

**TITLE: [ES] Deed of Agreement with Twin Towns Services Club - Drainage Easement at Club Banora**

**ORIGIN:**

**Design**

**FILE NO: DA3035/140 Pt 4**

**SUMMARY OF REPORT:**

Council has conducted protracted negotiations, over a period of approximately 2 years, with Twin Towns Services Club to create a Drainage Easement in Council's favour over the moat at Club Banora.

It was necessary to create the Easement in Council's favour to enable Council to maintain the moat, as part of the Banora Point Western Drainage Scheme, as the moat carries a great part of the stormwater run off from the surrounding residential areas. Council would not accept the maintenance of the moat, initially, as it was created to protect the Club's land and until an Easement was created, Council had no right of entry to maintain it.

The Plan of Management for the Drainage Scheme was approved by Council in late 2003. The Plan of Management provides for the maintenance of the moat as it forms part of the Scheme for western Banora Point.

A Deed of Agreement has been drawn whereby Council will maintain the moat following the creation of the Easement. A plan to create the Easement has been drawn. It is now necessary to resolve to agree to enter into the Agreement and to sign all necessary documentation under the Common Seal.

**RECOMMENDATION:**

That Council :

1. Enters into a Deed of Agreement with Twin Towns Services Club whereby Council will accept maintenance of the moat at Club Banora at Banora Point and the Club will grant Council an Easement for Drainage as part of the Western Banora Point Drainage Scheme;
2. Executes all necessary documentation under the Common Seal of Council.

**REPORT:**

Council has conducted protracted negotiations, over a period of approximately 2 years, with Twin Towns Services Club to create a Drainage Easement in Council's favour over the moat at Club Banora.

It was necessary to create the Easement in Council's favour to enable Council to maintain the moat, as part of the Banora Point Western Drainage Scheme, as the moat carries a great part of the stormwater run off from the surrounding residential areas. Council would not accept the maintenance of the moat, initially, as it was created to protect the Club's land and until an Easement was created, Council had no right of entry to maintain it.

The Plan of Management for the Drainage Scheme was approved by Council in late 2003. The Management Plan details the maintenance regime for all stormwater within the western Banora Point area and also provides for the maintenance of the moat as it forms part of the Scheme.

A Deed of Agreement has been drawn whereby Council will be obliged to maintain the moat following the creation of the Easement. A plan to create the Easement has been drawn. It is now necessary to resolve to agree to enter into the Agreement with the Club and to sign all necessary documentation under the Common Seal.

A plan showing the proposed Easement follows:-

## DEED OF AGREEMENT

This Deed made the            day of            2004.

**BETWEEN:** TWIN TOWNS SERVICES CLUB LIMITED ABN 61 001 042 833 of Wharf Street Tweed Heads in the State of New South Wales (hereinafter referred to as "the Club") of the One Part.

**AND:** TWEED SHIRE COUNCIL of Tumbulgum Road, Murwillumbah in the State of New South Wales (hereinafter referred to as "Council") of the Other Part.

### **RECITALS**

- A. The Club is the owner of the Land.
- B. Council has requested that the Club grant the Easement.
- C. The Club has agreed to grant the Easement provided Council assumes the Obligations.
- D. The Club and Council wish to record in this Deed their agreement concerning granting of the Easement by the Club and assumption of the Obligations by Council.

### **OPERATIVE PROVISIONS**

#### **1. DEFINITIONS AND INTERPRETATION**

**1.1** In this Deed unless the contrary intention appears:

"**Canal**" means the canal on the Land the approximate location of which is shown on the Plan.

"**Deed**" means this Deed of Agreement.

"**Easement**" means the easement referred to in the Instrument.

"**Instrument**" means an instrument pursuant to Section 88B of the Conveyancing Act in the form of that comprising Schedule One to this Deed.

"**Land**" means Lot 2 in Deposited Plan 1040576.

"**Management Plan**" means the Banora Point Western Drainage Operational Management Plan 2003.

"**Obligations**" means each of the obligations referred to in clause 2 of this Deed.

"**Permanent Barrier**" means the permanent barrier which has been installed by Council in the position indicated on the Plan and which

keeps separate the Eastern Drainage System and the Western Drainage System.

**"Plan"** means the plan comprising Schedule Two to this Deed.

**"Registration"** means registration as a dealing at the Land and Property Information Office.

**"Salt Water"** means water the salinity level of which exceeds 600 parts per million.

**"Banora Point West Drainage Scheme – Operational Management Plan 2003"** means the plan of management adopted by Council in respect of the Drainage Scheme, a copy of which in the form existing at the date of this Deed comprises Schedule Three to this Deed.

