

# Developer Infrastructure Agreements Policy

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# 1. INTRODUCTION

## 1.1 PURPOSE OF THIS POLICY

Our community expects that the infrastructure that is needed to serve new or growing communities will be provided when and where it is needed. Timely delivery of local infrastructure is an important goal of the Council.

The funding and delivery of local infrastructure - which includes local and collector roads, stormwater drainage networks, open space, recreation and community facilities - is a council responsibility.

The way the Council provides these facilities is through contributions of money and/or land required through the development approval process. These are known as s7.11 and s7.12 contributions.

Developers of land have the choice of either:

- making the contribution to the Council, and the Council then uses those contributions to deliver local infrastructure, or
- offering to directly provide public infrastructure on behalf of the Council and the community.

Council recognises that greater efficiencies often can be achieved through developers of land delivering public infrastructure as part of their developments, instead of the Council. This can also reduce financial and construction risk to Council in the delivery of this infrastructure.

A formal agreement between the Council, the developer and (where the developer does not own the land) the land owner(s) is needed to make this happen.

These agreements - collectively termed 'Infrastructure Agreements' in this policy - are voluntary for both Council and proponents. Ensuring there is an overall net public benefit to the community is key to Council's decision to enter into an Infrastructure Agreement.

This policy's purpose is to outline how Penrith City Council will deal with developers of land in the City who offer to provide development contributions through such agreements.

This policy sets out:

- The different types of Developer Infrastructure Agreements that may be offered and which the Council will consider,
- General requirements for all agreements and additional requirements for Voluntary Planning Agreements,
- The negotiation, execution and implementation process for these agreements,
- Council's preferred agreement terms, that will be contained in Template Agreement documents.

The policy replaces Council's 2013 Works in Kind Agreement Policy.

This policy has been prepared having regard to the latest practice notes on VPAs prepared by the Secretary of the Department of Planning, Industry and Environment (DPIE).

## 1.2 AIMS OF THE POLICY

Council aims for this policy to achieve the following:

- (a) Establish a consistent and transparent process for Council and developers to enter into agreements that meet contemporary probity standards.
- (b) Achieve the timely delivery of development-generated infrastructure so that it is provided when and where it is needed.
- (c) Ensure that all developers are treated consistently in the negotiation and execution of agreements.
- (d) Work with developers to achieve infrastructure and public benefits for the community which go beyond meeting the impacts generated by their developments.
- (e) Raise public confidence in the delivery of infrastructure provided by developers.
- (f) Allow developers to directly provide urban infrastructure as part of their developments where this is in the public interest and the infrastructure delivered achieves a net community benefit.
- (g) Allow developers to align the delivery of infrastructure with their planned staging of their developments.
- (h) Provide for flexibility and innovative solutions in meeting the future infrastructure needs of the City.
- (i) To limit any potential financial risk to Council in entering an agreement.

## 2. MEANINGS OF TERMS USED IN THIS POLICY

### 2.1 WHAT ARE DEVELOPER INFRASTRUCTURE AGREEMENTS?

Developer Infrastructure Agreements are agreements between the Council and developers of land in the City of Penrith LGA that formalise developer offers made to provide local infrastructure and facilities as part of their developments.

For the purposes of this policy, there are two types of Developer Infrastructure Agreements:

- Works in Kind Agreements (WIKAs)
- Voluntary Planning Agreements (VPAs)

In this policy, 'Agreements' refers to both WIKAs and VPAs. Each of the types of agreements are explained below.

### 2.2 WHAT ARE WORKS IN KIND AGREEMENTS?

A Works in Kind Agreement (or WIKAs) is a voluntary arrangement between a developer and Council, that requires the developer to undertake works (or a part of the works) that are included within a contributions plan, in part or full satisfaction of a condition imposed on a DA consent or a CDC under s7.11 of the EP&A Act.

S7.11(5) of the EP&A Act allows s7.11 contribution requirements to be either partially or fully settled by the provision of a 'material public benefit'. A work in kind can thus be defined as a type of material public benefit being a works item included in a contributions plan.

For the purposes of this policy, Council intends that WIKAs can be used to deliver works that are identified within a contributions plan to offset s7.11 contributions imposed by development consents.

## 2.3 WHAT ARE VOLUNTARY PLANNING AGREEMENTS?

A Voluntary Planning Agreement (or VPA) is an arrangement between a developer or developers (and land owner(s) if the developer(s) does not own the land) and one or more councils and/or other planning authorities, where the developer seeks to dedicate land free of cost, pay a monetary contribution, deliver work or provide any other material public benefit, to meet the infrastructure demands of their proposal.

VPAs can be offered in connection to any of the following:

- a planning proposal to change the planning controls applying to land
- a development application for consent to carry out development
- the modification of a development consent
- an application for a complying development certificate.

VPAs may address purposes and contributions included in a contributions plan and may also address other purposes and contributions that have a wider public benefit. For this reason, VPAs are a more flexible type of development contributions mechanism than s7.11 / s7.12 contributions, as they allow a developer to propose alternatives and variations to the timing and scope of public infrastructure. They also allow a planning authority to potentially secure planning benefits that exceed a developer's usual contributions obligation.

With flexibility however comes a responsibility to act fairly and consistently. Council has a duty to act with probity and transparency in VPA negotiations and in the interests of the wider community.

The *Environmental Planning and Assessment Act 1979* and *Environmental Planning and Assessment Regulation 2000* set out basic requirements for the preparation, execution and administration of VPAs. This policy provides detail on the Council's approach to VPAs beyond the minimum legislative requirements.

## 2.4 DEFINITIONS

Key terms used in this policy are summarised below for ease of interpretation:

| Term                       | Meaning   |
|----------------------------|---|
| <b>CC</b>                  | Construction Certificate  |
| <b>CDC</b>                 | Complying Development Certificate   |
| <b>Contributions Plan</b>  | a plan made by a council or councils for the purpose of imposing conditions under s7.11 or s7.12 of the EP&A Act  |
| <b>DA</b>                  | Development Application   |
| <b>Developer</b>           | a person who proposes to enter into an Infrastructure Agreement under this policy   |
| <b>EP&amp;A Act</b>        | <i>Environmental Planning and Assessment Act 1979</i>   |
| <b>EP&amp;A Regulation</b> | <i>Environmental Planning and Assessment Regulation 2000</i>  |
| <b>Maintain</b>            | means works to bring an item to or keep an item in a state of reasonable condition and in accordance with relevant standards applicable at the time of construction of the item, including repairing any defects due to use of poor materials or due to poor workmanship, but does not include repairing normal wear and tear, removing graffiti or repairing any item damaged as a consequence of vandalism. Maintained and Maintenance have corresponding meanings. |

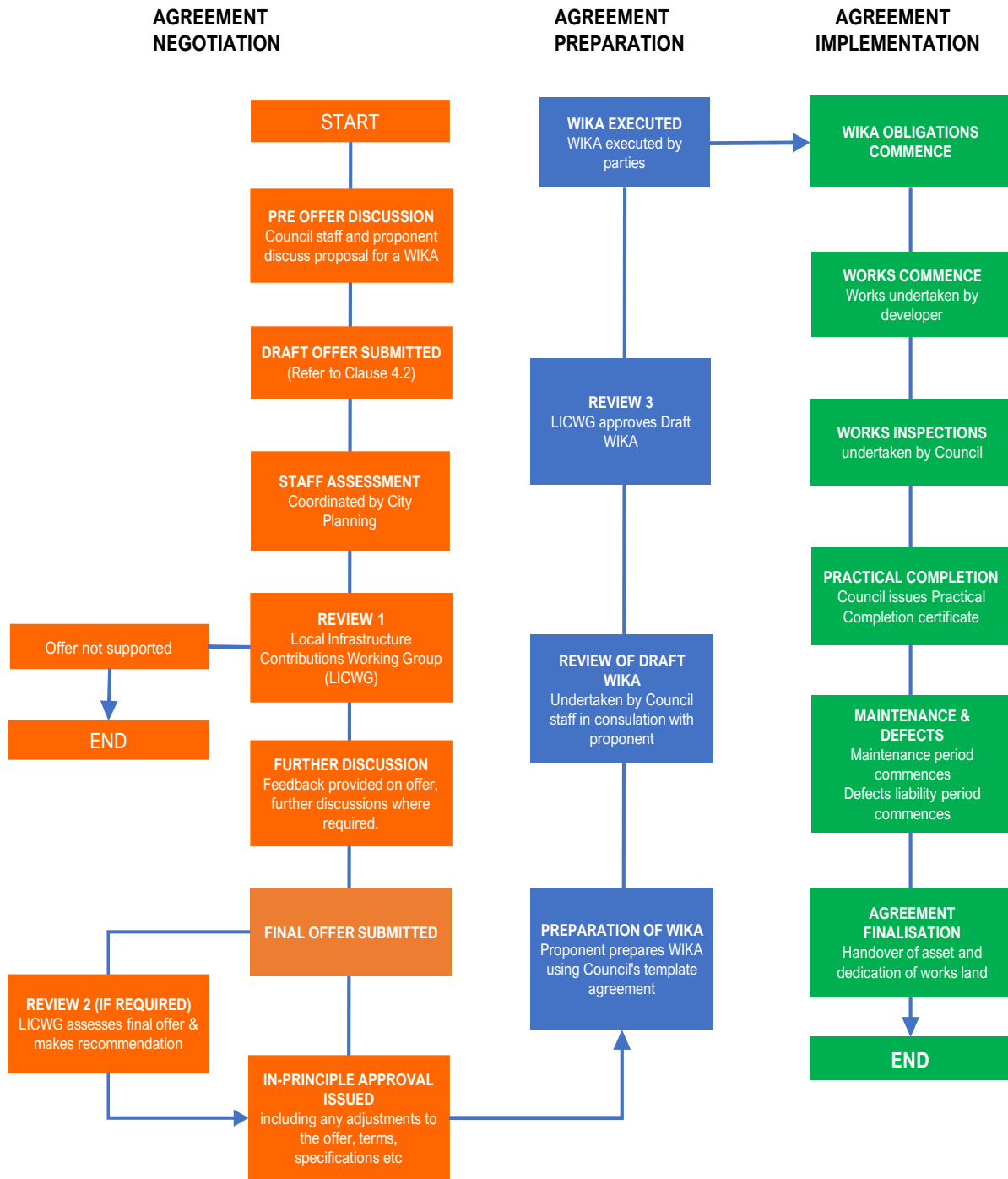
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|---------------------------|---|
| <b>S7.11 contribution</b> | a contribution of money or land for the provision of local infrastructure that is required by a condition imposed on a development consent and that is authorised under s7.11 of the EP&A Act |
| <b>S7.12 contribution</b> | a fixed rate levy for the provision of local infrastructure that is required by a condition imposed on a development consent and that is authorised under s7.12 of the EP&A Act               |

### 3. NEGOTIATING, PREPARING AND IMPLEMENTING AGREEMENTS

The processes for negotiating the different types of Infrastructure Agreements are shown on the flow charts on the following pages.

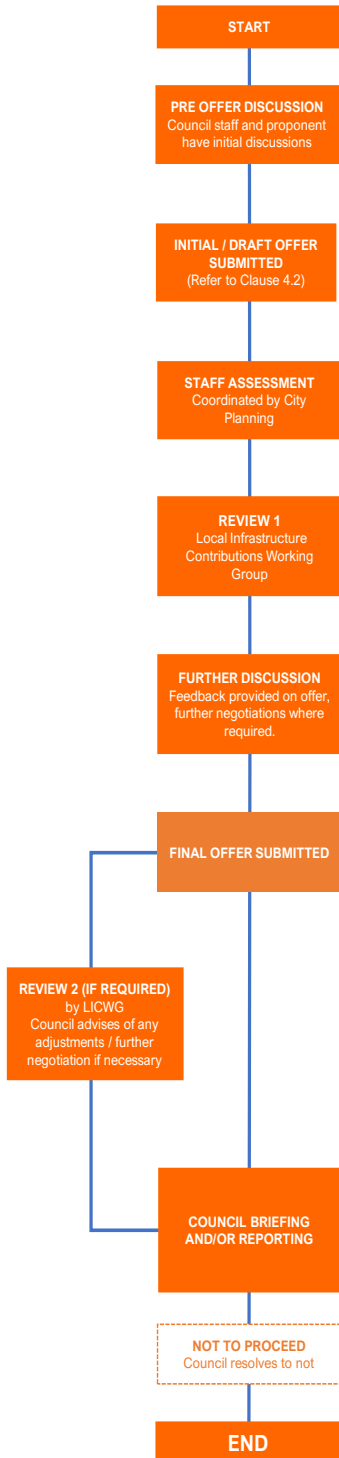
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### 3.1 WORKS IN KIND AGREEMENTS

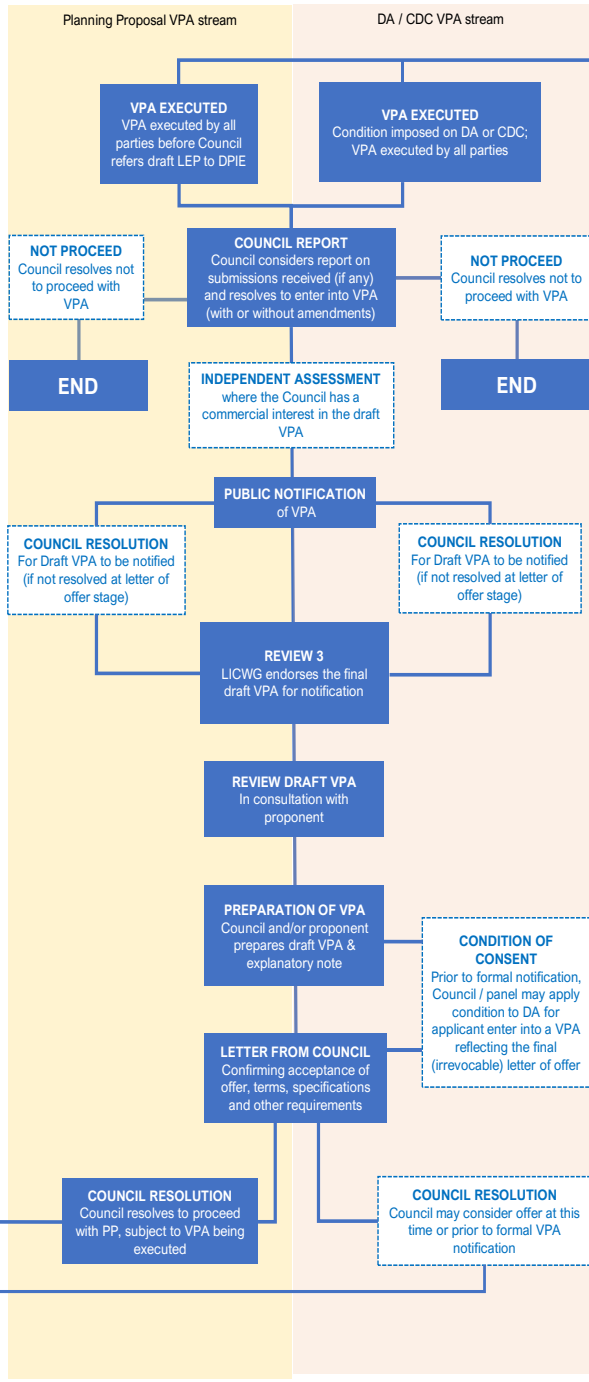


### 3.2 VOLUNTARY PLANNING AGREEMENTS

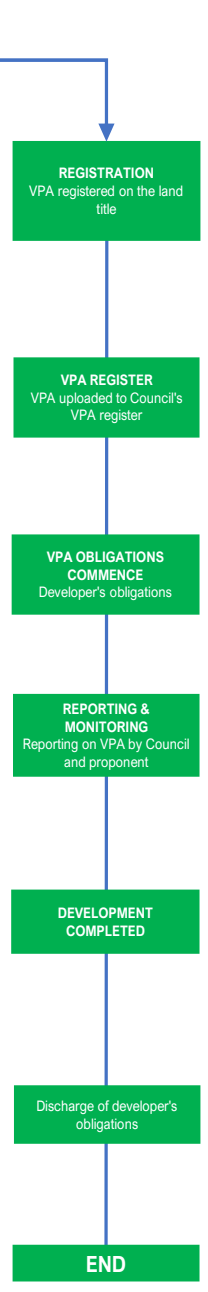
**AGREEMENT NEGOTIATION**



**AGREEMENT PREPARATION**



**AGREEMENT IMPLEMENTATION**





## 4. GENERAL REQUIREMENTS FOR AGREEMENTS

### 4.1 PROBITY

#### 4.1.1 COUNCIL'S RESPONSIBILITIES

To maximise transparency and public confidence in Infrastructure Agreements, Council will:

##### FOR ALL AGREEMENTS

- only enter into Agreements that achieve public benefits that are at least equal to the benefits that could be realised through s7.11 or s7.12 contributions
- ensure that Agreements are voluntary for both Council and developers
- comply with our Code of Conduct and inform developers proponents about ethical behaviour appropriate to business dealings with the Council
- not allow the interests of individuals or interest groups to outweigh the wider public interest when deciding whether to enter into Agreements
- provide a copy of this policy to any person who seeks to enter into a Developer Infrastructure Agreement with Council
- allow the public to access and download this policy and all executed VPAs from Council's website
- ensure that Councillors and Council staff understand their role and responsibility in the Agreement process,
- ensure that Councillors are not involved in any direct negotiations with proponents during the period of the Agreement negotiation
- ensure that all meetings with the developer in respect of a Developer Infrastructure Agreement are properly documented (including meeting minutes)
- where Council has a commercial interest in a development the subject of an Agreement, take appropriate steps to ensure that conflicts of interest are avoided or managed
- work with proponents to establish clear timeframes to progress agreements efficiently and actively communicate the status of the agreement
- seek to ensure that Council's financial risk in entering an Agreement is minimised
- provide a clear and transparent pathway for proponents to make an offer
- ensure the Policy is consistent with relevant legislation, practice notes and guidelines.

##### FOR VPAS:

- publicly notify proposed VPAs in accordance with the EP&A Act and EP&A Regulation
- not approve development that is unacceptable on planning grounds because of public benefits offered by developers
- not refuse or recommend refusal of a DA or CDC on the sole basis that a VPA has not been entered into or that the developer has not offered to enter into a VPA
- not enter into VPAs that require planning controls to be changed or a development consent to be granted as a result of the VPA
- ensure that the Council staff nominated to negotiate a VPA are not the same staff with the primary role of assessing or approving the Planning Proposal or DA except to provide advice on contributions or other relevant matters.

- VPAs associated with Planning Proposal, will not be finalised until the associated Planning Proposal is determined.

#### 4.1.2 PROPONENT’S RESPONSIBILITES

Conversely, Council expects developers to act in a respectful and transparent manner during the negotiation and implementation of Agreements. In this regard, Council expects proponents to:

- conduct themselves in a professional manner
- prior to preparing a letter of offer, specifications for works items should be requested from Council
- provide transparent and sound information to inform the Agreement
- respond to requests for information in a timely manner
- not solicit involvement of Councillors in the negotiations of VPAs
- for VPAs that will span more than one DA, include a statement with each DA identifying the relevant infrastructure triggers and items to be delivered to support that development under the VPA.

#### 4.2 LETTER OF OFFER

A letter of offer will be required to be prepared by the applicant for any proposed Agreements. This should be informed by the Planning Proposal (and supporting studies) or relevant DA and Council’s specifications. Requests for specifications for the works should be made to Council prior to the preparation of a letter of offer.

