

**AL369898S**



FORM 18 Section 181

**APPLICATION BY A RESPONSIBLE AUTHORITY FOR THE  
MAKING OF A RECORDING OF AN AGREEMENT**

**Planning and Environment Act 1987**

Lodged by:

Name: South Gippsland Shire Council

Phone: 03 5662 9236

Address: DX 94026

Ref:

Customer Code: 9887 Y.

The Authority having made an agreement referred to in section 181(1) of the Planning and Environment Act 1987 requires a recording to be made in the Register for the land.

Land: Certificate of title Volume 9472 Folio 481, Volume 9472 Folio 482 and Volume 9470 Folio 493

Authority: *South Gippsland Shire Council  
9 Smith St, Leongatha, Victoria, 3953*

Section and Act under which agreement made:  
*S 173 of Planning and Environment Act 1987*

A copy of the Agreement is attached to this Application.

Signature for the Authority:

Name of Officer: Ken Griffiths

Signature:



Date: 15 September 2014

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## **SECTION 173**

## **AGREEMENT**

**SOUTH GIPPSLAND SHIRE COUNCIL**  
(Council)

- and -

**FJ KURRELE** /  
(Owner)

**THIS AGREEMENT** is made on the

day of

2014

**PARTIES:**

**AL369898S**



1. **SOUTH GIPPSLAND SHIRE COUNCIL**  
Of 9 Smith Street, Leongatha in the State of Victoria ("Council"); and
2. **Franklin John Kurrle**  
Of 1 Lindsey Close, Inverloch VIC 3996 in the State of Victoria ("Owner").

**RECITALS:**

- A. The Council is the responsible authority under the South Gippsland Planning Scheme for the purposes of administering the provisions thereof;
- B. The Owner is the registered proprietor of the land known as the 'Kurrle land' Jumbunna Road, Korumburra in the said State being the land described as Certificate of Title Volume 9472 Folio 481, known as Lot 2 LP139824, Certificate of Title Volume 9472 Folio 482 known as Lot 4 LP135303 and Certificate of Title Volume 9470 Folio 493, known as Lot 2 LP139823.
- C. Amendment C52 to the Planning Scheme was authorized by the Minister for Planning on 12 January 2010 and varied on 22 January 2010 to correct a number of anomalies pursuant to Authorisation A01578, it was split into C52 Part 1 and C52 Part 2 on 18 December 2013 and affects land within the south west growth area of Korumburra and is proposed to be rezoned from Farming Zone to a General Residential Zone 1 and to introduce JUMBUNNA ROAD RESIDENTIAL AREA DPO7 (as amended from time to time) to the Development Plan Overlay ("DPO7") into the Planning Scheme and applies DPO7 over all of the land so rezoned;
- D. When Amendment C52 (Part 2) is approved, the Subject Land will be subject to the DPO7 under the Planning Scheme, which requires the preparation of a Development Plan with respect to the Subject Land to the satisfaction of the Council;
- E. The Owner intends to develop the Subject Land into Residential Lots in accordance with a future Development Plan;
- F. This Agreement is entered into between the Council and the Owner as provided for in Section 173 of the Act in order to facilitate the subdivision of the Subject Land and agree to the delivery of community and development infrastructure in a timely and efficient manner upon terms which require the landowner benefiting from such infrastructure to bear an appropriate part of the costs of such works; and
- G. This Agreement is also entered into between the Council and the Owner pursuant to section 173 of the Act in order to achieve and advance the objectives of planning in Victoria and the objectives of the Planning Scheme in respect of the Subject Land.

