

- 10.7 The Council cannot withhold its agreement to a variation of a Work if the variation does not result in a change to the matters identified as core elements for that Work in the ISDP.

Part 2 - Provisions relating to monetary Development Contributions

11 Payment of monetary Development Contributions

- 11.1 A monetary Development Contribution is made for the purposes of this Agreement when the Council receives the full amount of the contribution payable under this Agreement in cash or by unendorsed bank cheque or by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by the Council.
- 11.2 The Developer is to give the Council not less than two (2) business days written notice of its intention to pay a monetary Development Contribution.
- 11.3 The Developer is not required to pay a monetary Development Contribution under this Agreement unless the Council, after having received the Developer's notice under clause 11.2, has given to the Developer a tax invoice for the amount of the Development Contribution.
- 11.4 The Developer is not in breach of this Agreement if it fails to pay a monetary Development Contribution at the time required by this Agreement by reason only of the Council's failure to give to the Developer a tax invoice in relation to the amount proposed to be paid by it.

Part 3 - Provisions relating to dedication of Land

12 Procedures relating to the dedication of Land

- 12.1 A Development Contribution comprising the dedication of the Land is made for the purposes of this Agreement when:
- 12.1.1 a deposited plan is registered in the register of plans held with the Registrar General that:
- (a) dedicates Land as a public road (including a temporary public road) under the *Roads Act 1993* (NSW), or
 - (b) creates the Land as a public reserve or drainage reserve under the *Local Government Act 1993* (NSW), or
- 12.1.2 the Council is given an instrument in registrable form under the *Real Property Act 1900* that is effective to transfer the title to the Land to the Council when registered.
- 12.2 For the purposes of clause 12.1.2:
- 12.2.1 the Developer is to give the Council, for execution by the Council as transferee, an instrument of transfer under the *Real Property Act 1900* relating to the Land to be dedicated, and
- 12.2.2 within 21 days of receiving it from the Developer, the Council is to execute it and return it to the Developer, and

- 12.2.3 within 7 days of receiving it from the Council (properly executed), the Developer is to lodge it for registration with the Registrar General, and
- 12.2.4 the Developer is to do all things reasonably necessary to enable it to be registered, and
- 12.2.5 the Developer is to do all things reasonably necessary to enable the certificate of title for the Land dedicated which identifies the Council as the registered proprietor of that Land, to be provided to the Council at no cost to the Council.

13 Transfer of Land to the Developer

Not used.

Part 4- Provisions relating to the carrying out of Work

14 Design and Specification of Work

- 14.1 Before commencing construction of a Work, the Developer is to submit to the Council for its approval the detailed design and specification for the Work.
- 14.2 If, within sixty (60) days of the date of submission referred to in clause 14.1:
 - 14.2.1 the Council notifies the Developer in writing of its approval of the design and specification, the Developer is to carry out and Complete the Work in accordance with that design and specification,
 - 14.2.2 the Council fails to notify the Developer in writing that it approves or does not approve of the design and specification or does not require the Developer to make modifications, the Council is taken to have approved the design and specification of the Work and the Developer may carry out and Complete the Work in accordance with that design and specification,
 - 14.2.3 the Council notifies the Developer in writing that it does not approve of the design and specification or requires the Developer to make modifications, the Developer may:
 - (a) amend the design and specification and submit to the Council the amended design and specification, in which case the Developer must submit any such amended detailed design and specification to Council under clause 14.1, or
 - (b) if the Developer does not agree with the modifications requested by Council, refer the matter for expert determination or mediation under clauses 29 and 30.

15 Standard of construction of Work

- 15.1 Any Work that the Developer is required to carry out under this Agreement is to be carried out in accordance with:
 - 15.1.1 this Agreement;
 - 15.1.2 any further agreement entered into by the Parties under clause 7;

- 15.1.3 any reasonable requirements and directions of the Council notified in writing to the Developer before the Work is Completed for the purposes of this Agreement, that are not inconsistent with this Agreement or any Development Consent for the Development;
- 15.1.4 the requirements of any approval, consent, permission or licence issued by a relevant Authority;
- 15.1.5 any Australian standards and other laws applicable to the Work; and
- 15.1.6 in a proper and workmanlike manner, complying with current industry practice and standards relating to the Work.