The letter shall contain the following details for each type of Agreement:

| Works in Kind Agreement  | Voluntary Planning Agreement   |
|--|--|
| Land affected by the agreement   | Land affected by the agreement   |
| Parties to the agreement and where necessary, authority to act on behalf of other parties  | Parties to the agreement and where necessary, authority to act on behalf of other parties  |
| The DA or CDC contributions condition(s) that the works in kind offer relates to   | The Planning Proposal, DA or CDC to which the proposed VPA relates   |
| Written consent of all owners of land affected by the agreement  | Written consent of all owners of land affected by the agreement  |
| The proposed standard or specification of the works, including whether the applicant proposes to vary the Council’s specification for the works<br><br>When available, the reference to the DA that approved the works and associated approved plans | All matters referred to in section 7.4 of the EP&A Act. The “summary of requirements” at Schedule 3 of the VPA template can be used to inform the letter of offer. |
| Details of: <ul style="list-style-type: none"> <li>• the works or other material public benefits proposed to be carried out</li> </ul>   | Details of: <ul style="list-style-type: none"> <li>• the contributions (including works, material public benefits, land or monetary</li> </ul>                     |

|   |   |
|---|---|
| <ul style="list-style-type: none"> <li>• a description of the components of the works that are works in kind (i.e. works that in accordance with the relevant contributions plan(s)), and the components which are not works in kind</li> <li>• plans demonstrating the location and areas of works</li> <li>• the proposed staging / timing of those works</li> <li>• the estimated value of the proposed works in kind and any other proposed material public benefits documented by a Quantity Surveyor or appropriately qualified designer</li> </ul> | <ul style="list-style-type: none"> <li>• contribution) proposed to be provided by the developer</li> <li>• a description of the components of the works that are works in kind (i.e. works that in accordance with the relevant contributions plan(s)), and the components which are not works in kind</li> <li>• plans demonstrating the location and areas of works and land dedications</li> <li>• the standard of or specification for any proposed works (note: concept designs are acceptable at the letter of offer stage)</li> <li>• the estimated value of each of the contributions documented by a Quantity Surveyor or appropriately qualified designer</li> <li>• the proposed staging / timing of those contributions, and</li> <li>• the manner by which the contributions are to be made</li> </ul> |
| Capability and experience in delivering infrastructure.   | Whether the proposed agreement excludes the application of section 7.11, 7.12 or 7.24 of the EP&A Act to the development.   |
| Identify any risks associated with the offer and which party will bear those risks  | Capability to deliver and experience in delivering infrastructure   |
|   | Identify any risks associated with the offer and which party will bear those risks  |

### 4.3 TIMING FOR DELIVERY OF INFRASTRUCTURE

The developer’s letter of offer should outline their intended triggers or thresholds for the delivery of each works items, land dedication and monetary payment.

Council will negotiate with proponents to adopt appropriate delivery thresholds that:

- ensure the right development is provided to allow development to progress in an orderly and efficient manner
- ensure suitable amenity is delivered as the development progresses and the population is established
- where monetary contributions are involved, consideration of Council’s Works Improvement Program and commitment to deliver works for the wider community.

### 4.4 AGREEMENT TEMPLATES

Template agreements are attached to this policy and available on Council’s website. The agreements have been endorsed by Council and set out Council’s preferred terms for the different types of Agreements. The Template Agreements reflect the provisions of this Policy and contain Council’s detailed legal requirements for each type of Agreement.

Developers can enter into a WIKA without it being reported to Council, on the condition that:

- the Works in Kind Agreement Template is used and unchanged
- the value of works is equal to or less than the relevant allowance in the Contributions Plan
- credit against contributions is only sought from items identified within the Contributions Plan

If a developer wishes to change any part of the Works in Kind Agreement Template or seek credit for values of works in excess of allowances in the Contributions Plan, it will need to be reported to the Council for endorsement.

All VPAs and associated letters of offer, whether or not they are drafted in accordance with the templates, will be reported to Council for endorsement.

## 4.5 AGREEMENT DRAFTING AND IMPLEMENTATION

The developer is responsible for all costs related to a VPA, including the Council's costs of preparing, negotiating, executing and stamping VPAs, and any land or works valuations. Such costs are payable within 30 days of the date of a tax invoice issued by Council.

The proponent is also responsible for the Council's costs of monitoring and enforcing a VPA. A provision will be included in each Agreement requiring the proponent to pay an VPA monitoring and enforcement fee equivalent to 1% of the total value of the contributions included in the Agreement.

As for WIKA, provided no amendments are proposed to Council's standard, no legal drafting costs will be incurred. Should changes be proposed, the proponent will be responsible for Council's reasonable legal fees. Such costs are payable within 30 days of the date of a tax invoice issued by Council.

The proponent is also responsible for the Council's costs of monitoring and enforcing a WIKA. A provision will be included in each Agreement requiring the proponent to pay an WIKA monitoring and enforcement fee equivalent to 1% of the total value of the works included in the Agreement. The proponent has the option of paying this fee prior to the execution of the WIKA or alternatively, the value of credits against the contributions that are payable can be reduced by this same amount.

As outlined in Section 4.9, both WIKAs and VPAs will require the proponent to provide security to Council.

## 4.6 WORKS SPECIFICATION

The specifications for all works including civil engineering, public domain and social infrastructure items such as parks and community buildings will be determined in consultation with the following Council staff representatives:

| Item   | Council representative                      |
|--|---|
| Civil Engineering (roads, bridges, shared paths, drainage basins, gross pollutant traps) | Engineering Services Manager                |
| Public domain  | City Assets Manager                         |
| Local and district parks, playgrounds, sports fields and other recreation items          | Community Facilities and Recreation Manager |
| Community centres, meeting rooms, libraries and other community buildings                | Community Facilities and Recreation Manager |

## 4.7 APPROVALS FOR WORKS

Most works included in an Agreement will require the assessment and approval under the EP&A Act. Other approvals, such as under the Roads Act may also be necessary. The only exceptions are exempt development.

Entering into an Agreement for works does not provide development approval for those works. Where development approval(s) is required, this must be obtained prior to works commencing. The type of approval(s) required – such as a DA, CDC or CC - will depend on the location, type and scale of the works involved. Council's Development Assessment Team can be contacted to determine the approvals that are required.

Where works intended to be the subject of an Agreement are included as part of a DA for wider development works, proponents are encouraged to consult with Council prior to DA lodgement to determine the necessary specifications. This will reduce delays in the DA assessment.

Council will not recognise or allow any s7.11 / s7.12 contributions credit if works commence prior to an Agreement being executed and the developer obtaining all the necessary approvals for the works.

## 4.8 VALUATION OF WORKS AND OTHER MATERIAL PUBLIC BENEFITS

Works valuations may be required to inform the amount of any security required and the calculation of contributions credits, if any. Works or other material public benefits included in an agreement will be valued by either a registered quantity surveyor, or another person that Council agrees has the necessary skills, qualifications and experience to perform the valuation.

If the works to be delivered are contained within a Contributions Plan, the developer is generally entitled to the value of those works determined in the plan.

Where the dedication of land is proposed within a Planning Agreement and the value of that land is required to inform security or credits, an appropriately qualified land valuer is to value the land.

## 4.9 SECURITY AND INSURANCE

Council's preferred arrangements for the provision of security are set out in detail in the Template Agreements and summarised in the table below.

| Type         | Security that Council will seek under the Agreement   |
|--------------|---|
| <b>VPA</b>   | <p>Registration on title (refer to 4.10)</p> <p>Council reserves the right to require additional security prior to executing a VPA, other than registration on title. This may depend on the nature of the VPA and whether a contributions plan for the land exists.</p>  |
| <b>Works</b> | <p>Cash deposit, bank guarantee or bond that is 125% of the agreed value of each of the works in an Agreement.</p> <p>Where the work is proposed on public land and/or requires Road Act approval, the security shall be in accordance with Council's fees and charges.</p> <p>The security must be lodged before a CC is issued for each work.</p> |

|  |  |
|--|--|
|  | <p>Upon completion of the agreed works to Council's satisfaction, part of the security equivalent to 100% of the value of the work will be returned.</p> <p>The remaining security equivalent to 25% of the value of the work will be retained by Council as a security bond.</p> <p>To assist in more timely release of securities, Council will accept two separate securities.</p> <p>The bond shall be returned:</p> <ul style="list-style-type: none"> <li>• after the defects liability and maintenance periods have lapsed, and</li> <li>• Council's Engineering Service teams assisted by the City Asset Manager (and any relevant Council technical specialists) have certified in writing that all obligations and works have been undertaken and completed to the standard as detailed in the Agreement and relevant approval.</li> </ul> <p>The Agreement will also allow Council to step-in and remedy any breach in carrying out works at the developers cost.</p>   |
| <p><b>Dedication of land and easements</b></p>   | <p>The dedication or transfer of land will be tied to the issuing of a specified kind of Part 4A Certificate, which will usually be a subdivision certificate</p> <p>Council will include a provision in any VPA allowing Council to compulsorily acquire the land to be dedicated or transferred for a nominal sum if the landowner defaults.</p> <p>Compulsory acquisition by Council is provided for in the <i>Land Acquisition (Just Terms Compensation) Act 1991</i>. The provision in the VPA will constitute a pre-acquisition agreement between the landowner and Council for the purposes of that Act.</p> <p>If the landowner does not agree to the above arrangements, Council may seek to:</p> <ul style="list-style-type: none"> <li>• register a caveat on the title of the relevant land until such time as it is dedicated to Council, or</li> <li>• require the landowner to provide a financial security such as a bond or bank guarantee or a charge over land or assets equal to the full market value of the land.</li> </ul> |
| <p><b>Payment of a monetary contribution</b></p> | <p>The Agreement will require any monetary contributions to be paid before the issuing of a specified kind of Part 6 Certificate, which will usually be a subdivision certificate (where subdivision of land is involved), or a construction certificate for built form that proceeds before subdivision.</p> <p>Alternatively, the developer can provide a financial security such as a bond or bank guarantee or a charge over land or assets equal to the full monetary contributions.</p>  |

Council will include provisions that the developer will be required to take out and keep current the following insurances in relation to works in an Agreement:

- contract works insurance
- public liability insurance
- workers compensation insurance as required by law
- any other insurance required by law.

## 4.10 REGISTRATION OF VPAS ON LAND TITLE AND OTHER SECURITY

Council will include a provision in the VPA that requires the VPA to be registered on the land title immediately on commencement of the VPA, unless Council is satisfied there is a good reason not to do so.

Registration on commencement means that Council will generally not execute a VPA unless and until evidence to our satisfaction of the agreement of all landowner parties to its registration on title is received.

The proponent will, at their cost, submit all documents necessary to enable Council to effect registration of the VPA.

Council will generally agree to the removal of registration on any part of the subject land in which a subdivision certificate has been issued to create lots that are to be sold to end-purchasers or otherwise created for separate occupation, use and disposition. The proponent will, at their cost, submit all documents necessary to remove the affectation from title as part of the Subdivision Certificate process.

## 4.11 COMMENCING AND CARRYING OUT WORKS

The Agreement will contain provisions concerning the notification of commencement of works, notification of inspections and allowing Council staff to access the land for inspections. These provisions will reflect relevant statutory obligations that apply to the approval and delivery of works and land dedications.

Agreements will establish Councils required approvals, inspections and handover requirements.

## 4.12 PRACTICAL COMPLETION OF WORKS

The works will be deemed completed when Council provides written notice to that effect, and the developer has provided Council with a full set of works-as-executed plans.

The proponent will be able to use any contributions credit generated in respect of the works after receiving a certificate of practical completion from Council.

In respect to Works in Kind, the Agreement will include provisions to cover the situation where the completion of works is unable to be completed as per the specified timing/staging.

## 4.13 DEFECTS LIABILITY AND MAINTENANCE PERIOD

The developer shall be responsible for the maintenance of works and the rectification of any works defects for the period(s) set out in the Agreement.

Maintenance requirements may include, but are not limited to: cleaning, inspection of damage, rectification of damage including chips and cracks, fixing of stains, graffiti removal, following manufacturers' instructions, weed removal, re-levelling and topping up, removing salt deposits, tree inspections, watering, replacement of ties and stakes, fertilising, mowing, pest and disease treatment, pruning, irrigation, removing debris, checking water levels.

## 4.14 DEDICATION OF LAND AND EASEMENTS

Council will not accept land containing infrastructure works or other public purposes, unless by agreement. Agreements may involve the dedication / transfer of land:

- comprising works in a WIKA
- comprising works for public purposes (including land set aside for conservation purposes) in a VPA
- without any works thereon.

In all cases where the Council accepts land from a developer the land must be dedicated or transferred free of cost.

The proponent will be able to use any contributions credit generated in respect of the land after receiving a certificate of practical completion from Council.

In dedicating or transferring any land to Council, the developer will be responsible for preparing all documents and meeting all costs of:

- removing an encumbrance on the title
- creating an interest in land in our favour
- subdividing land
- preparing and lodging documents for registration
- obtaining the consent of any to registration
- dealing with any requisition from Land and Property Information relating to any dealing lodged for registration.

## 4.15 DISPUTE RESOLUTION

The Template Agreements contain Councils preferred mechanism for the resolution of disputes under the agreement and the means for the enforcement of the agreement.

## 4.16 MODIFICATIONS OF AGREEMENTS

Agreements can be modified by agreement between the parties. Either party can initiate modification.

Modification of an Agreement will generally occur by means of a deed of variation to the Agreement in a form acceptable to Council.

The party proposing the modification must bear the other party's costs of the modification.

## 4.17 TRANSFERRING THE AGREEMENT RESPONSIBILITIES TO A NEW LAND OWNER

A developer may choose to sell the site which is the subject of an Agreement.

However, the developer must not have any transfer dealings with the land (or part of the land) the subject of the Agreement unless:

The proposed purchaser or incoming party enters into a 'Novation Deed', which transfers the developer's obligation under the Agreement to the incoming party; or



Council has provided in writing a partial release and discharge of the Agreement in respect of the affected Land.

The Agreement template provides provisions relating to the novation of an agreement to another party.

Council reserves the right to exercise discretion in respect to the novation of an agreement, noting that the incoming party will be the subject of meeting a set of standards.

## 5. ADDITIONAL REQUIREMENTS FOR VOLUNTARY PLANNING AGREEMENTS

### 5.1 TYPES OF PUBLIC PURPOSES COUNCIL WILL SEEK IN VPAS

Council will seek to negotiate the provision of the following through VPAs:

- (a) public purposes that support the strategies and actions in its Local Strategic Planning Statement, Community Strategic Plan, Local Environmental Plans, Development Control Plans, and other land use plans and policies.
- (b) contributions of land, money or works that are required under s7.11 / s7.12 contributions plans, but the developer wishes to modify the location, staging or specification of local infrastructure included in those plans.
- (c) land, works or money for local infrastructure where urban release areas have been rezoned for development, but no s7.11 / s7.12 contributions plan applies to the rezoned area.
- (d) community infrastructure in relation to the development on 'Key Sites' in the Penrith City Centre in accordance with clause 8.7 of Penrith Local Environmental Plan 2010.
- (e) recurrent charges such as the costs to meet the full life-cycle cost of an asset, or a sinking fund for maintenance costs of an asset.

Council may also consider offers to provide public purposes other than those listed above, where the offer provides better planning outcomes than the sole use of s7.11 or s7.12 contributions.

### 5.2 PARTIES TO A VPA

The parties to a VPA will include:

- the Council
- one or more developers, and
- if the developer(s) is not the owner of all of the land the subject of the VPA, the land owner or owners.

The parties may also include another planning authority, such as a State Government agency or another council.

VPAs with multiple developers can be a useful mechanism to provide certainty to the type of infrastructure and ultimate timing for the delivery of infrastructure. However, they do require a high degree of coordination and cooperation between the proponents. Council encourages proponents in urban renewal developments and fragmented land release area to consider working with each other through VPAs.

### 5.3 ASSESSMENT CONSIDERATIONS

Council will assess applications for VPAs against a number of criteria, to determine the acceptability of the agreement. This criteria is provided in Appendix A.

### 5.4 APPLICATION OF S7.11 OR S7.12 CONTRIBUTIONS IN VPAS

A VPA must specify whether local infrastructure contributions under s7.11 or s7.12 of the EP&A Act will apply to the development the subject of the VPA, in addition to any development contributions to be provided by the developer and included in the VPA.

The decision of whether s7.11 / s7.12 contributions will be a matter of negotiation between the Council and the developer.

However, as a general guide:

- (a) where one of the aims of the VPA is to bring to account all local infrastructure contributions required by the development under a Council-adopted contributions plan, then s7.11 / s7.12 contributions may not apply to the development
- (b) where the VPA does not address contributions required under a contributions plan then s7.11 / s7.12 contributions will apply to the development.

Where s7.11 / s7.12 contributions apply to the development the subject of the VPA, Council will generally not agree to allowing public benefits to be provided under the VPA to be taken into consideration, in calculating the s7.11 / s7.12 contributions.

It is noted that the consent authority or the Minister is to be a party to any planning agreement that excludes the application of sections 7.11 or section 7.12. In some circumstances, both Council and the Sydney Western City Planning Panel may need to be a party to a planning agreement.

### 5.5 EXCLUSION OF SPECIAL INFRASTRUCTURE CONTRIBUTIONS

In accordance with provisions of the EP&A Act, the Minister or development corporation designated by the Minister must approve any planning agreement that seeks to exclude the application of Section 24 of the EP&A Act.

### 5.6 AGREEMENTS INVOLVING PENRITH CITY CENTRE KEY SITES

To remove any doubt, VPAs prepared in compliance with Councils Community Infrastructure Policy and Clause 8.7 of Penrith Local Environmental Plan 2010 are subject to the provisions of this Policy

### 5.7 PUBLIC NOTIFICATION AND CONSIDERATION OF SUBMISSIONS

A draft VPA and explanatory note will be publicly notified for minimum of 28 days. Council will consider all public submissions in deciding whether to enter into a VPA

A draft VPA may be subject to further negotiation between the parties to consider any issue arising out of the public notification. This may result in the VPA being modified.

Re-notification of a draft VPA will be required where:

- the modification is considered by the Council to result in a significant reduction in the public benefit to the notification VPA, and/or
- significant changes are made to the draft VPA including the timing of the delivery of contributions, provision of security or the scope of works for an item (notwithstanding to changes in public benefit).
- Significant changes to the terms of the agreement

In the above instances, Council will publicly re-notify and make available for public inspection the modified VPA and the application to which it relates.

## 5.8 COUNCIL MAY CO-CONTRIBUTE TOWARD INFRASTRUCTURE

Council may, at its sole discretion, complement monetary contributions paid by the developer with its own finances or grants to further enlarge, enhance or embellish the infrastructure or service funded under the VPA.

## 5.9 REFUNDS

Council will not under any circumstances refund monetary contributions to a developer that were paid under a VPA.

## 5.10 MONITORING OF VPAS

Council will periodically monitor the implementation of all VPAs and will seek to include provisions in VPAs requiring developers to report on their progress in the following terms.

The developer is to provide details of progress in the provision of the VPA's development contributions for the previous financial year in a written report or schedule to be submitted to the Council on or before 31 July in every year that any of the developer's obligations under the VPA remain outstanding.

This is to enable Council to meet its reporting obligations under s7.5(5) of the EP&A Act.

To assist in the active monitoring of requirements in during the DA assessment process, for VPAs that will span more than one DA, proponents will be required to include a statement with each DA identifying the relevant infrastructure triggers and items to be delivered to support that development under the VPA. This will assist in the inclusion of appropriate conditions of consent to ensure the right infrastructure is delivered in line with the development and VPA requirements.

## 5.11 CHANGES TO THE DEVELOPMENT

Major developments linked to VPAs often occur over long timeframes, and the scale or nature of the development described in the Agreement can change over time (e.g. additional dwellings, floorspace, population, employees, etc).

The evolution of a development may require additional local infrastructure or other public purposes to be required.

Changes to development may require an amendment to the planning agreement, or a new planning agreement, and will be considered on a case by case basis

## 5.12 PUBLIC INFORMATION AND REPORTING

Council will keep a register of all VPAs applying to land within the Local Government area, including agreements that the Council is a not a party to. The register will record the date an agreement was entered into and a short description of the agreement, including any subsequent amendments.

