



lindsaytaylorlawyers

planning • environment • local government

Airds Bradbury Renewal Project Planning Agreement

Under s93F of the *Environmental Planning and Assessment Act 1979*

**Campbelltown City Council
New South Wales Land and Housing Corporation**

[Insert Date]

lindsaytaylorlawyers

Level 9, Suite 3, 420 George Street, Sydney NSW 2000, Australia

T 02 8235 9700 • **F** 02 8235 9799 • **W** www.lindsaytaylorlawyers.com.au • **E** mail@lindsaytaylorlawyers.com.au

ABN 15 695 894 345

Liability limited by a scheme approved under Professional Standards Legislation

Airds Bradbury Renewal Project Planning Agreement

Table of Contents

Summary Sheet.....	4
Parties.....	6
Background.....	6
Operative provisions.....	6
Part 1 - Preliminary	6
1 Definitions & Interpretation	6
2 Status of this Agreement	9
3 Commencement of this Agreement	9
4 Application of this Agreement.....	10
5 Commencement of Development Contributions obligations	10
6 Part-performance of this Agreement	10
7 Further agreements relating to this Agreement	11
8 Application of s 94, s 94A and s 94EF of the Act to the Development.....	11
9 Ownership of Land.....	11
10 Provision of Development Contributions	11
11 Variation of scope or timing for provision of Development Contributions.....	12
Part 2 – Provisions relating to monetary Development Contributions	12
12 Payment of monetary Development Contributions	12
Part 3 – Provisions relating to dedication of Land	13
13 Procedures relating to the dedication of Land	13
Part 4 – Provisions relating to the carrying out of Work.....	14
14 Design and Specification of Work.....	14
15 Standard of construction of Work	14
16 Maintenance and management of Works.....	15
17 Access for Works.....	15
18 Protection of people and property	15
19 Completion.....	16
20 Procedures relating to the rectification of Defects	16
21 Deferral of Work.....	16
22 Failure to carry out Work	16
23 Works-as-executed-plan.....	17
24 Hand-over of Works.....	17



Part 5 –Enforcement and Disputes	17
25 Enforcement	17
26 Council to consult before enforcing this Agreement	18
27 Enforcement in court.....	18
28 Dispute resolution – expert determination	19
29 Dispute resolution - mediation	19
30 Registration of this Agreement	19
31 Assignment, sale of Land, etc	20
Part 6 - Other provisions	20
32 Indemnity	20
33 Insurance	21
34 Developer may Review Draft Determinations Relating to the Development	21
35 Termination of Agreement	21
36 Review of this Agreement.....	21
37 Confidentiality	22
38 Notices	23
39 Approvals and consent	23
40 Costs.....	23
41 Entire Agreement.....	23
42 Further acts.....	24
43 Notations on section 149(2) Planning Certificates	24
44 Governing law and jurisdiction.....	24
45 Joint and individual liability and benefits.....	24
46 Representations and warranties	25
47 Severability	25
48 Modification.....	25
49 Waiver.....	25
50 GST.....	25
51 Explanatory Note Relating to this Agreement	26
Schedule 1.....	27
Schedule 2.....	55
Schedule 3.....	56
Schedule 4.....	67
Execution.....	68
Appendix	69



Airds Bradbury Renewal Project Planning Agreement

Summary Sheet

Council:

Name: Campbelltown City Council

Address: Civic Centre, cnr Queen and Broughton Streets, Campbelltown NSW
2560

Telephone: 4645 4000

Facsimile: 4645 4111

Email: michael.sewell@campbelltown.nsw.gov.au

Representative: Michael Sewell

The Corporation:

Name: New South Wales Land and Housing Corporation

Address: Level 2, 223-239 Liverpool Road, Ashfield, New South Wales 2131

Telephone: 9268 3440

Facsimile: 9268 3496

Email: theo.posumah@services.nsw.gov.au

Representative: Theo Posumah

Land:

See definition of *Land* in clause 1.1.

Development:

See definition of *Development* in clause 1.1.

Development Contributions:

See clause 10 and Schedule 3.



Application of s94, s94A and s94EF of the Act:

See clause 8.

Enforcement:

See clause 25.

Registration:

This Agreement is not to be registered. See clause 30.

Restriction on dealings:

See clause 31.

