

ITEM 4 POST EXHIBITION - PLANNING AGREEMENTS POLICY REVIEW (2023)

Planning Agreements are a voluntary legal agreement between a planning authority (i.e. Council) and a developer, under which the developer agrees to make contributions towards a public purpose. Contribution may include the dedication of land, a monetary contribution, any other material public benefit or a combination of these and may be in addition to or in lieu of contributions levied under a Contributions Plan.

The Planning Agreements Policy sets out Council's approach for the use of Planning Agreements in relation to planning proposals (land rezonings) or development applications. In 2022 the Policy was reviewed and updated, mainly in response to legislative changes.

On 12 December 2022, Council endorsed the updated draft Policy for exhibition, which occurred from Tuesday 20 December 2022 to Friday 3 February 2023.

RECOMMENDATION

The Planning Agreements Policy (2023) be adopted.

REPORT AUTHORISATIONS

Report of: Chris Stewart, Manager City Strategy

Authorised by: Linda Davis, Director Planning + Environment - Future City + Neighbourhoods

ATTACHMENTS

- 1 Planning Agreements Policy

BACKGROUND

The Planning Agreements Policy (Policy) was prepared in accordance with the *Environmental Planning and Assessment Act 1979* and was first adopted by Council on 26 July 2011. On 16 November 2020, Council adopted the current version of the Policy which incorporated the outcomes of the Internal Audit on Planning Agreements.

The Policy sets out important aspects of the process including negotiation and probity, public exhibition, legal drafting and execution. In 2022, the Policy was reviewed by Council's Land Use Planning Team and General Counsel.

On 12 December 2022, Council considered a report on proposed minor updates to the Policy to improve readability and clarity, and to reflect legislative changes. The following amendments to the Policy were proposed -

- Update of references to the former *Development Contributions Practice Notes – July 2005* which was replaced by the *Planning Agreements Practice Note 2021*.
- Updates of references to the *Environmental Planning and Assessment Regulation 2000* which was replaced by the *Environmental Planning and Assessment Regulation 2021*, this includes updates to the numbers of sections.
- Updates to references from the *Department of Planning, Industry and Environment* to *Department of Planning and Environment*.
- Clarification to the online availability of the planning agreement register to reflect the requirements of the *Environmental Planning and Assessment Regulation 2021*.
- Inclusion reference to Section 7.24 of the *Environmental Planning and Assessment Act 1979* in the Planning Agreement Template (Clause 4). This reference will clarify that the Planning Agreement does not affect any State Infrastructure Contributions that may be required by the State Government.
- Detail in the Explanatory Note Template, at Appendix B of the Planning Agreement Template which provides a plain English outline of a Planning Agreement which is placed on public exhibition.
- Various updates to clarify intent and improve understanding in the document.

Council endorsed the draft Policy for exhibition on 17 December 2022. The draft Policy was exhibited from Tuesday 20 December 2022 to Friday 3 February 2023. Two submissions were received.

PROPOSAL

This report presents the feedback received through the exhibition period.

No further changes to the Policy have been proposed as a consequence of the feedback received.

CONSULTATION AND COMMUNICATION

The draft Policy was exhibited from Tuesday 20 December 2022, and concluded on Friday 3 February 2023. This included a newspaper notice, emails sent out to identified stakeholders, and a webpage set up on the Our Wollongong website. There were 154 unique visits to the webpage, and 64 downloads of the document.

Two submissions were received as detailed -

Submission No	Submission Summary	Response
1 Heritage NSW	<p>The draft Policy has no identified impacts on -</p> <ul style="list-style-type: none"> Aboriginal objects or places protected under the <i>National Parks and Wildlife Act 1974</i>, or State Heritage Register items or historic archaeology protected under the <i>Heritage Act 1977</i>. <p>HNSW also supports the consideration of heritage (Aboriginal Cultural Heritage and non-Aboriginal heritage) in Planning Agreements.</p> <p>Appendix B Explanatory Note Template (Clause 1.6) notes that the Planning Agreement promotes the public interest and objects of the Act by promoting the sustainable management of built and cultural heritage (including Aboriginal cultural heritage).</p>	<p>Noted.</p> <p>Planning Agreements are not a pathway to bypass other legislative requirements.</p> <p>Planning Agreements are a tool for the transfer of land / money / works through a public process.</p>
2 NSW State Emergency Service	<p>Ask that when assessing Planning Proposals or Development Applications, to consider the NSW Flood Prone Land Policy as set out in the NSW Floodplain Development Manual 2005 which outlines principles important to the role of NSW SES.</p>	<p>Noted.</p> <p>Planning Agreements are a tool for the transfer of land / money / works, and do not act as an approval for development.</p> <p>It is standard process for Planning Proposals and Development Applications to consider impacts relating to flooding. The submission was passed to the relevant teams.</p>

The draft Policy has been prepared in accordance with -

- Sections 7.4 to 7.10 of the *Environmental Planning and Assessment Act 1979*,
- Part 9 Infrastructure contributions and finance of the *Environmental Planning and Assessment Regulation 2021* and
- NSW Government's *Planning Agreement Practice Note – February 2021*.

This report contributes to the delivery of Our Wollongong 2028 goal “We are a Connected and Engaged Community”. It specifically delivers on core business activities as detailed in the Land Use Planning Service Plan 2020-21

RISK MANAGEMENT

The Policy provides a framework under which Council officers with delegated authority negotiate draft Planning Agreements on behalf of Council. The outcomes of these negotiations, being a draft Planning Agreement, are reported to Council for consideration, and if endorsed exhibited to enable community comment. The Policy reinforces what should be considered, steps in the process including appropriate probity levels. The Policy framework including the internal checklist and requirements for public exhibition aim to reduce any risk associated with entering into these agreements.

CONCLUSION

The draft Planning Agreements Policy has been publicly exhibited. Following an assessment of the submissions received, there are no proposed post-exhibition changes to the draft document. It is recommended that the Planning Agreements Policy 2023 (Attachment 1) be adopted.



PLANNING AGREEMENTS COUNCIL POLICY

ADOPTED BY COUNCIL: 20 MARCH 2023

PURPOSE

Section 7.4 of the *Environmental Planning and Assessment Act 1979* enables Council to enter into a Planning Agreement with a developer through which a material public benefit such as monetary contributions, works and/or land dedications will be provided.

This Planning Agreements Policy sets out Council's approach to the use of planning agreements through negotiation when considering Planning Proposal requests (land re-zonings) or Development Applications in the Wollongong City Council Local Government Area.

This Policy is known as the Planning Agreements Policy ('**Policy**'). It sets out Wollongong City Council's policy and procedures relating to planning agreements under section 7.4 of the *Environmental Planning and Assessment Act 1979* (the Act).

Land and Development to Which this Policy Applies

This Policy applies to land and development within the Wollongong City Council Local Government Area.

POLICY INTENT

The main objectives of this policy are to –

- 1 To establish a fair, transparent and accountable framework governing the use of planning agreements by Council;
- 2 To enhance the range and extent of development contributions made by developers towards public facilities in Council's area;
- 3 To set out Council's specific policies and procedures relating to the use of planning agreements within Council's area;
- 4 To give all stakeholders in development involvement in determining the type, standard and location of public facilities and other public benefits;
- 5 To facilitate public participation and to allow the community to gain an understanding of the benefits of appropriate planning agreements for the provision of public benefits;
- 6 To enhance planning flexibility without compromising certainty;
- 7 To supplement Council's adopted Section 7.11 and Section 7.12 Development Contributions Plans; and
- 8 To adopt innovative approaches to the delivery of facilities and services.