**"Banora Point West Drainage Scheme"** means the network of open stormwater drains servicing Banora Point West which is described in the Banora Point Western Drainage Operational Management Plan 2001.

- 1.2 A reference to a person includes a reference to a Body Corporate.
- 1.3 Words in the singular include the plural and words in the plural include the singular.
- 1.4 Words importing one gender include all genders.
- 1.5 Any reference in this Deed to any statute or regulation includes all amendments and revisions made from time to time to that statute or regulation.
- 1.6 Any note appearing as a heading in this Deed has been inserted for convenience of reference only.
- 1.7 Where any party comprises more than one person the agreements entered into by that party are entered into jointly and severally by the person comprising that party.

## 2. THE OBLIGATIONS

2.1(a) Council acknowledges that the Club uses fresh water from the Canal to irrigate the Land and that the Club will have no practical or viable means by which to irrigate the Land if Salt Water intrudes into the Canal.

(b) Council must not, whether by act or omission, do anything which results in, or which can reasonably be expected to result in, the intrusion of Salt Water into the Canal.

(c) Council must not, whether by act or omission, do anything which results in, or which can reasonably be expected to result in, the fresh water being prevented from entering the Canal.

**2.2(a)** Council acknowledges that the Permanent Barrier plays an important role in preventing the intrusion of Salt Water into the Canal.

**(b)** Council agrees not to remove or alter the Permanent Barrier.

**(c)** Council agrees to maintain the Permanent Barrier and keep it in a good and proper state of condition and repair.

**2.3(a)** Council must not repeal the Management Plan.

**2.4** Council must not, whether by act or omission do anything, which will result in, or can reasonably be expected to result in, Council being no longer responsible for any of the Obligations.

**2.5** The Club acknowledges that any salt derived from ground water sources as a result of irrigation practices by the Club within Lot 2 DP 1040576 will not be the responsibility of Council, nor will Council accept any liability for damages as a result of the existence of salt derived from ground water used for irrigation purposes.

### **3. GRANT OF EASEMENT**

**3.1** The Club must grant in favour of Council the Easement within 28 days from the date of this agreement.

**3.2** The Club shall, as soon as practicable after being requested by Council so to do sign and return to Council a copy of the Plan (in a form capable of Registration) and the Instrument. Council shall then attend to registration of the Plan and Instrument.

**3.3** The Club shall, as soon as practicable after being requested by Council so to do, produce the Certificate of Title to the Land at the Land and Property Information Office so as to permit registration of the Plan and the Instrument.

**3.4** The Club shall not mortgage charge lease or otherwise encumber its interest in the Land or consolidate the Land with any other land until Registration of the Plan and the Instrument has taken place.

### **4. PROPER LAW**

The proper law of this Deed will be the laws in force in the State of New South Wales and the parties by their execution of this Deed agree to submit to the jurisdiction of the courts of Australia.

### **5. STATUTORY RIGHTS NOT AFFECTED**

Nothing contained in this Deed or done pursuant to its terms shall in any way affect any statutory duty power or function of their party.

**6. SEVERABILITY**

Council and the Club agree that each obligation under or pursuant to this Deed is a separate and independent obligation and if any provision of this Deed or its application to any party person or circumstance is or becomes invalid void voidable or otherwise unenforceable for any reason whatsoever then:

- (a) the provision or its application to such party person or circumstance shall be severable from this Deed;
- (b) the remainder of this Deed or the application of such provision to such other parties persons or circumstances shall not be affected thereby;
- (c) the provision may be replaced with a valid and enforceable provision which so far as possible achieved the same purpose or effect as the invalid void or otherwise unenforceable provision was intended to achieve provided that in so doing the basic purpose and intend of this Deed is preserved.

**7. COSTS**

- 7.1** The cost of preparing and of Registration of any document which, pursuant to a provision of this Deed, a party is required to register shall be borne by that party.
- 7.2** Subject to 7.1, the Club and Council shall be responsible for payment of their own legal fees costs charges and expenses incurred in the preparation and execution of this Deed or any disbursements created pursuant to or contemplated by this Deed.

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**SCHEDULE ONE**

THE INSTRUMENT

**INSTRUMENT SETTING OUT TERMS OF EASEMENTS AND RESTRICTIONS AS  
TO USER INTENDED TO BE CREATED PURSUANT TO SECTION 88B OF THE  
CONVEYANCING ACT 1919-1964**

Sheet 1 of 3 sheets

Plan: DP Subdivision covered by Council Clerk's Certificate No.

