Planning agreement

[Date]

Strathfield Municipal Council

ABN 52 719 940 263

[Proponent name]

ACN [ACN]

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**Date**

**Parties**

|  |  |
| --- | --- |
| **First party** |  |
| Name | Strathfield Municipal Council (**Council**) |
| ABN | 52 719 940 263 |
| Contact | The General Manager |
| Telephone | First party phone no. |
| **Second party** |  |
| Name | [Name] (**Proponent** [or **Developer** if the Proponent is the owner of the Land]) |
| ACN | [ACN] |
| Contact | [Contact Name] |
| Telephone | [Telephone No.] |
| **Third party** |  |
| Name | [Name] (**Landowner**) |
| ACN | [ACN] |
| Contact | [Contact Name] |
| Telephone | [Telephone No.] |

[Note: Delete Third Party if Proponent is also the owner of the Land]

**Background**

[For Planning Agreements in connection with a Development Application]

1. As at the date of this agreement, the [Developer/Landowner] is the owner of the Land.
2. On [date], the [Developer/Landowner] made a Development Application to the Council for Development Consent to carry out the Development on the Land.
3. The Development Application was accompanied by an offer by the [Developer/Landowner] to enter into this agreement to make contributions for public purposes if Development Consent is granted.

[For Planning Agreements in connection with a Planning Proposal]

1. On [date], the [Developer/Landowner] 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.
2. The Instrument Change application was accompanied by an offer by the [Developer/Landowner] to enter into this agreement to make contributions for public purposes associated with the Instrument Change and the Development.
3. Planning Agreement under the Act
   1. Planning Agreement
      1. The parties agree that this agreement is a planning agreement within the meaning of section 7.4 of the Act.
      2. Schedule 9 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. Definitions and interpretation
   1. Definitions

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

1. **Act** means the *Environmental Planning and Assessment Act 1979* (NSW).
2. **agreement** means this document and includes all Schedules, Annexures and other documents or instruments forming part of it.
3. **Approval** means any approvals, consents, certificates, permits, endorsements, licences, conditions, permissions or requirements (and any modifications or variations to them) which may be required by Law or by any Authority for the commencement and carrying out of any works required under this agreement or the Development and includes a Development Consent or other approval under the Act.
4. **Authority** means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person, agency or entity and includes a certifier accredited under the *Building and Development Certifiers Act 2018* (NSW).
5. **Annexure** means an annexure to this agreement.

**Bank** **Guarantee** means an irrevocable and unconditional undertaking that:

* 1. is an unconditional undertaking;
  2. has no expiry date (or with an expiry date which is approved by the Council);
  3. is issued by a trading bank which is:
     1. within the Sydney metropolitan area; and
     2. holds a current Australian banking licence; and
  4. is in a form and upon such terms and conditions as are acceptable to Council; and,
  5. requires payment of an amount or amounts of money to the Council on demand.

1. **Bond** means a documentary performance bond which must be denominated in Australian dollars and be an unconditional undertaking with all the following requirements. It must:
   1. be signed and issued by an Australian Prudential Regulation Authority (**APRA**) regulated authorised deposit taking institution or an insurer authorised by APRA to conduct new or renewal insurance business in Australia;
   2. have at all times an investment grade security rating from an industry recognised rating agency of at least:
      1. BBB+ (Standard & Poors and Fitch);
      2. Baa 1 (Moodys); or
      3. bbb (Bests);
   3. be issued on behalf of the Developer;
   4. have no expiry or end date;
   5. have the beneficiary as the Council;
   6. be irrevocable;
   7. state either individually, or in total with other lodged compliant forms of Security, the relevant minimum amount required to be lodged as security; and
   8. state the purpose of the deposit required in accordance with this agreement.
2. **Business Day** means a day on which banks are open for general banking business in Sydney, excluding Saturdays and Sundays.
3. **Certificate** means a Construction Certificate, Occupation Certificate, Subdivision Works Certificate or Subdivision Certificate.
4. **Claim** means any claim, loss, liability, damage, proceeding, order, judgment or expense;
5. **Compliance Certificate** means a compliance certificate as defined under section 6.4 of the Act.
6. **Construction** **Certificate** means a construction certificate as defined under section 6.4 of the Act.
7. **Construction** **Terms** means the terms set out in Schedule 6;
8. **Contribution Item** means an item listed in the Contributions Schedule.
9. **Contributions** means the dedication of land, payment of monetary contributions and provision of material public benefits required under this agreement, the nature and extent of which are set out in the Contributions Schedule.
10. **Contributions** **Plan** has the same meaning as under the Act.
11. **Contributions Schedule** means the table contained in Schedule 2.
12. **CPI** means the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics.
13. **Damages** means all liabilities, losses, damages, costs and expenses, including legal fees and disbursements and costs of investigation, litigation, settlement, judgment, interest and penalties.
14. **Dealing**, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.
15. **Developer** means the Proponent and the Landowner, jointly and severally; ***[Note: If the Proponent is the owner of the land the definition of Developer can be deleted]***
16. **Development** is described in the Reference Schedule.
17. **Development Application** has the same meaning as in the Act.
18. **Development Consent** has the same meaning as in the Act and includes any Development Consent as modified.
19. **Explanatory note** means the explanatory note relating to and publicly notified with this agreement, as required by section 205 of the Regulation.
20. **GST** has the same meaning as in the GST Law.
21. **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.
22. **Insolvent** means, in relation to a party:
    1. that party makes an arrangement, compromise or composition with, or assignment for, the benefit of its creditors or a class of them;
    2. 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;
    3. a presumption of insolvency has arisen under legislation because of the party’s failure to comply with a statutory demand or analogous process;
    4. 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;
    5. 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;
    6. 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;
    7. an execution or analogous process is levied or enforced against the property of that party;
    8. that party ceases or suspends, or threatens to cease or suspend, the conduct of all or a substantial part of its business;
    9. that party disposes of, or threatens to dispose of, a substantial part of its assets;
    10. that party stops or suspends, or threatens to stop or suspend, payment of all or a class of its debts; or
    11. that party is unable to pay the party’s debts as and when they become due and payable.
23. **Instrument** **Change** means an amendment to the LEP or any other environmental planning instrumentin response to the Planning Proposal.