The following will be available to download on Council's website, and available for viewing at the Civic Centre during ordinary office hours:

- the planning agreement register
- copies of all planning agreements (and any amendments) that apply to land within the City of Penrith LGA
- copies of explanatory notes relating to those agreements or amendments.

Council will in its annual report prepare a report on the progress of all the VPAs that it is a party to and which remain in force.

## 5.13 ARRANGEMENTS FOR THE USE OF LAND

There may be instances where it is in the public interest that the use of land occurs prior to the completion of any applicable maintenance periods. Where this is the case, Council will seek VPA will require maintenance periods after handover and will authorise the Developer to access the land for that purpose.

## 6. CONTRIBUTION CREDITS

Contribution 'credits' may be provided to the developer in respect to the works delivered under an agreement. These 'credits' may be considered by Council to offset development contributions that may be imposed on that development through a DA consent or CDC

Council has discretion in the consideration of the opportunity for contribution credits and will consider the following principles when assessing the opportunity for credits:

- Where the work within the agreement is listed in a development contributions plan, a credit cannot exceed the value of that work in the contributions plan.
- No credits will be given for works or land additional to the requirements of a contributions plan.
- Where the completed works exceed the cost of works within the contributions plan, no credits will be available.
- Where the contribution credit is less than the contributions imposed by a DA consent or CDC, the balance of these contributions is to be paid to Council.
- Works delivered under an agreement that satisfy obligations under Councils Community Infrastructure Policy will not be considered for credits.
- Generally, the offset amount considered will only be up to the amount payable in respect of the same category of infrastructure included in a contributions plan.
- If a contributions credit exceeds the contributions plan requirement, Council may at its discretion:
  - Allow the developer to use the remaining part of the credit in relation to future development in the locality of the development where the VPA applies, or
  - Enable monetary recoupment of credits from future development, where the exceeding credits have benefited this land by delivering works subject to the contributions plan, or
  - In limited situations- pay the difference.

## APPENDIX A: ASSESSMENT CRITERIA

### CRITERIA FOR THE ASSESSMENT OF THE ACCEPTABILITY OF VOLUNTARY PLANNING AGREEMENTS

- Is the planning agreement directed towards a legitimate planning purpose? Is this purpose identified in statutory planning controls and other adopted strategies of Council?
- Do the proposed public benefits have a relationship to the development that are not wholly unrelated to the development?
- Does the agreement meet values and expectations of the public and protect public interest?
- Does the planning agreement provide a reasonable means to achieve the desired outcomes for the development?
- Does the planning agreement demonstrate the achievement of a public benefit?
- Where the agreement relates to a change in zoning or development standards, does the value of the development uplift equate to the public benefit proposed?
- Does the planning agreement adequately secure public benefits as required?
- Has the planning agreement been negotiated and prepared to protect the community against adverse planning decisions?
- Do the public benefits proposed under the agreement adequately meet the demands created by the new development?
- Are there any identified risks for Council in entering into the planning agreement? Can these be suitably managed?
- Are the benefits proposed by the planning agreement such that it is appropriate to forego monetary contributions that would be otherwise paid under the applicable development contributions plan?

## APPENDIX B: WORKS IN KIND AGREEMENT TEMPLATE

DRAFT

# Works in Kind Agreement

## Draft 1

**[Date] Penrith City Council**

*ABN 43 794 422 563*

**[Developer Name]**

*ACN [Developer ACN]*

### **Sydney**

Level 29, MLC Centre, 19 Martin Place, Sydney NSW 2000

PO Box Q1164, QVB Post Office, Sydney NSW 1230

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adelaide | brisbane | canberra | darwin | melbourne | newcastle | perth | sydney | upper hunter

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# Agreement

## Date

## Parties

### First party

**Name** Penrith City Council (**Council**)  
**ACN** 43 794 422 563  
**Contact** The General Manager  
**Telephone** 02 4732 7777

### Second party

**Name** [Developer Name] (**Developer**)  
**ACN** [Developer ACN]  
**Contact** [Developer contact]  
**Telephone** [Developer telephone details]

## Background

- A. On [date], the Consent was granted to carry out [insert details] on the Land.
- B. The Developer has the benefit of the Consent and proposes to carry out the Development.
- C. Condition [x] of the Consent provides: [insert details of contributions requirement]
- D. In accordance with section 7.11(5) of the Act, the Developer has offered to enter into this Agreement requiring it to carry out the Works, including [describe works] referred to in the Contributions Plan, in satisfaction [or partial satisfaction] of the requirement under condition [x] of the Consent in accordance with section 7.11(5) of the Act.

## Operative part

### 1 Definitions

In this agreement, unless the context indicates a contrary intention:

**NOTE: Remove definitions that are not required.**

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

**Address** means a party's address set out in the Notices clause of this agreement;

**Agreed Estimate** means the estimated cost of the Works as agreed between the parties at the date of this agreement as set out in Schedule 1;

**Approval** means any certificate, licence, consent, permit, approval or other requirement of any Authority having jurisdiction in connection with the activities contemplated by this agreement;

**Authority** means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person;

**Bank Guarantee** means an irrevocable and unconditional undertaking that is not limited in time and does not expire by one of the following trading banks:

- (a) Australia and New Zealand Banking Group Limited,
- (b) Commonwealth Bank of Australia,
- (c) Macquarie Bank,
- (d) National Australia Bank,
- (e) St George Bank Limited,
- (f) Westpac Banking Corporation, or
- (g) Other financial institution approved by the Council,

to pay an amount or amounts of money to the Council on demand and containing terms and conditions reasonably acceptable to the Council;

**Bond** means a documentary performance bond which must be denominated in Australian dollars and be an unconditional undertaking issued by an Australian Prudential Regulation Authority (APRA) regulated authorised deposit taking institution or an insurer authorised by APRA to conduct new or renewal insurance business in Australia that has at all times an investment grade security rating from an industry recognised rating agency;

**Business Day** means a day on which banks are open for general banking business in Sydney, excluding Saturdays and Sundays;

**Certificate of Practical Completion** means the written certificate confirming the Works, or part of the Works, have been completed to the Council's satisfaction issued under clause 10.1(d) of Schedule 2;

**Claim** means any claim, loss, liability, damage, proceeding, order, judgment or expense arising out of the operation of this agreement;

**Consent** means [insert details of development consent or complying development certificate requiring payment of contributions]

**Construction Certificate** means a construction certificate as defined under section 6.4 of the Act;

**Construction Terms** means the terms set out in Schedule 2;

**Contributions Plan** means [insert details of relevant Contributions Plan adopted by Council];

**CPI** means the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics;

**Damages** means all liabilities, losses, damages, costs and expenses, including legal fees and disbursements and costs of investigation, litigation, settlement, judgment, interest and penalties;

**Dealing**, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land;

**Dedication Land** means that part of the Land to be dedicated to Council in accordance with this agreement, as shown on the plan at Annexure D;

**Development** means the development subject to the Consent;

**Development Contributions** means development contributions required by a condition of the Consent imposed in accordance with section 7.11 of the Act;

**Easement Terms** means the terms of a public access easement as set out in Schedule 3;

**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 of or administration of the GST;

**Handover** means, with respect to any Works, the time Council takes possession of and assumes responsibility for the work in accordance with the Construction Terms;

**Insolvent** means, in relation to a party:

- (a) that party makes an arrangement, compromise or composition with, or assignment for, the benefit of its creditors or a class of them;
- (b) a receiver, receiver and manager, administrator, provisional liquidator, trustee, controller, inspector or analogous person is appointed in relation to, or over, all or any part of that party's business, assets or securities;
- (c) a presumption of insolvency has arisen under legislation because of the party's failure to comply with a statutory demand or analogous process;
- (d) an application for the winding up of, or for the appointment of a receiver to, that party, other than winding up for the purpose of solvent reconstruction or re amalgamation, is presented and not withdrawn or dismissed within [21] days (or such longer period agreed to by the parties), or an order is made or an effective resolution is passed for the winding up of, or for the appointment of a receiver to, that party, or any analogous application is made or proceedings initiated;
- (e) any shareholder or director of that party convenes a meeting for the purpose of considering or passing any resolution for the winding up or administration of that party;
- (f) that is an individual, a creditor's petition or a debtor's petition is presented to the Official Receiver or analogous authority in relation to that party;
- (g) an execution or analogous process is levied or enforced against the property of that party;
- (h) that party ceases or suspends, or threatens to cease or suspend, the conduct of all or a substantial part of its business;
- (i) that party disposes of, or threatens to dispose of, a substantial part of its assets;
- (j) that party stops or suspends, or threatens to stop or suspend, payment of all or a class of its debts; or
- (k) that party is unable to pay the party's debts as and when they become due and payable.

**Land** means Lot no. DP no., known as [address of land];

**Landowner** means [name of registered proprietor of the land];

**Law** means:

- (a) any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation;
- (b) any Approval, including any condition or requirement under it; and
- (c) any fees and charges payable in connection with the things referred to in paragraphs (a) and (b);

**Maintain** means works to bring an item to or keep an item in a state of reasonable condition and in accordance with relevant standards applicable at the time of construction of the item, including repairing any defects due to use of poor materials or due to poor workmanship, but does not include repairing normal wear and tear, removing graffiti or repairing any item damaged as a consequence of vandalism.

**Maintained** and **Maintenance** have corresponding meanings.

**Modification Application** means any application to modify the Development Consent under section 4.55 of the Act;

**Occupation Certificate** means an occupation certificate as defined under section 6.4 of the Act;

**Public Access Land** means that part of the Land to be made accessible to the public set out in Annexure E;

**Public Reserve** has the same meaning as in the *Local Government Act 1993*;

**Public Road** has the same meaning as in the *Roads Act 1993*;

**Register** means the Torrens title register maintained under the *Real Property Act 1900* (NSW);

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

**Related Body Corporate** has the meaning given to that term in s 9 of the *Corporations Act 2001* (Cth);

**Subdivision Certificate** means a subdivision certificate defined under section 6.4 of the Act;

**Subdivision Works Certificate** means a subdivision works certificate defined under section 6.4 of the Act; and

**Works** means the work set out in Schedule 1.

## 2 Interpretation

**NOTE: Delete references that are not required.**

In this agreement, unless the context indicates a contrary intention:

- (a) **(documents)** a reference to this agreement or another document includes any document which varies, supplements, replaces, assigns or novates this agreement or that other document;

- (b) **(references)** a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this agreement;
- (c) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this agreement;
- (d) **(person)** a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns;
- (e) **(party)** a reference to a party to a document includes that party's personal representatives, executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) **(president, General Manager, CEO or managing director)** the president, General Manager, CEO or managing director of a body or Authority means any person acting in that capacity;
- (g) **(requirements)** a requirement to do any thing includes a requirement to cause that thing to be done, and a requirement not to do any thing includes a requirement to prevent that thing being done;
- (h) **(including)** including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind;
- (i) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (j) **(singular)** the singular includes the plural and vice-versa;
- (k) **(gender)** words importing one gender include all other genders;
- (l) **(parts)** a reference to one or more things includes each part and all parts of that thing or group of things but nothing in this clause implies that part performance of an obligation constitutes performance of that obligation;
- (m) **(rules of construction)** neither this agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting;
- (n) **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (o) **(time and date)** a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in City or State, Australia, even if the obligation is to be performed elsewhere;
- (p) **(joint and several)** an agreement, representation, covenant, right or obligation:
  - (i) in favour of two or more persons is for the benefit of them jointly and severally; and
  - (ii) on the part of two or more persons binds them jointly and severally;

- (q) **(writing)** a reference to a notice, consent, request, approval or other communication under this agreement or an agreement between the parties means a written notice, request, consent, approval or agreement;
- (r) **(replacement bodies)** a reference to a body (including an institute, association or Authority) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions;
- (s) **(Australian currency)** a reference to dollars or \$ is to Australian currency;
- (t) **(month)** a reference to a month is a reference to a calendar month; and
- (u) **(year)** a reference to a year is a reference to twelve consecutive calendar months.

### 3 Application of this agreement

This agreement applies to the Land and the Development and any other land relevant to the Works.

### 4 Operation of this agreement

This agreement commences on and from the date it is executed by all parties.

### 5 Works in Kind

#### 5.1 Works

- (a) The Developer will carry out the Works in accordance with this agreement, including the Construction Terms, and any Development Consent or other Approval granted for the Works.
- (b) The Works or any part of the Works required under this agreement will be taken to have been completed for the purposes of this agreement when a Certificate of Practical Completion has been issued for those Works.
- (c) The Works or any part of the Works required under this agreement will be taken to have been delivered to Council on Handover in accordance with the Construction Terms.
- (d) The Works must be delivered to the Council [insert details of timing eg. Within x months of the date of this agreement or prior to the issue of a Subdivision Certificate for the Development], or at a time otherwise agreed between the parties if completion of the Works is delayed due to circumstances beyond the control of the Developer.
- (e) For the avoidance of doubt, any credit for the Works to be provided by Council in accordance with clause 6 will not take effect until Handover of the Works is complete.

**OPTION: Where land subject to the Works is also to be dedicated, delete if inapplicable**

#### 5.2 Dedication of Land

- (a) The Developer acknowledges that Council does not own the land on which the Works are to be located and agrees to transfer or dedicate that land to Council in accordance with this agreement.

**OPTION: Where land to be dedicated**

- (b) The Developer must dedicate or cause to be transferred to the Council, at no cost to the Council, the Dedication Land freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, easements, rights, charges, rates and contracts in, over or in connection with the land, including but not limited to, municipal rates and charges, water rates and land tax.
- (c) The Developer must take all steps, prepare all documents and meet all costs required to dedicate the Dedication land including, but not limited to:
  - (i) removing any encumbrances on the title to the land;
  - (ii) creating an interest in land in favour of Council if required;
  - (iii) subdividing the Land to create a separate lot for the Dedication Land;
  - (iv) preparing and lodging documents for registration;
  - (v) obtaining the consent of any other parties to the registration of the relevant documents; and
  - (vi) attending to any requisition relating to any dealing or document lodged for registration.

**OPTION: For dedication of public reserve land**

- (d) The obligation to dedicate the Dedication Land will be taken to have been satisfied when the Public Reserve is dedicated to Council by operation of the registration of a plan of subdivision in accordance with section 49 of the *Local Government Act 1993*.

**OPTION: For dedication of public road land**

- (e) The obligation to dedicate the Dedication Land will be taken to have been satisfied when the Public Road is dedicated to Council by operation of the registration of a plan of subdivision in accordance with section 9 of the *Roads Act 1993*.

**OPTION: For dedication of other land**

- (f) The obligation to dedicate the Dedication Land will be taken to have been satisfied when a Certificate of Title is issued by NSW Land and Property Information for the whole of the Dedication Land identifying the Council as the registered proprietor of that land without encumbrances as required by clause 5.2(b).
- (g) The Dedication Land must be dedicated or transferred to Council on Handover of the Works. For the avoidance of doubt, all Works required by this agreement on the Dedication Land must be completed in accordance with clause 5.1 prior to Council accepting the dedication.

**OPTION: Where an easement over land subject to the Works is to be granted**

**5.3 Public Access and Easements**

- (a) The Developer acknowledges that Council does not own the land on which the Works are to be located and agrees to grant an interest in that land to Council in accordance with this agreement.
- (b) The Developer will, at no cost to Council, register against the title to the Land an easement in gross burdening the Public Access Land limited in height to



[describe limitations] in favour of the Council permitting public access to the Public Access Land and generally in accordance with the Easement Terms.

- (c) Any requirement to register an easement against the title to the Land will be satisfied when the Developer provides to the Council a copy of the relevant title search showing the registration of the instrument.
- (d) Any easement, required under clause 5.3(a) must be registered on Handover of the Works. For the avoidance of doubt, all Works required by this agreement on the Public Access Land must be completed in accordance with clause 5.1 prior to Council accepting the interest in the land.

**OPTION: Where Developer is to maintain works after completion, delete if inapplicable**

#### 5.4 Maintenance and Rectification of Defects

The Developer must Maintain the Works and rectify any defects after Handover of the Works in accordance with the Construction Terms.

**OPTION: Where access to Council owned land is required, delete if inapplicable**

#### 5.5 Access to Council owned land

- (a) The Council agrees to permit the Developer, upon receiving at least 10 Business Days' prior notice, to enter, pass through or occupy any Council owned or controlled land in order to enable the Developer to properly perform its obligations under this agreement. Nothing in this clause creates or gives the Developer any estate or interest in any part of the Council owned or controlled land.
- (b) The Developer indemnifies the Council, its employees, officers, agents and contractors from and against all Claims in connection with the entry or access by the Developer to, or any presence of the Developer on, Council owned or controlled land for the purposes of performing their obligations under this agreement, except to the extent such Claim arises either directly or indirectly as a result of the Council or its employees, officers, agents, contractors or workmen's negligence, default, act or omission.

## 6 Development Contributions

### 6.1 Credit for Contributions

- (a) In consideration of the Developer performing its obligations under this agreement, Council agrees that the completion of the Works to the Council's satisfaction in accordance with this agreement will satisfy the requirement under condition [x] of the Consent to pay Development Contributions to the extent specified in this agreement.
- (b) For the purposes of clause 6.1(a) Council agrees to apply a credit against the amount of Development Contributions payable under the Consent to the value of the Works and any Dedication Land determined in accordance with clause 6.2.
- (c) For the avoidance of doubt, nothing in this agreement:
  - (i) requires Council to refund or repay any Development Contributions;
  - (ii) requires Council to pay any amount to the Developer if the value of the Works is more than the Development Contributions payable; or

- (iii) exempts the Developer from paying the Development Contributions not subject to a credit in accordance with clause 6.1(b).

## 6.2 *Value of the Works and Dedication Land*

- (a) If the Works are listed in the Contributions Plan, the value of the Works for the purposes of clause 6.1 will be taken to be the value attributed to those Works in the Contributions Plan, adjusted in accordance with CPI.
- (b) If the Works are not listed in the Contributions Plan, the value of the Works for the purposes of clause 6.1 will be the actual cost of the Works, established by the provision of invoices and remittance advices provided by the Developer to Council on Handover, provided the actual cost does not exceed the Agreed Estimate by more than 10%.
- (c) The value of any Dedication Land will be determined by an appropriately qualified land valuer appointed by Council at the Developer's cost.
- (d) Notwithstanding clauses 6.2(a) and (b) the parties may, in accordance with the Construction Terms, agree to an adjustment to the value of the Works prior to completion of the Works.

## 7 *Review of this agreement*

- (a) This agreement may be reviewed or modified.
- (b) Any review or modification of this agreement will be conducted in the circumstances and in the manner determined by the parties.
- (c) No modification or review of this agreement will be of any force or effect unless it is in writing and signed by the parties to this agreement.
- (d) A party is not in breach of this agreement if it does not agree to an amendment to this agreement requested by a party in, or as a consequence of, a review.

## 8 *Dispute Resolution*

### 8.1 *Reference to Dispute*

If a dispute arises between the parties in relation to this agreement, 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.

### 8.2 *Notice of Dispute*

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

- (a) The nature of the dispute,
- (b) The alleged basis of the dispute, and
- (c) The position which the party issuing the Notice of Dispute believes is correct.

### 8.3 *Representatives of Parties to Meet*

- (a) The representatives of the parties must promptly (and in any event within [x] Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.

- (b) The parties may, without limitation:
  - (i) resolve the dispute during the course of that meeting,
  - (ii) agree that further material or expert determination in accordance with clause 8.6 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.

#### 8.4 *Further Notice if Not Settled*

If the dispute is not resolved within [x] Business Days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (Determination Notice) by mediation under clause 8.5 or by expert determination under clause 8.6.

#### 8.5 *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 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 [x] Business Days of receipt of the Determination Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (c) The mediator appointed pursuant to this clause 8.5 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 function as a mediator, he or she being required to fully disclose any such interest or duty before his or her appointment;
- (d) The mediator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties;
- (e) The parties must within [x] 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 the Council is required to appoint a representative, the Council must advise of the representative within [x] 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.