WOLLONGONG 2028 OBJECTIVES

Link the policy to Council's strategic plan and deliverables and document what outcomes it hopes to achieve. Give particular focus to any innovation or sustainability objectives the policy hopes to achieve.

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POLICY

1.1 What Does the Planning Agreements Policy Set Out?

This Policy sets out Council's approach to the use of planning agreements through negotiation when considering planning proposal requests (rezoning) or Development Applications. It complements the Planning Agreements Practice Note – February 2021 from the Department of Planning and Environment.

In particular, this Policy sets out:

- The circumstances in which the Wollongong City Council would ordinarily consider entering into a planning agreement;
- The matters ordinarily covered by a planning agreement;
- The form of development contributions ordinarily sought under a planning agreement;
- The kinds of public benefits ordinarily sought and, in relation to each kind of benefit, whether it involves a planning benefit;
- The method for determining the value of public benefits and whether that method involves standard charging;
- Whether money paid under different planning agreements is to be pooled and progressively applied towards the provision of public benefits to which the different agreements relate;
- When, how and where public benefits will be provided;
- The procedures for negotiating and entering into planning agreements; and
- Council's Policies on other matters relating to planning agreements, such as their review and modification, the discharging of the developer's obligations under agreements, the circumstances, if any, in which refunds may be given, dispute resolution and enforcement mechanisms, and the payment of costs relating to the preparation, negotiation, execution, monitoring and other administration of agreements.

1.2 Legal and Policy Context

The current legal and procedural framework for planning agreements is set by Part 7, Division 7.1, Subdivision 2 of the *Environmental Planning and Assessment Act 1979* (the Act) and Part 49, Division 1 of the *Environmental Planning and Assessment Regulation 2021* (the Regulation).

The Act outlines that a planning agreement is to be used for or applied towards a public purpose. Clause 7.4(2) of the Act states that: *A public purpose includes (without limitation) any of the following –*

- (a) the provision of (or the recoupment of the cost of providing) public amenities or public services,*
- (b) the provision of (or the recoupment of the cost of providing) affordable housing,*
- (c) the provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land,*
- (d) the funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure,*
- (e) the monitoring of the planning impacts of development,*
- (f) the conservation or enhancement of the natural environment.*

The Practice Note issued by the Department of Planning and Environment sets out several tests for assessing whether planning obligations are appropriate. These include an *acceptability test* to ensure that planning agreements:

- Are directed towards proper or legitimate planning purposes, which can be identified in the statutory planning controls and other adopted planning policies applying to development;

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- Provide for the delivery of infrastructure or public benefits not wholly unrelated to the development;
- Produce outcomes that meet the general values and expectations of the public and protect the overall public interest;
- Provide for a reasonable means of achieving the desired outcomes and securing the benefits; and
- Protect the community against adverse planning decisions.

1.3 Principles Underlying the Use of Planning Agreements

Council's use of planning agreements will be governed by the following principles:

- i Planning decisions will not and cannot be bought or sold through planning agreements.
- ii Council will not allow planning agreements to improperly fetter the exercise of its functions under the Environmental Planning and Assessment Act and Regulation or any other act or law.
- iii Council will not use planning agreements for any purpose other than a proper planning purpose.
- iv 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.
- v Council will not seek benefits under a planning agreement that are wholly unrelated to particular development.
- vi Council will not take into consideration offers of planning agreements that are wholly unrelated to a development, nor will Council give undue weight to a planning agreement.
- vii If Council has a commercial interest in the development proposal the subject of the agreement, Council will take appropriate steps to avoid and ensure no potential, perceived or actual conflict of interest between its role as a planning (consent) authority and its interest in the development.

1.4 What are the Mandatory Requirements of a Planning Agreement?

Section 7.4(3) of the Act requires planning agreements to provide the following:

- i A description of the land to which the agreement applies.
- ii A description of:
 - a the change to the environmental planning instrument to which the agreement applies; or
 - b the development to which the agreement applies.
- iii 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.
- iv In the case of development, whether the agreement excludes (wholly or in part) or does not exclude the application of section 7.11, 7.12 and/or 7.24 to the development.
- v 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.
- vi A mechanism for the resolution of disputes under the agreement.
- vii The enforcement of the agreement by a suitable means, such as the provision of a bond or guarantee, in the event of a breach of the agreement by the developer.

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The Act does not preclude a planning agreement containing other provisions that may be necessary or desirable in particular cases, except as provided by law. However, Council has prepared a template agreement that will form the basis for a planning agreement and this will be used as the starting point for any agreement. The planning agreement template is attached at Appendix A.

Clause 205(1) of the Regulation provides that an explanatory note must accompany a planning agreement. The explanatory note must:

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

The explanatory note template for a planning agreement is attached at Appendix B.

1.5 Terms and Definitions Used in this Policy

In this Policy, the following terms and definitions are used:

Act	means the <i>Environmental Planning and Assessment Act 1979</i>
Application	The Development Application or Planning Proposal to which the planning agreement is associated
Contributions Plan	means a Section 7.11 or Section 7.12 Contributions Plan adopted by the Council
Council	means Wollongong City Council
Department of Planning and Environment	Means the NSW Government's Department of Planning and Environment (previously known as the: Department of Planning, Industry and Environment; Department of Planning and Infrastructure; and the Department of Infrastructure Planning and Natural Resources)
Developer	is 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)), or 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 Act
Development Contribution	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 carrying out of works
Explanatory Note	means a written statement that provides details of the objectives, nature, effect and merits of a planning agreement, or an amendment to or revocation of a planning agreement
Instrument Change	means a change to an environmental planning instrument to facilitate a development the subject of a planning agreement
Notification Policy	means the Wollongong Development Control Plan 2009 - Appendix 1 Public Notification and Advertising Procedures (or as amended)
Planning Authority	means Wollongong City Council

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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
Public Facilities	means public infrastructure, facilities, amenities and services
Planning Obligation	means an obligation imposed by a planning agreement on a developer requiring the developer to make a development contribution
Planning Proposal	means an application made to Council seeking to amend a Local Environmental Plan
Practice Note	means the <i>Development Contributions Practice Notes – July 2005</i> published by the Department of Infrastructure Planning and Natural Resources (now the Department of Planning and Environment) or as updated
Public	includes the general public or a section of the public
Public Benefit	is the benefit enjoyed by the public as a consequence of a development contribution
Regulation	means the <i>Environmental Planning and Assessment Regulation 2021</i>

2 MATTERS COUNCIL WILL CONSIDER IN PLANNING AGREEMENTS

2.1 Matters that Council Will Consider in Negotiations

The matters that Council may consider in any negotiations regarding a planning agreement may include (but are not limited to) the following:

- i Whether the planning agreement(s) contributes to meeting the demands created by the development for new public infrastructure, amenities and services.
- ii Does the proposal from the developer meet the planning objectives of Council?
- iii If compensation is required for the loss of, or damage to, a public amenity, service, resource or asset caused by the development through its replacement, substitution, repair or regeneration.
- iv Whether rectification of an existing deficiency in the provision of public facilities in Council's area is proposed
- v Whether the proposed works have already been identified through Council's infrastructure planning.
- vi Whether recurrent funding of public facilities is required or provided following consideration of recurrent and whole of life costs of the public purpose items.
- vii The extent to which Council needs to monitor the planning impacts of development.
- viii Whether planning benefits for the wider community accrue from the planning agreement.

