

PLANNING AGREEMENT

BYRON SHIRE COUNCIL
(Council)

And

GULGAN ROAD PROPERTY PTY LTD
(Developer)

PLANNING AGREEMENT

Parties

BYRON SHIRE COUNCIL of 70 Station Street, Mullumbimby
NSW 2482

(Council)

And

GULGAN ROAD PROPERTY PTY LTD (ACN 649 167 555) of C/-
CCS Partners, G 154 Elizabeth Street, Sydney NSW 2000

(Developer)

Background

- A. The Developer has made an application to Council for the Instrument Change for the purpose of making a Development Application to Council for Development Consent to carry out the Development on the Land.
- B. The Developer has made an offer to enter into this Agreement to make the Development Contributions if the Instrument Change is made and the Development Consent is granted to the Development Application the Developer proposes to make.

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 7.1 of Part 7 of the Act.

2. Operation and Application of this Agreement

- 2.1. This Agreement:

- (a) commences when the Development Consent is issued; and
- (b) applies to the carrying out of the Development on the Land.

3. Definitions and interpretation

- 3.1. In this Agreement the following definitions apply:

- (a) **Act** means the *Environmental Planning and Assessment Act 1979* (NSW).
- (b) **Compliance Certificate** means a compliance certificate within the meaning of section 6.4 of the Act.
- (c) **Construction Certificate** means a construction certificate within the meaning of section 6.4 of the Act.
- (d) **Development** means the development and subdivision of the Land for industrial use.
- (e) **Development Application** means an application made under the Act for the Development.
- (f) **Development Consent** means a development consent issued under the Act for the Development in response to a Development Application.
- (g) **Development Contributions** means the provision of the following works at the cost of the Developer:
 - 1. Stage 1 Works;

2. Stage 2 Works; and
 3. Stage 3 Works.
- (h) **Explanatory Note** means the explanatory note annexed to this Agreement at Schedule 4.
- (i) **First Defects Liability Period** means the period of 180 days on and from the date on which the Developer gives the Council a Compliance Certificate under clause 10 of this Agreement.
- (j) **GST** has the same meaning as in the GST Law.
- (k) **GST Law** has the meaning given to that term in *A New Tax System (Goods and Services) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.
- (l) **Instrument Change** means amendments to the Byron Local Environmental Plan 2014 to give effect to the Planning Proposal.
- (m) **Land** means part Lot 2 in Deposited Plan 1159910, known as 66 The Saddle Road, Brunswick Heads.
- (n) **Party** means a party to this agreement, including their successors and assigns.
- (o) **Planning Proposal** means the planning proposal concerning the Land with number PP 2021-7471.
- (p) **Public Purpose** means any purpose that benefits the public or a section of the public, including but not limited a purpose specified in section 7.4(2) of the Act.
- (q) **Rectification Certificate** means a compliance certificate within the meaning of section 6.4 of the Act to the effect that work the subject of a Rectification Notice has been completed in accordance with that notice.
- (r) **Rectification Notice** means a notice in writing that identifies a defect in a work and requires rectification of the defect within a specified period of time.
- (s) **Regulation** means the *Environmental Planning and Assessment Regulation 2021*.

- (t) **Second Defects Liability Period** means the period of 180 days on and from the date on which the Developer gives the Council a Rectification Certificate pursuant to clause 11 of this Agreement relating to a Rectification Notice given in the First Defects Liability Period.
- (u) **Stage 1** means the subdivision of the Land to create a separate super lot for the industrial zoned part of the Land (**Super Lot**).
- (v) **Stage 1 Works** means the construction of a Left in/Left out T-junction intersection of the Land and Gulgan Road, generally consistent with Option A in the Traffic Impact Study and the Stage 1 Works Plan and compliant with Austroads Guide to Road Design Part 4A – Unsignalised and signalized intersections.
- (w) **Stage 1 Works Plan** means the plan at Schedule 1.
- (x) **Stage 2** means the community title subdivision of the Super Lot (**Community Scheme**).
- (y) **Stage 2 Works** means the construction of a single lane roundabout at the ingress to the Land located on Gulgan Road, generally consistent with Option B in the Traffic Impact Study (excluding the southbound bypass lane) and the Stage 2 Works Plan and compliant with Austroads Guide to Road Design Part 4B – Roundabouts.
- (z) **Stage 2 Works Plan** means the plan at Schedule 2.
- (aa) **Stage 3** means the development of the most northern located development lot in the Community Scheme.
- (bb) **Stage 3 Works** means construction of a southbound Gulgan Road bypass lane to the roundabout intersection constructed in the Stage 2 Works, generally consistent with Option B in the Traffic Impact Study and the Stage 3 Works Plan and compliant with Austroads Guide to Road Design Part 3 – Geometric Design.
- (cc) **Stage 3 Works Plan** means the plan at Schedule 3.
- (dd) **Subdivision Certificate** means a subdivision certificate within the meaning of section 6.4 of the Act.