## OPERATIVE PART:



### 1. THE PARTIES AGREE AS FOLLOWS:

#### 1.1. Definitions

In this Agreement the words and expressions set out in this clause have the following meanings unless the context admits otherwise -

- 1.1.1. "Act" means the Planning and Environment Act 1987.
- 1.1.2. "Adjustment Index" means the Australian Bureau of Statistics Producer Price Index, Heavy and Civil Engineering Construction 3101 Road and Bridge Construction or any index substituted by the Bureau for the said index.
- 1.1.3. "Agreement" means this agreement and any agreement executed by the parties expressed to be supplemental to this Agreement;
- 1.1.4. "Attachment A" means the plan attached hereto and marked "Attachment A" which shows the area of land shaded which is land to which the Council will not contribute to the development.
- 1.1.5. "Attachment B" means the plan attached hereto and marked "Attachment B" which shows the area of land shaded which is the area within which all development contributions from this Agreement shall be expended, except where a new Korumburra kindergarten / childcare centre or Korumburra community centre is developed outside of the said shaded area.
- 1.1.6. "Council" means South Gippsland Shire Council as the Responsible Authority for the Planning Scheme and any subsequent person or body which is the Responsible Authority for the Planning Scheme;
- 1.1.7. "DPO7" means Schedule 7 to the Development Plan Overlay adopted by Council on 18 December 2013;
- 1.1.8. "Infrastructure Project" means an infrastructure project included in Council's Capital Works Program or in the Development Plan and in respect of which a Contribution is levied for that project for which Council will contribute;
- 1.1.9. "Mortgagee" means the person or persons registered or entitled from time to time to be registered by the Registrar of Titles as Mortgagee of the Subject Land or any part of it;
- 1.1.10. "Net Developable Area" is land within the Subject Land available for development which development includes lots, local roads and connector streets inclusive of both residential and commercial land but excludes land determined by the Council to be arterial roads, railway corridors, government schools, community facilities, and public open spaces.
- 1.1.11. "Owner" means the person or persons registered or entitled from time to time to be registered by the Registrar of Titles as proprietor or proprietors of an estate in

fee simple of the Subject Land or any part of it and includes a Mortgagee-in-possession;

- 1.1.12. "Party or parties" means the owner and Council under this Agreement as appropriate;
- 1.1.13. "Planning Scheme" means the South Gippsland Planning Scheme and any other planning scheme which applies to the Subject Land;
- 1.1.14. "Residential Lot" means a lot on a plan of subdivision intended for residential development and not exceeding 1,000 m<sup>2</sup> in size.
- 1.1.15. "Statement of Compliance" means a statement of compliance issued under the *Subdivision Act 1988*;
- 1.1.16. "Subject Land" means the land known as the Kurrle land Jumbunna Road, Korumburra being land described as Certificate of Title Volume 9472 Folio 481, known as Lot 2 LP139824, Certificate of Title Volume 9472 Folio 482 known as Lot 4 LP135303 and Certificate of Title Volume 9470 Folio 493, known as Lot 2 LP139823 and curtilage which Subject Land is the land shaded in "Attachment A" being land in respect of which Council is not required to contribute to development.

## 1.2. Interpretation

In the interpretation of this Agreement (including its recitals and any schedules) except to the extent that the context otherwise requires:

- 1.2.1. Words (including defined expressions) denoting the singular will be deemed to include the plural and vice versa.
- 1.2.2. Words (including defined expressions) denoting any gender will be deemed to include all other genders.
- 1.2.3. Words (including defined expressions) denoting persons will be deemed to include all trusts, bodies and associations, corporate or unincorporated, and vice versa.
- 1.2.4. References to a statute or statutory provision will be deemed to include any statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and any by laws, local laws, licences, statutory instruments, rules and regulations, orders, notices and directions, consents or permission made under it and any condition attaching to it.
- 1.2.5. Headings are included for convenience only and will not affect the interpretation of this Agreement or any schedule.
- 1.2.6. References to clauses, recitals and schedules are to clauses of, and recitals and schedules to, this Agreement.
- 1.2.7. References to the parties will include their transferees, heirs, assigns, and liquidators, executors and legal personal representatives as the case may be.





- 1.2.8. Reference to the Subject Land in this Agreement will include a reference to any lot created by the subdivision of the Subject Land or any part of it.
- 1.2.9. Reference to a document or agreement includes reference to that document or agreement as changed, novated or replaced from time to time.
- 1.2.10. Where a word or phrase is given a definite meaning in this Agreement a part of speech or other grammatical form for that word or phrase has a corresponding meaning.