Development that is unacceptable on planning grounds will not be given consent because of benefits offered by a developer via a planning agreement.

The most important factor in deciding what offers might be accepted is likely to be the size of the development, but other factors such as the location or type of development may be relevant. These will establish core information such as likely increases in population and demand for particular public facilities or services. This information will help Council to determine the application and negotiate the planning agreement.

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2.2 What will Council require to be provided under Planning Agreements?

The Practice Note sets out the acceptability tests for assessing whether planning obligations are appropriate in planning terms.

While Council will endeavour to standardise development contributions sought under planning agreements, this will not always be possible.

In some instances Council will prefer the collection of monetary contributions through a planning agreement as it provides greater flexibility for the allocation and the spending of such funds towards critical infrastructure. In other instances a better outcome will be achieved through the construction of public works by the developer.

2.3 Recurrent Costs

Council may request developers, through a planning agreement, to make development contributions towards the recurrent and whole of life costs of agreed public purposes, as per clause 1.2 of this Policy. 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, which is generally in the order of 20 years.

Where the public facility or public benefit is intended to serve the wider community, the planning agreement may only require the developer to make contributions towards the recurrent costs of the facility for a set period which will be negotiated according to the impact of the development.

If the funding of recurrent costs is required to be part of the planning agreement, the planning agreement will include the following matters:

- i The specific purpose of the recurrent funding;
- ii The nature and extent of the recurrent funding;
- iii The time period over which the funding shall be provided;
- iv Any mechanisms for the indexing of the recurrent funding;
- v The heads of consideration for any endowment fund or trust that may be required to be established to manage the recurrent funding;
- vi The provision of security such as bank guarantee or other form of security to secure the ongoing funding;
- vii Circumstances in which funding would be renegotiated or revoked; and
- viii Any other matter relevant to securing the public interest in the achievement of an ongoing public benefit.

2.4 Land Dedication in Planning Agreements

A planning agreement may make provision for the dedication of land.

In the case of land identified within a Contributions Plan, the estimated value of land that is identified in that Contributions Plan will be given due consideration. This consideration is essential as the initial estimated value contributed to determining the contribution rates. However, there are other matters that may impact on the agreed value of land.

In all cases, the agreed value of the particular parcel of land will be generally negotiated as part of the planning agreement.

In this regard, Council will take into account the unique characteristics of the property and the circumstances of the dedication, which may include:

- i The extent, if any, to which any development potential attaching to that part of the land to be dedicated can be incorporated elsewhere within the development.

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- ii Whether the land proposed to be dedicated has been identified by Council in any Development Control Plan, Contributions Plan or other Policy.
- iii The location, configuration, size, accessibility, topography and existing use of the land proposed to be dedicated.
- iv Whether the land is located in or adjacent to a riparian corridor or bush fire prone land.
- v Whether the land adjoins an existing area of open space and can be consolidated into that area.
- vi Whether the land will create or improve accessibility within the locality.
- vii Whether the land supports the habitat of threatened fauna or flora species or endangered ecological communities.
- viii Any factors which may affect the usability of the land such as soil characteristics, flood liability, potential soil contamination, public accessibility and safety, proximity to existing uses, the current use of the land, the cost of embellishment or construction of any proposed facility on the land etc.
- ix In the case of a material public benefit not anticipated by a Contributions Plan and proposed to be offset against monetary contributions, the impact on the achievement of works identified within any adopted Contributions Plan of Council.
- x The ongoing maintenance costs to Council after the improvement works are carried out on the land.
- xi Any other relevant matter, based on the circumstances of the case.

The planning agreement must specify the date at which the transfer of ownership will take place or the threshold that will trigger the requirement to transfer ownership of the land.

Following the execution of a planning agreement, the agreed value will be as per the planning agreement regardless of any subsequent change in land value including a change in value between the execution of the planning agreement and the transfer of land ownership.

If a planning agreement provides that a specified land dedication satisfies a required contribution or consent condition without specifying a land value that agreement will stand regardless of whether relative changes in land value or contribution rates alter the value of that agreement to either party, unless the planning agreement is formally amended by mutual agreement.

2.5 Monetary Contributions in Planning Agreements and Pooling of Contributions

A planning agreement may make provision for monetary contributions other than contributions under an adopted and in force Contributions Plan.

Where a planning agreement provides for monetary contributions, the following matters are to be addressed:

- i The amount of the monetary contribution;
- ii The purpose and extent of the monetary contribution;
- iii When such contributions are to be paid (by date or the threshold that will trigger the payment);
- iv In the case of staged payments, the nature of the staging or the dates at which time payments are to be made;
- v Any mechanisms for the indexing of the monetary contribution against inflation over time;
- vi Details of any security, such as a bank guarantee, that is to be provided in lieu of the monetary contribution until such time as it becomes due and payable;
- vii Any obligations on Council for the expenditure of the monetary contributions; and

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- viii Any other matter relevant to securing the public interest in the management and expenditure of the monetary contributions.

Where a proposed planning agreement provides for a monetary contribution by the developer, Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other planning agreements and applied progressively for the different purposes under those agreements.

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

Monetary contributions required by a standard condition of consent in accordance with an adopted Contributions Plan will not be normally referenced in a planning agreement, except where the planning agreement must clarify the relationship of the planning agreement to any contributions which may be required as a consequence of granting a consent on land to which the planning agreement applies.

2.6 Capital Works in Kind and Planning Agreements

A planning agreement may make provision for a developer to carry out work on land to be dedicated to Council or already in the public domain. In such circumstances, the provision of quality work that is fit for purpose, is critical to Council.

On most occasions, a suitably qualified and experienced quantity surveyor will be required to verify all cost estimates submitted by the developer as part of the negotiation process. The planning agreement will specify the particulars of the work and the procedure for satisfying any requirements in carrying out of the work taking into account the unique characteristics of the property and the circumstances of the work, which may include:

- i Requirements and specifications for detailed design plans for future approval or specific references to endorsed plans;
- ii Public liability insurance during construction and during the defects liability period;
- iii Requirements for inspections by Council prior to and during the course of construction including the notice to be given in order to arrange such an inspection;
- iv Requirements for the commencement of handover proceedings;
- v Details of the defects liability period;
- vi Security such as bonds or bank guarantees to be held during the course of construction and during the defects liability period.
- vii Access for Council officers during the course of construction to ascertain progress or to assess asset value;
- viii In some cases, permitting Council to carry out the work itself and recover the costs of so doing from the security and/or the Developer; and
- ix Any other matter relevant to securing the public interest in the achievement of a quality public benefit.

2.7 Do Other Development Contributions Apply?

Council has no general policy on whether a planning agreement should exclude the application of section 7.11 or section 7.12 of the Act to development to which the agreement relates. This is a matter for negotiations between Council and the developer having regard to the particular circumstances of the case.

