

Development & Environment Committee

Meeting Date: Monday, 18 January, 2021

Location: Council Chambers, City Administrative Building, Bridge Road, Nowra

Attachments (Under Separate Cover)

Index

7. Reports

DE21.1	Post Exhibition Finalisation - Voluntary Planning Agreement Policy and Works in Kind Policy Package	
Attachment 2	Combined Policy Package with recommended post exhibition changes.....	2



Draft Planning Agreement Policy

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Produced By: Planning Environment & Development Group

Review Date: **[Insert]**

Post exhibition additions are shown with **green highlighting**, and post exhibition deletions are shown in **red strikethrough with green highlighting**.

For more information contact the City Futures Group

Administrative Centre, Bridge Road, Nowra • **Telephone (02) 4429 3111** • Fax (02) 4422 1816 • PO Box 42 Nowra 2541
Southern District Office – Deering Street, Ulladulla • **Telephone (02) 4429 8999** • Fax (02) 4429 8939 • PO Box 737
Ulladulla

council@shoalhaven.nsw.gov.au • www.shoalhaven.nsw.gov.au

CONTENTS

1. PURPOSE.....	1
2. APPLICATION	1
3. OBJECTIVES.....	2
4. LEGISLATIVE AND POLICY CONTEXT	2
5. GUIDING PRINCIPLES OF PLANNING AGREEMENTS.....	2
6. THE PLANNING AGREEMENT PREPARATION AND EXECUTION PROCESS	4
7. PLANNING AGREEMENT PARTICULARS.....	9
8. OPERATION, MONITORING AND REVIEW OF A PLANNING AGREEMENT.....	12
9. DEFINITIONS.....	13
10. REVIEW	14
11. APPLICATION OF ESD PRINCIPLES.....	14

1. PURPOSE

Shoalhaven City Council (Council) is committed to ensuring a fair, transparent and accountable process for developers seeking to enter into Planning Agreements to which Council is a party. A Planning Agreement is a planning tool which can be used to negotiate flexible outcomes for a variety of public purposes, whether tied to Section 7.11 contributions or not.

The purpose of this Policy is to set out Council's framework for the preparation and use of Planning Agreements including:

- The instances in which Council may consider entering into a planning agreement;
- The matters generally covered by a planning agreement;
- The form of development contributions which may be sought under a planning agreement;
- The kinds of public benefits which may be negotiated and whether it includes a planning benefit;
- The method of determining the value of public benefits;
- Whether money paid under different planning agreements is to be pooled and progressively applied towards the provision of public benefits that the different agreements relate;
- Details relating to the timing and delivery of the public benefit to be provided;
- Probity measures and the procedures for making an application, negotiating and entering into a planning agreement;
- How Council will assess an application for a Planning Agreement.

2. APPLICATION

This policy applies when a developer seeks to negotiate a Planning Agreement with Council, associated with any Complying Development Certificate (CDC), Development Application (DA) or Planning Proposal (PP). The Planning Agreement could apply to land within the Shoalhaven local government area (including any land owned by the Council), as well as any land outside the Shoalhaven LGA, where Council has entered into a joint Planning Agreement with another council.

This policy will prevail to the extent of any inconsistency with any other policies that would otherwise apply to a Planning Agreement. Whilst this Policy is not legally binding, it is intended that Council and any person a party to a Planning Agreement will follow this Policy to the fullest extent possible.

3. OBJECTIVES

This Policy aims to:

- Ensure a consistent approach to the negotiation and preparation of all planning agreements;
- Ensure greater probity and establish a probity framework for the negotiation, preparation exhibition and implementation of planning agreements.
- Supplement, or where appropriate, replace the application of section 7.11 of the Act;
- Facilitate innovative and flexible approaches to the provision of infrastructure and other public benefits, consistent with Shoalhaven Contributions Plan 2019; and
- Provide stakeholders with a greater involvement in the type, standard and location of public facilities and other public benefits.

4. LEGISLATIVE AND POLICY CONTEXT

A Planning Agreement is a voluntary agreement, entered into by one or more planning authorities and a developer, where that developer seeks to change an environmental planning instrument or who has made, or who proposes to make a DA or an application for a CDC, where the following is required to be used for or applied towards a public purpose:

- Dedication of land.
- A monetary contribution.
- Material public benefit
- A combination of some or all of the above.

Part 7, Subdivision 2 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and Division 1A of the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulations), prescribes the procedural framework relating to the preparation of planning agreements in more detail.

5. GUIDING PRINCIPLES OF PLANNING AGREEMENTS

In July 2005, the NSW Government issued the [Development Contributions Practice Note](#). The Practice Note identifies a number of key guidelines and safeguards in the application of Planning Agreements which have been expanded upon below.

Fundamental Principles governing the use of Planning Agreements

Council's use of Planning Agreements will be governed by the following principles:

- Planning decision may not be bought and sold through Planning Agreements
- Development that is unacceptable on planning grounds will not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms;

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- The Council will not allow Planning Agreements to improperly fetter the exercise of its functions under the Act, Regulations or any other Act or law;
- The Council will not use Planning Agreements for any purpose other than a proper planning purpose;
- The Council will not seek benefits under a Planning Agreement that are unrelated to particular development;
- The Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed Planning Agreement;
- The Council will not improperly rely on its statutory position in order to extract unreasonable public benefits from developers under Planning Agreements; and

Where the Council has a commercial stake in the development subject of an agreement, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its interest in the development. Council will seek to ensure probity of its processes by ensuring applications involving planning agreements which involve Council land, or development applications made by or on behalf of Council, are assessed by an independent third party.

Acceptability Test to be applied to all Planning Agreements

When considering entering into a Planning Agreement, Council will apply the following test in order to assess the desirability of the possible outcome of a proposed Planning Agreement:

- Is the proposed Planning Agreement directed towards a proper and legitimate planning purpose having regard to its statutory planning controls and other adopted planning policies and the circumstances of the case?
- Does the Planning Agreement result in a public benefit?
- Does the Planning Agreement provide for a reasonable means of achieving the relevant purpose?
- Can the Planning Agreement be taken into consideration in the assessment of the relevant planning proposal or development application?
- Will the Planning Agreement produce outcomes that meet the general values and expectations of the community and protect the overall public interest?
- Does the Planning Agreement promote Council's strategic objectives in relation to the use of Planning Agreements?
- Does the Planning Agreement conform to the fundamental principles governing the Council's use of Planning Agreements?
- Are there any relevant circumstances that may operate to preclude Council from entering into the proposed Planning Agreement?

Matters Council May Consider

The matters that Council may consider in any negotiations for a Planning Agreement include whether:

- The demands created by the development for new public infrastructure, amenities or services are addressed;

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- The facilities and/or services to be provided meet the planning and strategic objectives of Council;
- Mitigation of the impact of development is addressed;
- Recurrent funding of public facilities is required;
- Past deficiencies in infrastructure provision that would otherwise prevent a development from occurring are addressed;
- Monitoring the planning impacts of development is required;
- Compensation for the loss of, or damage to, a public amenity, service, resource or asset caused by the developer through its replacement, substitution, repair or regeneration is provided for.
- Planning benefits for the wider community accrue from the Planning Agreement; and
- Any initial or ongoing costs are designated as Council's responsibility.

6. THE PLANNING AGREEMENT PREPARATION AND EXECUTION PROCESS

The Planning Agreement process, from start to execution, consists of 7 key steps as outlined in **Figure 1** and explained below.

The negotiation of Planning Agreements can be complex, and a number of the steps below may need to be repeated, including negotiation and public exhibition.



Figure 1: Summary of Planning Agreement Process Steps

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Step 1 – Initial Planning Agreement discussion and negotiation with Council

Prior to submitting a formal request for a Planning Agreement with Council the applicant must meet with Council's Development Contributions Coordinator (and other relevant staff) to:

- Discuss Council's preliminary expectations for a Planning Agreement, understand background information and ensure the proposal meets Council's requirements;
- Demonstrate that the relevant assessment criteria can be satisfied;
- Discuss the approval process.
- Discuss whether the proposed Planning Agreement is relevant to the DA, CDC or PP (i.e. directed towards appropriate and legitimate planning purposes) and whether it could be considered in connection with the application/proposal. A request to enter into a Planning Agreement will not be accepted if it is not associated with a Complying Development Application (CDC), Development Application (DA) or Planning Proposal (PP), and
- Determine the proper planning weight to be given to the proposed Planning Agreement and the public benefits being offered under the proposed terms.
- Discuss whether the proposal meets Council's planning policy objectives, including this Policy, the Shoalhaven Contributions Plan 2019 and other Council policies, procedures and technical specifications (as relevant).
- Discuss whether the proposed Planning Agreement meets the requirements of Council's Capital Works program.
- Determine whether the Planning Agreement seeks to justify a dispensation from an applicable local environmental plan (LEP) development standard/s under clause 4.6 of the LEP. A Planning Agreement can only be used for this purpose if Council is of the opinion that the subject matter of the proposed Planning Agreement addresses the matters specifically required to be addressed under that clause in relation to the dispensation sought.

Through this initial step the key issues associated with the proposal will be discussed, the parties will decide whether to negotiate a Planning Agreement and if favourable, the negotiations will commence.

Whilst Development Assessment Planners may be involved in preliminary discussions associated with a Planning Agreement, for probity, there is a need for the separation of responsibilities. As such, Development Assessment Planners are not to be involved in the negotiation of Planning Agreements.

Council is not under any obligations to enter into a Planning Agreement.

The negotiation of a Planning Agreement will generally involve the following steps:

- The parties will appoint a person to represent them in the negotiations;
- The parties will appoint a third person to attend and take minutes of all negotiations;
- The parties will decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it;
- The parties will identify the key issues for negotiation and undertake negotiations;

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- If 'in principle' agreement is reached, Step 2 commences.

Step 2 – Submit a Planning Agreement Application

Once each party has a real understanding of the proposal and an agreement has been reached at Step 1, the developer can then make the relevant application [\[Insert Hyperlink to Form\]](#) to Council accompanied by a written offer to enter into a Planning Agreement, with the specifics of the agreement set out in detail.

The formal request is to be complete and include the developer's details. Where the developer is not the owner of land subject to the Planning Agreement, the landowner must provide owners consent. The owner will also be required to become a party to the Planning Agreement.

The formal request must also include the following mandatory requirements as per Section 7.4(3) of the EP&A Act:

- A description of the land to which the agreement relates, including the legal description;
- A description of:
 - the change to the environmental planning instrument to which the agreement applies, or
 - the development to which the agreement applies,
- The nature and extent of the provision to be made by the developer under the agreement, the time or times by which the provision is to be made and the manner by which the provision is to be made. This includes the public benefits being offered under the terms of the Planning Agreement.
- In the case of development, whether the agreement excludes (wholly or in part) or does not exclude the application of Section 7.11 to the development. If the agreement does not exclude the application of Section 7.11 to the development, whether benefits under the agreement are or are not to be taken into consideration in determining a development contribution under Section 7.11.

The parties will undertake further negotiations on the specific terms of the proposed Planning Agreement as required until a consensus is reached.

At this stage, all WIK Agreement Applications will be considered by the Contributions Panel (panel of relevant Council staff).

Step 3 – Report to Council

The outcomes of the negotiations and the assessment of the written offer to enter into a Planning Agreement offer will be reported to Council to seek a formal resolution to prepare a draft Planning Agreement for public exhibition, except in the following circumstances:

- Where the Planning Agreement would be in a template format, and
- The contributions that will be required:
 - Are a standard amount of monetary contributions or an amount of monetary contributions that can be easily calculated using a standard rate, or
 - Consists of work and/or dedication land that are listed in Shoalhaven Contributions Plan 2019 and s7.11 contributions are not excluded, or

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- Consists of work and/or dedication of land that are listed in Shoalhaven Contributions Plan 2019 and s7.11 is excluded, but only in relation to s7.11 which are for the same category of infrastructure as the works and land to be provided under the Planning Agreement, and
- The Planning Agreement does not involve credit or refund arrangements, or has credit or refund arrangements which are set out in template format.

If as a result of negotiations, additional or different provisions or credit arrangements are required to be included, then the Planning Agreement would need to be reported to the Council before it is entered into.

In relation to Planning Agreements that are to be reported to Council in Step 3, Council at this may stage resolve to delegate authority to Council's Chief Executive Officer, or his delegate, to negotiate, publicly notify, enter into and register the Planning Agreement consistent with the detailed key terms.

Where a Planning Agreement offer is made in conjunction with a PP, where practical, the report to Council will occur in conjunction with the report seeking endorsement for the PP to be submitted to the Department of Planning, Industry and Environment for a Gateway determination.

Step 4 – Preparation of the draft Planning Agreement

Following a formal resolution from Council to proceed with the Planning Agreement, preparation of the draft Planning Agreement can commence in accordance with the Planning Agreement Template at **Attachment 1**. The template reflects the policies and procedures set out in this Policy.

Council will ordinarily prepare the draft Planning Agreement. Refer to Section 7 below regarding costs.

Step 5 – Public Exhibition

In accordance with the EP&A Act, a Planning Agreement must be publicly exhibited for a minimum period of 28 days, however Council may decide to extend this period. Where possible, the public exhibition of the draft planning agreement should occur concurrently with the public exhibition of the associated PP, DA or CDC; however, it is acknowledged that this is not always practicable.

Clause 25(E) of the Regulation requires that an explanatory note, jointly prepared by the parties, must accompany any Planning Agreement that:

- Summarises the objectives, nature and effect of the proposed agreement, amendment or revocation; and
- Contains an assessment of merits of the proposed agreement, amendment or revocation, including the impact (positive or negative) on the public or any relevant section of the public.

Public submissions received during the public exhibition of the Planning Agreement will be considered separately to those relating to the PP, DA or CDC it relates to, however the content of the submissions may require further negotiations to be undertaken. If Council considers that a material change needs to be made to the terms of the Planning Agreement or the PP, DA or CDC after it has been publicly exhibited, Council may re-exhibit the revised planning agreement and the application to which it relates.

Step 6 – Report to Council

In relation to a Planning Agreement that was reported to Council at Step 3 and where Council did not delegate authority to Council's Chief Executive Officer, or his delegate, the outcomes of the exhibition period will then be reported to Council for consideration and to seek a formal resolution to execute the Planning Agreement.

