- (b) any default by the Developer under any provisions of this document has been remedied by the Developer or waived by the Council on such conditions as the Council may determine, acting reasonably.

### **11.3 Costs**

The Developer must pay its own and the Council's reasonable legal costs and disbursements, up to the amount of \$1,500 (inclusive of any GST) associated with preparing, negotiating, the giving of public notice, executing and stamping this document and any document related to this document.

### **11.4 Entire agreement**

- (a) This document 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 document was executed, except as permitted by law.
- (b) Pursuant to clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this document.

### **11.5 Further acts**

Each party must promptly do whatever any other party reasonably requires of it to give effect to this document and to perform its obligations under it.

### **11.6 Governing law and jurisdiction**

This document and the transactions contemplated by this document are governed by and are to be construed in accordance with the laws applicable in New South Wales. The Parties irrevocably and unconditionally 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 those courts on any basis.

### **11.7 Joint and individual liability and benefits**

Except as otherwise set out in this document, any agreement, covenant, representation or warranty under this document by two or more persons binds them jointly and each of them individually, and any benefit in favour of two or more persons is for the benefit of them jointly and each of them individually.

### **11.8 No fetter**

Nothing in this document will be construed as requiring the Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing will be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

### **11.9 Representations and warranties**

The Parties represent and warrant that they have power to enter into this document and comply with their obligations under this document and that entry into this document will not result in the breach of any law.

### **11.10 Severability**

If a clause or part of a clause of this document 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 document, but the rest of this document is not affected.

### **11.11 Waiver**

The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this document, 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.

### **11.12 Relationship of parties**

This document is not intended to create a partnership, joint venture or agency relationship between the parties.

### **11.13 Counterparts**

This document may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

### **11.14 Rights cumulative**

Except as expressly stated otherwise in this document, the rights of a Party under this document are cumulative and are in addition to any other rights of that Party.

# Schedule 1

## Section 93F Requirements

<b>Provision of the Act</b>	<b>This document</b>
Under section 93F(1), the Developer has:	
(a) sought a change to an environmental planning instrument.	(a) No
(b) made, or proposes to make, a development application.	(b) Yes
(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.	(c) No
<b>Description of the land to which this document applies-</b> (Section 93F(3)(a))	Lot 111 in DP1197295, known as 2 Anderson Street, Banksmeadow NSW
<b>Description of the development to which this document applies-</b> (Section 93F(3)(b)(ii))	The construction and operation of a concrete batching plant on the Land.
<b>The scope, timing and manner of delivery of Development Contributions required by this document -</b> (Section 93F(3)(c))	See clause 5.
<b>Applicability of Section 94 of the Act -</b> (Section 93F(3)(d))	The application of section 94 is not excluded in respect of the Development.
<b>Applicability of Section 94A of the Act -</b> (Section 93F(3)(d))	The application of section 94A is not excluded in respect of the Development.
<b>Applicability of Section 94EF of the Act -</b> (Section 93F(3)(d))	The application of section 94EF is not excluded in respect of the Development.
<b>Applicability of Section 93F (3)(e) of the Act</b>	Any benefits under this document for a Public Purpose may not be taken into consideration in determining a Development Contribution under section 94 of the Act.
<b>Mechanism for Dispute resolution -</b> (Section 93F(3)(f))	See clause 7.
<b>Enforcement of this document -</b> (Section 93F(3)(g))	See clause 8.

<b>Provision of the Act</b>	<b>This document</b>
<b>Registration of this document (Section 93H)</b>	No
<b>No obligation to grant consent or exercise functions - (Section 93F(9))</b>	See clause 11.8.

## Schedule 2

### Explanatory Note

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

#### Explanatory Note

##### Draft Planning Agreement

Under section 93F of the *Environmental Planning and Assessment Act 1979* (NSW)

#### 1 Parties

Bayside Council (Council)

Gunlake Concrete Pty Limited (Developer)

#### 2 Description of subject land

Lot 111 in DP1197295, known as 2 Anderson Street, Banksmeadow NSW  
(Land).

#### 3 Description of Planning Application

The construction and operation of a concrete batching plant on the Land, approved pursuant to development consent no. DA 2016/39/1.

#### 4 Summary of objectives, nature and effect of the Planning Agreement

The objective of the planning agreement is to facilitate the development and improvement of public facilities and specifically to allow for the provision of a monetary contribution to the Council in the amount of \$75,000 (**Monetary Contribution**) towards installation of traffic signals and associated works at the intersection of Baker Street and Wentworth Avenue, Banksmeadow NSW.

## **5 Assessment of the merits of the Planning Agreement**

### **5.1 The planning purposes served by the Planning Agreement**

The Planning Agreement:

- (a) promotes the orderly and economic use and development of the Land to which the Planning Agreement applies;
- (b) facilitates the provision of community services and facilities; and
- (c) promotes increased opportunity for the public in environmental planning and assessment.

### **5.2 How the Planning Agreement promotes the public interest**

The Planning Agreement will promote the public interest by promoting the objects of the Act as set out in sections 5(a)(ii) and (v) and 5(c) of the Act.

### **5.3 For Planning Authorities:**

***Development Corporations – How the Planning Agreement promotes statutory responsibilities***

Not Applicable.

***Other Public Authorities – How the draft Planning Agreement promotes the objects (if any) of the act under which it is constituted***

Not Applicable.

***Councils – How the Draft Planning Agreement promotes the elements of the Council's charter***

The Planning Agreement promotes Council's charter under section 8 of the Local Government Act 1993 as it provides adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively.

***All Planning Authorities – Whether the Draft Planning Agreement Conforms with the Authority's Capital Works Program***

The public purpose, being the proposed intersection confirms with the Council's Capital Works Program.

### **5.4 Certain requirements of the Planning Agreement to be complied with before issue of an Occupation Certificate for the Development**

The Monetary Contribution is to be paid prior to issue of an Occupation Certificate for the Development.

## Execution

**Executed** as a deed.

### Council

Executed by Bayside Council by its )  
authorised delegate in the presence of: )  
)



Signature of Witness

HEATHER JOHNSON

Name of Witness (print)



Signature of Officer

MEREDITH WALLACE

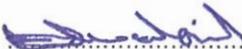
Name of Officer (print)

GENERAL MANAGER

Position of Officer (print)

### Developer

Executed by Gunlake Concrete Pty )  
Limited (ACN 36 162 907 575) in )  
accordance with section 127(1)  
Corporations Act 2001 (Cth):



Company Secretary/Director

Edward O'Neil

Name of Company Secretary/Director  
(print)



Director

SIMON O'NEIL

Name of Director (print)