

- (i) comply with the design approved under this clause if it is inconsistent with the relevant Development Consent; and
- (ii) make modifications to the design and specification of a Specified Work that results in a change to the matters identified as core elements for that Work in **column 5 of schedule 2**.

## **6.5 Standard and cost of construction of the Works**

- (a) Any Work that the Developer is required to carry out under this Agreement is to be carried out in accordance with:
  - (i) this Agreement;
  - (ii) the requirements of any approval, consent, permission or licence issued by a relevant Authority;
  - (iii) any Australian standards and other laws applicable to the Work; and
  - (iv) in a proper and workmanlike manner, complying with current industry practice and standards relating to the Work.
- (b) For the purposes of this Agreement, the Parties acknowledge that:
  - (i) the Contribution Value of each Work, excluding the Community Centre, is specified in **column 6 of schedule 2** and is determined as the estimated value of the relevant Work:
    - (A) however is not a cap on the cost of the relevant Work; and
    - (B) includes all fees and charges incurred by the Developer with respect to design, project management and consultants; and
  - (ii) the Developer is only required to carry out the Works connected with the Community Centre up to the Capped Amount.
- (c) After the Developer has costed any Work (excluding the Community Centre), and the costs of the relevant Work exceeds its Contribution Value by more than 10 percent then:
  - (i) the Developer may issue a notice to Council providing details of:
    - (A) the exceedance of the Contribution Value for the relevant Work; and
    - (B) any proposed variation to the Work including a variation to the specifications or design so that the additional cost of the Work is no more than 10 percent of the Contribution Value; and
  - (ii) within 5 Business Days of the issue of a notice by the Developer under clause **6.5(c)(i)**, the Developer and the Council are to meet in good faith to agree on any revised specifications or variation to the Work so that any additional costs for the variation of the relevant Work is no more than 10 percent of its Contribution Value.

- (e) The design or specifications of any Works that are required to be carried out by the Developer under this Agreement may be varied by agreement in writing between the Parties, acting reasonably, without the necessity for an amendment to this Agreement.

## **6.6 Failure to deliver Works**

- (a) If the Developer fails to complete all or any part of the Works as required by this Agreement by the time specified in **schedule 2** for that item of Work and Council has not agreed to a deferral of the Works under **clause 6.7**, the Council may elect to:
  - (i) complete that item or such part or parts of that item as are outstanding as at the date specified in **schedule 2** or otherwise as agreed and in the event Council makes such an election, the Council must act reasonably in carrying out the relevant Works;
  - (ii) appoint a contractor to carry out those Works on the Council's behalf and, in the event Council makes such an appointment, the Council must ensure that the contractor carries out the relevant Works in a reasonable manner; or
  - (iii) withhold the issue of a relevant Subdivision Certificate until the Works are completed by the Developer.
- (b) If **sub-clause 6.6(a)** applies:
  - (i) if required, the Developer must allow the Council, its officers, employees, agents and contractors to enter the Land for the purposes of completing the relevant Works but the Council must ensure that there is compliance with **clause 6.8**; and
  - (ii) any reasonable costs incurred by Council under **clause 6.6(a)** will be a liquidated debt due and payable by the Developer to Council but any such amount payable must be no more than the Contribution Value for that item of the Works or where relevant, no more than the Capped Amount for the Community Centre.

## **6.7 Deferral of Works**

- (a) Notwithstanding any other provision of this Agreement, if the Developer forms the view at any time, that it is unable to make all or part of a Development Contribution comprising an item or items of Works (**Deferred Works**) by the time specified in **schedule 2**, then the Developer must seek Council's approval to defer the relevant Works by providing written notice to the Council:
  - (i) identifying the relevant Work that the Developer proposes to defer;
  - (ii) identifying the anticipated time for Practical Completion of the relevant Work; and
  - (iii) if the Developer seeks to reduce the Security Amount for the Deferred Works from a default amount equal to 100 percent of the Contribution Value of the Work, the Developer must provide



reasons for that request including any evidence of the cost of achieving Practical Completion of the Deferred Works to support the reduction in the Security Amount.