In relation to a Planning Agreement that was not reported to Council at Step 3 or a Planning Agreement that was reported to Council at Step 3 and where Council did delegate authority to Council's Chief Executive Officer, or his delegate; Step 6 does not apply unless there are objections or substantial issues raised as a result of public notification, in which case the Planning Agreement would need to be reported to Council before it is entered into.

Step 7 – Execution of the Planning Agreement

Following a formal resolution from Council, any required changes will be made to the Planning Agreement and finalisation can occur. A Planning Agreement is executed when it is signed by all of the parties.

Council will usually require a developer to give an irrecoverable offer and execute the Planning Agreement at the following times:

- Development Applications (or modification application):
 - Council will seek to have the planning agreement executed prior to granting development consent.
 - Where the planning agreement is not executed prior to development consent being granted or modified, a condition will be imposed requiring execution of the planning agreement in accordance with the offer made and subsequent registration of the agreement.
 - Council will impose a deferred commencement condition requiring the execution and registration of the planning agreement be satisfied before the consent can become operational.

Council cannot impose a condition of consent that requires a developer to enter into a planning agreement on terms different to those offered, or if a planning agreement was not offered.

- Planning Proposals:
 - Council will seek to have the planning agreement executed prior to finalisation of any instrument change referred to in the planning proposal, or before Council makes that instrument change under delegation.
 - Council may also impose conditions of consent for related development applications requiring compliance with the Planning Agreement and the delivery of relevant contributions at the required time.
 - If the developer refuses to execute a planning agreement in connection with a PP or at the appropriate time, in accordance with Section 3.35 of the EP&A Act, Council may request the Minister not proceed with the instrument change.
- Complying Development Certificates: To be negotiated on a case by case basis.

7. PLANNING AGREEMENT PARTICULARS

Council's Costs of Negotiating, Entering Into, Monitoring and Enforcing a Planning Agreement

Council will require a Planning Agreement to make provision for payment by the developer of 100% of Council's costs of and incidental to:

- Negotiating, preparing and entering into the agreement (including associated legal costs and staff time);
- Enforcing the agreement.

Standard Charges

Wherever possible, Council will seek to standardise development contributions sought under Planning Agreements in order to streamline negotiations and provide fairness, predictability and certainty for developers. This, however, does not prevent public benefits being negotiated on a case by case basis, particularly where planning benefits are also involved.

Recurrent Charges

Council may request developers, through a Planning Agreement, to make development contributions towards the recurrent costs of public facilities. Where the public facility primarily serves the development to which the Planning Agreement relates or neighbouring development, the arrangement for recurrent funding may be in perpetuity. However, where the public facility or public benefit is intended to serve the wider community, the Planning Agreement will only require the developer to make contributions towards the recurrent costs of the facility until a public revenue stream is established to support the on-going costs of the facility.

Credits

Council will not agree to a Planning Agreement providing for the surplus value under a Planning Agreement being refunded to the developer or offset against development contributions required to be made by the developer in respect of other development in the Council's area.

Ongoing administration

In particular cases, Council may require the Planning Agreement to make provision for a development contribution by the developer towards the ongoing administration of the agreement.

Pooling of Development Contributions

Where a proposed Planning Agreement provides for a monetary contribution by the developer, the Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other Planning Agreements or by other developer contributions and applied progressively for the different purposes under those agreements or contributions, subject to the specific requirements of the relevant agreements. Pooling may be appropriate

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to allow public benefits, particularly essential infrastructure, to be provided in a fair, equitable and timely way.

Assignment and Dealings by the Developer

Council will require every Planning Agreement to provide that the Developer may not assign its rights or obligations under the agreement nor have any dealing in relation to the land the subject of the agreement unless, in addition to any other requirements of the agreement:

- The Council has given its consent to the proposed assignment or dealing;
- The developer has, at no cost to the Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of the Council by which that person agrees to be bound by the agreement as if they were a party to the original agreement, and
- The developer is not in breach of the Agreement.

Implementation

Council will require a Planning Agreement to provide for matters that relate to implementation of the proposed works, such as:

- The times at which and, if relevant, the period during which, the developer is to make provision under the Planning Agreement.

Council will generally require a Planning Agreement to provide that the developer's obligations under the agreement take effect when the first development consent operates in respect of development that is the subject of the agreement.

- The design, technical specification and standard of any work required by the Planning Agreement to be undertaken by the developer;
- The manner in which a work is to be handed over to the Council; and
- The manner in which a material public benefit is to be made available for its public purpose in accordance with the Planning Agreement.

Hand-over of Works

Council will also require the Planning Agreement to:

- Specify that the hand-over of a public work carried out under a Planning Agreement will not be accepted unless the developer furnishes to the Council a certificate to the effect that the work has been carried out and completed in accordance with the agreement and any applicable development consent (which certificate may, at the Council's discretion, be a final occupation certificate, compliance certificate or a subdivision certificate) and, following the issue of such a certificate to the Council, the work is also certified as complete by an appropriate Council officer.
- Provide for a defects liability period during which any defects must be rectified at the developer's expense.

If a Planning Agreement provides for the developer, at the developers cost, to manage or maintain land that has been dedicated to the Council or works that have been handed-over to

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the Council, the Council may require the parties to enter into a separate implementation agreement in that regard (refer to 'Implementation' Section above).

Developers may propose changes to the hand-over procedure as set out in the VPA template for Council consideration and approval, as appropriate in the circumstances of each agreement.

The failure of the parties to reach agreement in relation to management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the Planning Agreement.

Provision of Security Under a Planning Agreement

The Council will require a Planning Agreement to make provision for enforcement of the Planning Agreement (i.e. security) in the event of a breach of the Planning Agreement by the developer, consistent with Section 7.4(3) of the EP&A Act. The form of security will generally be the unconditional bank guarantee from an Australian Bank in favour of the Council to the full value of the Developer's provision under the Planning Agreement and on terms otherwise acceptable to the Council. **Council may consider a lesser amount, if it can be satisfied that other security measures are implemented to secure the provision of the development contributions and any Council enforcement costs.**

Notations on Planning Certificates Under section 10.7 of the Act

Council will require a Planning Agreement to contain an acknowledgement by the developer that the Council may, in its absolute discretion, make a notation under Section 10.7(5) of the EP&A Act about a Planning Agreement on any certificate issued under section 10.7 of the Act relating to the land the subject of the agreement or any other land.

Registration of Planning Agreements

Council will require a Planning Agreement to contain a provision requiring the developer to agree to registration of the agreement pursuant to section 7.6 of the Act if the requirements of that section are satisfied.

Dispute Resolution

In accordance with the EP&A Act, Council will require a Planning Agreement to provide for mediation of disputes between the parties to the agreement before the parties may exercise any other legal rights in relation to the dispute.

Methodology for Valuing Public Benefits Under a Planning Agreement

Unless otherwise agreed, where the benefit under a Planning Agreement is the provision of land for a public purpose, the Council will generally seek to value the benefit on the basis of the estimated amount of compensation to which the Developer would be entitled under *the Land Acquisition (Just Terms Compensation) Act 1991* upon the compulsory acquisition of the land. This means the estimated value of the completed works determined using the method that would be ordinarily adopted by a quantity surveyor.

Public use of Privately-Owned Facilities

If a Planning Agreement provides for the developer to make a privately-owned facility available for public use, Council may require the parties to enter into a separate agreement in that regard.

The failure of the parties to reach agreement in relation to management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the Planning Agreement.

8. OPERATION, MONITORING AND REVIEW OF A PLANNING AGREEMENT

Monitoring and Review of a Planning Agreement

Council will continuously monitor the performance of the developer's obligations under a Planning Agreement.

Council will require the Planning Agreement to contain a provision establishing a mechanism under which the performance and milestones contained under the Planning Agreement are periodically reviewed with the involvement of all parties.

Council may appoint an officer to supervise the implementation of the works that are the subject of the Planning Agreement.

Modification or Discharge of the Developer's Obligations Under a Planning Agreement

Council may agree to a provision in a Planning Agreement permitting the developer's obligations under the agreement to be modified or discharged where the modification or discharge is linked to the following circumstances:

- The developer's obligations have been fully carried in accordance with the agreement.
- The developer has assigned the developer's interest under the agreement in accordance with its terms and the assignee has become bound to the Council to perform the developer's obligations under the agreement.
- The development consent or approval to which the agreement relates has lapsed.
- The performance of the Planning Agreement has been frustrated by an event beyond the control of the parties.
- Other material changes affecting the operation of the Planning Agreement have occurred.
- The Council and the developer otherwise agree to the modification or discharge of the agreement.

Such a provision will require the modification or revocation of the Planning Agreement in accordance with the EP&A Act and the EP&A Regulation.

Reporting and Register Obligations

In accordance with Section 7.5(5) of the EP&A Act, Council is required to include in its annual report the particulars of compliance with and the effect of the planning agreements in force during the year to which the report relates.

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Council maintains a [register](#) of all Planning Agreements that have been executed by Council.

9. DEFINITIONS

Applicant means the person entitled to act upon a Development Consent or Complying Development Certificate, or in relation to a Planning Proposal.

Complying development certificate has the same meaning as in the EP&A Act.

Council means Shoalhaven City Council.

Developer means a person who has sought a change to an environmental planning instrument (which includes the making, amendment or repeal of an instrument (Section 7.4 (11) of the EP&A Act), or who has made or proposes to make a development application or complying development application, or who has entered into an agreement with or is otherwise associated with such a person.

Development application (DA) has the same meaning as in the EP&A Act.

Development contributions means the kind of provision made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit.

Contributions plan means a document that has been publicly exhibited and adopted by Council pursuant to Section 7.18 (formerly Section 94EA) of the EP&A Act that authorises the imposition of a condition under Section 7.11 (formerly Section 94) of that Act, as amended from time to time.

EP&A Act means the *Environmental Planning and Assessment Act 1979*.

EP&A Regulation means the Environmental Planning and Assessment Regulation 2000.

Infrastructure item means an item identified in the Contributions Plan or such other public infrastructure item approved by the Council.

Instrument change means a change to an environmental planning instrument to enable a development application to be made to carry out development the subject of a Planning Agreement.

Planning authority means Shoalhaven City Council (Council).

Planning benefit means a development contribution that confers a net public benefit, that is, a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community.

Planning proposal means a document that explains the intended effect of a proposed local environmental plan (LEP) and sets out the justification for making that plan.

Public includes a section of the public.

Public benefit means the benefit enjoyed by the public as a consequence of a development contribution.

Shoalhaven City Council – Draft Planning Agreement Policy

Public purpose means the provision of, or the recoupment of the cost of providing public amenities and public services (as defined in Section 7.4 (11) of the EP&A Act), affordable housing, transport or other infrastructure. It also includes the funding of recurrent expenditure relating to such things as the monitoring of the planning impacts of development and the conservation or enhancement of the natural environment.

Public facilities means public infrastructure, facilities, amenities and services.

10. REVIEW

This policy will be reviewed within one year of the election of every new Council, or earlier should circumstances arise to warrant revision.

11. APPLICATION OF ESD PRINCIPLES

This policy is in line with Council's adopted policy on integrating the principles of Ecologically Sustainable Development (ESD) into all Council's planning, decision-making and actions. The policy reflects the effective integration of economic and social considerations in the planning framework.

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Attachment 1 – Planning Agreement Template

DE21.1 - Attachment 2

Deed

[Insert Name of Planning Agreement]

Planning Agreement

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3]

[INSERT DATE]

Post exhibition additions are shown with **green highlighting**, and post exhibition deletions are shown in **red-strikethrough with green-highlighting**.

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

[Insert Name of Planning Agreement]

Table of Contents

Summary Sheet	4
Parties	6
Background	6
Operative provisions	6
Part 1 – Preliminary	6
1 Interpretation	6
2 Status of this Deed	10
3 Commencement	10
4 Application of this Deed	10
5 Warranties	11
6 Further agreements	11
7 Surrender of right of appeal, etc.	11
8 Application of s7.11, s7.12 and s7.24 of the Act to the Development	11
Part 2 – Development Contributions	12
9 Provision of Development Contributions	12
10 Payment of monetary Development Contributions	12
11 Dedication of land	12
12 Carrying out of Work	13
13 Variation to Work	14
14 Access to land by Developer	14
15 Access to land by Council	14
16 Protection of people, property & utilities	14
17 Repair of damage	15
18 Completion of Work	15
19 Rectification of defects	15
20 Works-As-Executed-Plan	16
21 Removal of Equipment	16
Part 3 – Dispute Resolution	16
22 Dispute resolution – expert determination	16
23 Dispute Resolution - mediation	17
Part 4 – Enforcement	17
24 Security for performance of obligations	17

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

25	Grant of Charge	18
26	Caveat and Discharge	18
27	Priority	19
28	Acquisition of land required to be dedicated.....	19
29	Breach of obligations	20
30	Enforcement in a court of competent jurisdiction	21
Part 5 – Registration & Restriction on Dealings		21
31	Registration of this Deed	21
32	Restriction on dealings	21
Part 6 – Indemnities & Insurance		22
33	Risk	22
34	Release	22
35	Indemnity	22
36	Insurance	22
Part 7 – Other Provisions		23
37	Annual report by Developer	23
38	Review of Deed	23
39	Notices	24
40	Approvals and Consent	24
41	Costs	24
42	Entire Deed	25
43	Further Acts	25
44	Notations on section 10.7(2) Planning Certificates	25
45	Governing Law and Jurisdiction	25
46	Joint and Individual Liability and Benefits	25
47	No Fetter	25
48	Illegality	26
49	Severability	26
50	Amendment	26
51	Waiver	26
52	GST	27
53	Explanatory Note	28
Schedule 1		29
Execution.....		30
Appendix		32

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

[Insert Name of Planning Agreement]

Summary Sheet

Council:

Name: Shoalhaven City Council ABN 59 855 182 344

Address: 36 Bridge Rd, Nowra NSW 2541

Telephone: [Insert Details]

Email: [Insert Details]

Representative: [Insert Details]

Developer:

Name: [Insert Details]

Address: [Insert Details]

Telephone: [Insert Details]

Email: [Insert Details]

Representative: [Insert Details]

Landowner:

Name: [Insert Name]

Address: [Insert Details]

Telephone: [Insert Details]

Email: [Insert Details]

Representative: [Insert Details]

Land:

See definition of *Land* in clause 1.1.

