

# Voluntary Planning Agreement

Port Macquarie Hastings Council ABN 11 236 901 601

[Developer Name] ACN [Developer ACN]

Date:

DRAFT

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# Agreement

## Date

## Parties

### First Party

Name Port Macquarie Hastings Council (**Council**)  
ACN 11 236 901 601  
Contact [Council contact]  
Telephone [Council telephone details]

### Second Party

Name [Developer Name] (**Developer**)  
ACN [Developer ACN]  
Contact [Developer contact]  
Telephone [Developer telephone details]

## Background

### ***OPTION: Where agreement is connected with a Development Application***

- A. On [date], the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.
- B. That Development Application was accompanied by an offer by the Developer to enter into this agreement to make contributions for public purposes if Development Consent is granted.

### ***OPTION: Where agreement is connected with a Modification Application***

- C. On [date], the Council approved Development Consent DA [insert details] to carry out [insert details] on the Land.
- D. On [date], the Developer lodged a Modification Application, seeking to amend the Development Consent to authorise the Development on the Land.
- E. That Modification Application was accompanied by an offer by the Developer to enter into this agreement to make contributions for public purposes if the Development Consent is modified.

### ***OPTION: Where agreement is connected with an Instrument Change***

- F. On [date], the Developer made an application to the Council for the Instrument Change for the purpose of making a Development Application to the Council for Development Consent to carry out the Development on the Land.

- G. The Instrument Change application was accompanied by an offer by the Developer to enter into this agreement to make contributions for public purposes associated with the Instrument Change and the Development.

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# Operative part

## 1 Definitions

In this agreement, unless the context indicates a contrary intention:

**NOTE: Remove definitions that are not required.**

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

**Address** means a party's address set out in the Notices clause of this agreement;

**Approval** means any certificate, licence, consent, permit, approval or other requirement of any Authority having jurisdiction in connection with the activities contemplated by this agreement;

**Authority** means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person;

**Bank Guarantee** means an irrevocable and unconditional undertaking that is not limited in time and does not expire by one of the following trading banks:

- (a) Australia and New Zealand Banking Group Limited,
- (b) Commonwealth Bank of Australia,
- (c) Macquarie Bank,
- (d) National Australia Bank,
- (e) St George Bank Limited,
- (f) Westpac Banking Corporation, or
- (g) Other financial institution approved by the Council,

to pay an amount or amounts of money to the Council on demand and containing terms and conditions reasonably acceptable to the Council;

**Bond** means an insurance bond from an AAA credit rated party, or a party with a credit rating otherwise acceptable to Council;

**Business Day** means a day on which banks are open for general banking business in Sydney, excluding Saturdays and Sundays;

**Certificate of Practical Completion** means the written certificate confirming the Works, or part of the Works, have been completed to the Council's satisfaction issued under clause 8.1(b)(i) of Schedule 2;

**Claim** means any claim, loss, liability, damage, proceeding, order, judgment or expense arising out of the operation of this agreement;

**Construction Certificate** means a construction certificate as defined under section 6.4 of the Act, or if the Former Building and Subdivision Provisions apply, section 109C of the Act;

**Construction Terms** means the terms set out in Schedule 2;

**Contributions Plan** has the same meaning as under the Act;

**CPI** means the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics;

**Damages** means all liabilities, losses, damages, costs and expenses, including legal fees and disbursements and costs of investigation, litigation, settlement, judgment, interest and penalties;

**Dealing**, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land;

**Dedication Land** means that part of the Land to be dedicated to Council in accordance with this agreement, as shown on the plan at Annexure B.

**Development** means [insert description of the proposed development];

**Development Application** has the same meaning as in the Act;

**Development Consent** has the same meaning as in the Act;

**Detailed Management Plan** means a plan relating to the establishment and maintenance of the Environmental Management Land in accordance with the provisions of the document of the Council titled 'Port Macquarie-Hastings Development Control Plan 2013' or any development control plan that replaces or supplements that document that contains provisions relating to the establishment and maintenance of the Environmental Management Land;

**Easement Terms** means the terms of a public access easement as set out in Schedule 3;

**EML Security** means Security to secure the performance by the Developer of the Establishment Obligation and the Management Obligation;

**Environmental Management Land** means:

- (a) any part of the Land that is situated within Zone E2 Environmental Conservation or Zone E3 Environmental Management under the LEP;
- (b) identified within the approved Vegetation Management Plan associated with the original and existing Development Applications; or
- (c) any other part of the Land agreed between the Parties to be Environmental Management Land for the purposes of this Deed

before such land is required to be dedicated to the Council under this Deed;

**Establishment Obligation** means the establishment of Environmental Management Land in accordance with:

- (a) any the relevant requirements of any Development Consent relating to the Development, and
- (b) to the extent not inconsistent with such a Development Consent:
  - (i) any Detailed Management Plan approved by the Council, and
  - (ii) otherwise, to the satisfaction of the Council.

**Establishment Period** means the period commencing when the Development is commenced (within the meaning of the Act), or such other period or periods commencing at such other time or times as the Parties agree, and ending when the Establishment Obligation is completed to the satisfaction of the Council;

**Fax Number** means a party's facsimile number set out in the Notices clause of this agreement;

**Final Lot** means a lot to be created in the Development for separate occupation and disposition or a lot of a kind or created for a purpose that is otherwise agreed by the parties, not being:

- (a) a lot created by a subdivision of the Land that is to be dedicated or otherwise transferred to the Council, or
- (b) a lot created by a subdivision of the Land which may be further subdivided.

**Former Building and Subdivision Provisions** has the same meaning as in clause 18 of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017*;

**GST** has the same meaning as in the GST Law;

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

**Insolvent** means, in relation to a party:

- (a) that party makes an arrangement, compromise or composition with, or assignment for, the benefit of its creditors or a class of them;
- (b) a receiver, receiver and manager, administrator, provisional liquidator, trustee, controller, inspector or analogous person is appointed in relation to, or over, all or any part of that party's business, assets or securities;
- (c) a presumption of insolvency has arisen under legislation because of the party's failure to comply with a statutory demand or analogous process;
- (d) an application for the winding up of, or for the appointment of a receiver to, that party, other than winding up for the purpose of solvent reconstruction or re amalgamation, is presented and not withdrawn or dismissed within 21 days (or such longer period agreed to by the parties), or an order is made or an effective resolution is passed for the winding up of, or for the appointment of a receiver to, that party, or any analogous application is made or proceedings initiated;
- (e) any shareholder or director of that party convenes a meeting for the purpose of considering or passing any resolution for the winding up or administration of that party;
- (f) that is an individual, a creditor's petition or a debtor's petition is presented to the Official Receiver or analogous authority in relation to that party;
- (g) an execution or analogous process is levied or enforced against the property of that party;
- (h) that party ceases or suspends, or threatens to cease or suspend, the conduct of all or a substantial part of its business;
- (i) that party disposes of, or threatens to dispose of, a substantial part of its assets;
- (j) that party stops or suspends, or threatens to stop or suspend, payment of all or a class of its debts; or

(k) that party is unable to pay the party's debts as and when they become due and payable.

**Instrument Change** means [insert details of LEP Amendment];

**Land** means Lot no. DP no., known as [address of land];

**Landowner** means [name of registered proprietor of the land];

**Law** means:

- (a) any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation;
- (b) any Approval, including any condition or requirement under it; and
- (c) any fees and charges payable in connection with the things referred to in paragraphs (a) and (b);

**LEP** means the Port Macquarie-Hastings Local Environmental Plan 2011 as amended, substituted or replaced from time to time.

**Management Contribution** means a monetary contribution of \$[Management Contribution] indexed quarterly after 1 January 2024 in accordance with the Consumer Price Index (All Groups- Sydney) published by the Australian Bureau of Statistics.

**Management Obligation** means the management of Environmental Management Land in accordance with:

- (a) the relevant requirements of any Development Consent relating to the Development, and
- (b) to the extent not inconsistent with such a Development Consent:
  - (i) any Detailed Management Plan approved by the Council, and
  - (ii) otherwise, to the satisfaction of the Council.

**Management Period** means the period of three years commencing immediately at the end of the Establishment Period, or such other period or periods commencing at such other time or times as the Parties agree.

**Management Work** means Work forming part of the Establishment Obligation or the Management Obligation.

**Modification Application** means any application to modify the Development Consent under section 4.55 of the Act;

**Monetary Contribution** means the monetary contribution payable by the Developer under clause 6.1 of this agreement;

**Net Developable Area** means the area of the Land remaining after excluding any part of the Land:

- (a) on which residential, business or industrial development is not permissible under the LEP;
- (b) that is, or will be, required to be dedicated to the Council for the purposes of a local park;
- (c) that the Council agrees to exclude at the request of the Developer;



- (d) that is or will be required for arterial road purposes (within the meaning of the document of the Council titled '*Port Macquarie-Hastings Development Control Plan 2013*'), and
- (e) any part of the Land on which development is restricted under a Development Consent to the protection of hollow-bearing trees.

**Occupation Certificate** means an occupation certificate as defined under section 6.4 of the Act, or if the Former Building and Subdivision Provisions apply, section 109C of the Act, and includes an interim Occupation Certificate, a final Occupation Certificate or a partial Occupation Certificate as the case may be;

**Public Reserve** has the same meaning as in the *Local Government Act 1993*;

**Public Road** has the same meaning as in the *Roads Act 1993*;

**Register** means the Torrens title register maintained under the *Real Property Act 1900* (NSW);

**Regulation** means the *Environmental Planning and Assessment Regulation 2000*;

**Related Body Corporate** has the meaning given to that term in s 9 of the *Corporations Act 2001* (Cth);

**Residue Lot** means a lot to be created in the Development that is not a Final Lot.

**Strata Plan** means a strata plan, a strata plan of subdivision or a strata plan of consolidation that is registered in accordance with the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*;

**Subdivision** has the same meaning as in the Act.

**Subdivision Certificate** has the meaning given to the term in Division 6.4 of the Act.

**Transferee** has the meaning given in clause 12.3; and

**Works** means the work set out in Schedule 1.

## 2 Interpretation

In this agreement, unless the context indicates a contrary intention:

**NOTE: Delete references that are not required.**

- (1) **(documents)** a reference to this agreement or another document includes any document which varies, supplements, replaces, assigns or novates this agreement or that other document;
- (2) **(references)** a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this agreement;
- (3) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this agreement;
- (4) **(person)** a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns;

- (5) **(party)** a reference to a party to a document includes that party's personal representatives, executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (6) **(president, CEO, general manager or managing director)** the president, CEO, general manager or managing director of a body or Authority includes any person acting in that capacity;
- (7) **(requirements)** a requirement to do any thing includes a requirement to cause that thing to be done, and a requirement not to do any thing includes a requirement to prevent that thing being done;
- (8) **(including)** including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind;
- (9) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (10) **(singular)** the singular includes the plural and vice-versa;
- (11) **(gender)** words importing one gender include all other genders;
- (12) **(parts)** a reference to one or more things includes each part and all parts of that thing or group of things but nothing in this clause implies that part performance of an obligation constitutes performance of that obligation;
- (13) **(rules of construction)** neither this agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting;
- (14) **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (15) **(time and date)** a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in Sydney, Australia, even if the obligation is to be performed elsewhere;
- (16) **(joint and several)** an agreement, representation, covenant, right or obligation:
  - (a) in favour of two or more persons is for the benefit of them jointly and severally; and
  - (b) on the part of two or more persons binds them jointly and severally;
- (17) **(writing)** a reference to a notice, consent, request, approval or other communication under this agreement or an agreement between the parties means a written notice, request, consent, approval or agreement;
- (18) **(replacement bodies)** a reference to a body (including an institute, association or Authority) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions;
- (19) **(Australian currency)** a reference to dollars or \$ is to Australian currency;
- (20) **(month)** a reference to a month is a reference to a calendar month; and

- (21) (year) a reference to a year is a reference to twelve consecutive calendar months.