- (b) The Council must give the Developer a written notice stating whether or not it consents to the deferral of the Deferred Works, the revised date for Practical Completion and any reduction in the Security Amount within 10 Business Days of the Developer providing the notice under **clause 6.7(a)**. In determining whether it consents to the deferral of the Deferred Works, the revised date for Practical Completion and any reduction in the Security Amount, Council must act reasonably.
- (c) If the Council consents to the deferral of the Deferred Works, then the following applies:
  - (i) the Developer must provide the Council with Security for the Security Amount identified in Council's notice in **clause 6.7(b)** in accordance with **clause 13.2** and for the avoidance of doubt, if Council already holds Security for the relevant Approved Deferred Works, any part of that amount may be applied to the Security Amount required under Council's notice in **clause 6.7(b)**; and
  - (ii) the time for completion of the Approved Deferred Works under this Agreement will be taken to be the revised date for Practical Completion approved by the Council.
- (d) If the Council approves the Deferred Works under **clause 6.7(c)**, then:
  - (i) the Developer will not be considered to be in breach of this Agreement as a result of a failure to achieve Practical Completion of the Approved Deferred Works by the time for completion of those Works as specified in **schedule 2**; and
  - (ii) if applicable, any relevant Subdivision Certificate may be issued if the time for compliance for Practical Completion of the Approved Deferred Works is required prior to the issue of a Subdivision Certificate in **schedule 2**.
- (e) If the Approved Deferred Works do not achieve Practical Completion by the revised date, then the Council may:
  - (i) withhold the issue of Subdivision Certificate until the Approved Deferred Works are completed; and/or
  - (ii) call on the Approved Deferred Works Security in accordance with **clause 13.4**.

## **6.8 Access to Land**

- (a) The Council is to permit the Developer to enter and occupy any land owned or controlled by the Council for the purpose of enabling the Developer to carry out any Works under this Agreement that is required to be carried out on such land or to perform any other obligation imposed on the Developer by or under this Agreement.

- (b) The Developer is to permit the Council, its officers, employees, agents and contractors to enter the Land at any time, upon giving reasonable prior written notice, in order to inspect any Works.
- (c) Council must ensure when entering onto the Land pursuant to **clauses 6.8(a) and (b)** that the Council and any of its officers, employees, agents and contractors comply with:
  - (i) if relevant, all directions of the Developer or its principal contractor; and
  - (ii) all Laws including those relating to work, health and safety.

## **6.9 Delivery of Monetary Contributions**

- (a) The Monetary Contributions are made for the purposes of this Agreement when cleared funds are deposited and credited by means of electronic funds transfer into a bank account nominated by the Council.
- (b) The Developer is to give the Council not less than 10 Business Days written notice of its intention to pay the Monetary Contributions.
- (c) If a tax invoice is by law required to be provided to the Developer by the Council the Developer is not required to pay the contributions identified in **clause 6.9(a)** until the Council, after having received the Developer's notice under **clause 6.9(b)**, has given to the Developer a tax invoice for the amount of the relevant monetary contribution

# **7 Dedication of Transfer Lands**

## **7.1 Identification of Community Centre Land**

- (a) Prior to the commencement of the construction of the Community Centre:
  - (i) the Developer must identify the location and configuration of the Community Centre Land to the Council which can be located within the area specified on the Contribution Location Plan or any other area as agreed between the Parties;
  - (ii) the Parties must agree the actual location and configuration of the Community Centre Land having regard to:
    - (A) the impositions and requirements of the Development applying at that time; and
    - (B) the detail and reasoning incorporated in the Developer's proposal referred to in **clause 7.1(a)(i)**; and
  - (iii) the Developer must, at its cost, prepare a Plan of Subdivision to create a separate Lot or Lots for the Community Centre Land (**Community Centre Land Plan**).



- (b) The Community Centre Land Plan is to be registered by the Developer immediately prior to the date it is to be dedicated to Council in accordance with **clause 7.2**.
- (c) The Parties must use reasonable endeavours to undertake the steps referred to in **clause 7.1(a)** so that the Developer can meet its obligations under this Agreement.

