

Annexure ## to Request: Planning Agreement

Parties: Fairfield City Council and (developer name)

Date: (insert date)

[Drafting Note: The above information will be completed when both parties sign the Planning Agreement for the purpose of registration]

Fairfield City Council

(developer name)

## Planning Agreement

(site reference name)

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# Planning Agreement

(site reference name)

## Parties

<b>Council</b>	<b>Name</b>	Fairfield City Council
	<b>Address</b>	86 Avoca Road Wakeley NSW 2176
	<b>ABN</b>	83 140 439 239
<b>Developer</b>	<b>Name</b>	[Insert]
	<b>Address</b>	[Insert]
	<b>ABN</b>	[Insert]

## Recitals

[Drafting Note: The Recitals must reflect the specific factual circumstances and in particular reflect compliance with 7.4(1) of the Act.]

- A. The Developer owns the Land.
- B. The Developer wishes to carry out the Development and [applied for/proposes to apply for/obtained] [Drafting Note: delete as applicable] the [Development Application/Instrumental Change] [Drafting Note: delete as applicable] for the purpose of enabling the Development to be carried out on the Land.
- C. The Developer and the Council have agreed that the Developer will make Development Contributions in connection with the [Development Application/Instrumental Change] [Drafting Note: delete as applicable] in accordance with this document.

It is agreed as follows.

## 1. Definitions and Interpretation

### 1.1 Definitions

In this document, words beginning with a capital letter have the following definitions:

**Acquisition Act** means the Land Acquisition (Just Terms Compensation) Act 1991 (NSW). [Drafting Note: Delete this definition if no land is being dedicated under this agreement]

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

**Assign** means, as the context requires, any assignment, sale, transfer, disposition, declaration of trust over the other assignment of a legal and/or beneficial interest.

**Assignee** has the meaning given to it in clause 12.1.

**Authority** means the Commonwealth or New South Wales government, a Minister of the Crown, a government department, state-owned corporation, a public authority established by or under any Act, a council or county council constituted under the *Local Government Act 1993*, or a person or body exercising functions under any Act including a commission, panel, court, tribunal and the like.

**Bank Guarantee** means an irrevocable and unconditional undertaking by a major Australian financial institution or trading bank carrying on business in Sydney issued:

- a) In favour of Council;
- b) Specifying the Developer as a customer;
- c) For an amount in accordance with clause 5.2 and Schedule 2;
- d) As security for the performance by the Developer of the obligations under this document;
- e) With an expiry date which must not be earlier than five years after the date the bank guarantee is issued; and
- f) On terms which provide that the bank guarantee may be called on by Council upon presentation and without reference to the Developer (however this does not affect Council's obligations under clause 5.2). [Drafting Note: Delete this definition if no financial security is being provided by the Developer under this agreement]

**Business Day** means a day which is not a Saturday, Sunday or a public holiday in New South Wales.

**Claim** means against any person 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.

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**Complete** means, in respect of a Works Contribution, that the Developer has fully performed its obligation to make that Works Contribution in accordance with clause 5.10. [Drafting Note: Delete this definition if no Works Contribution is being provided under this agreement]

**Construction Certificate** has the meaning given to it in s6.4(a) of the Act.

**Contribution Value** means the amount specified in column 4 of Schedule 2 headed "contribution value" for each Item of the Development Contribution.

**Cost** means a cost, charge, expense, outgoing, payment, fee and other expenditure of any nature.

**Dealing** in relation to the land means, without limitations, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with land,

**Dedication Plan** means the plan in Schedule 4.

**Defect** means anything that adversely affects, or is likely to adversely affect, the appearance, structural integrity, functionality or use or enjoyment of a Work or any part of a Works Contribution, or will require maintenance or rectification works to be performed on them at some time in the future as a result of the existence of the defect. [Drafting Note: Delete this definition if no Works Contribution is being provided under this agreement]

**Defect Liability Period** means, in respect of each Works Contribution, a period of [insert] months commencing on and from the date that the relevant Works Contribution is Complete. [Drafting Note: The Defect Liability Period is the period within which the Developer is responsible for rectifying any defects in any works required under this agreement post-completion. e.g. 12 months. Delete this definition if no Works Contribution is being provided under this agreement]

**Defects Security** has the meaning ascribed to it in clause 9.2. [Drafting Note: Delete this definition if no Works Contribution and/or financial security is being provided by the Developer under this agreement]

**Designated Land** means that part of the Land hatched in [insert colour] on the Dedication Plan as set out in **Schedule 2** (if any).

**Development** means the development [described in/contemplated by] the [Development Application/Planning Proposal]. [Drafting Note: The full description of the proposed Development needs to be inserted]

**Development Application** has the same meaning as in the Act and for this document means [insert details]. [Drafting Note: Delete this definition if the agreement only applies to an Instrument Change]

**Development Consent** means the consent issued under the Act for the Development. [Drafting Note: Delete this definition if the agreement only applies to an Instrument Change]

**Development Contribution** means any Monetary Contributions, Works Contributions and/or Designated Land as set out in **Schedule 2**.

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**Dispute** means a dispute or lack of certainty between the Parties under or in relation to this document.

**Equipment** means any equipment, apparatus, vehicle or other equipment or thing to be used by or on behalf of the Developer in connection with the performance of its obligations under this document. [Drafting Note: Delete this definition if no Works Contribution is being provided under this agreement]

**Encumbrance** means an interest of power:

- (a) reserved in or over any interest in any asset;
- (b) arising under, or with respect to, a Bio-Banking Document'
- (c) created or otherwise arising in or over any interest in any asset under any mortgage, charge (whether fixed or floating), pledge, lien, hypothecation, title retention, conditional sale agreement, hire or hire purchase agreement, option, restriction as to transfer, use or possession, easement, covenant, lease, subordination to any right of any other person and any other encumbrance or security interest, trust or bill of sale; or
- (d) by way of security for the payment of a debt or other monetary obligation or the performance of any obligation.

**Encumber** means to grant an Encumbrance. [Drafting Note: Delete this definition is no land is being dedicated under this agreement]

**Event of Default** has the meaning ascribed to it in clause 10.12(b).

**GST** has the same meaning as in the GST law.

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

**Index** means the 6427.0 Producer Price Index, Australia published by the Australian Bureau of Statistics and calculated in accordance with the following:

- a) Construction Industry Producer Price Indexes.
- b) Table 17 presenting the Price Index of the Output of the Construction industries, subdivision and class index numbers.
- c) Index number 30 Building Construction – New South Wales.
- d) Index calculated on the reference base 1998-99=100.0.

**Insolvency Event** means the happening of any of the following events:

- (a) Application which is not withdrawn or dismissed within fourteen (14) days is made to a court for an order or an order is made that a body corporate be wound up.



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- (b) An application which is not withdrawn or dismissed within fourteen (14) days is made to a court for an order appointing a liquidator or provisional liquidator in respect of a body corporate or one of them is appointed, whether or not under an order.
- (c) Except to reconstruct or amalgamate while solvent, a body corporate enters into, or resolves to enter into, a scheme of arrangement, agreement of company arrangement or composition with, or assignment for the benefit of, all or any class of its creditors, or it proposes a reorganisation, moratorium or other administration involving any of them.
- (d) A body corporate resolves to wind itself up, or otherwise dissolve itself, or gives notice of intention to do so, except to reconstruct or amalgamate while solvent or is otherwise wound up or dissolved.
- (e) A body corporate is or states that it is insolvent.
- (f) As a result of the operation of section 459F(1) of the *Corporations Act 2001* (Cth) (Corporations Act), a body corporate is taken to have failed to comply with a statutory demand;
- (g) A body corporate is or makes a statement from which it may be reasonably deduced that the body corporate is, the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act.
- (h) A body corporate takes any step to obtain protection or is granted protection from its creditors, under any applicable legislation or an administrator is appointed to a body corporate.
- (i) A person becomes an insolvent under administration as defined in section 9 of the Corporations Act or action is taken which could result in that event.
- (j) A receiver, manager or receiver and manager is appointed to the Company.
- (k) A claim is filed in a court against a person that is not defended, released or otherwise settled within twenty eight (28) days of the date of its filing at the court.
- (l) Anything analogous or having a substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction.