**2. OWNER'S COVENANTS**

**Contributions**

2.1. The Owner covenants and agrees with the Council that:

2.1.1 The owner will undertake all development in accordance with any approved Development Plan at the Owner's cost within the boundary of the shaded area shown in "Attachment A". Where works are required to be undertaken on nearby properties (within the "Attachment B" shaded area) to facilitate development within the shaded area on "Attachment A" to meet the requirements of any Development Plan in accordance with the Infrastructure Design Manual all costs are to be borne by the landowner. Council will assist with facilitating cost sharing discussions but will have no obligation to otherwise contribute. Where works are required to be undertaken outside the boundary of the area shaded in the plan in "Attachment A", and are not required to facilitate development in the area shaded as determined by Council, Council will meet such costs to the extent provided in clause 5.1 herein.

2.1.2 Any lot created as part of a staged subdivision which has a land area of greater than 20,000 m<sup>2</sup> will not be subject to developer contributions until a plan to further subdivide the lot is certified in which case 2.1.3 will apply. Where a lot in a subdivision exceeds 1,000 m<sup>2</sup> but is less than 20,000 m<sup>2</sup> then the amount to be contributed per lot will, in the absence of agreement to the contrary, be based upon a calculation of \$80,000.00 per hectare apportioned pro rata to the size of the lot to be created. Such calculation shall be made by the Council. The base allocation for the Net Developable Area of \$80,000.00 per hectare shall be adjusted on the 1<sup>st</sup> of July in each year after the commencement of this Agreement on a compound basis in the same manner as provided for in Clause 2.1.4 herein.

2.1.3 Prior to the issue of a Statement of Compliance with respect to any new Residential Lot created on the Subject Land, the Owner will pay to Council to its satisfaction \$8,000 per Residential Lot or such other sum as calculated by Council in respect of lots exceeding 1,000 m<sup>2</sup> but less than 20,000 m<sup>2</sup> and which amount will be adjusted on 1 July in each year after the commencement of this Agreement on a compounding basis in the manner provided for in clause 2.1.4 herein.

2.1.4 The Contribution amounts in clauses 2.1.2 and 2.1.3 of this Agreement must be adjusted on a compound basis upwards on 1 July each year after the due



execution of this Agreement by reference to the Adjustment Index for the year to 1 July. Such adjustment shall be calculated by reference to the following formula

$$AC = C \times \frac{CPIB}{CPIA}$$

Where "AC" means adjusted contributions;  
C means contribution prior to adjustment;  
CPIB means the index number for the quarter immediately preceding the review date; and  
CPIA means the index number for the quarter preceding the most recent earlier review date or if there is no earlier review date, the quarter immediately preceding the execution of this Agreement.

Provided that if the adjustment index is discontinued or suspended then the calculations will be made using whatever index is substituted for it. If no other index is substituted for it the calculation made using the index or calculation which the President of the Australian Property Institute, Victorian division (acting as an expert and not as an arbitrator) determines is appropriate in the circumstances and which determination is binding upon both parties.

- 2.2. The Parties agree that should the Owner have paid to the Council the total amount of the Contributions as set out in clause 2.1.2 of this Agreement (as indexed) prior to the issue of the Statement of Compliance for the final stage of subdivision for the Subject Land, the parties agree that no further Contribution pursuant to this Agreement will be due to be paid by the Owner under this Agreement with respect to the development of the Subject Land unless the land is further subdivided in which case additional contributions will be required pursuant this Agreement.
- 2.3. Public Open Space contributions pursuant to Clause 52.01 of the South Gippsland Planning Scheme (or as amended from time to time) are not part of this Agreement and may be charged additionally to money payable by the Owner herein.