Dispute Resolution:

Expert determination and mediation. See clauses 28 and 29.

Airds Bradbury Renewal Project Planning Agreement

Under s93F of the *Environmental Planning and Assessment Act 1979*

Parties

Campbelltown City Council ABN 31 459 914 087 of Civic Centre, cnr Queen and Broughton Streets, Campbelltown NSW 2560 (**Council**)
and

New South Wales Land and Housing Corporation ABN 24 960 729
253 of Level 2, 223-239 Liverpool Road, Ashfield, New South Wales 2131 (**The Corporation**)

Background

- A The Corporation is the owner of part of the Land.
- B The Corporation has lodged with the Council, as delegate of the Minister, the Concept Plan Application relating to the Development.
- C The Corporation intends to lodge further Development Applications relating to the Development.
- D The Corporation is prepared to make Development Contributions in connection with the carrying out of the Development in accordance with this Agreement.

Operative provisions

Part 1 - Preliminary

1 Definitions & Interpretation

- 1.1 In this Agreement the following definitions apply:

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

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

Alternative Funding means any funding obtained by any Party from persons not a party to this Agreement that may be applied towards the cost of Work.



Authority means the Commonwealth of Australia, the State of New South Wales, or any department or agency of the Commonwealth of Australia or the State of New South Wales, any public authority within the meaning of the Act, and any court or tribunal.

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 an Australian trading bank.

Building Work has the same meaning as in the Act.

Claim against any person means any allegation, action, demand, cause of action, suit, proceeding, judgement, debt, damage, loss, cost, expense, or liability howsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at law, in equity, under statute or otherwise.

Concept Plan Application means the application made to the Minister for approval of a concept plan for the Development being MP10_0186, and which will be assessed by Council under delegation from the Minister.

Construction Certificate has the same meaning as in the Act.

Contribution Value in relation to each Item means the amount shown in column 5 of Schedule 3 for that Item, indexed from the date of this Agreement in accordance with the Consumer Price Index (All Groups - Sydney) published by the Australian Bureau of Statistics.

Defect means any error, omission, shrinkage, blemish in appearance or other fault in the Works caused by the Developer which prevents the Works from being reasonably capable of being used for their intended purpose.

Defects Liability Period means:

- (a) for any Work which Column 2 of Schedule 3 indicates is for the public purpose of *'Road works and Intersection Upgrades', 'Water Cycle Management', 'Open Space and Landscape Works', 'Riparian and Bushland Regeneration', 'Bushland Regeneration'* – 12 months from the date the Work is completed for the purposes of this Agreement,
- (b) for Building Work – 3 months from the date the Work is completed for the purposes of this Agreement.

Developer means The Corporation.

Development means the development of the Land described in Schedule 2.

Development Application has the same meaning as in the Act.

Development Area means each of the areas described as '1A', '1B', '2A', '2B', '3', '4', '5', '6', '7A', '7B', '8', '9A', '9B' and '9C' on the Development Area Plan.

Development Area Plan means the plan in Schedule 4.

Development Consent means a development consent, within the meaning of the Act, or approval to carry out a project under Part 3A of the Act, and, for the avoidance of doubt, does not include an approval of a concept plan under Part 3A of the Act.

Development Contribution means any of the following, or any combination of them, to be used for, or applied towards, a public purpose:



- a monetary contribution,
- the dedication of land free of cost,
- the carrying out of work,
- the provision of any other material public benefit.

Final Lot means a lot to be created in the Development for separate occupation and disposition, not being:

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

Hard Landscaping Work means items such as paving, seating, buildings, signage, lighting, playground equipment, and any other landscaping works that is not Soft Landscaping Work.

ISDP means the document titled '*Infrastructure Services Delivery Plan, Airds Bradbury Renewal Project*' dated September 2014, or other document agreed to between the Parties that replaces that document.

Item means the object of a Development Contribution specified in Schedule 3.

Land means the land described in Schedule 1 of this Agreement.

Maintenance Period means:

- (a) in respect of Hard Landscaping Work, a period of 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 24 months commencing on the date the Work is completed for the purpose of this Agreement.

Minister means the Minister administering the Act.

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

Rectification Notice means a notice in writing that identifies a Defect in a Work and requires rectification of the Defect within a specified period of time.