**Instrument Change** means amendment of controls applicable to the Land under the Fairfield Local Environmental Plan 2013 (as amended or repealed or replaced) to:

- a) Increase the permissible height of buildings from [insert xx metres to xx metres];  
and
- b) Increase the permissible floor space ratio from [insert xx:1 to xx:1];
- c) [insert any other changes].

and otherwise substantially in accordance with the Planning Proposal.

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[Drafting Note: Set out the nature of the Instrument Change being sought. Delete 'Instrument Change' if not applicable to this planning agreement]

**Item** means an item in Schedule 2.

**Land** means the "Land" set out in **Schedule 1**.

**Location Plan** means the plan in Schedule 5.

**Masterplan** means the Masterplan and Urban Design Analysis by [insert name] dated [insert date] contained in Schedule ##. [Drafting Note: Delete if clause 8 is deleted]

**Monetary Contributions** means the Monetary Contributions set out in **Schedule 2** (if any).

**Occupation Certificate** has the meaning given to it in s6.4(c) of the Act.

**Outstanding Works Notice** has the meaning given to it in section 6.6 of the Act.

**Party** means a party to this document. [Drafting Note: Delete this definition if the Developer is not providing a Works Contribution under this planning agreement]

**Phasing Strategy** means the phasing strategy contained in Appendix ## of the Masterplan. [Drafting Note: Delete if clause 8 is deleted]

**Planning Legislation** means the Act, the *Local Government Act 1993* (NSW) and the *Roads Act 1993* (NSW).

**Planning Proposal** means the proposal as set out in [insert details] to be facilitated by the making of the Amending LEP. [Drafting Note: delete this definition if this planning agreement does not relate to an Instrument Change]

**Practical Completion** means, in respect of each Works Contribution, that the Works Contribution has been completed except for minor Defects that do not prevent the use of the Works Contribution for its intended purpose. [Drafting Note: Delete this definition if no Works Contribution is being provided under this agreement]

**Primary Security** has the meaning ascribed to it in clause 10.2. [Drafting Note: Delete this definition if no financial security is being provided by the Developer under this agreement]

**Quantity Surveyor** means a person who:

- (a) is a member of their respective professional organisation and has been for at least five (5) years;
- (b) practises as a quantity surveyor for works of the same nature as the relevant Works Contribution;
- (c) is active as a quantity surveyor at the time of his appointment;
- (d) has at least three (3) years experience in valuing works of the same nature as the relevant Works Contribution; and
- (e) undertakes to act fairly and promptly in accordance with the requirements of this document. [Drafting Note: Delete this definition if no Works Contribution is being provided under this agreement]

**Rectification Notice** means a notice in writing:

- a) identifying the nature and extent of a Defect,
- b) specifying the works or actions that are required to Rectify the Defect,
- c) specifying the date by which or the period within which the Defect will be rectified. [Drafting Note: Delete this definition if no Works Contribution is being provided under this agreement]

**Rectify** means rectify, remedy or correct. [Drafting Note: Delete this definition is no Works Contribution is being provided under this agreement]

**Regulation** means the *Environmental Planning and Assessment Regulation 2021* (NSW).

**Security** means collectively the Primary Security and Defects Security. [Drafting Note: Delete this definition is no Works Contribution is being provided under this agreement]

**Transferee** has the meaning given to it in clause 12.2.

**Variation** has the meaning given to it in clause ##.

**Work** means the physical result of any building, engineering or construction work in, on, over or under land. [Drafting Note: Delete this definition is no Works Contribution is being provided under this agreement]

**Works Contribution** means each Development Contribution that comprises the carrying out of works by the Developer, identified in Schedule 2 (if any).

**Works Notice** has the meaning given to it in clause 5.9. [Drafting Note: Delete this definition is no Works Contribution is being provided under this agreement]

## 1.2 Interpretation

Except as otherwise provided in this document, words in this document have the same meaning as those words have in the Act.

In the interpretation of this document, the following provisions apply unless the context otherwise requires:

- a) Headings are inserted for convenience only and do not affect the interpretation of this document;
- b) A reference in this document to a business day means a day other than a Saturday or Sunday on which banks are open for business in Sydney;
- c) If the day on which any act, matter or thing must be done under this document is not a business day, the act, matter or thing must be done on the next business day;
- d) A reference in this document to dollars or \$ means Australian dollars and all amounts payable under this document are payable in Australian dollars.
- e) A reference in this document to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.

- f) A reference to 'dedicate' or 'dedication' in relation to land is a reference to dedicate or dedication free of cost.
- g) A reference in this document to any law, 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;
- h) A reference in this document to any agreement, deed or document is to that document, deed or document as amended, novated, supplemented or replaced;
- i) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this document;
- j) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- k) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- l) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders;
- m) Reference to the word 'include' or 'including' are to be construed without limitation;
- n) A reference to this document included the agreement recorded in this document;
- o) A reference to a Party means a party to this document and includes a reference to the servants, agents and contractors of the Party, and the Party's successors and assigns;
- p) Any schedules, appendices and attachments form part of this document.
- q) Notes appearing in this document are operative provisions of this document.

## 2. Planning Agreement

This document is a planning agreement within the meaning set out in s7.4 of the Act and governed by Subdivision 2 of Division 7.1 of Part 7 of the Act.

### 2.1 Application

This document applies to:

- a) The Land;
- b) The Instrument Change; [Note: delete if not applicable] and
- c) The Development.

### 2.2 Warranties

The Parties warrant to each other that they:

- a) Have full capacity to enter into this document, and
- b) Are able to fully comply with their obligations under this document.

The Developer warrants to Council that it is:

- a) Legally and beneficially entitled to the Land; and
- b) There is no legal impediment to it entering into this document, or performing the obligations imposed under it.

### 2.3 Operation

[Drafting Note: [Option 1] used when the Development Consent/Instrument Change is not yet obtained]

This document operates:

- a) as a deed from the date that it is executed by both parties; and
- b) as a planning agreement for the purpose of the Act from the date that the [Development Consent/Instrument Change] becomes operative.

[Drafting Note: [Option 2] used when the Development Consent/Instrument Change is already obtained]

This document operates from the date it is executed by both parties.

## 2.4 Developer Contributions

The Developer must take each Development Contribution:

- a) In a manner specified in Column 3 of Schedule 2; and
- b) Subject to clause 10, at the time specified in Column 4 of Schedule 2.

and otherwise in accordance with the terms of this document.

## 2.5 Further agreements

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

## 2.6 Surrender of right of appeal, etc

- a) The Developer is not to commence or maintain, or to cause or procure the commencement or maintenance, of any proceedings in any court or tribunal or similar body appealing against, or questioning the validity of this document, or an Approval relating to the Development Application in so far as the subject matter of the proceedings relates to this document.
- b) Subclause (a) does not restrict the Developer or person with the benefit of the Development Consent issued in relation to the Development Application from commencing an appeal in the Land and Environment Court in relation to any subsequent development application or application to modify the Development Consent the subject of this document, provided that the subject matter of the appeal does not relate to this document or any condition of Development Consent requiring entry into this document.

## 2.7 Application of s7.11, s7.12 and s7.24 of the Act to the Development

- a) This document [does/does not/partly] [Drafting Note: delete as applicable] exclude(s) the application of s7.11, s7.12 or s7.24 of the Act to the Development [Note: Section 7.4(3) of the Act allows a Planning Agreement to exclude the application of section 7.11 and 7.12 in whole or in part. The drafting of this clause will depend on the extent to which those contributions are excluded. If the document partly excludes the operation of section 7.11, then detailed provisions need to be inserted in the document setting out the

exact extent to which those sections are excluded. Section 7.24 is the section dealing with Special Infrastructure Contributions and as such, this section can only be excluded by the Minister.]