#### 8.6 *Expert determination*

If the dispute is not resolved under clause 8.3 or clause 8.5, or the parties otherwise agree that the dispute may be resolved by expert determination, the parties may refer the dispute to an expert, in which event:

- (a) The dispute must be determined by an independent expert in the relevant field:
  - (i) Agreed upon and appointed jointly by the parties; and
  - (ii) In the event that no agreement is reached or no appointment is made within  Business Days of the agreement to refer the dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales;
- (b) The expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) The determination of the dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (d) The expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (e) Each party will bear its own costs in connection with the process and the determination by the expert and will share equally the expert's fees and costs; and
- (f) Any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
  - (i) Within  Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and commences litigation; or
  - (ii) The determination is in respect of, or relates to, termination or purported termination of this agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal.

#### 8.7 *Litigation*

If the dispute is not *finally* resolved in accordance with this clause 8, then either party is at liberty to litigate the dispute.

#### 8.8 *No suspension of contractual obligations*

Subject to any interlocutory order obtained under clause 8.1, the referral to or undertaking of a dispute resolution process under this clause 8 does not suspend the parties' obligations under this agreement.

## 9 Enforcement and Security

### 9.1 Default

- (a) In the event a party considers another party has failed to perform and fulfil an obligation under this agreement, it may give notice in writing to the other party (**Default Notice**) giving all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than 21 days.
- (b) In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (c) If a party disputes the Default Notice it may refer the dispute to dispute resolution under clause 10 of this agreement.

### 9.2 Security

- (a) In this clause 9.2, **Security** means a Bank Guarantee, Bond or cash deposit to be held by Council.
- (b) Prior to the issue of a [Construction Certificate/Subdivision Works Certificate] for the Works, the Developer must provide to the Council Security in an amount equivalent to [125% or 200%] of the Agreed Estimate of the Works. *[Note that where the Works are not listed in a Contributions Plan, security must be equivalent to 200% of the value of the Works. Council will accept security at 125% of the value of Works listed in a Contributions Plan. Security will be in accordance with Council's fees and charges for work proposed on public land and / or requires a Roads Act approval.]*

#### **OPTION: When Developer does not agree to compulsory acquisition clauses**

- (c) Prior to the issue of a [Construction Certificate/Subdivision Works Certificate] for the Works, the Developer must provide to the Council Security or a charge over land or assets equivalent to the full market value of the Dedication Land, determined in accordance with clause 6.2(c).
- (d) The Council may call on a Security provided under this clause if:
  - (i) the Developer is in material or substantial breach of this agreement and has failed to rectify the breach within a reasonable period of time after having been given reasonable notice (which must not be less than 21 Business Days) in writing to do so in accordance with clause 9.1 of this agreement; or
  - (ii) the Developer becomes insolvent.
- (e) Within 20 Business Days of each anniversary of a Security provided under clause (a), the Developer must provide Council with one or more replacement Securities (**Replacement Security**) in an amount calculated in accordance with the following:

$$A = \frac{B \times D}{C}$$

Where:

A is the amount of the Replacement Security,

B is the amount of the Security to be replaced,

C is the CPI for the quarter ending immediately before the date of the Security to be replaced,

D is the CPI for the quarter ending immediately before the date of the Replacement Security,

provided A is greater than B.

- (f) On receipt of a replacement Security provided under clause 9.2(e), the Council must release and return to the Developer, as directed, the Security that has been replaced as soon as reasonably practicable.
- (g) At any time following the provision of a Security under this clause, the Developer may provide the Council with one or more replacement Securities totalling the amount of all Securities required to be provided under this clause for the time being. On receipt of such replacement Security, the Council must release and return to the Developer, as directed, the Securities which it holds that have been replaced as soon as reasonably practicable.
- (h) Subject to this clause and the provisions of this agreement, the Council may apply the proceeds of a Security to satisfy:
  - (i) any obligation of the Developer under this agreement to deliver Contributions, and
  - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this agreement.
- (i) The Council must promptly return a Security provided under this clause if requested by the Developer and:
  - (i) Handover has occurred for an item of Works to which the Security relates; and
  - (ii) the Developer has provided a Bond or Bank Guarantee required under the Construction Terms for defects liability and maintenance of the item of Works; and
  - (iii) if the Security relates to other items of Works for which a Certificate of Practical Completion has not been issued, a replacement Security is provided by the Developer in an amount determined in accordance with clause 9.2(b).
- (j) For the avoidance of doubt, if it is practicable, Council may retain a component of the Security it holds for an item of Works that is equivalent to 25% of the value of the Works (determined in accordance with clause 6.2), in satisfaction of the requirement to submit a Bank Guarantee or Bond under the Construction Terms for defects liability and maintenance.

- (k) Nothing in this clause 9.2 prevents or restricts the Council from taking any enforcement action in relation to:
- (i) any obligation of the Developer under this agreement; or
  - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this agreement,
- that is not or cannot be satisfied by calling on a Security.

**OPTION: When land is to be dedicated**

**9.3 Caveat**

- (a) The Developer acknowledges and agrees that:
  - (i) when this agreement is executed, the Council is deemed to have acquired and the Developer is deemed to have granted, an equitable estate and interest in the Dedication Land for the purposes of section 74F(1) of the *Real Property Act 1900* (NSW) and consequently the Council will have a sufficient interest in the Land in respect of which to lodge a caveat over the Land notifying that interest; and
  - (ii) it will not object to the Council lodging a caveat in the relevant folios of the Register for the Land nor will it seek to remove any caveat lodged by the Council provided the caveat does not prevent registration of any dealing or plan other than a transfer.
- (b) When a separate lot is created for the Dedication Land, the Council may retain any caveat (or lodge a caveat) over the Dedication Land and must, at Developer's cost, register a withdrawal of any caveat in respect of the remainder of the Land.

**9.4 Compulsory Acquisition**

- (a) If the Developer does not dedicate the Dedication Land to Council as required by this agreement, the Council may compulsorily acquire the relevant land, in which case 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 in the *Land Acquisition (Just Terms Compensation) Act 1991* may recover any costs, including legal costs, incurred by the Council on acquisition of the land from the Developer.
- (b) Clause 9.4(a) constitutes an agreement for the purposes of section 30 of the *Land Acquisition (Just Terms Compensation) Act 1991*.
- (c) Except as otherwise agreed between the Developer and Council, the Developer must ensure the Dedication Land is freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, rights, charges, rates, strata levies and contracts, except as may be permitted by this agreement on the date that the Council will acquire the land in accordance with clause 9.4(a).
- (d) 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 relevant land under clause 9.4(a).

- (e) The Developer must pay the Council, promptly on demand, an amount equivalent to all costs, including legal costs, incurred by the Council acquiring the whole or any part of the relevant land under clause 9.4(a) that are not or cannot be recovered by calling on a Security.

#### 9.5 *General Enforcement*

- (a) Without limiting any other remedies available to the parties, this agreement may be enforced by any party in any Court of competent jurisdiction.
- (b) Nothing in this agreement prevents:
  - (i) 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
  - (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 agreement or any matter to which this agreement relates.

## 10 Assignment and Dealings

### 10.1 *Assignment*

- (a) A party must not assign or deal with any right under this agreement without the prior written consent of the other parties.
- (b) Any change of ownership or control (as defined in section 50AA of the *Commonwealth Corporations Act 2001*) of a party (excluding the Council) shall be deemed to be an assignment of this agreement for the purposes of this clause.
- (c) Any purported dealing in breach of this clause is of no effect.

### 10.2 *Transfer of Land*

- (a) The Developer [or the Landowner, if the Developer is not the owner of the land] may not transfer, assign or dispose of the whole or any part of its right, title or interest in the Land (present or future) or in the Development to another person (**Transferee**) unless before it sells, transfers or disposes of that right, title or interest:
  - (i) the Developer [or Landowner] satisfies the Council that the proposed Transferee is financially capable of complying with the Developer's obligations under this agreement;
  - (ii) the Developer [or Landowner] satisfies the Council that the rights of the Council will not be diminished or fettered in any way;
  - (iii) the Transferee delivers to the Council a novation deed signed by the Transferee in a form and of such substance as is acceptable to the Council containing provisions under which the Transferee agrees to comply with all the outstanding obligations of the Developer under this agreement;
  - (iv) any default under any provisions of this agreement has been remedied or waived by the Council, on such conditions as the Council may determine, and
  - (v) the Developer and the Transferee pay the Council's reasonable costs in relation to the assignment.



## 11 Approvals and consents

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

## 12 No fetter

### 12.1 Discretion

This agreement is not intended to operate to fetter, in any manner, the exercise of any statutory power or discretion of the Council, including, but not limited to, any statutory power or discretion of the Council relating to the Development Application or any other application for Development Consent (all referred to in this agreement as a "**Discretion**").

### 12.2 No fetter

No provision of this agreement is intended to constitute any fetter on the exercise of any Discretion. If, contrary to the operation of this clause, any provision of this agreement is held by a court of competent jurisdiction to constitute a fetter on any Discretion, the parties agree:

- (a) They will take all practical steps, including the execution of any further documents, to ensure the objective of this clause is substantially satisfied,
- (b) In the event that (a) cannot be achieved without giving rise to a fetter on the exercise of a Discretion, the relevant provision is to be severed and the remainder of this agreement has full force and effect, and
- (c) To endeavour to satisfy the common objectives of the parties in relation to the provision of this agreement which is to be held to be a fetter on the extent that is possible having regard to the relevant court judgment.

## 13 Notices

Any notice given under or in connection with this agreement (**Notice**):

- (a) must be in writing and signed by a person duly authorised by the sender;
- (b) must be addressed as follows and delivered to the intended recipient by hand, by prepaid post or by email at the address below, or at the address last notified by the intended recipient to the sender after the date of this agreement:
  - (i) to Penrith City Council: PO Box 60, Penrith, NSW 2751  
 Fax: (02) 4732 7958  
 Email: [council@penrith.city](mailto:council@penrith.city)  
 Attention: The General Manager
  - (ii) to [Developer Name]: [Developer address]  
 Fax: [Developer fax]  
 Email: [Developer email]  
 Attention: [Developer contact]

- (c) is taken to be given or made:
  - (i) in the case of hand delivery, when delivered;
  - (ii) in the case of delivery by post, three Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country); and
  - (iii) in the case of an email, when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above; and
- (d) if under clause (c) a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it is taken to have been given or made at the start of business on the next Business Day in that place.

## 14 General

### 14.1 *Relationship between parties*

- (a) Nothing in this agreement:
  - (i) constitutes a partnership between the parties; or
  - (ii) except as expressly provided, makes a party an agent of another party for any purpose.
- (b) A party cannot in any way or for any purpose:
  - (i) bind another party; or
  - (ii) contract in the name of another party.
- (c) If a party must fulfil an obligation and that party is dependent on another party, then that other party must do each thing reasonably within its power to assist the other in the performance of that obligation.

### 14.2 *Time for doing acts*

- (a) If the time for doing any act or thing required to be done or a notice period specified in this agreement expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.
- (b) If any act or thing required to be done is done after 5.00 pm on the specified day, it is taken to have been done on the following Business Day.

### 14.3 *Further assurances*

Each party must promptly execute all documents and do all other things reasonably necessary or desirable to give effect to the arrangements recorded in this agreement.

### 14.4 *Variation*

A provision of this agreement can only be varied by a later written document executed by or on behalf of all parties and in accordance with the provisions of the Act.

#### 14.5 *No assignment*

A party cannot assign or otherwise transfer its rights under this agreement without the prior written consent of the other party.

#### 14.6 *Counterparts*

This agreement may be executed in any number of counterparts. All counterparts taken together constitute one instrument.

#### 14.7 *Legal expenses, stamp duty and administration fees*

- (a) The Developer must pay on demand Council's reasonable legal costs and disbursements in connection with the negotiation, preparation, execution, stamping, and release and discharge of this agreement, including the reasonable costs incurred by the Council in obtaining any advice about this agreement or the value of land or works to be delivered under this agreement.
- (b) On execution of this agreement, the Developer must pay an administration, monitoring and enforcement fee to the Council in the amount of \$[X]. *[Note that the amount specified will be equivalent to 1% of the total value of the contributions subject to the agreement].*

#### 14.8 *Entire agreement*

The contents of this agreement constitute the entire agreement between the parties and supersede any prior negotiations, representations, understandings or arrangements made between the parties regarding the subject matter of this agreement, whether orally or in writing.

#### 14.9 *Representations and warranties*

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

#### 14.10 *Severability*

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

#### 14.11 *Invalidity*

- (a) A word or provision must be read down if:
  - (i) this agreement is void, voidable, or unenforceable if it is not read down;
  - (ii) this agreement will not be void, voidable or unenforceable if it is read down; and
  - (iii) the provision is capable of being read down.
- (b) A word or provision must be severed if:
  - (i) despite the operation of clause (a), the provision is void, voidable or unenforceable if it is not severed; and
  - (ii) this agreement will be void, voidable or unenforceable if it is not severed.

- (c) The remainder of this agreement has full effect even if clause 14.11(b) applies.

#### **14.12 Waiver**

A right or remedy created by this agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.

#### **14.13 GST**

- (a) Words and expressions which are not defined in this agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this agreement are exclusive of GST.
- (c) If GST is imposed on any supply made under or in accordance with this agreement, the Developer must pay the GST or pay to the Council an amount equal to the GST payable on or for the taxable supply, whichever is appropriate in the circumstances.

#### **14.14 Governing law and jurisdiction**

- (a) The laws applicable in New South Wales govern this agreement.
- (b) The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

## Schedule 1 Works

### **1 Scope of Works**

[Insert proposed scope of works, providing sufficient detail relating to standard and quality of proposed works, including any diagrams or plans – see Annexure B (Plans Showing Works) and Annexure C (Schedule of Materials and Finishes for Works)]

### **2 Agreed Estimate**

[Insert details of Agreed Estimate including reference to QS report if required]

## Schedule 2 Construction terms

### 1 Interpretation

For the purposes of this Schedule 2, the defined terms in clause 1 of this agreement and the Interpretation principles in clause 2 of this agreement will apply and, unless context indicates a contrary intention:

**Builder** means any entity contracted under the Construction Contract to carry out the Works.

**Construction Contract** means the contract to carry out the Works (whether or not that is a contract for the Works only or forms part of a contract for the building of other components of the Development).

**Defects Liability and Maintenance Period** means in respect of each item of building works which together comprise the Works the period of 12 months from the date on which Handover of the Works occurs.

**Detailed Design** means the final specifications and finishes for the Works prepared in accordance with clause 5.2 of this Schedule 2 and will include the design of the Works, the location for the Works, installation specifications and estimated costs of construction and/or installation.

**Services** means all water, gas, electricity, television, drainage, sewerage, cable TV, data communications, telecommunications and other services which are required under a development consent within the meaning of the Act or an Approval and which are necessary or desirable for the construction or operation of the Development.

**Superintendent** means the Superintendent appointed under any Construction Contract.

### 2 Requirements of Authorities and Approvals

2.1 These Construction Terms must be read and construed subject to:

- (a) any requirements or conditions of any Development Consent;
- (b) the requirements of and conditions imposed by all relevant Authorities and all Laws relating to the Works and the construction of the Works.

2.2 If the Developer requires any Approvals in order to carry out the obligations under this agreement, then the Developer will acquire all Approvals necessary to carry out the Works at its own cost.

2.3 The Developer must ensure that the Works carried out under this agreement are carried out:

- (a) in accordance with the relevant Development Consent for the Works and all Approvals and the requirements of all Laws, including without limitation, work health and safety legislation; and
- (b) in a good and workmanlike manner and so that they are diligently progressed until completion;

AND it is acknowledged that to the extent that there is any inconsistency between this agreement and any Approval the terms of the Approval shall take precedence.

### 3 Costs of Works

All costs of the Works must be borne by the Developer.

#### **4 Project Management and Contractor Engagement**

- 4.1 The Developer will be responsible for managing the Works.
- 4.2 The Developer will ensure that any contractor it engages to carry out the Works agrees to:
- (a) carry out the Developer's obligations in these Construction Terms as part of any Construction Contract; and
  - (b) request a Council representative to be present at each on-site meeting attended by the Superintendent and to ensure the Council representative is present at the meeting.

#### **5 Design Development**

##### **5.1 Concept Design**

Council and the Developer have worked in consultation with each other to prepare and agree the concept plans for the Works at Annexure B.

##### **5.2 Detailed Design**

- (a) Prior to Works commencing the Developer must provide a copy of the draft Detailed Design to the Council for approval.
- (b) Within 15 Business Days of receiving the Detailed Design, Council will respond to the Developer with any suggested amendments to the Detailed Design.
- (c) Council and the Developer must work in consultation with each other to prepare and agree the Detailed Design and must both act reasonably and with due expedition in their consultations with each other.
- (d) If the Detailed Design is not completed and agreed within 15 Business Days of Council providing its suggested amendments in accordance with clause 5.2(b) of this Schedule, to avoid possible delays to the issue of a Certificate of Practical Completion, the Council will, in its sole discretion, be entitled to decide on any outstanding or undecided matter or item relating to areas that are to be accessible to the public, provided that any decision made by Council under this clause:
  - (i) is consistent with the obligation to carry out the Works and dedicate the Dedication Land under this agreement; and
  - (ii) is consistent with the Development Consent; and
  - (iii) does not materially and adversely affect the Development; and
  - (iv) is not unreasonable.

- 5.3 Any acceptance by the Council of the Detailed Design under this clause 5 is not to be taken as approval of or to any Construction Certificate for the Works.

##### **5.4 Good faith**

The parties must act promptly and in good faith to consult in relation to the Detailed Design.

#### **6 Carrying out of Works**

## 6.1 Communication

The Developer must notify Council on the commencement of the Works and keep Council reasonably informed of progress of the Works and provide to Council such information about the Works as Council reasonably requests.

## 6.2 Standard of Works

- (a) Unless otherwise provided, the Developer shall, and must cause the Builder to, use suitable new materials and proper and tradesmanlike workmanship when carrying out the Works.
- (b) The qualitative standard of the design and finishes for the Works must be no less than those described in the following documents:
  - (i) Any relevant Australian Standard;
  - (ii) Any relevant design standards or guidelines and any other requirements or policies applied by the Council from time to time in assessing the adequacy of any works or improvements proposed for the public domain or to be accessible to the public in accordance with this agreement.
- (c) The Developer will obtain any relevant standards (including design standards), specifications, or guidelines and any other requirements or policies referred to in clause 6.2(b)(ii) of this Schedule from Council if the Council fails to deliver them to the Developer.
- (d) The Developer may but is not obliged to reinstate any Works where damage or destruction is as a result of:
  - (i) Any act or omission of the Council or its employees, consultants or agents relating to any part of the Works under this agreement; or
  - (ii) The use or occupation by the Council or its employees, consultants or agents, Council's representatives or other contractor of the Council of any part of the Works.

## 6.3 Damage to people, property & utilities

- (a) The Developer is to ensure to the fullest extent reasonably practicable that, in performing its obligations under this agreement:
  - (i) all necessary measures are taken to protect people and property;
  - (ii) unnecessary interference with the passage of people and vehicles is avoided; and
  - (iii) nuisances and unreasonable noise and disturbances are prevented.
- (b) Without limiting clause 6.3(a) of this Schedule, the Developer is not to obstruct, interfere with, impair or damage any public road, public footpath, public cycleway or other public thoroughfare, or any pipe, conduit, drain, watercourse or other public utility or service on any land except as authorised in writing by the Council or any relevant Authority.

## 7 Variations

- (a) Notwithstanding any other provision of this agreement, the parties to this agreement may agree, in writing, to a variation to the Detailed Design, for the



reasons of environmental conditions, changes as a result of approval being granted, achieving cost efficiencies or for any other practical purpose.