- (ee) **Subdivision Works Certificate** means a subdivision certificate within the meaning of section 6.4 of the Act.
- (ff) **Traffic Impact Study** means the Traffic Impact Study for Gulgan North, Brunswick Heads Document Number: J1143_TIS Revision G dated 13 January 2023 prepared by Ingen Consulting Pty Ltd.

1.1. 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 reenactment, 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) References 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 schedules and attachments form part of this Agreement.

2. Development Contributions to be made under this Agreement

2.1. The Developer must make the Development Contributions in accordance with this Agreement.

2.2. The Developer is not required to make the Development Contributions until the following:

- (a) Stage 1 Works: prior to the issue of a Subdivision Certificate for Stage 1.
- (b) Stage 2 Works: prior to the issue of a Subdivision Certificate for Stage 2.
- (c) Stage 3 Works: prior to the issue of a Construction Certificate or a Subdivision Works Certificate for Stage 3, whichever is issued first.

3. Application of the Development Contributions

3.1. The Council must apply any Development Contributions made under this Agreement towards the Public Purpose for which it is made and at the locations, in the manner and to the standards required by or under this Agreement.

3.2. The Parties agree that if the Development Contributions are

made in accordance with this Agreement then clause 3.1 is satisfied.

4. Application of s7.11 and s7.12 of the Act to the Development

- 4.1. This Agreement does not exclude the application of s7.11 of the Act to the Development.
- 4.2. This Agreement does not exclude the application of s7.12 of the Act to the Development.
- 4.3. The Development Contributions provided under this Agreement are to be taken into consideration in Council determining any development contributions relevant to the Development under sections 7.11 and 7.12 of the Act.

5. Registration of this Agreement

- 5.1. The Developer must arrange for this Agreement to be registered over the Land at its cost as soon as reasonably practicable after the date of the Instrument Change, and Council must promptly execute any instrument necessary for registration of this Deed after the Developer so requests.

6. Review of this Agreement

- 6.1. The Parties, acting in good faith and using their best endeavours, agree to review this Agreement if either Party is of the opinion that any change of circumstance has occurred that materially affects the operation of this Agreement.
- 6.2. For the purposes of clause 6.1, the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development.
- 6.3. A failure by a Party to agree to participate in, or to take action requested by the other Party as a consequence of, a review under clause 6.1 is taken to be a dispute for the purposes of clause 7.

7. Dispute Resolution

- 7.1. Should a dispute arise under this Agreement, the Parties shall firstly meet in an attempt to resolve the dispute.

- 7.2. If the dispute is not resolved within 28 days of the date that a Party first raises the issue about which there is a dispute, the Parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales that are current at the time the dispute is mediated, and must request the President of the Law Society, or the President's nominee, to select a mediator.
- 7.3. If the dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.

8. Carrying Out & Hand-over of Development Contribution

- 8.1. The Developer is to carry out and complete the Development Contribution in accordance with this Agreement.
- 8.2. If the Developer is required by this Agreement to make a Development Contribution comprising the carrying out of a work (**Work**), the Developer is to carry out and complete the Work in accordance with the requirements of this Deed and any other design standards and technical specifications reasonably specified by Council.
- 8.3. A Development Contribution comprising the carrying out of a Work is made for the purposes of this Agreement when the Council accepts the hand-over of the Work in accordance with this clause.
- 8.4. Subject to this Agreement, when the Developer considers that a Work is complete, the Developer is to give to the Council a Compliance Certificate relating to the Work.
- 8.5. Subject to Council's satisfaction that the Developer has complied with clauses 8.1, 8.2 and 8.4, Council is to accept the hand-over by the Developer of a Work that is the subject of a Compliance Certificate within 28 days of the date on which the Developer provides a copy of the Compliance Certificate to Council.
- 8.6. On hand-over of the Work, the Council accepts ownership, possession and control of the Work.