Development:

See definition of *Development* in clause 1.1.

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Development Contributions:

See clause 9 and Schedule 1.

Application of s7.11, s7.12 and s7.24 of the Act:

See clause 8.

Security:

See Part 4.

Registration:

See clause 32.

Restriction on dealings:

See clause 33.

Dispute Resolution:

See Part 3.

DRAFT

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

[Insert Name of Planning Agreement]

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Parties

Shoalhaven City Council ABN 59 855 182 344 of 36 Bridge Rd, Nowra NSW 2541
(Council)

and

[Insert Name of Party 2] ABN [Insert details] of [Insert Address] (Developer)

and

[Insert Name of Party 3] ABN [Insert details] of [Insert Address] (Landowner)

[Drafting Note: Only required if the Developer is not the owner of land to which this VPA relates. The landowner must be a party to the VPA.]

Background

A **[Drafting note:** Provide a brief background to the Development and this Deed.]

Operative provisions

Part 1 – Preliminary

[Drafting note: Some of the definitions in this clause may not be relevant. The definitions should be reviewed and removed, added to, amended and adapted to the circumstances of each particular case.]

1 Interpretation

1.1 In this Deed the following definitions apply:

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

Approval includes approval, consent, licence, permission or the like.

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

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Bank Guarantee means an irrevocable and unconditional undertaking without any expiry or end date in favour of the Council to pay an amount or amounts of money to the Council on demand issued by:

- (a) one of the following trading banks:
 - (i) Australia and New Zealand Banking Group Limited,
 - (ii) Commonwealth Bank of Australia,
 - (iii) Macquarie Bank Limited,
 - (iv) National Australia Bank Limited,
 - (iv) St George Bank Limited,
 - (v) Westpac Banking Corporation, or
- (b) any other financial institution approved by the Council in its absolute discretion.

Charge means the charge referred to in clause 25.1.

Charge Land means **[Drafting Note. Insert land description]**.

Claim includes a claim, demand, remedy, suit, injury, damage, loss, Cost, liability, action, proceeding or right of action.

Clearance Certificate means a clearance certificate issued by the Commissioner for Taxation under paragraph 14-220 of Schedule 1 of the *Taxation Administration Act 1953* (Cth).

Contribution Item means an item of Development Contribution specified in Column 1 of Schedule 1.

Contribution Value means in respect of a Contribution Item the \$ amount agreed between the Parties as the value of a Development Contribution made under this Deed. **[Drafting Note. A Contribution Value is only necessary if there are credit or offset arrangements under the VPA or for the purposes of calculating the amount of security. If works or land to be dedicated under this VPA are specified in a contributions plan then the value attributed to the work or land in the contributions plan should be used. Otherwise the value of land will generally be the compensation available under the Land Acquisition (Just Terms Compensation Act) 1991 and value of works generally will be based on the estimated cost of completing the work using the method ordinarily adopted by a quantity surveyor. Council will not normally agree to any surplus value being refunded or offset against development contributions required to be made by the developer in respect of other development in the Council's area].**

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

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

Defect means anything that adversely affects, or is likely to adversely affect, the appearance, structural integrity, functionality or use or enjoyment of a Work or any part of a Work.

Defects Liability Period means the period of 1 year commencing on the day immediately after a Work is completed for the purposes of this Deed.

Development means **[Drafting Note. Insert description of the development to which this Deed relates. The description can refer to a specific development]**

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

application. The description can be included in a schedule to this Deed if appropriate].

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost, the carrying out of work, or the provision of any other material public benefit, or any combination of them, to be used for, or applied towards a public purpose, but does not include any Security or other benefit provided by a Party to the Council to secure the enforcement of that Party's obligations under this Deed for the purposes of s7.4(3)(g) of the Act.

Dispute means a dispute or difference between the Parties under or in relation to this Deed.

ELNO has the meaning given to that term in the Participation Rules.

Equipment means any equipment, apparatus, vehicle or other equipment or thing to be used by or on behalf of the Developer in connection with the performance of its obligations under this Deed.

Foreign Resident Capital Gains Withholding Amount mean the amount a purchaser is required to pay to the Commissioner for Taxation under paragraph 14-200 of the *Taxation Administration Act 1953* (Cth).

Final Lot means a lot created in the Development for separate residential occupation and disposition or a lot of a kind or created for a purpose that is otherwise agreed by the Parties, not being a lot created by a subdivision of the Land:

- (a) that is to be dedicated or otherwise transferred to the Council, or
- (b) on which is situated a dwelling-house that was in existence on the date of this Deed.

GST has the same meaning as in the GST Law.

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

Just Terms Act means the *Land Acquisition (Just Terms Compensation) Act 1991*.

Land means [Drafting Note. Insert description of the land to which this Deed relates. This can be done by reference to title or to a map or by other means as appropriate. The description of the land can be included in a schedule to this Deed if appropriate. If a map is used, Map should be a defined term in this clause].

LEP means the *Shoalhaven Local Environmental Plan 2014*.

LEP Amendment means an amendment to the LEP giving effect to the Planning Proposal. [Drafting Note. Delete if not relevant.]

LEP Amendment Date means the date the LEP Amendment takes effect. [Drafting Note. Delete if not relevant.]

Maintain, in relation to a Work, means keep in a good state of repair and working order, and includes repair of any damage to the Work.

Participation Rules means the participation rules as determined by the *Electronic Conveyancing National Law* (NSW).

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Party means a party to this Deed.

Planning Proposal means [Insert details]. **[Drafting Note. Delete if not relevant.]**

Rectification Notice means a notice in writing:

- (a) identifying the nature and extent of a Defect,
- (b) specifying the works or actions that are required to Rectify the Defect,
- (c) specifying the date by which or the period within which the Defect is to be rectified.

Rectify means rectify, remedy or correct.

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

Security means a Bank Guarantee to the satisfaction of the Council indexed in accordance with [Drafting Note. Insert indexation method] from the date of this Deed.

Stage means a stage of the Development approved by a Development Consent or otherwise approved in writing by the Council for the purposes of this Deed.

Subdivision Certificate has the same meaning as in the Act.

Work means the physical result of any building, engineering or construction work in, on, over or under land.

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

- 1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Deed.
- 1.2.2 A reference in this Deed to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- 1.2.3 If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day.
- 1.2.4 A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
- 1.2.5 A reference in this Deed to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
- 1.2.6 A reference in this Deed to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- 1.2.7 A reference in this Deed to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- 1.2.10 Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- 1.2.11 A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.13 A reference to this Deed includes the agreement recorded in this Deed.
- 1.2.14 A reference to a Party to this Deed includes a reference to the employees, agents and contractors of the Party, the Party's successors and assigns.
- 1.2.15 A reference to 'dedicate' or 'dedication' in relation to land is a reference to dedicate or dedication free of cost.
- 1.2.16 Any schedules, appendices and attachments form part of this Deed.
- 1.2.17 Notes appearing in this Deed are operative provisions of this Deed.

2 Status of this Deed

- 2.1 This Deed is a planning agreement within the meaning of s7.4(1) of the Act.
- 2.2 The Developer agrees that this Deed operates as a deed poll in favour of the Council on and from the date of execution of this deed by the Developer until the date on which this deed commences.

3 Commencement

- 3.1 This Deed commences and has force and effect on and from the date when the Parties have:
 - 3.1.1 all executed the same copy of this Deed, or
 - 3.1.2 each executed separate counterparts of this Deed and exchanged the counterparts.
- 3.2 The Parties are to insert the date when this Deed commences on the front page and on the execution page.

4 Application of this Deed

- 4.1 This Deed applies to the Land and to the Development **[Drafting Note. Include and the taking effect of the LEP Amendment' if relevant]**.

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

5 Warranties

- 5.1 The Parties warrant to each other that they:
- 5.1.1 have full capacity to enter into this Deed, and
 - 5.1.2 are able to fully comply with their obligations under this Deed.

6 Further agreements

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

7 Surrender of right of appeal, etc.

- 7.1 The Developer is not to commence or maintain, or to cause or procure the commencement or maintenance, of any proceedings in any court or tribunal or similar body appealing against, or questioning the validity of this Deed, or an Approval relating to the Development in so far as the subject-matter of the proceedings relates to **this the validity of this Deed or any condition in the Approval requiring the entering into or compliance with this Deed.**

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

- 8.1 This Deed **[excludes/does not exclude]* [Drafting Note. Delete whichever is not applicable]** the application of s7.11 of the Act to the Development.
[Drafting Note 1. The Deed may wholly or partially exclude the application of s7.11. If only partially, particulars of the exclusion must be provided.]
[Drafting Note 2. If the Deed does not wholly exclude the application of s7.11, a clause is required to stipulate whether any benefits under this Deed should be taken into consideration when determining a development contribution under s7.11 of the Act in relation to the Development.]
- 8.2 This Deed **[excludes/does not exclude]* [Drafting Note. Delete whichever is not applicable]** the application of s7.12 of the Act to the Development.
[Drafting Note. The Deed may wholly or partially exclude the application of s7.12. If so, particulars of the exclusion must be provided.]
- 8.3 This Deed does not exclude the application of s7.24 of the Act to the Development.

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Part 2 – Development Contributions

9 Provision of Development Contributions

- 9.1 The Developer is to make Development Contributions to the Council in accordance with Schedule 1, any other provision of this Deed relating to the making of Development Contributions and otherwise to the satisfaction of the Council.
- 9.2 Any Contribution Value specified in this Deed in relation to a Development Contribution comprising dedication of land or the carrying out of a Work does not serve to define the extent of the Developer's obligation to make the Development Contribution.
- 9.3 The Council is to apply each Development Contribution made by the Developer under this Deed towards the public purpose for which it is made and otherwise in accordance with this Deed.
- 9.4 Despite clause 9.2, the Council may apply a Development Contribution made under this Deed towards a public purpose other than the public purpose specified in this Deed if the Council reasonably considers that the public interest would be better served by applying the Development Contribution towards that other purpose rather than the purpose so specified.

10 Payment of monetary Development Contributions

- 10.1 A monetary Development Contribution is made for the purposes of this Deed when the Council receives the full amount of the contribution payable under this Deed in cash or by unendorsed bank cheque or by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by the Council.
- 10.2 If the Development Consent is modified to allow for additional **[Drafting Note: Insert relevant details e.g. dwellings/Final Lots]** after **[Drafting Note: Insert timing, which may, for example, be the issuing of the first relevant Part 6 certificate e.g. Construction Certificate/Subdivision Certificate]** for the Development, the Developer is to pay monetary Development Contributions to the Council for the additional **[Drafting Note: Insert relevant details e.g. dwellings/Final Lots]** not later than 7 days after the Development Consent has been modified.

11 Dedication of land

- 11.1 A Development Contribution comprising the dedication of land is made for the purposes of this Deed when:
 - 11.1.1 the Council is provided with:
 - (a) a Clearance Certificate that is valid at the time of dedication of land, or
 - (b) the Foreign Resident Capital Gains Withholding Amount in respect of the land to be dedicated, and
 - 11.1.2 one of the following has occurred:

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- (a) a deposited plan is registered in the register of plans held with the Registrar-General that dedicates land as a public road (including a temporary public road) under the *Roads Act 1993* or creates a public reserve or drainage reserve under the *Local Government Act 1993*, or
 - (b) the Council is given:
 - (i) an instrument in registrable form under the *Real Property Act 1900* duly executed by the Developer as transferor that is effective to transfer the title to the land to the Council when executed by the Council as transferee and registered,
 - (ii) the written consent to the registration of the transfer of any person whose consent is required to that registration, and
 - (iii) a written undertaking from any person holding the certificate of title to the production of the certificate of title for the purposes of registration of the transfer, or
 - (c) the Council is given evidence that a transfer has been effected by means of electronic lodgement through Property Exchange Australia Ltd or another ELNO.
- 11.2 The Developer is to do all things reasonably necessary to enable registration of the instrument of transfer to occur.
- 11.3 The Developer is to ensure that land dedicated to the Council under this Deed is free of all encumbrances and affectations (whether registered or unregistered and including without limitation any charge or liability for rates, taxes and charges) except as otherwise agreed in writing by the Council.
- 11.4 If, having used all reasonable endeavours, the Developer cannot ensure that land to be dedicated to the Council under this Deed is free from all encumbrances and affectations, the Developer may request that Council agree to accept the land subject to those encumbrances and affectations, but the Council may withhold its agreement in its absolute discretion.
- 11.5 Despite any other provision of this Deed, if the Developer is required to dedicate land to the Council on which the Developer is also required to carry out a Work under this Deed, the Developer is to comply with clause 11.1.2(b) not later than 7 days after the Work is completed for the purposes of this Deed.

12 Carrying out of Work

- 12.1 Without limiting any other provision of this Deed, any Work that is required to be carried out by the Developer under this Deed is to be carried out in accordance with any design or specification specified or approved by the Council, any relevant Approval and any other applicable law.
- 12.2 The Developer, at its own cost, is to comply with any reasonable direction given to it by the Council to prepare or modify a design or specification relating to a Work that the Developer is required to carry out under this Deed.

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

13 Variation to Work

- 13.1 The design or specification of any Work that is required to be carried out by the Developer under this Deed may be varied by agreement in writing between the Parties, acting reasonably, without the necessity for an amendment to this Deed
- 13.2 Without limiting clause 13.1, the Developer may make a written request to the Council to approve a variation to the design or specification of a Work in order to enable it to comply with the requirements of any Authority imposed in connection with any Approval relating to the carrying out of the Work.
- 13.3 The Council is not to unreasonably delay or withhold its approval to a request made by the Developer under clause 13.2.
- 13.4 The Council, acting reasonably, may from time to time give a written direction to the Developer requiring it to vary the design or specification of a Work before the Work is carried out in a specified manner and submit the variation to the Council for approval.
- 13.5 The Developer is to comply promptly with a direction referred to in clause 13.4 at its own cost.

14 Access to land by Developer

- 14.1 The Council authorises the Developer to enter, occupy and use **[Drafting Note: Specify particular land owned or controlled by the Council]** for the purpose of performing its obligations under this Deed.
- 14.2 The Council is to permit the Developer, upon receiving reasonable prior notice from the Developer, to enter any other Council owned or controlled land in order to enable the Developer to properly perform its obligations under this Deed.
- 14.3 Nothing in this Deed creates or gives the Developer any estate or interest in any part of the land referred to in clause 14.1 or 14.2.