**3. WORKS IN LIEU OF DEVELOPMENT CONTRIBUTIONS**

- 3.1. The parties acknowledge and agree that:
  - 3.1.1 Provided Council in its absolute discretion agrees in writing, the Owner may construct or cause to be constructed an Infrastructure Project (works-in-lieu) and receive a credit for the cost of that Infrastructure Project against the obligation to pay the Contributions;
  - 3.1.2 The credit to which the Owner shall be entitled in respect of works-in-lieu shall be the amount Council expressly agrees to in writing;
  - 3.1.3 Any credit accrued in accordance with clause 3.1.1 of this Agreement will be deducted from the total cost of Contributions set out in clause 2.1 of this Agreement;
  - 3.1.4 Any agreement in writing in respect of works-in-lieu between the Council and the Owner shall be deemed to require that the works must:

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- (a) Be constructed in accordance with plans and specifications first approved by Council;
- (b) Accord with any conditions on the approval of the plans and specifications;
- (c) Be constructed to the satisfaction of Council;
- (d) Be in accordance with the specifications, requirements and any necessary approvals of all relevant authorities; and
- (e) Be maintained free of defects for a period of 12 months from their practical completion.

#### **4. FURTHER COVENANTS OF THE OWNER**

4.1 The Owner covenants with the Council that:

4.1.1. It owns the Subject Land.

4.1.2. Save as shown in the certificate of title to the Subject Land, there are no mortgages, liens, charges, easements or other encumbrances or any rights inherent in any person affecting the Subject Land or any part thereof and not disclosed by the usual searches.

4.1.3. No part of the Subject Land is subject to any right obtained by adverse possession.

4.1.4. It has not entered into any contract of sale or lease in respect of the Subject Land or any part thereof which option, contract or lease is still subsisting other than disclosed in Caveat AF105487T.

4.1.5. It will not sell, transfer, dispose of, assign, mortgage or otherwise part with possession of the Subject land or any part thereof without first providing to their successors a copy of this Agreement.

4.1.6. The Owner will within 28 days of written demand pay to the Council the Council's reasonable costs (including legal costs) and expenses of and incidental to the preparation, execution and registration and or amendment of the Agreement. To the extent that such costs and expenses constitute legal professional costs, the Council may at its absolute discretion have these costs assessed by the Law Institute of Victoria and in that event the parties shall be bound by the amount of that assessment, with any fee for obtaining such an assessment being borne equally by Council and the Owner. Such costs payable by the Owner shall include the costs and disbursements associated with the registration of the Agreement on the titles and removal therefrom.

4.2. Registration of Agreement

The parties agree and the Owner acknowledges that the Council will forthwith after the execution of the Agreement and prior to the first Statement of Compliance being issued with respect to the proposed subdivision of the Subject Land register the Agreement on the titles of the Subject Land pursuant to the provisions of Section 181 of the Act.





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**5. COUNCIL'S COVENANTS**

The Council agrees that:

- 5.1. It must apply Contributions paid by the Owner towards Infrastructure Projects required in accordance with the approved Development Plan in DPO7 or required pursuant to the staging plan (where applicable) in DPO7, being projects outside the area shaded in the plan in "Attachment A" and within the area shaded in the plan in "Attachment B" which Council determines are reasonably required to meet the needs associated with the development. Council will undertake to provide infrastructure outside the area shaded in the plan in "Attachment A" and within the area shaded in the plan in "Attachment B" as soon as practicable to service the demand arising from the completed development but subject at all times to budgetary constraints and necessary municipal discretions and priorities. At its absolute discretion, Council may also allocate Contributions collected from this Agreement (as a priority over other infrastructure projects) to the development of a new Korumburra kindergarten / childcare centre, Korumburra community centre or the upgrading / improvement of the shared pathway along Jumburra Road and Radovick Street between the Secondary College and Commercial Street (excluding that area of pathway adjacent to the Subject Land).
- 5.2. All Contributions paid by the Owner, including the Contribution paid in accordance with clause 2.1 of this Agreement, will be held and applied by the Council as though it were a contribution under a Development Contributions Plan Overlay payment of the Victorian Planning Provisions or successor provisions.

**6. APPLICATION OF CONTRIBUTIONS**

The parties acknowledge and agree that:

- 6.1 The Council may subject to Clause 5.1 but otherwise in its absolute discretion determine how, and to which Infrastructure Projects within the land identified in "Attachment B", it directs the application of the Contributions;
- 6.2 In the event that the Council has insufficient funds to complete all Infrastructure Projects, it must apply towards the Infrastructure Projects any funds it has received from the Owner as a Contribution; and
- 6.3 If, at the end of the Owner's obligations under this Agreement there are excess funds paid as a Contribution held by the Council and such funds are not sufficient in Council's reasonable opinion to undertake an Infrastructure Project, then Council must apply any such excess funds towards the improvement of public land which is within the Subject Land or otherwise as expressly agreed in writing with the Owner.