### 3 Planning Agreement under the Act

- (1) The parties agree that this agreement is a planning agreement within the meaning of section 7.4 of the Act.
- (2) Schedule 4 of this agreement summarises the requirements for planning agreements under section 7.4 of the Act and the way this agreement addresses those requirements.

### 4 Application of this agreement

This agreement applies to:

- (1) the Instrument Change [if applicable], and
- (2) the Development [if applicable], and
- (3) the Land.

### 5 Operation of this agreement

- (1) This agreement commences on and from the date it is executed by all parties.

**OPTION: Delete as appropriate**

- (2) This agreement terminates on the lapse of the Development Consent.
- (3) The Council may terminate this agreement:
- (a) if the Developer being an individual, dies or becomes incapable because of unsoundness of mind to manage their own affairs;
- (b) if the Developer being a company, resolves to go into liquidation (or has a petition for its winding up presented and not withdrawn within 30 days after presentation) or enters into any scheme or arrangement with its creditors under the relevant provisions of the Corporations Act 2001 or any similar legislation, or if a liquidator, receiver or receiver and manager or provisional liquidator is appointed, or if the company is deregistered. This does not negate, limit or restrict any rights or remedies of Council which would have been available at law or in equity had this clause not been included;
- (c) on the declaration by a Court of competent jurisdiction that the Development Consent issued for the Development is invalid;
- (d) if the Development Consent is surrendered in accordance with s 4.63 of the Act and the regulations;
- (e) if the Developer does not effect the dedication of the Dedication Land in accordance with 6.3 within 2 years of the date of this agreement.
- (4) Consequences of termination:

- (a) On the date of termination, subject to the following sub-paragraphs, the Developer releases the Council from any obligation to perform any term, or any liability arising out of, this agreement after the date of termination;
- (b) Termination of this agreement does not release either party from any obligation or liability arising under this agreement before termination; and
- (c) If the Dedication Land has been transferred to Council and this agreement is then terminated, clauses 6 to 17 survive this agreement.

## 6 Contributions to be made under this agreement

### **OPTION: Where monetary contribution offered**

#### 6.1 Monetary Contribution

- (1) The Developer will pay to Council a monetary contribution of \$insert amount of monetary contribution or an amount calculated in accordance with the following formula, whichever is the greater:

$$\begin{array}{r} \text{\$insert amount of} \\ \text{monetary contribution} \end{array} \times \frac{\text{The CPI at the time of payment}}{\text{The CPI at the date of this agreement}}$$

- (2) Subject to clause 6.1(3), the Monetary Contribution must be paid to Council in instalments as follows:
  - (a) 75% of the Monetary Contribution prior to the issue of a Construction Certificate for the Development; and
  - (b) 25% of the Monetary Contribution prior to the issue of an Occupation Certificate for the Development, or prior to the registration of any Strata Plan, whichever is earlier.
- (3) The Developer is not required to pay the instalment of the Monetary Contribution specified in clause 6.1(2)(a) if the Developer provides to the Council a Bank Guarantee in accordance with clause 12.2 as security for that payment, in which case the Developer must pay the full amount of the Monetary Contribution prior to the issue of an Occupation Certificate for the Development.
- (4) The Monetary Contribution must be paid by way of bank cheque in favour of Council or by deposit by means of electronic funds transfer into an account specified by Council.
- (5) The Monetary Contribution will be taken to have been made when the Council notifies the Developer in writing that the bank cheque has been received and cleared funds or electronic funds have been deposited in the Council's bank account.
- (6) The parties agree and acknowledge that the Monetary Contribution will be used by the Council towards insert public purpose of monetary contribution.

### **OPTION: Where works in kind offered**

## 6.2 Works

- (1) The Developer will carry out the Works in accordance with this agreement, including the Construction Terms and any Development Consent granted for the Works.
- (2) The Works or any part of the Works required under this agreement will be taken to have been completed for the purposes of this agreement when a Certificate of Practical Completion has been issued for those Works.
- (3) The Works or any part of the Works required under this agreement will be taken to have been delivered to Council when the land on which those Works are located is dedicated to Council.
- (4) The Works must be delivered to the Council prior to the issue of an Occupation Certificate for the Development or any part of the Development.
- (5) The parties agree and acknowledge that the Works serve the following public purposes:
  - (a) [insert details of public purposes].

### **OPTION: Where land is to be dedicated**

## 6.3 Dedication of Land

- (1) The Developer must dedicate or cause to be transferred to the Council, at no cost to the Council, the Dedication Land freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, easements, rights, charges, rates and contracts in, over or in connection with the land, including but not limited to, municipal rates and charges, water rates and land tax, except as permitted by Council.

### **OPTION: For dedication of public reserve land**

- (2) The obligation to dedicate the Dedication Land will be taken to have been satisfied when either a Certificate of Title is issued by NSW Land and Property Information for the whole of the Public Reserve identifying the Council as the registered proprietor of that land without encumbrances as required by clause 6.3(1) or when the Public Reserve is dedicated to Council by operation of the registration of a plan of subdivision in accordance with section 49 of the *Local Government Act 1993*.

### **OPTION: For dedication of public road land**

- (3) The obligation to dedicate the Dedication Land will be taken to have been satisfied when either a Certificate of Title is issued by NSW Land and Property Information for the whole of the Public Road identifying the Council as the registered proprietor of that land without encumbrances as required by clause 6.3(1) or when the Public Road is dedicated to Council by operation of the registration of a plan of subdivision in accordance with section 9 of the *Roads Act 1993*.

### **OPTION: For dedication of other land, including land for community facilities, environmental management, etc.**

- (4) The obligation to dedicate the Dedication Land will be taken to have been satisfied when a Certificate of Title is issued by NSW Land and Property Information for the whole of the Dedication Land identifying the Council as the registered proprietor of that land without encumbrances as required by clause 6.3(1).

- (5) The Dedication Land must be dedicated or transferred to Council prior to [insert timing for dedication or transfer of land – Options include: “within 10 Business Days of registration of a subdivision plan creating the Dedication Land” OR “prior to the issue of an Occupation Certificate for the Development or any part of the Development”].
- (6) The parties agree and acknowledge that the embellishment and dedication of the Dedication Land serve the public purpose of [insert details of public purposes].

***OPTION: Where Developer is to maintain works after completion***

**6.4 Maintenance of Works**

- (1) In this clause, the following definitions apply:

**Maintain** means works to bring an item to a state of reasonable condition and in accordance with relevant standards applicable at the time of construction of the item, including repairing any defects due to use of poor materials or due to poor workmanship, but does not include removing graffiti or repairing any item damaged as a consequence of vandalism. **Maintained** and **Maintenance** have corresponding meanings.

**Maintenance Period** in relation to a particular item of Work, is the period of [X] years from the time that item of Work is delivered to Council in accordance with this agreement.

**Maintenance Schedule** means the schedule of proposed Maintenance works as required by clause 6.4(4).
- (2) The Works or any part of those works, must be Maintained by the Developer to the reasonable satisfaction of the Council for the Maintenance Period.
- (3) The Developer must follow relevant Council policies and obtain all Approvals necessary to carry out the Maintenance required under this clause.
- (4) Prior to the issue of a Certificate of Practical Completion for any part of the Works, the Developer must:
  - (a) provide to the Council a Maintenance Schedule setting out the proposed Maintenance works and estimated costs for the relevant part of the Works over the Maintenance Period, and
  - (b) once the Council approves the Maintenance Schedule, acting reasonably, provide the Council with a Bank Guarantee or Bond in the amount of the estimated costs of the maintenance works as set out in the Maintenance Schedule.
- (5) The Council agrees to promptly return any Bank Guarantee provided under paragraph (4) of this clause at the end of the Maintenance Period for the relevant item of Works, subject to paragraphs (10) and (11) of this clause.
- (6) Forty Business Days prior to the end of any Maintenance Period, the Developer must request Council to carry out an inspection of the Works or any part of those Works.
- (7) The Council must carry out the inspection as requested by the Developer within 5 Business Days of the request.

- (8) The Council may, within 5 Business Days of carrying out the inspection notify the Developer of any Maintenance work required, including any Maintenance required in addition to the work set out in the Maintenance Schedule.
- (9) If the Developer is issued with a notice to carry out Maintenance work under paragraph (8) of this clause, the Developer must, at the Developer's cost, carry out the Maintenance work as specified in the notice and in the timeframe specified by the notice.
- (10) If the Council issues a notice under paragraph (8) of this clause, the Council may retain any Bank Guarantee provided by the Developer under paragraph (4) of this clause until the Maintenance work required under the notice has been completed, or any dispute about the notice has been resolved, despite the expiration of any Maintenance Period.
- (11) If the Developer fails to substantially comply with an approved Maintenance Schedule and does not rectify that failure within 21 Business Days of being notified of that failure or within a reasonable period of time agreed between the parties, or if the Developer fails to comply with a notice issued under paragraph (8) of this clause, the Council may, by itself, its employees, contractors or agents, carry out the required works and may:
  - (a) call on the Bank Guarantee or Bond provided under paragraph (4) of this clause in satisfaction of the costs of carrying out the maintenance work; and
  - (b) recover as a debt due to the Council by the Developer in a court of competent jurisdiction, any difference between the amount of the Bank Guarantee or Bond and the costs incurred by the Council in carrying out the maintenance work.