15 Access to land by Council

- 15.1 The Council may enter any land on which Work is being carried out by the Developer under this Deed in order to inspect, examine or test the Work, or to remedy any breach by the Developer of its obligations under this Deed relating to the Work.
- 15.2 The Council is to give the Developer prior reasonable notice before it enters land under clause 15.1.

16 Protection of people, property & utilities

- 16.1 The Developer is to ensure to the fullest extent reasonably practicable in relation to the performance of its obligations under this Deed that:
 - 16.1.1 all necessary measures are taken to protect people and property,
 - 16.1.2 unnecessary interference with the passage of people and vehicles is avoided, and

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

16.1.3 nuisances and unreasonable noise and disturbances are prevented.

- 16.2 Without limiting clause 16.2, 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.

17 Repair of damage

- 17.1 The Developer is to Maintain any Work required to be carried out by the Developer under this Deed until the Work is completed for the purposes of this Deed or such later time as agreed between the Parties.
- 17.2 The Developer is to carry out its obligation under clause 17.1 at its own cost and to the satisfaction of the Council.

18 Completion of Work

- 18.1 The Developer is to give the Council written notice of the date on which it will complete Work required to be carried out under this Deed or any Stage.
- 18.2 The Council is to inspect the Work the subject of the notice referred to in clause 18.1 within 14 days of the date specified in the notice for completion of the Work.
- 18.3 Work required to be carried out by the Developer under this Deed, or a Stage, is completed for the purposes of this Deed when:
- 18.3.1 the Developer gives the Council a compliance certificate within the meaning of s6.4(e)(i) or (v) of the Act to the effect that the Work has been completed in accordance with this Deed and any applicable Development Consent and standards and specifications, and
- 18.3.2 Council, acting reasonably, gives a written notice to the Developer that the Work is complete.
- 18.4 If the Council is the owner of the land on which Work the subject of a notice referred to in clause 18.3 is issued, the Council assumes responsibility for the Work upon the issuing of the notice, but if it is not the owner at that time, it assumes that responsibility when it later becomes the owner.
- 18.5 Before the Council gives the Developer a notice referred to in clause 18.3, it may give the Developer a written direction to complete, rectify or repair any specified part of the Work to the reasonable satisfaction of the Council.
- 18.6 The Developer, at its own cost, is to promptly comply with a direction referred to in clause 18.5.

19 Rectification of defects

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

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- 19.3 The Council is to do such things as are reasonably necessary to enable the Developer to comply with a Rectification Notice that has been given to it under clause 19.1

20 Works-As-Executed-Plan

- 20.1 No later than 60 days after Work is completed for the purposes of this Deed, the Developer is to submit to the Council a full works-as-executed-plan in respect of the Work.
- 20.2 The Developer, being the copyright owner in the plan referred to in clause 20.1, gives the Council a non-exclusive licence to use the copyright in the plans for the purposes of this Deed.

21 Removal of Equipment

- 21.1 When Work on any Council owned or controlled land is completed for the purposes of this Deed, the Developer, without delay, is to:
- 21.1.1 remove any Equipment from Land and make good any damage or disturbance to the land as a result of that removal, and
- 21.1.2 leave the land in a neat and tidy state, clean and free of rubbish.

Part 3 – Dispute Resolution

22 Dispute resolution – expert determination

- 22.1 This clause applies to a Dispute between any of the Parties to this Deed concerning a matter arising in connection with this Deed that can be determined by an appropriately qualified expert if:
- 22.1.1 the Parties to the Dispute agree that it can be so determined, or
- 22.1.2 the Chief Executive Officer of the professional body that represents persons who appear to have the relevant expertise to determine the Dispute gives a written opinion that the Dispute can be determined by a member of that body.
- 22.2 A Dispute to which this clause applies is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 22.3 If a notice is given under clause 22.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 22.4 If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 22.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 22.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- 22.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

23 Dispute Resolution - mediation

- 23.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute to which clause 22 applies.
- 23.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 23.3 If a notice is given under clause 23.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 23.4 If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.
- 23.5 If the Dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the Dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.
- 23.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 23.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

Part 4 - Enforcement

24 Security for performance of obligations

- 24.1 The Developer is to provide Security to the Council in the amount of **[Drafting Note. Insert \$ amount. This amount will normally be full value of the developer's provision under the VPA]** in relation to the performance of its obligations under this Deed.
- 24.2 The Developer is to provide the Security to the Council **[Drafting Note. Insert timing for provision of Security. At the latest it should be before the developer commences any part of the Development]** unless, before that time, the Council agrees in writing to apportion the Security to different Stages, in which case the Developer is to provide the portion of the Security relating to a particular Stage to the Council before it commences any part of the Development comprised in the Stage.
- 24.3 The Council, in its absolute discretion and despite clause 14, may refuse to allow the Developer to enter, occupy or use any land owned or controlled by the Council or refuse to provide the Developer with any plant, equipment, facilities or assistance relating to the carrying out the Development if the Developer has not provided the Security to the Council in accordance with this Deed.

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- 24.4 The Council may call-up and apply the Security in accordance with clause 29 to remedy any breach of this Deed notwithstanding any other remedy it may have under this Deed, under any Act or otherwise at law or in equity.
- 24.5 The Council is to release and return the Security or any unused part of it to the Developer within 14 days of completion of the obligation to which the Security relates.
- 24.6 The Developer may at any time provide the Council with a replacement Security.
- 24.7 On receipt of a replacement Security, the Council is to release and return the Security that has been replaced to the Developer.
- 24.8 If the Council calls-up the Security or any portion of it, it may, by written notice to the Developer, require the Developer to provide a further or replacement Security to ensure that the amount of Security held by the Council equals the amount it is entitled to hold under this Deed.
- 24.9 The Developer is to ensure that the Security provided to the Council is at all times maintained to the full current indexed value.

25 Grant of Charge

- 25.1 On the date the Developer **[Drafting Note. Or Landowner if the landowner is a different entity]** executes this Deed, the Developer **[Drafting Note. Or Landowner if the landowner is a different entity]** grants to the Council a fixed and specific charge over the Developer's right, title and interest in the Charge Land, to secure:
 - 25.1.1 the performance of the Developer's obligation to make monetary Development Contributions under this Deed, and
 - 25.1.2 any damages that may be payable to the Council, or any costs which may be incurred by the Council in the event of a breach of this Deed by the Developer
- 25.2 Upon the execution of this Deed, the Developer is to give to the Council an instrument in registrable form under the *Real Property Act 1900* duly executed by the Developer that is effective to register the Charge on the title to the Charge Land.
- 25.3 If the Charge Land comprises part only of a lot in a deposited plan at the time that the instrument referred to in clause 25.2 is required to be given, the Developer is to give the Council an instrument that charges a greater area of the Land which includes the whole of the Charge Land.
- 25.4 The Developer is to do all other things necessary, including execute all other documents, to allow for the registration of the Charge.

26 Caveat and Discharge

- 26.1 The Developer agrees that:
 - 26.1.1 the Council may lodge a caveat on the title of the Land to which the Charge applies,

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- 26.1.2 the Council is to release the caveat from any part of the Land to which the Charge applies that is not the Charge Land once that part of the Land is contained in a separate lot to the Charge Land, and
- 26.1.3 the Council cannot be required to have the caveat removed from the title to the Charge Land other than in accordance with clause 26.2.
- 26.2 In order to enable Final Lots to be sold, the Council is to release the Charge and withdraw the caveat from the title to any Final Lot on satisfaction by the Developer of its obligations under this Deed to make Development Contributions in respect of the creation of the lot.
- 26.3 For the purposes of clause 26.2 the Council is to use its reasonable endeavours to provide any documentation necessary to enable the release of the Charge and withdrawal of the caveat from the title of a Final Lot on or immediately prior to the date for settlement of the sale of that lot.
- 26.4 Nothing in this Deed prevents the registration of a plan of subdivision in respect of the Charge Land nor the creation of a Final Lot from the Charge Land.

27 Priority

- 27.1 The Developer is not to create any mortgage or charge over the Charge Land or grant any other interest in the Charge Land ranking in priority equal with or ahead of the Charge created under this Deed without the prior written approval of the Council.

28 Acquisition of land required to be dedicated

- 28.1 If the Developer does not dedicate land required to be dedicated under this Deed at the time at which it is required to be dedicated, the Developer consents to the Council compulsorily acquiring the land for compensation in the amount of \$1 without having to follow the pre-acquisition procedure under the Just Terms Act.
- 28.2 The Council is to only acquire land pursuant to clause 28.1 if it considers it reasonable to do so having regard to the circumstances surrounding the failure by the Developer to dedicate the land required to be dedicated under this Deed.
- 28.3 Clause 28.1 constitutes an agreement for the purposes of s30 of the Just Terms Act.
- 28.4 If, as a result of the acquisition referred to in clause 28.1, the Council is required to pay compensation to any person other than the Developer, the Developer is to reimburse the Council that amount, upon a written request being made by the Council, or the Council can call on any Security provided under clause 24.
- 28.5 The Developer indemnifies and keeps indemnified the Council against all Claims made against the Council as a result of any acquisition by the Council of the whole or any part of the land concerned except if, and to the extent that, the Claim arises because of the Council's negligence or default.
- 28.6 The Developer is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 28, including without limitation:
 - 28.6.1 signing any documents or forms,

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- 28.6.2 giving land owner's consent for lodgement of any Development Application,
- 28.6.3 producing certificates of title to the Registrar-General under the *Real Property Act 1900*, and
- 28.6.4 paying the Council's costs arising under this clause 28.

29 Breach of obligations

- 29.1 If the Council reasonably considers that the Developer is in breach of any obligation under this Deed, it may give a written notice to the Developer:
 - 29.1.1 specifying the nature and extent of the breach,
 - 29.1.2 requiring the Developer to:
 - (a) rectify the breach if it reasonably considers it is capable of rectification, or
 - (b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification,
 - 29.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 29.2 If the Developer fails to fully comply with a notice referred to in clause 29.1, the Council may, without further notice to the Developer, call-up the Security provided by the Developer under this Deed and apply it to remedy the Developer's breach.
- 29.3 If the Developer fails to comply with a notice given under clause 29.1 relating to the carrying out of Work under this Deed, the Council may step-in and remedy the breach and may enter, occupy and use any land owned or controlled by the Developer and any Equipment on such land for that purpose.
- 29.4 Any costs incurred by the Council in remedying a breach in accordance with clause 29.2 or clause 29.3 may be recovered by the Council by either or a combination of the following means:
 - 29.4.1 by calling-up and applying the Security provided by the Developer under this Deed, or
 - 29.4.2 as a debt due in a court of competent jurisdiction.
- 29.5 For the purpose of clause 29.4, the Council's costs of remedying a breach the subject of a notice given under clause 29.1 include, but are not limited to:
 - 29.5.1 the costs of the Council's employees, agents and contractors reasonably incurred for that purpose,
 - 29.5.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
 - 29.5.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- 29.6 Nothing in this clause 29 prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Deed by the Developer, including but not limited to seeking relief in an appropriate court.

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

30 Enforcement in a court of competent jurisdiction

- 30.1 Without limiting any other provision of this Deed, the Parties may enforce this Deed in any court of competent jurisdiction.
- 30.2 For the avoidance of doubt, nothing in this Deed prevents:
 - 30.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Deed or any matter to which this Deed relates, or
 - 30.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Deed or any matter to which this Deed relates.

Part 5 – Registration & Restriction on Dealings

31 Registration of this Deed

- 31.1 The Parties agree to register this Deed for the purposes of s7.6(1) of the Act.
- 31.2 Upon the commencement of this Deed, the Developer is to deliver to the Council in registrable form:
 - 31.2.1 an instrument requesting registration of this Deed on the title to the Land duly executed by the registered proprietor of the land, and
 - 31.2.2 the written irrevocable consent of each person referred to in s7.6(1) of the Act to that registration.
- 31.3 The Developer is to do such other things as are reasonably necessary to enable registration of this Deed to occur.
- 31.4 The Parties are to do such things as are reasonably necessary to remove any notation relating to this Deed from the title to the Land:
 - 31.4.1 in so far as the part of the Land concerned is a Final Lot,
 - 31.4.2 in relation to any other part of the Land, once the Developer has completed its obligations under this Deed to the reasonable satisfaction of the Council or this Deed is terminated or otherwise comes to an end for any other reason.

32 Restriction on dealings

- 32.1 The Developer is not to:
 - 32.1.1 sell or transfer the Land, other than a Final Lot, or
 - 32.1.2 assign the Developer's rights or obligations under this Deed, or novate this Deed,
- to any person unless:
 - 32.1.3 the Developer has, at no cost to the Council, first procured the execution by the person to whom the Land or part is to be sold or transferred or the Developer's rights or obligations under this Deed are

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

to be assigned or novated, of a deed in favour of the Council on terms reasonably satisfactory to the Council, and

32.1.4 the Council has given written notice to the Developer stating that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this Deed, and

32.1.5 the Developer is not in breach of this Deed, and

32.1.6 the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.

32.2 Subject to clause 32.3, the Developer acknowledges and agrees that it remains liable to fully perform its obligations under this Deed unless and until it has complied with its obligations under clause 32.1.

32.3 Clause 32.1 does not apply in relation to any sale or transfer of the Land if this Deed is registered on the title to the Land at the time of the sale.

Part 6 – Indemnities & Insurance

33 Risk

33.1 The Developer performs this Deed at its own risk and its own cost.

34 Release

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

35 Indemnity

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

36 Insurance

36.1 The Developer is to take out and keep current to the satisfaction of the Council the following insurances in relation to Work required to be carried out by the Developer under this Deed up until the Work is taken to have been completed in accordance with this Deed:

36.1.1 contract works insurance, noting the Council as an interested party, for the full replacement value of the Works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

the Developer's liability in respect of damage to or destruction of the Works,

- 36.1.2 public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party,
- 36.1.3 workers compensation insurance as required by law, and
- 36.1.4 any other insurance required by law.
- 36.2 If the Developer fails to comply with clause 36.1, the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Developer to the Council and may be recovered by the Council as it deems appropriate including:
 - 36.2.1 by calling upon the Security provided by the Developer to the Council under this Deed, or
 - 36.2.2 recovery as a debt due in a court of competent jurisdiction.
- 36.3 The Developer is not to commence to carry out any Work unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 36.1.