However, where the application of section 7.11 of the Act to development is not excluded by a planning agreement, Council will generally not agree to a provision allowing benefits under the agreement to be taken into consideration in determining a development contribution under section 7.11.

2.8 Costs Associated with Planning Agreements

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Council reserves its rights to require the developer to pay Council's full costs in executing the planning agreement, especially where the size or complexity of the planning agreement requires Council to engage an independent expert.

A planning agreement will specify that other costs related to the core purposes of the planning agreement such as architectural design plans and detailed landscape plans will be borne by the developer.

A planning agreement may also make provision for Council's costs for the monitoring and enforcing of the planning agreement to be borne by the developer.

3 NEGOTIATION PROCEDURES AND PROBITY

3.1 General

Council's negotiation approach for planning agreements aims to be efficient, predictable, transparent and accountable. Council will seek to ensure that the final negotiation of planning agreements runs in parallel with planning proposals for instrument changes or development applications so as not to unduly delay assessment.

Where practicable, Council is required to ensure that a planning agreement and explanatory note is publicly notified as part of and contemporaneously with, in the same manner as, the planning proposal for the instrument change or the development application to which it relates.

Council's preference is therefore to have the planning agreement discussed with it and documented before it is publicly notified as required by the Act and Regulation. It is also preferable that a planning agreement is discussed with Council before lodgement of the relevant application and that it accompanies the application on lodgement.

An internal Planning Agreements Checklist is used as a procedure to be followed during the negotiation, preparation and implementation of Planning Agreements to ensure compliance with the *Environmental Planning and Assessment Act 1979*, and the *Environmental Planning and Assessment Regulation 2000*.

3.2 Steps in the Negotiation Process

The negotiation of a planning agreement will generally involve the following key steps:

- i Prior to the lodgement of the relevant application by the developer, Council and the Developer (and any other relevant person) will decide whether to negotiate a planning agreement.
- ii At least two (2) Council officers with appropriate delegation will negotiate a planning agreement on behalf of Council in accordance with the Act, Regulation and this Policy. The Council officers will be appointed by the relevant Senior Manager, keeping in mind the need for a degree of separation between the Planning Agreement negotiating officer's role and the Planning Proposal or Development Application determination process.

Early engagement with Council's Legal Team will be undertaken and where considered necessary and appropriate, a legal representative will be included in the negotiating team. Consideration will also be given to establishment of a Steering Committee, which includes representation from Council's Executive, to provide oversight to the negotiation process.

The Council officers must not represent or be associated with any Council business unit that has a commercial interest in the planning agreement outcome. Council staff with the key responsibility for determining applications will not play a role in the assessment of any commercial aspects of the agreement, but may be involved where advice is required on matters relating to the conditions of consent for a particular proposal. Note: All draft Planning Agreements and draft Planning Proposals are reported to Council for determination, and all Development Applications that include a draft Planning Agreement are reported to the Wollongong Local Planning Panel (LPP) for determination.

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- iii Council will decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of the negotiation process.
- iv The key issues for negotiation will be identified by the parties, and the negotiations over these issues will take place. In appropriate circumstances, early community engagement will be conducted by Council to determine community infrastructure need in the area or precinct where not identified by any adopted strategy or plan.
- v Once 'in principle' agreement has been reached the developer should submit a formal Letter of Offer to Council outlining the details of the planning agreement they are seeking to enter into.
- vi A draft planning agreement should then be prepared by either Council or the developer based on the template at Appendix A to this policy. The draft planning agreement must address the requirements of the draft planning agreement template, the agreed outcomes of negotiations and this Policy.
- vii The parties may undertake further negotiation on the specific terms of the proposed planning agreement as necessary.
- viii The draft Planning Agreement will be reported to Council and if supported, Council will publicly exhibit the draft planning agreement and explanatory note in accordance with the Act, Regulation and its Notification Policy
- ix The developer can make the relevant application to Council at any stage during this process, however ideally the application will be accompanied either by a copy of the proposed agreement or by an offer to enter into such an agreement with specifics of the agreement set out in detail (Letter of Offer).
- x Council will consider any submissions received following notification and raise them, where appropriate, for further discussions with the Developer. If required, amendments will be made to the planning agreement. The planning agreement may be reported back to Council or Council may delegate authority to the General Manager to finalise and execute the Planning Agreement should be finalised.
- xi Council may then finalise the application. If the application is a Development Application, and consent is granted, a condition of consent will require execution of the planning agreement. If the application is a rezoning proposal, the planning agreement will need to be executed following any resolution to refer the making of a plan to the Department of Planning and Environment or Minister for Planning. In most cases, Council will require the planning agreement to be executed before the application is determined.

The parties may be required to undertake further negotiations and, hence, a number of the above steps may need to be repeated as a result of the public notification process or its formal consideration by Council in connection with the relevant application.

Note: The Minister for Planning may intervene in the procedures to be followed in negotiating a planning agreement and other standard requirements, pursuant to the provisions of section 7.9 of the Act.

3.3 Probity

Probity is important to Council and it will ensure that the negotiation of any planning agreements is fair, transparent and is directed at achieving public benefits in an appropriate manner, free of corruption.

In this regard, Council will:

- Inform any applicant about Council values and business ethics – specifically, about ethical behaviour appropriate to business dealings as set out in Council's Code of Business Ethics Policy.

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- Endeavour to ensure that its communities understand the system and Council's role – specifically, how the planning agreements system operates and how Council will deal with developments objectively.
- Notify planning agreements to ensure they are open and transparent – specifically, achieving public awareness of the matters contained in a planning agreement(s) and the potential benefits of an agreement.
- Ensure appropriate delegations and separation of responsibilities in considering Planning Proposals or Development Applications that involve planning agreements – specifically, the need to ensure processes adequately address the level of risk of corruption of a process while at the same time being appropriate to the likely level of risk.
- Ensure that modifications to approved development, where appropriate, are subject to the same scrutiny as the original Development Application.
- Ensure that Councillors and Council staff understand their varied roles, some of which have potential to conflict.
- Take every step to ensure that conflicts of interest are ameliorated to the greatest extent possible – specifically, independent assessment by third parties where Council has a commercial interest (ie landowner or developer) and not entering into any contractual arrangement which purport to guarantee outcomes that are subject to separate regulatory processes.

The following procedures that will be implemented to address the above probity matters:

- i At least two (2) Council officers with appropriate delegated authority will negotiate a planning agreement on behalf of Council in accordance with this Policy.
- ii If Council has a commercial interest in the subject development project or the property of the subject planning agreement, Council staff with the key responsibility for determining applications will not play a role in the assessment of any commercial aspects of the agreement, but may be involved where advice is required on matters relating to the conditions of consent for a particular proposal.
- iii Where Council has a commercial interest in the subject planning agreement, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its commercial interest in the development. In this case, Council will ensure that the Council officer who is assessing the application to which the planning agreement relates is not the same person who negotiated the terms of the planning agreement on behalf of Council.
- iv Council may, at its discretion, involve an independent person(s), particularly where Council has a commercial interest in the matter or where the size or complexity of the project requires an independent person(s) with specialist skills to participate in the negotiations or any aspect of the negotiations.
- v Council will ensure that all negotiations with a developer and their consultants are sufficiently documented.
- vi An internal Planning Agreements Checklist is used to provide the procedure to be followed during negotiation, preparation and implementation of Planning Agreements to ensure compliance. The checklist may differ slightly depending on the nature of the Planning Agreement being negotiated.