**7. AMENDMENT**

This Agreement may be amended only in accordance with the requirements of the Act.

**8. WAIVER**

No waiver by any party of any default in the strict and literal performance of or compliance with any provision condition or requirement in this Agreement will be deemed to be a waiver of strict

and literal performance of and compliance with any other provision, condition or requirement of this Agreement nor to be a waiver of or in any way release any party from compliance with any provision condition or requirement in the future nor will any delay or omission of any party to exercise any right under this Agreement in any manner impair the exercise of such right accruing to it thereafter.

**9. NO FETTERING OF COUNCIL'S POWERS**

9.1 The parties acknowledge and agree that this Agreement does not fetter or restrict the power or discretion of the Council to make any decision or impose any requirements or conditions in connection with the granting of any planning approval or certification of any plans of subdivision applicable to the Subject Land or relating to any use or development of the Subject Land.

9.2 For clarity, nothing in this Agreement which provides for the provision of contributions to the Infrastructure Projects shall fetter the Council's ability to require the Owner to contribute to or provide roads and other infrastructure reasonably required by the subdivision of the Subject Land.

**10. NOTICE**

All notices and other communications provided for or permitted by this Agreement will be sent by prepaid mail, by hand delivery, email or by facsimile to the addresses of the parties as specified in this Agreement or to such other address or person as any party may specify by notice in writing to the other party or parties, and may be sent by an agent of the party sending the notice. Each notice or communication will be deemed to have been duly received:

10.1. Not later than two business days after being deposited in the mail with postage prepaid;

10.2. When delivered by hand;

10.3. If sent by email upon production of a delivery confirmation report received by the sender which records the time the email was delivered unless the sender received a delivery failure notification; or

10.4. If sent by facsimile transmission upon completion of that transmission and production of a transmission report stating that the facsimile was sent to the addressee's facsimile number.

**11. JURISDICTION**

This Agreement will be governed by and construed in accordance with the law of the State of Victoria and each of the parties hereby submits to the jurisdiction of the Courts of the State of Victoria and the Victorian Civil and Administrative Tribunal.

**12. INVALIDITY OF ANY CLAUSE**

Notwithstanding anything to the contrary in this Agreement, if any provision of this Agreement will be invalid and not enforceable in accordance with its terms, all other provisions which are self sustaining and capable of separate enforcement without regard to the invalid provisions will be and continue to be valid and enforceable in accordance with those terms.



**13. AGREEMENT BINDING ON SUCCESSORS OF OWNER**

This Agreement will extend to and bind the Owner's successors, assigns, administrators, transferees and legal personal representatives and the obligations imposed upon them shall also be binding on their successors transferees purchasers mortgagees and assigns as if each of them had separately executed this Agreement.

**14. JOINT OBLIGATIONS**

In the case of each party that consists of more than one person (including in that expression any corporation) each of those persons covenants, agrees and declares that all of the covenants, agreements, declarations and consents contained in this agreement and made and given by that party have been entered into, made and given and are binding upon that person both severally and also jointly with the other person or persons constituting that party.

**15. GST**

- 15.1. In this clause 15, 'GST Act' means the A New Tax System (Goods and Services Tax) Act 1999 (Cth).
- 15.2. Expressions used in this clause and in the GST Act have the same meanings as when used in the GST Act.
- 15.3. Amounts payable and consideration provided under or in respect of this Agreement are GST exclusive.
- 15.4. The recipient of a taxable supply made under or in respect of this Agreement must pay to the supplier, at the time the consideration for the supply is due, the GST payable in respect of the supply. This obligation extends to supply consisting of a party's entry into this document.
- 15.5. A party is not obliged, under clause 15.4, to pay the GST on a taxable supply to it until given a valid tax invoice for the supply.

