

The Sanctuary Residential Estate

Works-in-Kind Agreement

Port Macquarie Hastings Council

Bird in the Hand No. 2 Pty Ltd

Developer

PN: **[related parcel number]**

Related Reference: [DA2014/114.1 & DA2022/822.1](#)

Date: [Draft XX January 2024](#)

The Sanctuary Works-in-Kind Agreement
Port Macquarie-Hastings Council
Bird in the Hand No. 2 Pty Ltd

The Sanctuary Residential Estate

Works-in-Kind Agreement

Summary Sheet

Council:

Name: Port Macquarie-Hastings Council, ABN 11 236 901 601.

Address: Corner Lord and Burrawan Streets, Port Macquarie, New South Wales, 2444

Telephone: (02) 6581 8111

Facsimile: (02) 6581 8123

Representative: [document officer given name] [document officer surname]

Email: council@pmhc.nsw.gov.au

Developer:

Name: [Bird in the Hand No. 2 Pty Ltd \(ABN: 15 639 066 083\)](#)

Address: [C/- King and Campbell, PO Box 243, Port Macquarie NSW 2444](#)

Telephone: [02 6586 2555](#)

Representative: [Andrew Conochie](#)

Email: [info@kingcampbell.com.au](#)

Development Consents:

Development Consent for DA [2014/114.1](#) determined by the Council on 29 October 2015 under s4.16 of the Act to the Development and as subsequently modified; and [DA2022/822.1](#) as lodged with Council on 14 September 2022 in accordance with Clause 24 of the Regulation.

Commented [DM1]: DA2022/822.1 is not yet determined. This statement can be amended if the consent issued prior to the WIK Agreement being Executed

Works:

[Construction of Item 3 in Appendix 1 of the Port Macquarie-Hastings Council Section 94 Local Roads Contributions Plan – Areas 13, 14, & 15, being described as:](#)

[Intersection \(No. 4\) with Partridge Creek Access – Large rural roundabout \(MR765A&B\)](#)

[And](#)

[Construction of 1 part of Item 9 in Appendix 1 Port Macquarie-Hastings Council Section 94 Local Roads Contributions Plan – Areas 13, 14, & 15, being described as:](#)

[Koala & Pedestrian Underpasses x 2 \(map 4.13 Area 13 DCP\) \(MR859A&B\)](#)

[full proposal]

Land:

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344 John Oxley Drive, Thrumster NSW 2444, legally described as Lot 1 DP 1245588

Security: _____

See clause 14

Commented [DM2]: Not required under this agreement as provided in accordance with Condition A10 & A19 of DA2014/114.1 (as amended)

DRAFT

The Sanctuary Works-in-Kind Agreement

Port Macquarie-Hastings Council

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The Sanctuary Residential Estate

Works-in-Kind Agreement

Parties

Port Macquarie Hastings Council ABN 11 236 901 601 of Corner Lord and Burrawan Streets, Port Macquarie, New South Wales, 2444 (**Council**)

and

Bird in the Hand No. 2 Pty Ltd ABN: 15 639 066 083 care of King and Campbell, PO Box 243, Port Macquarie NSW 2444 (**Developer**)