***OPTION: Where Environmental Management Land is offered***

**6.5 Approval of Detailed Management Plan**

- (1) The Developer is not to establish or maintain the Environmental Management Land except in accordance with:
  - (a) Detailed Management Plan that has been approved by the Council, and
  - (b) the terms of any Approval granted by the Council (as modified from time to time).
- (2) The Developer is to ensure that any Development Application that seeks Development Consent for the establishment and maintenance of Environmental Management Land is accompanied by a Detailed Management Plan.

**6.6 Approval of Vegetation Management Plan**

- (1) The Developer is to submit a Vegetation Management Plan to the Council for approval before any application being made for a Construction Certificate for the establishment and maintenance of the Environmental Management Land.
- (2) The Developer is not to establish or maintain the Environmental Management Land except in accordance with:
  - (a) the Vegetation Management Plan, and

- (b) the terms of any Approval granted by the Council as modified from time to time.

#### 6.7 Establishment and management of Environmental Management Land

- (1) The Developer, at its own cost, is to perform:
  - (a) the Establishment Obligation during the Establishment Period, and
  - (b) the Management Obligation during the Management Period.
- (2) The Developer is to perform its obligations with respect to its Establishment Obligation and Management Obligation in accordance with:
  - (a) this Agreement;
  - (b) any further agreement that is entered into by the Parties; and
  - (c) any requirements and directions notified in writing by the Council to the Developer at any time before the Management Work is taken to have been completed under this Agreement that are not inconsistent with:
    - (i) this Agreement,
    - (ii) any further agreement entered into by the Parties, or
    - (iii) any Development Consent relating to the Development.
- (3) Despite any other provision of this Deed, the Establishment Obligation and the Management Obligation are not to be varied by the Developer, unless:
  - (a) the Parties agree in writing to the variation, and
  - (b) any consent or Approval required under the Act or any other law to the variation is first obtained.
- (4) Despite any other provision of this Deed:
  - (a) the Developer, by written notices, is to inform the Council when it considers it has completed the Establishment Obligation and, again, when it considers it has completed the Management Obligation;
  - (b) not later than 14 days after receipt of such notice, the Council may, by written notice, direct the Developer to do the things specified in the notice in order to complete the Establishment Obligation or the Management Obligation to its satisfaction; and
  - (c) The Developer, at its own cost, is to comply with any such direction of the Council according to its terms.
- (5) For the purposes of this Deed, the Establishment Obligation and the Management Obligation are taken to have been completed:
  - (a) if the Developer was not given a notice under **clause 6.7(4)** – at the end of the period specified in that clause, or



- (b) if the Developer was given a notice under clause 6.7(4) – when the Council, by written notice, informs the Developer that the Developer has complied with that notice to the satisfaction of the Council.

#### 6.8 Failure to perform Establishment Obligation or Management Obligation

Clause 6.4, with any necessary modifications, applies to a breach of the Establishment Obligation or the Management Obligation by the Landowner in the same way as it applies to a breach of an obligation to carry out Work by the Landowner.

#### 6.9 Inspection of Environmental Management Land

- (1) Before the Environmental Management Land is dedicated to the Council in accordance with this Deed, the Landowner is to permit the Council, its officers, employees, agents and contractors to enter that land at any time for the purposes of establishing compliance with the Vegetation Management Plan upon giving reasonable prior notice.
- (2) After the Environmental Management Land is dedicated to the Council in accordance with this Deed, the Landowner is to permit the Council, its officers, employees, agents and contractors to reasonably pass through land owned, occupied or otherwise controlled by the Landowner to enable the Council to obtain reasonable access to the Environmental Management Land.
- (3) This clause does not derogate from any other rights the Council has under this Deed to enter the Environmental Management Land.

#### 6.10 Access to Environmental Management Land

- (1) Before the Environmental Management Land is dedicated to the Council in accordance with this Deed, the Developer is to permit the Council, its officers, employees, agents and contractors to enter that land at any time, upon giving reasonable prior notice, to inspect, examine or test that land.
- (2) After the Environmental Management Land is dedicated to the Council in accordance with this Deed:
  - (a) the Developer is to permit the Council, its officers, employees, agents and contractors to pass through land owned, occupied or otherwise controlled by the Developer to enable the Council to obtain access to the Environmental Management Land;
  - (b) subject to complying with the provisions in the *Local Government Act 1993*, the Developer and its employees, agents, and contractors are to be appointed as the Council's agents on terms agreed with the Council, for the purpose of passing through private land in order to access the Environmental Management Land and carry out its Management Obligation; and
  - (c) the Developer and its employees, agents and contractors are authorised to access the Environmental Management Land without payment of any access fee in order to carry out its Management Obligation, subject to the Developer:
    - (i) providing no less than 14 days' notice to the Council; and
    - (ii) complying with the Council's reasonable requirements for access, except that no access fee will be payable by the Developer.

- (3) The Developer jointly and severally indemnifies the Council in respect of any negligent act or omission of the Developer, its employees, agents or contractors in accessing the Environmental Management Land under clause 6.10(2).

#### 6.11 Damage and repairs to Management Work

- (1) Subject to clause 6.11(2), the Developer, at its own cost, is to repair and make good, to the satisfaction of the Council having regard to the standard specified in clause 6.11(3), any loss or damage to any Management Work, from any cause whatsoever, occurring prior to the commencement of the Management Period.
- (2) Despite clause 6.11(1), the Developer is not required to repair or make good any loss or damage to any Management Work to the extent that it is:
  - (a) caused or contributed to by the Council or the Council's invitees, agents, employees or contractors, or
  - (b) outside of the Developer's control, following dedication of the Environmental Management Land to the Council.
- (3) If the Developer is required under clause 6.11(1) to repair and make good any loss or damage to any Management Work, the Developer is to repair and make good such loss or damage to the standard required under the applicable Approval and Detailed Management Plan for the relevant Management Work.

#### 6.12 Management Contribution

- (1) Subject to clause 6.5(2), the Developer is to pay to the Council the Management Contribution relating to each part of the Development to which a Development Consent relates based on the Net Developable Area of the Land the subject of the relevant Development Consent and at the following times:
  - (a) if the Development involves Subdivision that will create a Final Lot - before a Subdivision Certificate is issued in relation to the Development or at such other time as the Parties agree; or
  - (b) if the Development does not involve Subdivision that will create a Final Lot - before the first Construction Certificate is issued in respect of the Development or at such other time as the Parties agree.
- (2) Nothing in this Deed requires the Developer to pay to the Council the Management Contribution in respect of the creation of a Residue Lot unless the Council is of the opinion that the lot will not be further subdivided.
- (3) The Council is to deposit the Management Contribution paid by the Developer into the consolidated fund referred to in s 409(3)(b) of the *Local Government Act 1993*.
- (4) The Management Contribution and any interest earned on its investment is to be held and applied by the Council for a period of 17 years on and from the expiration of the Management Period towards the ongoing environmental management of the Environmental Management Land but only where that land has been dedicated to the Council.
- (5) The Management Contribution payable by the Developer may be reduced by agreement in writing between the Developer and the Council but only if the agreement also provides for a Management Period that exceeds three years.

### 6.13 EML Security

- (1) The Developer is to provide the EML Security to the Council before the Environmental Management Land is dedicated to the Council.
- (2) The amount of the EML Security is \$20,000.00 indexed annually from the commencement of this Deed in accordance with the.
- (3) From time to time, Council may:
  - (a) review the amount of the EML Security having regard to the cost to the Developer of performing the Management Obligation in accordance with this Deed, and
  - (b) notify the Developer in writing of the revised amount of the EML Security, and the revised amount notified to the Developer replaces the amount of EML Security specified in clause 6.13(2).
- (4) The Council is not to call upon the EML Security unless the Council considers that the Landowner has failed to comply with a notice referred to in clause 6.4, relating to a breach of the Management Obligation under clause 6.8.
- (5) The Council may apply the EML Security in satisfaction of:
  - (a) the Developer's obligations under this Agreement to carry out the Management Obligation, and
  - (b) any liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to carry out the Management Obligation.
- (6) The Council is to release and return the EML Security or any remaining part of it to the Developer within 14 days of the date on which the Management Obligation is completed to the satisfaction of the Council but only if the Developer is not in breach of this Deed at that time.
- (7) If the Council calls on the EML Security in accordance with this Agreement, the Council may, by notice in writing to the Developer, require the Developer to provide a further EML Security in an amount which, together with any unused portion of any existing EML Security, does not exceed the amount specified in clause 6.13(2).
- (8) Any difference between the amount of the EML Security called upon by the Council and the costs incurred by the Council in completing the Management Obligation or both may be recovered by the Council from the Developer as a debt due in a court of competent jurisdiction.

#### **OPTION: Where public access easements are offered**

### 6.14 Public Access and Easements

- (1) Subject to clause 6.2, the Developer will, at no cost to Council, register against the title to the Land:
  - (a) a covenant prohibiting any building or structures, including pillars, other than structures approved by the Council (acting reasonably) for the purposes of enhancing public domain areas, to be constructed on [describe the location where public access is required by reference to plan and

include a defined term if required e.g. Setback Area], which covenant is to be limited in height and depth [describe limitations]; and

- (b) an easement in gross burdening that part of the Land on which the [eg. Setback Area] is located limited in height to [describe limitations] in favour of the Council permitting public access to the [e.g. Setback Area] and generally in accordance with the Easement Terms.
- (2) Any requirement to register an easement, covenant or other instrument against the title to the Land will be satisfied when the Developer provides to the Council a copy of the relevant title search showing the registration of the instrument.
- (3) Any covenant required under clause (1) must be registered prior to the issue of the first Construction Certificate for any building on the Land forming part of the Development.
- (4) Any easement, required under clause (1) must be registered prior to the issue of an Occupation Certificate for any building on the Land forming part of the Development.
- (5) The parties agree that the proposed covenant and easement under this clause will serve the following public purposes:
  - (a) To increase the amount of and improve existing public open space areas in the vicinity of the Land;
  - (b) To improve pedestrian circulation and the amenity of the public domain in the vicinity of the Land.
- (6) The Developer agrees and acknowledges that the obligations under this clause 6.5 are relevant considerations for the Council or any other consent authority when determining a Development Application or Modification Application relating to the Land and that a failure to comply with those obligations or any inconsistency with the requirements in those clauses may constitute a reason for refusal of such a Development Application or Modification Application.