## 7.2 Dedication process

- (a) The Developer must take all steps necessary to register at the LPI the transfer for the relevant part of the Transfer Lands to the Council on the later of:
  - (i) dedication of the Transfer Lands on the registration of a deposited plan which indicates that the relevant portion of the Transfer Lands is intended to be dedicated to the Council; or
  - (ii) Practical Completion of the Works that are located on the Transfer Lands and if so, the Developer must deliver to the Council at the same time as it provides notice to Council that Practical Completion has been achieved:
    - (A) a form of transfer in respect of the relevant portion of the Transfer Lands executed by the Developer in registrable form transferring that land for \$1.00; and
    - (B) the certificates of title for the relevant part of the Transfer Lands; and
    - (C) withdrawal of any caveat, mortgage or charge registered on the title to the Transfer Lands which would prevent registration of the transfer to Council,
 and the Developer must otherwise take any other necessary action (other than paying stamp duty associated with the transfer) to give effect to the transfer of the title of the relevant portion of the Transfer Lands to the Council.
- (b) The Council agrees that it will accept the Transfer Lands subject to the Permitted Encumbrances.

## 7.3 Carrying out of the Works prior to dedication of Transfer Lands

Subject to **clause 6.7**, the Developer must reach Practical Completion of the Works prior to the dedication to the Council of the relevant Transfer Lands upon which those Works are to be erected.

## 8 Contamination

- (a) At the same time as the lodgement of the Development Application for a Stage that includes the proposed Subdivision and dedication to Council of any part of the Transfer Lands (**Stage Transfer Lands**), the

Developer must provide Council with a Phase 1 ESA for the Stage Transfer Lands.

- (b) If:
  - (i) the Phase 1 ESA for the Stage Transfer Lands concludes that the Stage Transfer Lands are likely to be at a level of contamination suitable for the proposed use of the Stage Transfer Lands and that no further investigations are required, the Developer is not required to provide a Phase 2 ESA to Council; and
  - (ii) the Phase 1 ESA for the Stage Transfer Lands concludes that a Phase 2 ESA should be prepared to identify the extent of the contamination, then the Developer must provide Council with a Phase 2 ESA for the Stage Transfer Lands as close as practicable to the date of the lodgement of the Development Application for the relevant Stage.
- (c) Council may request by written notice to the Developer that the Developer procure from the consultants that prepared the Phase 1 ESA or the Phase 2 ESA, a letter that provides Council with contractual reliance on the Phase 1 ESA or the Phase 2 ESA (**Reliance Letter**).
- (d) The Developer must, within a reasonable period of time from receipt of the notice in **clause 8(c)**, provide the Reliance Letter to Council.
- (e) The Developer is responsible for payment of all costs and expenses associated with obtaining a Phase 1 ESA, Phase 2 ESA and Reliance Letter (if applicable) including (but not limited to) the fees of the Certified ESA Consultant(s).

## 9 Application of sections 94, 94A and 94EF of the Act to the Development

This Agreement:

- (a) wholly excludes the application of sections 94 and 94A of the Act to the Development; and
- (b) does not exclude the application of section 94EF of the Act to the Development.

## 10 Registration of this Agreement

### 10.1 Registration

- (a) The Council and the Developer agree that as soon as reasonably practicable after execution of the Agreement, the Agreement must be lodged with the LPI by the Developer for registration on the title to all Super Lots which are located within Contribution Areas O, N, M, L and K on the Contribution Area Plan and which, at the time of lodgement, are



owned by the Developer at the Developer's expense and the Developer must provide Council with:

- (i) evidence of that lodgement; and
- (ii) a written undertaking that it will not take steps to uplift the request form from the LPI (other than as may be necessary to comply with any requisition raised by the LPI).

## **10.2 Release by Council**

- (a) The Council agrees to provide the Developer with a release and discharge of this Agreement with respect to a Lot or Lots forming part of the relevant Land or any lot, including a strata lot, created or to be created on subdivision of the Land (or part of the Land) (**Release Land**) on the earliest of:
  - (i) the date that Council consents to the deferral of Deferred Works under **clause 6.7(b)** and the Developer providing any Security required to be provided with respect to that Deferred Work; or
  - (ii) date of satisfaction by the Developer of the obligation to provide the Development Contributions for that Release Land.
- (b) Within 7 Business Days of the occurrence of a release and discharge event in **clause 10.2(a)**, Council must do all things reasonably necessary, including the execution of any documents, to enable the Developer to remove the notation of this Agreement on the relevant folios of the register, held by the LPI pertaining to the Release Land.