16 Access for Works

- 16.1 The Developer must permit the Council, its officers, employees, agents and contractors to enter the Land or any other land at any time, upon giving reasonable prior notice, to:
 - 16.1.1 inspect, examine or test any Work; or
 - 16.1.2 remedy any breach by the Developer in carrying out a Work.
- 16.2 The Council must permit the Developer its officers, employees, agents and contractors to enter and occupy any land owned or controlled by the Council, including any part of the Land dedicated to the Council, to:
 - 16.2.1 enable the Developer to carry out any Work under this Agreement that is required to be carried out on that land, or
 - 16.2.2 perform any other obligation imposed on the Developer by this Agreement.

17 Protection of people and property

- 17.1 The Developer is to ensure to the fullest extent reasonably practicable in carrying out any Work that:
 - 17.1.1 all necessary measures are taken to protect people and property; and
 - 17.1.2 unnecessary interference with the passage of people and vehicles is avoided; and
 - 17.1.3 nuisances and unreasonable noise and disturbances are prevented.

18 Completion

- 18.1 In this clause **Compliance Certificate** has the same meaning as in the Act.
- 18.2 An Item (or any part) that comprises a Work is Completed for the purposes of this Agreement when the Council issues a Compliance Certificate (with respect to that Item).
- 18.3 The Developer must not seek any Compliance Certificate for a Work from any person other than Council.

19 Procedures relating to the rectification of defects

- 19.1 In this clause:

19.1.1 **Building Works** has the same meaning as in the Act.

19.1.2 **Defects Liability Period** means:

- (a) for an Open Space Work (other than a Building Work), or any Work which Column 2 of Schedule 3 indicates is for the public purpose of 'Drainage' 'Roads and Drainage', 'Roads and Traffic Facilities' - twelve (12) months from the date the Work is Completed for the purposes of this Agreement;
- (b) for Building Work - three (3) months from the date the Work is Completed for the purposes of this Agreement.

19.2 During the Defects Liability Period, the Council may give to the Developer a Rectification Notice.

19.3 The Developer must comply with a Rectification Notice at its own cost according to its terms and to the satisfaction of the Council acting reasonably.

19.4 If the Developer breaches clause 19.3, the Council may have the Defect rectified at the cost of the Developer.

19.5 By no later than fourteen (14) days prior to the end of the Defects Liability Period:

19.5.1 Council will undertake a final inspection of the Work; and

19.5.2 Council may either:

- (a) by way of written notice to the Developer, confirm that the Work is acceptable to Council acting reasonably; or
- (b) issue a Rectification Notice to the Developer if it identifies any part of the Work which is not acceptable to Council (acting reasonably).

19.6 If Council issues a Rectification Notice under clause 19.5.2(b), the Developer must comply with the Rectification Notice at its own cost according to its terms and to the satisfaction of the Council acting reasonably.

19.7 Council may not issue a further Rectification Notice under clause 19.5 for any additional unacceptable parts of the Work that were not identified in the Rectification Notice issued under clause 19.5.2(b).

20 Failure to carry out Work

20.1 Subject to clause 27, if the Council considers that the Developer is in breach of any obligation under this Agreement relating to the carrying out of any Work, including Work the subject of a Rectification Notice, the Council may give the Developer a notice under this clause.

20.2 The notice may require the Developer to:

20.2.1 rectify the breach to the Council's satisfaction; and

20.2.2 immediately cease carrying out further work relating to the Work except to rectify the breach.

- 20.3 A notice given under clause 20.1 must allow the Developer not less than 28 days (or such further period as the Council considers reasonable in the circumstances) to rectify the breach.
- 20.4 Without limiting any other rights the Council has to enforce this Agreement, if the Developer does not comply with a notice given under clause 20.1 then the Council may:
- 20.4.1 call upon the Security referred to in clause 26; and
- 20.4.2 carry out and Complete the Work the subject of the Developer's breach, and
- 20.4.3 in the event the costs reasonably incurred by the Council in carrying out the Works cannot be met by the Security, the Developer must pay the difference to Council within twenty eight (28) days of receiving a written demand for such payment by Council.
- 20.5 Clauses 29 and 30 do not prevent a notice being given under clause 20.1, nor do they apply to such a notice or the circumstances relating to the giving of the notice. Any procedure commenced under clause 29 or clause 30 ceases to apply when such a notice is given.
- 20.6 For the purposes of clause 20.4, the costs which Council can recover include fees and charges incurred by Council, Council's employees, agents and contractors, and legal costs and expenses.

