



Our Ref
Your Ref

TF:CC:SERP-21058

22 January 2009

Mr Simon Wilkes
Executive Manager Planning
Shire of Serpentine Jarrahdale
6 Paterson Street
MUNDIJONG WA 6202



Stirling Law Chambers
220-222 Stirling Highway
Claremont WA 6010
Tel (08) 9383 3133
Fax (08) 9383 4935
Email: mcleods@mcleods.com.au

Denis McLeod (Counsel)
Neil Douglas
Fiona Grgich
David Nadebaum
Geoff Owen
Andrew Roberts
Craig Clarke
Peter Wittkuhn
Elisabeth Stevenson (Senior Associate)
David Nicholson (Associate)
Peter Gillett (Associate)

By post & email

Dear Mr Wilkes

Revised Developer Cost Contribution Deed

We refer to the meeting at our offices of 22 December 2009, between the Shire's officers, Brad Gleeson and Peter Varelis, the Shire's consultant Chris Donnelly and Trudi Firth of this office.

In preparation for a Council meeting, the Shire has sought further clarification from us in relation to the arrangements, both current and future, in relation to the Developer Cost Contribution agreements for the Byford Structure Plan.

Past Arrangements

We **enclose** an audit of all developer cost contribution agreements, prepared by us. There are a number of different variations within the agreements, but generally the agreements operate in the following way:

- (a) the Developer is required to pay to the Shire an Estimated Cost Contribution to the Shire;
- (b) the Developer's Actual Cost Contribution will be determined upon gazettal of the Scheme Amendment incorporating the final version of the Development Contribution Plan into the Shire's scheme (currently Scheme Amendment No. 151). Upon gazettal and determination of the Actual Cost Contribution:
 - (i) in the event the Estimated Cost Contribution is more than the Actual Cost Contribution, the Shire is required to refund the surplus to the Developer; or
 - (ii) in the event the Estimated Cost Contribution is less than the Actual Cost Contribution, the Developer is required to pay any shortfall amount to the Shire.

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- (c) The Developer has in the majority of agreements been required to provide some form of security to protect the Shire in the event the Developer defaults in the payment of any 'short fall amount'. Such security has taken the form of a higher estimated contribution, which includes a contingency amount, or for larger subdivisions involves a charge and caveat over remaining land.

We would suggest the Shire conduct a similar audit, to determine how much it has collected in comparison to how much the current estimated cost contributions are suggesting should have been collected. This process will be important for larger subdivisions, where the Developers still have a number of stages on foot.

Suggested New Arrangements

We **enclose** a copy of our letter dated 30 October 2009, **enclosing** a revised Developer Cost Contribution Agreement.

Smaller Subdivisions

The revised Agreement has been designed for smaller subdivisions that are completed within a single stage. In general, the revised Agreement looks at strengthening the requirements of the security for any potential shortfall amount, particularly given the continuing uncertainty as to what the cost contribution will ultimately be.

The reason for strengthening the security is that from a practical point of view, it will be easier for the Shire to refund or return additional monies or a bank guarantee, rather than having to seek the shortfall from the Developer in the future.

For the Shire's general information, the most common forms of security that could be utilised are:

- (a) Bank Guarantee: A bank guarantee is an indemnity letter in which the bank commits itself to pay a certain sum if a third party (namely the developer) fails to perform or if any other form of default occurs.

The advantage of a bank guarantee from the Shire's point of view, is that it is a very liquid form of security and will have limited administrative requirements upon the Shire. From a developer's perspective, the bank will generally require such guarantee to be fully secured by way of cash, property or shares equal to the value of the guarantee as security.

- (b) Performance Bond: A performance bond is a cash payment, securing performance. If the developer fails to pay any shortfall amount, the Shire can draw upon the bond.

The disadvantage of a bond is that it may impose additional administrative obligations upon the Shire in managing the bonds, as generally speaking the Shire will need to create trust accounts, at it is holding the money on trust and is not entitled to access to such sums, unless and until the Developer actually defaults in paying the shortfall amount.

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However, it would be possible for such a bond to be built into the payment of an estimated cost contribution (as was the case with some of the earlier deeds prepared for the Shire). For example, the deed could require the developer to pay a higher estimated cost contribution which specifically incorporates a certain percentage contingency. If security is provided in this form, the Shire will not be required to place the monies in a trust account and can utilise the monies (and any interest earned) immediately. Obviously, the Shire will need to take into account the fact that it may need to refund such additional amounts to subdividers upon gazettal of the Developer Contribution Plan.

- (c) Charge & Caveat: A legal agreement may contain a charge and caveat clause. A charge is an interest in land to secure payment of money or performance of an obligation. To protect the Shire's charge over the land, a caveat is also lodged to ensure the land is not on-sold or encumbered, without the Shire's consent.

We would be reluctant to suggest a charge and caveat as a form of security for smaller subdivisions, as a charge is not a liquid form of security, requires further action from the Shire, such as court action, to secure payment for any outstanding amount in the event of default by the developer.

At this stage, the revised Agreement we have prepared requires the Developer to provide to the Shire, in addition to an estimated cost contribution, a bank guarantee to protect the Shire in relation to any shortfall amount.