## **11 Review of this Agreement**

- (a) This Agreement may be reviewed or modified and any review or modification of this Agreement will be conducted in the circumstances and in the manner determined by the Parties and subject to the Act.
- (b) No modification or review of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

## **12 Dispute Resolution**

### **12.1 Reference to Dispute**

- (a) If a dispute arises between the Parties in relation to this Agreement, then the Parties must resolve that dispute in accordance with this clause; and
- (b) If a dispute arises between the Parties under **clause 6.2(e)(ii)**, the expert determination provisions in **clause 12.5** will apply.

### **12.2 Notice of Dispute**

The Party wishing to commence the dispute resolution processes must notify the other Parties in writing of:

- (a) the intent to invoke this clause;
- (b) the nature or subject matter of the dispute, including a summary of any efforts made to resolve the dispute other than by way of this clause; and
- (c) the outcomes which the notifying Party wishes to achieve (if practicable).

### **12.3 Representatives of Parties to Meet**

- (a) The representatives of the Parties must promptly (and in any event within 14 Business Days of the written notice provided in accordance with **clause 12.2**) meet in good faith to attempt to resolve the notified dispute.
- (b) The Parties may, without limitation:
  - (i) resolve the dispute during the course of that meeting;
  - (ii) agree that further material, expert determination in accordance with **clause 12.5** or consideration is needed to effectively resolve the dispute (in which event the Parties will, in good faith, agree to a timetable for resolution);
  - (iii) 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.

### **12.4 No party may constrain**

If:

- (a) at least one meeting has been held in accordance with **clause 12.3**; and
- (b) the Parties have been unable to reach an outcome identified in **clause 12.3(b)(i) to (iii)**; and
- (c) any of the Parties, acting in good faith, forms the view that the dispute is reasonably unlikely to be resolved in accordance with a process agreed under **clause 12.3**,

then, that Party may, by 14 Business Days written notice to the other Party, terminate the dispute resolution process in respect of that dispute. The termination of the process set out in this clause does not of itself amount to a breach of this Agreement.

### **12.5 Expert Determination**

- (a) If a Dispute arises between Parties to this Agreement, the Parties may agree to refer the Dispute to expert determination in Sydney, New South Wales administered by the Australian Commercial Dispute Centre (**ACDC**).
- (b) The expert determination will be conducted in accordance with the ACDC Rules for Expert Determination (**Rules**) in force at the date of this Agreement. The Rules set out the procedures to be adopted, the process of selection of the expert and the costs involved, including the



Parties' respective responsibilities for the payment of the expert's costs and other costs of the expert determination.

- (c) The expert determination will be final and binding on the Parties.
- (d) This **clause 12.5** survives termination of this Agreement.
- (e) At any time, a Party may, without inconsistency with this **clause 12.5**, seek urgent interlocutory relief in respect of a dispute subject of this **clause 12.5**, from any Court having jurisdiction.

## **13 Security and Enforcement**

### **13.1 Developer to provide Security**

Section 93F(3)(g) of the Act requires the enforcement of a planning agreement by a suitable means, such as the provision of a bond or guarantee, in the event of a breach of the Agreement by the Developer. The intention of the Parties is that **clause 10** and this **clause 13** satisfy this obligation.

### **13.2 Security to be provided to Council**

The Developer must provide the Security for the Security Amount to the Council in the following circumstances for the Approved Deferred Works, prior to the date on which the application for the relevant Subdivision Certificate is made for the relevant Land.

### **13.3 Release of Security to the Developer and Adjustment of Security**

- (a) In respect of each Security provided to the Council for the Approved Deferred Works, the Council must release the Security or the relevant part of the Security to the Developer within 28 days from achieving Practical Completion of the relevant part of the Approved Deferred Works under **clause 6.2(d)**.
- (b) In the event that only part of the Security is to be released to the Developer under **clause 13.3(a)** as a consequence of only part of the Approved Deferred Works achieving Practical Completion, then the Council must release the Security and the Developer must provide the Replacement Security for the remaining Approved Deferred Works.
- (c) In respect of the Defects Security provided under **clause 6.3**, the Council must release the Security to the Developer on the earlier of:
  - (i) expiration of the Defects Liability Period; or
  - (ii) rectification of the relevant defects in the Works subject of the Defects Security.
- (d) When the Developer satisfies its obligations under this Agreement to provide any or all of the Works by paying to the Council the specified Contribution Value for any or all of the Works under **clause 19**, then the Council must release the Security or the relevant part of the Security to the Developer within 28 days of receipt of payment.