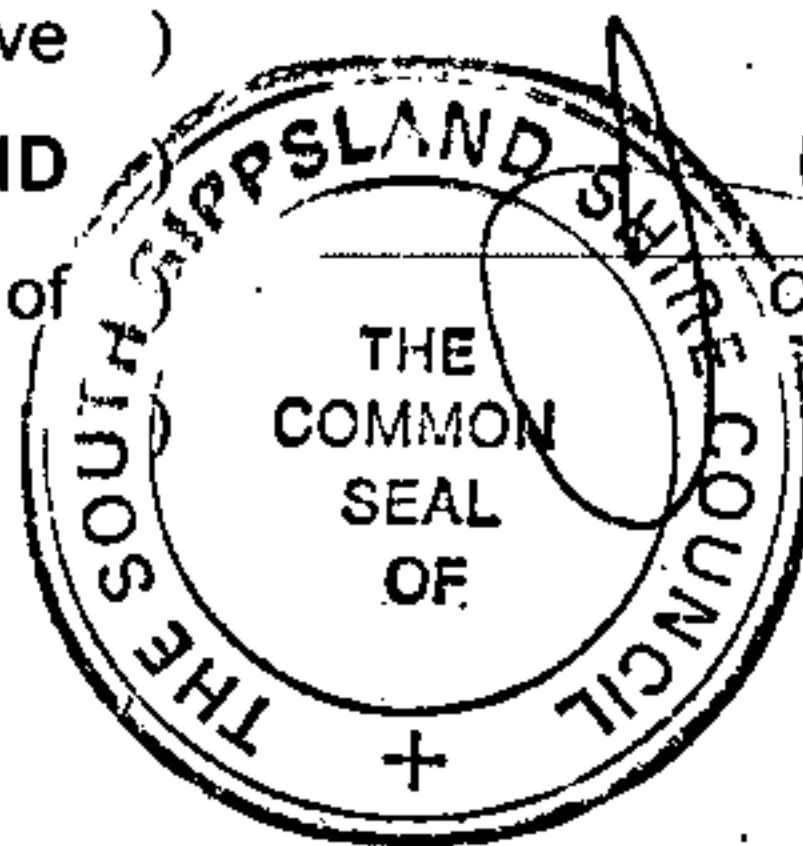
**16. THE PARTIES AGREE**

- 16.1. The Council and the Owner shall do all things necessary (including signing any further agreement, acknowledgment or document) to give full effect to the terms of this Agreement and to enable the Council to register this Agreement on the titles to the Subject Land in accordance with the Act.
- 16.2. The Agreement shall commence on the date that it bears and shall end as hereinbefore provided for or by the agreement of the parties in accordance with the Act. The Council must at the request of, and at the cost of, the Owner take steps to end the registration of this Agreement on the certificates of title to the Subject Land upon its ending.



**EXECUTED BY THE PARTIES**

**SIGNED and SEALED** by the Chief Executive Officer on behalf of the **SOUTH GIPPSLAND SHIRE COUNCIL** pursuant to delegations of Council dated 28 AUGUST 2013