9. Rectification of Defects

- 9.1. During the First Defects Liability Period and the Second Defects Liability Period, the Council may give to the Developer a Rectification Notice, which the Developer must comply with at its own cost according to the terms of the Notice.
- 9.2. When the Developer considers that rectification is complete, the Developer may give to Council a Rectification Certificate relating to the Work the subject of the relevant Rectification Notice.
- 9.3. Subject to Council's reasonable satisfaction that the Developer has complied with a Rectification Notice, a Rectification Certificate discharges the Developer from any further obligation under this clause 9 .
- 9.4. If the Developer does not comply with a Rectification Notice, then Council may have the defect rectified and may recover its costs of so doing as a debt due in a court of competent jurisdiction.

10. Security and Enforcement

10.1. The following security provisions apply:

- (a) A Subdivision Certificate for Stage 1 must not be issued for the Development until the Developer has provided the Stage 1 Works pursuant to clause 8;
- (b) A Subdivision Certificate for Stage 2 must not be issued for the Development until the Developer has provided the Stage 2 Works pursuant to clause 8; and
- (c) A Construction Certificate and/or Subdivision Works Certificate for Stage 3 must not be issued for the Development until the Developer has provided the Stage 3 Works pursuant to clause 8.
- (d) For each certificate above, the Developer will not commence any appeal under the Act against a certificate's non-issue if the relevant Development Contribution has not been provided according to this Agreement.

- 10.2. The parties may enter into further written agreements and/or agree on the payment of security in substitution for the prohibition against issuing of certain certificates under clause 10.1.
- 10.3. Without limiting any other remedies available to the Parties, this Agreement may be enforced by either Party in any court of competent jurisdiction.
- 10.4. For the avoidance of doubt, nothing in this Agreement prevents:
- (a) 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,
 - (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; and
 - (b) Emailed to that Party at its email address set out below.

Council

Attention: The General Manager
Address: PO Box 219, Mullumbimby NSW 2482
Email: council@byron.nsw.gov.au

Developer

Attention: Abel East
Address: 44-45/1 Porter Street, Byron Bay NSW 2481
Email: abel@thecreativecapital.company

- 11.2. 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 or emailed to the latest address or email address.

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 email, at the time the email is sent provided that the sender does not subsequently receive a mail delivery error message; and
- (d) at the earliest time it is served, if it is served more than once.

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 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 obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

13. Assignment

13.1. The Developer cannot assign, transfer or otherwise encumber this Agreement without the prior written consent of Council, which may not be unreasonably withheld or delayed.

14. Costs

14.1. The costs of negotiating, preparing and executing this Agreement are to be borne by the Developer.

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 bylaw.

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 those 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 of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

20. Approvals and Consent

20.1. 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 obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

21. Representations and warranties

21.1. 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.

22. Severability

22.1. 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 this Agreement is not affected.

23. Modification

23.1. 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.

24. Waiver

24.1. 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.

25. GST

25.1. 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.

26. Explanatory Note Relating to this Agreement

26.1. Schedule 2 contains the Explanatory Note relating to this Agreement pursuant to section 205 of the Regulation.

26.2. Pursuant to section 205 of the Regulation, the Parties agree that the Explanatory Note in the Appendix is not to be used to assist in construing this Agreement.

Execution

Dated:

Executed as an Agreement:

EXECUTED for and on behalf of)
BYRON SHIRE COUNCIL)
by its authorised delegate:)

.....

.....
Signature of delegate

.....