- (b) The acceptance of a variation, for the purposes of this agreement, should not be unreasonably withheld by any party if the proposed amendment does not significantly affect the public benefit to be provided or the cost of carrying out the Works.
- (c) For the avoidance of doubt, clause 7(b) of this Schedule is not intended to fetter the Council's discretion when determining any application for or proposed modification to any approval applying to the Works.

## 8 Review of Scope of Works

If, at any time prior to completion of the Works, the parties to this agreement agree, in writing, that the estimated cost of any item of the Works is likely to be above or below the Agreed Estimate for that item by more than 10%, the parties may agree to review the scope of the works for that item and the terms of this agreement to ensure that:

- (a) the Developer makes an appropriate contribution to provide the public benefit as described in the Contributions Plan; and
- (b) any credit for Development Contributions imposed under the Consent is adjusted, up or down, proportionately to the agreed changes.

## 9 Inspection

- (a) On completion of the Detailed Design, the Council will provide a schedule of inspections to be undertaken by Council (**Inspection Schedule**) to occur at specified stages of the construction of the Works (**Inspection Stage**). If the Council does not provide the Inspection Schedule, the Developer must request the Inspection Schedule from the Council prior to the Works commencing.
- (b) Five Business Days prior to reaching an Inspection Stage as set out in the Inspection Schedule, the Developer must notify the Council of the proposed inspection date (**Inspection Date**).
- (c) On the Inspection Date, or other agreed date, the Developer must ensure that any employees, contractors, agents or representatives of Council have access to and may enter the Land to inspect the Works.
- (d) In addition to carrying out inspections in accordance with the Inspection Schedule, the Council and its employees, contractors, agents or representatives may enter the Land or any part of the Land on which the Works are located to inspect the progress of the Works, subject to:
  - (i) the terms of the Construction Contract (save for any clause of the Construction Contract which prevents the Council from accessing the Land);
  - (ii) giving reasonable notice to the Developer;
  - (iii) complying with all reasonable directions of the Developer; and
  - (iv) being accompanied by the Developer or a nominee, or as otherwise agreed.
- (e) The Council may, acting reasonably, within 5 Business Days of carrying out an inspection (either under clause 9(c) or clause 9(d) of this Schedule), notify the

Developer of any defect or non-compliance in the Works and direct the Developer to carry out work to rectify that defect or non-compliance within a reasonable period of time. Such work may include, but is not limited to:

- (i) removal of defective or non-complying material;
  - (ii) demolishing defective or non-complying work;
  - (iii) reconstructing, replacing or correcting any defective or non-complying work; and
  - (iv) not delivering any defective or non-complying material to the site of the Works.
- (f) If the Developer is issued a direction to carry out further work under clause 9(e) of this Schedule, the Developer must, at its cost, rectify the defect or non-compliance specified in the Notice within the time period specified in the Notice, provided that it is reasonable having regard to the nature of the works.
- (g) If the Developer fails to comply with a direction to carry out work given under clause 9(e) of this Schedule, the Council will be entitled to refuse to accept that the Works (or the relevant part of the Works) meet the Council's standards and specifications and may refuse to issue a Certificate of Practical Completion, until the required Works have been completed to the Council's satisfaction, acting reasonably.
- (h) For the avoidance of doubt, any acceptance by the Council that the Developer has rectified a defect or non-compliance identified in a notice issued under clause 9(e) of this Schedule does not constitute:
- (i) acceptance by the Council that the Works comply with all Approvals and Laws; or
  - (ii) an Approval by the Council in respect of the Works; or
  - (iii) an agreement or acknowledgment by the Council that the Works or the relevant part of the Works are complete and may be delivered to the Council in accordance with this agreement.

## **10 Completion**

### **10.1 Practical Completion**

- (a) When the Developer considers that the Works, or any part of the Works, are complete, the Developer must send a Notice to the Council accompanied by complete works as executed plans, any relevant certificates or consents of any public utility authority and a request for written certification from the Council that the Works are complete.
- (b) Within 10 Business Days of receipt of the notice under clause 10.1(a) of this Schedule 2, the Council will carry out an inspection of the Works and will, acting reasonably, either:
- (i) provide written certification to the Developer that the Works have been completed; or
  - (ii) notify the Developer of any additional information required or matters which must be addressed by the Developer prior to the certification being issued.

- (c) If the Developer is required to provide additional information or address any matters under clause 10.1(b)(ii) of this Schedule, the Developer will provide that information to Council or address those matters within 10 Business Days of receiving the notice or within a reasonable period of time and make a further request under clause 10.1(a) of this Schedule 2 for written certification that the Works have been completed.
- (d) Practical completion will be achieved in relation to the Works or any part of the Works when a Certificate of Practical Completion has been issued for those Works.

## 10.2 Handover

- (a) The Developer is responsible for the delivery and care of the Works at all times prior to Handover of the Works.
- (b) Handover will occur and Council will assume responsibility for the Works:
  - (i) following dedication to Council of the land on which Works are located; or
  - (ii) if Works are carried out on land already owned by Council, on the issue of a Certificate of Practical Completion for those Works.

## 10.3 Delivery of documents

- (a) If it has not already done so, the Developer must as soon as practicable, and no later than 20 Business Days after the date on which the Certificate of Practical Completion is issued in respect of the Works or any part of the Works deliver to the Council, complete and legible copies of:
  - (i) all "as built" full-sized drawings, specifications and relevant operation and service manuals;
  - (ii) all necessary certificates including the certificates of any consultants of the Developer that the Council may reasonably require, and Approvals of any public utility authority (where relevant); and
  - (iii) copies of all Approvals required for use of the land subject to the Works.
- (b) The Developer must as soon as practicable, and no later than 20 Business Days after the date on which the Certificate of Practical Completion is issued in respect of the Works or any part of the Works, provide the Council with a tour of the land subject to the Works and provide reasonable instructions on the operation and use of the Services on that land.

## 10.4 Assignment of Warranties and Causes of Action

- (a) The Developer must assign (as beneficial owner) or cause to be assigned to Council the benefit of any warranties and guarantees obtained by the Developer and the Builder (and capable of assignment) with respect to any material or goods incorporated in or forming part of the Works.
- (b) To the extent that any such warranties or guarantees cannot be assigned, the Developer must at the request of Council do anything reasonably required by Council to enforce such warranties or guarantees for the benefit of Council.

## 11 Defects Liability and Maintenance

### 11.1 Maintenance

- (a) Prior to the issue of a Certificate of Practical Completion for any part of the Works, the Developer must provide to the Council a Maintenance Schedule setting out the proposed maintenance works and estimated costs for the relevant part of the Works over the Maintenance Period.
- (b) Within 10 Business Days of receiving the Maintenance Schedule, Council must issue a written notice to the Development advising of any changes it requires to the Maintenance Schedule, which changes must be reasonable and in accordance with Council's usual practice for maintaining works of the same type.
- (c) Within 5 Business Days of receiving the Council's notice under clause 11.1(b) of this Schedule, the Developer must provide to Council a final Maintenance Schedule incorporating the Council's changes.
- (d) The Works or any part of those works, must be Maintained by the Developer in accordance with the Maintenance Schedule for the Maintenance Period.
- (e) The Developer must follow relevant Council policies and obtain all Approvals necessary to carry out the Maintenance required under this clause.
- (f) The Council must give the Developer and its contractors any access required to carry out Maintenance in accordance with the Maintenance Schedule.

#### 11.2 Defects Liability and Maintenance Period

- (a) During the Defects Liability and Maintenance Period, the Council (acting reasonably) may give to the Developer a notice (**Rectification Notice**) in writing that identifies a defect in the Works or any Maintenance requirement that has not been complied with.
- (b) The Rectification Notice must specify:
  - (i) action required to be undertaken by the Developer to rectify the defect or Maintain the Works (**Rectification Works**); and
  - (ii) the date on which the defect must be rectified, or the Maintenance work completed (**Rectification Date**).
- (c) The Developer must comply with the Rectification Notice by:
  - (i) procuring the performance of the Rectification Works by the Rectification Date, or such other date as agreed between the parties;
  - (ii) keeping the Council reasonably informed of the action to be taken to rectify the defect or Maintain the Works; and
  - (iii) carrying out the Rectification Works.
- (d) The Council must give the Developer and its contractors any access required to carry out the Rectification Works.
- (e) When the Developer considers that the Rectification Works are complete, either the Developer must notify the Council and provide documentation, plans or invoices which establish that the Rectification Works were carried out.
- (f) The Council may inspect the Rectification Works within 15 Business Days of receiving a Notice from the Developer under clause 11.2(e) of this Schedule and, acting reasonably:

- (i) issue a further Rectification Notice if it is not reasonably satisfied that the Rectification Works are complete; or
  - (ii) notify the Developer in writing that it is satisfied the Rectification Works are complete.
- (g) The Developer must meet all costs of and incidental to rectification of defects or Maintenance of Works under this clause 11.
- (h) If the Developer fails to comply with a Rectification Notice, then the Council may do such things or take such action as is necessary to carry out the Rectification Works, including accessing and occupying any part of the Land without further notice to the Developer, and may:
- (i) call upon any Bond or Bank Guarantee provided to the Council under clause 11.3 of this Schedule to meet its costs of carrying out Rectification Works; and
  - (ii) recover as a debt due to the Council by the Developer in a court of competent jurisdiction, any difference between the amount of the Bond or Bank Guarantee and the costs incurred by the Council in carrying out Rectification Works.
- (i) The Developer must request that Council inspect the Works 28 days prior to the end of the Defects Liability and Maintenance Period. The Council must inspect the Works at any time after receiving the request from the Developer and before to the end of the Defects Liability and Maintenance Period.
- (j) If, prior to the end of the Defects Liability and Maintenance Period:
- (i) the Developer fails to request the inspection, or
  - (ii) the Council does not carry out the inspection,
- the Council may extend the Defects Liability and Maintenance Period so that the inspection may be carried out.

### 11.3 Security for Defects Liability

- (a) Prior to the issue of a Certificate of Practical Completion for each item of the Works the Developer must deliver to the Council Bonds or Bank Guarantees in an amount equivalent to 25% of the construction costs for the particular item of Works.
- (b) The Developer advises and the Council acknowledges its awareness that the Bonds or Bank Guarantees may be supplied by the Builder and form a part of the security held by the Developer from the Builder under the terms of the Construction Contract, provided that:
  - (i) any Bond or Bank Guarantee provided by the Builder benefits the Council and satisfies the requirements of this agreement; and
  - (ii) the Developer procures an agreement from the Builder that the Council will be entitled to call on any Bond or Bank Guarantee provided by the Builder, in accordance with the terms of this agreement and the terms of any Construction Contract.
- (c) Within 10 Business Days after the Defects Liability and Maintenance Period for a particular item of Works has expired Council must (if it has not called on it) return

the Bond or Bank Guarantee referred to in clause 11.3(a) of this Schedule for that item of Works (or any remaining balance of it) to the Developer.

- (d) Notwithstanding clause 11.3(c) of this Schedule, if during the Defects Liability and Maintenance Period for a particular item of Works, the Council issues a Rectification Notice, then the Council need not deliver the balance of any Bonds or Bank Guarantees provided to it until the Rectification Notice has been complied with.

## **12 Risk**

The Developer undertakes the Works entirely at its own risk.

## **13 Insurance**

- (a) Prior to the commencement of the construction of any of the Works, the Developer must ensure the Builder effects and the Developer must produce evidence to the Council of the following insurances issued by an insurer approved by the Council (acting reasonably) in a form approved by the Council (acting reasonably):
- (i) construction works insurance for the value of the Works;
  - (ii) public risk insurance for at least \$20 million;
  - (iii) workers compensation insurance as required by Law.
- (b) The Developer must provide evidence of currency of insurance required by clause 13(a) of this Schedule upon request by the Council, acting reasonably, throughout the term of this agreement.

## **14 Indemnities**

The Developer indemnifies the Council, its employees, officers, agents and contractors from and against all Claims in connection with the carrying out by the Developer of the Works except to the extent such Claim arises either directly or indirectly as a result of the Council or its employees, officers, agents, contractors or workmen's negligence, default, act or omission.

## **15 Intellectual Property Rights**

The Council acknowledges that the Developer or its contractors hold all rights to copyright and any intellectual property which may exist in the Works. To the extent the Developer have or receive intellectual property rights for the Works, the Developer shall assign those intellectual property rights to Council or permit use thereof.

## **16 Risk of contamination**

The Developer acknowledges and agrees:

- (a) that it is responsible for the management and remediation of any contamination present upon or under the land on which the Works are to be carried out;
- (b) it will attend to any necessary remediation at their own costs; and
- (c) to the fullest extent permitted by Law indemnify and release the Council from any Claim which might arise from any contamination with respect to the land on which the Works are to be carried out.

## **17 Plans**

The parties acknowledge and agree that further detail and refinement of plans and documents in connection with this agreement may be necessary having regard to the following matters:

- (a) matters affecting Works not capable of identification on or before the date of this agreement; or
- (b) by agreement between the parties.

## Schedule 3 Easement Terms

***NOTE: The term Public Access Land is used in these Easement Terms. Amend that term if required.***

- 3 The owner of the Public Access Land grants to the Council and members of the public full and free right to go, pass and repass over the Public Access Land at all times:
- (c) with or without companion animals (as defined in the Companion Animals Act 1998) or other small pet animals; and
  - (d) on foot without vehicles (other than wheelchairs or other disabled access aids), unless vehicles are being used to access the building on the Land via clearly identified entry and exit points;
- for all lawful purposes.
- 4 The owner of the Public Access Land must, to the satisfaction of Council, acting reasonably:
- (i) keep the Public Access Land (including any services in, on or under the Public Access Land) in good repair and condition;
  - (ii) maintain and repair the Public Access Land and all improvements on the Public Access Land;
  - (iii) keep the Public Access Land clean and free from rubbish; and
  - (iv) maintain sufficient public liability insurance covering the use of the Public Access Land in accordance with the terms of this Easement.
- 5 The owner of the Public Access Land must ensure that any rules made by an Owner's Corporation relating to the Public Access Land have been approved by the Council, acting reasonably.
- 6 If any member or members of the public loiter or congregate, for any purpose which the owner of the Public Access Land, acting reasonably, considers to be a nuisance or a safety risk, the owner may either remove those members of the public, or arrange for their removal by an appropriate authority.
- 7 The owner of the Public Access Land may erect safety signage and any other appropriate signage and may erect CCTV cameras in the Public Access Land.
- 8 The owner of the Public Access Land may engage security personnel to monitor and control the behaviour of the public including but not limited to prohibiting smoking, consumption of alcohol (except within licensed areas), passage of animals, bicycles and skateboards and the like in accordance with any rules made by an Owner's Corporation relating to the Public Access Land.
- 9 The owner of the Public Access Land may with the Council's prior written consent (except in the case of an emergency, in which case the Council's prior written consent is not required) temporarily close or temporarily restrict access through all or part of the Public Access Land for the time and to the extent necessary but only on reasonable grounds for the purposes of:
- (a) construction, construction access, repairs, maintenance, replacement and alteration to the Public Access Land or any improvements in, on or under the Public Access Land; or



- (b) security, public safety or evacuation of the Public Access Land and adjoining buildings.
- 10 Subject to ensuring the provision of access in accordance with above clause 1 of this Schedule, the owner of the Public Access Land may, provided any necessary planning approvals are obtained:
- (e) Carry out works in the Public Access Land for the purposes of enhancing the Public Access Land;
  - (f) Install or erect works of art, street furniture, awnings, tables and chairs associated with ground floor commercial premises, notice boards or any other similar improvements at ground level within the Public Access Land; and
  - (g) Use the Public Access Land,  
in a manner consistent with [any applicable Council Policy, for example, an Outdoor Dining Policy) should be inserted here].
- 11 The Council is solely empowered to release this Easement.
- 12 This Easement may only be varied by written agreement between the Council and the owner of the Public Access Land.

## Executed as an agreement

**Executed** for and on behalf of **Penrith** )  
**City Council** by its authorised delegate in )  
accordance with a resolution of the )  
Council dated [insert date]: )

.....  
Signature of witness

.....  
Signature of Authorised Delegate

Print position:

.....  
Print name

.....  
Print name

[Insert further execution clauses as required for each party]

Annexure A      Plan showing Land

***NOTE: Delete Annexures that are not relevant***

## Annexure B      Plans showing Works

## Annexure C      Schedule of Materials and Finishes

Annexure D      Plan showing Dedication Land

Annexure E      Plan showing Public Access Land

## APPENDIX C: VOLUNTARY PLANNING AGREEMENT TEMPLATE

DRAFT



# Voluntary Planning Agreement

## Draft 1

**[Date] Penrith City Council**

*ABN 43 794 422 563*

**[Developer Name]**

*ACN [Developer ACN]*

### **Sydney**

Level 29, MLC Centre, 19 Martin Place, Sydney NSW 2000

PO Box Q1164, QVB Post Office, Sydney NSW 1230

t: +61 2 9373 3555 | f: +61 2 9373 3599 | DX 282 Sydney | [www.sparke.com.au](http://www.sparke.com.au)

adelaide | brisbane | canberra | darwin | melbourne | newcastle | perth | sydney | upper hunter

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# Agreement

## Date

## Parties

### First party

**Name** Penrith City Council (**Council**)  
**ACN** 43 794 422 563  
**Contact** The General Manager  
**Telephone** 02 4732 7777

### Second party

**Name** [Developer Name] (**Developer**)  
**ACN** [Developer ACN]  
**Contact** [Developer contact]  
**Telephone** [Developer telephone details]

## Background

***OPTION: Where agreement is connected with a Development Application or application for a Complying Development***

- A. On [date], the Developer made [a Development Application / application for a Complying Development Certificate] to carry out the Development on the Land.
- B. That application was accompanied by an offer by the Developer to enter into this agreement to make contributions for public purposes if Development Consent is granted.

***OPTION: Where agreement is connected with a Modification Application***

- C. On [date], the Council approved Development Consent DA [insert details] to carry out [insert details] on the Land.
- D. On [date], the Developer lodged a Modification Application, seeking to amend the Development Consent to authorise the Development on the Land.
- E. That Modification Application was accompanied by an offer by the Developer to enter into this agreement to make contributions for public purposes if the Development Consent is modified.

***OPTION: Where agreement is connected with an Instrument Change***

- F. On [date], the Developer made an application to the Council for the Instrument Change for the purpose of making a Development Application to the Council for Development Consent to carry out the Development on the Land.

- G. The Instrument Change application was accompanied by an offer by the Developer to enter into this agreement to make contributions for public purposes associated with the Instrument Change and the Development.

## Operative part

### 1 Definitions

In this agreement, unless the context indicates a contrary intention:

**NOTE: Remove definitions that are not required.**

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

**Address** means a party's address set out in the Notices clause of this agreement;

**Approval** means any certificate, licence, consent, permit, approval or other requirement of any Authority having jurisdiction in connection with the activities contemplated by this agreement;

**Authority** means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person;

**Bank Guarantee** means an irrevocable and unconditional undertaking that is not limited in time and does not expire by one of the following trading banks:

- (a) Australia and New Zealand Banking Group Limited,
- (b) Commonwealth Bank of Australia,
- (c) Macquarie Bank,
- (d) National Australia Bank,
- (e) St George Bank Limited,
- (f) Westpac Banking Corporation, or
- (g) Other financial institution approved by the Council,

to pay an amount or amounts of money to the Council on demand and containing terms and conditions reasonably acceptable to the Council;

**Bond** means a documentary performance bond which must be denominated in Australian dollars and be an unconditional undertaking issued by an Australian Prudential Regulation Authority (APRA) regulated authorised deposit taking institution or an insurer authorised by APRA to conduct new or renewal insurance business in Australia that has at all times an investment grade security rating from an industry recognised rating agency;

**Business Day** means a day on which banks are open for general banking business in Sydney, excluding Saturdays and Sundays;

**Certificate of Practical Completion** means the written certificate confirming the Works, or part of the Works, have been completed to the Council's satisfaction issued under clause 8.1(d) of Schedule 2;

**Claim** means any claim, loss, liability, damage, proceeding, order, judgment or expense arising out of the operation of this agreement;

**Complying Development Certificate** has the same meaning as in the Act;

**Construction Certificate** means a construction certificate as defined under section 6.4 of the Act;

**Construction Terms** means the terms set out in Schedule 2;

**Contributions** means the dedication of land, the payment of money or the carrying out of Works required under this agreement.