Background

- A The Developer is entitled to act upon the Development Consent.
- B The Development Consent requires the Developer to make the Monetary Contributions for s7.11 Major Roads and Local Roads in accordance with the relevant contributions plans as listed in Condition 20 of DA2014/114.1 (as amended) and the attached Notice of Payment, as updated from time to time.
- BC The Developer has lodged DA2022/822.1 with Council on 14 September 2022 and seeks development consent for an additional 10 (ten) residential lots. Should consent be issued by Council for this DA the Council will impose conditions for the Developer to make Monetary Contributions for s7.11 Major Roads and Local Roads in accordance with the relevant s7.11 contributions plans similarly to DA2014/114.1 (as amended).
- CD The Council and the Developer wish to enter into this Agreement to make provision for the Works by the Developer in satisfaction of the Developer's obligation to pay the s7.11 Major Roads and Local Roads Monetary Contributions for DA2014/114.1 (as amended) and DA2022/822.1.
- E The Works comprise the
- i. Construction of Item 3 in Appendix 1 of the Port Macquarie-Hastings Council Section 94 Local Roads Contributions Plan – Areas 13, 14, & 15, being described as:
Intersection (No. 4) with Partridge Creek Access – Large rural roundabout (MR765A&B)
AND
 - ii. Construction of 1 part of Item 9 in Appendix 1 Port Macquarie-Hastings Council Section 94 Local Roads Contributions Plan – Areas 13, 14, & 15, being described as:
Koala & Pedestrian Underpasses x 2 (map 4.13 Area 13 DCP) (MR859A&B).
- DF The Act authorises the Council and the Developer to enter into this Agreement to make provision for the carrying out of the Works by the Developer in satisfaction of the Monetary Contributions.

Operative provisions

1 Definitions & Interpretation

1.1 In this Agreement the following definitions apply:

Act means the *Environmental Planning and Assessment Act 1979* (NSW).

Agreement includes any schedules, annexures and appendices to this Agreement.

Construction Certificate has the same meaning as in the Act.

Contribution Offsets means the reduction in the Developer's obligation to pay the Monetary Contributions determined in accordance with clause 4.

Defects Liability Period means the period commencing on the date of Hand-Over of the Works to Council and ending 12 months after that date.

Defects Liability Bond means an unconditional bond or bank guarantee in a form, and on terms otherwise acceptable, to the Council in the amount of 10% of the total cost of the Works.

Development means development the subject of Development Application [DA2014/114.1 \(as amended\)](#) and [DA2022/822.1 \(as amended\)](#).

Development Consent means the Development Consent determined by the Council under s4.16 of the Act to the Development on [29 October 2015](#) and as subsequently modified; ~~and any future Development Consents issued in respect of DA2022/822.1 under s4.16 of the Act and as subsequently modified.~~

Development Contribution means a monetary contribution or the dedication of land free of cost.

Equivalent Tenement (ET) has the same meaning as in *Port Macquarie Hastings Council's Development Contribution Assessment Policy 2007*, a copy of which is available from the Council, or any document that relevantly replaces that document.

GST has the same meaning as in the GST Law.

GST Law has the same meaning as in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

Hand-Over means the hand-over to the Council of Works –in accordance with this agreement.

Indexation means [indexed quarterly after the date of this Agreement in accordance with upward movements only of the Consumer Price Index \(All Groups Sydney\) published by the Australian Bureau of Statistics.](#)

Item of Works means an item of the Works.

Land means [Lot 1 DP 1245588 \[related property title\]](#) situated at [344 John Oxley Drive, Thurmaster NSW 2444 \[related property address\]](#).

Monetary Contributions means the monetary Development Contributions required to be paid to the Council under [Condition E20<<Contribution Condition Reference>>](#) of the Development Consent [DA 2014/114 and Development Consent DA 2022/822 if it is approved by the Council.](#)

Party means a Party to this agreement, including their successors and assigns.

~~**Rectification Certificate** means a compliance certificate within the meaning of s6.4(e)(i) of the Act to the effect that work the subject of a Rectification Notice has been completed in accordance with the notice.~~

~~**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.~~

Commented [DM3]: Although this DA is not yet approved, this wording allows the WIK to apply to any amendment to this consent in the future.

Commented [DM4]: Neither required under this agreement

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Regulation means the *Environmental Planning and Assessment Regulation 2021*00.

~~**Security** means an unconditional bond or bank guarantee in a form, and on terms otherwise acceptable, to the Council.~~

Subdivision Works Certificate has the same meaning as in the Act.

