

Edmondson Park South Planning Agreement
Cambelltown City Council
Landcom (t/a UrbanGrowth NSW)

- 21.1.1 **Hard Landscaping Work** means items such as paving, seating, buildings, signage, lighting, playground equipment, and any other landscaping work that is not a Soft Landscaping Work.
- 21.1.2 **Maintenance Period** means:
 - (a) in respect of Hard Landscaping Work, a period of twelve (12) months commencing on the date the Work is Completed for the purpose of this Agreement,
 - (b) in respect of Soft Landscaping Work, a period of twenty four (24) months commencing on the date the Work is Completed for the purpose of this Agreement.
- 21.1.3 **Plan of Management** means a plan of management within the meaning of s36 of the *Local Government Act 1993 (NSW)*.
- 21.1.4 **Soft Landscaping Work** means any Work comprising the planting of vegetation and associated preparation of planting beds or growing medium, such as shrubs, groundcovers, mulch and grass.
- 21.2 The Developer must maintain each Hard Landscaping Work and Soft Landscaping Work during the Maintenance Period in accordance with:
 - 21.2.1 any matters set out in clause 15.1,
 - 21.2.2 any Plan of Management or draft Plan of Management relating to the Work or the land on which the Work is or is to be located.
- 21.3 By no later than fourteen (14) days prior to the end of the Maintenance Period:
 - 21.3.1 Council will undertake a final inspection of the Work; and
 - 21.3.2 Council may either:
 - (a) by way of written notice to the Developer, confirm that the Work is acceptable to Council acting reasonably; or
 - (b) issue a notice to the Developer if it identifies any part of the Work which has not been maintained by the Developer in accordance with this clause 21.
- 21.4 If Council issues a notice under clause 21.3.2(b), the Developer must comply with that notice at its own cost.
- 21.5 Council may not issue a further notice under clause 21.3.2(b) for any additional unacceptable parts of the Work that were not identified in the original notice issued under 21.3.2(b).
- 21.6 For the purposes of this clause maintenance includes repairing damage caused by vandalism to the Work (including replacement of plants due to vandalism).
- 21.7 The Developer must:
 - 21.7.1 fund and prepare a draft Plan of Management for any part of the Land on which an Open Space Work is to be constructed, and
 - 21.7.2 provide the draft Plan of Management to the Council for Council's consideration not less than six (6) months prior to the time the Land

the subject of the draft Plan of Management is required to be dedicated.

- 21.8 For the purposes of clause 21.7.1, the Council is to promptly provide the Developer with a template of a Plan of Management if requested by the Developer in writing.
- 21.9 If the Developer has complied with its obligations under this clause, the Council cannot make any Claim (other than a Claim arising from the negligence of the Developer or a breach of this Agreement by the Developer), objection or demand about the state or condition of a Work after the end the Maintenance Period for that Work.

22 Works-as-executed-plan

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

23 Hand-over of Works

- 23.1 Subject to anything to the contrary in this Agreement, Council accepts responsibility for a Work on the later of:
 - 23.1.1 the date when the Work is Completed for the purposes of this Agreement; or
 - 23.1.2 if the Work is carried out on land which is to be dedicated to the Council under this Agreement, the date of dedication of that land.
- 23.2 The Developer, at its own cost, is to repair and make good to the satisfaction of the Council (acting reasonably) any loss or damage to a Work from any cause whatsoever which occurs before the Work is Completed for the purposes of this Agreement.