21 Maintenance and management of Works

- 21.1 In this clause:
- 21.1.1 **Hard Landscaping Work** means items such as paving, seating, buildings, signage, lighting, playground equipment, and any other landscaping work that is not a Soft Landscaping Work.
- 21.1.2 **Maintenance Period** means:
- (a) in respect of Hard Landscaping Work, a period of twelve (12) months commencing on the date the Work is Completed for the purpose of this Agreement,
- (b) in respect of Soft Landscaping Work, a period of twenty four (24) months commencing on the date the Work is Completed for the purpose of this Agreement.
- 21.1.3 **Plan of Management** means a plan of management within the meaning of s36 of the *Local Government Act 1993* (NSW).
- 21.1.4 **Soft Landscaping Work** means any Work comprising the planting of vegetation and associated preparation of planting beds or growing medium, such as shrubs, groundcovers, mulch and grass.
- 21.2 The Developer must maintain each Hard Landscaping Work and Soft Landscaping Work during the Maintenance Period in accordance with:
- 21.2.1 any matters set out in clause 15.1,
- 21.2.2 any Plan of Management or draft Plan of Management relating to the Work or the land on which the Work is or is to be located.

- 21.3 By no later than fourteen (14) days prior to the end of the Maintenance Period:
- 21.3.1 Council will undertake a final inspection of the Work; and
- 21.3.2 Council may either:
- (a) by way of written notice to the Developer, confirm that the Work is acceptable to Council acting reasonably; or
 - (b) issue a notice to the Developer if it identifies any part of the Work which has not been maintained by the Developer in accordance with this clause 21.
- 21.4 If Council issues a notice under clause 21.3.2(b), the Developer must comply with that notice at its own cost.
- 21.5 Council may not issue a further notice under clause 21.3.2(b) for any additional unacceptable parts of the Work that were not identified in the original notice issued under clause 21.3.2(b).
- 21.6 For the purposes of this clause maintenance includes repairing damage caused by vandalism to the Work (including replacement of plants due to vandalism).
- 21.7 The Developer must:
- 21.7.1 fund and prepare a draft Plan of Management for any part of the Land on which an Open Space Work is to be constructed, and
- 21.7.2 provide the draft Plan of Management to the Council for Council's consideration not less than six (6) months prior to the time the Land the subject of the draft Plan of Management is required to be dedicated.
- 21.8 For the purposes of clause 21.7.1, the Council is to promptly provide the Developer with a template of a Plan of Management if requested by the Developer in writing.
- 21.9 If the Developer has complied with its obligations under this clause, the Council cannot make any Claim (other than a Claim arising from the negligence of the Developer or a breach of this Agreement by the Developer), objection or demand about the state or condition of a Work after the end the Maintenance Period for that Work.

22 Works-as-executed-plan

- 22.1 No later than sixty (60) days after an Item comprising a Work is Completed in accordance with this Agreement, the Developer must submit to the Council:
- 22.1.1 a full works-as-executed-plan for the Item, and
- 22.1.2 the technical or operation manual, specifications and warranties (if any) for any product that forms part of the Item comprising a Work.

23 Hand-over of Works

- 23.1 Subject to anything to the contrary in this Agreement, Council accepts responsibility for a Work on the later of:
- 23.1.1 the date when the Work is Completed for the purposes of this Agreement; or

23.1.2 if the Work is carried out on land which is to be dedicated to the Council under this Agreement, the date of dedication of that land.

23.2 The Developer, at its own cost, is to repair and make good to the satisfaction of the Council (acting reasonably) any loss or damage to a Work from any cause whatsoever which occurs before the Work is Completed for the purposes of this Agreement.

Part 5 - Security, Enforcement and Disputes

24 Security for monetary Development Contributions

24.1 The Developer may only make, or cause, suffer or permit the making of, an application for a Subdivision Certificate that creates a Final Lot in the Development if, at the date of the application, the Developer is not in breach of its obligation to make monetary Development Contributions under this Agreement.

25 Security for the Dedication of Land

25.1 Subject to clause 27, if the Developer does not dedicate the land required to be dedicated under this Agreement, or any part thereof, at the time at which it is required to be dedicated, the Developer consents to the Council compulsorily acquiring that land for compensation in the amount of \$1.00 without having to follow the pre-acquisition procedures under the Just Terms Act.

25.2 The Council is to only acquire land pursuant to clause 25.1 if it considers it reasonable to do so having regard to the circumstances surrounding the failure by the Developer to dedicate the land required to be dedicated under this Agreement.