***OPTION: Where access to Council owned land is required***

**6.15 Access to Council owned land**

- (1) The Council agrees to permit the Developer, upon receiving at least 10 Business Days' prior notice, to enter, pass through or occupy any Council owned or controlled land in order to enable the Developer to properly perform its obligations under this agreement. Nothing in this clause creates or gives the Developer any estate or interest in any part of the Council owned or controlled land.
- (2) The Developer indemnifies the Council, its employees, officers, agents and contractors from and against all Claims in connection with the entry or access by the Developer to, or any presence of the Developer on, Council owned or controlled land for the purposes of performing its obligations under this agreement, except to the extent such Claim arises directly as a result of the Council or its employees, officers, agents, contractors or workmen's negligence, default, act or omission.

**7 Application of s 7.11, s 7.12 and s 7.24 of the Act to the Development**

- (1) This agreement [excludes OR does not exclude] the application of section 7.11 of the Act to the Development.

- (2) This agreement [excludes OR does not exclude] the application of section 7.12 of the Act to the Development.
- (3) This agreement [excludes OR does not exclude] the application of section 7.24 of the Act to the Development.
- (4) The benefits under this agreement [are to be OR are not to be] taken into consideration in determining a development contribution under section 7.11 of the Act.

*Note: s7.4(3A) of the Act provides that sections 7.11 and 7.12 of the Act cannot be excluded unless the consent authority for the development or the Minister is a party to the agreement. Section 7.4(5A) provides that a planning authority must not enter into a planning agreement that excludes the application of section 7.24 without the approval of the Minister or a development corporation designated by the Minister.*

## **8 Registration of this agreement**

### **8.1 Developer Interest**

The Developer [or "The Landowner", if the Developer is not the registered proprietor] represents and warrants to the Council that on the date of this agreement it is the registered proprietor of the Land.

### **8.2 Registration of this agreement**

- (1) The Developer agrees to procure the registration of this agreement under the *Real Property Act 1900* (NSW) in the relevant folios of the Register of the Land in accordance with section 7.6 of the Act.
- (2) The Developer, at its own expense, must:
  - (a) procure the lodgement of this agreement with the Registrar-General as soon as reasonably practicable after this agreement comes into operation, but in any event, no later than 10 Business Days after that date;
  - (b) procure the registration of this agreement by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this agreement is lodged for registration; and
  - (c) provide documentary evidence that the registration of this agreement has been completed to Council within 5 Business Days of receiving confirmation that the registration has occurred.
- (3) The Developer at its own expense will take all practical steps, and otherwise do anything that the Council reasonably requires to procure:
  - (a) The consent of each person who:
    - (i) has an estate or interest in the Land registered under the *Real Property Act 1900* (NSW); or
    - (ii) is seized or possessed of an estate or interest in the Land,
  - (b) An acceptance of the terms of this agreement and an acknowledgement in writing from any existing mortgagee in relation to the Land that the mortgagee will adhere to the provisions of this agreement if it takes possession of the Land as mortgagee in possession,

- (c) The execution of any documents; and
  - (d) The production of the relevant duplicate certificates of title,  
to enable the registration of this agreement in accordance with this clause 8.2.
- (4) The Landowner consents to the registration of the agreement in accordance with this clause 8.2.

### 8.3 Removal from Register

The Council will provide a release and discharge of this agreement so that it may be removed from the folios of the Register for the Land (or any part of it) provided the Council is satisfied the Developer has duly fulfilled its obligations under this agreement, and is not otherwise in default of any of the obligations under this agreement.

### 8.4 Caveat

**Note: Can be deleted if Council considers the clause unnecessary**

- (1) The Developer acknowledges and agrees that:
  - (a) when this agreement is executed, the Council is deemed to have acquired and the Developer is deemed to have granted, an equitable estate and interest in the Land for the purposes of section 74F(1) of the *Real Property Act 1900* (NSW) and consequently the Council will have a sufficient interest in the Land in respect of which to lodge a caveat over the Land notifying that interest;
  - (b) it will not object to the Council lodging a caveat in the relevant folios of the Register for the Land nor will it seek to remove any caveat lodged by the Council provided the caveat does not prevent registration of any dealing or plan other than a transfer.
- (2) The Council must, at the Developer's cost, register a withdrawal of any caveat in respect of the Land within five Business Days after the Developer complies with clause 8.2 and must not lodge any other caveats on the titles to any of the Land, other than in accordance with clause (1).

## 9 Dispute resolution

### 9.1 Reference to Dispute

If a dispute arises between the parties in relation to this agreement, the parties must not commence any court proceedings relating to the dispute unless the parties have complied with this clause, except where a party seeks urgent interlocutory relief.

### 9.2 Notice of Dispute

The party wishing to commence the dispute resolution process must give written notice (**Notice of Dispute**) to the other parties of:

- (1) The nature of the dispute,
- (2) The alleged basis of the dispute, and
- (3) The position which the party issuing the Notice of Dispute believes is correct.

### 9.3 Representatives of Parties to Meet

- (1) The representatives of the parties must promptly (and in any event within 20 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.
- (2) The parties may, without limitation:
  - (a) resolve the dispute during the course of that meeting,
  - (b) agree that further material or expert determination in accordance with clause 9.6 about a particular issue or consideration is needed to effectively resolve the dispute (in which event the parties will, in good faith, agree to a timetable for resolution); or
  - (c) agree that the parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

### 9.4 Further Notice if Not Settled

If the dispute is not resolved within 10 Business Days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (**Determination Notice**) by mediation under clause 9.5 or by expert determination under clause 9.6.

### 9.5 Mediation

If a party gives a Determination Notice calling for the dispute to be mediated:

- (1) The parties must agree to the terms of reference of the mediation within 15 Business Days of the receipt of the Determination Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);
- (2) The mediator will be agreed between the parties, or failing agreement within 15 Business Days of receipt of the Determination Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (3) The mediator appointed pursuant to this clause 9.5 must:
  - (a) Have reasonable qualifications and practical experience in the area of the dispute; and
  - (b) Have no interest or duty which conflicts or may conflict with his or her function as a mediator he or she being required to fully disclose any such interest or duty before his or her appointment;
- (4) The mediator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties;
- (5) The parties must within 15 Business Days of receipt of the Determination Notice notify each other of their representatives who will be involved in the mediation (except if a resolution of the Council is required to appoint a representative, the

Council must advise of the representative within 5 Business Days of the resolution);

- (6) The parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement; and
- (7) In relation to costs and expenses:
  - (a) Each party will bear its own professional and expert costs incurred in connection with the mediation; and
  - (b) The costs of the mediator will be shared equally by the parties unless the mediator determines that a party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that party.

#### 9.6 **Expert determination**

If the dispute is not resolved under clause 9.3 or clause 9.5, or the parties otherwise agree that the dispute may be resolved by expert determination, the parties may refer the dispute to an expert, in which event:

- (1) The dispute must be determined by an independent expert in the relevant field:
  - (a) Agreed upon and appointed jointly by the parties; and
  - (b) In the event that no agreement is reached or no appointment is made within 20 Business Days of the agreement to refer the dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales;
- (2) The expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (3) The determination of the dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (4) The expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (5) Each party will bear its own costs in connection with the process and the determination by the expert and will share equally the expert's fees and costs; and
- (6) Any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
  - (a) Within 20 Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and commences litigation; or
  - (b) The determination is in respect of, or relates to, termination or purported termination of this agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal.



## 9.7 Litigation

If the dispute is not *finally* resolved in accordance with this clause 9, then either party is at liberty to litigate the dispute.

## 9.8 No suspension of contractual obligations

Subject to any interlocutory order obtained under clause 9.1, the referral to or undertaking of a dispute resolution process under this clause 9 does not suspend the parties' obligations under this agreement.

# 10 Enforcement

## 10.1 Default

- (1) In the event a party considers another party has failed to perform and fulfil an obligation under this agreement, it may give notice in writing to the other party (**Default Notice**) giving all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than 21 days.
- (2) In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (3) If a party disputes the Default Notice it may refer the dispute to dispute resolution under clause 9 of this agreement.

## 10.2 Bank Guarantee

***OPTION: When monetary contributions or works are proposed and not to be provided on execution***

- (1) If the Developer elects to provide a Bank Guarantee instead of paying the first instalment of the Monetary Contribution as set out in clause 6.1(2), the Developer must provide to the Council a Bank Guarantee in an amount equivalent to 75% of the Monetary Contribution prior to the issue of a Construction Certificate for the Development.
- (2) Prior to the issue of a Construction Certificate [or other date as agreed] the Developer must provide to the Council a Bank Guarantee in the amount of \$insert amount to secure:
  - (a) [insert details of items secured by Bank Guarantee as required including the costs of compulsory acquisition, completion of works, etc.].
- (3) The Council may reject any Bank Guarantee that contains errors, or if it has received the Bank Guarantee, require at any time the Developer to obtain a replacement Bank Guarantee that rectifies any such errors or otherwise obtain rectification of the errors. The Developer must provide the replacement Bank Guarantee, or otherwise obtain rectification of the errors, within 5 Business Days of receiving the Council's request.
- (4) The Council may call on a Bank Guarantee provided under this clause if:
  - (a) the Developer is in material or substantial breach of this agreement and has failed to rectify the breach within a reasonable period of time after

having been given reasonable notice (which must not be less than 21 Business Days) in writing to do so in accordance with clause 10.1 of this agreement; or

(b) the Developer becomes Insolvent.

- (5) Within 20 Business Days of each anniversary of a Bank Guarantee provided under clause (1), the Developer must provide Council with one or more replacement Bank Guarantees (**Replacement Bank Guarantee**) in an amount calculated in accordance with the following:

$$A = \frac{B \times D}{C}$$

Where:

A is the amount of the Replacement Bank Guarantee,

B is the amount of the Bank Guarantee to be replaced,

C is the CPI for the quarter ending immediately before the date of the Bank Guarantee to be replaced,

D is the CPI for the quarter ending immediately before the date of the Replacement Bank Guarantee,

provided A is greater than B.