**Interest Rate** means the rate charged from time to time on overdraft facilities of more than $100,000 by the Council’s principal bank plus a margin of 2% per annum;

**Land** means the land described at Item 2 of the Reference Schedule;

**Law** means:

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

1. **LEP** means the *Strathfield Local Environmental Plan 2012 (2013 EPI 115.)*.
2. **Modification Application** means any application to modify the Development Consent under section 4.55 of the Act.
3. **Occupation** **Certificate** means an occupation certificate as defined under section 6.4 of the Act, and includes an Occupation Certificate issued for part of a building.
4. **Planning Proposal** means the proposal described at Item 3 of the Reference Schedule;
5. **Reference Schedule** means the table contained in Schedule 1;
6. **Register** means the Torrens title register maintained under the *Real Property Act 1900* (NSW).
7. **Regulation** means the *Environmental Planning and Assessment Regulation 2021*.
8. **Security** means a Bank Guarantee or Bond.
9. **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 Development Act 2015 (NSW)*.
10. **Subdivision Certificate** means a subdivision certificate as defined under section 6.4 of the Act.
11. **Subdivision Works Certificate** means a subdivision works certificate as defined under section 6.4 of the Act.
12. **Works** means all works, including all design, engineering, survey, environmental assessment and construction works, required to deliver any Contribution required under this agreement consisting of the provision of a material public benefit.
    1. Interpretation

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

* + 1. 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. 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. clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this agreement;
    4. 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. 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. the president, CEO or managing director of a body or Authority means any person acting in that capacity;
    7. 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 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. a word that is derived from a defined word has a corresponding meaning;
    10. the singular includes the plural and vice-versa;
    11. words importing one gender include all other genders;
    12. 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. 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. a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
    15. 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, Australia, even if the obligation is to be performed elsewhere;
    16. an agreement, representation, covenant, right or obligation:
        1. in favour of two or more persons is for the benefit of them jointly and severally; and
        2. on the part of two or more persons binds them jointly and severally;
    17. 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. 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. a reference to dollars or $ is to Australian currency;
    20. a reference to a month is a reference to a calendar month; and
    21. a reference to a year is a reference to twelve consecutive calendar months.

1. Application of this agreement
   1. Application

This agreement applies to:

* + 1. the Instrument Change [Note: delete if agreement offered in connection with a DA],
    2. the Development, and
    3. the Land.
  1. Operation

This agreement commences on and from the date it is executed by all parties.

1. Contributions to be made under this agreement
   1. Contributions
      1. The Developer must deliver the Contributions to the Council at the time and in the manner set out in the Contributions Schedule.
      2. The parties acknowledge and agree that the Contributions serve the public purposes set out in the Contributions Schedule.
   2. Application of s 7.11, s 7.12 and s 7.24 of the Act
      1. This agreement excludes the application of sections 7.11, 7.12 and 7.24 of the Act to the Development to the extent set out in Items 4, 5 and 6 of the Reference Schedule.
      2. Any Contributions made under this agreement are not to be considered when determining any development contribution under section 7.11 of the Act.
2. Registration of this agreement
   1. Interest

The [Developer/Landowner] represents and warrants to the Council that on the date of this agreement it is the registered proprietor of the Land.

* 1. Registration of this agreement
     1. The Developer agrees to promptly do all things that are necessary 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 will, promptly after the execution of this agreement, take all practical steps, and otherwise do anything that the Council reasonably requires to procure:
        1. the consent of each person who:
           1. has an estate or interest in the Land registered under the *Real Property Act 1900* (NSW); or
           2. is seized or possessed of an estate or interest in the Land: and
        2. the execution of any documents,

to enable the registration of this agreement in accordance with clause 8.2.

* + 1. The Landowner consents to the registration of the agreement in accordance with this clause 5.2. [***Note: clause to be deleted if the Proponent is the owner of the land****]*
    2. The Developer, at its own expense, will take all practical steps, and otherwise do anything that the Council reasonably requires:
       1. to 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; and
       2. to 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.
  1. Removal from Register
     1. Once Council is satisfied the Developer has satisfied all of its obligations under this agreement, the Council must within 20 Business Days of being requested to do so by the Developer:
        1. provide a full release and discharge of this agreement with respect to the whole of the Land and documentation required to remove the notation of this agreement on title to the Land;
        2. should the Council not already have done so, sign such documentation as is necessary to remove any caveat lodged by Council in relation to the Land pursuant to clause 5.4 of this agreement.
     2. Despite clause 5.3(a), from time to time, the Developer may request a release and discharge of this Deed so that the Developer may remove the notation of this Deed from the Register for a part of the Land, and the Council must provide a release and discharge within 20 Business Days, provided that:
        1. all obligations under clause 4 of this agreement have been met for the relevant part of the Land;
        2. the Developer has provided Council with all Security required in accordance with clause 8.2 and any defects liability security required under the Construction Terms; and
        3. the Developer is not otherwise in default of any of its obligations under this agreement, as determined by Council (acting reasonably) at the time of the Developer’s request.
     3. For the avoidance of doubt, a release under clause 5.3 does not operate as a release from any outstanding obligation under this agreement and is intended only to allow removal of the notation of this agreement from the Register for the relevant part of the Land.
  2. Caveat
     1. The [Developer/Landowner] acknowledges and agrees that:
        1. when this agreement is executed, the Council is deemed to have acquired and the [Developer/Landowner] 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;
        2. Council may lodge a caveat restricting transfer of the Land to protect its rights under this agreement and the [Developer/Landowner] 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 5.2.

[ optional caveat provision if the Contributions include delivery of affordable housing ]

* + 1. The Developer acknowledges and agrees that:
       1. when this agreement is executed:
          1. the Council is deemed to have acquired, and the Developer is deemed to have granted, an equitable estate and interest in the land or property to be transferred, or dedicated to, the Council under this agreement for the purposes of section 74F(1) of the *Real Property Act 1900 (NSW;)* and
          2. the Council has sufficient interest in the land or property to be transferred, or dedicated to, the Council under this agreement in respect of which to lodge a caveat over the Land notifying that interest;
       2. it will notify the Council that any plan of subdivision or Strata Plan that creates any lot, strata lot or stratum lot to be transferred, or dedicated, to the Council under this agreement the Strata Plan has been registered within 5 Business Days of registration; and
       3. it will not object to Council lodging a caveat in the relevant folios of the Register for the lot, the strata lot or the stratum lot to be transferred, or dedicated, to the Council under this agreement, nor will it seek to remove any such caveat lodged by Council.

1. Review of this agreement
   1. Review
      1. This agreement may be reviewed or modified. Any review or modification of this agreement will be conducted in the circumstances and in the manner determined by the parties.
      2. No modification or review of this agreement will be of any force or effect unless it is in writing, exhibited in accordance with the Regulation and signed by the parties to this agreement.
      3. A party is not in breach of this agreement if it does not agree to an amendment to this agreement requested by a party in, or because of, a review.
2. Dispute Resolution
   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.

* 1. 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.
  1. Representatives of Parties to Meet
     1. The representatives of the parties must promptly (and in any event within 15 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.
     2. The parties may, without limitation:
        1. resolve the dispute during that meeting,
        2. agree that further material or expert determination in accordance with clause 7.6 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
        3. 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.
  2. Further Notice if Not Settled

If the dispute is not resolved within 15 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 7.5 or by expert determination under clause 7.6.

* 1. 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 10 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 10 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 7.5 must:
       1. have reasonable qualifications and practical experience in the dispute; and
       2. 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 10 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 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:
       1. each party will bear its own professional and expert costs incurred in connection with the mediation; and
       2. 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.
  1. Expert determination

If the dispute is not resolved under clause 7.3 or clause 7.5, 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:

the dispute must be determined by an independent expert in the relevant field:

* + - 1. agreed upon and appointed jointly by the parties; and
      2. in the event that no agreement is reached, or no appointment is made within 10 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;
    1. the expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
    2. 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;
    3. 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;
    4. 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
    5. any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
       1. 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
       2. 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.
  1. Litigation

If the dispute is not *finally* resolved in accordance with this clause 7, then either party is at liberty to litigate the dispute.

