
Deed of Guarantee

Date

8 August 2017

Parties

Name

Coyne Anthony Graham ('**Guarantor**')

Notice details

Suite 14, 30 Tedder Avenue Main Beach Qld 4217

Name

Mid-Coast Council ABN 44 961 208 161 ('**Council**')

Notice details

Breese Parade, PO Box 450, Forster NSW 2428

Background

- A The *Developer* has, or will enter into, the *Deed* with *Council*.
- B At the request of *Council*, the *Guarantor* has agreed to provide a guarantee in favour of *Council* in relation to the due and punctual performance of the *Obligations* by the *Developer* on the terms and conditions of this deed.
- C The *Guarantor* considers that by providing this guarantee and indemnity there has been or will be a commercial benefit flowing to the *Guarantor*.

Agreed terms

1 DEFINED TERMS & INTERPRETATION

1.1 Defined terms

In this deed:

'*Activities*' has the same meaning as '*Activities*' in the *Deed*.

'*Abandonment*' means the *Developer* wholly or substantially abandons the *Activities*.

'*business day*' has the same meaning as in the *Deed*.

'*Deed*' means the deed entitled 'Development Agreement Mid-Coast Council - Forster Civic Precinct between *Council* and the *Developer* dated on or about 8 August 2017 in relation to the *Activities*.

'*Developer*' means Enyoc Pty Ltd as trustee for the Graham Dong Family Trust.

'*Insolvency Event*' has the same meaning as in the *Deed*.

'*Liability*' means any debt, obligation, cost, expense, loss, damage, compensation, charge or liability of any kind, including those that are prospective or contingent and those the amount of which is not ascertained or ascertainable.

'*Loss*' means any liability (including legal and other professional expenses) of any kind whatsoever and includes but is not limited to direct and indirect, consequential or special

damage, loss of profits, loss of use, loss of revenue, anticipated revenue, interest or other such claim arising from any cause whatsoever whether or not such loss, damage or claim is based on contract, statute, warranty, tort (including negligence), indemnity or otherwise.

'*Obligations*' means all the obligations and liabilities of the *Developer* to *Council* in respect of:

- (a) the Council Works;
- (b) the Council Works Lot;
- (c) the Developer Works Stage 1; and
- (d) that part of the *Activities* associated with the Council Works, the Developer Works Stage 1 or the Council Works Lot.

(whether liquidated or not, whether contingent or presently accrued due and whether relating to the payment of money or the performance or omission of any act or thing) that are now in existence, or may hereafter come into existence, pursuant to the *Deed*.

1.2 Interpretation

In this deed:

- (a) headings are for convenience only and do not affect the interpretation of this deed;
- (b) a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation;
- (c) a reference to any statute or to any statutory provision includes any statutory modification or re-enactment of it or any statutory provision substituted for it, and all ordinances, bylaws, regulations, rules and statutory instruments (however described) issued under it;
- (d) a reference to \$ or dollar is to Australian currency;
- (e) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every gender;
- (f) where the day on which or by which any act, matter or thing is to be done under this deed is not a *business day*, that act, matter or thing will be done on the next following *business day*; and
- (g) includes and cognate expressions indicate what is included without limiting what may be included.

1.3 Guarantor's warranty as to capacity

The *Guarantor* warrants that it enters this deed in its own right and not as a trustee or in any other representative capacity.

1.4 Consideration

Each party acknowledges to each other party that it enters into this deed and incurs obligations and gives rights under it for valuable consideration from the other party.

1.5 Reliance

The *Guarantor* acknowledges that:

- (a) *Council* has entered into the *Deed* in reliance on the representations and warranties in clause 4; and
- (b) it has not entered into this deed in reliance on any representation, warranty, promise or statement of *Council* or of any person on behalf of *Council*.

2 GUARANTEE AND INDEMNITY

2.1 Guarantee

- (a) The *Guarantor* irrevocably and unconditionally guarantees to *Council* the due and punctual performance by the *Developer* of all the *Obligations*.
- (b) Subject to clause 3.2, if the *Developer* does not perform an *Obligation*, the *Guarantor* must:
 - (i) perform that *Obligation*; or
 - (ii) procure the performance of that *Obligation*,

on demand from *Council*. A demand may be made by *Council* at any time and from time to time after failure by the *Developer* to perform any of its *Obligations* in accordance with the *Deed*.