- (6) On receipt of a Replacement Bank Guarantee provided under clause 10.2(5), the Council must release and return to the Developer, as directed, the Bank Guarantee that has been replaced as soon as reasonably practicable.
- (7) At any time following the provision of a Bank Guarantee under this clause, the Developer may provide the Council with one or more replacement Bank Guarantees totalling the amount of all Bank Guarantees required to be provided under this clause for the time being. On receipt of such replacement Bank Guarantee, the Council must release and return to the Developer, as directed, the Bank Guarantee(s) which it holds that have been replaced as soon as reasonably practicable.
- (8) Subject to clause 10.2(4), the Council may apply the proceeds of a Bank Guarantee in satisfaction of:
- (a) any obligation of the Developer under this agreement that is secured by the Bank Guarantee; and
  - (b) any associated 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.
- (9) The Council must promptly return a Bank Guarantee provided under this clause to secure the provision of any Works if requested by the Developer and:
- (a) A Certificate of Practical Completion has been issued for the item of Works to which the Bank Guarantee relates; and
  - (b) The Developer has provided a Bond or Bank Guarantee under clause 8.5 of the Construction Terms (defects liability guarantee) for that item of Works;

- (c) The Developer has provided a Bank Guarantee for any Maintenance Period under clause 6.4 for that item of Works; and
  - (d) If the Bank Guarantee relates to other items of Works for which a Certificate of Practical Completion has not been issued, a replacement Bank Guarantee is provided by the Developer in an amount determined by the Council acting reasonably, that is equivalent to the costs of constructing those other items of Works.
- (10) For the avoidance of doubt, the Developer may direct Council in writing to continue to hold a Bank Guarantee provided under this clause 12.2 in satisfaction of the requirement to submit a Bank Guarantee or Bond under clause 8.5 of the Construction Terms for defects liability.
- (11) Nothing in this clause 10.2 prevents or restricts the Council from taking any enforcement action in relation to:
- (a) any obligation of the Developer under this agreement; or
  - (b) any associated 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,

that is not or cannot be satisfied by calling on a Bank Guarantee.

**OPTION: When land is to be dedicated**

**10.3 Compulsory Acquisition**

- (1) If the Developer does not dedicate the Dedication Land to Council as required by this agreement, the Council may compulsorily acquire the relevant land, in which case the Developer consents to the Council compulsorily acquiring that land for compensation in the amount of \$1.00 without having to follow the pre-acquisition procedures in the *Land Acquisition (Just Terms Compensation) Act 1991* and may call upon any Bank Guarantee provided under clause 10.2 to cover any costs, including legal costs, incurred by the Council on acquisition of the land.
- (2) Clause 10.3(1) constitutes an agreement for the purposes of section 30 of the *Land Acquisition (Just Terms Compensation) Act 1991*.
- (3) Except as otherwise agreed between the Developer and Council, the Developer must ensure the Dedication Land is freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, rights, charges, rates, strata levies and contracts, except as may be permitted by this agreement on the date that the Council will acquire the land in accordance with clause 10.3(1).
- (4) The Developer indemnifies and keeps indemnified the Council against all Claims made against the Council as a result of any acquisition by the Council of the whole or any part of the relevant land under clause 10.3(1).
- (5) The Developer must pay the Council, promptly on demand, an amount equivalent to all costs, including legal costs, incurred by the Council acquiring the whole or any part of the relevant land under clause 10.3(1) that are not or cannot be recovered by calling on a Bank Guarantee.

**10.4 Restriction on the issue of Certificates**

**NOTE: Delete the provisions that are not relevant**

- (1) In accordance with section 6.8 of the Act and any associated regulations (or if the Former Building and Subdivision Provisions apply, section 109F of the Act and clause 146A of the Regulation) any obligations to:
  - (a) provide a Bank Guarantee under clause 10.2; and
  - (b) pay the Monetary Contribution under clause 6.1,

must be satisfied prior to the issue of a Construction Certificate for the Development or any part of the Development.

- (2) In accordance with section 6.10 of the Act and any associated regulations (or if the Former Building and Subdivision Provisions apply, section 109H(2) of the Act) the obligations to:
  - (a) carry out the Works;
  - (b) dedicate the Dedication Land;
  - (c) provide a Bank Guarantee or Bond for any item of the Works for defects liability under the Construction Terms;
  - (d) complete the construction and finishing of the Council Strata Lot in accordance with clause 6.7(1); and

must be satisfied prior to the issue of an Occupation Certificate for the Development or any part of the Development.

#### 10.5 **General Enforcement**

- (1) Without limiting any other remedies available to the parties, this agreement may be enforced by any party in any Court of competent jurisdiction.
- (2) Nothing in this agreement prevents:
  - (a) a party from bringing proceedings in the Land and Environment Court to enforce any aspect of this agreement or any matter to which this agreement relates; and
  - (b) the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this agreement or any matter to which this agreement relates.

### 11 **Warranties**

The Developer warrants to Council that

- (1) it is able to fully comply with its obligations under this agreement;
- (2) it has full capacity to enter into this agreement; and
- (3) there is no legal impediment to it entering into this agreement, or performing the obligations imposed under it.

## 12 Assignment and dealings

### 12.1 Assignment

- (1) A party must not assign or deal with any right under this agreement without the prior written consent of the other parties.
- (2) Any change of ownership or control (as defined in section 50AA of the *Commonwealth Corporations Act 2001*) of a party (excluding the Council) shall be deemed to be an assignment of this agreement for the purposes of this clause.
- (3) Any purported dealing in breach of this clause is of no effect.

### 12.2 Arrangements with Mortgagee

- (1) The Developer [or the Landowner, if the Developer is not the owner of the land] agrees with the Council that if the Developer [or the Landowner, if the Developer is not the owner of the land] mortgages the Land after this agreement is entered into it must use all reasonable efforts at that time to arrange a multiple party deed of agreement between the Council, the Developer, and the mortgagee who will be providing finance for the Works so that the mortgagee accepts that the responsibilities set out in this agreement are binding upon the mortgagee in the event that the Developer defaults on the mortgage and the mortgagee takes possession of the Land.
- (2) The terms of the adoption of the obligations of the Developer by the mortgagee shall be as reasonably required by the Council. The agreement shall be prepared at the cost of the Developer.

### 12.3 Transfer of Land

- (1) The Developer [or the Landowner, if the Developer is not the owner of the land] may not transfer, assign or dispose of the whole or any part of its right, title or interest in the Land (present or future) or in the Development to another person (**Transferee**) unless before it sells, transfers or disposes of that right, title or interest:
  - (a) The Developer [or Landowner] satisfies the Council that the proposed Transferee is financially capable of complying with the Developer obligations under this agreement;
  - (b) The Developer [or Landowner] satisfies the Council that the rights of the Council will not be diminished or fettered in any way;
  - (c) The Transferee delivers to the Council a novation deed signed by the Transferee in a form and of such substance as is acceptable to the Council containing provisions under which the Transferee agrees to comply with all the outstanding obligations of the Developer under this agreement;
  - (d) The Transferee delivers to the Council replacement Bonds or Bank Guarantees as required by this agreement;
  - (e) Any default under any provisions of this agreement has been remedied or waived by the Council, on such conditions as the Council may determine, and
  - (f) The Developer and the Transferee pay the Council's reasonable costs in relation to the assignment.

## 13 Approvals and consents

Except as otherwise set out in this agreement, and subject to any statutory obligations, a party may give or withhold an approval or consent to be given under this agreement in that party's absolute discretion and subject to any conditions determined by the party. A party is not obligated to give its reasons for giving or withholding consent or for giving consent subject to conditions.

## 14 No fetter

### 14.1 Discretion

This agreement is not intended to operate to fetter, in any manner, the exercise of any statutory power or discretion of the Council, including, but not limited to, any statutory power or discretion of the Council relating to the Development Application or any other application for Development Consent (all referred to in this agreement as a "**Discretion**").

### 14.2 No fetter

No provision of this agreement is intended to constitute any fetter on the exercise of any Discretion. If, contrary to the operation of this clause, any provision of this agreement is held by a court of competent jurisdiction to constitute a fetter on any Discretion, the parties agree:

- (1) They will take all practical steps, including the execution of any further documents, to ensure the objective of this clause is substantially satisfied,
- (2) In the event that (a) cannot be achieved without giving rise to a fetter on the exercise of a Discretion, the relevant provision is to be severed and the remainder of this agreement has full force and effect, and
- (3) To endeavour to satisfy the common objectives of the parties in relation to the provision of this agreement which is to be held to be a fetter on the extent that is possible having regard to the relevant court judgment.

### 14.3 Planning Certificates

The Developer acknowledges that Council may, at its discretion, include advice on any planning certificate issued under section 10.7 of the Act that this agreement affects the Land.

## 15 Notice

### 15.1 Notices

Any notice given under or in connection with this agreement (**Notice**):

- (1) must be in writing and signed by a person duly authorised by the sender;

- (2) must be addressed as follows and delivered to the intended recipient by hand, by prepaid post or by email or fax at the address or fax number below, or at the address or fax number last notified by the intended recipient to the sender after the date of this agreement:
- (a) to Port Macquarie Hastings Council: Corner Lord and Burrawan Streets, Port Macquarie, New South Wales 2444  
 Fax: [Council fax]  
 Email: [Council email]  
 Attention: [Council contact]
  - (b) to [Developer Name]: [Developer address]  
 Fax: [Developer fax]  
 Email: [Developer email]  
 Attention: [Developer contact]
- (3) is taken to be given or made:
- (a) in the case of hand delivery, when delivered;
  - (b) in the case of delivery by post, three Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country); and
  - (c) in the case of a fax, on production of a transmission report by the machine from which the fax was sent that indicates the fax was sent in its entirety to the recipient's fax number; and
- (4) if under clause (3) a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it is taken to have been given or made at the start of business on the next Business Day in that place.

#### 15.2 Notices sent by email:

- (1) A party may serve a Notice by email if the Notice:
- (a) includes a signature block specifying:
    - (i) the name of the person sending the Notice; and
    - (ii) the sender's position within the relevant party;
  - (b) states in the body of the message or the subject field that it is sent as a Notice under this agreement;
  - (c) contains an express statement that the person sending the Notice has the authority to serve a Notice under this agreement;
  - (d) is sent to the email address below or the email address last notified by the intended recipient to the sender:
    - (i) to Port Macquarie Hastings Council: Attention: [Council contact]  
[Council email]
    - (ii) to [Developer Name]: Attention: [Developer contact]  
[Developer email]

- (2) The recipient of a Notice served under this clause 15.2 must:
  - (a) promptly acknowledge receipt of the Notice; and
  - (b) keep an electronic copy of the Notice,
- (3) Failure to comply with clause 15.2 does not invalidate service of a Notice under this clause.

### **15.3 Receipt of Notices sent by email**

- (1) A Notice sent under clause 15.2 is taken to be given or made:
  - (a) when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above;
  - (b) when the Notice enters an information system controlled by the recipient; or
  - (c) when the Notice is first opened or read by the recipient,whichever occurs first.
- (2) If under clause 15.3 a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it will be taken to have been given or made at the start of business on the next Business Day in that place.