* 1. No suspension of contractual obligations

Subject to any interlocutory order obtained under clause 7.1, the referral to or undertaking of a dispute resolution process under this clause 7 does not suspend the parties’ obligations under this agreement.

1. Enforcement
   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 10 Business 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 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 7 of this agreement.
      4. If the Developer fails to comply with a Default Notice, the Council may perform the obligations the Developer has failed to fulfil in accordance with the Default Notice and do anything which the Developer should have done under this agreement in relation to the Developer’s obligations the subject of the Default Notice.
      5. Without limiting clause 8.1(d), the Developer agrees that the Council, its employees, agents and contractors, may when exercising its rights under that clause, enter onto the Land and do whatever is necessary to remedy the default, in the absolute discretion of the Council, subject to compliance with the reasonable directions of the Developer relating to work, health and safety and compliance with all Laws.
      6. The Developer indemnifies and will keep the Council indemnified from and against all Claims and Damages reasonably incurred by the Council or which the Council may become liable in the exercise or purported exercise of the rights of the Council under this clause 8.1, except to the extent that such Claim or Damage is caused by Council’s negligence or default, and Council may call on any Security provided to it under clause 8.2 to satisfy any Claim under this clause.

[ clause 8.2 should be included in all situations where Contributions are delivered after the agreement date ]

* 1. Security
     1. The Developer must provide to the Council Security for the delivery of the Contributions as specified in the Contributions Schedule.
     2. The Council may reject any Security provided by the Developer that is expressed as expiring on a certain date, in which case the Developer will be taken not to have satisfied its obligation to provide the Security under this agreement.
     3. The Council may call on a Security provided under this clause 8.2 if:
        1. the Developer has been issued with a Default Notice under clause 8.1 and failed to rectify the default in accordance with that notice; or
        2. the Developer becomes Insolvent.
     4. Within 20 Business Days of each anniversary of a Security provided under clause 8.2(a), the Developer must provide the Council with one or more replacement Securities in an amount calculated in accordance with the following:

Where:

A is the amount of the replacement Security,

B is the amount of the Security to be replaced,

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

D is the CPI for the quarter ending immediately before the date of the replacement Security,

provided A is greater than B.

* + 1. On receipt of a replacement Security provided under clause 8.2(d), the Council must release and return to the Developer, as directed, the Security that has been replaced as soon as reasonably practicable.
    2. At any time following the provision of a Security under this clause, the Developer may provide the Council with one or more replacement Securities totalling the amount of all Securities required to be provided under this clause for the time being. On receipt of such replacement Security, the Council must release and return to the Developer, as directed, the Securities which it holds that have been replaced as soon as reasonably practicable.
    3. Subject to this clause 8.2 and the provisions of this agreement, the Council may apply the proceeds of a Security in satisfaction of:
       1. any obligation of the Developer under this agreement to which the Security applies, and
       2. 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.
    4. The Council must promptly return a Security provided under this clause 8.2 if requested by the Developer and:
       1. the Developer has delivered the Contribution Item to which the Security applies to the Council’s satisfaction; and
       2. where Works are involved, the Developer has provided a Security under clause 10(m)of the Construction Terms for that item of Works.
    5. For the avoidance of doubt, the Developer may direct the Council in writing to continue to hold a Security provided under this clause 8.2 in satisfaction of the requirement to submit a Security under clause 10(m) of the Construction Terms.
    6. The provision of a Security under this clause 8.2 does not relieve the Developer from any of its obligations under this agreement.
    7. Nothing in this clause 8.2 prevents or restricts the Council from taking any enforcement action in relation to:
       1. any obligation of the Developer under this agreement; or
       2. 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 Security.

[ clause 8.3 to be included in all situations where the Contributions include land dedication ]

* 1. Compulsory Acquisition
     1. If the [Developer/Landowner] does not transfer or grant to the Council the interests in land as required by this agreement (including dedication or transfer of any part of the Land and registration of any public access easement over part of the Land), the Council may compulsorily acquire the relevant interest in the land, in which case the [Developer/Landowner] 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 applicable Security provided under clause 8.2 to cover any costs, including legal costs, incurred by the Council on acquisition of the land.
     2. If Council compulsorily acquires the relevant interests land, clause 8.3(a) constitutes an agreement for the purposes of section 30 of the *Land Acquisition (Just Terms Compensation) Act 1991*.
     3. The [Developer/Landowner] approves, in accordance with section 188 of the *Local Government Act 1993*, of the acquisition of any land or interest in land as required by this agreement for the purposes of re-sale by the Council.
     4. Except as otherwise agreed between the parties, the [Developer/Landowner] must ensure the any land or interest to be acquired by the Council is freed and discharged from all encumbrances and affectations (including any charge or liability for rates, taxes, strata levies and charges), on the date of acquisition.
     5. The [Developer/Landowner] indemnifies and keeps indemnified the Council against all Claims made against the Council because of any acquisition by the Council of the whole or any part of the relevant land or interest in land under clause 8.3(a).
     6. The [Developer/Landowner] 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 or any interest in land under clause 8.3(a) that are not or cannot be recovered by calling on a Security.
  2. Restriction on the issue of Certificates
     1. If the Contributions Schedule specifies that:
        1. a Contribution Item; or
        2. a Security

must be delivered prior to the issue of a Certificate, in accordance with provisions of any Law (including the Act or the Regulation or both), the relevant Certificate must not be issued unless that Contribution Item or Security has been delivered.

* + 1. If a Default Notice has been issued by Council under clause 8.1 and the Developer has failed to rectify the default, a Certificate must not be issued for any part of the Development until the default has been rectified to the satisfaction of Council or any dispute about the Default Notice has been finally resolved.
  1. 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:
        1. 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
        2. 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.
  2. Overdue Payments
     1. The Developer agrees to pay interest to Council on any amount payable by it under this agreement from when the amount becomes due for payment, during the period it remains unpaid, on demand or at times determined by Council, calculated on daily balances and applying the Interest Rate.
     2. Interest which is not paid when due for payment may be capitalised by Council at intervals which Council determines from time to time or, if no determination is made, then on the first day of each month.
     3. Interest is payable on capitalised interest at the rate and in the manner referred to in this clause 8.6.
     4. If a liability under this agreement becomes merged in a judgment or order, then the Developer agrees to pay interest to Council on the amount of that liability as an independent obligation.
     5. Interest payable under clause 8.6(d) accrues from the date the liability becomes due for payment both before and after the judgment or order until it is paid, at a rate that is the higher of the rate payable under the judgment or order and the Interest Rate.
     6. For the avoidance of doubt, if a liability under this agreement becomes merged in a judgment or order then the Developer will only be required to pay either interest payable under the judgment or order or interest calculated in accordance with this clause 8.6, but not both.