Works means construction of a two lane large rural roundabout that includes a koala underpass and a pedestrian underpass using stamped and approved Section 138 Application No. 2014-114.1 dated 27 February 2023 by Port Macquarie-Hastings Council –construction plans as shown at Schedule 1 to be constructed and as referred to in Condition A20 of the Development Consent (DA2014/114.1).

Works Schedule means the schedule at Schedule 2.

Works-As-Executed-Plan means detailed plans and specifications of the completed Works.

- 1.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:
- 1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
 - 1.2.2 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.
 - 1.2.3 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.
 - 1.2.4 A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
 - 1.2.5 A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
 - 1.2.6 A reference to an applicable law includes a reference to anything required to be done by or under the law in relation to the Works, including anything required to be done by reason of a requirement lawfully imposed by a person or body exercising functions under the law.
 - 1.2.7 A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
 - 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
 - 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
 - 1.2.10 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.
 - 1.2.11 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.
 - 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.

Commented [DM5]: Not required under this agreement as provided in accordance with Condition A10 & A19 of DA2014/114.1 (as amended)

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1.2.13 A reference to this Agreement includes the agreement recorded in this Agreement.

1.2.14 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.

1.2.15 Any schedules, appendices and attachments form part of this Agreement.

1.2.16 Notes appearing in this Agreement are operative provisions of this Agreement.

2 Obligation to Carry Out Works

2.1 The Developer is to carry out and complete the Works to the reasonable satisfaction of Council.

2.2 The Developer's obligation under clause 2.1 exists irrespective of whether the Developer:

2.2.1 carries out the Works itself, or

2.2.2 enters into an agreement with another person under which the other person carries out the Works on the Developer's behalf.

2.3 The Developer is to carry out and complete the Works in a good and workmanlike manner having regard to the intended purpose of the Works and otherwise to the satisfaction of Council, in accordance with:

2.3.1 the Development Consent, and

2.3.2 all applicable laws, including those relating to occupational health and safety, and

2.3.3 this Agreement to the extent that it is not inconsistent with the Development Consent or an applicable law.

2.4 In the event of an inconsistency between this Agreement and the Development Consent or any applicable law, the Development Consent or the law prevails to the extent of the inconsistency.

2.5 It is the Developer's responsibility to ensure that everything necessary for the proper performance of its obligations under this Agreement is supplied or made available.

2.6 The Works are to be Handed-Over to the Council in accordance with the [Development Consentis Agreement](#).

3 Ownership of Works, etc

3.1 Nothing in, or done under, this Agreement gives the Developer any right, title or interest in the Works whether at law or in equity after the Works are complete and Handed-Over to Council in accordance with this Agreement.

4 Effect of Developer's Compliance with this Agreement

4.1 The entering into of this Agreement by the Developer, satisfies the Developer's obligation to pay the Monetary Contributions to the following extent:

4.1.1 \$3,792,9004,182,960.06 (as at 1 November 2023 and subject to [indexation CPI increases](#)) pursuant to Condition E20 of the Development Consent (DA2014/114.1) in respect of the:

(a) [Hastings S94 Major Roads Contributions Plan; and](#)

(b) [S94 Local Roads Contributions Plan -Areas 13, 14 and 15; and](#)

Commented [DM6]: Definition has been added to Clause 1.1

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4.1.2 ~~\$161,400 (as at 1 November 2023 and subject to IndexationCPI increases) Any carryover amount of the \$4,182,060.06 not used in Subclause 4.1.1 pursuant to a future condition to any Development Consent issued for DA2022/822.1 in respect of the:~~

~~(a) Hastings S94 Major Roads Contributions Plan; and~~

~~(a)(b) S94 Local Roads Contributions Plan-Areas 13, 14 and 15~~

~~4.1.24.1.3 or the amount of the Cost of the Works determined by Council in accordance with Clause 5.~~

4.2 ~~Clause 4.1 only takes effect when the Security has been provided to Council in accordance with clause 14 or the Works have been Handed-Over.~~

Commented [DM7]: Not Required as works have already commenced and securities are provided in accordance with Condition A10 & A19 of DA2014/114.1 (as amended)

5 Determination of Works Value

5.1 Council will consider and may approve a variation in the cost of an Item of Works, ~~if requested by the Developer following execution of this Deed.~~

5.2 The Parties acknowledge and agree that the Costs of the Works shall be determined by the Council acting reasonably having regard to the detail in the Works Schedule.