It would appear to us that any of the security options, save and except the charge and caveat, will be sufficient to protect the Shire's interests. The Shire may be minded to make a determination of the amount of security required, and leave it to the Shire's officers to determine the most appropriate type of security in the circumstances of the subdivision.

Level of Security

At this stage, the revised Deed requires the Developer to provide security to the Shire in the form of a bank guarantee up to certain percentage of the cost contribution amount. We would suggest the Shire require a very high percentage (perhaps as high as 100% of the estimated cost contribution amount) for the following reasons:

- (a) The continuing uncertainty as to the final contribution amount. It is our understanding that in the history of the Structure Plan, the cost contribution figures have varied from approximately \$4,015 per lot to \$18,000 per lot, and that the current figures are around \$6 - 8,000 per lot.
- (b) Our intent is to minimise any financial exposure to the Shire. If the Shire can be fully protected, the financial risk to the Shire in the administration of the Structure Plan will be minimal.
- (c) The current estimates are comparatively quite low, particularly in comparison to other local governments which have cost contributions in the vicinity of \$30,000 per lot,

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such that the additional amount may not necessarily be a massive burden on developers.

We act for a number of other local governments, and are aware of one local government which requires security of 50% of the cost contribution; however that local government estimated cost contributions are in the vicinity of \$30,000 per lot.

We would expect that a number of subdividers will be very reluctant, initially, to provide the Shire a high level of security. However, the Shire should bear in mind that the higher amount of security it collects, the less could be the financial risk to the Shire. An argument with developers before they develop is likely to be far more productive than an argument attempted after development when there is an ascertained shortfall in cost contributions.

Larger Subdivisions

With larger subdivisions the principles of the revised Agreement remain the same, but the Shire may consider using a charge and caveat as security for the following reasons:

- (a) There are a number of stages, so it is hoped by the time the subdivision is completed the Plan will be gazetted. In comparison, smaller subdivisions are completed in one stage.
- (b) There is substantial balance land over which the Shire's caveat can be lodged. The land is generally worth a substantial amount. The real benefit of the caveat over balance land, is that the Developer cannot proceed to the next stage of the subdivision without the Shire's co-operation. In comparison, with smaller subdivisions the land that may be offered for security would most probably be a homestead lot that the owners do not intend to sell or deal with in the near future; and
- (b) In larger subdivisions, the Developer generally undertakes a large number of shared common infrastructure works, and consequently may be entitled to a refund for such works. In comparison, subdividers in smaller subdivisions will generally not carry out any common infrastructure works.

Off-sets, Refunds and Credits

We would recommend that the Shire, as much as possible, resist paying any claims to Developers for pre-funded items of Common Infrastructure, as presumably the items of Common Infrastructure to be funded by the Structure Plan will not finally be determined until gazettal of the Development Contribution Plan. Payment of any claim prematurely, may jeopardize the equitable cost sharing arrangements of the Structure Plan and increase the complexity of administering the scheme for the Shire.

If the Shire elects to pay any claim to a Developer, we would strongly recommend that the terms and conditions of the claim be appropriately recorded in a deed to prevent the Developer from attempting to seek further or inappropriate monies from the Shire in the future.

For large items of common infrastructure that are critical to the Structure Plan, the Shire may be minded to require the Developer to enter into a pre-funding agreement prior to the Developer undertaking such works, as is contemplated by the Shire's Scheme. Such an agreement will provide the Shire with a degree of control over the works and importantly the cost of such works.

Refunding Amounts to Developers prior to Gazettal

We understand the Shire is contemplating refunding a portion of cost contribution amounts to a limited number of developers. The developers in questions are smaller developers, who have paid to the Shire sums under the much higher Worley Parsons' estimates.

As mentioned throughout this letter, the Shire is best protected if it continues to collect amounts and return additional payments once the actual cost contribution is determined. As the figures for the cost contribution have changed constantly throughout this process, we would recommend the Shire not refund any developer until such time as the scheme amendment has been gazetted.

However, if the Shire was minded to refund a portion of the estimated cost contribution paid by the developers we consider that this could be done within the parameters of the existing legal agreements, with a simple accompanying supplementary agreement. If the existing legal agreement contained an adjusting provision stating that if the estimated contribution is insufficient the developer would pay any shortfall, what would be required in such circumstances would be a simple document merely recording the fact that the Shire has provided a partial refund. However, if the agreement did not contain adjusting provisions, we would recommend that such clauses be inserted in addition to the acknowledgement of the refund.

Partial refunds to small scale developers would not affect the operation of legal agreements for larger-scale subdivisions, as the agreements operate independently from each other.

However, if the Shire refunded portions to smaller developers and there was ultimately a shortfall that could not be recovered from such developers, this would potentially impact the entire cost sharing arrangements for all other developers within the Structure Plan area.

If you have any queries in respect to the above, please contact Denis McLeod or Trudi Firth of this firm.

Yours faithfully



Contact:	Trudi Firth
Direct line:	9424 6206
Email:	tfirth@mcleods.com.au
Partner responsible:	Denis McLeod

Encl.