2.2 Payment by the Guarantor

If the *Developer* does not pay any monetary *Obligation* when due, the *Guarantor* must within 2 *business days* of receipt of a written demand from *Council* pay that amount to, or as directed by, *Council*.

2.3 Indemnity

The *Guarantor* indemnifies *Council* against any *Loss* *Council* suffers or incurs:

- (a) if the *Developer* does not, or is unable to, perform an *Obligation* (including the payment of a monetary *Obligation*);
- (b) if an *Obligation* (including the payment of a monetary *Obligation*) is found to be unenforceable, invalid, illegal or void;
- (c) if an obligation the *Guarantor* would otherwise have under clauses 2.1 or 2.2 is found to be unenforceable, invalid, illegal or void;
- (d) as a result of an *Insolvency Event* in respect of the *Developer*; or
- (e) if the *Guarantor* is in breach of this deed,

in each case, for any reason and whether or not *Council* knew or ought to have known anything about those matters.

The *Guarantor* agrees to pay amounts under this indemnity within 2 *business days* of receipt of a written demand from *Council* to pay such amounts to *Council*.

3 LIABILITY OF THE GUARANTOR

3.1 No reduction or release

The *Liability* of the *Guarantor* and the rights of *Council* under this deed will not be affected by any act, omission, matter or thing that would otherwise operate in law or in equity to reduce or release the *Guarantor* from *Liability* under this deed.

Without limiting the generality of the foregoing, the *Guarantor's Liability* will not be affected by:

- (a) the granting by *Council* to the *Developer* of time, waiver, indulgence or concession or the making of any composition or compromise with the *Developer*;
- (b) *Council* forbearing to enforce or neglecting to exercise any right against the *Developer*;
- (c) any laches, acquiescence or other act, neglect, default, omission or mistake by *Council*;
- (d) any variation of any of the *Obligations* or of the *Deed*, made either with or without the knowledge of the *Guarantor*;
- (e) the loss or release of any security or any variation in the order of priorities relating to that security;
- (f) any failure by *Council* to disclose to the *Guarantor* any fact, circumstance or event relating to the *Developer* at any time before or during the currency of this deed;
- (g) the cessation of the obligations, in whole or in part, of any person under any document or agreement;
- (h) the liquidation of any person;
- (i) any arrangement, composition or compromise entered into by *Council* or any other person;
- (j) any document or agreement being in whole or in part illegal, void, voidable, avoided, unenforceable or otherwise of limited force or effect;
- (k) any extinguishment, failure, loss, release, discharge, *Abandonment*, impairment, compound, composition or compromise, in whole or in part of any agreement;
- (l) any security being given to *Council* by any person;
- (m) any moratorium or other suspension of any right of *Council*;
- (n) *Council* or any receiver or attorney exercising or enforcing, delaying or refraining from exercising or enforcing, or being not entitled or unable to exercise or enforce any right of *Council*;
- (o) *Council* obtaining a judgment against any person for the payment or performance of any of the *Obligations*;
- (p) any transaction, agreement or arrangement that may take place with *Council* or any other person;

- (q) any payment to *Council*, including any payment which at the payment date or at any time after the payment date is, in whole or in part, illegal, void, voidable, avoided or unenforceable;
- (r) any failure to give effective notice to any person of any default under the *Deed* or other document or agreement;
- (s) the acceptance of the repudiation of, or termination of the *Deed*; or
- (t) any assignment, novation or other dealing with, any rights or obligations under the *Deed*.