*[Handwritten Signature]*  
\_\_\_\_\_  
Chief Executive Officer

**SIGNED SEALED and DELVERED** by the said Franklin John Kurrle in the presence of:-

*[Handwritten Signature]*  
\_\_\_\_\_  
Witness

*[Handwritten Signature]*  
\_\_\_\_\_  
Name

**Caveator's Consent**

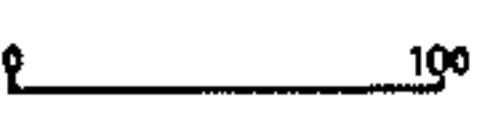
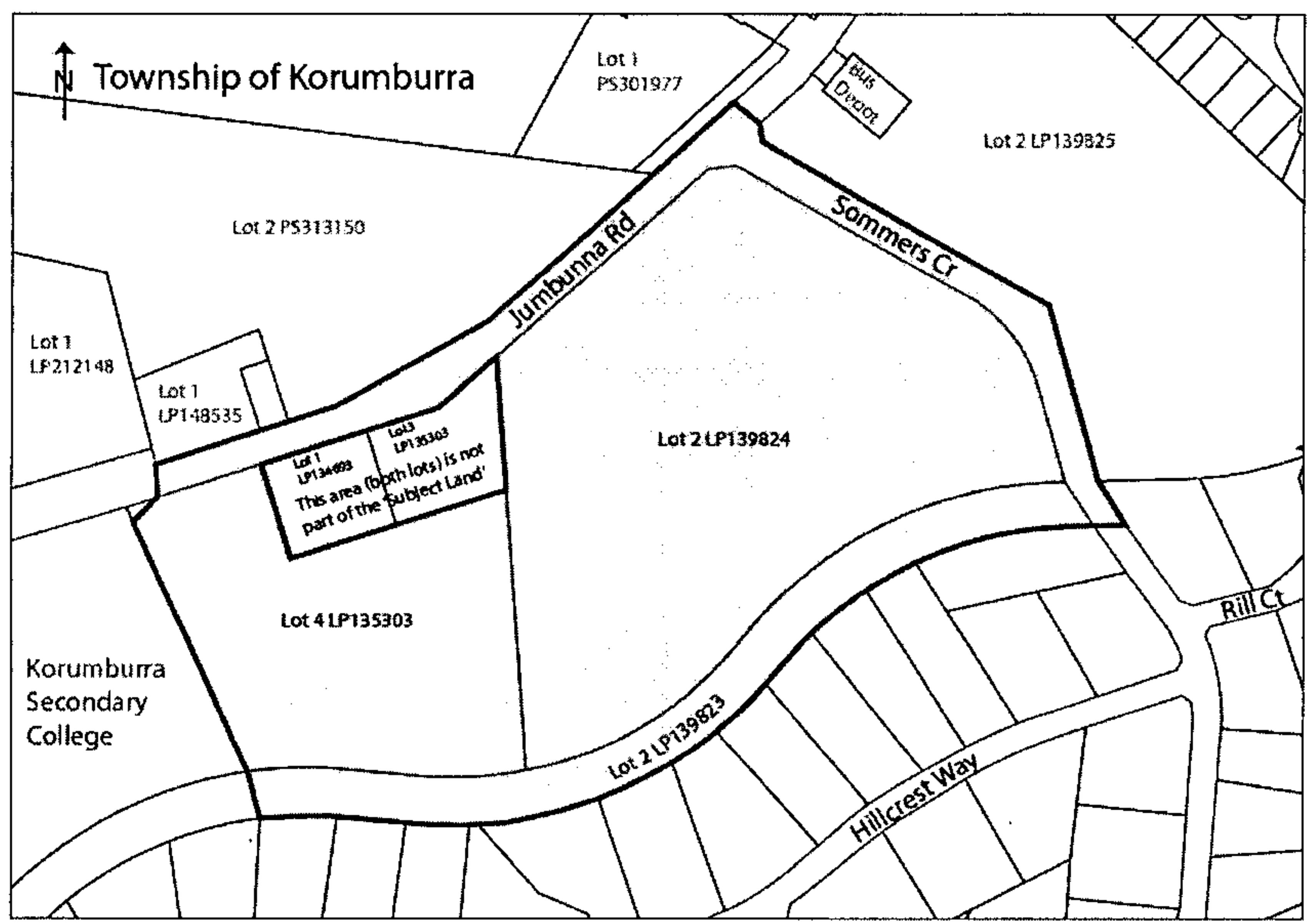
KUFNER TEXTILES (AUSTRALIA) PTY LTD (ACN 006 494 873) as caveator pursuant to caveat AF105487T hereby consents to the registration of the agreement against the titles to the subject land by being executed by an authorised officer.

03/09/14 Dated

*[Handwritten Signature]*  
..... Authorised officer

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# "Attachment A"



 Area identified as the "Subject Land" for the purpose of this Agreement.