- b) Section 7.11(6) of the Act [does/does not] apply to the Development Contributions that are to be carried out or provided pursuant to this document. [Drafting Note: If section 7.11(6) applies, Council must take into account the land, money or other material public benefit that the Developer has provided under this document when imposing contributions under s7.11 for developments in the area, or adjacent to the area of the Development.]

### 3. Monetary Contributions [Drafting Note: Delete this clause if Monetary Contributions are not being provided under this document]

- a) The Developer must make the Monetary Contributions to Council in accordance with Schedule 2 and any other provision of this document relating to the making of Development Contributions.
- b) The Monetary Contributions are made for the purpose of this document when Council receives the full amount of the Monetary Contributions payable under this document in cash, by unendorsed bank cheque or by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by Council.

### 4. Dedication of land [Drafting Note: Delete this clause if land is not being dedicated by the Developer under this document]

#### 4.1 Condition precedent to dedication

- a) Prior to dedication of the Designated Land in accordance with clause 4.2, the Developer must, at its cost, provide Council with a section A1 site audit statement which states that the Designated Land is suitable for the use for which the Designated Land will be dedicated. If the section A1 site audit statement identifies that any remediation work is required to make the Dedication Land suitable for the purposes of this document, the Developer will carry out that remediation work at its cost. (**Condition Precedent**).
- b) Dedication of the Designated Land under clause 4.2 must not occur until the Developer has satisfied the Condition Precedent or unless Council agrees to waive this condition precedent.

#### 4.2 Dedication of land

- a) The Developer must dedicate the Designated Land to Council free of any trusts, estates, interests, covenants and Encumbrances (other than any trusts,



estates, interests, covenants and Encumbrances agreed by Council) by the time specified in column 4 of Schedule 2.

- b) The Developer must meet all costs (including legal and registration costs) associated with the dedication of the Designated Land in accordance with paragraph 4.1(a), including any costs incurred by Council in relation to that dedication.
- c) Each Development Contribution which comprises the Designated Land is taken to be made upon either:
  - (i) Registration of a plan of subdivision at NSW Land Registry Services dedicating the relevant land to Council (if that Designated Land will be dedicated in a registered plan); or
  - (ii) Otherwise when the Developer delivers to Council:
    - A. A transfer of the relevant land in registrable form;
    - B. any consent required by an interested party in the relevant land; and
    - C. Any document in registrable form which, when registered, will remove any Encumbrances registered on the title of that land, excluding Encumbrances that would not in the Council's opinion, acting reasonably, impede the intended use of all or any part of the Designated land to be dedicated to the Council including but not limited to easements and covenants for services and drainage.

**5. Works Contributions [Drafting Note: Delete this clause if Works Contributions are not being dedicated by the Developer under this document]**

**5.1 Conduct of Works**

The Developer, at its cost, must:

- a) Obtain Development Consent, and any other form of consent required by a relevant authority, for the construction and use of the Works Contribution;
- b) Carry out and complete the Works Contribution:
  - (i) In accordance with any relevant Development Consent;
  - (ii) In accordance with the requirements of, or consents issued by, any authority;

- (iii) In accordance with the specifications (if any) referred to in Schedule 3 or Schedule 6 for the relevant item of the Works Contribution;
- (iv) Ensuring that:
  - D. All necessary measures are taken to protect people, property and the environment;
  - E. Unnecessary interference with the passage of people and vehicles is avoided;
  - F. Nuisances and unreasonable noise and disturbances are prevented; and
  - G. All relevant laws and regulations with respect to water, air, noise and land pollution (including 'pollution incidents') as defined under the Protection of the Environment Operations Act 1997 (NSW);
- (v) In accordance with any Australian Standards applicable to works of the same nature as each aspect of the Works Contribution; and
- (vi) In a proper and workmanlike manner complying with current industry practice and standards relating to each aspect of the Works Contribution.

**5.2 Design and specification of Works Contribution** [Drafting Note: Delete this clause if the full design/specifications of the Works Contribution as agreed by the parties will be annexed to this document]

- a) The Developer must:
  - (i) Consult with Council with respect of the development of the detailed design and specification of each Works Contribution; and
  - (ii) Take into consideration the reasonable requirements of Council in any such detailed design;

in accordance with this clause 5.2. For clarity, a requirement of Council is not reasonable where it is inconsistent with a Development Consent applicable to the relevant Works Contribution.
- b) Before commencing construction of a Works Contribution, the Developer must submit to Council:
  - (i) For its approval under clause 5.2(e), the detailed design and specification for that Works Contribution; and
  - (ii) A report from a suitably qualified and experienced Quality Surveyor which estimates the cost to complete the relevant Works Contribution in accordance with the detailed design.

- c) Council must:
- (i) Devote sufficient time and resources to, and act promptly in the assessment of, the detailed design submitted to Council under clause 5.2(b)(i);
  - (ii) Take into account any Development Consent which applies to the relevant Works Contribution and assess the Detailed Design in a manner consistent with that Development Consent;
  - (iii) Have regard to the Contribution Value for the relevant Works Contribution such that Council cannot require changes to the detailed design and specification that would cause the Works Contribution to exceed the relevant Contribution Value.
- d) The design and specification for the Works Contribution must be prepared by the Developer having specific regard to:
- (i) Council's 'Specification for Roadworks and Drainage associated with subdivision or other development' policy or any other policy of Council from time to time relevant to the specific Works Contribution; and
  - (ii) The Contribution Value of the relevant Works Contribution.
- e) If, within forty two (42) days of the date of submission referred to in paragraph (b):
- (i) Council notifies the Developer in writing of its approval of the design and specification, the Developer must carry out and complete the Works Contribution in accordance with the approved design and specification; or
  - (ii) Council notifies the Developer in writing that it does not approve of the design and specification, Council must specify the reasons why approval is withheld and the Developer may elect to:
    - A. Amend the design and specification and submit to Council the amended design and specification in which case the approval process set out in this clause 5.2 applies to that amendment; or
    - B. Refer the relevant matter for dispute resolution in accordance with this document.
- f) If Council fails to notify the Developer in writing that it approves or does not approve of the design and specification within the time required under paragraph e), the Council is deemed to have not approved the relevant design and the Developer may elect to proceed as set out in clauses 5.2(e)(ii)(A) or 6.2(e)(ii)(B).

### **5.3 Carrying out of Work**

- a) Without limiting any other provision of this document, any Work that is required to be carried out by the Developer under this document must be carried out in accordance with any design or specification specified or approved by the Council in accordance with clause 5, any relevant approval and any other applicable law.
- b) The Developer, at its own cost, must obtain any approvals necessary for the carrying out of the Work and must comply with any reasonable direction given to it by the Council to prepare or modify a design or specification relating to a Work that the Developer is required to carry out under this document.

#### 5.4 Variation of Work

[Drafting Note: This clause is included to provide flexibility in respect of the Works and to allow the Developer to request a variation to the timing/scope of the Works if Council agrees. Delete if not applicable to the agreed arrangement]

- a) The design or specification of any Work that is required to be carried out by the Developer under this document may be varied by document in writing between the Parties, acting reasonably, without the necessity for an amendment to this document.
- b) Without limiting clause 5.2, the Developer may make a written request to the Council to approve a variation to the design or specification of a Work in order to enable it to comply with the requirements of any Authority imposed in connection with any Approval relating to the carrying out of the Work.
- c) The Council is not to unreasonably delay or withhold its response to a request made by the Developer under this clause. Council will provide a response to the request for a variation within 14 days of the developer's submission in writing being received. Council may withhold its consent to a variation of a Works Contribution at its absolute discretion.
- d) The Council, acting reasonably, may from time to time give a written direction to the Developer requiring it to vary the design or specification of a Works Contribution before the Works Contribution is carried out in a specified manner only if the variation:
  - (i) is not inconsistent with the details contained In Schedules 2, 4 and 5; and
  - (ii) does not require works beyond or outside the scope of the specified Works.
- e) The Developer must comply promptly with a reasonable direction referred to in this clause at its own cost.