4 PUBLIC EXHIBITION OF A PLANNING AGREEMENT

4.1 Public Exhibition of Planning Agreements

In accordance with section 7.5(1) of the Act, a planning agreement must be publicly exhibited and available for public inspection for a minimum period of 28 days. Where possible, this will occur as

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part of and at the same time as notification of the Application. Where this is not possible notification will occur after Council has endorsed the draft Planning Agreement.

4.2 Re-Notification of Planning Agreements

Council will publicly re-notify and make available for public inspection a proposed planning agreement and the application to which it relates if, in Council's opinion, a material change is made to the terms of the agreement or the application after it has been previously publicly notified and inspected. Such a change may arise as a consequence of public submissions made in respect of the previous public notification and inspection of the agreement or the application, or their formal consideration by Council, or for any other reason.

4.3 Submissions on Planning Agreements

Any person may make a written submission on the draft planning agreement.

Council encourages written submissions on draft planning agreements, so Council can better understand local needs. Written submissions on draft planning agreements may also help Council to refine any planning obligations or outcomes set out in the planning agreement.

All submissions regarding planning agreements will be assessed on their merit by Council in accordance with the requirements of the Act.

5 EXECUTION AND COMMENCEMENT OF A PLANNING AGREEMENT

5.1 Preparation of the Planning Agreement

Council uses a standard form of planning agreement in which every planning agreement should be based. This standard form reflects the procedures set out in this document (refer to planning agreement template at Appendix A). The planning agreement must also include a plain English explanatory note (refer to explanatory note template at Appendix B).

Council will require a planning agreement to make provision for payment by the developer of Council's costs of and incidental to negotiating, preparing and entering into the agreement.

5.2 When is a Planning Agreement Entered Into?

A planning agreement is entered into when it is signed by all of the parties. Council will usually require a planning agreement to be entered into before a Planning Proposal is finalised, or as a condition of granting development consent to the development to which the agreement relates. In most cases an executed planning agreement will be required before the application is finalised. However, a planning agreement can be entered into at any time after the agreement is publicly notified in accordance with the Act and Regulation.

5.3 Contract Administration Plan

A contract administration plan may be developed for the day to day management of a planning agreement. The requirement for a contract administration plan will be at the discretion of the relevant Divisional Manager or Middle Manager and/or the General Counsel.

The contract administration plan is a plan specific to the individual contract and contains all the key information about how the contract will be managed. The contract administration plan will be consistent with the provisions of clause 2.6 in Council's Contract Administration Management Procedures (Internal Management Policy).

The contract administration plan may provide for the following matters:

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

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5.4 Monitoring and Review of a Planning Agreement

Council will continuously monitor the performance of the developer's obligations under a planning agreement and ensure all obligations are met. In accordance with section 7.5(5) of the Act, Council will include in its annual report particulars of compliance with and the effect of planning agreements during the year.

5.5 Roles and Responsibilities of Council Staff in dealing with a Planning Agreement/Contract Administration Plan

i Contract Manager

The contract manager is any Council staff member who oversees the day to day management of the contracted works or services under the planning agreement. The contract manager is Council's representative.

The contract manager is responsible for ensuring the contracted goods or services in the planning agreement are provided in accordance with the specifications and terms of the planning agreement. This is achieved if the developer fulfils obligations and accepts its liabilities under the planning agreement. The contract manager should endeavour to have a positive working relationship with the developer, in order to ensure that the goods or services are provided in accordance with the specifications and terms of the planning agreement (and the contract administration plan, if applicable).

To this end, the contract manager oversees the daily activities associated with the performance of the planning agreement (and the contract administration plan, if applicable). The activities of the contract manager include:

- Represent Council's interests when dealing with the developer/contractor.
- Promote ethical conduct, honesty and transparency in all dealings.
- Review, monitor, manage and report contract risks to the relevant manager.
- Maintain effective communication with the developer/contractor.
- Process and approve variations within delegations (otherwise obtain appropriate approval/ endorsement from more senior staff).
- Document continuous improvement practices for future contracting purposes.
- Maintain appropriate records, document management and reporting.
- Monitor contract performance and undertake contract performance reviews.
- Resolve disputes or assist with dispute resolution.
- Act in accordance with the terms of the planning agreement (and contract administration plan, if applicable).

ii The Developer

The developer is responsible for the provision of the development contributions in accordance with the planning agreement. The developer is responsible to fulfil all their obligations and accepts its liabilities under the planning agreement.

iii Land Use Planning Team

The Land Use Planning Manager and/or a Strategic Project Officer - Development Contributions will be responsible for the regular review of the milestones contained in the planning agreement (and the contract administration plan, if applicable).

The Land Use Planning Manager or a Strategic Project Officer - Development Contributions will also review the operative provisions contained in the planning agreement (and the contract administration plan, if applicable) against the relevant development consent.

iv Development Application and Certification Division

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The relevant middle manager or senior/development project officer in the Development Assessment and Certification Division will provide assistance to the Land Use Planning Manager and/or the Strategic Project Officer - Development Contributions and/or the General Counsel with respect to specific conditions of development consent and/or in the initial drafting of the specifications and terms for the goods or services to be provided for in the planning agreement (and/or the contract administration plan, if applicable).

The Development Engineering team within the Development Assessment and Certification Division may also be required to provide assistance in the initial drafting of the specifications and terms of the goods or services to be provided for in the planning agreement (and the contract administration plan, if applicable).

The Development Engineering team may also provide technical advice to the Land Use Planning Manager or Strategic Project Officer - Development Contributions as to performance of any goods or works delivered by the developer with respect to the specifications and terms covered in the relevant planning agreement.

5.6 Modification or Discharge of Obligations

Council may agree to a provision in a planning agreement permitting the developer's obligations under the agreement to be modified or discharged in the following circumstances:

- i The developer's obligations have been fully carried out in accordance with the agreement;
- ii The development consent to which the agreement relates has lapsed;
- iii The development consent to which the agreement relates has been modified to such an extent that the planning obligations may not be appropriate;
- iv The performance of the planning agreement has been frustrated by an event or events beyond the reasonable control of the parties;
- v The developer has fully and completely assigned the developer's interest under the agreement in accordance with its terms;
- vi Council and the developer otherwise agree to the modification or discharge of the agreement; or
- vii The Minister has determined in writing to the parties not to support the planning proposal.

In most cases, the planning agreement itself will provide opportunity for appropriate review or modification.

5.7 Assignment and Dealings by the Developer

Council will not permit the assignment of any or all of the developer's rights or obligations under the agreement, nor will Council permit any dealing in relation to any part or the whole of the land the subject of the agreement unless:

- i The developer has, at no cost to Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of Council by which that person agrees to be bound by the agreement as if they were a party to the original agreement;
- ii If the proposed dealing involves a mortgage, charge or other encumbrance in relation to the party's right, title and interest in the land, such documents provide for an agreement by the person to the effect that they, and any receiver appointed by them, will not enjoy rights greater than those of that party;
- iii The party is not in breach of this Agreement; and
- iv Appropriate security and registration of the planning agreement is also in place.