Registrar General means the Registrar General within the meaning of the *Real Property Act 1900*.

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

Security means a Treasury Guarantee.

Soft Landscaping Work means any Work comprising the planting of vegetation and associated preparation of planting beds or growing medium such as trees, shrubs, groundcovers, mulch and grass.

Subdivision Certificate has the same meaning as in the Act.

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

Work means the physical result of any building, engineering or construction work in, on, over or under land, required to be carried out by the Developer under this Agreement.

- 1.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:
- 1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
 - 1.2.2 A reference to a business day means a day, other than a Saturday or Sunday, on which banks are open for business generally in Sydney.
 - 1.2.3 If the day on which something is to be done under this Agreement is not a business day, then it must be done on the next business day.
 - 1.2.4 A reference to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
 - 1.2.5 A reference in this Agreement to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
 - 1.2.6 A reference to any legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
 - 1.2.7 A reference to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
 - 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
 - 1.2.9 A reference to a person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
 - 1.2.10 Where a word or phrase is given a defined meaning, another part of speech or other grammatical form for that word or phrase has a corresponding meaning.
 - 1.2.11 The singular includes the plural, and the plural includes the singular.
 - 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
 - 1.2.13 A reference to a Party to this Agreement includes a reference to the Party's employees, agents and contractors, and the Party's successors and assigns.
 - 1.2.14 Any schedules, appendices and attachments form part of this Agreement.

2 Status of this Agreement

- 2.1 This Agreement is intended by the Parties to be a planning agreement within the meaning of s93F(1) of the Act.

3 Commencement of this Agreement

- 3.1 This Agreement commences on the date on which it has been executed by all Parties.

4 Application of this Agreement

- 4.1 This Agreement applies to the Land and the Development.
- 4.2 The Parties acknowledge that the Development Contributions required to be made under this Agreement are to meet the expected demand for public facilities arising from the Development.

5 Commencement of Development Contributions obligations

- 5.1 The Developer is under no obligation to make the Development Contributions provided for in this Agreement unless and until:
- 5.1.1 Development Consent is granted to any part of the Development, subject to a requirement or condition requiring this Agreement to be entered into, and
- 5.1.2 this Agreement is entered into as required by clause 25C(1) of the Regulation and the Council executes this Agreement.
- 5.2 Until then, this document, executed only by the Developer, is to be read and construed as containing the Developer's irrevocable offer to make the Development Contributions once all of the matters specified in clause 5.1 have occurred.
- 5.3 A Development Contribution which is required to be made in connection with a Development Area, is not required to be made unless Development Consent is granted to that Development Area.
- 5.4 The Council must notify the Developer immediately after it executes this Agreement and promptly provide the Developer with the Agreement as executed by the Council.

6 Part-performance of this Agreement

- 6.1 The Council is not to raise any objection, requisition or claim, or impose any requirements beyond that provided for in this Agreement in relation to any obligation imposed on the developer under this Agreement that had been performed, whether in whole or in part, on the date this Agreement commenced.

7 Further agreements relating to this Agreement

- 7.1 The Parties may, at any time and from time to time, enter into agreements relating to the subject-matter of this Agreement that are not inconsistent with this Agreement for the purpose of implementing this Agreement.

8 Application of s 94, s 94A and s 94EF of the Act to the Development

- 8.1 This Agreement excludes the application of s 94 and s 94A to the Development.
- 8.2 This Agreement does not exclude the application of s 94EF to the Development.

9 Ownership of Land

- 9.1 The Developer will ensure that it becomes the registered proprietor of the Land, or any part thereof, that is required to be dedicated and that it does not own as at the date of this Agreement, prior to any obligations arising under this Agreement which require any part of that Land to be dedicated to Council, unless otherwise agreed with Council.
- 9.2 The Developer will ensure that it secures the legal right to access, and construct any relevant Works on any part of the Land that it does not own as at the date of this Agreement, prior to any obligations arising under this Agreement which require the carrying out of Works on that part of the Land, unless otherwise agreed with Council.