1. Assignment and Dealings
   1. Assignment
      1. The [Developer/Landowner] must not assign or deal with any right under this agreement without the prior written consent of the Council.
      2. Any change of ownership or control (as defined in section 50AA of the *Commonwealth Corporations Act 2001*) of a party (excluding the Council) is taken to be an assignment of this agreement for the purposes of this clause 9.1.
      3. Any purported dealing in breach of this clause 9.1 is of no effect.
   2. Transfer of Land
      1. The [Developer/Landowner] 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:
         1. the [Developer/Landowner] satisfies the Council that the proposed Transferee is financially capable of complying with the Developer’s obligations under this agreement;
         2. the [Developer/Landowner] satisfies the Council that the rights of the Council will not be diminished or fettered in any way;
         3. 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 and to be bound by the terms and condition of this agreement as if the Transferee had executed this agreement;
         4. the Transferee provides to the satisfaction of the Council any Security required under this agreement to secure the outstanding obligations under this agreement;
         5. the Transferee provides to the satisfaction of the Council copies of insurances or other documents required under this agreement for the carrying out of any Works;
         6. 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
         7. the Developer and the Transferee pay the Council’s reasonable costs in relation to the assignment.
   3. Mortgagee arrangements
      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, [the Landowner, if the Developer is not the owner of the Land] 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 [or the Landowner, if the Developer is not the owner of the Land] defaults under the mortgage and the mortgagee takes possession of the Land.
      2. The terms of the adoption of the obligations of the Developer [or the Landowner, if the Developer is not the owner of the Land] by the mortgagee shall be as reasonably required by the Council. The agreement shall be prepared at the cost of the Developer.
2. Approvals and consents
   1. Approvals
      1. 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.
      2. Subject to statutory requirements, a party is not obligated to give its reasons for giving or withholding consent or for giving consent subject to conditions.
3. No fetter
   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 a Development Application, Planning Proposal or any other application for Approval (all referred to in this agreement as a “**Discretion**”).

* 1. No fetter
     1. Nothing in this agreement is to be construed as requiring an Authority to do anything that would cause it to be in breach of any of its obligations at Law.
     2. Nothing in this Deed is to be construed as limiting or fettering in any way the exercise of Discretion.
     3. Nothing in this Deed imposes any obligation on an Authority to grant any Development Consent or exercise any function or power under the Act in relation to a change, or a proposed change to an environmental planning instrument.
     4. If, contrary to the operation of this clause 11, 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. if clause 11.2(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.
  2. Planning certificates

The Developer acknowledges that Council may, at its discretion, include advice on any planning certificate issued under section 10.7(5) of the Act that this agreement affects the Land.

1. Release and indemnity
   1. Release and Indemnity
      1. The Developer agrees that the obligation to provide the Contributions is at the risk of the Developer.
      2. The Developer releases the Council from any Claim incurred in connection with the Developer’s obligation to provide the Contributions, except where arising and to the extent of any negligence or default of the Council.
      3. The Developer indemnifies the Council (to the extent that any Claim is made against it) against all Damages incurred, in connection with the Council reasonably enforcing the Developer’s obligation to provide the Contributions in accordance with this agreement and / or the Council reasonably exercising the Council’s rights under or by virtue of this agreement.
      4. The indemnity in clause 12.1(c) is a continuing obligation, independent of the Developer’s other obligations under this agreement and continues after this agreement ends.
      5. It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity conferred by this clause 12.1.
      6. A party must pay on demand any amount it must pay under an indemnity in this clause 12.1.
2. Confidentiality
   1. Confidentiality

The parties agree that the terms of this agreement are not confidential, and this agreement may be treated as a public agreement and exhibited or reported without restriction by any party.

1. Costs, duty and GST
   1. Legal expenses and stamp duty

The Developer must pay the Council's reasonable costs (including legal costs) and disbursements in connection with:

* + 1. the drafting, negotiation, preparation, execution, carrying into effect, and registration of this agreement;
    2. the cost of any legal advice obtained in connection with this agreement;
    3. exercising, enforcing or preserving or attempting to exercise, enforce or preserve rights under this agreement, including in connection with the default of any party other than the Council; and
    4. any waiver, variation, release or discharge of this agreement.
  1. Duty

The Developer must pay or reimburse the Council on demand for taxes and fees (including without limitation registration fees and stamp duty) and fines and penalties in respect of fees which may be payable or determined to be payable in connection with this agreement or a payment or receipt or any transaction contemplated by this agreement.

* 1. 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. The parties agree, in accordance with Class Ruling CR2013/13 published by the Commissioner, that Contributions required to be made under this agreement are exempt from GST.
     4. 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.
     5. This clause14.3 will not merge on completion or termination of this agreement.

1. Notices
   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 and delivered to the intended recipient by hand, by prepaid post or by email at the address specified in this agreement, or at the address last notified by the intended recipient to the sender after the date of this agreement;
    3. is taken to be given or made:
       1. in the case of hand delivery, when delivered;
       2. 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
       3. in the case of email when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address or when the Notice is first opened or read by the recipient, whichever occurs first.
    4. if under clause 15.1‎(c) 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.
  1. Change of address

If a party gives another party 3 Business Days’ notice of a change of its address or email address, any notice, consent, information, application or request is only given or made by that other party if it is delivered, posted or emailed to the latest address or email address.

1. General
   1. Relationship between parties
      1. Nothing in this agreement:
         1. constitutes a partnership between the parties; or
         2. 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:
         1. bind another party; or
         2. 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.
   2. Schedules and Annexures

The parties agree that all the Schedules and Annexures form part of this agreement and to agree to comply with the provisions of those Schedules and Annexures.

* 1. 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.
  2. 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.

* 1. Variation

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.

* 1. Counterparts

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

* 1. 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.

* 1. Representations and warranties
     1. Each party individually represents and warrants that:
        1. it has power to enter into this agreement and comply with its obligations under this agreement;
        2. this agreement does not contravene its constituent documents (if any) or any law or obligations by which it is bound or to which any of its assets are subject, or cause a limitation on its powers or the powers of its officers to be exceeded;
        3. it has in full force and effect the authorisations necessary for it to enter into this agreement, to comply with its obligations and to exercise its rights under this agreement and to allow this agreement to be enforced;
        4. its obligations under this agreement are valid and binding and are enforceable against it in accordance with the terms of this agreement;
        5. it does not any immunity from the jurisdiction of a court or from legal process; and
        6. it benefits by entering into this agreement to which it is a party.
     2. Each party acknowledges that the other party has entered into this agreement in reliance on the representations and warranties in this clause.
  2. Severability
     1. If a clause or part of a clause of this agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way.
     2. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this agreement, but the rest of this agreement is not affected.
  3. Invalidity
     1. A word or provision must be read down if:
        1. this agreement is void, voidable, or unenforceable if it is not read down;
        2. this agreement will not be void, voidable or unenforceable if it is read down; and
        3. the provision is capable of being read down.
     2. A word or provision must be severed if:
        1. despite the operation of clause (a), the provision is void, voidable or unenforceable if it is not severed; and
        2. 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 13.11(b) applies.
  4. 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 obligation or breach in respect of which it is given. It is not to be taken as an implied wavier of any other obligation or breach or as an implied wavier of that obligation or breach in relation to any other occasion.
  5. 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.
  6. Electronic signature
     1. In this clause 16.13, **electronic signature** means a digital signature or other visual representation of a person’s handwritten signature or mark placed or typed on a copy of this Agreement by electronic or mechanical means (including by using DocuSign or other electronic signing platform agreed between the parties) and **electronically signed** has a corresponding meaning.
     2. The parties consent to this agreement being signed by or on behalf of a party by electronic signature.
     3. Where this agreement is electronically signed by or on behalf of a party, the party warrants and agrees that the electronic signature has been used to identify the person signing and to indicate that the party intends to be bound by this agreement.
     4. This agreement may be physically or electronically signed in any number of counterparts which together will constitute one document.
     5. Each party consents to the exchange of counterparts of this agreement by delivery by email to the party or its legal representative or other electronic means of exchange as the parties may agree.
     6. On request, each party must deliver a physical counterpart of this agreement with the handwritten signature or signatures of the party and any written evidence of the authority of a person signing on their behalf, but a failure to comply with this request will not affect the validity of this agreement.