Part 5 – Security, Enforcement and Disputes

24 Security for monetary Development Contributions

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

25 Security for the Dedication of Land

- 25.1 Subject to clause 27, if the Developer does not dedicate the land required to be dedicated under this Agreement, or any part thereof, at the time at which it is required to be dedicated, the Developer consents to the Council compulsorily acquiring that land for compensation in the amount of \$1.00 without having to follow the pre-acquisition procedures under the Just Terms Act.
- 25.2 The Council is to only acquire land pursuant to clause 25.1 if it considers it reasonable to do so having regard to the circumstances surrounding the failure by the Developer to dedicate the land required to be dedicated under this Agreement.
- 25.3 Clause 25.1 constitutes an agreement for the purposes of section 30 of the Just Terms Act.
- 25.4 If, as a result of an acquisition referred to in clause 25.1, the Council is required to pay compensation to any person other than the Developer, the Developer is to reimburse the Council for that amount upon a written request being made by the Council.
- 25.5 The Developer indemnifies and keeps indemnified the Council against all Claims made against the Council as a result of any acquisition by the Council of the whole or any part of the land that is required to be dedicated under this Agreement.
- 25.6 The Developer is to promptly do all things necessary, and consent to the Council doing all things necessary, to give effect to this clause 25, including without limitation:
- 25.6.1 signing any documents or forms;
 - 25.6.2 giving land owner's consent for the lodgement of any Development Application;
 - 25.6.3 producing certificates of title to the Registrar-General under the *Real Property Act 1900* (NSW); and
 - 25.6.4 paying the Council's costs arising from this clause 25.
- 25.7 In this clause, **Just Terms Act** means the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

26 Security for carrying out of Work

- 26.1 In this clause:
- 26.1.1 **Bank Guarantee** means an irrevocable and unconditional undertaking without any expiry or end date in favour of the Council to pay an amount or amounts of money to the Council on demand issued by:
- (a) one of the following trading banks:
 - (i) Australia and New Zealand Banking Group Limited,
 - (ii) Commonwealth Bank of Australia,

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- (iii) Macquarie Bank Limited,
 - (iv) National Australia Bank Limited,
 - (v) St George Bank Limited,
 - (vi) Westpac Banking Corporation, or
 - (b) any other financial institution approved by the Council in its absolute discretion.
- 26.1.2 **Ledger** means a document in a form similar to that in Schedule 5 that includes the following information:
- (a) the Notional Contribution Value,
 - (b) all Work that is required to be provided under this Agreement and the Contribution Value of those Items,
 - (c) all Work that has been Completed under clause 18.1, and
 - (d) the sum of all Contribution Values of Work that have been Completed under clause 18.2.
- 26.1.3 **Ledger Item** means a Work identified in the Ledger.
- 26.1.4 **Notional Contribution Value** means the amount determined by multiplying \$17,123.00 by the sum of the number of Final Lots that have been created and the number of Final Lots that are proposed to be created by the Subdivision Certificate referred to in clause 26.3.
- 26.1.5 **Security** means:
- (a) if Landcom (t/a UrbanGrowth NSW) is the Developer under this Agreement, a Treasury Guarantee,
 - (b) if Landcom (t/a UrbanGrowth NSW) is not the Developer under this Agreement, a Bank Guarantee or a bond or other form of security to the satisfaction of the Council.
- 26.1.6 **Treasury Guarantee** means a written guarantee issued by or on behalf of New South Wales Government that is materially similar to a Bank Guarantee.
- 26.2 A Construction Certificate may only be issued if at the time of issuing, the Parties, acting reasonably, determine the appropriate Ledger Item that is to be completed or for which Security is to be provided so that the sum of the Contribution Value of that Ledger Item and Contribution Values of Work that have been Completed equals or exceeds the Notional Contribution Value.
- 26.3 Subject only to clause 26.5 and notwithstanding any other provision in this Agreement, a Subdivision Certificate may only be issued if, at the time of issuing, the Ledger Item that has been determined under clause 26.2 to be completed prior to the issue of the relevant Construction Certificate has been Completed or Security has been provided for that Ledger Item to a value of:
- 26.3.1 150% of the cost to complete the Ledger Item, if it has been commenced but uncompleted; or
 - 26.3.2 the Contribution Value of the Ledger Item if it has not been commenced,
- as the case may be.

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

27 Council to consult before enforcing this Agreement

- 27.1 This clause applies to any of the Developer's obligations to carry out Work or dedicate land under this Agreement.
- 27.2 If the Council reasonably forms the opinion that the Developer has failed to comply with an obligation to which this clause applies, it is not to enforce this Agreement against the Developer (including taking any action under clause 20) unless it has first notified the Developer in writing of its intention to do so and has consulted with the Developer as to:
- 27.2.1 the reason for the non-compliance;
- 27.2.2 the likely effects of the non-compliance; and
- 27.2.3 the Developer's capacity in all of the circumstances to reasonably rectify the non-compliance.