## 5.5 Contribution Value

If the Developer's actual cost of carrying out the Works Contribution, including any costs incurred pursuant to this document, determined at the date on which the Works Contribution is Completed, differs from the Contribution Value, then neither party will be entitled to claim credit or reimbursement, as the case may be, for the difference.

## 5.6 Access to Land

- (a) The Developer permits the Council, its officers, employees, agents and contractors to enter the Land at any time, upon giving reasonable prior notice, in order to inspect, examine or test (any part of) the Works Contribution.
- (b) The Developer must enable Council, its officers, employees, agents and contractors access to the location of the Works where this is not the Land, Council land or a public road.

## 5.7 Access to land by Developer [Drafting Note: Delete this clause if Council does not require the Developer to access its land to satisfy the Developer's obligations under this document]

- a) If the Developer or its authorised employees, agents, contractors, sub-contractors and consultants requires access to any land owned by Council for the purposes of constructing a Works Contribution, the Developer must make an application to Council for access within a reasonable period of time prior to the required access.
- b) The Developer acknowledges and agrees that:
  - (i) any such application will be considered by Council at the relevant time; and
  - (ii) Council must comply with any relevant law with respect to any such application and licence.
- c) Council must respond to an application under paragraph (a) within ten (10) Business Days of the making of the application.
- d) Council may grant access to the Developer (and its authorised employees, agents, contractors, sub-contractors and consultants) to enter, occupy and use that land on conditions including, but not limited to, the following:

- (i) That access be solely for the purposes of the Developer performing its obligations under this document.
  - (ii) That the access be subject to, and in accordance with all relevant Laws, rules regulations and statutory approvals, including but not limited to work, health and safety Laws, rules and regulations.
  - (iii) Any other reasonable directions and conditions imposed by Council in relation to that access.
- e) Nothing in this Agreement creates or gives the Developer any estate or interest in any part of the land referred to in clause 5.7

### **5.8 Access to land by Council**

- a) The Council may enter any land on which Work is being carried out by the Developer under this document in order to inspect, examine or test the Work, or to remedy any breach by the Developer of its obligations under this document relating to the Work.
- b) The Council will give the Developer prior reasonable notice before it enters land under clause a). For the purpose of this clause reasonable notice is taken to be 14 days.
- c) Council cannot enter land pursuant to clause a) for the purpose of remedying a breach by the Developer unless Council has first complied with clause 10.12 of this document.

### **5.9 Practical Completion**

- a) For the purpose of this document, a Works Contribution is Completed when the Works have been accepted as, or deemed to have been, Completed in accordance with this clause 5.9 and any other obligation with respect to the relevant item of Works which must be discharged prior to the Completion of that item of Works in accordance with this document has been discharged.
- b) The Developer must give notice in writing to Council when the Developer considers each Works Contribution has achieved Practical Completion, which identifies the particular Item of the Works Contribution to which it relates and specifies the date on which the Developer believes the relevant Item of the Works Contribution was completed (**Works Notice**).
- c) The Developer will permit Council to inspect the Works Contribution set out in a Works Notice within ten [insert] Business Days of the receipt of that notice.

- d) Council may, acting reasonably, give notice to the Developer within [insert] Business Days after the date of the Works Notice to carry out work that is reasonably required to achieve Practical Completion of the Works Contribution (Outstanding Works Notice).
- e) The Developer must comply with the Outstanding Works Notice according to its terms, and at the Developer's cost, unless the Developer disputes the Outstanding Works Notice, in which case this is a dispute to which clause 9 applies.
- f) If Council:
  - (i) Does not give an Outstanding Works Notice, the Works Contribution will be taken to be Complete on the date that is [insert] Business Days after the date of the Works Notice.
  - (ii) Given an Outstanding Works Notice, the procedure of clause 5.9 must not be repeated until, in respect of the last Works Notice to be given, Council does not give an Outstanding Works Notice in accordance with clause 5.9(b) in which clause 5.9(e)(i) applies.

#### **5.10 Work-As-Executed-Plan**

- a) This clause 5.10 applies to the Works Contribution.
- b) As soon as practicable and by no later than forty (40) Business Days after an Item of Works Contribution is Completed in accordance with this document, the Developer must provide to the Council with:
  - (i) A full Works-As-Executed-Plan in respect of the relevant Item of the Works Contribution that has been Completed; and
  - (ii) All appropriate certificates to verify that the Item of Works Contribution has been carried out in accordance with relevant standards.

#### **5.11 Defects**

- a) At any time within the Defects Liability Period, where any part of the Works has been completed but those Works contain a material defect which:
  - (i) Materially adversely affects the ordinary use and/or enjoyment of the relevant Works; or
  - (ii) Will require rectification works to be performed on them at some time in the future as a result of the existence of the defect,

Council may issue a defects notice (Defects Notice) concerning those Works.

- b) A Defects Notice must contain the following information:
  - (i) The nature and extent of the Defect;
  - (ii) The work Council requires the Developer to carry out in order to rectify the Defect; and
  - (iii) The time within which the Defect must be rectified (which must be a reasonable time and not less than ten (10) Business Days).
- c) The Developer must rectify the Defects contained within a Defects Notice as soon as practicable after receipt of the Defects Notice.
- d) Council, at its absolute discretion, may enter upon the Land for the purpose of satisfying the Defects Notice where the Developer has failed to comply with a Defects Notice but only after giving the Developer ten (10) Business Days written notice of its intention to do so.
- e) If Council elects to exercise the step-in rights granted it under this clause then:
  - (i) Council may enter upon any part of the Land that it requires access to in order to satisfy the obligations of the Developer in accordance with the Defects Notice; and
  - (ii) Council may rectify the relevant Defects in accordance with the Defects Notice; and
  - (iii) The Developer must not impede or interfere with Council undertaking that work.
- f) Where Council exercises its step-in rights, it may call upon the Defects Security provided by the Developer pursuant to clause 10 and recover as a debt due in a court of competent jurisdiction any difference between the amount of the Defects Security and the costs incurred by the Council rectifying the Defects. For the avoidance of any doubt, the right of Council to require the rectification of Defects and to Step-In lapses at the conclusion of the Defects Liability Period.

### **5.12 Council's obligations relating to Work**

The Council is not to unreasonably delay, hinder or otherwise interfere with the performance by the Developer of its obligations under this document, and will use its reasonable endeavours to ensure third parties unrelated to the Developer do not unreasonably delay, hinder or otherwise interfere with the performance of those obligations.



### 5.13 Removal of Equipment

When Work on any Council owned or controlled land is completed for the purposes of this document, the Developer, without delay, must:

- a) remove any Equipment from the Council owned and controlled land and make good any damage or disturbance to the land as a result of that removal, and
- b) leave the land in a neat and tidy state, clean and free of rubbish.

## 6. Adjustment of Contribution Value

- a) On the date of this document and every three months thereafter (each an Adjustment Date), the Contribution Value of each Contribution Item will be adjusted to revised amounts in accordance with the Index applicable on the Adjustment Date (Index Method), except as provided under clause 6(c).
- b) If requested by Council, by no later than 20 Business Days after each Adjustment Date, the Developer must give Council replacement or further Security so that Council holds Security for an amount equal to the revised Contribution Values for the Security that is held by Council on the relevant Adjustment Date.
- c) Prior to any Adjustment Date, and instead of the Index Method, the Developer may request Council to adjust the Contribution Values to revised amounts specified in a cost estimate report prepared by a suitably qualified Quantity Surveyor (QS Method). For the purposes of clause 6(a), Council may, in its discretion, consent to the QS Method replacing the Index Method on the next occurring Adjustment Date. [Drafting Note: Delete this paragraph if Council intends to rely on indexation for the purpose of any increase to the Contribution Value]

## 7. Registration

### 7.1 Registration

- a) The Developer, at their own expense, must, as soon as reasonably practicable and no later than ten (10) Business Days after this document comes into operation and before the issue of any Construction Certificate or Subdivision Certificate for the Development, take all necessary and practical steps, and otherwise do anything that Council reasonably requires to procure:
  - (i) The consent of each person who:

- A. Has an estate or interest in the Land registered under the Real Property Act 1900 (NSW); or
- B. Is seized or possessed of an estate or interest in the Land; and

(ii) The execution of any documents

to enable registration of this document on the title to the Land pursuant to s7.6 of the Act.