This does not affect the operation of any of other requirements of the agreement.

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5.8 Provision of Security under a Planning Agreement

Council will generally require a planning agreement to make provision for security to cover the developer's obligations under the agreement. The form of security will generally be an unconditional bank guarantee from an Australian Bank in favour of Council reflecting the developer's obligations under the Agreement, the risk to Council and on terms otherwise acceptable to Council.

5.9 Planning Agreements and Conditions of Development Consent

Section 7.7(3) of the Act authorises a consent authority to require a planning agreement to be entered into as a condition of development consent, where the required planning agreement is in the terms of an offer made by the developer in connection with the Application.

The conditions of development consent will require the planning agreement to be executed before the consent is acted on and will require that all operative provisions be complied with by specific timeframes.

5.10 Notations on Planning Certificates under Section 10.7(2) of the Act

Council may also make notation under section 10.7(5) of the Act about a planning agreement on any certificate issued under section 10.7(2) of the Act relating to the land to which the planning agreement relates, whether or not the planning agreement has been registered on the title of the land.

5.11 Registration of Planning Agreements

Section 7.6 of the Act permits a planning agreement to be registered on the title of the land to which the planning agreement relates if each person with an interest in the land agrees to its registration.

In this regard, Council will require a planning agreement to contain a provision requiring the developer to agree to the registration of the agreement on the title of the land. The cost of the registration of the planning agreement will be borne by the developer.

5.12 Dispute Resolution

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, save where urgent interlocutory action is required.

5.13 Variation to Development Standards

Variation to applicable development standards under clause 4.6 in *Wollongong Local Environmental Plan 2009* as part of a planning agreement or application will not be permitted unless Council is of the opinion that the tests within the clause are satisfied independent of the planning agreement.

5.14 How will Council Value Public Benefits under a Planning Agreement?

If the benefit under a planning agreement is the provision of land for a public purpose, 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.

If the benefit under a planning agreement is the carrying out of works for a public purpose, Council will generally seek to value the benefit on the basis of the estimated value of the completed works on the basis of a cost estimate prepared by a registered quantity surveyor.

In either case, the cost of the valuation of the benefits is to be at no cost to Council.

Nothing in this clause 5.14 makes any representation or provides any obligation that Council will reflect the value of any such benefit in any subsequent development consents or planning agreements relating to the same owner or developer.

5.15 Refunds or Credit Off-Sets

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Council will not generally agree to any planning agreement providing for the surplus value under a planning agreement being refunded to the developer or a credit off-set against development contributions required to be made by the developer in respect of other development in the area, except where it is part of an approved staged development.

However, for all works or land dedications agreed to generate a credit to reduce the monetary contributions payable under the planning agreement, the following mechanism will apply:

- i Any credit will be calculated based on the actual cost of works or the agreed cost estimate, whichever is the lesser.
- ii The agreed cost estimate can be amended by submission of a variation request which will be reviewed and certified by a registered Quantity Surveyor.
- iii The actual cost of works is required to be evidenced and verified by a registered Quantity Surveyor.
- iv The Quantity Surveyor to act on the project will be chosen by Council from a list of three (3) recommended by the applicant all of whom are members of Panels for the NSW Department of Commerce or Local Government Procurement.
- v The Quantity Surveyor costs are to be borne by the applicant.

5.16 Planning Agreement Register

Council is required to keep a register of planning agreements applying to land within the Wollongong City Council Local Government Area. The planning agreement register will provide a short description of the planning agreement including the date the agreement was entered into, the names of the parties and the land to which it applies (clause 206(1) of the Regulation).

The planning agreement register is available on Council's website.

5.17 Review and Feedback

Toward the end of the Planning Agreement process, feedback will be sought from the applicant in regard to the planning agreement process and may be used to improve procedures.

LEGISLATIVE REQUIREMENTS

The following instruments of legislation are applicable to this policy:

- Environmental Planning and Assessment Act 1979
- Environmental Planning and Assessment Regulation 2021

REVIEW

This Policy will be reviewed every two years from the date of each adoption of the policy, or more frequently as required.

REPORTING

The particulars of compliance with and the effect of planning agreements in force during any year are reported in Section 7.5(5) of the Annual Report.

ROLES AND RESPONSIBILITIES

All officers with delegation under CP59 are responsible for the implementation of the actions under this policy when delegated to negotiate a planning agreement.

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RELATED PROCEDURES

- Planning Agreement Checklist Template (Document Set ID: 20521446)

APPENDICES:

- APPENDIX A – PLANNING AGREEMENT TEMPLATE
- APPENDIX B – EXPLANATORY NOTE TEMPLATE

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APPENDIX A

Planning Agreement Template

PLANNING AGREEMENT

Wollongong City Council

and

[List]



WOLLONGONG CITY COUNCIL
41 Burelli Street, Wollongong NSW 2500
Locked Bag 8821, Wollongong DC NSW 2500
Tel: 02 4227 7111
Fax: 02 4227 7277
Web: www.wollongong.nsw.gov.au
ABN: 63 139 525 939 – GST Registered

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DATE [DATE]

PARTIES **WOLLONGONG CITY COUNCIL** of 41 Burelli Street, Wollongong in the State of New South Wales (**Council**)
[LIST NAME AND ADDRESS OF DEVELOPER] (**Developer**)

BACKGROUND

- 1 The Developer is the registered proprietor of the Land.
- 2 The Developer has made a [Planning Proposal/Development Application] with Council.
- 3 The Developer has offered to provide the Contributions if the Development is undertaken.

OPERATIVE PROVISIONS

1 DEFINITIONS

The following definitions apply unless the context otherwise requires:

Act	means the <i>Environmental Planning and Assessment Act 1979</i> (NSW).
Acquisition Act	means the <i>Land Acquisition (Just Terms Compensation) Act 1991</i> (NSW).
Assign	as the context requires refers to any assignment, sale, transfer, disposition, declaration of trust over or other assignment of a legal and/or beneficial interest.
Authority	means (as appropriate) any: <ol style="list-style-type: none"> 1 federal, state or local government; 2 department of any federal, state or local government; 3 any court or administrative tribunal; or 4 statutory corporation or regulatory body.
Bank Guarantee	means the bank guarantee(s) from an Australian bank required to be provided to Council by the Developer under this agreement.
Claim	against any person any allegation, action, demand, cause of action, suit, proceeding, judgement, debt, damage, loss, cost, expense or liability howsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at law, in equity, under statute or otherwise.
Complete, Completed, Completion	means completed in accordance with the requirements of this document.
Contribution Value	means: <ul style="list-style-type: none"> • with respect to Designated Land, the amount specified in [Insert] in the column headed "contribution value" for each item of Designated Land; and • with respect to each Item of Work, the Development Cost of that Item of Work determined in accordance with clause 5.
Contributions	means the provision of the Works, the making of the Monetary Contributions and the dedication of the Designated Lands by the Developer in accordance with this document.