## **16 Security for legal costs**

### **16.1 Enforcement**

- (1) The Parties acknowledge and agree that as at the date of this Deed, the Developer has provided to the Council and the Council holds a Bank Guarantee of \$50,000 in respect of the Council's costs of enforcement of any breach of the terms of this Deed by the Developer.
- (2) If the Council calls on a Bank Guarantee given pursuant to this clause, it may use the amount so paid to it in satisfaction of the Developer's obligations under this Deed so breached and additionally for any liability, loss, cost, charge or expense incurred by the Council because of the failure by the Developer to comply with this Deed.
- (3) The Council is to release and return the Bank Guarantee upon the completion by the Developer of all of its obligations under this Deed.
- (4) At any time following the provision of a Bank Guarantee, the Developer may provide the Council with a replacement Bank Guarantee totalling the amount of the Bank Guarantee required to be provided under clause (1).
- (5) On receipt of a replacement Bank Guarantee, the Council is to release and return to the Developer as directed, the Bank Guarantee it holds which has been replaced.



## 16.2 Negotiation and execution

- (1) Within 28 days of the date on which the Council provides to the Developer the information required by clause 16.2(2), the Developer is to pay to the Council its costs of preparing, negotiating and executing this Deed up to a maximum of **\$65,000 +GST**.
- (2) The Developer is not obliged to contribute towards Council's costs unless the Council has first provided to the Developer:
  - (a) copies of relevant invoices, and
  - (b) evidence that the relevant invoices have been paid by the Council.
- (3) The Developer is not to question any aspect of the invoices.
- (4) The Council may make an allowance for any unpaid amount that is required to be paid under clause 16.2(1) when determining an amount to be paid under clause 6.1.

## 17 General

### 17.1 Relationship between parties

- (1) Nothing in this agreement:
  - (a) constitutes a partnership between the parties; or
  - (b) except as expressly provided, makes a party an agent of another party for any purpose.
- (2) A party cannot in any way or for any purpose:
  - (a) bind another party; or
  - (b) contract in the name of another party.
- (3) If a party must fulfil an obligation and that party is dependent on another party, then that other party must do each thing reasonably within its power to assist the other in the performance of that obligation.

### 17.2 Time for doing acts

- (1) If the time for doing any act or thing required to be done or a notice period specified in this agreement expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.
- (2) If any act or thing required to be done is done after 5.00 pm on the specified day, it is taken to have been done on the following Business Day.

### 17.3 Further assurances

Each party must promptly execute all documents and do all other things reasonably necessary or desirable to give effect to the arrangements recorded in this agreement.

#### 17.4 **Joint and individual liability and benefits**

Except as otherwise set out in this agreement, any agreement, covenant, representation or warranty under this agreement by two or more persons binds them jointly and each of them individually, and any benefit in favour of two or more persons is for the benefit of them jointly and each of them individually.

#### 17.5 **Variations and Amendments**

A provision of this agreement can only be varied by a later written document executed by or on behalf of all parties and in accordance with the provisions of the Act.

#### 17.6 **Counterparts**

This agreement may be executed in any number of counterparts. All counterparts taken together constitute one instrument.

#### 17.7 **Entire agreement**

The contents of this agreement constitute the entire agreement between the parties and supersede any prior negotiations, representations, understandings or arrangements made between the parties regarding the subject matter of this agreement, whether orally or in writing.

#### 17.8 **Representations and warranties**

The parties represent and warrant that they have the power and authority 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.

#### 17.9 **Severability**

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. 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.

#### 17.10 **Invalidity**

- (1) A word or provision must be read down if:
  - (a) this agreement is void, voidable, or unenforceable if it is not read down;
  - (b) this agreement will not be void, voidable or unenforceable if it is read down; and
  - (c) the provision is capable of being read down.
- (2) A word or provision must be severed if:
  - (a) despite the operation of clause (a), the provision is void, voidable or unenforceable if it is not severed; and
  - (b) this agreement will be void, voidable or unenforceable if it is not severed.
- (3) The remainder of this agreement has full effect even if clause 17.10(2) applies.

#### 17.11 Waiver

- (1) A right or remedy created by this agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.
- (2) 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. 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. 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.

#### 17.12 GST

- (1) Words and expressions which are not defined in this agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law.
- (2) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this agreement are exclusive of GST.
- (3) If GST is imposed on any supply made under or in accordance with this agreement, the Developer must pay the GST or pay to the Council an amount equal to the GST payable on or for the taxable supply, whichever is appropriate in the circumstances.
- (4) If the Council is obliged to pay any GST on any supply made under or in accordance with this agreement, the Developer indemnifies the Council for the amount of any such payment is required to make.

#### 17.13 Governing law and jurisdiction

- (1) The laws applicable in New South Wales govern this agreement.
- (2) The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

#### 17.14 Explanatory note

Whilst the parties note their agreement to the explanatory note provided in Annexure E to this agreement, the explanatory note is not to be used to assist in construing this agreement.

## Schedule 1 -Scope of works

[Insert proposed scope of works, providing sufficient detail relating to standard and quality of proposed works, including any diagrams or plans]

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## Schedule 2 - Construction terms

### 1 Interpretation

For the purposes of this Schedule 2, the defined terms in clause 1 of this agreement and the Interpretation principles in clause 2 of this agreement will apply and, unless context indicates a contrary intention:

**Builder** means any entity contracted under the Construction Contract to carry out the Works.

**Construction Contract** means the contract to carry out the Works (whether or not that is a contract for the Works only or forms part of a contract for the building of other components of the Development).

**Defects Liability Period** means in respect of each item of building works which together comprise the Works the period of 12 months from the date on which the Certificate of Practical Completion is issued for the Works.

**Detailed Design** means the final specifications and finishes for the Works prepared in accordance with clause 5.2 of this Schedule 2 and will include the design of the Works, the location for the Works, installation specifications and estimated costs of construction and/or installation.

**Services** means all water, gas, electricity, television, drainage, sewerage, cable TV, data communications, telecommunications and other services which are required under a development consent within the meaning of the Act or an Approval and which are necessary or desirable for the construction or operation of the Development.

**Superintendent** means the Superintendent appointed under any Construction Contract.

### 2 Requirements of Authorities and Approvals

2.1 These Construction Terms must be read and construed subject to:

- (a) any requirements or conditions of any Development Consent;
- (b) the requirements of and conditions imposed by all relevant Authorities and all Laws relating to the Development and the construction of the Development.

2.2 If the Developer requires any Approvals in order to carry out the obligations under this agreement, then the Developer will acquire all Approvals necessary to carry out the Works at its own cost.

2.3 The Developer must ensure that the Works carried out under this agreement are carried out:

- (a) in accordance with the relevant Development Consent for the Works and all Approvals and the requirements of all Laws, including without limitation, work health and safety legislation; and
- (b) in a good and workmanlike manner and so that they are diligently progressed until completion;

AND it is acknowledged that to the extent that there is any inconsistency between this agreement and any Approval the terms of the Approval shall take precedence.

### **3 Costs of Works**

All costs of the Works must be borne by the Developer.

### **4 Project Management and Contractor Engagement**

4.1 The Developer will be responsible for managing the Works.

4.2 The Developer will ensure that any contractor it engages to carry out the Works agrees to:

- (a) carry out the Developer's obligations in these Construction Terms as part of any Construction Contract; and
- (b) request a Council representative to be present at each on-site meeting attended by the Superintendent and to ensure the Council representative is present at the meeting.

### **5 Design Development and Approvals**

#### **5.1 Concept Design**

Council and the Developer have worked in consultation with each other to prepare and agree the concept plans for the Works at Annexure C.

#### **5.2 Detailed Design**

- (a) Prior to Works commencing the Developer must provide a copy of the draft Detailed Design to the Council for approval.
- (b) Within 28 Business Days of receiving the Detailed Design, Council will respond to the Developer with any suggested amendments to the Detailed Design.
- (c) Council and the Developer must work in consultation with each other to prepare and agree the Detailed Design and must both act reasonably and with due expedition in their consultations with each other.
- (d) If the Detailed Design is not completed and agreed within 28 Business Days of Council providing its suggested amendments in accordance with clause 5.2(b) of this Schedule 2, to avoid possible delays to the issue of a Certificate of Practical Completion, the Council will, in its sole discretion, be entitled to decide on any outstanding or undecided matter or item relating to areas that are to be accessible to the public, provided that any decision made by Council under this clause:
  - (i) is consistent with the obligation to carry out the Works and dedicate the Dedication Land under this agreement; and
  - (ii) is consistent with the Development Consent; and
  - (iii) does not materially and adversely affect the Development; and
  - (iv) is not unreasonable.
- (e) Any acceptance by the Council of the Detailed Design under this clause 5 of Schedule 2 is not to be taken as approval of or to any Construction Certificate for the Works.

#### **5.3 Good faith**

The parties must act promptly and in good faith to consult in relation to the Detailed Design.

## **6 Carrying out of Works**

### **6.1 Communication**

The Developer must keep Council reasonably informed of progress of the Works and provide to Council such information about the Works as Council reasonably requests.

### **6.2 Standard of Works**

- (a) Unless otherwise provided, the Developer shall, and must cause the Builder to, use suitable new materials and proper and tradesmanlike workmanship when carrying out the Works.
- (b) The qualitative standard of the design and finishes for the Works must be no less than those described in the following documents:
  - (i) Any relevant Australian Standard;
  - (ii) Any relevant design standards or guidelines and any other requirements or policies applied by the Council from time to time in assessing the adequacy of any works or improvements proposed for the public domain or to be accessible to the public in accordance with this agreement.
- (c) The Developer will obtain any relevant standards (including design standards), specifications, or guidelines and any other requirements or policies referred to in clause 6.2(b)(ii) of this Schedule 2 from Council if the Council fails to deliver them to the Developer.
- (d) The Developer may but is not obliged to reinstate any Works where damage or destruction is as a result of:
  - (i) Any act or omission of the Council or its employees, consultants or agents relating to any part of the Works under this agreement; or
  - (ii) The use or occupation by the Council or its employees, consultants or agents, Council's representatives or other contractor of the Council of any part of the Works.

### **6.3 Damage to people, property & utilities**

- (a) The Developer is to ensure to the fullest extent reasonably practicable that, in performing its obligations under this agreement:
  - (i) all necessary measures are taken to protect people and property;
  - (ii) unnecessary interference with the passage of people and vehicles is avoided; and
  - (iii) nuisances and unreasonable noise and disturbances are prevented.
- (b) Without limiting clause 6.3(a) of this Schedule, the Developer is not to obstruct, interfere with, impair or damage any public road, public footpath, public cycleway or other public thoroughfare, or any pipe, conduit, drain, watercourse or other public utility or service on any land except as authorised in writing by the Council or any relevant Authority.