Part 7 – Other Provisions

37 Annual report by Developer

- 37.1 The Developer is to provide to the Council by not later than each anniversary of the date on which this Deed is entered into a report detailing the performance of its obligations under this Deed.
- 37.2 The report referred to is to be in such a form and to address such matters as required by the Council from time to time.

38 Review of Deed

- 38.1 The Parties agree to review this Deed every **[Drafting Note. Insert number]** years, and otherwise if either party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Deed.
- 38.2 For the purposes of clause 38.1, the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development.
- 38.3 For the purposes of addressing any matter arising from a review of this Deed referred to in clause 38.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Deed.
- 38.4 If this Deed becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- 38.5 A failure by a Party to agree to take action requested by the other Party as a consequence of a review referred to in clause 38.1 (but not 38.4) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.

39 Notices

- 39.1 Any notice, consent, information, application or request that is to or may be given or made to a Party under this Deed is only given or made if it is in writing and sent in one of the following ways:
- 39.1.1 delivered or posted to that Party at its address set out in the Summary Sheet, or
- 39.1.2 emailed to that Party at its email address set out in the Summary Sheet.
- 39.2 If a Party gives the other Party 3 business days' notice of a change of its address or email, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or emailed to the latest address.
- 39.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 39.3.1 delivered, when it is left at the relevant address,
- 39.3.2 sent by post, 2 business days after it is posted, or
- 39.3.3 sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.
- 39.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

40 Approvals and Consent

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

41 Costs

- 41.1 The Developer is to pay to the Council the Council's costs of and incidental to preparing, negotiating, executing and stamping this Deed, and any document related to this Deed within 7 days of a written demand by the Council for such payment.

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- 41.2 The Developer is also to pay to the Council the Council's costs of and incidental to enforcing this Deed within 7 days of a written demand by the Council for such payment.

42 Entire Deed

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

43 Further Acts

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

44 Notations on section 10.7(2) Planning Certificates

- 44.1 The Parties agree that the Council may, in its absolute discretion, make a notation under section 10.7(5) of the Act regarding this Agreement on any certificate issued under section 10.7(2) of the Act relating to the Land.

45 Governing Law and Jurisdiction

- 45.1 This Deed is governed by the law of New South Wales.
- 45.2 The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.
- 45.3 The Parties are not to object to the exercise of jurisdiction by those courts on any basis.

46 Joint and Individual Liability and Benefits

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

47 No Fetter

- 47.1 Nothing in this Deed shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

48 Illegality

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

49 Severability

- 49.1 If a clause or part of a clause of this Deed 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.
- 49.2 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 Deed, but the rest of this Deed is not affected.

50 Amendment

- 50.1 No amendment of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed in accordance with clause 25C of the Regulation.

51 Waiver

- 51.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- 51.2 A waiver by a Party is only effective if it:
- 51.2.1 is in writing,
 - 51.2.2 is addressed to the Party whose obligation or breach of obligation is the subject of the waiver,
 - 51.2.3 specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,
 - 51.2.4 is signed and dated by the Party giving the waiver.
- 51.3 Without limitation, a waiver may be expressed to be conditional on the happening of an event, including the doing of a thing by the Party to whom the waiver is given.
- 51.4 A waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given, and is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- 51.5 For the purposes of this Deed, an obligation or breach of obligation the subject of a waiver is taken not to have been imposed on, or required to be complied with by, the Party to whom the waiver is given.

52 GST

- 52.1 In this clause:

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

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

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

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

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

- 52.2 Subject to clause 52.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- 52.3 Clause 52.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.
- 52.4 No additional amount shall be payable by the Council under clause 52.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.
- 52.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:
- 52.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;
- 52.5.2 that any amounts payable by the Parties in accordance with clause 52.2 (as limited by clause 52.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 52.6 No payment of any amount pursuant to this clause 52, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 52.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.

52.8 This clause continues to apply after expiration or termination of this Deed.

53 Explanatory Note

53.1 The Appendix contains the Explanatory Note relating to this Deed required by clause 25E of the Regulation.

53.2 Pursuant to clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Planning Deed.

DRAFT

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Schedule 1

(Clause 9)

Development Contributions

Column 1	Column 2	Column 3	Column 4
Item/ Contribution	Public Purpose	Manner & Extent	Timing
A. Monetary Contributions			
1. [Drafting Note. Insert description]	[Drafting Note. Insert public purpose]	[Drafting Note. Insert manner in which contributions are to be provided including details of any design, technical specification and standards of work. Details can also be provided in a separate Schedule]	[Drafting Note. Insert timing by which contributions are to be provided]
B. Dedication of Land			
1.			
C. Carrying out of Work			
1.			
D. Other material public benefits			
1.			

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Execution

Executed as a Deed

Dated:

Executed on behalf of the Council

Chief Executive Officer

Name of Chief Executive Officer:

Witness

Name of Witness:

Executed on behalf of the Developer in accordance with s127(1) of the
Corporations Act (Cth) 2001

Director

Name of Director:

Director/Secretary

Name of Director/Secretary:

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Executed on behalf of the Landowner in accordance with s127(1) of the
Corporations Act (Cth) 2001

Director

Name of Director:

Director/Secretary

Name of Director/Secretary:

DRAFT

DE21.1 - Attachment 2

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Appendix

(Clause 53)

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Planning Agreement

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Parties

Shoalhaven City Council ABN 59 855 182 344 of **[Insert Address]** (Council)

[Insert name of Party 2] ABN **[Insert]** of **[Insert Address]** (Developer)

[Insert Name of Party 3 / Landowner] ABN **[Insert]** of **[Insert Address]** (Landowner)

Description of the Land to which the Draft Planning Agreement Applies

[Drafting Note: To be completed]

Description of Proposed Development

[Drafting Note: To be completed]

Summary of Objectives, Nature and Effect of the Draft Planning Agreement

Objectives of Draft Planning Agreement

[Drafting Note: To be completed]

[Insert Name of Planning Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Nature of Draft Planning Agreement

[Drafting Note: To be completed]

Effect of the Draft Planning Agreement

[Drafting Note: To be completed]

Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

[Drafting Note: To be completed]

How the Draft Planning Agreement Promotes the Public Interest

[Drafting Note: To be completed]

For Planning Authorities:

Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities

N/A

Other Public Authorities - How the Draft Planning Agreement Promotes the Principles for Local Government (formerly the Council's charter) in the Local Government Act 1993

N/A

Councils - How the Draft Planning Agreement Promotes the Elements of the Council's Charter

The Draft Planning Agreement promotes the Principles for Local Government by:

[Drafting Note: To be completed]

All Planning Authorities - Whether the Draft Planning Agreement Conforms with the Authority's Capital Works Program

[Drafting Note: To be completed by Council]

All Planning Authorities - Whether the Draft Planning Agreement specifies that certain requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued

[Drafting Note: To be completed]



Draft Works-in-Kind Agreement Policy

Policy Number: POL19/79

Adopted: [Insert]

Minute Number: [Insert]

File: 51680E

Produced By: Planning Environment & Development Group

Review Date: [Insert]

Post exhibition additions are shown with green highlighting, and post exhibition deletions are shown in red strikethrough with green highlighting.

For more information contact the City Futures Group

Administrative Centre, Bridge Road, Nowra • Telephone (02) 4429 3111 • Fax (02) 4422 1816 • PO Box 42 Nowra 2541
Southern District Office – Deering Street, Ulladulla • Telephone (02) 4429 8999 • Fax (02) 4429 8939 • PO Box 737
Ulladulla

council@shoalhaven.nsw.gov.au • www.shoalhaven.nsw.gov.au

CONTENTS

1. PURPOSE	1
2. APPLICATION	1
3. LEGISLATIVE CONTEXT	1
4. THE WIK AGREEMENT PROCESS	1
1.1. Step 1 – Discuss WIK proposal with Council	2
1.2. Step 2 – Submit a WIK Agreement Application	3
1.3. Step 3 - Assessment of WIK Agreement Application	3
1.4. Step 4 - Preparation of the WIK Agreement	5
1.5. Step 5 – Construction Phase	5
1.6. Step 6 – Handover and Finalisation of Work	6
5. THE DEVELOPER’S OBLIGATIONS	7
6. DEFINITIONS	8
7. REVIEW	9
8. APPLICATION OF ESD PRINCIPLES	9
ATTACHMENT 1 – WORKS IN KIND AGREEMENT TEMPLATE	10

1. PURPOSE

Shoalhaven City Council (Council) is committed to ensuring a fair, transparent and accountable process for developers seeking to enter into a Works-in-Kind (WIK) Agreement.

The purpose of this Policy is to provide a comprehensive policy framework to enable decisions regarding WIK Agreements, in lieu of Section 7.11 Development Contributions, including;

- Procedures for making an application and entering into a WIK Agreement; and
- How Council will assess applications and determine whether to enter into a WIK Agreement.
- Probity measures associated with WIK applications and agreements.

As Council is ultimately responsible for the infrastructure constructed under a WIK Agreement, this Policy sets out the criteria that must be met.

2. APPLICATION

This policy applies when a developer seeks to construct community infrastructure, in full or part, to satisfy requirements imposed by a condition of a development consent, as an alternative to paying Section 7.11 Development Contributions.

3. LEGISLATIVE CONTEXT

Section 7.11 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) enables Council, via the Shoalhaven Contributions Plan 2019 (the Contributions Plan), to levy monetary development contributions or require the dedication of land (or both) for the provision of community infrastructure which is required because of that development.

Section 7.11(5)(b) of the EP&A Act provides that the development contribution requirements may be satisfied by the provision of WIK or other material public benefit (other than the dedication of land or payment of monetary contributions).

4. THE WIK AGREEMENT PROCESS

The WIK Agreement process, from start to finish, consists of 6 key steps as outlined in **Figure 1** and explained below.

Shoalhaven City Council – Draft Works-in-Kind Agreement Policy



Figure 1: Summary of WIK Agreement Process Steps

1.1. Step 1 – Discuss WIK proposal with Council

Prior to submitting a formal proposal for a WIK Agreement, the applicant must meet with Council's Development Contributions Coordinator (and other relevant staff) to:

- Establish the impending need to construct the works for which the contributions are to be offset and the benefit to both Council and the community;
- Discuss the concept design to establish Council's preliminary expectations for a WIK Agreement, understand background information and ensure the proposal meets Council's requirements;
- Identify relevant Council policies, procedures and technical specifications requiring consideration;
- Demonstrate that the relevant assessment criteria can be satisfied;
- Discuss the approval process.

Whilst Development Assessment Planners may be involved in preliminary discussions associated with a WIK Agreement, for probity, there is a need for the separation of responsibilities. As such, Development Assessment Planners are not to be involved in the negotiation of WIK Agreements.

Following this meeting, Council staff will provide advice as to whether the WIK Agreement proposal should progress to the application stage, or not.

1.2. Step 2 – Submit a WIK Agreement Application

Following support from Council staff at Step 1, the WIK Agreement proposal is to be formally submitted to Council. Council's WIK Agreement Application Form [\[Insert Hyperlink\]](#) must be completed and submitted, along with the required fees and relevant supporting information which will include (not exclusively):

- The subject land to which the proposal applies, including the legal description;
- The relevant development consent highlighting the Section 7.11 condition/s which requires a monetary development contribution to be paid;
- Owners consent for all land affected by the WIK proposal;
- A description of the WIK proposal, including:
 - The relevant contributions project/s noting the contribution value for that work contained in the Contributions Plan.
 - Evidence that the proposed WIK Agreement is for the same category of infrastructure or infrastructure item as the monetary contribution required (e.g. car parking) and not the total development contributions levied.
 - Value to which the proposed WIK Agreement relates (i.e. estimated construction value, including detailed quotations, tenders);
 - The extent of the development contribution sought to be satisfied by the works, including the difference, if any, of the WIK value and the monetary 7.11 contributions proposed to be satisfied by the WIK.
 - Whether works comprise the whole or part of an infrastructure item in the contributions plan;
 - Identification of any components of the proposed works that is not in accordance with the Contributions Plan.
- Copies of all written documentation including (not exclusively) approvals, plans, contracts and specifications for the proposed works;
- A construction program including proposed timing (including commencement and completion dates), relevant milestones and standard of delivery.

To avoid delays and to allow sufficient time for the WIK Agreement application to be considered, the application should be submitted to Council as soon as practicable following the issue of the development consent.

A WIK Agreement Application will not be accepted where a development consent has not been issued.

1.3. Step 3 - Assessment of WIK Agreement Application

The WIK Agreement Application will be assessed based on:

- The written and supporting information provided at Step 2;

Shoalhaven City Council – Draft Works-in-Kind Agreement Policy

- The relevant components of the Shoalhaven Contributions Plan 2019; and
- The benefit of the work to the community;
- Council's priorities for infrastructure delivery and the need to construct the works to which contributions are to be offset.
- Council's ability to deliver the works and if WIK would be a better outcome for the community.
- Financial and implementation implications relating to the Contributions Plan.

The WIK Agreement must operate in one of the following three ways:

1. Where the contribution value of works undertaken is equal to the monetary development contributions required as a condition of consent, the WIK will be considered to fully satisfy the payment of those development contributions; or
2. Where the contribution value of the works undertaken is less than the monetary development contributions required as a condition of consent, the WIK will be considered to partly satisfy the payment of those development contributions and the difference will be payable to Council by the developer. This will be set out in the WIK Agreement; or
3. Where the contribution value of the works undertaken exceeds the monetary development contributions required as a condition of consent, the WIK will be considered to fully satisfy the payment of those Development Contributions. The Council will generally not provide any credit or reimbursement for the amount that the contribution value exceeds the monetary development contributions.

Any difference between the agreed contribution value of the WIK Agreement and the actual costs of constructing the WIK in accordance with the agreement will be to the advantage or disadvantage to the developer. The developer is not entitled to claim any credits or reimbursement for the difference.