10 Provision of Development Contributions

- 10.1 The Developer is to make Development Contributions to the Council in accordance with this Agreement.
- 10.2 Schedule 3 has effect in relation to Development Contributions to be made by the Developer under this Agreement.
- 10.3 A Contribution Value specified in relation to an obligation by the Developer to carry out Work or dedicate land under this Agreement does not define or limit the extent of the Developer's obligation in that regard.
- 10.4 If the cost incurred by the Developer to properly perform an obligation to carry out Work or dedicate land is less than a Contribution Value specified in relation to the obligation, the Developer is not required to carry out further Work or dedicate further land or pay money to the Council to make up the difference between the Contribution Value and the cost incurred by the Developer in performing the obligation.
- 10.5 The Council is to apply each Development Contribution made by the Developer under this Agreement towards the public purpose for which it is made and otherwise in accordance with this Agreement.

11 Variation of scope or timing for provision of Development Contributions

- 11.1 The Developer may request that the Council approve in writing, a variation to the scope or the timing for the provision of Development Contributions, and the Council must act reasonably in determining whether to approve the variation.
- 11.2 For the purposes of determining whether to approve a variation under clause 11.1, the Council may consider the content of the ISDP and whether the variation prejudices the provision of public services or public amenities for any Development Area.
- 11.3 The scope or the timing for provision of a Development Contribution is not to be varied unless:
 - 11.3.1 the Parties, acting reasonably, agree in writing to the variation, and
 - 11.3.2 any consent or approval required under the Act or any other law to the variation is first obtained, if required, and
 - 11.3.3 each Party bears its own costs of and incidental to the variation.
- 11.4 If a variation is made to the scope or timing for provision of a Development Contribution pursuant to this clause, then Schedule 3 is taken to have been amended accordingly.
- 11.5 If the Council requests a variation to a Work after a Construction Certificate has been issued for the Work, then the Council is liable to pay to the Developer an amount equal to the increase in the costs incurred by the Developer of completing the Work which results from the variation requested by the Council.
- 11.6 Council shall pay the amount referred to in clause 11.5 to the Developer after the Work is complete, and within 28 days of receipt of:
 - 11.6.1 a tax invoice for the amount claimed by the Developer; and
 - 11.6.2 documentation which verifies the increase in costs incurred by the Developer as a result of the variation.
- 11.7 The Council cannot withhold its agreement to a variation of a Work if the variation relates to any matter other than a matter identified as a core element for that Work in the ISDP.

Part 2 – Provisions relating to monetary Development Contributions

12 Payment of monetary Development Contributions

- 12.1 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.

- 12.2 The Developer is to give the Council not less than 2 business days written notice of its intention to pay a monetary Development Contribution.
- 12.3 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 12.2, has given to the Developer a tax invoice for the amount of the Development Contribution.
- 12.4 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

13 Procedures relating to the dedication of Land

- 13.1 A Development Contribution comprising the dedication of any part of the Land is made for the purposes of this Agreement when:
 - 13.1.1 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*, or
 - (b) creates a public reserve or drainage reserve under the *Local Government Act 1993*, or
 - 13.1.2 the Council is given an instrument in registrable form under the *Real Property Act 1900* that is effective to transfer the title to the relevant part of the Land to the Council when registered.
- 13.2 For the purposes of clause 13.1.2:
 - 13.2.1 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
 - 13.2.2 within 7 days of receiving it from Developer, the Council is to execute it and return it to Developer, and
 - 13.2.3 within 7 days of receiving it from the Council (properly executed), the Developer is to lodge it for registration with the Registrar General, and
 - 13.2.4 the Developer is to do all things reasonably necessary to enable it to be registered.

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 21 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 elect to:
 - (a) amend the design and specification and submit to the Council the amended design and specification in which case this clause 14.2 applies to that amendment, or
 - (b) make monetary Development Contributions for the provision of the Work in lieu of carrying out the Work not exceeding the amount of the Contribution Value of the Work.
- 14.3 If the Developer elects to make monetary Development Contributions under clause 14.2.3 (b), the Developer is to pay the Development Contributions to the Council as progress payments upon presentation by the Council of documents verifying costs incurred by the Council in carrying out the Work, or in such instalments as may be agreed in writing between the Parties.
- 14.4 For the purposes of clause 14.2.3, the Council is not to require the Developer to make modifications to the design and specification of a Work that result in a change to the matters identified as core elements for that Work in the ISDP.