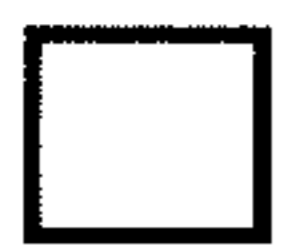
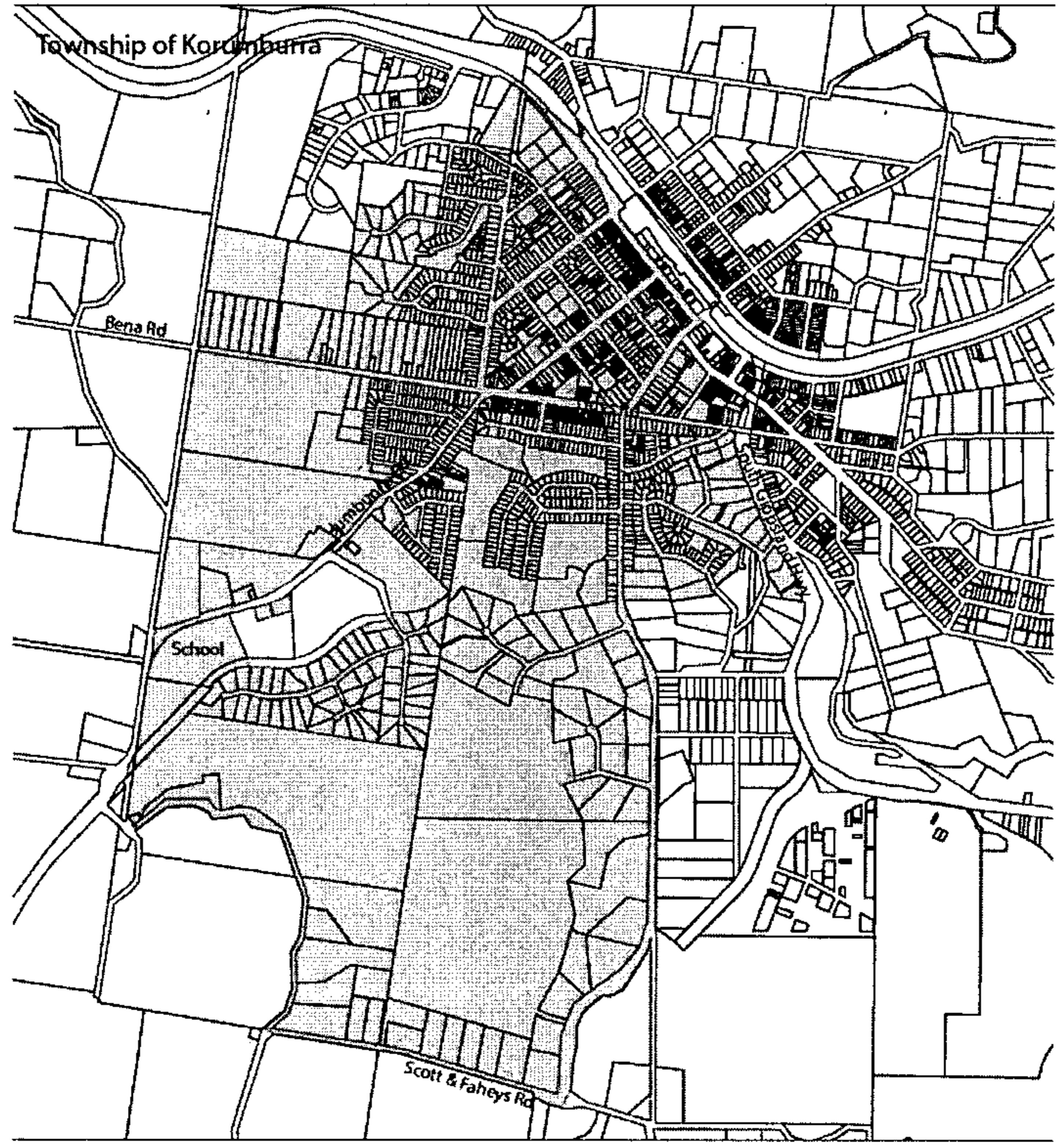
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South Gippsland  
Shire Council

# "Attachment B"



Area identified as the land within which all development contributions collected from this Agreement shall be expended by Council pursuant to the provisions of Clause 5.1 of the Agreement.

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