**Contributions Plan** has the same meaning as under the Act;

**CPI** means the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics;

**Damages** means all liabilities, losses, damages, costs and expenses, including legal fees and disbursements and costs of investigation, litigation, settlement, judgment, interest and penalties;

**Dealing**, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land;

**Dedication Land** means that part of the Land to be dedicated to Council in accordance with this agreement, as shown on the plan at Annexure B;

**Development** means [insert description of the proposed development];

**Development Application** has the same meaning as in the Act;

**Development Consent** has the same meaning as in the Act;

**Easement Terms** means the terms of a public access easement as set out in Schedule 3;

**Fax Number** means a party's facsimile number set out in the Notices clause of this agreement;

**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 of or administration of the GST;

**Handover** means, with respect to any Works, the time Council takes possession of and assumes responsibility for the work in accordance with the Construction Terms;

**Insolvent** means, in relation to a party:

- (a) that party makes an arrangement, compromise or composition with, or assignment for, the benefit of its creditors or a class of them;
- (b) a receiver, receiver and manager, administrator, provisional liquidator, trustee, controller, inspector or analogous person is appointed in relation to, or over, all or any part of that party's business, assets or securities;
- (c) a presumption of insolvency has arisen under legislation because of the party's failure to comply with a statutory demand or analogous process;
- (d) an application for the winding up of, or for the appointment of a receiver to, that party, other than winding up for the purpose of solvent reconstruction or re amalgamation, is presented and not withdrawn or dismissed within [21] days (or such longer period agreed to by the parties), or an order is made or an effective

resolution is passed for the winding up of, or for the appointment of a receiver to, that party, or any analogous application is made or proceedings initiated;

- (e) any shareholder or director of that party convenes a meeting for the purpose of considering or passing any resolution for the winding up or administration of that party;
- (f) that is an individual, a creditor's petition or a debtor's petition is presented to the Official Receiver or analogous authority in relation to that party;
- (g) an execution or analogous process is levied or enforced against the property of that party;
- (h) that party ceases or suspends, or threatens to cease or suspend, the conduct of all or a substantial part of its business;
- (i) that party disposes of, or threatens to dispose of, a substantial part of its assets;
- (j) that party stops or suspends, or threatens to stop or suspend, payment of all or a class of its debts; or
- (k) that party is unable to pay the party's debts as and when they become due and payable.

**Instrument Change** means [insert details of LEP Amendment / Planning Proposal];

**Land** means Lot no. DP no., known as [address of land];

**Landowner** means [name of registered proprietor of the land];

**Law** means:

- (a) any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation;
- (b) any Approval, including any condition or requirement under it; and
- (c) any fees and charges payable in connection with the things referred to in paragraphs (a) and (b);

**Maintain** means works to bring an item to or keep an item in a state of reasonable condition and in accordance with relevant standards applicable at the time of construction of the item, including repairing any defects due to use of poor materials or due to poor workmanship, but does not include repairing normal wear and tear, removing graffiti or repairing any item damaged as a consequence of vandalism.

**Maintained** and **Maintenance** have corresponding meanings.

**Modification Application** means any application to modify the Development Consent under section 4.55 of the Act;

**Monetary Contribution** means the monetary contribution payable by the Developer under clause 6 of this agreement;

**Occupation Certificate** means an occupation certificate as defined under section 6.4 the Act;

**Public Access Land** means that part of the Land to be made accessible to the public set out in Annexure C;

**Public Reserve** has the same meaning as in the *Local Government Act 1993*;

**Public Road** has the same meaning as in the *Roads Act 1993*;



**Register** means the Torrens title register maintained under the *Real Property Act 1900* (NSW);

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

**Related Body Corporate** has the meaning given to that term in s 9 of the *Corporations Act 2001* (Cth);

**Subdivision Certificate** means a subdivision certificate defined under section 6.4 of the Act;

**Subdivision Works Certificate** means a subdivision works certificate defined under section 6.4 of the Act; and

**Works** means the work set out in Schedule 1.

## 2 Interpretation

**NOTE: Delete references that are not required.**

In this agreement, unless the context indicates a contrary intention:

- (a) **(documents)** a reference to this agreement or another document includes any document which varies, supplements, replaces, assigns or novates this agreement or that other document;
- (b) **(references)** a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this agreement;
- (c) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this agreement;
- (d) **(person)** a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns;
- (e) **(party)** a reference to a party to a document includes that party's personal representatives, executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) **(president, General Manager, CEO or managing director)** the president, General Manager, CEO or managing director of a body or Authority means any person acting in that capacity;
- (g) **(requirements)** a requirement to do any thing includes a requirement to cause that thing to be done, and a requirement not to do any thing includes a requirement to prevent that thing being done;
- (h) **(including)** including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind;
- (i) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (j) **(singular)** the singular includes the plural and vice-versa;
- (k) **(gender)** words importing one gender include all other genders;

- (l) **(parts)** a reference to one or more things includes each part and all parts of that thing or group of things but nothing in this clause implies that part performance of an obligation constitutes performance of that obligation;
- (m) **(rules of construction)** neither this agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting;
- (n) **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (o) **(time and date)** a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in City or State, Australia, even if the obligation is to be performed elsewhere;
- (p) **(joint and several)** an agreement, representation, covenant, right or obligation:
  - (i) in favour of two or more persons is for the benefit of them jointly and severally; and
  - (ii) on the part of two or more persons binds them jointly and severally;
- (q) **(writing)** a reference to a notice, consent, request, approval or other communication under this agreement or an agreement between the parties means a written notice, request, consent, approval or agreement;
- (r) **(replacement bodies)** a reference to a body (including an institute, association or Authority) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions;
- (s) **(Australian currency)** a reference to dollars or \$ is to Australian currency;
- (t) **(month)** a reference to a month is a reference to a calendar month; and
- (u) **(year)** a reference to a year is a reference to twelve consecutive calendar months.

### 3 Planning Agreement under the Act

- (a) The parties agree that this agreement is a planning agreement within the meaning of section 7.4 of the Act.
- (b) Schedule 4 of this agreement summarises the requirements for planning agreements under s 7.4 of the Act and the way this agreement addresses those requirements.

### 4 Application of this agreement

This agreement applies to:

- (a) the Instrument Change [if applicable], and
- (b) the Development [if applicable], and
- (c) the Land.

### 5 Operation of this agreement

This agreement commences on and from the date it is executed by all parties.

## 6 Contributions to be made under this agreement

**OPTION: Where monetary contribution offered, delete if inapplicable**

### 6.1 Monetary Contribution

- (a) The Developer will pay to Council a monetary contribution of \$insert amount of monetary contribution or an amount calculated in accordance with the following formula, whichever is the greater:

$$\frac{\text{\$insert amount of monetary contribution} \times \text{The CPI at the time of payment}}{\text{The CPI at the date of this agreement}}$$

- (b) The Monetary Contribution must be paid to Council prior to the issue of the first [Construction Certificate / Occupation Certificate / Subdivision Works Certificate / Subdivision Certificate] for the Development, or if no such certificate is required, prior to the commencement of any work comprising the Development.
- (c) The Monetary Contribution must be paid by way of bank cheque in favour of Council or by deposit by means of electronic funds transfer into an account specified by Council.
- (d) The Monetary Contribution will be taken to have been made when the Council notifies the Developer in writing that the bank cheque has been received and cleared funds or electronic funds have been deposited in the Council's bank account.
- (e) The parties agree and acknowledge that the Monetary Contribution will be used by the Council towards [insert public purpose of monetary contribution].

**OPTION: Where works in kind offered, delete if inapplicable**

### 6.2 Works

- (a) The Developer will carry out the Works in accordance with this agreement, including the Construction Terms, and any Development Consent or other Approval granted for the Works.
- (b) The Works or any part of the Works required under this agreement will be taken to have been completed for the purposes of this agreement when a Certificate of Practical Completion has been issued for those Works.
- (c) The Works or any part of the Works required under this agreement will be taken to have been delivered to Council on Handover in accordance with the Construction Terms.
- (d) The Works must be delivered to the Council prior to the issue of [an Occupation Certificate / Subdivision Certificate] for the Development or any part of the Development.

- (e) The parties agree and acknowledge that the Works serve the following public purposes:
  - (i) [insert details of public purposes].

**OPTION: Where land is to be dedicated, delete if inapplicable**

**6.3 Dedication of Land**

- (a) The Developer must dedicate or cause to be transferred to the Council, at no cost to the Council, the Dedication Land freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, easements, rights, charges, rates and contracts in, over or in connection with the land, including but not limited to, municipal rates and charges, water rates and land tax.
- (b) The Developer must take all steps, prepare all documents and meet all costs required to dedicate the Dedication land including, but not limited to:
  - (i) removing any encumbrances on the title to the land;
  - (ii) creating an interest in land in favour of Council if required;
  - (iii) subdividing the Land to create a separate lot for the Dedication Land;
  - (iv) preparing and lodging documents for registration;
  - (v) obtaining the consent of any other parties to the registration of the relevant documents; and
  - (vi) attending to any requisition relating to any dealing or document lodged for registration.

**OPTION: For dedication of public reserve land**

- (c) The obligation to dedicate the Dedication Land will be taken to have been satisfied when the Public Reserve is dedicated to Council by operation of the registration of a plan of subdivision in accordance with section 49 of the *Local Government Act 1993*.

**OPTION: For dedication of public road land**

- (d) The obligation to dedicate the Dedication Land will be taken to have been satisfied when the Public Road is dedicated to Council by operation of the registration of a plan of subdivision in accordance with section 9 of the *Roads Act 1993*.

**OPTION: For dedication of other land, including land for community facilities etc.**

- (e) The obligation to dedicate the Dedication Land will be taken to have been satisfied when a Certificate of Title is issued by NSW Land and Property Information for the whole of the Dedication Land identifying the Council as the registered proprietor of that land without encumbrances as required by clause 6.3(a).
- (f) For the avoidance of doubt, all Works required by this agreement on the land to be dedicated under this clause 6.3 must be completed in accordance with clause 6.2 prior to Council accepting the dedication.
- (g) The Dedication Land must be dedicated or transferred to Council prior to the issue of [the first Occupation Certificate for the Development or any part of the

Development / the first Subdivision Certificate for the Development / other timing agreed by Council that will occur prior to occupation of the Development].

- (h) The parties agree and acknowledge that the embellishment and dedication of the Dedication Land serve the public purpose of [insert details of public purposes].

**OPTION: Where Developer is to maintain works after completion, delete if inapplicable**

#### 6.4 Maintenance and Rectification of Defects

The Developer must Maintain the Works and rectify any defects after Handover of the Works in accordance with the Construction Terms.

**OPTION: Where public access easements are offered, delete if inapplicable**

#### 6.5 Public Access and Easements

- (a) Subject to clause 6.2, the Developer will, at no cost to Council, register against the title to the Land:
- (i) a covenant prohibiting any building or structures, including pillars, other than structures approved by the Council (acting reasonably) for the purposes of enhancing public domain areas, to be constructed on the Public Access Land, which covenant is to be limited in height and depth [describe limitations]; and
  - (ii) an easement in gross burdening the Public Access Land limited in height to [describe limitations] in favour of the Council permitting public access to the Public Access Land and generally in accordance with the Easement Terms.
- (b) Any requirement to register an easement, covenant or other instrument against the title to the Land will be satisfied when the Developer provides to the Council a copy of the relevant title search showing the registration of the instrument.
- (c) Any covenant required under clause (a) must be registered prior to the issue of the first [Construction Certificate / Subdivision Works Certificate] for any part of the Development.
- (d) Any easement, required under clauses (a) must be registered prior to the issue of [an Occupation Certificate / a Subdivision Certificate] for any building on the Land forming part of the Development.
- (e) The parties agree that the proposed covenant and easement under this clause will serve the following public purposes:
- (i) To increase the amount of and improve existing public open space areas in the vicinity of the Land;
  - (ii) To improve pedestrian circulation and the amenity of the public domain in the vicinity of the Land.
- (f) The Developer agrees and acknowledges that the obligations under this clause 6.5 are relevant considerations for the Council or any other consent authority when determining a Development Application or Modification Application relating to the Land and that a failure to comply with those obligations or any inconsistency with the requirements in those clauses may constitute a reason for refusal of such a Development Application or Modification Application.

**OPTION: Where access to Council owned land is required, delete if inapplicable**

## 6.6 Access to Council owned land

- (a) The Council agrees to permit the Developer, upon receiving at least 10 Business Days' prior notice, to enter, pass through or occupy any Council owned or controlled land in order to enable the Developer to properly perform its obligations under this agreement. Nothing in this clause creates or gives the Developer any estate or interest in any part of the Council owned or controlled land.
- (b) The Developer indemnifies the Council, its employees, officers, agents and contractors from and against all Claims in connection with the entry or access by the Developer to, or any presence of the Developer on, Council owned or controlled land for the purposes of performing their obligations under this agreement, except to the extent such Claim arises either directly or indirectly as a result of the Council or its employees, officers, agents, contractors or workmen's negligence, default, act or omission.

## 7 Application of s 7.11, s 7.12 and s 7.24 of the Act

- (a) This agreement [excludes OR does not exclude] the application of section 7.11 of the Act to the Development.
- (b) This agreement [excludes OR does not exclude] the application of section 7.12 of the Act to the Development.
- (c) This agreement [excludes OR does not exclude] the application of section 7.24 of the Act to the Development.
- (d) The benefits under this agreement [are to be OR are not to be] taken into consideration in determining a development contribution under section 7.11 of the Act.

*Note that s 7.4(3A) of the Act provides that sections 7.11 and 7.12 of the Act cannot be excluded unless the consent authority for the development or the Minister is a party to the agreement. The consent authority may be the Sydney Western City Planning Panel and not Council. Section 7.4(5A) provides that a planning authority must not enter into a planning agreement that excludes the application of section 7.24 without the approval of the Minister or a development corporation designated by the Minister.*

## 8 Registration of this agreement

### 8.1 Developer Interest

*Note that if the Developer is not the Landowner, the Landowner should be a party to the agreement.*

The [Developer / Landowner] represents and warrants to the Council that on the date of this agreement it is the registered proprietor of the Land.

### 8.2 Registration of this agreement

- (a) The Developer agrees to procure the registration of this agreement under the *Real Property Act 1900* (NSW) in the relevant folios of the Register of the Land in accordance with section 7.6 of the Act.

- (b) The Developer, at its own expense, must:
  - (i) procure the lodgement of this agreement with the Registrar-General as soon as reasonably practicable after this agreement comes into operation, but in any event, no later than 10 Business Days after that date;
  - (ii) procure the registration of this agreement by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this agreement is lodged for registration; and
  - (iii) provide documentary evidence that the registration of this agreement has been completed to Council within 5 Business Days of receiving confirmation that the registration has occurred.
- (c) The Developer warrants that, as at the date of this agreement, it has obtained the consent of each person who has an estate or interest in the Land registered under the *Real Property Act 1900* (NSW) or is seized or possessed of an estate or interest in the Land to the registration of this agreement on title.
- (d) The Developer, at its own expense will, promptly after the execution of this agreement, take all practical steps, and otherwise do anything that the Council reasonably requires to procure:
  - (i) An acceptance of the terms of this agreement and an acknowledgement in writing from any existing mortgagee in relation to the Land that the mortgagee will adhere to the provisions of this agreement if it takes possession of the Land as mortgagee in possession,
  - (ii) The execution of any documents; and
  - (iii) The production of the relevant duplicate certificates of title,
 to enable the registration of this agreement in accordance with clause 8.2.
- (e) **OPTION : Include only if the Developer is not the Landowner** The Landowner consents to the registration of the agreement in accordance with this clause 8.2.

### 8.3 Removal from Register

The Council will, at the Developer's cost, provide a release and discharge of this agreement so that it may be removed from the folios of the Register for the Land (or any part of it) provided the Council is satisfied the Developer has duly fulfilled its obligations under this agreement in respect of that part of the Land.

### 8.4 Caveat

- (a) The Developer acknowledges and agrees that:
  - (i) when this agreement is executed, the Council is deemed to have acquired and the Developer is deemed to have granted, an equitable estate and interest in the Land for the purposes of section 74F(1) of the *Real Property Act 1900* (NSW) and consequently the Council will have a sufficient interest in the Land in respect of which to lodge a caveat over the Land notifying that interest;
  - (ii) it will not object to the Council lodging a caveat in the relevant folios of the Register for the Land nor will it seek to remove any caveat lodged by the Council provided the caveat does not prevent registration of any dealing or plan other than a transfer.

- (b) The Council must, at Developer's cost, register a withdrawal of any caveat in respect of the Land within five Business Days after the Developer complies with clause 8.2.
- (c) The Developer must notify the Council within 5 Business Days after the registration of any subdivision plan that creates a separate lot for the Dedication Land or any part of the Dedication Land.
- (d) The Developer acknowledges and agrees that, in the event a separate lot is created for the Dedication Land or any part of the Dedication Land, it will not object to Council lodging a caveat in the relevant folios of the Register for that land, nor will it seek to remove any such caveat lodged by Council, until the relevant part of the Land is dedicated to Council in accordance with this agreement.

## 9 Review of this agreement

### 9.1 *Review generally*

- (a) This agreement may be reviewed or modified.
- (b) Subject to clause 9.2:
  - (i) any review or modification of this agreement will be conducted in the circumstances and in the manner determined by the parties;
  - (ii) no modification or review of this agreement will be of any force or effect unless it is in writing and signed by the parties to this agreement; and
  - (iii) a party is not in breach of this agreement if it does not agree to an amendment to this agreement requested by a party in, or as a consequence of, a review.

### 9.2 *Review for Better Outcome*

- (a) The Developer may propose a variation to this agreement to include a contribution, including works, land or monetary contributions, that will deliver a greater public benefit than the Contributions to be delivered under this agreement (**Better Outcome Proposal**).
- (b) Council will consider the Better Outcome Proposal and whether or not the proposal meets the following criteria:
  - (i) The contribution value of the new contribution is the same as the Contribution to be varied;
  - (ii) The new contribution contains the core elements of the Contribution to be varied or replaced;
  - (iii) The new contribution provides the same public purpose as the Contribution to be varied or replaced;
  - (iv) The new contribution will be delivered at the same time the Contribution to be varied or replaced was to be delivered; and
  - (v) The new contribution complies with the requirements of any relevant Authority.
- (c) Council will notify the Developer within 15 Business Days of receiving the Better Outcome Proposal, whether the proposal meets the relevant criteria and, subject



to clause 9.2(d), whether an amendment to the Contributions to be delivered under this agreement can be agreed in principle.

- (d) Any agreement reached during a review under this clause 9.2 will not constitute an amendment to this agreement until the amendment has been:
  - (i) confirmed in writing as a proposed amendment to this agreement;
  - (ii) publicly notified in accordance with the Regulation;
  - (iii) approved by Council after consideration of any public submissions; and
  - (iv) signed by the parties.
- (e) A failure by a party to agree to participate in a review under this clause 9.2 is taken to be a dispute for the purposes of clause 10.
- (f) If the parties cannot agree to the terms of any amendment to this agreement following a review under clause 9.2, either party may refer the matter to dispute resolution under clause 10.
- (g) Nothing in this clause 9.2:
  - (i) affects the obligation of the Developer under the Act to pay contributions in accordance with section 7.11 or section 7.12 of the Act; or
  - (ii) requires the Council to pay any money to the Developer or to refund to the Developer or any other entity, any amount paid to it under this agreement or for any other purpose.