25.3 Clause 25.1 constitutes an agreement for the purposes of section 30 of the Just Terms Act.

25.4 If, as a result of an acquisition referred to in clause 25.1, the Council is required to pay compensation to any person other than the Developer, the Developer is to reimburse the Council for that amount upon a written request being made by the Council.

25.5 The Developer indemnifies and keeps indemnified the Council against all Claims made against the Council as a result of any acquisition by the Council of the whole or any part of the land that is required to be dedicated under this Agreement.

25.6 The Developer is to promptly do all things necessary, and consent to the Council doing all things necessary, to give effect to this clause 25, including without limitation:

25.6.1 signing any documents or forms;

25.6.2 giving land owner's consent for the lodgement of any Development Application;

25.6.3 producing certificates of title to the Registrar-General under the *Real Property Act 1900* (NSW); and

25.6.4 paying the Council's costs arising from this clause 25.

25.7 In this clause, **Just Terms Act** means the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

26 Security for carrying out of Work

26.1 In this clause:

26.1.1 **Bank Guarantee** means an irrevocable and unconditional undertaking without any expiry or end date in favour of the Council to pay an amount or amounts of money to the Council on demand issued by:

- (a) one of the following trading banks:
 - (i) Australia and New Zealand Banking Group Limited,
 - (ii) Commonwealth Bank of Australia,
 - (iii) Macquarie Bank Limited,
 - (iv) National Australia Bank Limited,
 - (v) St George Bank Limited,
 - (vi) Westpac Banking Corporation, or
- (b) any other financial institution approved by the Council in its absolute discretion.

26.1.2 **Ledger** means a document in a form similar to that in Schedule 5 that includes the following information:

- (a) the Notional Contribution Value,
- (b) all Work that is required to be provided under this Agreement and the Contribution Value of those Items,
- (c) all Work that has been Completed under clause 18.1, and
- (d) the sum of all Contribution Values of Work that have been Completed under clause 18.2.

26.1.3 **Ledger Item** means a Work identified in the Ledger.

26.1.4 **Notional Contribution Value** means the amount determined by multiplying \$17,123.00 by the sum of the number of Final Lots that have been created and the number of Final Lots that are proposed to be created by the Subdivision Certificate referred to in clause 26.3.

26.1.5 **Security** means:

- (a) if Landcom (t/a UrbanGrowth NSW) is the Developer under this Agreement, a Treasury Guarantee,
- (b) if Landcom (t/a UrbanGrowth NSW) is not the Developer under this Agreement, a Bank Guarantee or a bond or other form of security to the satisfaction of the Council.

26.1.6 **Treasury Guarantee** means a written guarantee issued by or on behalf of New South Wales Government that is materially similar to a Bank Guarantee.

- 26.2 A Construction Certificate may only be issued if at the time of issuing, the Parties, acting reasonably, determine the appropriate Ledger Item that is to be completed or for which Security is to be provided so that the sum of the Contribution Value of that Ledger Item and Contribution Values of Work that have been Completed equals or exceeds the Notional Contribution Value.
- 26.3 Subject only to clause 26.5 and notwithstanding any other provision in this Agreement, a Subdivision Certificate may only be issued if, at the time of issuing, the Ledger Item that has been determined under clause 26.2 to be completed prior to the issue of the relevant Construction Certificate has been Completed or Security has been provided for that Ledger Item to a value of:
- 26.3.1 150% of the cost to complete the Ledger Item, if it has been commenced but uncompleted; or
- 26.3.2 the Contribution Value of the Ledger Item if it has not been commenced, as the case may be.
- 26.4 The Developer is to ensure that a Ledger accompanies any Development Application or application for a Construction Certificate or Subdivision Certificate for the Development (or any part).
- 26.5 Despite clause 26.3, a Subdivision Certificate may be issued in respect of the Development if the Developer provides Security for 150% of the Contribution Value of a Work which, when the Contribution Value of that Work is added to the sum of all Contribution Values of Work that have been Completed, equals or exceeds the Notional Contribution Value to the satisfaction of Council, acting reasonably.
- 26.6 If any Item of Work is subject to the provision of Security under clause 26.3 or 26.5 (**Deferred Work**):
- 26.6.1 the Developer must Complete the Deferred Work within such time determined by Council acting reasonably (**Extended Completion Date**); and
- 26.6.2 by way of written notice to the Developer, Council may:
- (a) extend the Extended Completion Date at its discretion having regard to the nature of the Work to be completed; and
- (b) if Council extends the Extended Completion Date, the Developer must Complete the uncompleted part of the Work by the date specified in the notice.
- 26.7 If any Deferred Work is not Completed by the Extended Completion Date, then Council may:
- 26.7.1 refuse to issue any further Subdivision Certificates with respect to the Development until the Deferred Work is Completed; or
- 26.7.2 Complete the Deferred Work itself in which case the Developer must meet the costs incurred by Council in doing so.
- 26.8 Council must return the Security provided for a Work to the Developer within twenty eight (28) days after a Work is Completed for the purpose of this Agreement.