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 Maintenance and management of Works

- 16.1 The Developer will maintain each Hard Landscaping Work and Soft Landscaping Work during the Maintenance Period in accordance with any matters set out in clause 15.1.
- 16.2 Despite any other provision of this Agreement, if the Developer has complied with its obligations under this clause, the Council cannot make any Claim, objection or demand about the state or condition of a Work after the end of the Maintenance Period for that Work.
- 16.3 For the purposes of this clause maintenance does not include repairing damage caused by vandalism to the Work (but includes replacement of plants due to vandalism), unless the Developer notifies the Council in writing that it elects to carry out such repair.

17 Access for Works

- 17.1 The Developer is to 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:
 - 17.1.1 inspect, examine or test any Work, or
 - 17.1.2 remedy any breach by the Developer in carrying out a Work.
- 17.2 The Council is to grant to the Developer its officers, employees, agents and contractors a legal right to enter and occupy any land owned or controlled by the Council, including any part of the Land owned by the Council, to
 - 17.2.1 enable the Developer to carry out any Work under this Agreement that is required to be carried out on that land, or
 - 17.2.2 perform any other obligation imposed on the Developer by this Agreement.

18 Protection of people and property

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

19 Completion

- 19.1 Work is completed for the purposes of this Agreement when the Council at the request of the Developer, acting reasonably, gives a certificate to the Developer to that effect or the Developer gives the Council a Compliance Certificate to that effect.
- 19.2 The Council is to respond to any request made by the Developer to provide a certificate referred to in clause 19.1 within 14 business days.
- 19.3 Despite clause 19.1, if a response referred to in clause 19.2 is not provided within the time specified in that clause, then the Work to which the request referred to in that clause relates is taken to be completed for the purposes of this Agreement.
- 19.4 In this clause **Compliance Certificate** has the same meaning as in the Act.

20 Procedures relating to the rectification of Defects

- 20.1 During the Defects Liability Period, the Council may give to the Developer a Rectification Notice.
- 20.2 The Developer is to comply with a Rectification Notice at its own cost according to its terms and to the satisfaction of the Council.

21 Deferral of Work

- 21.1 Notwithstanding any other provision of this Agreement, if the Developer reasonably considers, at any time, that it is unable to make a Development Contribution comprising a Work by the time the Work is required to be completed under this Agreement, then:
 - 21.1.1 the Developer is to provide written notice to the Council to that effect,
 - 21.1.2 the Developer is to provide the Council with Security for the uncompleted part of the Work before the date on which the Work is required to be completed under this Agreement,
 - 21.1.3 the Developer is to provide to the Council, for approval, a revised completion date for the Work, and
 - 21.1.4 the time for completion of the Work under this Agreement is the revised completion date approved or agreed to by the Council under this clause 21.1.
- 21.2 If the Developer complies with clause 21.1 in relation to a Work, then it is not in breach of this Agreement as a result of a failure to complete the Work by the time for completion of the Work specified in Column 4 of Schedule 3.

22 Failure to carry out Work

- 22.1 Subject to clause 26, 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.
- 22.2 The notice may require the Developer to:



- 22.2.1 rectify the breach to the Council's satisfaction, and
- 22.2.2 immediately cease carrying out further work relating to the Work except to rectify the breach.
- 22.3 A notice given under clause 22.1 is to allow the Developer not less than 28 days (or such further period as the Council considers reasonable in the circumstances) to rectify the breach.
- 22.4 If the Developer does not comply with the notice given under clause 22.1, the Council may carry out and complete the Work the subject of the breach. This does not affect the Council's other rights to enforce this Agreement.
- 22.5 Clauses 28 and 29 do not prevent a notice being given under clause 22.1, nor do they apply to such a notice or the circumstances relating to the giving of the notice. Any procedure commenced under clause 28 or clause 29 ceases to apply when such a notice is given.
- 22.6 If the Council reasonably incurs a cost in carrying out, completing or rectifying a Defect in a Work, the Council may recover the cost from the Developer in a court of competent jurisdiction.
- 22.7 For the purposes of clause 22.6, the costs which Council can recover include fees and charges incurred by Council, Council's employees, agents and contractors, and legal costs and expenses.

23 Works-as-executed-plan

- 23.1 No later than 60 days after a Work is completed in accordance with this Agreement, the Developer is to submit to the Council a full works-as-executed-plan for the Work.