## 10 Dispute Resolution

### 10.1 Reference to Dispute

If a dispute arises between the parties in relation to this agreement, 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.

### 10.2 Notice of Dispute

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

- (a) The nature of the dispute,
- (b) The alleged basis of the dispute, and
- (c) The position which the party issuing the Notice of Dispute believes is correct.

### 10.3 Representatives of Parties to Meet

- (a) The representatives of the parties must promptly (and in any event within [x] Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.
- (b) The parties may, without limitation:
  - (i) resolve the dispute during the course of that meeting,
  - (ii) agree that further material or expert determination in accordance with clause 10.6 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.

#### 10.4 Further Notice if Not Settled

If the dispute is not resolved within  Business Days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (Determination Notice) by mediation under clause 10.5 or by expert determination under clause 10.6.

#### 10.5 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 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  Business Days of receipt of the Determination Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (c) The mediator appointed pursuant to this clause 10.5 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 function as a mediator, he or she being required to fully disclose any such interest or duty before his or her appointment;
- (d) The mediator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties;
- (e) The parties must within  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 the Council is required to appoint a representative, the Council must advise of the representative within  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.

## 10.6 *Expert determination*

If the dispute is not resolved under clause 10.3 or clause 10.5, or the parties otherwise agree that the dispute may be resolved by expert determination, the parties may refer the dispute to an expert, in which event:

- (a) The dispute must be determined by an independent expert in the relevant field:
  - (i) Agreed upon and appointed jointly by the parties; and
  - (ii) In the event that no agreement is reached or no appointment is made within  Business Days of the agreement to refer the dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales;
- (b) The expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) The determination of the dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (d) The expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (e) Each party will bear its own costs in connection with the process and the determination by the expert and will share equally the expert's fees and costs; and
- (f) Any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
  - (i) Within  Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and commences litigation; or
  - (ii) The determination is in respect of, or relates to, termination or purported termination of this agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal.

## 10.7 *Litigation*

If the dispute is not *finally* resolved in accordance with this clause 10, then either party is at liberty to litigate the dispute.

## 10.8 *No suspension of contractual obligations*

Subject to any interlocutory order obtained under clause 10.1, the referral to or undertaking of a dispute resolution process under this clause 10 does not suspend the parties' obligations under this agreement.

# 11 Enforcement and Security

## 11.1 *Default*

- (a) In the event a party considers another party has failed to perform and fulfil an obligation under this agreement, it may give notice in writing to the other party (**Default Notice**) giving all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than 21 days.

- (b) In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (c) If a party disputes the Default Notice it may refer the dispute to dispute resolution under clause 10 of this agreement.

11.2 Security

**OPTION: When monetary contributions or works are proposed and not to be provided on execution**

- (a) In this clause 11.2, **Security** means a Bank Guarantee, Bond or cash deposit to be held by Council.
- (b) On execution of this agreement, the Developer must provide to the Council Security in an amount equivalent to the Monetary Contribution payable as at the date of execution of this agreement.
- (c) Prior to the issue of a [Construction Certificate/Subdivision Works Certificate] for the Development, the Developer must provide to the Council Security in an amount equivalent to [125% or 200%] of the agreed value of the Works. *[Note that where the Works are not listed in a Contributions Plan, security must be equivalent to 200% of the value of the Works. Council will accept security at 125% of the value of Works listed in a Contributions Plan. Security will be in accordance with Council’s fees and charges for work proposed on public land and / or requires a Roads Act approval.]*

**OPTION: When Developer does not agree to compulsory acquisition clauses**

- (d) Prior to the issue of a [Construction Certificate/Subdivision Works Certificate] for the Development, the Developer must provide to the Council Security or a charge over land or assets equivalent to the full market value of the Dedication Land, determined by Council acting reasonably.
- (e) The Council may call on a Security provided under this clause if:
  - (i) the Developer is in material or substantial breach of this agreement and has failed to rectify the breach within a reasonable period of time after having been given reasonable notice (which must not be less than 21 Business Days) in writing to do so in accordance with clause 11.1 of this agreement; or
  - (ii) the Developer becomes insolvent.
- (f) Within 20 Business Days of each anniversary of a Security provided under clause (a), the Developer must provide Council with one or more replacement Securities (**Replacement Security**) in an amount calculated in accordance with the following:

$$A = \frac{B \times D}{C}$$

Where:

- A is the amount of the Replacement Security,
- B is the amount of the Security to be replaced,

C is the CPI for the quarter ending immediately before the date of the Security to be replaced,

D is the CPI for the quarter ending immediately before the date of the Replacement Security,

provided A is greater than B.

- (g) On receipt of a replacement Security provided under clause 11.2(f), the Council must release and return to the Developer, as directed, the Security that has been replaced as soon as reasonably practicable.
- (h) At any time following the provision of a Security under this clause, the Developer may provide the Council with one or more replacement Securities totalling the amount of all Securities required to be provided under this clause for the time being. On receipt of such replacement Security, the Council must release and return to the Developer, as directed, the Securities which it holds that have been replaced as soon as reasonably practicable.
- (i) Subject to this clause and the provisions of this agreement, the Council may apply the proceeds of a Security to satisfy:
  - (i) any obligation of the Developer under this agreement to deliver Contributions, and
  - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this agreement.
- (j) The Council must promptly return a Security provided under this clause if requested by the Developer and:
  - (i) Handover has occurred for an item of Works to which the Security relates; and
  - (ii) the Developer has provided a Bond or Bank Guarantee required under the Construction Terms for defects liability and maintenance of the item of Works; and
  - (iii) if the Security relates to other items of Works for which a Certificate of Practical Completion has not been issued, a replacement Security is provided by the Developer in an amount determined in accordance with clause 11.2(c).
- (k) For the avoidance of doubt, Council may retain a component of the Security it holds for an item of Works that is equivalent to 25% of the value of the Works, in satisfaction of the requirement to submit a Bank Guarantee or Bond under the Construction Terms for defects liability and maintenance.
- (l) Nothing in this clause 11.2 prevents or restricts the Council from taking any enforcement action in relation to:
  - (i) any obligation of the Developer under this agreement; or
  - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this agreement,

that is not or cannot be satisfied by calling on a Security.

**OPTION: When land is to be dedicated****11.3 Compulsory Acquisition**

- (a) If the Developer does not dedicate the Dedication Land to Council as required by this agreement, the Council may compulsorily acquire the relevant land, in which case 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 in the *Land Acquisition (Just Terms Compensation) Act 1991* and may recover any costs, including legal costs, incurred by the Council on acquisition of the land from the Developer.
- (b) Clause 11.3(a) constitutes an agreement for the purposes of section 30 of the *Land Acquisition (Just Terms Compensation) Act 1991*.
- (c) Except as otherwise agreed between the Developer and Council, the Developer must ensure the Dedication Land is freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, rights, charges, rates, strata levies and contracts, except as may be permitted by this agreement on the date that the Council will acquire the land in accordance with clause 11.3(a).
- (d) 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 relevant land under clause 11.3(a).
- (e) The Developer must pay the Council, promptly on demand, an amount equivalent to all costs, including legal costs, incurred by the Council acquiring the whole or any part of the relevant land under clause 11.3(a) that are not or cannot be recovered by calling on a Security.

**11.4 Restriction on the issue of Certificates****NOTE: Remove provisions that are not relevant and amend for consistency with timing for delivery of Contributions.**

- (a) In accordance with section 6.8 of the Act and clause 146A of the Regulation the following obligations under this agreement must be satisfied before a Construction Certificate is issued for the Development or any part of the Development:
  - (i) Payment of the Monetary Contribution in accordance with clause 6.1;
  - (ii) Registration of the covenant required under clause 6.5(a)(i); and
  - (iii) Provision of Securities required under clause 11.2.
- (b) In accordance with section 6.10 of the Act and clause 154E of the Regulation, the following obligations under this agreement must be satisfied before an Occupation Certificate is issued for the Development or any part of the Development:
  - (i) Payment of the Monetary Contribution in accordance with clause 6.1;
  - (ii) Delivery of the Works in accordance with clause 6.2;
  - (iii) Dedication of the Dedication Land in accordance with clause 6.3;
  - (iv) Registration of the easement in gross required under clause 6.5(a)(ii); and

- (v) Provision of a Bank Guarantee or Bond for any item of the Works for defects liability and maintenance under the Construction Terms.
- (c) In accordance with section 6.14 of the Act and clause 148G of the Regulation the following obligations under this agreement must be satisfied before a Subdivision Works Certificate is issued for the Development or any part of the Development:
  - (i) Payment of the Monetary Contribution in accordance with clause 6.1;
  - (ii) Registration of the covenant required under clause 6.5(a)(i); and
  - (iii) Provision of Securities required under clause 11.2.
- (d) In accordance with section 6.15(1)(d) of the Act, the following obligations under this agreement must be satisfied before a Subdivision Certificate is issued for the Development or any part of the Development:
  - (i) Payment of the Monetary Contribution in accordance with clause 6.1;
  - (ii) Delivery of the Works in accordance with clause 6.2;
  - (iii) Dedication of the Dedication Land in accordance with clause 6.3;
  - (iv) Registration of the easement in gross required under clause 6.5(a)(ii); and
  - (v) Provision of a Bank Guarantee or Bond for any item of the Works for defects liability and maintenance under the Construction Terms

### 11.5 *General Enforcement*

- (a) Without limiting any other remedies available to the parties, this agreement may be enforced by any party in any Court of competent jurisdiction.
- (b) Nothing in this agreement prevents:
  - (i) 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
  - (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 agreement or any matter to which this agreement relates.

## 12 Assignment and Dealings

### 12.1 *Assignment*

- (a) A party must not assign or deal with any right under this agreement without the prior written consent of the other parties.
- (b) Any change of ownership or control (as defined in section 50AA of the *Commonwealth Corporations Act 2001*) of a party (excluding the Council) shall be deemed to be an assignment of this agreement for the purposes of this clause.
- (c) Any purported dealing in breach of this clause is of no effect.

### 12.2 *Transfer of Land*

- (a) The Developer [or the Landowner, if the Developer is not the owner of the land] may not transfer, assign or dispose of the whole or any part of its right, title or interest in the Land (present or future) or in the Development to another person

(**Transferee**) unless before it sells, transfers or disposes of that right, title or interest:

- (i) the Developer [or Landowner] satisfies the Council that the proposed Transferee is financially capable of complying with the Developer's obligations under this agreement;
- (ii) the Developer [or Landowner] satisfies the Council that the rights of the Council will not be diminished or fettered in any way;
- (iii) the Transferee delivers to the Council a novation deed signed by the Transferee in a form and of such substance as is acceptable to the Council containing provisions under which the Transferee agrees to comply with all the outstanding obligations of the Developer under this agreement;
- (iv) any default under any provisions of this agreement has been remedied or waived by the Council, on such conditions as the Council may determine, and
- (v) the Developer and the Transferee pay the Council's reasonable costs in relation to the assignment.

## 13 Approvals and consents

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

## 14 No fetter

### 14.1 Discretion

This agreement is not intended to operate to fetter, in any manner, the exercise of any statutory power or discretion of the Council, including, but not limited to, any statutory power or discretion of the Council relating to the Development Application or any other application for Development Consent (all referred to in this agreement as a "**Discretion**").

### 14.2 No fetter

No provision of this agreement is intended to constitute any fetter on the exercise of any Discretion. If, contrary to the operation of this clause, any provision of this agreement is held by a court of competent jurisdiction to constitute a fetter on any Discretion, the parties agree:

- (a) They will take all practical steps, including the execution of any further documents, to ensure the objective of this clause is substantially satisfied,
- (b) In the event that (a) cannot be achieved without giving rise to a fetter on the exercise of a Discretion, the relevant provision is to be severed and the remainder of this agreement has full force and effect, and
- (c) To endeavour to satisfy the common objectives of the parties in relation to the provision of this agreement which is to be held to be a fetter on the extent that is possible having regard to the relevant court judgment.



## 15 Notices

Any notice given under or in connection with this agreement (**Notice**):

- (a) must be in writing and signed by a person duly authorised by the sender;
- (b) must be addressed as follows and delivered to the intended recipient by hand, by prepaid post or by email at the address below, or at the address last notified by the intended recipient to the sender after the date of this agreement:
  - (i) to Penrith City Council: PO Box 60, Penrith, NSW 2751  
 Fax: (02) 4732 7958  
 Email: [council@penrith.city](mailto:council@penrith.city)  
 Attention: The General Manager
  - (ii) to [Developer Name]: [Developer address]  
 Fax: [Developer fax]  
 Email: [Developer email]  
 Attention: [Developer contact]
- (c) is taken to be given or made:
  - (i) in the case of hand delivery, when delivered;
  - (ii) in the case of delivery by post, three Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country); and
  - (iii) in the case of an email, when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above; and
- (d) if under clause (c) a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it is taken to have been given or made at the start of business on the next Business Day in that place.

## 16 General

### 16.1 *Relationship between parties*

- (a) Nothing in this agreement:
  - (i) constitutes a partnership between the parties; or
  - (ii) except as expressly provided, makes a party an agent of another party for any purpose.
- (b) A party cannot in any way or for any purpose:
  - (i) bind another party; or
  - (ii) contract in the name of another party.
- (c) If a party must fulfil an obligation and that party is dependent on another party, then that other party must do each thing reasonably within its power to assist the other in the performance of that obligation.

## 16.2 *Time for doing acts*

- (a) If the time for doing any act or thing required to be done or a notice period specified in this agreement expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.
- (b) If any act or thing required to be done is done after 5.00 pm on the specified day, it is taken to have been done on the following Business Day.

## 16.3 *Further assurances*

Each party must promptly execute all documents and do all other things reasonably necessary or desirable to give effect to the arrangements recorded in this agreement.

## 16.4 *Variation*

A provision of this agreement can only be varied by a later written document executed by or on behalf of all parties and in accordance with the provisions of the Act.

## 16.5 *No assignment*

A party cannot assign or otherwise transfer its rights under this agreement without the prior written consent of the other party.

## 16.6 *Counterparts*

This agreement may be executed in any number of counterparts. All counterparts taken together constitute one instrument.

## 16.7 *Legal expenses, stamp duty and administration fees*

- (a) The Developer must pay on demand Council's reasonable legal costs and disbursements in connection with the negotiation, preparation, execution, stamping, and release and discharge of this agreement, including the reasonable costs incurred by the Council in obtaining any advice about this agreement or the value of land or works to be delivered under this agreement.
- (b) On execution of this agreement, the Developer must pay an administration, monitoring and enforcement fee to the Council in the amount of \$[x]. *[Note that the amount specified will be equivalent to 1% of the total value of the contributions subject to the agreement].*

## 16.8 *Entire agreement*

The contents of this agreement constitute the entire agreement between the parties and supersede any prior negotiations, representations, understandings or arrangements made between the parties regarding the subject matter of this agreement, whether orally or in writing.

## 16.9 *Representations and warranties*

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

## 16.10 *Severability*

If a clause or part of a clause of this agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal,

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

#### 16.11 *Invalidity*

- (a) A word or provision must be read down if:
  - (i) this agreement is void, voidable, or unenforceable if it is not read down;
  - (ii) this agreement will not be void, voidable or unenforceable if it is read down; and
  - (iii) the provision is capable of being read down.
- (b) A word or provision must be severed if:
  - (i) despite the operation of clause (a), the provision is void, voidable or unenforceable if it is not severed; and
  - (ii) this agreement will be void, voidable or unenforceable if it is not severed.
- (c) The remainder of this agreement has full effect even if clause 16.11(b) applies.

#### 16.12 *Waiver*

A right or remedy created by this agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.

#### 16.13 *GST*

- (a) Words and expressions which are not defined in this agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this agreement are exclusive of GST.
- (c) If GST is imposed on any supply made under or in accordance with this agreement, the Developer must pay the GST or pay to the Council an amount equal to the GST payable on or for the taxable supply, whichever is appropriate in the circumstances.

#### 16.14 *Governing law and jurisdiction*

- (a) The laws applicable in New South Wales govern this agreement.
- (b) The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

### 17 *Reporting*

On or before 31 July in each calendar year after the execution of this agreement and until the Developer's obligations under this agreement are satisfied, the Developer must provide a written report to Council detailing the progress of the provision of Contributions under this agreement and the progress of the Development.

## Schedule 1            Scope of works

[Insert proposed scope of works, providing sufficient detail relating to standard and quality of proposed works, including any diagrams or plans – see Annexure E (Plans Showing Works) and Annexure F (Schedule of Materials and Finishes for Works)]

## Schedule 2 Construction terms

### 1 Interpretation

For the purposes of this Schedule 2, the defined terms in clause 1 of this agreement and the Interpretation principles in clause 2 of this agreement will apply and, unless context indicates a contrary intention:

**Builder** means any entity contracted under the Construction Contract to carry out the Works.

**Construction Contract** means the contract to carry out the Works (whether or not that is a contract for the Works only or forms part of a contract for the building of other components of the Development).

**Defects Liability and Maintenance Period** means in respect of each item of building works which together comprise the Works the period of 12 months from the date on which Handover of the Works occurs.

**Detailed Design** means the final specifications and finishes for the Works prepared in accordance with clause 5.2 of this Schedule 2 and will include the design of the Works, the location for the Works, installation specifications and estimated costs of construction and/or installation.

**Services** means all water, gas, electricity, television, drainage, sewerage, cable TV, data communications, telecommunications and other services which are required under a development consent within the meaning of the Act or an Approval and which are necessary or desirable for the construction or operation of the Development.

**Superintendent** means the Superintendent appointed under any Construction Contract.

### 2 Requirements of Authorities and Approvals

2.1 These Construction Terms must be read and construed subject to:

- (a) any requirements or conditions of any Development Consent;
- (b) the requirements of and conditions imposed by all relevant Authorities and all Laws relating to the Development and the construction of the Development.

2.2 If the Developer requires any Approvals in order to carry out the obligations under this agreement, then the Developer will acquire all Approvals necessary to carry out the Works at its own cost.

2.3 The Developer must ensure that the Works carried out under this agreement are carried out:

- (a) in accordance with the relevant Development Consent for the Works and all Approvals and the requirements of all Laws, including without limitation, work health and safety legislation; and
- (b) in a good and workmanlike manner and so that they are diligently progressed until completion;

AND it is acknowledged that to the extent that there is any inconsistency between this agreement and any Approval the terms of the Approval shall take precedence.

### 3 Costs of Works

All costs of the Works must be borne by the Developer.

#### **4 Project Management and Contractor Engagement**

- 4.1 The Developer will be responsible for managing the Works.
- 4.2 The Developer will ensure that any contractor it engages to carry out the Works agrees to:
- (a) carry out the Developer's obligations in these Construction Terms as part of any Construction Contract; and
  - (b) request a Council representative to be present at each on-site meeting attended by the Superintendent and to ensure the Council representative is present at the meeting.

#### **5 Design Development**

##### **5.1 Concept Design**

Council and the Developer have worked in consultation with each other to prepare and agree the concept plans for the Works at Annexure D.

##### **5.2 Detailed Design**

- (a) Prior to Works commencing the Developer must provide a copy of the draft Detailed Design to the Council for approval.
- (b) Within 15 Business Days of receiving the Detailed Design, Council will respond to the Developer with any suggested amendments to the Detailed Design.
- (c) Council and the Developer must work in consultation with each other to prepare and agree the Detailed Design and must both act reasonably and with due expedition in their consultations with each other.
- (d) If the Detailed Design is not completed and agreed within 15 Business Days of Council providing its suggested amendments in accordance with clause 5.2(b) of this Schedule, to avoid possible delays to the issue of a Certificate of Practical Completion, the Council will, in its sole discretion, be entitled to decide on any outstanding or undecided matter or item relating to areas that are to be accessible to the public, provided that any decision made by Council under this clause:
  - (i) is consistent with the obligation to carry out the Works and dedicate the Dedication Land under this agreement; and
  - (ii) is consistent with the Development Consent; and
  - (iii) does not materially and adversely affect the Development; and
  - (iv) is not unreasonable.