Signing page

Executed as an agreement

[ insert suitable signature blocks for each party

1. - Reference schedule

|  |  |
| --- | --- |
| **Item** | **Reference Information** |
| **Item 1 - Development** | [Description of Development] |
| **Item 2 - Land** | Lot [No.] DP [No.], known as [Address] as shown on the plan at Annexure A |
| **Item 3 - Planning Proposal** | Planning Proposal [No.] seeking the following amendments to the LEP:  [Summary of proposed LEP Amendments] |
| **Item 4 - Exclusion of Section 7.11** | This agreement [excludes/does not exclude] the application of section 7.11 of the Act to the Development. |
| **Item 5 - Exclusion of Section 7.12** | This agreement [excludes/does not exclude] the application of section 7.12 of the Act to the Development. |
| **Item 6 - Exclusion of Section 7.24** | This agreement [excludes/does not exclude] the application of section 7.24 of the Act to the Development. |

1. - Contribution Schedule

[ The Items listed in the table are common examples of Contributions provided under planning agreement arrangements. The table must be revised to suit the circumstances of each planning agreement. ]

| 1. Contribution Item | 1. Public Purpose | 1. Nature and Extent | 1. Timing | 1. Manner of Delivery | 1. Security Required | 1. Timing of Security |
| --- | --- | --- | --- | --- | --- | --- |
| Monetary Contribution [insert description if required] | [Insert public purposes] | Monetary Contribution in the sum of $[insert amount], adjusted in accordance with Schedule 3. | The Monetary Contribution is to be paid to Council [prior to the issue of a Construction Certificate for the Development]. | The Monetary Contribution is to be paid to Council in accordance with Schedule 3. | [Insert Security information] | [Insert timing for delivery of Security] |
| Works, being [name particular works] | [Insert public purposes] | The scope of the Works is set out in Schedule 4. | The Works are to be completed [prior to the issue of an Occupation Certificate for the Development]. | Works are to be carried out and delivered in accordance with the Construction Terms (see Schedule 5).  Maintenance of the Works after handover to Council is required in accordance with Schedule 4. | [Insert Security information] | [Insert timing for delivery of Security] |
| Land dedication | [Insert public purposes] | Dedication to Council of the Land described in Schedule 6, at no cost to the Council. | The land is to be dedicated to Council [prior to the issue of an Occupation Certificate for the Development]. | Land is to be dedicated to Council in accordance with in Schedule 6. | [Insert Security information] | [Insert timing for delivery of Security] |
| Registration of an easement | [Insert public purposes] | Registration of a public access easement over the Land described in Schedule 7, at no cost to the Council. | The public access easement is to be registered [prior to the issue of an Occupation Certificate for the Development]. | The easement is to be approved by Council and registered in accordance with Schedule 7. | [Insert Security information] | [Insert timing for delivery of Security] |
| Construction and dedication of [no.] Affordable Housing Units | To increase and improve the provision of affordable housing in the Council’s local government area | Works to construct [no.] apartments that are to be dedicated or transferred to Council free of cost. [Insert further details about the apartments, including no. of bedrooms, area, level of the building etc. or alternatively provide this additional information in Schedule 8] | The works to construct the Affordable Housing Unit(s) are to be completed prior to the issue of the first Occupation Certificate for the Development, which must apply to the Affordable Housing Unit(s).  The Affordable Housing Unit(s) are to be dedicated to Council within 10 Business days after the issue of first Occupation Certificate for the Development and registration of the Strata Plan creating the strata lots containing each of the Affordable Housing Unit(s). | The works to construct and fitout an Affordable Housing Unit must be carried out in accordance with the Construction Terms.  The Affordable Housing Unit must be designed and constructed to meet the specifications in Schedule 8. | [Insert Security information] | [Insert timing for delivery of Security] |

1. - Monetary Contributions
2. Adjustment of Monetary Contribution

The Monetary Contribution payable under this agreement will be adjusted in accordance with the following formula:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Amount to be paid (Monetary Contribution) | = | Amount specified in Schedule 2 | x | The CPI at the time of payment |
| The CPI at the date of this agreement |

1. Payment
   * 1. 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.
     2. The Monetary Contribution will be taken to have been made when the Council notifies the Developers in writing that the bank cheque has been received and cleared funds or electronic funds have been deposited in the Council’s bank account.
2. - Works
3. Works description

[Insert works description include links or copies of plans, specifications and other documents as required. This description will be bespoke to each planning agreement and may involve plans etc being attached to this agreement.]

1. Manner of Delivery
   * 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 the Works.
     3. The Works or any part of the Works required under this agreement will be taken to have been delivered to the Council when (as the context requires):
        1. the Council takes possession of and assumes responsibility for the work in accordance with the Construction Terms; or
        2. the land on which those Works are located is dedicated to the Council.
2. 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 the Council owned or controlled land to enable the Developer to properly perform its obligations under this agreement to carry out any Works. Nothing in this clause3 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 and Damages arising 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 or Damage arises either directly or indirectly as a result of the Council or its employees, officers, agents, contractors or workmen's negligence or default.
3. - Construction Terms

[The terms below assume that the Works will be completed in a single stage or work package. If the Works involve various stages or packages, amendments are required to suit the circumstances.]

1. Interpretation

For the purposes of this Schedule 5, the defined terms in clause 2.1 of this agreement and the Interpretation principles in clause 2.2 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).

**Contamination** has the same meaning as in the *Contaminated Land Management Act 1997 (NSW)*.

**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 of Handover.

**Handover** means Council’s acceptance of delivery and responsibility for the Works in accordance with clause 8.1 of this Schedule 5.

**Insurer** means an insurer that is licensed by the Australian Prudential Regulatory Authority (APRA) to operate in Australia or has an investment grade rating from an industry recognised rating agency such as Moodies, Standard & Poors or Bests.