- b) An acceptance of the terms of this document and an acknowledgement in writing from any existing mortgagee in relation to the Land that each will consent to the registration of this document and be bound by an adhere to the provisions of this document as owner of the Land or as mortgagee in possession, as the case may be, in accordance with section 7.6 of the Act;
  - (i) The execution of any document;
  - (ii) The production of the relevant certificates of title or electronic equivalent, to enable the registration of this document in accordance with this clause; and the lodgement of this document with the Land Registry Services on Land; and
- c) Council must promptly execute all document necessary to enable registration of this document on the title to the Land at the Developer's cost.
- d) The Developer agrees to procure the registration of this document under the Real Property Act 1900 (NSW) in the relevant folios of the Register in accordance with section 7.6 of the Act.
- e) The Developer must provide documentary evidence that the registration of this document has been completed to Council within five (5) Business Days of receiving confirmation that the registration has occurred.
- f) If Council undertakes the registration in accordance with this clause 7.1, then the Developer will pay or reimburse Council for all its legal and registration costs associated with that registration.

## 7.2 Discharge

Council must execute any form required by the Registrar-General, and prepared by the Developer, to enable this document to be removed from the title to the Land or any part of it as soon as reasonably practicable after:

- a) The Developer has fully performed the obligations under this document;
- b) In respect of part performance of the obligations under this document, the Developer has fully performed the obligations referable to the part of the Land over which the document is sought to be released and provided the Developer is not in breach of this document at that time, unless waived by Council; or

- c) If this document is terminated, then the parties will do all things necessary to promptly remove this document from the title of the Land.

## 8. Phasing Strategy and Variations

[Drafting Note: Delete if a phasing strategy will not form part of the planning agreement. This clause may be relevant in circumstances where there is an Instrument Change and the parties need to include some level of detail in this document as to the proposed staging of the development subject to the Instrument Change to which this Planning Agreement relates. Otherwise, in circumstances where this document only relates to the Development to which consent has already been given, this clause will generally be deleted]

- a) On the date of this document, the Phasing Strategy for the Development is as generally depicted in Schedule ## of this document.
- b) Council acknowledges that:
  - (i) After obtaining the Instrument Change, the Developer will progress the detailed design of the Development and will lodge Development Applications seeking Development Consents for Development; and
  - (ii) As a result, the Developer may seek to update the Phasing Strategy and make consequential changes to the time by which Development Contributions are to be made under this document, in accordance with this clause.
- c) The Developer may seek a variation to the Phasing Strategy (**Variation**) by giving notice to the Council which:
  - (i) Attaches an updated phasing strategy depicting the Variation;
  - (ii) Specifies the reason(s) for requesting the Variation; and
  - (iii) States whether, as a result of the Variation, the timing in Column 4 of Schedule 2 for the delivery of any of the Development Contributions will change.

### **(Phasing Strategy Notice)**

- d) Within 20 Business Days after receiving a Phasing Strategy Notice, Council must notify the Developer where Council consents to the Variation including any reasonable conditions Council requires as a consequence of the Variation.
- e) The parties agree that upon Council notifying the Developer that Council consents to the Variation:
  - (i) The updated phasing strategy referred to in clause 8(c)(i) is taken to replace the Phasing Strategy contained in Schedule ##, and

- (ii) Schedule 2 is taken to be amended to reflect the timing for delivery of the Development Contributions referred to in clause 8(c)(iii).
- f) Failure by Council to accept a proposed variation to the Phasing Strategy under clause 8(d) is a dispute to which clauses 9.1 and 9.2 to 9.10 apply.

## **9. Dispute Resolution**

### **9.1 Reference to Dispute**

If a dispute arises between the Parties in relation to this document, the Parties must not commence any court proceedings relating to the dispute unless the parties have complied with this clause, except where a party seeks urgent interlocutory relief.

### **9.2 Notice of Dispute**

The party wishing to commence the dispute resolution process must give written notice (**Notice of Dispute**) to the other parties which:

- a) Adequately identifies and provides details of the nature of the dispute;
- b) States the alleged basis of the dispute;
- c) The position which the party issuing the Notice of Dispute believes is correct;
- d) States what the party commencing the dispute resolution process believes will resolve the dispute; and
- e) Designates its representative to negotiate the dispute.

### **9.3 Meeting of parties' senior representatives**

- a) Within 10 Business Days after the notice is given, or another period agreed by the parties in writing, a senior representative of each party must meet in good faith with a view to resolving the dispute.
- b) The parties may, without limitation:
  - (i) Resolve the dispute during the course of that meeting;
  - (ii) Agree that further material or expert determination in accordance with clause 9.6 about a particular issue or consideration is needed to effectively resolve the dispute (in which event the parties will, in good faith, agree to a timetable for resolution); or

- (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.
- c) If the dispute is not resolved within 20 Business Days after the meeting convened under clause 9.3(b), either party may give to the other a written notice calling for determination of the dispute (Determination Notice) by:
  - (i) mediation under clause 9.5 or for expert determination under clause 9.6; and
  - (ii) Failing agreement under clause 9.3(c)(i), refer the dispute for expert determination under clause 9.6.

#### **9.4 Conduct pending resolution**

The parties must continue to perform their respective obligations under this document if there is a Dispute but will not be required to complete the matter the subject of the Dispute, unless the appropriate party indemnifies the other parties against costs, damages and all losses suffered in completing the disputed matter if the Dispute is not resolved in favour of the indemnifying party.

#### **9.5 Mediation**

If a party gives a Determination Notice calling for the dispute to be mediated:

- a) The parties must agree to the terms of reference of the mediation within 15 Business Days of the receipt of the Determination Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);
- b) The mediator will be agreed between the parties, or failing agreement within 15 Business Days or receipt of the Determination Notice, either Party may request the Present of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- c) The mediator appointed pursuant to this clause must:
  - (i) Have reasonable qualifications and practical experience in the area of the dispute; and
  - (ii) Have no interest or duty which conflicts or may conflict with his or her functions as a mediator;
- d) The mediator shall be required to undertake to keep confidential all matters coming to their knowledge by reason of their appointment and performance of their duties;

- e) The parties must within 15 Business Days of receipt of the Determination Notice notify each other of their representatives who will be involved in the mediation (except if a resolution of Council is required to appoint a representative, the Council must advise of the representative within 5 Business Days of the resolution);
- f) The parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement; and
- g) In relation to costs and expenses:
  - (i) Each party will bear its own professional and expert costs incurred in connection with the mediation; and
  - (ii) The costs of the mediator will be shared equally by the parties unless the mediator determines that a party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that party.

## 9.6 Expert determination

- a) If the dispute is referred for expert determination, the dispute must be determined by an independent expert in the relevant field jointly appointed by the parties. If the parties cannot agree on the expert to be appointed, the parties must jointly appoint an expert nominated by the President of the NSW Law Society.
- b) The expert appointed to determine the dispute must:
  - (i) Have a technical understanding of the subject matter in the dispute;
  - (ii) Not have a significantly greater understanding of one party's business, functions or operations which might allow the other party to construe this greater understanding as a bias; and
  - (iii) Inform the parties before being appointed of the extent of the expert's understanding of each party's business or operations and, if that information indicates a possible bias, then that expert must not be appointed except with the written approval of the parties.
- c) The parties must promptly enter into a document with the appointed expert setting out the terms of the expert's appointment and the fees payable to the expert (which are to be shared by the parties equally).
- d) The dispute must be referred to the expert by written submissions from each party, which must include a copy of this document.