3.2 Reinstatement of rights

If a claim is made that all or part of a payment, obligation, settlement, transaction, conveyance or transfer in satisfaction of an *Obligation* is void or voidable:

- (a) under any law relating to liquidation, administration, insolvency or the protection of creditors; or
- (b) for any other reason,

provided the *Guarantor* is liable under this deed in respect of the *Obligation* and the claim is upheld by a court of law, conceded or compromised, then:

- (c) *Council* is entitled immediately as against the *Guarantor* to the rights in respect of the *Obligation* to which it would have been entitled if all or that part of that payment, obligation, settlement, transaction, conveyance or transfer had not taken place; and
- (d) the *Guarantor* must immediately take all action and sign all documents reasonably required by *Council* to restore to *Council* the benefit of the *Liability* of the *Guarantor* under this deed in place immediately before the payment or transaction.

3.3 Continuing obligations

- (a) The guarantee and indemnity contained in this deed are continuing obligations of the *Guarantor* and remain in full force and effect until all:
 - (i) the obligations owing to *Council* under this deed, contingently or otherwise, have been performed in full; and
 - (ii) the monetary obligations and all other moneys owing to *Council* under this deed, contingently or otherwise, have been paid in full.
- (b) *Council's* rights under this deed are additional to and do not merge with or affect and are not affected by any other obligation of the *Guarantor* to *Council*, despite any rule of law or equity or any statutory provision to the contrary.

3.4 Independent obligation

The guarantee in clause 2.1, the undertaking to pay in clause 2.2 and the indemnity in clause 2.3 contained in this deed are separate and independent obligations of the *Guarantor* and neither limits the generality of the other.

3.5 Immediate recourse

The *Guarantor* waives any right it may have to require *Council* to proceed against, or enforce any other rights or security or claim payment from, any other person before claiming from the *Guarantor* under this deed. This waiver applies irrespective of any law or any provision of the *Deed* to the contrary.

4 REPRESENTATIONS AND WARRANTIES

The *Guarantor* represents and warrants that:

- (a) this deed constitutes a valid and legally binding obligation of it in accordance with its terms;
- (b) the execution, delivery and performance of this deed does not violate any law applying to it or any agreement or instrument binding on it or any of its property;
- (c) it has the power to enter into this deed and to authorise its execution and delivery and the performance of its obligations under it;
- (d) it is a corporation as that expression is defined in the *Corporations Act* and validly existing under that Act;
- (e) it is solvent and no *Insolvency Event* has occurred in respect of it; and
- (f) all information provided to *Council* by or on behalf of the *Guarantor* and all representations made in this deed are true and correct in all material respects and are not, whether by omission of information or otherwise, misleading.

The *Guarantor* will be taken to have repeated the representations and warranties in this clause 4 on each day during the term of this deed.

5 DEFENCES AND CROSS CLAIMS AVAILABLE TO GUARANTOR

Notwithstanding any other provision of this deed, the aggregate liability of the *Guarantor* under this deed will not exceed the aggregate liability of the *Developer* under the *Deed* (including any liability which would have been due if the *Deed* or the liability was enforceable, valid and not illegal).

6 NOT USED

7 COSTS AND EXPENSES

- (a) The *Guarantor* must pay all taxes, duties, fees, costs and expenses in relation to the delivery, stamping, registration and discharge of this deed.
- (b) The *Guarantor* must on demand reimburse *Council* for all expenses (including legal costs and disbursements on a solicitor/own client basis) incurred by *Council* in connection with the enforcement, attempted enforcement or preservation of any rights under this deed.
- (c) The *Guarantor* will be solely responsible for the payment of any and all taxes imposed by the government of any jurisdiction with respect to or by reason of the receipt or derivation of any and all actual or constructive payments to it under this deed, including any retrospective assessments or taxes that may be made at any time during or after the term of this deed by any duly constituted revenue authority.
- (d) All payments under this deed will be made without any deduction or withholding for or on account of any *Tax* except to the extent, if any, that such deduction or

withholding is required by any applicable law, including any practical application thereof by any relevant revenue authority.

- (e) Where the *Guarantor* is so required to make such a deduction or withholding with respect to any payment to *Council* under this deed, the *Guarantor* will:
 - (i) notify *Council* of such requirement;
 - (ii) pay to the relevant revenue authority the full amount required to be deducted or withheld in accordance with the applicable law as applied; and
 - (iii) provide *Council* with an official receipt or certification or other documentation reasonably acceptable to *Council*, evidencing such payment.
- (f) In this clause 7 'Tax' means withholding or other tax imposed pursuant to the *Income Tax Assessment Act 1936* (Cth), the *Income Tax Assessment Act 1997* (Cth), the *Taxation Administration Act 1953* (Cth), the rating Acts and other applicable tax legislation, regulations and delegated legislation (including interest, penalties, fines or charges with respect thereto).