**PART 1**

Full Name and Address of  
Proprietor of the Land:

**TWIN TOWNS SERVICES CLUB  
LIMITED (ABN 61 001 042 833) of 1  
Wharf Street, Tweed Heads. NSW. 2485**

1. Identify of Easement Firstly  
referred to in the abovementioned Plan: Easement for drainage of water  
variable width

**Schedule of Lots, etc. Affected**

Lots Burdened

Authority Benefited

Lot in DP

Tweed Shire Council

**PART 2**

1. **TERMS OF EASEMENT FOR DRAINAGE OF WATER FIRSTLY REFERRED TO  
IN THE ABOVEMENTIONED PLAN**

1. The authority benefited may:
  - (a) drain fresh water (but not salt water) from any natural source through the lot burdened, but only within the site of this easement; and
  - (b) do anything reasonably necessary for that purpose, including:
    - entering the lot burdened;
    - taking anything on to the lot burdened;
    - using the existing channel; and
    - carrying out work, such as repairing or maintaining the existing channel and equipment, but not do undertake any works which will reduce the volumetric water storage capacity of the channel.
2. In exercising those powers, the authority benefited must:
  - (a) ensure all work is done properly;
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened;
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it;



**INSTRUMENT SETTING OUT TERMS OF EASEMENTS AND RESTRICTIONS AS TO  
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Sheet 2 of 3 sheets

Plan: DP                      Subdivision covered by Council Clerk's Certificate No.

- (d) restore the lot burdened as nearly as is practicable to its former condition;
  - (e) make good any collateral damage
  - (f) not, whether by act or omission, do anything which results in, or which can reasonably be expected to result in, the intrusion of salt water into the existing channel;
  - (g) not, whether by act or omission, do anything which results in, or which can reasonably be expected to result in, fresh water being prevented from entering the existing channel;
  - (h) not remove or alter the permanent barrier indicated on the plan; and
  - (i) maintain the permanent barrier in the position indicated on the plan in a good and proper state of condition and repair.
3. (a) The authority benefited must not, whether by act or omission, do anything which will result in, or which can reasonably be expected to result in, the Banora Point Western Drainage Operational Management Plan 2003 ("the Management Plan") being amended or altered in such a way that:
- (i) the lot burdened is no longer incorporated within the Management Plan;
  - (ii) the authority benefited ceases to be obliged to maintain the existing channel to a standard not less than that of all other parts of the Management Plan; and
  - (iii) the owner of the lot burdened ceases to be permitted to periodically remove silt from the existing channel to the extent necessary to maintain a minimum depth of water at all positions through that channel of 1.5 metres, provided it is in accordance with any current Management Plan adopted by the Tweed Shire Council.
- (b) The authority benefited must not at any time replace the Management Plan with another plan of management in substitution for the Management Plan unless that other plan contains provisions which ensure that:
- (i) the lot burdened is incorporated within it;
  - (ii) the authority benefited is obliged to maintain the existing channel to no less a standard than that of all other land within it; and
  - (iii) the owner of the lot burdened is permitted to periodically remove silt from the existing channel to the extent necessary to maintain a minimum depth of water at all positions through it of 1.5 meters.
- (c) The authority benefited must not repeal the Management Plan.

**INSTRUMENT SETTING OUT TERMS OF EASEMENTS AND RESTRICTIONS AS TO  
USER INTENDED TO BE CREATED PURSUANT TO SECTION 88B OF THE  
CONVEYANCING ACT 1919-1964**

Sheet 3 of 3 sheets

Plan: DP                      Subdivision covered by Council Clerk's Certificate No.

2. **NAME OF PERSON AUTHORISED TO RELEASE, VARY OR MODIFY THE  
EASEMENT FIRSTLY REFERRED TO IN THE ABOVEMENTIONED PLAN**

The owner of the lot burdened and the authority benefited, jointly.

DATED at    this    day of    2004.

THE COMMON SEAL of **TWEED SHIRE COUNCIL**                      )  
was hereunto affixed in accordance with a                      )  
resolution passed at a meeting held on                      )  
in the presence of:                      )

.....

THE COMMON SEAL of **TWIN TOWNS SERVICES)  
CLUB LIMITED (ABN 61 001 042 833)** was                      )  
affixed hereto in accordance with its                      )  
Memorandum of Articles of Association in the                      )  
presence of:                      )



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**SCHEDULE TWO**

THE PLAN



IN WITNESS whereof the parties have hereunto set their hands and seals on the day and year first hereinbefore written.

THE COMMON SEAL OF  
**TWEED SHIRE COUNCIL** was  
affixed on the  
day of  
2004 in the presence of:

.....

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THE COMMON SEAL OF  
**TWIN TOWNS SERVICES CLUB** was  
affixed on the  
day of  
2004 in the presence of:



.....

**LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:**

Nil.

**POLICY IMPLICATIONS:**

Nil.

**UNDER SEPARATE COVER:**

Nil.