At this stage, all WIK Agreement Applications will be considered by the Contributions Panel (panel of relevant Council staff). The WIK Agreement offer will then be reported to Council for formal consideration, except in the following circumstances:

- The WIK Agreement is in a template format, and
- The WIK Agreement consists of works that are listed in Shoalhaven Contributions Plan 2019, and
- The value of works which are recognised are consistent with the value as specified in Shoalhaven Contributions Plan 2019, and
- The works satisfy s7.11 contributions of the same category of infrastructure as the works, and
- The WIK Agreement does not involve credit or refund arrangements, or has credit or refund arrangements which are set out in template format.

In relation to WIK Agreements that are to be reported to Council in Step 3, Council at this may stage resolve to delegate authority to Council's Chief Executive Officer, or his delegate, to negotiate, enter into and register the WIK Agreement (and any associated tender process under s55 of the *Local Government Act 1993*, as relevant) consistent with the detailed key terms.

Council is not under any obligations to enter into a WIK Agreement. In the event that a proposal for WIK Agreement is not supported by Council, the Section 7.11 contributions condition must be wholly paid by the Developer.

1.4. Step 4 - Preparation of the WIK Agreement

Based on the detailed information in the WIK Agreement Application, a draft WIK Agreement will be prepared based on Council's WIK Agreement Template at **Attachment 1**.

The WIK Agreement will include, but not be limited to:

- The Scope of Works
- Obligations to Carry out Works
- Ownership of Works
- Effect of Developer's Compliance with this Agreement
- Value of Works
- Access of the Works on the Site
- Completion of Works
- Defects Liability Period
- Delay/Timing
- Guarantee (the amount of which will be determined by Council and utilised in the event works are not completed to Council's satisfaction and as otherwise allowed under the WIK Agreement).
- Insurance
- Indemnity
- Assignments and Dealings
- Dispute Resolution
- Failure to Carry Out Works
- Termination & Notices
- Other General Terms

At this point, the applicant must pay Council's legal and external costs and disbursements relating to the preparation and negotiation of the WIK Agreement. Once prepared, all parties must sign the WIK Agreement to enable execution of the agreement.

1.5. Step 5 – Construction Phase

Following execution of the WIK Agreement, an application for a Construction Certificate or any other relevant approval for the construction of the infrastructure can be made.

Shoalhaven City Council – Draft Works-in-Kind Agreement Policy

When all the relevant pre-construction requirements of the WIK Agreement have been met, and all relevant approvals for construction of the infrastructure have been obtained, the construction of the infrastructure can commence.

For all works carried out under a WIK Agreement, a principle certifying authority (PCA), must be nominated prior to works commencing. The nominated PCA can either be Council (preferred) or a private certifier. Inspections of the works will be conducted throughout the construction process, as outlined in the WIK Agreement and in accordance with any legislative or industry requirements.

1.6. Step 6 – Handover and Finalisation of WorkFinal Inspection

The Developer must notify Council in writing when the works are considered to be practically complete.

An inspection will be carried out by Council to determine whether works are practically complete. Once Council is satisfied that works are practically complete, Council will issue written notice of practical completion to the developer confirming Council's acceptance that the works are practically complete.

Incomplete or Defective Works

If, following the inspection the Council is not satisfied that the works are practically complete, the Council will issue a written notice identifying the issues and require the developer to complete and rectify the works.

Defects Liability and Maintenance Periods

The Defects Liability Period and Maintenance Periods will commence from the date the Council gives a notice of practical completion.

Hand-over of Works

Before the end of the Defects Liability Period or Maintenance Period (whichever is later), the developer must notify the Council in writing of the end of that period.

An inspection will be carried out by Council to determine whether the all defects have been rectified and all maintenance has been carried out in accordance with the WIK Agreement. Once Council is satisfied that all defects have been rectified and that maintenance has been carried out, Council will issue a written Final Certificate evidencing acceptance of the work.

If, following the inspection the Council is not satisfied that defects have been rectified or maintenance has been carried out as required under the WIK Agreement, then Council will issue a written notice identifying the issues and require the developer to complete and rectify the works.

Dedication of Land

Where the infrastructure is located on land not yet in the ownership of Council, the land is to be dedicated to Council free of cost. A separate planning agreement may be required for the dedication.

Where the infrastructure is provided on land which will not be dedicated to Council, a restriction on use, easement, covenant or other encumbrance is to be placed on the title to the satisfaction of Council.

5. THE DEVELOPER'S OBLIGATIONS

Where Council agrees to enter into a WIK Agreement, a developer shall:

- Work cooperatively with Council to develop a design that achieves a positive outcome for the community having regard to aesthetics, sustainability, life cycle costs and value for money;
- Comply with all statutory requirements that relate to the work, including the requirements of the Local Government (General) Regulation 2005 and the Tendering Guidelines for NSW Local Government;
- Ensure that works reach practical completion on or before the date for practical completion, in accordance with the terms of the WIK Agreement.
- Be responsible for works undertaken, irrespective of whether they carry out the work themselves or a contractor carries out the works on their behalf.
- At their own cost, obtain all relevant approvals and consents, prior to commencing works and once approved, provide copies of these to Council.
- Carry out and complete the works, to the satisfaction of Council, and in accordance with:
 - (a) the development consent;
 - (b) any approvals and consents relating to the works;
 - (c) all applicable laws, including those relating to the environment and occupational health and safety;
 - (d) the WIK Agreement (to the extent that it is not inconsistent with the development consent, any other approval or consent, or applicable law); and
 - (e) any reasonable directions given by Council about the works.
- Financial information (cost of works, e.g. account statements, receipts and bank statements) needs to be provided to Council regularly as evidence of works completed to date and must differentiate between those costs relating to the WIK Agreement and other project costs.
- At their own cost, repair and make good, to the satisfaction of Council, any loss or damage to the works from any cause whatsoever which occurs before the date on which the works are handed over to the Council.
- Enable Council as a party to the WIK Agreement, to enter the land and inspect the works during construction including for any other purposes allowed under the WIK Agreement, provided Council give reasonable time and notice to the Developer. If the

Shoalhaven City Council – Draft Works-in-Kind Agreement Policy

site is not owned by the Developer, the Developer must obtain any necessary approval or consent from the landowner for the Council's entry.

- Adhere to Council's Work Health Safety Management System (WHSMS) and comply with all relevant statutory requirements during the work.
- Maintain an appropriate public risk insurance policy with a minimum liability of \$20,000,000. Maintain also other insurance policies in relation to the works and the carrying out of the works including but not limited to contract works insurance, professional indemnity insurance and comprehensive motor vehicle insurance. Depending on the nature of the works proposed, Council may require the amount of public liability insurance to be increased. Copies of all relevant insurances must be provided to Council.
- Provide a cash or unendorsed bank cheque guarantee within 5 days of signing the WIK Agreement.
- Indemnify Council against all claims relating to the works undertaken;
- Not make any variations to the agreed works without written approval from Council;
- Notify Council when all inspections are required as per the WIK Agreement. Further details of these responsibilities may be included in the WIK Agreement.

Further details of responsibilities will be outlined within the WIK Agreement.

6. DEFINITIONS

Applicant means the person entitled to act upon a Development Consent.

Certifying authority has the same meaning as in the EP&A Act.

Council means Shoalhaven City Council.

Defects liability period means the period stipulated in a WIK Agreement.

Developer means a person who has made or proposes to make a development application, or who has entered into an agreement with or is otherwise associated with such a person.

Development application has the same meaning as in the EP&A Act.

Development contribution means a monetary contribution referred to in Section 7.11 of the EP&A Act.

Contributions plan means a document that has been publicly exhibited and adopted by Council pursuant to Section 7.18 (formerly Section 94EA) of the EP&A Act that authorises the imposition of a condition under Section 7.11 (formerly Section 94) of that Act, as amended from time to time.

Development contributions value means the value of the relevant development contributions referred to in the development consent.

EP&A Act means the *Environmental Planning and Assessment Act 1979*.

Shoalhaven City Council – Draft Works-in-Kind Agreement Policy

Guarantee means

- (a) a deposit by cash or unendorsed bank cheque with the Council; or
- (b) an irrevocable and unconditional bank guarantee, unlimited in time, issued by a bank licensed to carry on business in Australia that is:
 - (i) in favour of the Council;
 - (ii) for the Guarantee Amount to be paid to the Council on demand; and
 - (iii) on such other terms the Council may approve from time to time.

Hand over means the handover of the works to Council, which typically requires care, control and management.

Infrastructure item means an item identified in the Contributions Plan or such other public infrastructure item approved by the Council.

Maintenance period means the period stipulated in the WIK Agreement during which the developer must maintain an infrastructure item.

Notification means that a WIK Agreement will be available for public inspection for a minimum period of 28 days, in accordance with the requirements of the

Public includes a section of the public.

Public benefit means the benefit enjoyed by the public as a consequence of a development contribution.

Unendorsed bank cheque means is a form of guarantee, that does not have limitations attached on the back of the cheque.

Works-in-kind (WIK) means the construction or provision of the whole or part of an infrastructure item that is identified in a works schedule in a contributions plan in lieu (wholly or partially) of related Section 7.11 Development Contributions.

Works-in-kind (WIK) agreement means the formal agreement between Council and a developer for the works-in-kind provision of infrastructure.

7. REVIEW

This policy will be reviewed within one year of the election of every new Council, or earlier should circumstances arise to warrant revision.

8. APPLICATION OF ESD PRINCIPLES

This policy is in line with Council's adopted policy on integrating the principles of Ecologically Sustainable Development (ESD) into all Council's planning, decision-making and actions. The policy reflects the effective integration of economic and social considerations in the planning framework.

Shoalhaven City Council – Draft Works-in-Kind Agreement Policy

ATTACHMENT 1 – WORKS IN KIND AGREEMENT TEMPLATE

DE21.1 - Attachment 2

Works In Kind Agreement

[Insert Name of Works In Kind Agreement]

Under s7.11(5)(b) of the *Environmental Planning and Assessment Act 1979*

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3]

[Insert DA Details]

[Insert Reference]

[Insert Date]

Post exhibition additions are shown with **green highlighting**, and post exhibition deletions are shown in **red strikethrough with green highlighting**.

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

[Insert Name of Works In Kind Agreement]

This Agreement is made on the date set out in **Item 1** of **Schedule 1**.

Parties

- (1) **The Council of the City of Shoalhaven** of Bridge Road, Nowra, NSW 2541 (**Council**), and
- (2) **The party set out Item 2 of Schedule 1 (Developer)**.

Background

- A. The Developer has been granted the Development Consent or is otherwise entitled to act upon the Development Consent.
- B. The Development Consent contains the Condition which requires the Developer to pay the Contributions in respect to the development.
- C. The Developer has offered to carry out the Works in lieu of paying the Contributions.
- D. The Developer and Council wish to enter into this Agreement to make provision for the carrying out of the Works by the Developer in [whole/part] satisfaction of the Developer's obligation to pay the Contributions.
- E. Section 7.11(5)(b) of the Act authorises Council and the Developer to enter into this Agreement.

Agreed Terms

- 1. Scope and design of Works**
 - 1.1** The Developer and Council agree that the scope of Works to be carried out and completed by the Developer under this Agreement is set out in **Schedule 2**.
 - 1.2** Prior to the Developer commencing design of any item of the Works, the Developer is to request that the Council provide the Developer with:
 - (a) its requirements for the design, materials and specifications for the provision of the item of the Works; or
 - (b) written notice of its in-principle agreement to the design, materials and specifications proposed by the Developer.
 - 1.3** Once the Developer receives the Council's requirements under clause 1.2(a), or receives written notice of the Council's in-principle agreement under clause 1.2(b), and before the commencement of the Works, the Developer must (at its cost):
 - (c) prepare a detailed design for the Works in accordance with the Council's requirements or agreement under clause 1.2;

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- (d) obtain the approval of Council for the detailed design;
 - (e) prepare construction drawings for the Works; and
 - (f) obtain the approval of Council for the construction drawings.
- 1.4 The Developer must prepare any detailed design or construction drawings for the Works in accordance with the standards set out in **Schedule 2**.
- 2. Variation to design**
- 2.1 The design or specification of the Works that is required to be carried out by the Developer under this Agreement may only be varied by agreement in writing between the Parties, acting reasonably.
- 2.2 Without limiting clause 2.1, the Developer may make a written request to the Council to approve a variation to the design or specification of the Works in order to enable it to comply with the requirements of any Authority imposed in connection with any approval relating to the carrying out of the work.
- 2.3 The Council is not to unreasonably delay or withhold its approval to a request made by the Developer under clause 2.2.
- 2.4 Clause 2.1 does not apply to a variation that is trivial or inconsequential.
- 3. Obligation to Carry out Work**
- 3.1 The Developer is to carry out and complete each of the Works and must ensure that the Works reach Practical Completion on or before the Date for Practical Completion and are Handed-Over in accordance with the terms of this Agreement.
- 3.2 The Developer's obligation under clause 3.1 exists irrespective of whether the Developer:
- (a) carries out the Works itself; or
 - (b) enters into an agreement with another person under which the other person carries out the Works on the Developer's behalf.
- 3.3 The Developer must (at its cost):
- (a) obtain all relevant approvals and consents for the carrying out of the Works whether from the Council or any other relevant Authority; and
 - (b) before commencing the Works, give to the Council copies of all approvals and consents for the Works (except those granted by Council); and
 - (c) from time to time, give to Council such information as requested by the Council relating to the carrying out of the Works
- 3.4 The Developer must carry out and complete the Works in a good and workmanlike manner

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

having regard to the intended purpose of the Works and otherwise to the satisfaction of Council in accordance with:

- (a) the Development Consent;
- (b) any approvals and consents relating to the Works;
- (c) all applicable laws, including those relating to the environment and occupational health and safety;
- (d) this Agreement to the extent that it is not inconsistent with the Development Consent, any other approval or consent, or applicable law; and
- (e) any reasonable directions given by Council about the Works.

3.5 The Developer must ensure, in relation to the carrying out of the Works, that it:

- (a) takes all necessary measures to protect people and property;
- (b) avoids unnecessary interference with the passage of people and vehicles; and
- (c) prevents any nuisance or unreasonable noise and disturbance; and
- (d) complies with the Council's work health & safety management systems as applicable to the Works.

3.6 The Developer, at its own cost, must repair and make good to the satisfaction of Council any loss or damage to the Works from any cause whatsoever which occurs before the date on which the Works are Handed-Over.