- e) The expert must be instructed to determine the dispute and provide the expert's determination to the parties no later than 10 Business Days after receipt of the submissions (or another period agreed by the parties).
- f) The parties must promptly provide the expert with any information, assistance and cooperation requested in writing by the expert in connection with the expert's determination. All correspondence between the expert and a party must be copied to the other party.
- g) The expert must act as an expert and not as an arbitrator. The expert's written determination will be final and binding on the parties in the absence of manifest error.
- h) If the expert fails to determine the dispute and provide the expert's determination to the parties within 20 Business Days after the date on which the determination was due under clause 9.6 (including any extension agreed by the parties under that clause), either party may commence proceedings to determine the dispute.

#### **9.7 Confidentiality of information provided in dispute resolution process**

- a) The parties agree, and must procure that the mediator and the expert agree as a condition of his or her appointment:
  - (i) Subject to paragraph (b), to keep confidential all documents, information and other material disclosed to them during or in relation to the mediation or expert determination;
  - (ii) Not to disclose any confidential documents, information and other material except:
    - A. To a party or adviser or consultant who has signed a confidentiality undertaking; or
    - B. If required by law or any authority to do so; and
  - (iii) Not to use confidential documents, information or other material disclosed to them during or in relation to the mediation or expert determination for a purpose other than the mediation or expert determination.
- b) The parties must keep confidential and must not disclose or rely upon or make the subject of a subpoena to give evidence or produce document in any arbitral, judicial or other proceedings:
  - (i) Views expressed or proposals or suggestions made by a party or a mediator or the expert during the expert determination or mediation relating to a possible settlement of the Dispute.

- (ii) Admissions or concessions made by a party during the mediation or expert determination in relation to the dispute; and
- (iii) Information, documents or other material concerning the dispute which are disclosed by a party during the mediation or expert determination unless such information, documents or facts would be discoverable in judicial or arbitral proceedings.

## 9.8 Conduct pending resolution

While a dispute is unresolved between the parties, each party must continue to perform their respective obligations under this document.

## 9.9 Remedies available under the Act

This clause 9 does not operate to limit the availability of any remedies available to Council under the Act.

## 9.10 Urgent relief

This clause 9 does not prevent any party from seeking urgent injunctive or declaratory relief concerning any matter under this document.

## 10. Enforcement

[Drafting Note: Section 7.4(3)(g) requires the Planning Agreement to provide for enforcement of the Planning Agreement by suitable means such as a bond or bank guarantee. The form and value of security is likely to be a matter for negotiation between the parties and will depend on the nature and extent of the contributions being provided. The form of the following clause may require amendment to reflect the negotiated position, however is a standard provision for security by bank guarantee and dedication of land.]

### 10.1 Application

Clauses 10.2 to 10.6 apply only in respect of the Development Contributions to which a Contribution Value is attributed in Schedule 2.

### 10.2 Delivery of Bank Guarantees



- a) Prior to the issue of the first Construction Certificate in respect of the Development, the Developer must give a Bank Guarantee to Council (or other form of security to the satisfaction of the Council) for an amount equal to the Contribution Value for each item of the Development Contribution (**Primary Security**).
- b) As soon as reasonably practicable after each Works Contribution is Complete in accordance with clause 5, the Developer must give a Bank Guarantee to Council (or other forms of security to the satisfaction of the Council) for an amount equivalent to [insert] percent of the Contribution Value of that Works Contribution (**Defects Security**). [Drafting Note: Council will take into consideration that nature and extent of the Contributions to confirm the amount of the Defects Security for each Works Contribution e.g. 5%, 10% or 20% of the Contribution Value]

### 10.3 Replacement of Bank Guarantees

- a) The Developer may replace any Bank Guarantees for the Primary Security or Defects Security provided by it at any time, provided that the amount of that replacement is not less than that which is required to be provided under this document.
- b) On receipt of a replacement Bank Guarantee under paragraph (a), Council must immediately release the security being replaced and return it to the Developer.

### 10.4 Return of Bank Guarantees

- a) Within 10 Business Days of any written request being made by the Developer, after the Developer has made each Development Contribution, Council must return to the Developer the Primary Security referable to that Development Contribution to the Developer, including any replacement Bank Guarantee referable to the Development Contribution given by the Developer under clause 9.6, provided that:
  - (i) If Council has made a demand against the relevant Primary Security, Council is only required to return any remaining balance of the Primary Security still held by Council;
  - (ii) The Developer has complied with clause 10.2(b) in respect of the relevant Works Contribution;
  - (iii) The Developer is not in breach of this document at that time (unless waived by Council).
- b) Council must release and return the Defects Security or any unused part of it to the Developer no later than 10 Business Days after the last to occur of:

- (i) If no Rectification Notice has been issued, the end of the Defects Liability Period; or
  - (ii) If one (1) or more Rectification Notices have been issued, the date that all Defects have been rectified in accordance with clause 5.11.
- c) Within 10 Business Days after this document is terminated and a request being made by the Developer, Council must return to the Developer all of the Bank Guarantees given under clauses 10.2 and 10.6.

### **10.5 Calling on Bank Guarantees**

- a) If the Developer commits an Event of Default, Council, without limiting any other remedies available to it, may call on any Security provided by the Developer.
- b) If Council calls on any Security, it may use the amount so paid to it in satisfaction of any costs incurred by it in remedying the relevant Event of Default.

### **10.6 Replacement of Bank Guarantees**

If Council calls on one or more of the Bank Guarantees under clause 10.5(b), the Developer must deliver a replacement Bank Guarantee equal to the amount of the Bank Guarantee called upon by Council.

### **10.7 Compulsory acquisition of the Designated Land [Drafting Note: Delete this clause if the Developer is not dedicated land to Council under this document]**

- a) The Developer consents to the compulsory acquisition of the Designated Land:
  - (i) In accordance with the Acquisition Act; and
  - (ii) On the terms set out in this clause 10.7.
- b) Council may only acquire the Designated Land compulsorily in accordance with the Acquisition Act if the Developer has committed an Event of Default with respect to the dedication of that land under this document.
- c) If Council acquires the Designated Land compulsorily in accordance with the Acquisition Act:
  - (i) The Developer agrees that the compensation payable to it on account of that acquisition under the Acquisition Act is \$1.00; and

- (ii) Council must complete that acquisition within twelve (12) months of the relevant Event of Default.
- d) The parties agree that the provisions of this clause 10.7 are a document with respect to the compulsory acquisition of the Designated Land for the purpose of s30 of the Acquisition Act.
- e) If Council acquires the Designated Land under paragraph (c) and is required to pay any compensation to a third party as a result of that acquisition, then the Developer must pay Council the amount of that compensation as a Monetary Contribution within ten (10) Business Days of demand for payment being made by Council and prior to the issue of the then next Occupation Certificate or Subdivision Certificate with respect to the Development.
- f) 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 concerned except if, and to the extent that, the Claim arises because of the Council's negligence or default.
- g) The Developer must promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause, including without limitation:
  - (i) signing any documents or forms;
  - (ii) giving land owner's consent for lodgement of any Development Application;
  - (iii) producing certificates of title to the Registrar-General under the *Real Property Act 1900* (NSW); and
  - (iv) paying the Council's reasonable costs arising under this clause.

#### **10.8 Council may withhold Construction Certificate**

- a) The Developer may only make, or cause, suffer or permit the making of, an application for a Construction Certificate in respect of the Development if, at the date of the application, the Developer is not in breach of any obligation under this document that is required to be performed prior to the issue of the relevant Construction Certificate.
- b) Council may withhold the issue of the relevant Construction Certificate if, at the relevant time, the Developer is in breach of any obligation under this document that is required to be performed prior to this issue of the relevant Construction Certificate, until such time as the breach is rectified.