## 7 Inspection

- (a) On completion of the Detailed Design, the Council will provide a schedule of inspections to be undertaken by Council (**Inspection Schedule**) to occur at specified stages of the construction of the Works (**Inspection Stage**). If the Council does not provide the Inspection Schedule, the Developer must request the Inspection Schedule from the Council prior to the Works commencing.
- (b) Five Business Days prior to reaching an Inspection Stage as set out in the Inspection Schedule, the Developer must notify the Council of the proposed inspection date (**Inspection Date**).
- (c) On the Inspection Date, or other agreed date, the Developer must ensure that any employees, contractors, agents or representatives of Council have access to and may enter the Land to inspect the Works.
- (d) In addition to carrying out inspections in accordance with the Inspection Schedule, the Council may enter the Land or any part of the Land on which the Works are located to inspect the progress of the Works, subject to:
  - (i) the terms of the Construction Contract (save for any clause of the Construction Contract which prevents the Council from accessing the Land);
  - (ii) giving reasonable notice to the Developer;
  - (iii) complying with all reasonable directions of the Developer; and
  - (iv) being accompanied by the Developer or a nominee, or as otherwise agreed.
- (e) The Council may, acting reasonably, within 5 Business Days of carrying out an inspection (either under clause 7(c) or 7(d) of this Schedule 2), notify the Developer of any defect or non-compliance in the Works and direct the Developer to carry out work to rectify that defect or non-compliance within a reasonable period of time. Such work may include, but is not limited to:
  - (i) removal of defective or non-complying material;
  - (ii) demolishing defective or non-complying work;
  - (iii) reconstructing, replacing or correcting any defective or non-complying work; and
  - (iv) not delivering any defective or non-complying material to the site of the Works.
- (f) If the Developer is issued a direction to carry out further work under clause 7(e) of this Schedule 2, the Developer must, at its cost, rectify the defect or non-compliance specified in the Notice within the time period specified in the Notice, provided that it is reasonable having regard to the nature of the works.
- (g) If the Developer fails to comply with a direction to carry out work given under 7(e) of this Schedule 2, the Council will be entitled to refuse to accept that the Works (or the relevant part of the Works) meet the Council's standards and specifications and may refuse to issue a Certificate of Practical Completion, until the required Works have been completed to the Council's satisfaction, acting reasonably.



- (h) For the avoidance of doubt, any acceptance by the Council that the Developer has rectified a defect or non-compliance identified in a notice issued under 7(e) of this Schedule 2 does not constitute:
  - (i) acceptance by the Council that the Works comply with all Approvals and Laws; or
  - (ii) an Approval by the Council in respect of the Works; or
  - (iii) an agreement or acknowledgment by the Council that the Works or the relevant part of the Works are complete and may be delivered to the Council in accordance with this agreement.

## **8 Completion**

### **8.1 Practical Completion**

- (a) When the Developer considers that the Works, or any part of the Works, are complete, the Developer must send a Notice to the Council accompanied by complete works as executed plans, any relevant certificates or consents of any public utility authority and a request for written certification from the Council that the Works are complete.
- (b) Within 10 Business Days of receipt of the notice under clause 8.1(a) of this Schedule 2, the Council will carry out an inspection of the Works and will, acting reasonably, either:
  - (i) provide written certification to the Developer that the Works have been completed; or
  - (ii) notify the Developer of any additional information required or matters which must be addressed by the Developer prior to the certification being issued.
- (c) If the Developer is required to provide additional information or address any matters under clause 8.1(b)(ii) of this Schedule 2, the Developer will provide that information to Council or address those matters within 10 Business Days of receiving the notice or within a reasonable period of time and make a further request under clause 8.1(a) of this Schedule 2 for written certification that the Works have been completed.
- (d) Practical completion will be achieved in relation to the Works or any part of the Works when a Certificate of Practical Completion has been issued for those Works.

### **8.2 Delivery of documents**

- (a) The Developer must as soon as practicable, and no later than 20 Business Days after the date on which the Certificate of Practical Completion is issued in respect of the Works or any part of the Works deliver to the Council, complete and legible copies of:
  - (i) all "as built" full-sized drawings, specifications and relevant operation and service manuals;
  - (ii) all necessary certificates including the certificates of any consultants of the Developer that the Council may reasonably require, and Approvals of any public utility authority (where relevant); and
  - (iii) copies of all Approvals required for use of the land subject to the Works.

- (b) The Developer must as soon as practicable, and no later than 20 Business Days after the date on which the Certificate of Practical Completion is issued in respect of the Works or any part of the Works, provide the Council with a tour of the land subject to the Works and provide reasonable instructions on the operation and use of the Services on that land.

### 8.3 Assignment of Warranties and Causes of Action

- (a) The Developer must assign (as beneficial owner) or cause to be assigned to Council the benefit of any warranties and guarantees obtained by the Developer and the Builder (and capable of assignment) with respect to any material or goods incorporated in or forming part of the Works.
- (b) To the extent that any such warranties or guarantees cannot be assigned, the Developer must at the request of Council do anything reasonably required by Council to enforce such warranties or guarantees for the benefit of Council.

### 8.4 Defects Liability Period

- (a) During the Defects Liability Period, the Council (acting reasonably) may give to the Developer a notice (**Rectification Notice**) in writing that identifies a defect in the Works and specifies:
  - (i) action required to be undertaken by the Developer to rectify that defect (**Rectification Works**); and
  - (ii) the date on which the defect must be rectified (**Rectification Date**).
- (b) The Developer must comply with the Rectification Notice by:
  - (i) procuring the performance of the Rectification Works by the Rectification Date, or such other date as agreed between the parties;
  - (ii) keeping the Council reasonably informed of the action to be taken to rectify the defect; and
  - (iii) carrying out the Rectification Works.
- (c) The Council must give the Developer and its contractors any access required to carry out the Rectification Works.
- (d) When the Developer considers that the Rectification Works are complete, either the Developer must notify the Council and provide documentation, plans or invoices which establish that the Rectification Works were carried out.
- (e) The Council may inspect the Rectification Works within 15 Business Days of receiving a Notice from the Developer under clause 8.4(d) of this Schedule 2 and, acting reasonably:
  - (i) issue a further Rectification Notice if it is not reasonably satisfied that the Rectification Works are complete; or
  - (ii) notify the Developer in writing that it is satisfied the Rectification Works are complete.
- (f) The Developer must meet all costs of and incidental to rectification of defects under this clause 8.4.

- (g) If the Developer fail to comply with a Rectification Notice, then the Council may do such things or take such action as is necessary to carry out the Rectification Works, including accessing and occupying any part of the Land without further notice to the Developer, and may:
  - (i) call upon any Bond or Bank Guarantee provided to the Council under clause 8.5 of this Schedule 2 to meet its costs of carrying out Rectification Works; and
  - (ii) recover as a debt due to the Council by the Developer in a court of competent jurisdiction, any difference between the amount of the security deposit and the costs incurred by the Council in carrying out Rectification Works.
- (h) The Developer must request that Council inspect the Works 28 days prior to the end of the Defects Liability Period. The Council must inspect the Works at any time after receiving the request from the Developer and before to the end of the Defects Liability Period.
- (i) If, prior to the end of the Defects Liability Period:
  - (i) the Developer fails to request the inspection, or
  - (ii) the Council does not carry out the inspection,
 the Council may extend the Defects Liability Period so that the inspection may be carried out.

## **8.5 Security for Defects Liability**

- (a) Prior to the issue of a Certificate of Practical Completion for each item of the Works the Developer must deliver to the Council Bonds or Bank Guarantees in an amount equivalent to 2.5% of the construction costs for the particular item of Works.
- (b) The Developer advises and the Council acknowledges its awareness that the Bonds or Bank Guarantees may be supplied by the Builder and form a part of the security held by the Developer from the Builder under the terms of the Construction Contract, provided that:
  - (i) any Bond or Bank Guarantee provided by the Builder benefits the Council and satisfies the requirements of this agreement; and
  - (ii) the Developer procure an agreement from the Builder that the Council will be entitled to call on any Bond or Bank Guarantee provided by the Builder, in accordance with the terms of this agreement and the terms of any Construction Contract.
- (c) Within 10 Business Days after the Defects Liability Period for a particular item of Works has expired Council must (if it has not called on it) return the Bond or Bank Guarantee referred to in clause 8.5(a) of this Schedule 2 for that item of Works (or any remaining balance of it) to the Developer.
- (d) Notwithstanding clause 8.4(c) of this Schedule 2, if during the Defects Liability Period for a particular item of Works, the Council issues a Rectification Notice and the Rectification Notice is not complied with, then the Council need not deliver the balance of any Bonds or Bank Guarantees provided to it until that defect has been rectified.

- (e) The Council must deliver the balance of any Bond or Bank Guarantee for the Defects Liability Period to the Developer within 14 days after the Defects Liability Period has ended.

**9 Risk**

The Developer undertakes the Works entirely at its own risk.

**10 Insurance**

- (a) Prior to the commencement of the construction of any of the Works, the Developer must ensure the Builder effects and the Developer must produce evidence to the Council of the following insurances issued by an insurer approved by the Council (acting reasonably) in a form approved by the Council (acting reasonably):
  - (i) construction works insurance for the value of the Works;
  - (ii) public risk insurance for at least \$20 million;
  - (iii) workers compensation insurance as required by Law.
- (b) The Developer must provide evidence of currency of insurance required by clause 10(a) of this Schedule 2 upon request by the Council, acting reasonably, throughout the term of this agreement.

**11 Indemnities**

The Developer releases and indemnifies the Council, its employees, officers, agents and contractors from and against all Claims in connection with the carrying out by the Developer of the Works except to the extent such Claim arises either directly or indirectly as a result of the Council or its employees, officers, agents, contractors or workmen's negligence, default, act or omission.

**12 Intellectual Property Rights**

The Council acknowledges that the Developer or its contractors hold all rights to copyright and any intellectual property which may exist in the Works. To the extent the Developer has or receives intellectual property rights for the Works, the Developer shall assign those intellectual property rights to Council or permit use thereof.

**13 Risk of contamination**

- (a) The Developer acknowledges and agrees:
  - (i) that it is responsible for the management and remediation of any contamination present upon or under the land on which the Works are to be carried out;
  - (ii) it will attend to any necessary remediation at its own costs; and
  - (iii) to the fullest extent permitted by Law indemnify and release the Council from any Claim which might arise from any contamination with respect to the land on which the Works are to be carried out.
- (b) Prior to the dedication of any part of the Land to Council, the Developer must provide to Council's reasonable satisfaction, certification by a qualified person, that the land is not contaminated and is suitable for the proposed use.