### 13.4 Call on Security

- (a) Subject to **clause 13.3**:
  - (i) the Security provided in **clause 13.3(a)** is given to secure performance by the Developer of its obligations to pay any costs of achieving Practical Completion of the Approved Deferred Works under **clause 6.7** if the Developer fails to complete those works in accordance with the revised timeframe agreed with Council under **clause 6.7(c)(ii)**;
  - (ii) the Defects Security provided in **clause 6.3** is given to secure rectification of any defects arising and notified to the Developer by the Council in writing during the Defects Liability Period.  
**(Rectification Costs)**.
- (b) The Council must only exercise its rights under the Security in accordance with this **clause 13.4**
- (c) The Council must not request a payment (**Security Payment**) under the Security from the provider of it, unless:
  - (i) the Council has first given 40 Business Days written notice (**Claim Notice**) to the Developer of its intention to do so within which period the Developer may rectify the breach identified in the Claim Notice;
  - (ii) the Claim Notice specifies the Rectification Costs to which that Security Payment relates and the amount and calculation of the Security Payment;
  - (iii)
    - (A) where the reason for the request is that, the Developer has, in breach of this Agreement, failed to comply with its obligations to carry out the Works or the Approved Deferred Works in accordance with this Agreement and the Developer has failed to pay any Rectification Costs, the amount of which has been ascertained and to which the Council is entitled; and
    - (B) there is no dispute between the Developer and the Council:
      - (1) as to whether the Developer is obliged to pay the relevant Rectification Costs or is otherwise in breach of its obligations to do so; or
      - (2) about the amount of the Rectification Costs, for which the Security Payment is requested.
- (d) The amount of the Security Payment requested by Council under this **clause 13.4** must not exceed the amount of the Rectification Costs (as the case requires) and Council must, upon demand, account to the Developer for any Security Payment to the extent that it exceeds or is



otherwise not required to pay the Rectification Costs for which the Security Payment is requested.

- (e) The Council must take reasonable steps to mitigate any loss.

### **13.5 Compulsory Acquisition for Transfer Lands**

- (a) If the Developer does not dedicate the Transfer Lands in accordance with the timing in **clause 7.2(a)**, the Developer consents to the Council compulsorily acquiring the relevant part of the Transfer Lands in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) for the amount of \$1.00.
- (b) Council acknowledges that the compulsory acquisition right provided by the Developer to Council in **clause 13.5(a)** for the Transfer Lands is adequate security for the purposes of this Agreement and section 93F(3)(g) of the Act with respect to the obligation to provide the Transfer Lands.
- (c) The Council is to only acquire the relevant part of the Transfer Lands pursuant to **clause 13.5(a)** 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.
- (d) The Developer and the Council agree that:
  - (i) **clause 13.5(a)** is an agreement between the Developer and the Council for the purpose of section 30 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW); and
  - (ii) in **clause 13.5(a)**, the Developer, and the Council have agreed on all relevant matters concerning the compulsory acquisition and the compensation to be paid for the acquisition.
- (e) If, as a result of the acquisition referred to in **clause 13.5(a)**, the Council is required to pay compensation to any person other than the Developer, the Developer is to reimburse the Council that amount, upon a written request being made by the Council.

## **14 Warranties and indemnities**

### **14.1 Warranties**

The Parties warrant to one another that:

- (a) they are able to fully comply with their obligations under this Agreement; and
- (b) there is no legal impediment to them entering into this Agreement, or performing the obligations imposed under it.

## 15 Insurance

- (a) The Developer must take out and keep current to the satisfaction of Council the following insurances in relation to the Works required to be carried out by the Developer under this Agreement up until each of the Works are taken to have been completed in accordance with this Agreement:
  - (i) contract works insurance covering loss of or damage to the Works for the full replacement value of the Works.
  - (ii) public liability insurance for at least \$20,000,000.00 for a single occurrence, noting the Council as an interested party, for liability to any third party;
  - (iii) workers compensation insurance as required by Law; and
  - (iv) any other insurance required by Law.
- (b) The Developer must not commence any of the Works unless it has first complied with **clauses 15(a)**.