5.3 For the purposes of clause 5.2, the Developer must provide to the Council copies of all documents reasonably required by Council (including invoices and evidence of payment).

Commented [DM8]: Because the value of the works in 4.1.1 is to be agreed before this Deed is executed. Any variation to this amount is to be instigated by the Developer only.

6 Access to the Land

6.1 ~~Subject to any applicable law, the Developer is to obtain the approval of the owner of the Land to enter the Land for the purposes of this Agreement.~~

Commented [DM9]: Clauses 6 to 14 of Template not required as works are already approved and this WIK only performs purpose of enabling the s7.11 Offset. These procedures are already part of the Development Consent, s138 Approval, and the Works are underway and almost complete. There is no need to add an additional layer of conditions via this agreement and/or potentially create any discrepancy with the DA Conditions

7 Protection of People and Property

7.1 The Developer is to ensure in relation to the carrying out of the Works that:

7.1.1 ~~all necessary measures are taken to protect people and property, and~~

7.1.2 ~~unnecessary interference with the passage of people and vehicles is avoided, and~~

7.1.3 ~~nuisances and unreasonable noise and disturbances are prevented.~~

8 Damage and Repairs to the Works

8.1 ~~The Developer, at its own cost, is to repair and make good to the satisfaction of the Council any loss or damage to the Works from any cause whatsoever which occurs prior to the date on which the Works are Handed-Over to the Council.~~

Commented [DM10]: Condition 7 of the s138 Approval (710.2014.0114.01) for the Roundabout Works covers rectification of defects and damage by the Applicant.

9 Hand-Over of Works

9.1 ~~The Developer is to give the Council not less than 20 calendar days written notice of the date on which it proposes to Hand-Over the Works to the Council.~~

9.2 ~~The Council may, at any time before the date specified in the notice referred to in clause 9.1, direct the Developer in writing:~~

9.2.1 ~~to carry out work specified in the notice to complete the Works in accordance with clause 2.3 before Hand-Over to the Council, and~~

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9.2.2 ~~to Hand-Over the Works to the Council by a specified date completed in accordance with the Council's direction to the Council by a specified date, irrespective of whether that date is later than the proposed Hand-Over pursuant to the notice under clause 9.1.~~

9.3 ~~The Developer is to comply with a direction referred to in clause 9.2 according to its terms and at the Developer's own cost.~~

9.4 ~~Before the Hand-Over of Works are handed-over to the Council, the Developer is to:~~

9.4.1 ~~remove:~~

(a) ~~any rubbish or surplus material, and~~

(b) ~~any temporary works, and~~

(c) ~~any construction plant and equipment, relating to the carrying out of the Works as the case requires.~~

9.4.2 ~~Provide the Defects Liability Bond to Council.~~

9.5 ~~The Works are taken to be Hand-Over to the Council when the Council gives the Developer written notice to that effect.~~

10 Works As Executed Plan

40.1 ~~No later than 60 calendar days after a notice is given under clause 9.5, the Developer is to submit to the Council a full Works-As-Executed-Plan in respect of the Works the subject of the notice.~~

11 Rectification of Defects

11.1 ~~During the Defects Liability Period the Council may give to the Developer a Rectification Notice in relation to the Works specifying:~~

11.1.1 ~~the Works requiring rectification;~~

11.1.2 ~~the action required to be undertaken by the Developer to rectify those Works, and~~