24 Hand-over of Works

- 24.1 Subject to anything to the contrary in this Agreement, Council accepts responsibility for a Work on the later of:
 - 24.1.1 the date when the Work is completed for the purposes of this Agreement, or
 - 24.1.2 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.
- 24.2 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 –Enforcement and Disputes

25 Enforcement

- 25.1 The Parties acknowledge that Council is entitled to withhold a Subdivision Certificate in respect of a Development Area of the Development if the

Development Contributions required by this Agreement to be provided prior to the issue of a Subdivision Certificate for that Development Area, have not been provided in accordance with this Agreement.

26 Council to consult before enforcing this Agreement

- 26.1 This clause applies to any of the Developer's obligations under this Agreement.
- 26.2 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 21) unless it has first notified the Developer in writing of its intention to do so and has consulted with the Developer as to:
 - 26.2.1 the reason for the non-compliance,
 - 26.2.2 the likely effects of the non-compliance, and
 - 26.2.3 the Developer's capacity in all of the circumstances to reasonably rectify the non-compliance.
- 26.3 The Council is not to enforce this Agreement against the Developer unless, after having consulted with the Developer:
 - 26.3.1 it has reasonably formed the opinion the Developer has no reasonable excuse for the non-compliance,
 - 26.3.2 it has notified the Developer in writing that it intends to enforce the Agreement not earlier than 14 days from the date of the notice, and
 - 26.3.3 the notice specifies the enforcement action it intends to take.
- 26.4 At any time between the date of the notice referred to in clause 26.3 and the time when the Council takes action to enforce this Agreement, the Developer may notify the Council of a dispute under clause 28 or 29.
- 26.5 If the Developer notifies the Council in accordance with in clause 26.4, 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 28 or 29 has been exhausted without resolution between the parties.

27 Enforcement in court

- 27.1 Subject only to clause 26, the Parties may enforce this Agreement in any court of competent jurisdiction.
- 27.2 For the avoidance of doubt, nothing in this Agreement prevents:
 - 27.2.1 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,
 - 27.2.2 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.

28 Dispute resolution – expert determination

- 28.1 This clause applies to a dispute under this Agreement about a matter that can be determined by an appropriately qualified expert (**Expert Determination Dispute**).
- 28.2 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.
- 28.3 Within 14 days of the notice, the Parties are to meet to try to resolve the dispute.
- 28.4 If within a further 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.
- 28.5 The expert determination binds the Parties, except in the case of the expert's fraud or misfeasance.
- 28.6 Each Party must bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 28.7 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.

29 Dispute resolution - mediation

- 29.1 This clause applies to any dispute under this Agreement other than a dispute to which clause 28 applies.
- 29.2 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 29.3 The Parties are then to meet within 14 days of the notice to try to resolve the dispute.
- 29.4 If the dispute is not resolved within a further 28 days, the Parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time, and must request the President of the Law Society, or the President's nominee, to select a mediator.
- 29.5 If the dispute is not resolved by mediation within a further 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.

30 Registration of this Agreement

- 30.1 The Parties agree not to register this Agreement for the purposes of s 93H of the Act.

31 Assignment, sale of Land, etc

- 31.1 Unless the preconditions specified in clause 31.2 are satisfied, the Developer is not to:
- 31.1.1 transfer the Land, other than a Final Lot, to any person, or
 - 31.1.2 assign its rights or obligations under this Agreement, or novate this Agreement, to any person.
- 31.2 The preconditions to be satisfied under clause 31.1 are:
- 31.2.1 the Developer has, at no cost to the Council:
 - (a) procured the execution by the person to whom the Developer proposes to sell or transfer the Land or to whom the Developer's rights or obligations under this Agreement are to be assigned or novated (**Third Party**), of an agreement in favour of the Council on terms satisfactory to the Council acting reasonably, and
 - (b) provided evidence, satisfactory to the Council (demonstrated by the Council giving written notice to the Developer of its satisfaction) to show that the Third Party is reasonably capable of performing the Developer's obligations under the Agreement, and
 - 31.2.2 the Developer is not in breach of this Agreement.
- 31.3 An agreement entered into pursuant to clause 31.2.1(a):
- 31.3.1 must provide that the Third Party is to do all such things as necessary to enable the Developer to comply its obligations under this Agreement, if the Developer will remain responsible for making any Development Contributions under the Agreement after the transfer, assignment or novation;
 - 31.3.2 may require the Third Party to register this Agreement on the title to any part of the Land which the Third Party will own within 90 days of the transfer of the Land or part of the Land to the Third Party, and
 - 31.3.3 may require the Third Party to provide security in a form acceptable to Council, in respect of the performance by the Third Party of obligations under this Agreement,
- and if the Third Party provides evidence that any security required under the agreement can be provided, then Council cannot refuse to provide the written notice referred to in clause 31.2.1(b).