#### **10.9 Council may withhold Occupation Certificate**

- a) The Developer may only make, or cause, suffer or permit the making of, an application for an Occupation Certificate in respect of the Development if, at the date of the application, the Developer is not in breach of its obligation to make any Development Contribution under this document that is required to be performed prior to the issue of the relevant Occupation Certificate.
- b) An Occupation Certificate must not be issued if, at the relevant time, the Developer is in breach of any obligation to make any Development Contribution under this document that is required to be performed prior to the issue of the relevant Occupation Certificate, until such time as:
  - (i) The breach is rectified; or
  - (ii) Council calls upon the Bank Guarantee in accordance with clause 10.5.

#### 10.10 Termination

- a) This document terminates in the following events:
  - (i) The Instrument Change is not made by the date that is [insert] months after the date of this document [Drafting Note: Delete if this document does not relate to an Instrument Change];
  - (ii) The Development Consent lapses [Drafting Note: Delete if this document relates only to an Instrument Change]
  - (iii) The parties agree in writing to terminate this document.
  - (iv) Council serves notice on the Developer terminating this document where the Developer has failed to remedy a breach in accordance with clause 10.12; and
  - (v) The Developer is subject to an Insolvency Event.
- b) Upon termination of this document, all future right and obligations of the parties are discharged and all pre-existing rights and obligations of the parties continue to subsist.
- c) This document will determine upon the Developer satisfying all of the obligations imposed on it in full.

#### 10.11 Notices

- a) Any notice, consent, information, application or request that must or may be given or made to a Party under this document is only given or made if it is in writing and sent in one of the following ways:
  - (i) Delivered or posted to that party at its address set out below; or

- (ii) Emailed to that party at its email address set out below

**Council**

Attention: General Manager  
Address: PO Box 12, Fairfield NSW 1860  
Email address: [mail@fairfieldcity.nsw.gov.au](mailto:mail@fairfieldcity.nsw.gov.au)

**Developer**

Attention: \_\_\_\_\_  
Address: \_\_\_\_\_  
Email address: \_\_\_\_\_

- b) If a party gives the other party 3 Business Days notice of a change of its address or email address, any notice, consent, information, application or request is only given or made by that other party if it is delivered, posted, or sent to the latest address or email address.
- c) Any notice, consent, information, application or request will be treated as given or made at the following time:
- (i) If it is delivered, when it is left at the relevant address.
  - (ii) If it is sent by post, 2 Business Days after it is posted.
  - (iii) If it is sent by email, within 3 hours of the sender having sent the email provided that no error message is received within that 3 hour timeframe.
- d) If any notice, consent, information, application or request is delivered, or sent, 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 will be treated as having been given or made at the beginning of the next business day.

**10.12 Breach of obligations**

- a) If the Council reasonably considers that the Developer is in breach of any obligation under this document, it may serve a written notice on the Developer (**Breach Notice**) specifying:
- (i) the nature and extent of the breach;

- A. if the breach is capable of rectification other than the payment of compensation, what Council requires the Developer to do in order to rectify the breach; or
  - B. the breach is not reasonably capable of rectification other than the payment of compensation, the amount of compensation Council requires the Developer to pay in order to rectify the breach;
- (ii) the period within which the breach will be rectified or compensation paid, being a period that is reasonable in the circumstances and is not less than [insert] business days. [Drafting Note: Council to confirm the maximum timeframe (if any) for the Developer to rectify breaches under Breach Notices issued under this document, e.g. 10 business days].
- b) The Developer commits an Event of Default if the Developer fails to fully comply with a Breach Notice or becomes subject to an Insolvency Event.
  - (iii) If the Developer commits an Event of Default, Council may, in addition to any of its rights at law, step-in and carry out any work specified in any relevant Breach Notice and may enter, occupy and use any land owned or controlled by the Developer and any Equipment on such land for that purpose.
  - (iv) Any costs reasonably incurred by the Council in remedying a breach in accordance with subclause (c) may be recovered by the Council by either or a combination of the following means:
    - A. by calling-up and applying the Security provided by the Developer under this document; or
    - B. as a debt due in a court of competent jurisdiction.
  - (v) For the purpose of subclause (vi), the Council's costs of remedying a breach the subject of a Breach Notice include, but are not limited to:
    - A. the costs of the Council's servants, agents and contractors reasonably incurred for that purpose;
    - B. all fees and charges necessarily or reasonably incurred by the Council in remedying the breach; and
    - C. all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
  - (vi) Nothing in this clause prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this document by the Developer, including but not limited to seeking relief in an appropriate court.

### **10.13 Enforcement in a court of competent jurisdiction**

- a) Without limiting any other provision of this document, the Parties may enforce this document in any court of competent jurisdiction.
- b) For the avoidance of doubt, nothing in this document prevents:
  - (i) a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this document or any matter to which this document relates; or
  - (ii) the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this document or any matter to which this document relates.

## **11. Position of Council**

### **11.1 Consent authority**

The parties acknowledge that Council is a consent authority with statutory rights and obligations pursuant to the terms of the Planning Legislation.

### **11.2 Document does not fetter discretion**

This document is not intended to operate to fetter, in any unlawful manner:

- a) The power of Council to make any Law; or
- b) The exercise by Council of any statutory power or discretion.

**(Discretion)**

### **11.3 Severance of provisions**

- a) No provision of this document is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this document is held by a court of competent jurisdiction to constitute an unlawful fetter on any Discretion, the parties agree:
  - (i) They will take all practical steps, including the execution of any further document, to ensure the objective of this clause 11 is substantially satisfied;

- (ii) In the event that paragraph (i) cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision will be severed and the remainder of this document has full force and effect; and
  - (iii) To endeavour to satisfy the common objective of the parties in relation to the provision of this document which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.
- b) Where the Law permits Council to contract out of a provision of that Law or gives Council power to exercise a Discretion, then if Council has in this document contracted out of a provision or exercised a Discretion under this document, then to the extent of this document is not to be taken to be inconsistent with the Law.

#### **11.4 No Obligations**

Nothing in this document will be deemed to impose any obligation on Council to exercise any of its functions under the Act in relation to the Development Consent, the Land or the Development in a certain manner.

#### **11.5 Approvals and consent**

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

### **12. Assignment and Dealings**

#### **12.1 Assignment**

- a) Subject to 12.1(b), the Developer may not Assign the rights and obligations of this document to any part of the Land to any person (**Assignee**) unless the Developer first obtains the consent of Council which cannot be unreasonably withheld or delayed provided the Developer satisfies the requirements of this clause 12.1.
- b) The Developer must provide Council with any evidence required by Council, acting reasonably, to satisfy Council that the Assignee is reasonably capable of performing the obligations under this document that are to be assigned to it.



- c) Within 10 Business Days after receiving the evidence provided under clause 11.1(b), Council must confirm whether Council consents to the proposed Assignment to the Assignee, and if so, whether as a condition of that consent Council requires the Assignee to enter into an agreement in accordance with clause 12.1(d).
- d) Council may require, as a condition of any consent given under clause 12.1(a) that the proposed Assignee enter into an agreement with Council under which the Assignee agrees to comply with those of the Developer's obligations under this document that remained to be performed (or such part of those obligations as is proposed to be Assigned) as if it were the Developer.
- e) Council is under no obligation to consider granting its consent to any request made by the Developer under clause 12.1(a) if, at the time the request is made, the Developer is in breach of this document, unless waived by Council.

## 12.2 Dealings

- a) The Developer may not Deal with the whole or any part of the Land unless, before the Developer enters into the Dealing with another person (**Transferee**):
  - (i) The Transferee enters into an agreement with Council under which the Transferee agrees to comply with those of the Developer's obligations under this document that remain to be performed in respect of the Land the subject of the Dealing as if it were the Developer;
  - (ii) Any default by the Developer under this document has been remedied by the Developer or waived by Council; and
  - (iii) The Developer and the Transferee pay Council's reasonable costs in relation to the Dealing.
- b) If the Developer enters into a Dealing and has fully complied with the requirements of clause 12.2(a) with respect to that Dealing, the Developer will be released from its obligations under this document with respect to the Land the subject of the Dealing.