.....
Name and Position of Delegate

EXECUTED by **GULGAN ROAD**)
PROPERTY PTY LTD (ACN 649) 167)
555 in)
accordance with section 127 of the
Corporations Act 2001:

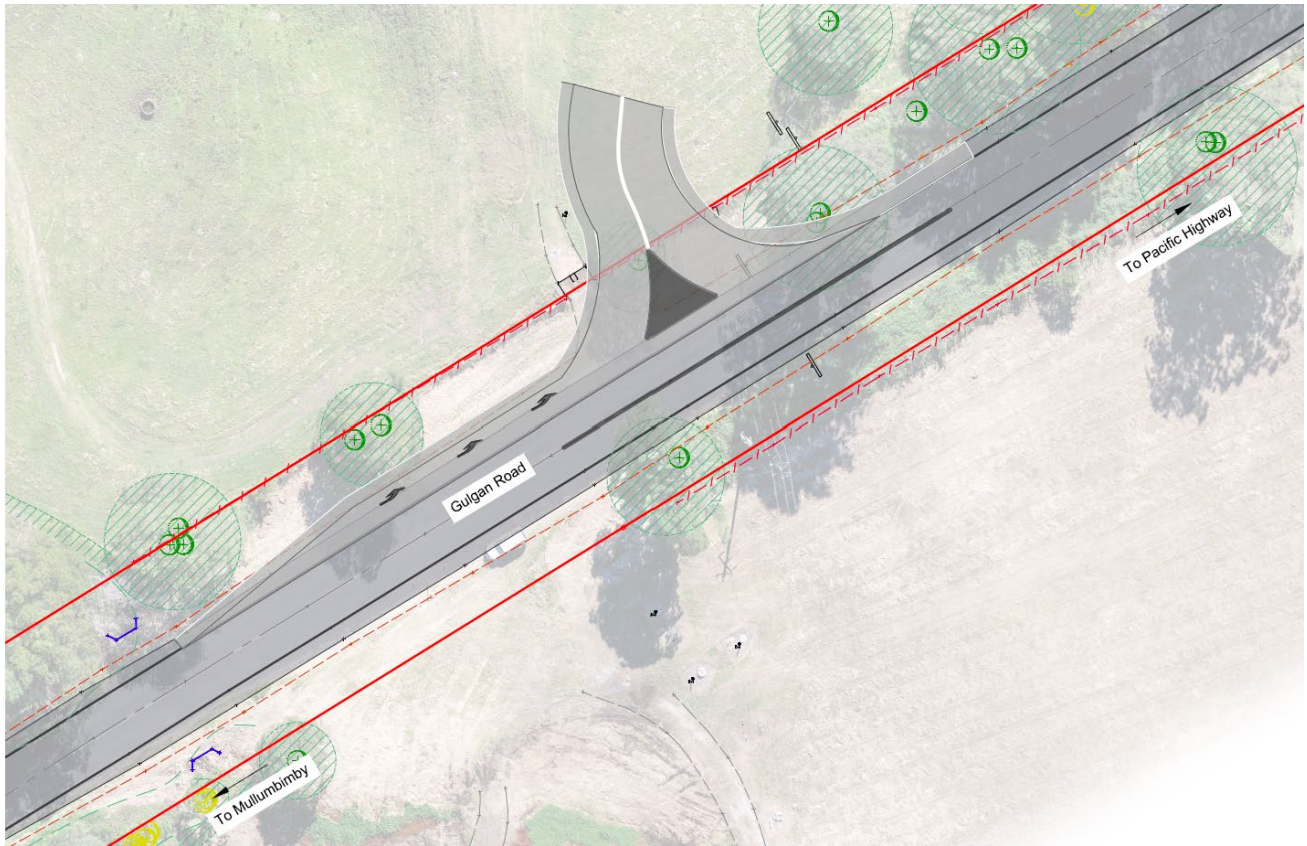
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Signature of Director/Secretary

Name:

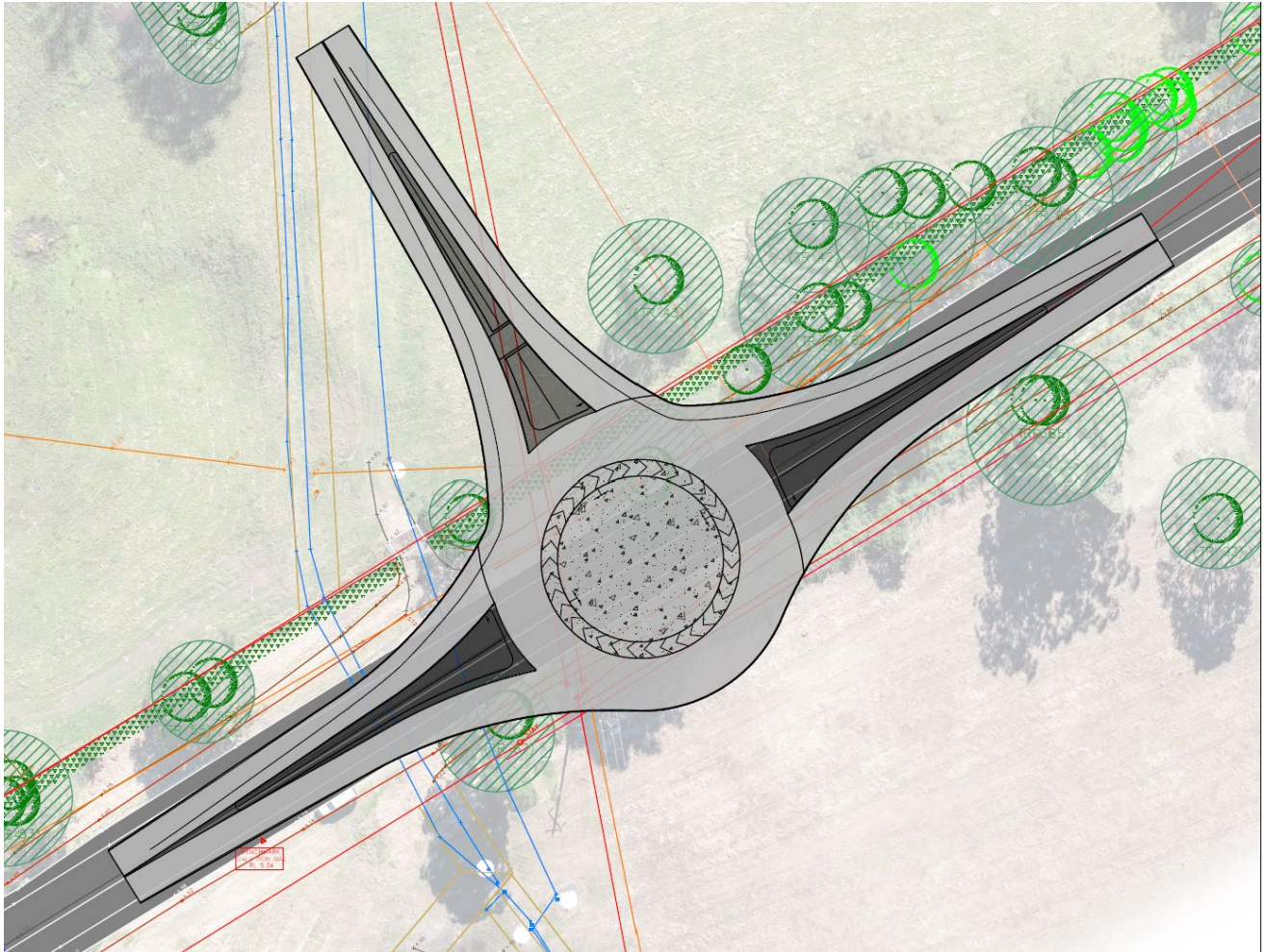
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Signature of Director

Name:

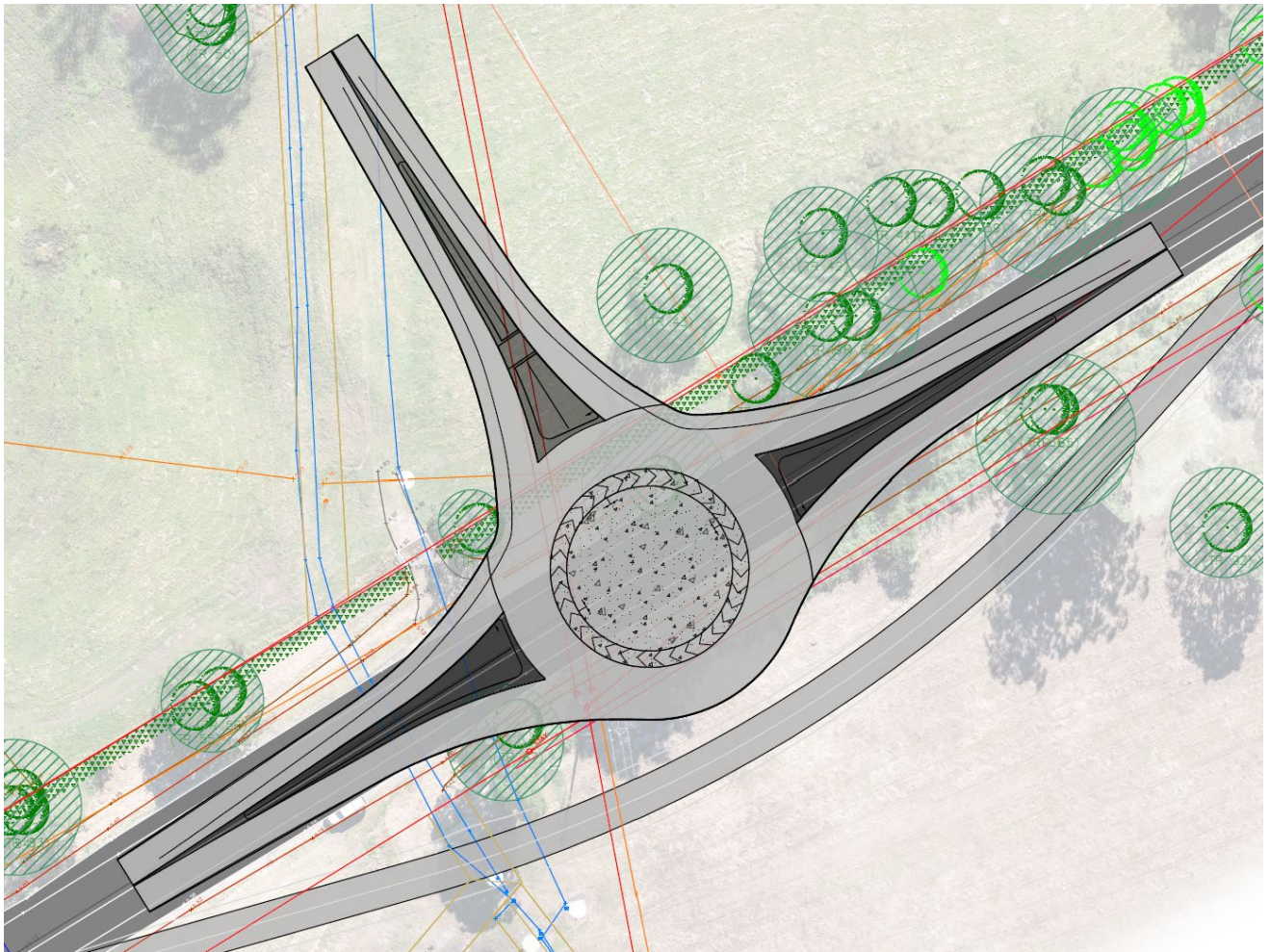
Schedule 1 – Stage 1 Works Plan



Schedule 2 – Stage 2 Works Plan



Schedule 3 – Stage 3 Works Plan



Schedule 4 – Explanatory Note

Pursuant to section 205 of the Environmental Planning and Assessment Regulation 2021

In accordance with the provisions of section 205 of the *Environmental Planning and Assessment Regulation 2021*, the following explanatory notes are provided in relation to the proposed planning agreement between GULGAN ROAD PROPERTY PTY LTD and Byron Shire Council.

1. How does the proposed planning agreement promote the public interest and one or more of the objects of the Act?

The proposed planning agreement is considered to be in the public interest because it will facilitate the provision of upgraded, safer and more accessible road and transport infrastructure to the community and road users.

2. How does the proposed planning agreement, promote one or more of the elements of the Council's charter under section 8 of the Local Government Act 1993?

The proposed planning agreement promotes Council's charter through the provision of public infrastructure that meets community needs (including long term needs) by the best value possible (being at the cost of the Developer) and reflects a diversity in modes of transport.

3. Identifying a planning purpose or purposes served by the proposed planning agreement, and an assessment of whether the agreement, provides for a reasonable means of achieving that purpose.

The planning purpose served by the proposed planning agreement is the provision of an upgraded, safe and function transport and road infrastructure for the benefit of the community and road users.

4. Identifying whether the proposed planning agreement, conforms with the planning authority's capital works program (if any)

Not applicable.

5. Statements on whether the agreement, amendment or revocation specifies that certain requirements of the

agreement must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued.

These statements are included in the body of this planning agreement.