11.1.3 ~~the date on which those Works are to be rectified.~~

11.2 ~~The Developer must comply with a Rectification Notice at its own cost according to the terms of the Notice.~~

11.3 ~~When the Developer considers that rectification is complete, the Developer may give to request the Council to provide a Rectification Certificate relating to the Works that are the subject of the relevant Rectification Notice.~~

11.4 ~~A Rectification Certificate discharges the Developer from any further obligation to comply with the relevant Rectification Notice.~~

11.5 ~~If the Developer does not comply with a Rectification Notice, the Council may do such things as are necessary to rectify the defect and may:~~

11.5.1 ~~call upon the Defects Liability Bond to meet its costs in rectifying the defect, and~~

11.5.2 ~~recover, as a debt due in a court of competent jurisdiction, any difference between the amount of the Defects Liability Bond and the costs incurred by the Council in rectifying the defect.~~

Commented [DM11]: This is covered by both the DA Consent and the s138 approval.
DA consent - Generally via number of Conditions under Part E
- Prior to issue of Subdivision Certificate
S138 Approval - Condition 19

Commented [DM12]: Condition E16 of DA Consent 2014/114.1

Commented [DM13]: Condition 7 of the s138 Approval (710.2014.0114.01) for the Roundabout Works covers rectification of defects and damage by the Applicant.

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12 Cost of Works carried out by Council

- 12.1 The Parties acknowledge and agree that where, in accordance with this Agreement, the Council incurs a cost in carrying out, completing or rectifying a defect in the Works, the Council may recover from the Developer in a court of competent jurisdiction its full costs, including costs determined in accordance with clause 12.2.1-12.2.3.
- 12.2 The Council's costs of carrying out, completing or rectifying the Works in accordance with this Agreement include, but are not limited to:
- 12.2.1 the reasonable costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
- 12.2.2 all fees and charges necessarily or reasonably incurred by the Council in order to have the Works carried out, completed or rectified, and
- 12.2.3 without limiting the generality of the preceding sub-clause, all legal costs and expenses reasonably incurred by the Council, by reason of the Developer's failure to comply with this Agreement.

Commented [DM14]: Condition 7 of the s138 Approval (710.2014.0114.01) for the Roundabout Works covers rectification of defects and damage by the Applicant.

13 Indemnity and Insurance

- 13.1 The Developer indemnifies the Council, its employees, officers, agents, contractors and workmen from and against all losses, damages, costs (including legal costs on a full indemnity basis), charges, expenses, actions, claims and demands whatsoever which may be sustained, suffered, recovered or made arising in connection with a negligent act or omission of the Developer in carrying out any Work and the performance of any other obligation under this Agreement.
- 13.2 The Developer is to take out and keep current, or is to ensure that its contractors take out and keep current, to the reasonable satisfaction of the Council the following insurances in relation to Work required to be carried out by the Developer under this Agreement up until the Work is Handed Over to the Council in accordance with this Agreement:
- 13.2.1 contract works insurance, noting the Council as an interested party, for the full replacement value of the Works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover the Developer's liability in respect of damage to or destruction of the Works,
- 13.2.2 public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party,
- 13.2.3 workers compensation insurance as required by law, and
- 13.2.4 any other insurance required by law.
- 13.3 If the Developer fails to comply with clause 13.2, the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Developer to the Council and may be recovered by the Council as it deems appropriate including:
- 13.3.1 by calling upon the Security provided by the Developer to the Council under this Agreement, or
- 13.3.2 recovery as a debt due in a court of competent jurisdiction.
- 13.4 The Developer is not to commence to carry out any Work unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 13.2.

Commented [DM15]: This is already provided in accordance with Condition 3 of the s138 Approval (710.2014.0114.01) for the Roundabout Works.