- 5.3 Any acceptance by the Council of the Detailed Design under this clause 5 is not to be taken as approval of or to any Construction Certificate for the Works.

##### **5.4 Good faith**

The parties must act promptly and in good faith to consult in relation to the Detailed Design.

#### **6 Carrying out of Works**

## 6.1 Communication

The Developer must notify Council on the commencement of the Works and keep Council reasonably informed of progress of the Works and provide to Council such information about the Works as Council reasonably requests.

## 6.2 Standard of Works

- (a) Unless otherwise provided, the Developer shall, and must cause the Builder to, use suitable new materials and proper and tradesmanlike workmanship when carrying out the Works.
- (b) The qualitative standard of the design and finishes for the Works must be no less than those described in the following documents:
  - (i) Any relevant Australian Standard;
  - (ii) Any relevant design standards or guidelines and any other requirements or policies applied by the Council from time to time in assessing the adequacy of any works or improvements proposed for the public domain or to be accessible to the public in accordance with this agreement.
- (c) The Developer will obtain any relevant standards (including design standards), specifications, or guidelines and any other requirements or policies referred to in clause 6.2(b)(ii) of this Schedule from Council if the Council fails to deliver them to the Developer.
- (d) The Developer may but is not obliged to reinstate any Works where damage or destruction is as a result of:
  - (i) Any act or omission of the Council or its employees, consultants or agents relating to any part of the Works under this agreement; or
  - (ii) The use or occupation by the Council or its employees, consultants or agents, Council's representatives or other contractor of the Council of any part of the Works.

## 6.3 Damage to people, property & utilities

- (a) The Developer is to ensure to the fullest extent reasonably practicable that, in performing its obligations under this agreement:
  - (i) all necessary measures are taken to protect people and property;
  - (ii) unnecessary interference with the passage of people and vehicles is avoided; and
  - (iii) nuisances and unreasonable noise and disturbances are prevented.
- (b) Without limiting clause 6.3(a) of this Schedule, the Developer is not to obstruct, interfere with, impair or damage any public road, public footpath, public cycleway or other public thoroughfare, or any pipe, conduit, drain, watercourse or other public utility or service on any land except as authorised in writing by the Council or any relevant Authority.

## 7 Inspection

- (a) On completion of the Detailed Design, the Council will provide a schedule of inspections to be undertaken by Council (**Inspection Schedule**) to occur at specified stages of the construction of the Works (**Inspection Stage**). If the

Council does not provide the Inspection Schedule, the Developer must request the Inspection Schedule from the Council prior to the Works commencing.

- (b) Five Business Days prior to reaching an Inspection Stage as set out in the Inspection Schedule, the Developer must notify the Council of the proposed inspection date (**Inspection Date**).
- (c) On the Inspection Date, or other agreed date, the Developer must ensure that any employees, contractors, agents or representatives of Council have access to and may enter the Land to inspect the Works.
- (d) In addition to carrying out inspections in accordance with the Inspection Schedule, the Council and its employees, contractors, agents or representatives may enter the Land or any part of the Land on which the Works are located to inspect the progress of the Works, subject to:
  - (i) the terms of the Construction Contract (save for any clause of the Construction Contract which prevents the Council from accessing the Land);
  - (ii) giving reasonable notice to the Developer;
  - (iii) complying with all reasonable directions of the Developer; and
  - (iv) being accompanied by the Developer or a nominee, or as otherwise agreed.
- (e) The Council may, acting reasonably, within 5 Business Days of carrying out an inspection (either under clause 7(c) or 7(d) of Schedule), notify the Developer of any defect or non-compliance in the Works and direct the Developer to carry out work to rectify that defect or non-compliance within a reasonable period of time. Such work may include, but is not limited to:
  - (i) removal of defective or non-complying material;
  - (ii) demolishing defective or non-complying work;
  - (iii) reconstructing, replacing or correcting any defective or non-complying work; and
  - (iv) not delivering any defective or non-complying material to the site of the Works.
- (f) If the Developer is issued a direction to carry out further work under clause 7(e) of this Schedule, the Developer must, at its cost, rectify the defect or non-compliance specified in the Notice within the time period specified in the Notice, provided that it is reasonable having regard to the nature of the works.
- (g) If the Developer fails to comply with a direction to carry out work given under clause 7(e) of this Schedule, the Council will be entitled to refuse to accept that the Works (or the relevant part of the Works) meet the Council's standards and specifications and may refuse to issue a Certificate of Practical Completion, until the required Works have been completed to the Council's satisfaction, acting reasonably.
- (h) For the avoidance of doubt, any acceptance by the Council that the Developer has rectified a defect or non-compliance identified in a notice issued under clause 7(e) of this Schedule does not constitute:



- (i) acceptance by the Council that the Works comply with all Approvals and Laws; or
- (ii) an Approval by the Council in respect of the Works; or
- (iii) an agreement or acknowledgment by the Council that the Works or the relevant part of the Works are complete and may be delivered to the Council in accordance with this agreement.

## **8 Completion**

### **8.1 Practical Completion**

- (a) When the Developer considers that the Works, or any part of the Works, are complete, the Developer must send a Notice to the Council accompanied by complete works as executed plans, any relevant certificates or consents of any public utility authority and a request for written certification from the Council that the Works are complete.
- (b) Within 10 Business Days of receipt of the notice under clause 8.1(a) of this Schedule 2, the Council will carry out an inspection of the Works and will, acting reasonably, either:
  - (i) provide written certification to the Developer that the Works have been completed; or
  - (ii) notify the Developer of any additional information required or matters which must be addressed by the Developer prior to the certification being issued.
- (c) If the Developer is required to provide additional information or address any matters under clause 8.1(b)(ii) of this Schedule, the Developer will provide that information to Council or address those matters within 10 Business Days of receiving the notice or within a reasonable period of time and make a further request under clause 8.1(a) of this Schedule 2 for written certification that the Works have been completed.
- (d) Practical completion will be achieved in relation to the Works or any part of the Works when a Certificate of Practical Completion has been issued for those Works.

### **8.2 Handover**

- (a) The Developer is responsible for the delivery and care of the Works at all times prior to Handover of the Works.
- (b) Handover will occur and Council will assume responsibility for the Works:
  - (i) following dedication to Council of the land on which Works are located; or
  - (ii) if Works are carried out on land already owned by Council, on the issue of a Certificate of Practical Completion for those Works.

### **8.3 Delivery of documents**

- (a) If it has not already done so, the Developer must as soon as practicable, and no later than 20 Business Days after the date on which the Certificate of Practical Completion is issued in respect of the Works or any part of the Works deliver to the Council, complete and legible copies of:

- (i) all “as built” full-sized drawings, specifications and relevant operation and service manuals;
  - (ii) all necessary certificates including the certificates of any consultants of the Developer that the Council may reasonably require, and Approvals of any public utility authority (where relevant); and
  - (iii) copies of all Approvals required for use of the land subject to the Works.
- (b) The Developer must as soon as practicable, and no later than 20 Business Days after the date on which the Certificate of Practical Completion is issued in respect of the Works or any part of the Works, provide the Council with a tour of the land subject to the Works and provide reasonable instructions on the operation and use of the Services on that land.

#### 8.4 Assignment of Warranties and Causes of Action

- (a) The Developer must assign (as beneficial owner) or cause to be assigned to Council the benefit of any warranties and guarantees obtained by the Developer and the Builder (and capable of assignment) with respect to any material or goods incorporated in or forming part of the Works.
- (b) To the extent that any such warranties or guarantees cannot be assigned, the Developer must at the request of Council do anything reasonably required by Council to enforce such warranties or guarantees for the benefit of Council.

### 9 Defects Liability and Maintenance

#### 9.1 Maintenance

- (a) Prior to the issue of a Certificate of Practical Completion for any part of the Works, the Developer must provide to the Council a Maintenance Schedule setting out the proposed maintenance works and estimated costs for the relevant part of the Works over the Maintenance Period.
- (b) Within 10 Business Days of receiving the Maintenance Schedule, Council must issue a written notice to the Development advising of any changes it requires to the Maintenance Schedule, which changes must be reasonable and in accordance with Council’s usual practice for maintaining works of the same type.
- (c) Within 5 Business Days of receiving the Council’s notice under clause 9.1(b) of this Schedule, the Developer must provide to Council a final Maintenance Schedule incorporating the Council’s changes.
- (d) The Works or any part of those works, must be Maintained by the Developer in accordance with the Maintenance Schedule for the Maintenance Period.
- (e) The Developer must follow relevant Council policies and obtain all Approvals necessary to carry out the Maintenance required under this clause.
- (f) The Council must give the Developer and its contractors any access required to carry out Maintenance in accordance with the Maintenance Schedule.

#### 9.2 Defects Liability and Maintenance Period

- (a) During the Defects Liability and Maintenance Period, the Council (acting reasonably) may give to the Developer a notice (**Rectification Notice**) in writing that identifies a defect in the Works or any Maintenance requirement that has not been complied with.

- (b) The Rectification Notice must specify:
  - (i) action required to be undertaken by the Developer to rectify the defect or Maintain the Works (**Rectification Works**); and
  - (ii) the date on which the defect must be rectified, or the Maintenance work completed (**Rectification Date**).
- (c) The Developer must comply with the Rectification Notice by:
  - (i) procuring the performance of the Rectification Works by the Rectification Date, or such other date as agreed between the parties;
  - (ii) keeping the Council reasonably informed of the action to be taken to rectify the defect or Maintain the Works; and
  - (iii) carrying out the Rectification Works.
- (d) The Council must give the Developer and its contractors any access required to carry out the Rectification Works.
- (e) When the Developer considers that the Rectification Works are complete, either the Developer must notify the Council and provide documentation, plans or invoices which establish that the Rectification Works were carried out.
- (f) The Council may inspect the Rectification Works within 15 Business Days of receiving a Notice from the Developer under clause 9.2(e) of this Schedule and, acting reasonably:
  - (i) issue a further Rectification Notice if it is not reasonably satisfied that the Rectification Works are complete; or
  - (ii) notify the Developer in writing that it is satisfied the Rectification Works are complete.
- (g) The Developer must meet all costs of and incidental to rectification of defects or Maintenance of Works under this clause 9.2.
- (h) If the Developer fails to comply with a Rectification Notice, then the Council may do such things or take such action as is necessary to carry out the Rectification Works, including accessing and occupying any part of the Land without further notice to the Developer, and may:
  - (i) call upon any Bond or Bank Guarantee provided to the Council under clause 9.3 of this Schedule to meet its costs of carrying out Rectification Works; and
  - (ii) recover as a debt due to the Council by the Developer in a court of competent jurisdiction, any difference between the amount of the Bond or Bank Guarantee and the costs incurred by the Council in carrying out Rectification Works.
- (i) The Developer must request that Council inspect the Works 28 days prior to the end of the Defects Liability and Maintenance Period. The Council must inspect the Works at any time after receiving the request from the Developer and before to the end of the Defects Liability and Maintenance Period.
- (j) If, prior to the end of the Defects Liability and Maintenance Period:
  - (i) the Developer fails to request the inspection, or

- (ii) the Council does not carry out the inspection,  
the Council may extend the Defects Liability and Maintenance Period so that the inspection may be carried out.

### 9.3 Security for Defects Liability

- (a) Prior to the issue of a Certificate of Practical Completion for each item of the Works the Developer must deliver to the Council Bonds or Bank Guarantees in an amount equivalent to 25% of the construction costs for the particular item of Works.
- (b) The Developer discloses and the Council acknowledges that the Bonds or Bank Guarantees may be supplied by the Builder and form a part of the security held by the Developer from the Builder under the terms of the Construction Contract, provided that:
  - (i) any Bond or Bank Guarantee provided by the Builder benefits the Council and satisfies the requirements of this agreement; and
  - (ii) the Developer procures an agreement from the Builder that the Council will be entitled to call on any Bond or Bank Guarantee provided by the Builder, in accordance with the terms of this agreement and the terms of any Construction Contract.
- (c) Within 10 Business Days after the Defects Liability and Maintenance Period for a particular item of Works has expired Council must (if it has not called on it) return the Bond or Bank Guarantee referred to in clause 9.3(a) of this Schedule for that item of Works (or any remaining balance of it) to the Developer.
- (d) Notwithstanding clause 9.2(c) of this Schedule, if during the Defects Liability and Maintenance Period for a particular item of Works, the Council issues a Rectification Notice, then the Council need not deliver the balance of any Bonds or Bank Guarantees provided to it until the Rectification Notice has been complied with.

## 10 Risk

The Developer undertakes the Works entirely at its own risk.

## 11 Insurance

- (a) Prior to the commencement of the construction of any of the Works, the Developer must ensure the Builder effects and the Developer must produce evidence to the Council of the following insurances issued by an insurer approved by the Council (acting reasonably) in a form approved by the Council (acting reasonably):
  - (i) construction works insurance for the value of the Works;
  - (ii) public risk insurance for at least \$20 million;
  - (iii) workers compensation insurance as required by Law.
- (b) The Developer must provide evidence of currency of insurance required by clause 11(a) of this Schedule 2 upon request by the Council, acting reasonably, throughout the term of this agreement.

## 12 Indemnities

The Developer indemnifies the Council, its employees, officers, agents and contractors from and against all Claims in connection with the carrying out by the Developer of the Works except to the extent such Claim arises either directly or indirectly as a result of the Council or its employees, officers, agents, contractors or workmen's negligence, default, act or omission.

**13 Intellectual Property Rights**

The Council acknowledges that the Developer or its contractors hold all rights to copyright and any intellectual property which may exist in the Works. To the extent the Developer have or receive intellectual property rights for the Works, the Developer shall assign those intellectual property rights to Council or permit use thereof.

**14 Risk of contamination**

The Developer acknowledges and agrees:

- (a) that it is responsible for the management and remediation of any contamination present upon or under the land on which the Works are to be carried out;
- (b) it will attend to any necessary remediation at their own costs; and
- (c) to the fullest extent permitted by Law indemnify and release the Council from any Claim which might arise from any contamination with respect to the land on which the Works are to be carried out.

**15 Plans**

The parties acknowledge and agree that further detail and refinement of plans and documents in connection with this agreement may be necessary having regard to the following matters:

- (a) matters affecting Works not capable of identification on or before the date of this agreement; or
- (b) by agreement between the parties.

## Schedule 3 Easement Terms

***NOTE: The term Public Access Land is used in these Easement Terms. Amend that term if required.***

- 1 The owner of the Public Access Land grants to the Council and members of the public full and free right to go, pass and repass over the Public Access Land at all times:
  - (a) with or without companion animals (as defined in the Companion Animals Act 1998) or other small pet animals; and
  - (b) on foot without vehicles (other than wheelchairs or other disabled access aids), unless vehicles are being used to access the building on the Land via clearly identified entry and exit points;

for all lawful purposes.
- 2 The owner of the Public Access Land must, to the satisfaction of Council, acting reasonably:
  - (i) keep the Public Access Land (including any services in, on or under the Public Access Land) in good repair and condition;
  - (ii) maintain and repair the Public Access Land and all improvements on the Public Access Land;
  - (iii) keep the Public Access Land clean and free from rubbish; and
  - (iv) maintain sufficient public liability insurance covering the use of the Public Access Land in accordance with the terms of this Easement.
- 3 The owner of the Public Access Land must ensure that any rules made by an Owner's Corporation relating to the Public Access Land have been approved by the Council, acting reasonably.
- 4 If any member or members of the public loiter or congregate, for any purpose which the owner of the Public Access Land, acting reasonably, considers to be a nuisance or a safety risk, the owner may either remove those members of the public, or arrange for their removal by an appropriate authority.
- 5 The owner of the Public Access Land may erect safety signage and any other appropriate signage and may erect CCTV cameras in the Public Access Land.
- 6 The owner of the Public Access Land may engage security personnel to monitor and control the behaviour of the public including but not limited to prohibiting smoking, consumption of alcohol (except within licensed areas), passage of animals, bicycles and skateboards and the like in accordance with any rules made by an Owner's Corporation relating to the Public Access Land.
- 7 The owner of the Public Access Land may with the Council's prior written consent (except in the case of an emergency, in which case the Council's prior written consent is not required) temporarily close or temporarily restrict access through all or part of the Public Access Land for the time and to the extent necessary but only on reasonable grounds for the purposes of:
  - (a) construction, construction access, repairs, maintenance, replacement and alteration to the Public Access Land or any improvements in, on or under the Public Access Land; or

- (b) security, public safety or evacuation of the Public Access Land and adjoining buildings.
- 8 Subject to ensuring the provision of access in accordance with above clause 1 of this Schedule, the owner of the Public Access Land may, provided any necessary planning approvals are obtained:
- (c) Carry out works in the Public Access Land for the purposes of enhancing the Public Access Land;
  - (d) Install or erect works of art, street furniture, awnings, tables and chairs associated with ground floor commercial premises, notice boards or any other similar improvements at ground level within the Public Access Land; and
  - (e) Use the Public Access Land,  
in a manner consistent with [any applicable Council Policy (for example, an Outdoor Dining Policy) should be inserted here].
- 9 The Council is solely empowered to release this Easement.
- 10 This Easement may only be varied by written agreement between the Council and the owner of the Public Access Land.

## Schedule 4 Summary of requirements (section 7.4)

| Subject and subsection of the Act   | Planning Agreement  |
|---|---|
| <p><b>Planning instrument and/or Development Application – Section 7.4(1)</b></p> <p>The Landowners have:</p> <p>(a) Sought a change to an environmental planning instrument</p> <p>(b) Made, or propose to make a Development Application</p> <p>(c) Entered into an agreement with, or are otherwise associated with, a person to whom paragraph (a) or (b) applies</p> | <p><input type="checkbox"/> Yes<br/><input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes<br/><input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes<br/><input type="checkbox"/> No</p> |
| <p><b>Description of the land to which the planning Agreement applies – Section 7.4(3)(a)</b></p>   |   |
| <p><b>Description of the change to the environmental planning instrument or development to which the Planning Agreement applies - Section 7.4(3)(b)</b></p>   |   |
| <p><b>The scope, timing and manner of delivery of contributions required by the Planning Agreement – Section 7.4(3)(c)</b></p>  |   |
| <p><b>Applicability of section 7.11 of the Act – Section 7.4(3)(d)</b></p>  |   |
| <p><b>Applicability of section 7.12 of the Act – Section 7.4(3)(d)</b></p>  |   |
| <p><b>Applicability of section 7.24 of the Act – Section 7.4(3)(d)</b></p>  |   |
| <p><b>Whether the benefits are or are not to be taken into consideration in determining a development contribution under section 7.11 – Section 7.4(3)(e)</b></p>   |   |
| <p><b>Mechanism for dispute resolution – Section 7.4(3)(f)</b></p>  |   |
| <p><b>Enforcement of the Planning Agreement by a suitable means – Section 7.4(3)(g)</b></p>   |   |
| <p><b>Registration of the Planning Agreement – Section 7.6</b></p>  |   |
| <p><b>No obligation to grant consent or exercise functions – Section 7.4(9)</b></p>   | See clause 14 (no fetter)   |



## Executed as an agreement

**Executed** for and on behalf of **Penrith** )  
**City Council** by its authorised delegate in )  
accordance with a resolution of the )  
Council dated [insert date]: )

.....  
Signature of witness

.....  
Signature of Authorised Delegate

Print position:

.....  
Print name

.....  
Print name

[Insert further execution clauses as required for each party]

Annexure A      Plan showing Land

***NOTE: Delete Annexures that are not relevant***

Annexure B      Plan showing Dedication Land

Annexure C      Plan showing Public Access Land

## Annexure D Plans showing Works

# Annexure E      Schedule of Materials and Finishes