27 Council to consult before enforcing this Agreement

- 27.1 This clause applies to any of the Developer's obligations to carry out Work or dedicate land under this Agreement.
- 27.2 If the Council reasonably forms the opinion that the Developer has failed to comply with an obligation to which this clause applies, it is not to enforce this Agreement against the Developer (including taking any action under clause 20) unless it has first notified the Developer in writing of its intention to do so and has consulted with the Developer as to:
 - 27.2.1 the reason for the non-compliance;
 - 27.2.2 the likely effects of the non-compliance; and
 - 27.2.3 the Developer's capacity in all of the circumstances to reasonably rectify the non-compliance.
- 27.3 The Council is not to enforce this Agreement against the Developer unless, after having consulted with the Developer:
 - 27.3.1 it has reasonably formed the opinion the Developer has no reasonable excuse for the non-compliance;
 - 27.3.2 it has notified the Developer in writing that intends to enforce the Agreement not earlier than 14 days from the date of the notice; and
 - 27.3.3 the notice specifies the enforcement action it intends to take.
- 27.4 At any time between the date of the notice referred to in clause 27.3 and the time when the Council takes action to enforce this Agreement, the Developer may notify the Council of a dispute under clause 29 or 30.
- 27.5 If the Developer notifies the Council in accordance with clause 27.4, the Council is not to enforce this Agreement against the Developer in relation to the relevant non-compliance unless and until the dispute resolution process under clause 29 or 30 has been exhausted without resolution between the parties.

28 Enforcement in court

- 28.1 Subject only to clause 27, the Parties may enforce this Agreement in any court of competent jurisdiction.
- 28.2 For the avoidance of doubt, nothing in this Agreement prevents:
 - 28.2.1 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/or
 - 28.2.2 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.

29 Dispute resolution - expert determination

- 29.1 This clause applies to a dispute under this Agreement about a matter that can be determined by an appropriately qualified expert (**Expert Determination Dispute**).

- 29.2 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute and requiring it to be determined by an appropriately qualified expert.
- 29.3 Within fourteen (14) days of the notice, the Parties are to meet to try to resolve the dispute.
- 29.4 If within a further twenty eight (28) days the dispute is not resolved, the dispute must be referred to the President of the NSW Law Society to appoint an expert to determine the dispute.
- 29.5 The expert determination binds the Parties, except in the case of the expert's fraud or misfeasance.
- 29.6 Each Party must bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 29.7 If the Parties disagree over whether a dispute is properly an Expert Determination Dispute, then either Party may refer that issue to the Chief Executive Officer (**CEO**) of the professional body that represents persons with the relevant expertise, for a determination of that issue. The CEO's determination is final and binds the Parties.

30 Dispute resolution - mediation

- 30.1 This clause applies to any dispute under this Agreement other than a dispute to which clause 29 applies.
- 30.2 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 30.3 The Parties are then to meet within fourteen (14) days of the notice to try to resolve the dispute.
- 30.4 If the dispute is not resolved within a further twenty eight (28) days, the Parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time, and must request the President of the Law Society, or the President's nominee, to select a mediator.
- 30.5 If the dispute is not resolved by mediation within a further twenty eight (28) days, or any longer period that may be needed to complete any mediation process which has been started, then the Parties may exercise their legal rights in relation to the dispute, including by taking legal proceedings in a court of competent jurisdiction in New South Wales.

31 Registration of this Agreement

- 31.1 The Developer must ensure that this Agreement is registered on the title of the Land at the time required under clause 32 including by:
 - 31.1.1 procuring the consent of each person referred to in s93H(1) of the Act to the registration of this Agreement on the folio of the Register pertaining to the Land;
 - 31.1.2 arranging for the production of the relevant certificate of title pertaining to the Land at the Lands and Property Information Office (**LPI**); and
 - 31.1.3 promptly responding to any requisition raised by the LPI regarding any matter within the Developer's control.