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14 Provision of Security

- 14.1 The Developer is not entitled to Contribution Offsets to which this Agreement applies unless the requirements of this clause have been complied with.
- 14.2 Unless the Works are completed, the Developer is to provide the Council with Security in a form, on terms and for an amount agreed between the Parties.
- 14.3 For the purposes of clause 14.2, the Parties are to have regard to any policy or practice of the Council, current at the time, relating to the provision of the Security to the Council for the construction of public infrastructure by developers.
- 14.4 The Council may call upon the Security if the Council considers that the Developer has failed to comply with a notice referred to in clause 19.1 or the Council gives the Developer a termination notice under clause 19.3.
- 14.5 If the Council calls on the Security under clause 14.4, the Council may, by notice in writing to the Developer, require the Developer to provide a further Security in an amount which, together with any unused portion of any existing Security, does not exceed the amount specified in clause 14.2.
- 14.6 The Council may apply the Security in satisfaction of:
- 14.6.1 the carrying out of the Works, and
 - 14.6.2 any liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this Agreement.
- 14.7 The Council is to release and return the Security to the Developer, less any amount of the Security called upon by the Council in accordance with clause 19.4 within 14 days of the date the works are Handed Over to the Council by the Developer in accordance with this Agreement.
- 14.8 The Council is not required to return any part of the Security to the Developer if the Council has given the Developer a termination notice under clause 19.3.
- 14.9 Clause 16 does not apply to a dispute arising under or in relation to this clause.

Commented [DM16]: Not Required as works have already commenced and securities are provided in accordance with Condition A10 & A19 of DA2014/114.1 (as amended)

156 Dispute Resolution – expert determination

- 15-16.1 This clause applies to a dispute under this Agreement, which relates to a matter that can be determined by an appropriately qualified expert unless expressly provided to the contrary by this Agreement.
- 15-26.2 Any dispute between the Parties as to whether a dispute to which this clause applies can be determined by an appropriately qualified expert is to be referred to the Chief Executive Officer of the professional body that represents persons with the relevant expertise for determination, which is to be final and binding on the Parties.
- 15-36.3 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 15-46.4 If a notice is given under clause 615.3, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- 15-56.5 If the dispute is not resolved within a further 28 days, the dispute must be referred to the President of the NSW Law Society to appoint an Expert for Expert Determination.
- 15-66.6 The Expert Determination is binding on the Parties except in the case of fraud or misfeasance by the Expert.
- 15-76.7 Each Party must bear its own costs arising from or in connection with the appointment of the Expert and the Expert Determination.

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167 Dispute Resolution - mediation

- 16.47.1** This clause applies to any dispute under this Agreement other than a dispute to which clause 28 applies.
- 16.27.2** Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 16.37.3** If a notice is given under clause ~~7.2~~**16.2**, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- 16.47.4** If the dispute is not resolved within a further 28 days, the Parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and must request the President of the Law Society, or the President's nominee, to select a mediator.
- 16.57.5** 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.

178 Arbitration Excluded

- 17.48.1** The arbitration of any dispute between the Parties arising under or in connection with Agreement is expressly excluded.

18 Failure to Carry out Works

- 18.1** ~~Subject to clause 19, if the Council considers that the Developer is in breach of any obligation under this Agreement relating to the carrying out of the Works, the Council may but is not obliged to give the Developer a notice requiring:~~
- ~~18.1.1 the breach to be rectified to the Council's satisfaction, or~~
 - ~~18.1.2 the carrying out of the Works to immediately cease and the breach to be rectified to the Council's satisfaction.~~
- 18.2** ~~A notice given under clause 18.1 is to allow the Developer a period of not less than 28 days to rectify the breach.~~
- 18.3** ~~A notice under clause 18.1.2 does not prevent the Developer from rectifying the breach the subject of the notice to the Council's satisfaction.~~
- 18.4** ~~Without limiting any other rights the Council has to enforce this Agreement, the Council may, if the Developer does not comply with a notice given under clause 18.1:~~
- ~~18.4.1 call upon the Security in accordance with clause 14, and~~
 - ~~18.4.2 carry out and complete the Works.~~
- 18.5** ~~For the purposes of clause 18.4, any difference between the amount of the Security called upon by the Council and the costs incurred by the Council in completing the Works may be recovered by the Council from the Developer as a debt due in a court of competent jurisdiction.~~
- 18.6** ~~Clauses 15 and 16 do not prevent a notice being given under clause 18.1 and do not apply to such a notice or the circumstances relating to the giving of that notice, and any procedure commenced under clause 15 or clause 16 ceases to apply when such a notice is given.~~