7.1 Legal advice

The *Guarantor* acknowledges that before executing this deed the *Guarantor*:

- (a) was advised by *Council* to consult and receive advice as to the purport, effect and consequences of and obligations created by this deed from a solicitor or barrister independent of *Council*; and
- (b) was aware of and fully understood the purport, effect and consequences of and the obligations created by this deed.

8 MISCELLANEOUS

8.1 Severance

Any provision of this deed which is illegal, void or unenforceable will be ineffective to the extent only of that illegality, voidness or unenforceability without invalidating the remaining provisions of this deed.

8.2 Notices

All notices and other communications to a party in connection with this deed may be made by delivering or posting the notice or communication to the address of the party or sent by facsimile to the facsimile number of the party, as notified to the other party from time to time.

8.3 Waivers

- (a) Waiver of any right arising from a breach of this deed or of any power arising upon default under this deed must be in writing and signed by the party granting the waiver.
- (b) A failure or delay in exercise, or partial exercise, of:
 - (i) a right arising from a breach of this deed; or
 - (ii) a right, power, authority, discretion, or remedy created or arising upon default under this deed,does not result in a waiver of that right, power, authority, discretion, or remedy.

- (c) A party is not entitled to rely on a delay in the exercise or non-exercise of a right, power, authority, discretion, or remedy arising from a breach of this deed or on a default under this deed as constituting a waiver of that right, power, authority, discretion, or remedy.
- (d) A party may not rely on any conduct of another party as a defence to the exercise of a right, power, authority, discretion, or remedy by that other party.
- (e) This clause may not itself be waived except by writing.

8.4 Variation

A variation of any provision of this deed must be in writing and signed by the parties.

8.5 Further assurances

Each party must do all things and execute all further documents necessary to give full effect to this deed.

8.6 Entire agreement

This deed supersedes all previous agreements in respect of its subject matter and embodies the entire agreement between the parties.

8.7 To the extent not excluded by law

The rights, duties and remedies granted or imposed under this deed operate to the extent not excluded by law.

8.8 Information

The *Guarantor* agrees to, promptly after request by *Council*, provide any financial and other information in relation to the *Guarantor* reasonably requested by *Council*.

8.9 Government Information

The *Guarantor* acknowledges and agrees that *Council* may disclose this deed (and information concerning the terms of this deed) under or in accordance with any law, including the *Government Information (Public Access) Act 2009* (NSW).

9 GOVERNING LAW AND JURISDICTION

9.1 Governing law

This deed is governed by and will be construed according to the laws of New South Wales, Australia.

9.2 Jurisdiction

- (a) Each party irrevocably submits to the non-exclusive jurisdiction of the courts of New South Wales, Australia, and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought at any time relating in any way to this deed.
- (b) Each party irrevocably waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any

proceedings have been brought in an inconvenient forum, where that venue falls within paragraph (a) of this subclause 9.2.

10 COUNTERPARTS

This deed may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes an original of this deed, all of which together constitute one agreement.

11 ASSIGNMENT

11.1 Assignment/novation by Council

Council may novate, assign or charge its rights under this deed without the prior written consent of the *Guarantor* to any person.

11.2 No assignment by the Guarantor

The *Guarantor* may not assign any of its rights under this deed without the prior written consent of *Council*. *Council* may withhold consent in its absolute discretion.

EXECUTED as a deed

EXECUTED by MID-COAST COUNCIL)
The seal of Mid-Coast Council was)
hereunto affixed in the presence of the)
following authorised officers of the)
Council pursuant to a Council)
Resolution passed at the Ordinary)
Meeting held on 26 July 2017)

.....)
Signature of John Turner, Administrator)

.....)
Signature of Glenn Handford, General)
Manager)

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Signature of witness

Name of witness (block letters)


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