## 16 Notices

### 16.1 Delivery

Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

- (a) Delivered or posted to that Party at its address set out below.
- (b) Faxed to that Party at its fax number set out below.
- (c) Emailed to that Party at its email address set out below.

#### **Campbelltown City Council**

Attention: General Manager, Campbelltown City Council  
Address: Civic Centre, Queen Street, Campbelltown NSW 2560  
Fax Number: (02) 4645 4111  
Email: Council@Campbelltown.nsw.gov.au

#### **Stockland**

Attention: General Manager, Residential Development, NSW  
Address: Level 25, 133 Castlereagh Street, Sydney, NSW 2000  
Fax Number: (02) 8988 2000  
Email: Richard.rhydderch@stockland.com.au



## **16.2 Change of Details**

If a Party gives the other Parties 10 Business Days' notice of a change of its address, email address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, electronically sent, posted or faxed to the latest address, email address or fax number.

## **16.3 Giving of Notice**

Subject to **clause 16.4**, any notice, consent, invoice, information, application or request is to be treated as given or made at the following time:

- (a) if it is delivered by process server, when it is served at the relevant address;
- (b) if it is sent by registered post, two Business Days after it is posted; and
- (c) if it is sent by email, when a delivery confirmation report is received by the sender, unless subsequently the sender receives a delivery failure notification, indicating that the electronic mail has not been delivered.

## **16.4 Delivery outside of business hours**

If any notice, consent, information, application or request is delivered on a day that is not a Business Day, or if on a Business Day, after 5.00 pm 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.

## **17 Approvals and consent**

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

## **18 Assignment and Novation**

### **18.1 Assignment and novation**

The Developer may not assign, novate or otherwise deal with its rights, obligations or interest under this Agreement other than in accordance with this **clause 18**.

### **18.2 Transfer Dealings and novation**

- (a) Subject to **clause 18.3**, the Developer must not enter into any Transfer Dealings in respect of the Land without the prior written consent of the Council, which the Council must not withhold if, acting reasonably, it is satisfied that the person to whom the Developer's rights, obligations or interests are to be transferred, assigned or novated (the "**Incoming**

**Party**") has sufficient assets, resources and expertise required in order to perform the Developer's rights and obligations under this Agreement having regard to:

- (i) the type of rights, obligations or interests being transferred, assigned or novated; and
  - (ii) the area of the Land owned by the Developer being transferred to the Incoming Party including the value of the Development Contributions attributable to that part of the Land; and
- (b) Once a novation deed is executed by the Council, the Developer and the Incoming Party, from the date of the novation deed the Developer is released from its obligations under this Agreement to the extent that they:
- (i) are novated to the Incoming Party, and
  - (ii) remain to be performed.

### **18.3 Transfer of certain parts of the Land**

The provisions of **clauses 18.1** and **18.2** do not apply to the sale and transfer of:

- (a) an Urban Lot; and
- (b) a Super Lot where the Developer has completed its obligations under this Agreement in respect of that Super Lot.

## **19 Development Contribution Alternatives**

### **19.1 Alternative method of providing Items of Work**

- (a) If Council consents (in its absolute discretion), the Developer may satisfy its obligation under this Agreement to provide any or all of the Works by paying to Council the specified Contribution Value for any or all of the Works.
- (b) If the Developer pays a monetary amount under **clause 19.1(a)**, the relevant amount must be paid to Council by the time that the relevant item of Work was required to have been completed under this Agreement.
- (c) If Council consents (in its absolute discretion), the Developer may vary or replace any item of Work provided that:
  - (i) the Contribution Value of the varied or new item of Work is the same or greater than the Contribution Value of the original item of Work, or the Developer increases the amount it expends on a different item of Work by any amount it reduces the amount it expends on the relevant item of Work;
  - (ii) the varied or new item of Work serves the same, or a similar, public purpose as the original item of Work;



- (iii) the varied or new item of Work is provided at the same time as the original item of Work was required to have been provided under this document; and
- (iv) the varied or new item of Work complies with the requirements of any relevant Authority.