3.7 The Council as a party to this Agreement and not as a consent authority may (but is not obliged) at reasonable times and on reasonable notice inspect the Works during the course of construction.

4. Ownership of Works

4.1 Nothing in, or done under, this Agreement gives the Developer:

- (a) any right, title or interest in the Works; or
- (b) any estate or interest in the Site,

whether at law or in equity.

5. Effect of Developer's Compliance with this Agreement

5.1 For the purposes of the Condition and s7.11(5)(b) of the Act:

- (a) the issuing of a Notice of Practical Completion for all the Works for [Insert category of infrastructure] satisfies the Developer's obligation under the Development Consent to

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

pay the Contributions for [Insert category of infrastructure] to the extent of the sum of all the Works Value for those Works; and

- (b) the Developer is not required to pay the Contributions to that extent.

6. Value of Works

6.1 For the purposes of this Agreement, the Council and Developer agree that the value of an item of the Works is the Works Value for that item as set out in **Schedule 2**.

6.2 The Developer expressly acknowledges and agrees that

- (a) the Works Value as set out in **Schedule 2** is based on the value of the Works as based on the value of the Works as specified in the Contributions Plan, or as otherwise agreed by the Council; and
- (b) if the Developer's actual cost of carrying out and completing the Works, including any costs incurred under this Agreement, determined at the date on which the Works reach Completion, differs from the Works Value, then:
- (i) no party to this Agreement will be entitled to claim any credit or reimbursement, as the case may be, for the difference; and
- (ii) the Developer is not entitled to change or reduce the scope of the Works by reason only that the costs actually incurred are greater than the Works Value.

7. Access of the Works on the Site

7.1 If the Council owns the Site and subject to clause 7.2, the Council authorises the Developer to enter the Site in order to enable the Developer to properly perform its obligations under this Deed.

7.2 Council may, by notice in writing, require the Developer to enter into a separate occupation licence in respect to the occupation and use of the Site and upon giving such notice, the Developer may not enter the Site except in accordance with such an occupation licence.

7.3 The Council may enter the Site in order to inspect, examine or test the Works, or to remedy any breach by the Developer of its obligations under this Deed relating to the Works.

7.4 The Council is to give the Developer prior reasonable notice before it enters the Site under clause 7.3.

7.5 If the Site is owned by a third party, the Developer warrants that it has:

- (a) obtained any necessary approval or consent from the relevant landowner:
- a. to enter the land for the purposes of carrying out the Works; and
- b. for Council to enter the land for the purposes of this Agreement; and

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- (b) if requested, provide Council with written evidence of such approval or consent.

8. Practical Completion of Works

8.1 When, in the opinion of the Developer, an item of the Works have reached a state of Practical Completion, the Developer must notify Council in writing. This notice must include:

- (a) a statement from the person with direct responsibility for completion of the item of the Works that in that person's opinion the item has reached Practical Completion;
- (b) copies of any warranties, guarantees, maintenance information or other material reasonably required for the ongoing maintenance or management of the item of Works;
- (c) a complete set of works-as-executed-plans for the item of Works including one set in electronic format.

8.2 Within 10 Business Days of receipt of a notice under clause 8.1, Council will inspect the Works the subject of the notice.

8.3 The Council must by written notice to the Developer:

- (a) issue a Notice of Practical Completion for an item of the Works if it is satisfied, acting reasonably, that Practical Completion of that item has been achieved; or
- (b) disagree that Practical Completion has been achieved, identify the errors or omissions in the item of the Works which in the opinion of Council prevent Practical Completion and direct the Developer to complete, rectify or repair the Works.

8.4 Nothing in clause 8.3, or in any notice issued under clause 8.3, will be construed to reduce or waive in any manner the Developer's responsibilities to complete the Works and to correct minor defects or omissions, whether or not these are identified by Council.

8.5 The Developer must comply with a direction given under clause 8.3(b) according to its terms and at the Developer's own cost. The Developer may then give Council further written notice in accordance with clause 8.1.

8.6 An item of the Works is taken to have reached Practical Completion when Council acting reasonably gives the Developer a Notice of Practical Completion for that item.

9. Maintenance of Works

9.1 The Developer is to Maintain each of the Work during the Maintenance Period to the satisfaction of the Council.

10. Defects Liability Period

10.1 During the Defects Liability Period, Council may give to the Developer written notice in relation to the Works specifying:

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- (a) the Works requiring rectification;
 - (b) the action to be undertaken by the Developer to rectify those Works; and
 - (c) the date on which those Works must be rectified.
- 10.2** The Developer must comply with a notice given under clause 10.1 according to its terms and at the Developer's own cost.
- 10.3** The Works is taken to be rectified when Council gives the Developer written notice to that effect.
- 10.4** Without limiting any other rights the Council has to enforce this Agreement, the Council may, if the Developer does not comply with a notice given under clause 10.1 do one or more of the following::
- (a) call upon the Guarantee and apply it in accordance with clause 12; and
 - (b) do such things as are necessary to rectify the defect; and
 - (c) recover, as a debt due and owing, any difference between the amount of the Guarantee and the costs incurred by Council in rectifying the defect.
- 10.5** Clause 10.1 does not limit any other right, power or privilege of the Council whether arising under this Agreement or otherwise at law.
- 11. Hand-Over of Works**
- 11.1** Not later than 10 Business Days before the end of the Defects Liability Period or Maintenance Period for an item of Works (whichever is later), the Developer is to give the Council written notice of the end of the Defects Liability Period and Maintenance Period.
- 11.2** Within 10 Business Days of receipt of a notice under clause 11.1, Council will inspect the Works the subject of the notice.
- 11.3** The Council must by written notice to the Developer:
- (a) issue a Final Certificate for the item of the Works if it is satisfied, acting reasonably, that any notice issued by the Council under clause 10.1 has been complied with and the Developer has Maintained the Works in accordance with this Agreement; or
 - (b) disagree that all notices issued by the Council under clause 10.1 have been complied with or that the Works have been Maintained in accordance with this Agreement and identify the errors or omissions in the item of the Works which in the opinion of Council prevent completion and direct the Developer to complete, rectify or repair the Works.
- 11.4** The Developer must comply with a direction given under clause 11.3(b) according to its terms and at the Developer's own cost. The Developer may then give Council further written notice in accordance with clause 11.1.

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

11.5 An item of the Works is Handed-Over for the purposes of this Agreement when the Council acting reasonably gives the Developer a Final Certificate for that item.

11.6 If the Council is the owner of the land on which an item of the Works the subject of a notice referred to in clause 11.5 is given, the Council assumes responsibility for that item upon the issuing of the Final Certificate for the Works, but if it is not the owner at that time, it assumes that responsibility when it later becomes the owner or is granted an easement on terms satisfactory to the Council in respect of the Works.

11.7 Before an item of the Works is Handed-Over to the Council, the Developer is to:

- (a) remove from the Site:
 - (i) any rubbish or surplus material, and
 - (ii) any temporary works, and
 - (iii) any construction plant and equipment,
 relating to the carrying out of the work as the case requires, and
- (b) assign to the Council all of the Developer's contractor's warranties under any building or construction contract entered into by the Developer in respect of the Works.

12. Easements, covenants etc. relating to Works

12.1 The Developer must create, or procure the creation of, any easement or covenant or any other instrument benefitting the Council that is reasonably required by the Council in relation to the Works.

12.2 The costs required to be incurred by the Developer in doing so include, unless otherwise agreed in writing between the Parties, the payment of compensation to any person.

13. Delay

13.1 When it becomes evident to the Developer that anything, including:

- (a) any act or omission of Council;
- (b) delay or disruption caused by Council, or a breach of this Agreement by Council;
- (c) a change in legislative requirements;
- (d) an event of force majeure,

may delay the performance of any obligation under this Agreement, the Developer may within 20 Business Days of becoming aware of the delay, notify Council in writing with details of the possible delay, the cause and request an extension of time to perform the relevant obligation.

13.2 If the Developer is delayed by any of the causes referred to in clause 13.1 and Council considers that such cause:

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- (a) could not be reasonably avoided; and
 - (b) affects an activity critical for completion or performance of the relevant obligation,

then the Developer will be entitled to an extension of time for the relevant obligation as determined by the Council acting reasonably.
- 13.3 In any other case, the Council may approve or reject a request for extension of time in its absolute discretion.
- 14. **Guarantee**
- 14.1 Within 5 Business Days of the date of this Agreement, the Developer must provide the Council with the Guarantee for the Guarantee Amount.
- 14.2 If the Guarantee is provided by way of cash or unendorsed bank cheque, Council must hold the Guarantee in an interest bearing account on behalf of the Developer. Any interest earned by the Developer forms part of the Guarantee.
- 14.3 Council may call upon the Guarantee if:
 - (a) the Developer fails to comply with a notice given under clause 10.1 or 20.1; or
 - (b) Council gives the Developer a termination notice under clause 21.
- 14.4 The amount appropriated by the Council under clause 14.3(a) must be applied towards:
 - (a) the reasonable costs and expenses incurred by the Council in rectifying any default by the Developer under this Agreement; or
 - (b) carrying out the Works; or
 - (c) carrying out any works at the Site necessary for the protection of persons or property.
- 14.5 The Developer acknowledges and agrees that:
 - (a) where the Council may call on the Guarantee under this Agreement, the Council may claim, and the bank will be entitled to make, payment under the Guarantee without reference to the Developer and despite any objection, claim or direction by the Developer to the contrary; and
 - (b) the rights of the Council under this Agreement are without derogation from the other rights and remedies available to the Council under this Agreement, at law or in equity in relation to the default of the Developer.
- 14.6 After the Council issues Notice of Practical Completion, the Developer may by written notice to the Council request a partial release of the Guarantee. This notice must include details of the Works and Works Value for which a Notice of Practical Completion has been given.
- 14.7 Upon receipt of a notice under clause 14.6, Council may in its absolute discretion by written

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

notice to the Developer:

- (a) request that the Developer provide verification from an appropriately qualified expert of the Practically Completed Works and the Works Value;
- (b) subject to clause 14.10, partially release the Guarantee; or
- (c) refuse to partially release the Guarantee.

14.8 If the Council refuses to partially release the Guarantee, on request by the Developer, it must give written reasons for its decision.

14.9 Unless the Council is entitled to call upon the Guarantee, and subject to clause 14.10, Council will release the Guarantee to the Developer within 10 Business Days of the Council giving a Notice of Practical Completion of all the Works.

14.10 Nothing in clauses 14.7 and 14.9 requires the Council to release any part of the Guarantee which will result in Council holding a Guarantee in an amount less than 10% of the Works Value.

14.11 Unless the Council is entitled to the remaining Guarantee, Council will release the remaining Guarantee (and if applicable, together with any interest earned on the Guarantee less any charges payable to the bank) to the Developer within 10 Business Days of the Hand-Over of all of the Works.

15. Insurance

15.1 The Developer must:

- (a) take out and maintain public liability insurance, with an insurer approved by Council, with Council nominated as an interested party, for an amount not less than the amount set out in **Item 11 of Schedule 1** for a single occurrence covering all aspects of the Works;
- (b) take out and maintain all other necessary insurance policies in respect of the Works and the carrying out of the Works including, but not limited to, contract works insurance (noting the Council as an interested party, for the full replacement value of the Works), insurance against death or injury to persons employed in relation to the undertaking of the Works, professional indemnity insurance, comprehensive motor vehicle insurance, and any other insurances required at law;
- (c) submit a copy of the certificate of currency for each insurance to Council before commencement of the Works and when otherwise required by the Council;
- (d) maintain the insurance in clauses 15.1(a) and (b) until all of the Works have been Handed-Over for the purposes of this Agreement.

16. Indemnity

16.1 Except to the extent that the Council has by act or omission contributed to its loss, the

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Developer indemnifies and releases the Council against all damage, expense, loss or liability of any nature suffered or incurred by the Council arising from any act or omission by the Developer (or any person engaged by it) in connection with the carrying out of the Works.

17. Assignments & Dealings

17.1 This Agreement is intended by the parties to bind successors in title to the Land.

17.2 The Developer must not have any Dealings with the Land or assign its rights or obligations under this Agreement to another person unless the Developer:

- (a) first informs the proposed assignee, purchaser or other party (the **Incoming Party**) of this Agreement;
- (b) provides the Incoming Party with a copy of this Agreement;
- (c) enters into a novation deed with the Incoming Party and the Council on terms satisfactory to the Council, whereby the Incoming Party agrees to perform the obligations of the Developer under this Agreement;
- (d) remedies any default by the Developer, unless such default has been waived by the Council; and
- (e) pays the Council's reasonable costs in relation to the assignment and novation.

18. Dispute Resolution – Expert Determination

18.1 This clause applies to a Dispute between any of the Parties to this Agreement concerning a matter arising in connection with this Agreement that can be determined by an appropriately qualified expert if:

- (a) the Parties to the Dispute agree that it can be so determined, or
- (b) the Chief Executive Officer of the professional body that represents persons who appear to have the relevant expertise to determine the Dispute gives a written opinion that the Dispute can be determined by a member of that body.

18.2 A Dispute to which this clause applies is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.

18.3 If a notice is given under clause 18.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.

18.4 If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.

18.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.

18.6 Each Party is to bear its own costs arising from or in connection with the appointment of the

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

expert and the expert determination.