**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 damage.

**Maintained** and **Maintenance** have corresponding meanings.

**Practical Completion** means practical completion of Works in accordance with clause 7 of this out in this Schedule 5.

**Remediation** has the same meaning as in the *Contaminated Land Management Act 1997 (NSW).*

**Remediation Action Plan** means any plan approved by a Site Auditor for the remediation of any part of the Land, or land on which the Works will be located, including by way of adoption and implementation of an environmental management plan, if required for the purpose of obtaining any Approval.

**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.

**Site Auditor** has the same meaning as in the *Contaminated Land Management Act 1997 (NSW).*

**Standard Requirement** means a requirement in order to comply with the Building Code of Australia, any applicable Australian Standard, any requirement, standard or specification applied by an Authority, any applicable public domain manual or guidelines issued by Council, applicable planning controls and any other engineering requirement to ensure a work is functional and suitable for its intended purpose.

1. Approvals

The Developer must at its cost and risk:

* + 1. prepare all Applications and submit such applications to the relevant Authorities and obtain all Approvals necessary to carry out the Works; and
    2. comply with all conditions of Approvals for the Works.

1. Design phase
   * 1. The Developer agrees to procure the design of the Works in accordance with this agreement and any Development Consent granted for the Development.
     2. Prior to submission of a Development Application for the Works or any Application for Approval of the Works, the Developer must provide a draft of the design of the Works to the Council.
     3. The Developer acknowledges and agrees that prior to the grant of Development Consent or any Approval for any part of the Works, the Council may require the design for those works to be adjusted so that it is consistent with a Standard Requirement.
2. Construction drawings
   * 1. Prior to obtaining a Construction Certificate for the Works, or commencement of the Works, the Developer must provide construction drawings for the relevant item of Works to the Council.
     2. The Council must provide a response to the Developer within 10 Business Days of the Developer providing the construction drawings, and
        1. The Council may, by notice in writing and acting reasonably, approve, vary or direct a variation to the construction drawings to reflect a Standard Requirement; and
        2. the Developer must comply with any direction given by the Council under clause 4(b)(i) of this Schedule.
     3. The Developer acknowledges and agrees that:
        1. the Council may, but is not obliged to critically analyse the plans and specifications for the Works;
        2. the Council is not responsible for any errors, omissions or non-compliance with any Law or the requirement of any Authority by reason of agreeing to the plans and specifications for the Works;
        3. the Council is not liable for any Claim or Damage incurred by the Developer because of any defect in the design or construction of any part of the Works, other than a defect caused by the Council; and
        4. no comment, review or information supplied to the Developer by the Council alters or alleviates the Developer’s obligation to construct and complete the Works in accordance with this agreement.
     4. For the avoidance of doubt:
        1. any approval of the construction drawings provided by Council under this agreement does not constitute the grant of any Construction Certificate or other building certification under the Act; and
        2. the Council is not responsible for the costs of any variation in accordance with this clause 4p
3. Construction Phase
   * 1. The Developer must procure, at its cost and risk, the execution and completion of the Works, including the relocation of any utility services, in a good and workmanlike manner and so that they are diligently progressed to Practical Completion, and in accordance with:
        1. the Approvals;
        2. any Development Program provided to the Council under this Schedule;
        3. the requirements of all Laws, including without limitation, workplace health and safety legislation; and
        4. its other obligations under this agreement.
     2. The Developer must not commence construction of any Works until it has given Council copies of all Approvals necessary for the construction of the Works.
     3. If the Developer or the employees or agents of the Developer damage any public utilities and Services or property on or adjacent to the Land, the Developer must promptly make good the damage and pay any compensation which the Law requires the Developer to pay.
     4. The Developer must keep the Council reasonably informed of progress of the Works and provide to the Council such information about the Works as the Council reasonably requests.
     5. The Developer must procure the Works to be carried out:
        1. using good quality materials, which must be suitable for the purpose for which they are required under this agreement;
        2. in a proper and tradesmanlike manner;
        3. without the use of asbestos in any form;
        4. in compliance with relevant Australian Standards, the Building Code of Australia and any relevant manufacturers’ standards; and
        5. so that the Works, when completed, are suitable for the purpose for which they are required as contemplated by the relevant Approvals.
     6. The Developer undertakes the Works entirely at its own risk.
     7. The Developer must, at the Council’s request, provide the Council with a copy of the development program for the Works and provide updates on the development program from time to time as the Development progresses.
4. Inspection
   * 1. The Council may enter the Land to inspect the progress of the Works subject to:
        1. the terms of any Construction Contract (save for any clause of the Construction Contract which prevents Council from accessing the Land);
        2. giving reasonable notice to the Developer;
        3. complying with all reasonable directions of the Developer;
        4. exercising its rights under this clause entirely at its own risk in all respects; and
        5. being accompanied by the Developer or its nominee, or as otherwise agreed.
     2. The Council may, within 5 Business Days of carrying out an inspection, 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. Such work may include, but is not limited to:
        1. removal of defective or non-complying material;
        2. demolishing defective or non-complying work;
        3. reconstructing, replacing or correcting any defective or non-complying work; and
        4. not delivering any defective or non-complying material to the site of the Works.
     3. If the Developer is issued a direction to carry out further work under clause 6(b) of this this Schedule 5, the Developer must, at its cost, rectify the defect or non-compliance specified in the Notice within the period specified in the Notice.
     4. If the Developer fails to comply with a direction to carry out work given under clause 6(b) of this this Schedule 5, the Council will be entitled to refuse to accept Practical Completion and Handover of the Works in accordance with this agreement.
     5. 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 clause 6(b) of this this Schedule 5 does not constitute:
        1. acceptance by the Council that the Works comply with all Approvals and Laws; or
        2. an Approval by the Council in respect of the Works; or
        3. 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.
5. Practical Completion
   * 1. 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.
     2. Within 10 Business Days of receipt of the notice under clause 7(a) of this this Schedule 5, the Council will carry out an inspection of the Works and will, acting reasonably, either:
        1. provide written certification to the Developer that the Works have been completed; or
        2. notify the Developer of any additional information required or matters which must be addressed by the Developer prior to the certification being issued.
     3. If the Developer is required to provide additional information or address any matters under clause 7(b) of this this Schedule 5, 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 7(a) of this this Schedule 5 for written certification that the Works have been completed.
     4. Practical Completion will be achieved in relation to the Works or any part of the Works when Council certifies that the Works have been completed in accordance with clause 7(a) of this this Schedule 5.
6. Handover
   * 1. Subject to clause 10 of this this Schedule 5, the Council will accept delivery of the Works and assume responsibility for the Works when they have reached Practical Completion and:
        1. following dedication to the Council of any part of the Land on which the Works are located; or
        2. in the case of Works that are not located on land to be dedicated, when the Developer provides documentary evidence to the Council that public access easements permitting public access to the Works have been registered on title to the relevant part of the Land.
     2. Prior to Handover of the Works, the Developer is responsible for:
        1. the delivery and care of the Works;
        2. providing all things and taking all measures reasonably within its control to protect people and property in relation to the Land where failure to do so may render the Council or the Developer liable under the Law; and
        3. taking any urgent action in relation to the Land necessary to protect people and the consequences of any failure to take such action where failure to do so may render the Council or the Developer liable under the Law.
7. Delivery of documents
   * 1. The Developer must as soon as practicable, and no later than 20 Business Days after Handover in respect of the Works or any part of the Works deliver to the Council, complete and legible copies of:
        1. all “as built” full-sized drawings, specifications and relevant operation and service manuals;
        2. 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
        3. copies of all Approvals required for use of the land subject to the Works.
     2. 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. Defects Liability and Maintenance
   * 1. During the Defects Liability Period, the Developer must:
        1. Maintain the Works or any part of the Works; and
        2. rectify any defects in the Works.
     2. The Developer must follow relevant Council policies and obtain all Approvals necessary to carry out any work required under this clause 10.1.
     3. 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 or a failure to Maintain the Works and specifies:
        1. action required to be undertaken by the Developer to rectify the defect or Maintain the Works (**Rectification Works**); and
        2. the date on which the Rectification Works must be completed (**Rectification Date**).
     4. The Developer must comply with the Rectification Notice by:
        1. procuring the performance of the Rectification Works by the Rectification Date, or such other date as agreed between the parties;
        2. keeping the Council reasonably informed of the action to be taken to rectify the defect; and
        3. carrying out the Rectification Works.
     5. The Council must give the Developer and its contractors any access required to carry out the Rectification Works.
     6. When the Developer considers that the Rectification Works are complete, the Developer must notify the Council and provide documentation, plans or invoices which establish that the Rectification Works were carried out.
     7. The Council may inspect the Rectification Works within 15 Business Days of receiving a Notice from the Developer under clause 10.6 of this Schedule and, acting reasonably:
        1. issue a further Rectification Notice if it is not reasonably satisfied that the Rectification Works are complete; or
        2. notify the Developer in writing that it is satisfied the Rectification Works are complete.
     8. The Developer must meet all costs of and incidental to the carrying out of any Rectification Works under clause 10 of this this Schedule 5.
     9. If the Developer fails 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:
        1. call upon any Security provided to the Council under clause 10.13 of this this Schedule 5 to meet its costs of carrying out Rectification Works; and
        2. 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 and the costs incurred by the Council in carrying out Rectification Works.
     10. The Developer indemnifies Council for all monies payable by the Developer to Council pursuant to clause 10.9 of this Schedule 5 that are not satisfied by the calling up of a Security, provided that the Council takes any reasonable action to mitigate the costs incurred and the indemnity excludes and costs arising due to the negligence of the Council.
     11. The Developer must request that the Council inspect the Works 20 Business 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.
     12. If, prior to the end of the Defects Liability Period:
         1. the Developer fails to request the inspection, or
         2. the Council does not carry out the inspection,