Commented [DM17]: Not required. The Works are almost complete and their completion is covered by various conditions of the DA Consent - Part E, which if there is any issue with the works would hold back the issue of the Subdivision Certificate. Further, as this Agreement only deals with monetary 'Roads' contributions offsets, it would be difficult for the developer to breach an obligation under this Agreement as it is Council's obligation to provide the appropriate offset when issuing a Notice of Payment for the s7.11 Contributions otherwise payable.

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199 Termination

~~19.49.1~~ If the Developer commits a breach of this Agreement, the Council may, despite any other provision of this Agreement, give the Developer a written notice requiring the Developer to show cause why the Council should not terminate this Agreement.

~~19.29.2~~ A notice under clause 49.1 is to:

~~19.2.19.2.1~~ state that the notice is given under this Agreement, and

~~19.2.29.2.2~~ particularise the nature of the breach by the Developer, and

~~19.2.39.2.3~~ require the Developer to show cause by notice to the Council why the Council should not terminate this Agreement, and

~~19.2.49.2.4~~ specify a date by which the Developer is to show cause as provided for in clause 49.2.3

~~19.39.3~~ If the Developer fails to show cause to the reasonable satisfaction of the Council why the Council should not terminate this Agreement in relation to the Developer's breach, the Council may terminate this Agreement by written notice to the Developer.

~~19.49.4~~ If the Council terminates this Agreement under clause 49.3, the rights and liabilities of the Parties are the same as they would have been at common law had the Developer repudiated this Agreement and the Council elected to treat this Agreement as at an end and recover damages.

~~19.5~~ ~~Clauses 15 and 16 do not prevent a notice being given under clause 19.1 or 19.3 and do not apply to such a notice or the circumstances relating to the giving of that notice, and any procedure commenced under clause 15 or clause 16 ceases to apply when such a notice is given.~~

Commented [DM18]: Clauses 15 and 16 deleted

2010 Governing Law & Enforcement

~~20.410.1~~ This Agreement is governed by the law of New South Wales.

~~20.210.2~~ This Agreement may be enforced by either Party in any court of competent jurisdiction.

~~20.3~~ ~~Clauses 15 and 16 do not prevent the enforcement of this Agreement in any court of competent jurisdiction and any procedure commenced under clause 15 or 16 ceases to apply when such proceedings are commenced in such a court.~~

Commented [DM19]: As comment above

~~20.410.3~~ The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.

~~20.510.4~~ The Parties will not object to the exercise of jurisdiction by those courts on any basis.

2111 Notices

~~21.411.1~~ 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:

~~21.4.111.1.1~~ delivered or posted to that Party at its address set out in the Summary Sheet.

~~21.1.2~~ faxed to that Party at its fax number set out in the Summary Sheet.

~~21.1.311.1.2~~ emailed to that Party at its email address set out in the Summary Sheet.

~~21.211.2~~ If a Party gives the other Party 3 business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or

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made by that other Party if it is delivered, posted or faxed-emailed to the latest address or emailfax-number.

24.311.3 Any notice, consent, information, application or request is to be treated as given or made if it is:

24.3.411.3.1 delivered, when it is left at the relevant address.

24.3.211.3.2 sent by post, 2 business days after it is posted.