## 12.3 Restriction on dealings

- a) The Developer must not:
  - (i) sell or transfer the Land; or
  - (ii) Assign the Developer's rights or obligations under this document, or novate this document,to any person unless:

- b) the Developer has, at no cost to the Council, first procured the execution by the person to whom the Land or part will be sold or transferred or the Developer's rights or obligations under this document are to be Assigned or novated, of a deed in favour of the Council on terms reasonably satisfactory to the Council; and
- c) the Council has given written notice to the Developer stating that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this document, and
- d) the Developer is not in material breach of this document; and
- e) the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.
- f) This clause does not apply in relation to any sale or transfer of the Land if this document is registered on the title to the Land at the time of the sale or transfer.

## **13. Indemnities & Insurance**

### **13.1 Risk**

The Developer performs this document at its own risk and its own cost.

### **13.2 Release**

The Developer releases the Council from any Claim it may have against the Council arising in connection with the performance of the Developer's obligations under this document except if, and to the extent that, the Claim arises because of the Council's negligence or default.

### **13.3 Indemnity**

The Developer indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in connection with the performance of the Developer's obligations under this document except if, and to the extent that, the Claim arises because of the Council's negligence or default.

### **13.4 Insurance**

- a) The Developer must 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 document up until the Work is taken to have been completed in accordance with this document:
  - (i) 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;
  - (ii) public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party;
  - (iii) workers compensation insurance as required by law; and
  - (iv) any other insurance required by law.
- b) If the Developer fails to comply with clause 13.4(a), 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:
  - (i) by calling upon the Security provided by the Developer to the Council under this document; or
  - (ii) recovering the amount as a debt due in a court of competent jurisdiction.
- c) 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 13.4(a).

## 14. Other provisions

### 14.1 Costs

- a) The Developer agrees to reimburse or pay Council's reasonable costs of negotiating, preparing, executing, stamping and registering the document, and any document related to this document, within **10 Business Days** of receiving a tax invoice from Council.

- b) The Developer agrees to pay or reimburse the costs and expenses incurred by Council in connection with the advertising and exhibition of this document in accordance with the Act;
- c) The Developer must also pay to the Council the Council's reasonable costs of administration and ongoing enforcement of this document within 7 days of a written demand by the Council for such payment.

#### **14.2 Entire agreement**

- a) This document contains everything to which the Parties have agreed in relation to the matters it deals with.
- b) 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 document was executed, except as permitted by law.

#### **14.3 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 document and all transactions incidental to it.

#### **14.4 Governing law and jurisdiction**

This document 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.

#### **14.5 Joint and individual liability and benefits**

- a) Except as otherwise set out in this document:
  - (i) any agreement, covenant, representation or warranty under this document by two or more persons binds them jointly and each of them individually, and
  - (ii) any benefit in favour of two or more persons is for the benefit of them jointly and each of them individually.

#### **14.6 Representation and warranties**

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

#### **14.7 Severability**

- a) If a clause or part of a clause of this document 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.
- b) 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 document, but the rest of this document is not affected.

#### **14.8 Illegality**

If this document or any part of it becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties are to co-operate and do all things necessary to ensure that an enforceable agreement of the same or similar effect to this document is entered into.

#### **14.9 Modification**

No modification of this document will be of any force or effect unless it is in writing and signed by the Parties to this document.

#### **14.10 Waiver**

- a) The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this document, does not amount to a waiver of any obligations 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 a particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver or any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

#### **14.11 GST**

If any Party reasonably decides that it is liable to pay GST on a supply made to the other Party under this document and the supply was not priced to include GST, then recipient of the supply must pay an additional amount equal to the GST on that supply.

## **GST**

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 in respect of the Taxable Supply.

**GST Law** has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**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 in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.

- a) Subject to subclause (c), if GST is payable on a Taxable Supply made under, by reference to or in connection with this document, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- b) Subclause (a) does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this document to be GST inclusive.
- c) No additional amount shall be payable by the Council under subclause (a) 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.
- d) If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this document by one Party to the other Party that are not subject to Division 82 of the GST Law, the Parties agree:
  - (i) to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies; and

- (ii) that any amounts payable by the Parties in accordance with this clause (as limited by subclause (c)) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- e) No payment of any amount pursuant to this clause, 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 a Tax Invoice or Adjustment Note as the case may be to the recipient.
- f) 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.
- g) This clause continues to apply after expiration or termination of this document.

#### **14.12 Explanatory Note**

An Explanatory Note relating to this document is required by clause 205 of the Regulation. Pursuant to clause 205(5) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this document. A template for an Explanatory Note is included in Council's Planning Agreements Policy 2022.

## Schedule 1

### Requirements under s7.4 of the Act

Requirement under the Act	This Agreement
<b>Planning instrument and/or development application (s 7.4(1))</b> The Developer has: a) Sought a change to an environmental planning instrument; b) Made, or proposes to make, a development application or application for a complying development certificate; and/or c) Entered into an agreement with, or is otherwise associated with, a person to whom paragraph (a) or (b) applies.	a) Yes/No b) Yes/No c) Yes/No/Not Applicable
<b>Description of land to which this agreement applies (s.7.4(3)(a))</b>	[insert folio identifiers of relevant land]
<b>Description of change to the environmental planning instrument to which this agreement applies (s.7.4(3)(b))</b>	Yes/No
<b>Description of the development to which the agreement applies (s.7.4(3)(b))</b>	Refer to definition of the 'Development'
<b>Application of section 7.11 of the Act (s.7.4(3)(d))</b>	Applies/Does not apply
<b>Application of section 7.12 of the Act (s.7.4(3)(d))</b>	Applies/Does not apply
<b>Application of section 7.24 of the Act (s.7.4(3)(d))</b>	Applies/Does not apply
<b>Consideration of benefits under this agreement if section 7.11 applies (s.7.4(3)(e))</b>	Refer to clause ## and ##
<b>Mechanism for Dispute resolution (s.7.4(3)(f))</b>	Refer to clause ##



Requirement under the Act	This Agreement
<b>Enforcement of this 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 (s.7.4(3)(g))</b>	Refer to clause ##
<b>No obligation to grant consent or exercise functions in relation to a change to an environmental planning instrument (s.7.4(9))</b>	Refer to clause ##.

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**Schedule 2**

**Development Contributions**

Item	Column 1 Development Contribution	Column 2 Public Purpose	Column 3 Manner & Extent	Column 4 Timing	Column 4 Contribution Value
1.	(item name)  (brief description including map description (where relevant))	(description)	(description of work and any dedication)	(timing in relation to the development i.e. Prior to Occupation Certificate, Construction Certificate etc.)	(\$ amount)
2.	....	....	....	....	....

**Schedule 3**

**Description of Land and Works**

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**Schedule 4**

**Dedication Plan**

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**Schedule 5**

**Location Plan**

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**Schedule 6**

**Specifications**

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## Execution page

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Executed as a deed

Dated:

**Signed, sealed and delivered** by **Fairfield City Council** by its General Manager in the presence of the witness whose signature appears below and in accordance with resolution dated

\_\_\_\_\_  
Witness (Signature)

\_\_\_\_\_  
General Manager (Signature)

\_\_\_\_\_  
Name of Witness (Print Name)

\_\_\_\_\_  
Name of General Manager (Print Name)

[insert if the Developer is a corporate entity]

**Signed, sealed and delivered** by the [insert name of Developer] in accordance with section 127(1) of the *Corporations Act 2001* (Cth) by authority of its directors.

\_\_\_\_\_  
Director/Secretary (Signature)

\_\_\_\_\_  
Director (Signature)

\_\_\_\_\_  
Name of Director/Secretary (Print Name)

\_\_\_\_\_  
Name of Director (Print Name)

[insert if the Developer is an individual]

**Signed, sealed and delivered** by [insert name of Developer] in the presence of:

\_\_\_\_\_  
Witness (Signature)

\_\_\_\_\_  
Person (Signature)

\_\_\_\_\_  
Name of Witness (Print Name)