## **20 Costs**

The Developer agrees to pay Council's reasonable costs of preparing, negotiating, executing and stamping this Agreement and any document related to this Agreement.

## **21 Entire Agreement**

- (a) This Agreement contains everything to which the Parties have agreed in relation to the matters those documents deal with. 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.
- (b) Pursuant to clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Agreement.

## **22 Capacity of Parties**

### **22.1 General**

Each Party warrants to each other Party that:

- (a) this Agreement creates legal, valid and binding obligations, enforceable against the relevant party in accordance with its terms; and
- (b) unless otherwise stated, it has not entered into this Agreement in the capacity of trustee of any trust.

## **23 Further acts**

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

## **24 Governing law and jurisdiction**

This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its Courts and Courts of appeal from

them. The Parties will not object to the exercise of jurisdiction by those Courts on any basis.

## 25 No fetter

Nothing in this Agreement shall be construed as requiring the Authority to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

## 26 Severability

If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

## 27 Waiver

- (a) 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 or exercise of a right of, or breach of obligation by, another Party.
- (b) A waiver by a Party is only effective if it is in writing.
- (c) A written waiver by a Party is only effective in relation to the particular obligation, right or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation, right or breach or as an implied waiver of that obligation, right or breach in relation to any other occasion.
- (d) A single or partial exercise or waiver by a Party of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.
- (e) A Party is not liable for any loss, cost or expense of any other Party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

## 28 GST

### 28.1 Construction

In this **clause 28**:



- (a) words and expressions which are not defined in this Agreement but which have a defined meaning in the GST Law have the same meaning as in the GST Law; and
- (b) **GST Law** has the same meaning given to that expression in the GST Act.

## **28.2 Intention of the Parties**

Without limiting the operation of this **clause 28**, as at the date of this Agreement, the Parties intend that:

- (a) Divisions 81 and 82 of the GST Act apply to the supplies made under and in connection with this Agreement;
- (b) no tax invoices will be exchanged between the Parties; and
- (c) no additional amount will be payable to a Supplier (as defined in **clause 28.4** below) on account of GST.

## **28.3 Consideration GST exclusive**

All prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST.

## **28.4 Payment of GST – additional payment required**

- (a) If an entity (**Supplier**) makes a taxable supply under or in connection with this Agreement (**Relevant Supply**), then, subject to **clause 28.4(d)**, the Party required under the other provisions of this Agreement to provide the consideration for that Relevant Supply (**Recipient**) must pay an additional amount to the Supplier (**GST Amount**), as calculated under **clause 28.4(b)**, **28.4(c)** and **28.4(e)** (as appropriate).
- (b) To the extent that the consideration to be provided by the Recipient for the Relevant Supply under the other provisions of this Agreement is a payment of money (including, for the avoidance of doubt, any payment under **clauses 28.4(c)** and **28.4(e)**), the Recipient must pay to the Supplier an additional amount equal to the amount of the payment multiplied by the rate or rates of GST applicable to that Relevant Supply.
- (c) To the extent that the consideration to be provided by the Recipient for that Relevant Supply is neither:
  - (i) a payment of money; nor
  - (ii) a taxable supply,

**(Non-taxable non monetary consideration),**

the Recipient must pay to the Supplier an additional amount equal to 1/11<sup>th</sup> of the GST-inclusive market value of the Non-taxable non-monetary consideration.

- (d) To the extent that the consideration payable by the Recipient is a taxable supply made to the Supplier by the Recipient, then, notwithstanding **clause 28.4(a)** and subject to **clause 28.4(e)**, no additional amount is

payable by the Recipient to the Supplier on account of the GST payable on that taxable supply.

- (e) Notwithstanding **clause 28.4(d)** if the GST-inclusive market value of the non-monetary consideration of the Relevant Supply (**Supplier's taxable supply**) is less than the GST-inclusive market value of the non-monetary consideration comprising the taxable supply made by the Recipient to the Supplier for the Supplier's taxable supply (**Recipient's taxable supply**) then, the Recipient must pay to the Supplier an additional amount equal to  $1/11^{\text{th}}$  of the difference between the GST-inclusive market value of the Recipient's taxable supply and the GST-inclusive market value of the Supplier's taxable supply.
- (f) The recipient will pay the GST Amount referred to in this **clause 28.4** in addition to and at the same time as the first part of the consideration is provided for the Relevant Supply.