Part 6 - Other provisions

32 Indemnity

- 32.1 Each Party indemnifies the other Party from and against all Claims that may be sustained, suffered, recovered or made against the other Party arising in connection with the performance of their obligations under this Agreement except if, and to the extent that, the Claim arises because of the other Party's negligence or default.

33 Insurance

- 33.1 The Developer warrants, and Council acknowledges, that:
 - 33.1.1 the Developer is a member of the NSW Treasury Managed Fund (Fund),
 - 33.1.2 the Fund provides the Developer with insurance cover against any liability arising from a breach by the Developer of its obligations under this Agreement.

34 Developer may Review Draft Determinations Relating to the Development

- 34.1 Not less than 14 days before determining a Development Application or an application under s96 of the Act relating to the Development, the Council is to give to the Developer a copy of its proposed determination including, if applicable, the terms and conditions upon which any Development Consent or approval is proposed to be granted.
- 34.2 The Developer may, by notice in writing, not more than 14 days from receipt of the proposed determination under clause 34.1 request the Council to modify or abandon the proposed determination.
- 34.3 The Council is to properly consider a request made by the Developer under clause 34.2 before it makes any further decision in relation to the determination.

35 Termination of Agreement

- 35.1 This Agreement terminates at the later of:
 - 35.1.1 when the Developer has satisfied all of its obligations under this Agreement, including its obligations to rectify Defects under clause 20, or
 - 35.1.2 at the end of the Defects Liability Period for the last of the Works to be Completed.

36 Review of this Agreement

- 36.1 The Developer is to provide the Council with a report every 3 years detailing the performance of its obligations under this Agreement.
- 36.2 The report is to be:
 - 36.2.1 given no later than every 3 years from the date on which this Agreement is entered into, and
 - 36.2.2 in the form and addressing the matters the Council notifies to the Developer from time to time.
- 36.3 The Parties are to review this Agreement every 3 years, and otherwise if either Party considers that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Agreement.
- 36.4 For the purposes of clause 36.3, the relevant changes include:

- 36.4.1 any change to a law that restricts or prohibits, or enables the Council or any other planning authority to restrict or prohibit, any aspect of the Development, or
- 36.4.2 any Alternative Funding has been obtained by any Party.
- 36.5 For the purposes of addressing any matter arising from a review of this Agreement referred to in clause 36.3, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Agreement.
- 36.6 If this Agreement becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Agreement is entered into.
- 36.7 A Party's failure to agree to take action requested by the other Party as a consequence of a review referred to in clause 36.3 is not a dispute for the purposes of clauses 28 and 29, and is not a breach of this Agreement.

37 Confidentiality

- 37.1 The terms of this Agreement are not confidential and this Agreement may be treated as a public document and exhibited or reported without restriction by any Party.
- 37.2 The Parties acknowledge that:
 - 37.2.1 confidential information may have been supplied to some or all of the Parties in the negotiations leading up to the making of this Agreement, and
 - 37.2.2 the Parties may disclose to each other further confidential information in connection with the subject matter of this Agreement.
 - 37.2.3 subject to clauses 37.3 and 37.4, each Party agrees:
 - (a) not to disclose any confidential information received before or after the making of this Agreement to any person without the prior written consent of the Party who supplied the confidential information, or
 - (b) to take all reasonable steps to ensure all confidential information received before or after the making of this Agreement is kept confidential and protected against unauthorised use and access.
- 37.3 A Party may disclose confidential information in the following circumstances:
 - 37.3.1 in order to comply with the law, or the requirements of any Authority, or
 - 37.3.2 to any of their employees, consultants, advisers, financiers or contractors to whom it is considered necessary to disclose the information, if the employees, consultants, advisers, financiers or contractors undertake to keep the information confidential.
- 37.4 The obligations of confidentiality under this clause do not extend to information which is public knowledge other than as a result of a breach of this clause.