the Council may extend the Defects Liability Period so that the inspection may be carried out.

1. Security for Defects Liability
   * 1. Prior to the Practical Completion and Handover for each item of the Works the Developer must deliver to the Council Security in an amount equivalent to 2.5% of the construction costs for the particular item of Works.
     2. Within 15 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 Security provided under clause 11(a) of this this Schedule 5 for that item of Works (or any remaining balance of it) to the Developer.
     3. Notwithstanding clause 11(b) of this this Schedule 5, 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 Security provided to it until the Rectification Works have been completed.
2. Insurance
   * 1. Prior to the commencement of the construction of any of the Works, the Developer must ensure there is effected and maintained insurance policies covering risks, and on terms, reasonable acceptable to Council including:
        1. physical loss, damage or destruction of each item of the Works (including any associated temporary works)
        2. construction works insurance for the value of the Works;
        3. public risk insurance for at least $20 million;
        4. workers compensation insurance as required by Law; and
        5. professional indemnity insurance with respect to design works only.
     2. The policies must provide cover for the period from the date of the commencement of construction of the Works until the end of the Defects Liability Period for each and every aspect of the Works and during the Defects Liability Period, for the purpose of providing insurance cover in respect of the Developer’s defect liability and maintenance obligations under this agreement.
     3. The insurance cover under clause 12(a) of this this Schedule 5 in relation to any construction works insurance must be for an amount not less than the full insurable value of the Works on a full reinstatement and replacement basis (including extra costs of reinstatement, costs of demolition and removal of debris, and professional fees).
     4. All insurances which the Developer is required by clause 12(a) of this this Schedule 5 to effect and maintain:
        1. must be with an Insurer; and
        2. must not in any respect limit or derogate from the liabilities or obligations of the Developer under this agreement.
     5. The Developer must give Council certificates of insurance policies which are required by clause 12(a) of this this Schedule 5, prior to the commencement of the Defects Liability Period, and otherwise whenever reasonably requested in writing by Council.
     6. The Developer must punctually pay or procure that all premiums in respect of all insurances required under clause 12(a) of this this Schedule 5 be paid.
     7. The Development must:
        1. not do or omit to do anything which if done or not done is likely to vitiate, impair, derogate or prejudice any insurance or is likely to prejudice any claim under any insurance policy required under this agreement;
        2. if necessary, rectify or cause to be rectified anything which might prejudice any insurance cover;
        3. reinstate or cause to be reinstated an insurance policy if it lapses;
        4. immediately notify the Council in writing if an insurer gives notice of cancellation in respect of any insurance policy; and
        5. give full, true and particular information to the insurer of all matters and things the non-disclosure of which might in any prejudice or affect any such insurance cover or the payment of all or any benefits under the insurance.
     8. If all or any part of the Works are damaged or destroyed prior to Practical Completion and Handover:
        1. all insurance proceeds in respect of that damage or destruction must be applied to repair or reinstate the Works, except if the damage or destruction is caused by the Council;
        2. if the insurance proceeds received under the insurances in respect of the damage or destruction are less than the cost of repairing or replacing the Works (or those insurances are void or unenforceable and there are no proceeds), the Developer must complete the repair and replacement of the Works using its own funds; and
        3. if the insurance proceeds received under the insurances in respect of the damage or destruction exceed the costs of repairing or replacing the Works, the Developer will be entitled to keep the excess.
3. Assignment of Warranties and Causes of Action
   * 1. The Developer must assign (as beneficial owner) or cause to be assigned to the 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.
     2. 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.
4. Indemnities

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

1. 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.

1. Contamination and Remediation
   * 1. The Developer must, at its cost, carry out any Remediation of the Land, or any land on which the Works will be carried out, in accordance with the *Contaminated Land Management Act 1997*, any Remediation Action Plan and any other legislation and guidelines relating to the Remediation.
     2. Prior to Handover of any Works, the Developer must:
        1. provide to Council a Site Audit Report or, as the case may be, a preliminary investigation report prepared by a Site Auditor, confirming that the land on which the Works are located is suitable for its intended purpose; and
        2. satisfy any conditions in the Site Auditor’s statement, including any measures required to be implemented to ensure any ongoing monitoring obligations.
     3. The Developer, to the fullest extent permitted by Law, indemnifies and releases 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.
2. - Land Dedication
3. Land dedication description

[Insert description of the land to be dedicated including links or copies of plans, specifications and other documents as required. This description will be bespoke to each planning agreement and may involve plans etc being attached to this agreement.]