## **28.5 Valuation of non-monetary consideration**

The Parties will seek to agree upon the market value of any non-monetary consideration which the Recipient is required to provide under **clause 28.4**. If agreement cannot be reached prior to the time that a Party becomes liable for GST, the matter in dispute is to be determined by an independent expert nominated by the President for the time being of the Institute of Chartered Accountants in Australia. The Parties will each pay one half of the costs of referral and determination by the independent expert.

## **28.6 Tax invoice**

The Supplier must deliver a tax invoice to the Recipient before the Supplier is entitled to payment of the GST Amount under **clause 28.4**. The Recipient can withhold payment of the GST Amount until the Supplier provides a tax invoice.

## **28.7 Adjustment event**

If an adjustment event arises in respect of a taxable supply made by a Supplier under this Agreement, the GST Amount payable by the Recipient under **clause 28.4** will be recalculated taking into account any previous adjustment under this clause to reflect the adjustment event and a payment will be made by the Recipient to the Supplier or by the Supplier to the Recipient as the case requires.

## **28.8 Reimbursements**

Where a party is required under this Agreement to pay, indemnify or reimburse an expense, loss or outgoing of another party, the amount to be paid, indemnified or reimbursed by the first party will be the sum of:

- (a) the amount of the expense, loss or outgoing less any input tax credits in respect of the expense, loss or outgoing to which the other party, or to which the representative member of a GST group of which the other party is a member, is entitled; and
- (b) any additional amount payable under **clause 28.4** in respect of that reimbursement.



**28.9 No Merger**

This **clause 28** does not merge in the completion, discharge, rescission or termination of this document or on the transfer of any property supplied or to be supplied under this document.

**29 Relationship of Parties**

This Agreement is not intended to create a partnership, joint venture or agency relationship between the Parties.

**30 Further steps**

Each Party must promptly do whatever any other Party reasonably requires of it to give effect to this document and to perform its obligations under it.

**31 Counterparts**

This document may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

**32 Rights cumulative**

Except as expressly stated otherwise in this Agreement, the rights of a Party under this Agreement are cumulative and are in addition to any other rights of that Party.

**33 Frustrated Contracts Act 1978**

The provisions of the *Frustrated Contracts Act 1978* (NSW) are excluded as they apply to this Agreement.

# Schedule 1

## Section 93F Requirement

Provision of the Act	This Agreement
Under section 93F(1), the Developer has:	
(a) sought a change to an environmental planning instrument.	(a) No
(b) made, or proposes to make, a development application.	(b) Yes
(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.	(c) No
<b>Description of the land to which this Agreement applies-</b> (Section 93F(3)(a))	See definition of Land in <b>clause 1.1</b>
<b>Description of the development to which this Agreement applies-</b> (Section 93F(3)(b)(ii))	See definition of Development in <b>clause 1.1</b>
<b>The scope, timing and manner of delivery of Development Contributions required by this Agreement -</b> (Section 93F(3)(c))	See <b>schedule 2</b> and <b>clause 7.2(a)</b>
<b>Applicability of Section 94 of the Act -</b> (Section 93F(3)(d))	Section 94 is wholly excluded as it applies to the Land and the Development.
<b>Applicability of Section 94A of the Act -</b> (Section 93F(3)(d))	Section 94A is wholly excluded as it applies to the Land and the Development.
<b>Applicability of Section 94EF of the Act -</b> (Section 93F(3)(d))	Section 94EF is not excluded as it applies to the Land and the Development.
<b>Applicability of Section 93F(3)(e) of the Act</b>	Not Applicable.
<b>Mechanism for Dispute resolution -</b> (Section 93F(3)(f))	See <b>clause 12</b>
<b>Enforcement of this Agreement -</b> (Section 93F(3)(g))	See <b>clause 13</b>
<b>Registration of this Agreement</b> (Section 93H)	Not Applicable
<b>No obligation to grant consent or exercise functions -</b> (Section 93F(9))	See <b>clause 17</b> and <b>24.</b>