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Contributions Plan	means the [Insert], or such other replacement plan adopted by Council from time to time.
Council	means Wollongong City Council
Defects Liability Period	means two (2) years.
Designated Land	means that part of the Land identified on the plan attached as Schedule 3.
Developer	means [Insert]
Development	means [Insert].
Development Application	means a Development Application lodged by the Developer with Council for the Development Consent.
Development Consent	means a development consent issued under the Act with respect to the Development.
Development Cost	means in relation to an Item of Work: <ul style="list-style-type: none"> the construction costs of that item; any costs incurred under a building contract in relation to that item; or any costs or expenses payable to an Authority in relation to that item.
Encumbrance	means an interest or power: <ul style="list-style-type: none"> reserved in or over an interest in any asset; created or otherwise arising in or over any interest in any asset under any mortgage, charge (whether fixed or floating), pledge, lien, hypothecation, title retention, conditional sale agreement, hire or hire purchase agreement, option, restriction as to transfer, use or possession, easement, subordination to any right of any other person and any other encumbrance or security interest, trust or bill of sale; or by way of security for the payment of a debt or other monetary obligation or the performance of any obligation.
EPA	means the NSW Environment Protection Authority.
GST Law	means <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Commonwealth) and any other Act or regulation relating to the imposition or administration of the goods and services tax.
Item of Work	means an individual item of the Works as set out in Schedule 3.
Land	means the whole of the land contained in [Insert].
Law	means all legislation, regulations, by-laws, common law and other binding order made by any Authority.
Maintenance Liability Period	means two (2) years.
Monetary Contributions	means the monetary contributions set out in Schedule 4.
Occupation Certificate	means an occupation certificate as defined in section 6.4(c) of the Act.

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Planning Legislation	means the Act, the <i>Local Government Act 1993</i> (NSW) and the <i>Roads Act 1993</i> (NSW).
Planning Proposal	means an application made to Council seeking to amend a Local Environmental Plan
Quantity Surveyor	selected and appointed by Council from a list of Quantity Surveyors recommended by the Developer all of whom must be members of Panels for the NSW Department of Commerce or Local Government Procurement.
Residential Lot	means a single lot created on the registration of a plan of subdivision as part of the Development intended to not be further subdivided and to be used for the purpose of the construction of one (1) or more residential dwellings.
Subdivision Certificate	means a subdivision certificate as defined in section 6.4(d) of the Act.
Works	means the works specified or described in Schedule 3.
WSUD Infrastructure	Means water sensitive urban design infrastructure associated with the Works on dedicated lands in Schedule 3 being the range of measures that are designed to avoid or minimise the environmental impacts of urbanisation in terms of the demand for water and the potential pollution threat to natural waterways.

2 DEFINITIONS

The following rules of interpretation apply unless the context requires otherwise:

clauses, annexures and schedules	a clause, annexure or schedule is a reference to a clause in, or annexure or schedule to, this document.
reference to statutes	a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them.
singular includes plural	the singular includes the plural and vice versa.
person	the word 'person' includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association or any government agency.
executors, administrators, successors	a particular person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns.
dollars	Australian dollars, dollars, \$ or A\$ is a reference to the lawful currency of Australia.
calculation of time	if a period of time dates from a given day or the day of an act or event, it is to be calculated exclusive of that day.
reference to a day	a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later.
reference to a group of persons	a group of persons or things is a reference to any two or more of them jointly and to each of them individually.

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meaning not limited	the words 'include', 'including', 'for example' or 'such as' are not used as, nor are they to be interpreted as, words of limitation, and, when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind.
next day	if an act under this document to be done by a party on or by a given day is done after 4.30pm on that day, it is taken to be done on the next day.
next Business Day	if an event must occur on a stipulated day which is not a Business Day then the stipulated day will be taken to be the next Business Day.
time of day	time is a reference to Sydney time.
headings	headings (including those in brackets at the beginning of paragraphs) are for convenience only and do not affect the interpretation of this document.
agreement	a reference to any agreement, Agreement or instrument includes the same as varied, supplemented, novated or replaced from time to time.
Gender	a reference to one gender extends and applies to the other.

3 DEFINITIONS

3.1 Planning Agreement

This document is a planning agreement:

- i Within the meaning set out in section 7.4 of the Act; and
- ii Governed by Subdivision 2 of Division 7.1 of Part 7 of the Act.

3.2 Application

This document applies to both the Land and the Development.

3.3 Operation of document

- i Subject to paragraph (ii), this document operates from the date it is executed by both parties.
- ii The following clauses of this document will only operate if and when Council grants Development Consent.

4 APPLICATION OF SECTION 7.11, SECTION 7.12 AND SECTION 7.24

4.1 Application

This document does not exclude the application of section 7.11 or section 7.12 or section 7.24 of the Act to the Development.

4.2 Consideration of Benefits

Section 7.11(6) of the Act does not apply to the Contributions that are to be carried out or provided pursuant to this document.

5 SATISFACTION OF CONTRIBUTION CONDITION

5.1 Determination of Development Cost

- i Upon completion of any Item of Work the Developer must provide Council with a certificate from a Quantity Surveyor in favour of both Council and the Developer as to the Development Cost of the relevant Item of Work.
- ii The determination of the Quantity Surveyor as to the Development Cost of an Item of Work is conclusive and binding on the parties except in the case of manifest error.

5.2 Calculating Contribution Values

The parties acknowledge that for where an Item of Work is identified in Schedule 3 as having a Contribution Value, the following mechanism will apply:

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- i The amount of the Contribution Value will be calculated based on the actual cost of an Item of Work or the agreed cost estimate, whichever is the lesser.
- ii The agreed cost estimate can be amended by submission of a variation request which will be reviewed and certified by the Quantity Surveyor.
- iii The actual cost of Works is required to be evidenced and verified by a registered Quantity Surveyor.
- iv The Quantity Surveyor costs are to be borne by the Developer.

5.3 Credit for Contribution Values

- i Once determined in accordance with clause 5.2, the Contribution Value of an Item of Work will generate a credit equal to the amount of that Contribution Value.
- ii The Developer, by letter in writing to Council, may then elect to use any credit generated under paragraph 5.2 to reduce any:
 - a monetary Section 7.11 or Section 7.12 contribution required pursuant to a condition of Development Consent; or
 - b monetary contribution required to be made under this document.

6 REGISTRATION OF THIS DOCUMENT

6.1 Registration

This document must be registered on the title of the Land pursuant to section 7.6 of the Act within 21 days of execution of the Agreement and must occur prior to any Development Application being lodged on the Land

6.2 Obligations of the Developer

The Developer must:

- i do all things necessary to allow the registration of this document to occur, including but not limited to obtaining the consent of any mortgagee registered on the title of the Land; and
- ii pay any reasonable costs incurred by Council in undertaking that registration.

6.3 Removal from Title of the Land

- i Council will do all things necessary to allow the Developer to remove the registration of this document from the title of the Land where the Developer has:
 - a provided all Monetary Contributions;
 - b Completed the Works; and
 - c Dedicated the Designated Land.
- ii The Developer must pay any reasonable costs incurred by Council in undertaking that discharge.

7 PROVISION OF CONTRIBUTIONS

7.1 Designated Land

- i The Developer must dedicate the Designated Lands to Council:
 - a free of any trusts, estates, interests, covenants and Encumbrances;
 - b by the times specified in Schedule 2; and
 - c at no cost to Council.
- ii The Developer must meet all costs associated with the dedication of the Designated Lands in accordance with paragraph (i), including any costs incurred by Council in relation to that dedication.
- iii Council must do all things reasonably necessary to enable the Developer to comply with paragraph (i).