24.3.311.3.3 sent by emailfax, as soon as the sender receives from the sender's fax email machine a read receiptport of an error-free transmission to the correct fax number.

24.411.4 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.

2212 Entire Agreement

22.412.1 Subject to anything expressly provided for to the contrary in this Agreement:

22.4.412.1.1 this Agreement contains everything to which the Parties have agreed in relation to the matters it deals with, and

22.4.212.1.2 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 by law.

2313 Further Acts

23.413.1 Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to effect, perfect or complete this Agreement and all transactions incidental to it.

2414 Joint and Individual Liability and Benefits

24.414.1 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.

2515 No Fetter

25.415.1 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.

2616 Representations and Warranties

26.416.1 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.

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2717 Severability

27-417.1 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.

27-217.2 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.

2818 Modification

28-418.1 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.

2919 Waiver

29-419.1 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.

29-219.2 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.

29-319.3 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.

3020 Costs

20.1 The Developer is to pay to the Council its reasonable costs of preparing, negotiating and executing this Agreement of <<Enter Council WIK Cost>> (excluding GST) within 28 days of a written demand by the Council for that payment.

20.2 The written demand referred to in Clause 20.1 is to be in the form of a Tax Invoice, and

30-420.3 Include a summary of Council's costs of preparing, negotiating and executing this Agreement if the amount in Clause 20.1 is exceeded.

Commented [DM20]: Amount to be advised by Council prior to this Agreement being executed.

3121 GST

31-421.1 In this clause:

Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice have the meaning given by the GST Law.

GST Amount means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.

GST Law has the meaning given by the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

Input Tax Credit has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a Party includes an Input Tax Credit for an acquisition made by that Party but to which another member of the same GST Group is entitled under the GST Law.

Taxable Supply has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.

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31.221.2 Subject to clause 31.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Agreement, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.

31.321.3 Clause 31.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Agreement to be GST inclusive.

31.421.4 No additional amount shall be payable by the Council under clause 31.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.

31.521.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Agreement by one Party to the other Party that are not subject to Division 82 of the A New Tax System (Goods and Services Tax) Act 1999, the Parties agree:

31.5.421.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;

31.5.221.5.2 that any amounts payable by the Parties in accordance with clause 31.2 (as limited by clause 31.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.

31.621.6 No payment of any amount pursuant to this clause 31, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.

31.721.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a Party, must exclude the amount of any Input Tax Credit entitlement of that Party in relation to the relevant cost, expense or other liability.

31.821.8 This clause continues to apply after expiration or termination of this Agreement.

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Bird in the Hand No. 2 Pty Ltd

Schedule 1

Plan of works

{Insert Plan of Works}

Stamped and approved Section 138 Application No. 2014-114.1 dated 27 February 2023 by Port Macquarie-Hastings Council

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DRAFT

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Schedule 2

Works Schedule

(Insert Works Schedule)

Construction of Item 3 in Appendix 1 of the Port Macquarie-Hastings Council Section 94 Local Roads Contributions Plan – Areas 13, 14, & 15, being described as:

Intersection (No. 4) with Partridge Creek Access – Large rural roundabout (MR765A&B)

AND

Construction of 1 part of Item 9 in Appendix 1 Port Macquarie-Hastings Council Section 94 Local Roads Contributions Plan – Areas 13, 14, & 15, being described as:

Koala & Pedestrian Underpasses x 2 (map 4.13 Area 13 DCP) (MR859A&B).

The agreed cost of the above works is: **\$3,484,044.66** (excluding GST)

DRAFT

The Sanctuary Works-in-Kind Agreement
Port Macquarie-Hastings Council
Bird in the Hand No. 2 Pty Ltd

Execution

Executed as an Agreement

Dated:

Executed by the Council:

General Manager

Witness/Name/Position:

Executed by the in accordance with s127 of the Corporations Act 2001 (Cth):

Developer Name/Position

Developer Name/Position