38 Notices

- 38.1 A notice, consent, information, application or request (**Notification**) that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:
 - 38.1.1 delivered or posted to that Party at its address set out in the Summary Sheet, or
 - 38.1.2 faxed to that Party at its fax number set out in the Summary Sheet, or
 - 38.1.3 emailed to that Party at its email address set out in the Summary Sheet.
- 38.2 A Party may change its address, fax number or email address by giving the other Party 3 business days' notice of the change, in which case the new address, fax number or email address is treated as the address or number in the Summary Sheet.
- 38.3 A Notification is to be treated as given or made if it is:
 - 38.3.1 delivered, when it is left at the relevant address, or
 - 38.3.2 sent by post, 2 business days after it is posted, or
 - 38.3.3 sent by fax, as soon as the sender receives from the sender's fax machine a report of an error-free transmission to the correct fax number, or
 - 38.3.4 sent by email, and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.
- 38.4 If a Notification is delivered, or an error-free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

39 Approvals and consent

- 39.1 In this clause, a reference to an approval or consent does not include a reference to a Development Consent.
- 39.2 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.
- 39.3 A Party is to give its reasons for giving or withholding consent or for giving consent subject to conditions.

40 Costs

- 40.1 The Parties are each to pay their own costs of preparing, negotiating, executing and stamping this Agreement and any document related to this Agreement.

41 Entire Agreement

- 41.1 This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with.
- 41.2 No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.

42 Further acts

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

43 Notations on section 149(2) Planning Certificates

- 43.1 The Council agrees not to make a notation under section 149(5) of the Act regarding this Agreement on any certificate issued under section 149(2) of the Act relating to the Land.

44 Governing law and jurisdiction

- 44.1 This Agreement is governed by the law of New South Wales.
- 44.2 The Parties submit to the non-exclusive jurisdiction of its courts, and are not to object to the exercise of jurisdiction by those courts on any basis.

45 Joint and individual liability and benefits

- 45.1 Except as otherwise set out in this Agreement:
 - 45.1.1 any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and
 - 45.1.2 any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.



46 Representations and warranties

- 46.1 The Parties represent and warrant that they have power to enter into this Agreement and to comply with their obligations under the Agreement, and that entry into this Agreement will not result in the breach of any law.

47 Severability

- 47.1 If a clause or part of a clause 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.
- 47.2 If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part of it is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

48 Modification

- 48.1 No modification of this Agreement has any effect unless it is in writing and signed by the Parties.

49 Waiver

- 49.1 A Party does not waive any of the other Party's obligation or breach of obligation merely by failing to do, or delaying in doing, something under this Agreement.
- 49.2 A waiver by a Party is effective only if it is in writing.
- 49.3 A written waiver by a Party is effective only in relation to the particular obligation or breach for which it is given. It is not to be taken as an implied waiver of any other obligation or breach, or as an implied waiver of that obligation or breach in relation to any other occasion.

50 GST

- 50.1 In this clause:

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

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

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

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

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

- 50.2 Subject to clause 50.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Agreement, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- 50.3 Clause 50.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Agreement to be GST inclusive.
- 50.4 No additional amount is payable by the Council under clause 50.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.
- 50.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Agreement by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:
 - 50.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies before issuing Tax Invoices for those Supplies;
 - 50.5.2 that any amounts payable by the Parties in accordance with clause 50.2 (as limited by clause 50.4) to each other for those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 50.6 No payment of any amount under this clause 50, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided the recipient with a Tax Invoice or Adjustment Note as the case may be.
- 50.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a Party, must exclude the amount of any Input Tax Credit entitlement of that Party in relation to the relevant cost, expense or other liability.
- 50.8 This clause continues to apply after expiration or termination of this Agreement.

51 Explanatory Note Relating to this Agreement

- 51.1 The Appendix contains the Explanatory Note relating to this Agreement required by clause 25E of the Regulation.
- 51.2 Under clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note in the Appendix is not to be used to assist in construing this Agreement.