- 27.3 The Council is not to enforce this Agreement against the Developer unless, after having consulted with the Developer:
 - 27.3.1 it has reasonably formed the opinion the Developer has no reasonable excuse for the non-compliance;
 - 27.3.2 it has notified the Developer in writing that it intends to enforce the Agreement not earlier than 14 days from the date of the notice; and
 - 27.3.3 the notice specifies the enforcement action it intends to take.
- 27.4 At any time between the date of the notice referred to in clause 27.3 and the time when the Council takes action to enforce this Agreement, the Developer may notify the Council of a dispute under clause 29 or 30.
- 27.5 If the Developer notifies the Council in accordance with clause 27.4, the Council is not to enforce this Agreement against the Developer in relation to the relevant non-compliance unless and until the dispute resolution process under clause 29 or 30 has been exhausted without resolution between the parties.

28 Enforcement in court

- 28.1 Subject only to clause 27, the Parties may enforce this Agreement in any court of competent jurisdiction.
- 28.2 For the avoidance of doubt, nothing in this Agreement prevents:
 - 28.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates; and/or
 - 28.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

29 Dispute resolution – expert determination

- 29.1 This clause applies to a dispute under this Agreement about a matter that can be determined by an appropriately qualified expert (**Expert Determination Dispute**).
- 29.2 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute and requiring it to be determined by an appropriately qualified expert.
- 29.3 Within fourteen (14) days of the notice, the Parties are to meet to try to resolve the dispute.
- 29.4 If within a further twenty eight (28) days the dispute is not resolved, the dispute must be referred to the President of the NSW Law Society to appoint an expert to determine the dispute.
- 29.5 The expert determination binds the Parties, except in the case of the expert's fraud or misfeasance.

- 29.6 Each Party must bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 29.7 If the Parties disagree over whether a dispute is properly an Expert Determination Dispute, then either Party may refer that issue to the Chief Executive Officer (CEO) of the professional body that represents persons with the relevant expertise, for a determination of that issue. The CEO's determination is final and binds the Parties.

30 Dispute resolution - mediation

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

31 Registration of this Agreement

- 31.1 The Developer must ensure that this Agreement is registered on the title of the Land at the time required under clause 32 including by:
 - 31.1.1 procuring the consent of each person referred to in s93H(1) of the Act to the registration of this Agreement on the folio of the Register pertaining to the Land;
 - 31.1.2 arranging for the production of the relevant certificate of title pertaining to the Land at the Lands and Property Information Office (LPI); and
 - 31.1.3 promptly responding to any requisition raised by the LPI regarding any matter within the Developer's control.
- 31.2 The provisions of this Agreement will be jointly and severally binding on, and enforceable against, the owner for the time being of:
 - 31.2.1 the lots created by virtue of any such subdivision, or further subdivision, of the Land; and/or
 - 31.2.2 the parts of the Land transferred to a third party,

on which this Agreement remains registered as if that person had entered into this Agreement themselves.

32 Assignment, sale of Land, etc

- 32.1 Unless the preconditions specified in clause 32.2 are satisfied, the Developer must not:
 - 32.1.1 transfer the Land or any part of it, other than a Final Lot, to any person; or
 - 32.1.2 assign its rights or obligations under this Agreement, or novate this Agreement, to any person.
- 32.2 The preconditions to be satisfied under clause 32.1 are:
 - 32.2.1 the Developer has, at no cost to the Council, 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 to the effect that the Third Party is bound as if a party to this Agreement;
 - 32.2.2 prior to completion of a transfer under clause 32.1.1, this Agreement is registered on the title to the relevant part of the Land proposed to be transferred pursuant to clause 31; and
 - 32.2.3 the Developer is not in breach of this Agreement.

Part 6 - Other provisions

33 Indemnity

- 33.1 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.

34 Insurance

- 34.1 This clause only applies if Landcom (t/a UrbanGrowth NSW) is the Developer under this Agreement.
- 34.2 The Developer warrants, and Council acknowledges, that:
 - 34.2.1 the Developer is a member of the NSW Treasury Managed Fund (**Fund**),

- 34.2.2 the Fund provides the Developer with insurance cover against any liability arising from a breach by the Developer of its obligations under this Agreement.