- 18.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

19. Dispute Resolution – Mediation

- 19.1 This clause applies to any Dispute arising in connection with this Agreement other than a Dispute to which clause 18 applies.
- 19.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 19.3 If a notice is given under clause 19.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 19.4 If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.
- 19.5 If the Dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the Dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.
- 19.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 19.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

20. Failure to Carry Out Works

- 20.1 Subject to clause 21, if Council considers the Developer is in breach of any obligation under this Agreement relating to the carrying out of the Works, the Council may but is not obliged to give the Developer a notice requiring:
- (a) the Developer to rectify the breach to the Council's satisfaction; or
 - (b) the Developer to immediately cease carrying out of the Works and to rectify the breach to Council's satisfaction.
- 20.2 A notice given under clause 20.1 is to allow the Developer at least 20 Business Days to rectify the breach, except in cases of emergency where the notice may require the Developer to rectify the breach immediately.
- 20.3 Without limiting any other rights Council has to enforce this Agreement, the Council may, if the Developer does not comply with a notice given under clause 20.1 do one or more of the following:

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- (a) call upon the Guarantee and apply it in accordance with clause 14;
 - (b) carry out and complete the Works; and
 - (c) recover, as a debt due and owing, any difference between the amount of the Guarantee and the costs incurred by Council in completing the Works.
- 20.4** Clauses 18 and 19 do not prevent a notice being given under clause 20.1 and does not apply to such a notice or the circumstances relating to the giving of that notice, and any procedure commenced under clauses 18 and 19 cease to apply when such a notice is given.
- 21. Termination**
- 21.1** If the Developer is in breach of this Agreement, the Council may, despite any other provision of this Agreement, give the Developer written notice requiring the Developer to show cause why the Council should not terminate this Agreement.
- 21.2** A notice under clause 21.1 must:
- (a) state that it is a notice given under this Agreement and clause 21.1;
 - (b) particularise the nature of the breach by the Developer;
 - (c) require the Developer to show cause by notice to the Council why the Council should not terminate this Agreement;
 - (d) specify a date by which the Developer must show cause.
- 21.3** If the Developer fails to show cause to the reasonable satisfaction of the Council why the Council should not terminate this Agreement in relation to the Developer's breach, the Council may terminate this Agreement by written notice to the Developer.
- 21.4** If the Council terminates this Agreement under clause 21.3 the rights and liabilities of the parties are the same as they would have been at common law had the Developer repudiated this Agreement and the Council elected to treat this Agreement at an end and recover damages.
- 21.5** Clauses 18 and 19 do not prevent a notice being given under clause 21.1 and does not apply to such a notice or the circumstances relating to the giving of that notice, and any procedure commenced under clauses 18 and 19 cease to apply when such a notice is given.
- 21.6** Clause 14.3 does not merge on termination of this Agreement.
- 22. Notices**
- 22.1** Any notice, consent, information, application or request that must or may be given or made to a party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- (a) delivered or posted to that party at its address set out in **Item 12 of Schedule 1**; or
 - (b) faxed to that party at its fax number set out in **Item 12 of Schedule 1**.
- 22.2** If a party gives the other party three business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other party if it is delivered, posted or faxed to the latest address or fax number.
- 22.3** Any notice, consent, information, application or request is to be treated as given or made at the following time:
- (a) If it is delivered, when it is left at the relevant address;
 - (a) If it is sent by post, two business days after it is posted; or
 - (b) If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.
- 22.4** If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

23. General

23.1 Approvals & 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 obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

23.2 Legal and Administrative Costs

The Developer must pay **all the Council's** reasonable legal and **administrative other external** costs and expenses in relation to:

- (a) the negotiation, preparation and execution of this Agreement and any documents related to this Agreement; and
- (b) any enforcement of Council's rights under this Agreement.

23.3 Stamp Duty

The Developer is liable for and must pay all stamp duty (including any fine or penalty except where it arises from default by any other Party) on or relating to this Agreement, any document executed under it or any dutiable transaction evidenced or effected by it.

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

23.4 Entire Agreement

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

23.5 Further Acts

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

23.6 Governing Law & Jurisdiction

This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

23.7 Joint & Several Liability

An obligation on two or more persons binds them separately and together.

23.8 No Fetter

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

23.9 Representations & Warranties

The Parties represent and warrant that they have power 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.

23.10 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.

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

23.11 Modification

This Agreement may only be varied or replaced by a document in writing, which is signed by the parties.

23.12 Waiver

The fact that a Party fails to do, or delays in doing, something the party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another party. A waiver by a party is only effective if it is in writing. A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

23.13 Relationship of Parties

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

23.14 Counterparts

This Agreement may be signed in counterparts.

23.15 GST

- (a) In this clause 23.15:
 - (i) words and expressions which are not defined in this document but which have a defined meaning in GST Law have the same meaning as in the GST Law;
 - (ii) "GST Law" has the meaning given to that expression in the A New Tax System (Goods and Services Tax) Act 1999; and
 - (i) any reference to GST payable or an entitlement to an input tax credit includes a reference, as appropriate, to GST payable by, or an input tax credit entitlement of, the representative member of a GST group.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under, or in connection with, this Agreement are exclusive of GST.
- (c) If GST is payable in respect of any supply made by a supplier under, or in connection with, this Agreement, then to the extent that the consideration (or part thereof) payable by the recipient is:
 - (i) a monetary payment; or

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- (ii) a non-monetary payment which is not a taxable supply by the recipient, the recipient will pay to the supplier an additional amount equal to the GST payable by the supplier in respect of the supply (**GST Amount**).
- (d) Subject to paragraph (g), the recipient will pay the GST Amount referred to in clause 23.15(c) in addition to and at the same time the consideration for the supply is to be provided under this Agreement.
- (e) If GST is payable in respect of any supply made by a supplier under, or in connection with, this Agreement, then to the extent that the consideration (or part thereof) payable by the recipient is a non-monetary payment which is also a taxable supply by the recipient:
 - (i) at or before the time of payment of any relevant consideration by either party, the parties agree that they will each exchange tax invoices; and
 - (ii) if the parties exchange non-monetary consideration of unequal GST-inclusive market value:
 - (A) in respect of the exchange, one party (**the First Party**) will have a GST liability on its supply (**First Party Supply**) that exceeds its entitlement to an input tax credit on its acquisition in exchange for that supply (**First Party Acquisition**);
 - (B) the other party (**Second Party**) must make a monetary payment to the First Party equal to the positive difference between the GST payable on the First Party Supply and a full input tax credit in respect of the First Party Acquisition plus any GST payable in respect of that payment (**Payment**); and
 - (C) the Payment referred to in paragraph (B) above will be made by the Second Party at the time the Second Party receives a tax invoice for the First Party Supply.
- (f) The parties will agree upon the market value of any non-monetary consideration which the recipient is required to provide under clause 23.15(e). If agreement cannot be reached prior to the time that a party becomes liable for GST, the matter in dispute is to be determined by an independent expert nominated by the President for the time being of the Institute of Chartered Accountants in Australia. The parties will each pay one half of the costs of referral and determination by the independent expert.
- (g) The supplier must deliver a tax invoice to the recipient before the supplier is entitled to payment of the GST Amount under clause 23.15(c). The recipient can withhold payment of the GST Amount until the supplier provides a tax invoice.
- (h) If an adjustment event arises in respect of a taxable supply made by a supplier under, or in connection with, this Agreement;
 - (i) any amount payable by the recipient under clause 23.15(c) will be recalculated to reflect the adjustment event, taking into account any previous adjustments under this clause, and a payment will be made by the recipient to the supplier

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

or by the supplier to the recipient as the case requires and the supplier will issue an adjustment note to the recipient; or

- (ii) in respect of an exchange of supplies that falls within clause 23.15(e), the principle in that clause will be applied, taking into account the adjustment event and any previous adjustments under this clause 23.15(h), tax invoices or adjustment notes will be exchanged, and a further monetary payment made as required or appropriate.
- (i) Where a party is required under, or in connection with, this Agreement to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party is entitled.

24. Interpretation

24.1 Definitions

In this Agreement the following definitions apply:

Act means the *Environmental Planning and Assessment Act 1979* (NSW) as amended from time to time.

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

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

Contributions Plan means the section 7.11 contributions plan made by Council under section 7.18 of the Act as set out in **Item 7 of Schedule 1**.

Condition means the condition of the Development Consent which requires the payment of the Contribution as set out in **Item 5 of Schedule 1**.

Contributions means the section 7.11 contributions payable by the Developer under the Development Consent at the date of this Agreement as set out in **Item 6 of Schedule 1**.

Date for Practical Completion in respect of an item of the Works means the date that item of the Works must reach Practical Completion as set out in **Column 5 of Schedule 1** corresponding to that item.

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

Defects Liability Period means in respect of an item of the Works, the period of 12 months commencing on the date the Council's gives a Notice of Practical Completion for the item under clause 8.3.

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Development means the development the subject of the Development Consent.

Development Application means the development application set out in **Item 4 of Schedule 1** submitted to the relevant consent authority.

Development Consent means the development consent granted by Council in respect to the Development Application as set out in **Item 4 of Schedule 1**.

Dispute means a dispute or difference between the Parties under or in relation to this Agreement.

Final Certificate means a certificate in relation to an item of the Works issued by the Council to the effect that, in the reasonable opinion of the Council:

- (a) any notice issued by the Council under clause 10.1 has been complied with, and
- (b) the Developer has Maintained the item of the Works in accordance with this Agreement.

Guarantee means

- (a) a deposit by cash or unendorsed bank cheque with the Council; or
- (b) an irrevocable and unconditional bank guarantee, unlimited in time, issued by a bank licensed to carry on business in Australia that is:
 - (i) in favour of the Council;
 - (ii) for the Guarantee Amount to be paid to the Council on demand; and
 - (iii) on such other terms the Council may approve from time to time.

Guarantee Amount means the amount of the Guarantee to be provided by the Developer in respect to the Works as set out in **Item 10 of Schedule 1**.

Hand-Over means the hand-over to the Council of the Works in accordance with this Agreement.

Land means the land the subject of the Development Consent as set out in **Item 3 of Schedule 1**.

Maintain means, in relation to an item of the Works, keep in a good state of repair and working order, and includes repair of any damage to the work.

Maintenance Period in respect of an item of the Works means the period specified in **Column 6 of Schedule 2** corresponding to that item of the Works commencing on the date of the Council's Notice of Practical Completion given under clause 8.3.

Notice of Practical Completion means a written notice in relation to the Works or an item of the Works issued by the Council to the effect that, in the reasonable opinion of Council the

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Works are complete except for minor omissions and minor defects which are non-essential and:

- (a) which do not prevent the Works from being reasonably capable of being used for their intended purposes;
- (b) which the Council determines the Developer has reasonable grounds for not promptly rectifying; and
- (c) the rectification of which will not prejudice the convenient use of the Works.

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

Practical Completion means the stage in the construction of the Works when the Works are complete except for minor omissions and minor defects which are non-essential and:

- (a) which do not prevent the Works from being reasonably capable of being used for their intended purposes;
- (b) which the Council determines the Developer has reasonable grounds for not promptly rectifying; and
- (c) the rectification of which will not prejudice the convenient use of the Works.

Site means the land where the Developer will carry out the Works as shown on the plan attached as **Schedule 3**.

Surplus Value for a category of infrastructure means the amount by which the sum all Works Value for Works for that category of infrastructure exceeds the Contributions for that category of infrastructure as set out in **Item 9 of Schedule 1**.

Works means the items of works the Developer must carry out and complete in accordance with the terms of this Agreement as set out in **Columns 2 & 4 of Schedule 2**.

Works Value in respect of an item of the Works means the value of that item of the Works as set out in **Column 3 of Schedule 2** corresponding to that item.

24.2 Interpretation

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

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) A reference in this Agreement to a business day means a day other than Saturday or Sunday on which banks are open for business generally in the Shoalhaven local government area.
- (c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

- (e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (g) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (h) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (i) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- (j) References to the word 'include' or 'including are to be construed without limitation.
- (k) A reference to this Agreement includes the agreement recorded in this Agreement.
- (l) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- (m) Any schedules and attachments form part of this Agreement.
- (n) The Explanatory Note for this Agreement is not to be used to assist in construing this Agreement.

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Executed by the parties as an Agreement:

Signed for and on behalf of the)
COUNCIL OF THE CITY OF)
SHOALHAVEN by its duly authorised)
officer in the presence of:)
)

Witness:

Signature:

Name (printed):

General Manager:

SIGNED by [INSERT NAME OF)
DEVELOPER] ACN [INSERT], in)
accordance with its Constitution (Section)
127 of the Corporations Act 2001):)

Signature:

Signature:

Name:

Name:

Position:

Position:

DE21.1 - Attachment 2

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Schedule 1 Reference Schedule

Item	Name	Description
1	Date	[leave blank until agreement signed by both parties – then insert date signed by last party]
2	Developer's Name	[insert name of developer]
	Developer's ABN	[insert ABN]
	Developer's Address	[insert address]
3	Land	[insert land subject of the consent]
4	Development Application	[insert details of description of development application]
	Development Consent	[insert details of consent including consent reference and description of development]
5	Condition	[insert condition of consent which requires payment of s7.11 contributions including condition number. A copy of the condition can be attached to the agreement]
6	Contributions	<p>[insert amount of section 7.11 contributions payable under the condition which relates to the in kind works as at the date of this agreement. This should take into account any indexation under the condition. The Contributions inserted here should only be the s7.11 contributions relevant to the category of infrastructure of the works being carried out under this agreement]</p> <p><i>Note: The section 7.11 contributions are indexed each year in accordance with the Condition. The above figure is the amount payable under the Condition as at the date of this Agreement.</i></p>
7	Contributions Plan	[insert details of the contributions plan which was the basis for the calculation of the contributions under the consent]
9	Surplus Value	[insert amount by which the Works Value exceeds the Contributions – this will usually be "nil" unless the developer agrees to do additional works]
10	Guarantee Amount	[insert amount of guarantee to be provided by developer – usually the value of the Contributions, or the sum of the Works Value, whichever is higher]

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

11	Public liability Insurance	[insert amount of public liability insurance – usually \$20 million]
12	Notices	
	Council	
	Attention	General Manager
	Address	Administrative Building Bridge Road Nowra NSW 2541
	Fax Number	02 4422 1816
	Developer	
	Attention	[insert position]
	Address	[insert address]
	Fax Number	[insert fax number]

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Schedule 2 Works

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Contribution Project Code	Item of Works	Works Value	Plans & Standards	Date for Practical Completion	Maintenance Period
[insert code from Contributions Plan]	[insert description of works]	[insert value of works]	[insert relevant plans & detail any applicable standards – these can be attached separately]	[insert date or trigger for practical completion of works in kind eg: release of occupation certificate or subdivision certificate under the development consent or a specific date]	[insert maintenance period for work]

DE21.1 - Attachment 2

[Insert Name of Works In Kind Agreement]

Shoalhaven City Council

[Insert Name of Developer]

[Insert Name of Party 3 / Landowner]

Schedule 3 Site

The Developer must carry out the Works at the Site known as [insert details of land] as shown marked red in the plan below:

[insert plan showing land boundaries]

DRAFT