#### **14 Plans**

The parties acknowledge and agree that further detail and refinement of plans and documents in connection with this agreement may be necessary having regard to the following matters:

- (a) matters affecting Works not capable of identification on or before the date of this agreement; or
- (b) by agreement between the parties.

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### Schedule 3 - Easement Terms

***NOTE: The term Setback Area is used in these Easement Terms. Amend that term if required.***

- 1 The owner of the Setback Area grants to the Council and members of the public full and free right to go, pass and repass over the Setback Area at all times:
  - (a) with or without companion animals (as defined in the Companion Animals Act 1998) or other small pet animals; and
  - (b) on foot without vehicles (other than wheelchairs or other disabled access aids), unless vehicles are being used to access the building on the Land via clearly identified entry and exit points;  
for all lawful purposes.
- 2 The owner of the Setback Area must, to the satisfaction of Council, acting reasonably:
  - (i) keep the Setback Area (including any services in, on or under the Setback Area) in good repair and condition;
  - (ii) maintain and repair the Setback Area and all improvements on the Setback Area;
  - (iii) keep the Setback Area clean and free from rubbish; and
  - (iv) maintain sufficient public liability insurance covering the use of the Setback Area in accordance with the terms of this Easement.
- 3 The owner of the Setback Area must ensure that any rules made by an Owner's Corporation relating to the Setback Area have been approved by the Council, acting reasonably.
- 4 If any member or members of the public loiter or congregate, for any purpose which the owner of the Setback Area, acting reasonably, considers to be a nuisance or a safety risk, the owner may either remove those members of the public, or arrange for their removal by an appropriate authority.
- 5 The owner of the Setback Area may erect safety signage and any other appropriate signage and may erect CCTV cameras in the Setback Area.
- 6 The owner of the Setback Area may engage security personnel to monitor and control the behaviour of the public including but not limited to prohibiting smoking, consumption of alcohol (except within licensed areas), passage of animals, bicycles and skateboards and the like in accordance with any rules made by an Owner's Corporation relating to the Setback Area.
- 7 The owner of the Setback Area may with the Council's prior written consent (except in the case of an emergency, in which case the Council's prior written consent is not required) temporarily close or temporarily restrict access through all or part of the Setback Area for the time and to the extent necessary but only on reasonable grounds for the purposes of:
  - (a) construction, construction access, repairs, maintenance, replacement and alteration to the Setback Area or any improvements in, on or under the Setback Area; or
  - (b) security, public safety or evacuation of the Setback Area and adjoining buildings.

- 8 Subject to ensuring the provision of access in accordance with above clause 1 of this Schedule, the owner of the Setback Area may, provided any necessary planning approvals are obtained:
  - (a) Carry out works in the Setback Area for the purposes of enhancing the Setback Area; and
  - (b) Install or erect works of art, street furniture, awnings, tables and chairs associated with ground floor commercial premises, notice boards or any other similar improvements at ground level within the Setback Area.
- 9 The Council is solely empowered to release this Easement.
- 10 This Easement may only be varied by written agreement between the Council and the owner of the Setback Area.

## Schedule 4 - Summary of requirements (section 7.4)

Subject and subsection of the Act	Planning Agreement
<p><b>Planning instrument and/or Development Application – Section 7.4(1)</b></p> <p>The Developer has:</p> <p>(a) Sought a change to an environmental planning instrument</p> <p>(b) Made, or propose to make a Development Application</p> <p>(c) Entered into an agreement with, or are otherwise associated with, a person to whom paragraph (a) or (b) applies</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes <input type="checkbox"/> No</p>
<p><b>Description of the land to which the planning Agreement applies – Section 7.4(3)(a)</b></p>	
<p><b>Description of the application – Section 7.4(3)(b)</b></p>	<p>[Insert brief description of the proposed Instrument Change or proposed development]</p>
<p><b>The scope, timing and manner of delivery of contribution required by the Planning Agreement – Section 7.4(3)(c)</b></p>	
<p><b>Applicability of section 7.11 of the Act – Section 7.4(3)(d)</b></p>	
<p><b>Applicability of section 7.12 of the Act – Section 7.4(3)(d)</b></p>	
<p><b>Applicability of section 7.24 of the Act – Section 7.4(3)(d)</b></p>	
<p><b>Mechanism for dispute resolution – Section 7.4(3)(f)</b></p>	
<p><b>Enforcement of the Planning Agreement – Section 7.4(3)(g)</b></p>	<p>[Include details of enforcement mechanisms including bank guarantees / security amounts]</p>
<p><b>Registration of the Planning Agreement – Section 7.6</b></p>	
<p><b>No obligation to grant consent or exercise functions – Section 7.4(9)</b></p>	



**Executed as an agreement**

Signed on behalf of **Port Macquarie Hastings Council** by its duly authorised officer in the presence of:

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Signature of authorised officer

\_\_\_\_\_  
Name of witness

\_\_\_\_\_  
Name of authorised officer

\_\_\_\_\_  
Address of witness

\_\_\_\_\_  
Position of authorised officer

[Insert further execution clauses as required for each party]

DRAFT

DRAFT

## **Annexure A – Plan showing Land**

***NOTE: Delete Annexures that are not relevant***

**Annexure B – Plan showing Dedication Land**

## **Annexure C – Plan showing Works**

## **Annexure D – Works Schedule of Materials and Finishes**

## Annexure E – Explanatory Note

**NOTE: The Explanatory Note should be prepared separately and does not form part of the agreement but is provided here for convenience.**

### Explanatory Note

#### Draft Planning Agreement

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

##### Parties

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

[Developer Name] ACN [Developer ACN] of [Developer address] (**Developer**)

##### 1 Description of the Land to which the Draft Planning Agreement Applies

[Lot identifier(s) and address]

##### 2 Description of Proposed Development

The development of the Land for urban purposes permissible on the Land from time to time.

##### 3 Summary of Objectives, Nature and Effect of the Draft Planning Agreement

###### Objectives of Draft Planning Agreement

The objective of the Draft Planning Agreement is to provide suitable funding for the provision of infrastructure, facilities and services to meet urban development that is permissible on the Land.

###### Nature of Draft Planning Agreement

The Draft Planning Agreement is a planning agreement under s7.4 of the *Environmental Planning and Assessment Act 1979 (Act)*. It is an agreement between the Council, the Developer and the Owner, being the owner of the land to which the agreement applies. The Draft Planning Agreement is a voluntary agreement under which Development Contributions (as defined in clause 1.1 of the Draft Planning Agreement) are made by the Developer or the Owners or both for various public purposes (as defined in s7.4(2) of the Act).

###### Effect of the Draft Planning Agreement

The Draft Planning Agreement:

- relates to the carrying out by the Developer of any development on the Land to which it applies that is permissible on the Land,

- partly excludes the application of s7.11 of the Act to the Development (as defined in clause 1.1 of the Draft Planning Agreement),
- does not exclude the application of s7.12 or s7.24 of the Act to the Development,
- requires monetary Development Contributions of a specified minimum amount to be made towards community, cultural and emergency services, open space and roads and administration,
- requires the carrying out of specified Works by the Developer for the purposes of providing community and cultural facilities and services, open space, roads and other public purposes,
- requires the dedication of specified land to the Council by the Owner on which some Works will be situated,
- allows offsets against specified monetary Development Contributions, in consideration of the benefits provided to the Council by the Developer and the Owner under the agreement,
- requires the Council to apply monetary Development Contributions made under the agreement towards the specified purpose for which they were made and at the location, in the manner and to the standard (if any) specified in the agreement,
- imposes obligations on the Developer in relation to the carrying out of specified Works, the handing over of those Works to the Council and the rectification of defects in those Works,
- requires the Developer and Owner to provide the Council with security for legal costs in the event that the Council is required to enforce the terms of the agreement,
- requires the Developer and Owner to grant the Council a charge over specified land as security for the performance of the agreement,
- is to be registered on the title to the Land,
- imposes restrictions on the Parties transferring the Land or part of the Land or assigning an interest under the agreement,
- provides two dispute resolution methods for a dispute under the agreement, being expert determination and mediation,
- provides that the agreement is governed by the law of New South Wales, and
- provides that the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) applies to the agreement.

#### **4 Assessment of the Merits of the Draft Planning Agreement**



#### **4.1 *The Planning Purposes Served by the Draft Planning Agreement***

The Draft Planning Agreement:

- promotes and co-ordinates of the orderly and economic use and development of the Land to which the agreement applies,
- provides land for public purposes in connection with the Development,
- provides and co-ordinates community services and facilities in connection with the Development, and
- provides increased opportunity for public involvement and participation in environmental planning and assessment of the Development.

#### **4.2 *How the Draft Planning Agreement Promotes the Public Interest***

The draft Planning Agreement promotes the public interest by promoting the objects of the Act as set out in s1.3(c), (g) and (j) of the Act.

#### **4.3 *For Planning Authorities:***

##### **4.3.1 *Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities***

N/A

##### **4.3.2 *Other Public Authorities – How the Draft Planning Agreement Promotes the Objects (if any) of the Act under which it is Constituted***

N/A

##### **4.3.3 *Councils – How the Draft Planning Agreement Promotes the Elements of the Council's Charter***

The Draft Planning Agreement promotes the elements of the Council's charter by:

- providing services and facilities for the community,
- ensuring that public facilities provided by the Developer and Owner under the agreement are transferred to and managed by the Council or are otherwise subject to the Council's control,
- by providing a means for the private funding of public facilities for the benefit of the Development and the wider community, and
- providing a means that allows the wider community to make submissions to the Council in relation to the agreement.

##### **4.3.4 *All Planning Authorities – Whether the Draft Planning Agreement Conforms with the Authority's Capital Works Program***

The Draft Planning Agreement requires that specified Works to be carried out by the Developer for the purposes of providing community and cultural facilities and services, open space, roads and other public purposes.

These works are not included in the Council's relevant current capital Works program. However, the Council's Management Plan identifies these types of works in the relevant capital Works program.

Accordingly, the provision of these Works under the agreement is consistent and conforms with the capital Works envisioned by the Council's Management Plan.

*4.3.5 All Planning Authorities – Whether the Draft Planning Agreement specifies that certain requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued*

Yes. The Draft Planning Agreement specifies requirements that are to be complied with before certain occupation certificates and subdivision certificates are issued.

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