1. Interpretation

For the purposes of this Schedule 6, the defined terms in clause 2.1 of this agreement and the Interpretation principles in clause 2.2 of this agreement will apply and, unless context indicates a contrary intention:

**Dedication Land** means land required to be dedicated to Council under this agreement;

**? Easement** means any public access easement required to be registered over any part of the Land under this agreement;

**Encumbrance** means any:

* + 1. security for the payment of money or performance of obligations, including a mortgage, charge, lien, pledge, trust, power or title retention;
    2. right, interest or arrangement which has the effect of giving another person a preference, priority or advantage over creditors including any right of set-off;
    3. right that a person (other than the owner) has to remove something from land (known as a *profit-à-prendre*), easement, public right of way, restrictive or positive covenant, lease, or licence to use or occupy; or
    4. third party right or interest or any right arising as a consequence of the enforcement of a judgment,

or any agreement to create any of them or to allow them to exist;

**Permitted Encumbrance** means each of:

* + 1. easements benefiting statutory authorities authorised by Approvals;
    2. environmental management requirements imposed under an Approval;
    3. an Encumbrance (other than a mortgage, charge, pledge, lien, security interest, title retention, contractual right of set-off, or any other security agreement or arrangement in favour of any person) the Council agrees in writing is a Permitted Encumbrance;

1. Manner of Delivery
   * 1. The [Developer/Landowner] must dedicate or cause to be transferred to the Council, at no cost to the Council, the Dedication Land freed and discharged from all Encumbrances, taxes, rates or charges except Permitted Encumbrances.
     2. The obligation to dedicate the Dedication Land will be taken to have been satisfied when:
        1. for land dedicated as public reserve, 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*;
        2. for land dedicated as a public road, 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*; and
        3. otherwise, a Certificate of Title is issued by NSW Land Registry Services for the whole of the Dedication Land identifying the Council as the registered proprietor of that land.
2. - Easement
3. Easement description

[Insert description of the easement to be provided and the land to which the easement relates including links or copies of plans, specifications and other documents as required. This description will be bespoke to each planning agreement and may involve plans etc being attached to this agreement.]

1. Interpretation

For the purposes of this Schedule 7, the defined terms in clause 2.1 of this agreement and the Interpretation principles in clause 2.2 of this agreement will apply and, unless context indicates a contrary intention:

**Easement** means [ Insert easement description and this might include stating the easement terms.].

**Easement Site** means the land to which the Easement relates. [ This definition to be revised to ensure it work harmoniously with he proposed easement. The circumstances will guide the drafting. ]

1. Manner of Delivery
   * 1. The Developer will, at no cost to Council, register the Easement against the title to the Land:
     2. Any requirement to register the Easement 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 (a) must be registered prior to the issue of the first Construction Certificate for any building on the Land forming part of the Development.
2. - Specifications for Affordable Housing

[ This is included for information purposes only. It is an example of affordable housing requirements that might be relevant to the negotiation of Contributions. ]

Each Affordable Housing Unit (**AHU**), car space and storage space to be transferred to the Council will be to the following standards:

* + 1. The quality and standards of construction and finish of an AHU, car space and storage space to be transferred to the Council is to be the same as any other similar unit, car space and storage space in the building which is not an AHU or for the purposes of an AHU.
    2. All fixtures, fittings and inclusions in an AHU, car space and storage space to be transferred to the Council are to be consistent with and of the same quality and standards as other similar units, car spaces and storage spaces within the Building unless otherwise required to comply with Australian Standards 1428 and/or Australian Standard 4299, or as otherwise agreed between the parties in a detailed Schedule of Finishes.
    3. The AHU, car space and storage space will comply with appropriate Australian Standards and the Building Code of Australia
    4. The AHU will be equipped with the following minimum fittings, if not already included in an agreed Schedule of Finishes or as otherwise agreed between the parties in writing:
       1. floor coverings to all rooms (tiled kitchens, bathrooms, laundries and hallways; and carpet in living, lounge and bedroom/s),
       2. light fittings fit for purpose in each room,
       3. telephone and television aerial points in the lounge and main bedroom,
       4. cable television fittings if provided in the Building,
       5. allocation of car and storage spaces consistent with other units,
       6. all opening windows to have fly screens; and blinds consistent with other units, if other units do not have fly screens or blinds then fly screens and blinds are to be installed for the AHU to a type and standard approved by the Council,
       7. sliding doors to have blinds and security fly screen door provisions consistent with other units, if other units do not have fly screen doors then fly screen doors are to be installed for the AHU to a type and standard approved by the Council
       8. provision of air conditioning to living area and bedroom/s,
       9. security and/or intercom system
    5. Each Accessible AHU including their related car spaces and storage spaces shall comply with Australian Standard 1428 (AS1428). An Accessible AHU will include features in place to facilitate use by a person with a disability or progressive frailty.
    6. Where specified provision of an adaptable AHU including car spaces will comply with Australian Standard 4299 (AS4299). An adaptable AHU will be designed in such a way that it can be modified easily in the future to become accessible to both occupants and visitors with disabilities or progressive frailties.

1. - Summary of requirements (section 7.4)

|  |  |
| --- | --- |
| **Subject and subsection of the Act** | **Planning Agreement** |
| **Planning instrument and/or Development Application** – Section 7.4(1) |  |
| The [Developer/Landowner] has: |  |
| 1. Sought a change to an environmental planning instrument | ☐ Yes  ☐ No |
| 1. Made, or propose to make a Development Application | ☐ Yes  ☐ No |
| 1. Entered into an agreement with, or are otherwise associated with, a person to whom paragraph (a) or (b) applies | ☐ Yes  ☐ No |
| **Description of the land to which the planning Agreement applies** – Section 7.4(3)(a) | Refer to Schedule 1 |
| **A description of the change to the environmental planning instrument and / or development to which the Planning Agreement applies** – Section 7.4(3)(b) | Refer to Schedule 1 |
| **The scope, timing and manner of delivery of contribution required by the Planning Agreement** – Section 7.4(3)(c) | Refer to Schedule 2 |
| **Applicability of section 7.11 of the Act** – Section 7.4(3)(d) | Refer to Schedule 1 |
| **Applicability of section 7.12 of the Act** – Section 7.4(3)(d) | Refer to Schedule 1 |
| **Applicability of section 7.24 of the Act** – Section 7.4(3)(d) | Refer to Schedule 1 |
| **Whether benefits are to be taken into consideration when determination development contributions** – Section 7.4(3)(e) | Refer to clause 4 |
| **Mechanism for dispute resolution** – Section 7.4(3)(f) | Refer to clause 7 |
| **Enforcement of the Planning Agreement** – Section 7.4(3)(g) | Refer to clause 8 |
| **Registration of the Planning Agreement** – Section 7.4(3)(g) | Refer to clause 5 |
| **No obligation to grant consent or exercise functions** – Section 7.4(9) | Refer to clause 11 (no fetter) |