35 Insurance when Developer other than Landcom

- 35.1 This clause only applies if Landcom (t/a UrbanGrowth NSW) is not the Developer under this Agreement.
- 35.2 The Developer is to take out and keep current to the satisfaction of the Council the following insurances in relation to Work required to be carried out by the Developer under this Deed, up until the time that the Work is taken to have been Completed in accordance with this Deed:
- 35.2.1 contract works insurance, noting the Council as an interested party, for the full replacement value of the Works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover the Developer's liability in respect of damage to or destruction of the Works,
- 35.2.2 public liability insurance for at least \$20,000,000.00 for a single occurrence or provided Landcom is not the Developer an additional amount requested by Council following an annual review, acting reasonably, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party,
- 35.2.3 workers compensation insurance as required by law, and
- 35.2.4 any other insurance required by law.
- 35.3 If the Developer fails to comply with clause 35.2, the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Developer to the Council and may be recovered by the Council as it deems appropriate, including:
- 35.3.1 by calling upon any Security provided by the Developer to the Council pursuant to clause 26, or
- 35.3.2 recovery as a debt due in a court of competent jurisdiction.
- 35.4 The Developer is not to commence to carry out any Work unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 35.2.

36 Developer may Review Draft Determinations Relating to the Development

- 36.1 Not less than 14 days before determining a Development Application or an application under s96 of the Act relating to the Development, the Council must 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.

- 36.2 The Developer may, by notice in writing, not more than 14 days from receipt of the proposed determination under clause 36.1 request the Council to modify or abandon the proposed determination.
- 36.3 The Council must properly consider a request made by the Developer under clause 36.2 before it makes any further decision in relation to the determination.

37 Review of this Agreement

- 37.1 The Developer must provide the Council with a report every three years detailing the performance of its obligations under this Agreement.
- 37.2 The report is to be:
 - 37.2.1 given no later than every three (3) years from the date on which this Agreement is entered into; and
 - 37.2.2 in the form and addressing the matters the Council notifies to the Developer from time to time.
- 37.3 The Parties are to review this Agreement every three (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.
- 37.4 For the purposes of clause 37.3, the relevant changes include 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.
- 37.5 For the purposes of addressing any matter arising from a review of this Agreement referred to in clause 37.3, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Agreement.
- 37.6 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.
- 37.7 A Party's failure to agree to take action requested by the other Party as a consequence of a review referred to in clause 37.3 is not a dispute for the purposes of clauses 29 and 30, and is not a breach of this Agreement.

38 Confidentiality

- 38.1 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.
- 38.2 The Parties acknowledge that:
 - 38.2.1 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

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38.2.2 the Parties may disclose to each other further confidential information in connection with the subject matter of this Agreement.

38.2.3 subject to clauses 38.3 and 38.4, 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.

38.3 A Party may disclose confidential information in the following circumstances:

38.3.1 in order to comply with the law, or the requirements of any Authority;
or

38.3.2 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.

38.4 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.

39 Notices

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

39.1.1 delivered or posted to that Party at its address set out in the Summary Sheet; or

39.1.2 faxed to that Party at its fax number set out in the Summary Sheet; or

39.1.3 emailed to that Party at its email address set out in the Summary Sheet.

39.2 A Party may change its address, fax number or email address by giving the other Party three (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.

39.3 A Notification is to be treated as given or made if it is:

39.3.1 delivered, when it is left at the relevant address;

39.3.2 sent by post, two (2) business days after it is posted;

39.3.3 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

- 39.3.4 sent by email, and the sender does not receive a delivery failure message from the sender's internet service provider within a period of twenty four (24) hours of the email being sent.
- 39.4 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.

40 Approvals and consent

- 40.1 In this clause, a reference to an approval or consent does not include a reference to a Development Consent.
- 40.2 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.
- 40.3 A Party must give its reasons for giving or withholding consent or for giving consent subject to conditions.

41 Costs

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

42 Entire Agreement

- 42.1 This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with.
- 42.2 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.

43 Further acts

- 43.1 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.

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 two (2) or more persons binds them jointly and each of them individually, and
 - 45.1.2 any benefit in favour of two (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.