7.2 Works

The Developer, at its cost, must:

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- i if necessary, obtain any consents, approvals or permits required by a relevant Authority, for the conduct of the Works;
- ii carry out and complete each Item of Work by the time specified in Schedule 3; and
- iii carry out and complete the Works:
 - a in accordance with the requirements of, or consents issued, by any Authority;
 - b in accordance with the reasonable requirements of Council and any applicable Development Consent; and
 - c in a proper and competent manner complying with current industry practice and standards, including applicable Australian standards.

7.3 Monetary Contributions

The Developer must make the Monetary Contributions to Council in accordance with Schedule 5.

7.4 Indexation

- i The amount of each Monetary Contribution will be indexed in accordance with the following formula:

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

where:

A = the indexed amount;

B = the relevant amount as set out in this agreement;

C = the Index most recently published before the date that the relevant item is provided, completed or paid as the case may be; and

D = the Index current as at the date the Planning Agreement comes into effect.

If **A** is less than **B** then the amount of the relevant amount will not change.

- ii For the purposes of paragraph (i):
 - a each component of the Monetary Contribution is indexed as at the date it is paid; and
 - b the Index means the *Consumer Price Index (All Groups) for Sydney* or such other index which replaces it from time to time.

8 COMPLETION OF WORKS

8.1 Issue of Completion Notice

If the Developer considers that an Item of Work is Complete it must serve a notice on Council within fourteen (14) days of Completion of that item which:

- i is in writing; and
- ii specifies the date on which the Developer believes the Works were Completed.

8.2 Notice by Council

Within the earlier of:

- i seven (7) days of inspecting the Item of Work set out in a Completion Notice; and
- ii fourteen (14) days from the receipt of the Completion Notice;

Council must provide notice in writing to the Developer that the relevant Item of Work:

- iii has been Completed; or
- iv has not been Completed, in which case the notice must also detail:
 - a those aspects of the Item of Work which have not been Completed; and
 - b the work Council requires the Developer to carry out in order to rectify those deficiencies.

8.3 Deemed Completion

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If Council does not provide the Developer with notice within the time specified in clause 8.2, the Item of Work subject of a Completion Notice will be deemed to have been Completed on the date nominated in the Completion Notice.

8.4 Effect of Council Notice

- i Where Council serves notice on the Developer pursuant to clause 8.2, the Developer must:
 - a rectify the deficiencies in that item in accordance with that notice within a reasonable time (not being less than fourteen (14) days from the date it is issued by Council); or
 - b serve a notice on Council that it disputes the matters set out in the notice.
- ii Where the Developer:
 - a serves notice on Council in accordance with paragraph 8.4(i)(b) the dispute resolution provisions of this document apply; or
 - b rectifies the Works in accordance with paragraph 8.4(i)(a) it must serve upon Council a new Completion Notice for the Works it has rectified (**New Completion Notice**).

8.5 New Completion Notice

The provisions of clauses 8.1 to 8.4 (inclusive) apply to any New Completion Notice issued by the Developer.

9 DEFECTS LIABILITY

9.1 Defects Notice

- i Where any Item of Work is Complete but that item contains a defect which:
 - a adversely affects the ordinary use and/or enjoyment of that item; or
 - b will require maintenance or rectification works to be performed on it at some time in the future as a result of the existence of the defect;

(**Defect**) Council may issue a notice to the Developer (**Defects Notice**) concerning that Item of Work but only during the Defects Liability Period.
- ii A Defects Notice must contain the following information:
 - a the nature and extent of the Defect;
 - b the work Council requires the Developer to carry out in order to rectify the Defect; and
 - c the time within which the Defect must be rectified by the Developer (which must be a reasonable time and not less than fourteen (14) days).

9.2 Developer to Rectify Defects

- i The Developer must rectify the Defects contained within a Defects Notice prior to the date specified in that notice.
- ii The Developer must follow the procedure set out in clause 8 in respect of the completion of the rectification of any Defect as if a reference in that clause to an Item of Work is a reference to the relevant Defect.

9.3 Access to Designated Land

If the Developer is required to access, use and occupy any part of the Designated Land for the purpose of discharging its obligations under this clause 8 or 9 after the relevant land has been dedicated or transferred to Council, Council will grant a fee free licence to the Developer:

- i with respect to so much of the relevant Designated Land; and
- ii for such period;

that is reasonably necessary to allow the Developer to properly discharge those obligations.

9.4 Right of Council to Step-in

Council may, at its absolute discretion, enter upon the Land for the purpose of rectifying a Defect set out in the Defects Notice where the Developer has failed to comply with a Defects Notice, but only after giving the Developer seven (7) days written notice of its intention to do so.

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9.5 Consequence of Step-in

If Council elects to exercise the step-in rights granted to it under clause 9.4 then:

- i Council may:
 - a enter upon any part of the Land reasonably required to exercise those step-in rights; and
 - b rectify the relevant Defects in accordance with the Defects Notice;
- ii the Developer must not impede or interfere with Council in exercising those rights; and
- iii Council may claim any costs incurred by it in doing so from the Developer as a liquidated debt.

9.6 Costs of Council

Where Council exercises its step-in rights under clause 9.5, it may:

- i call upon the Bank Guarantees provided by the Developer pursuant to clause 14 to meet any costs for which the Developer is liable under clause 9; and
- ii recover as a debt due in a court of competent jurisdiction any difference between the amount of the Bank Guarantees and the costs incurred by Council in rectifying the Defects.

10 MAINTENANCE OF STORMWATER QUALITY

10.1 Maintenance

- i The Developer must commence stormwater quality monitoring at [agreed point in time], at which time the Maintenance Liability Period will commence.
- ii Prior to the handover of the WSUD Infrastructure to Council, the Developer must undertake sufficient water sampling and analysis to prove statistically that the WSUD treatment train is functional and achieving the targeted improvement in water quality.

10.2 Security During Maintenance Liability Period

Upon the commencement of the Maintenance Liability Period the Developer must provide Council with a Bank Guarantee for an amount equal to [Security amount to be inserted].

10.3 Council May Call on Bank Guarantee

- i If the Developer does not comply with the terms of this clause, Council may issue the Developer with a notice requiring the Developer to rectify the relevant default within twenty (20) business days from the date of that notice.
- ii If the Developer fails to comply with a notice issued under paragraph (i) above, Council, without limiting any other avenues available to it, may call on the relevant Bank Guarantee to the extent necessary to reimburse Council for any costs incurred by it in rectifying the relevant default of the Developer.

10.4 Return of the Bank Guarantee

Council must return the remaining Bank Guarantee provided under this clause (if any) to the Developer at the expiration of the Maintenance Liability Period for the WSUD Infrastructure.

10.5 Indemnity

The Developer indemnifies Council against any Claim to the extent that the Claim arises as a direct result of a breach of this clause by the Developer.

11 WARRANTIES AND INDEMNITIES

11.1 Warranties

The Developer warrants to Council that:

- i it is able to fully comply with its obligations under this document;
- ii it has full capacity to enter into this document; and
- iii there is no legal impediment to it entering into this document, or performing the obligations imposed under it.

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11.2 Indemnity

The Developer indemnifies Council in respect of any Claim that may arise as a result of the conduct of the Works, but only to the extent that any such Claim does not arise as a result of the negligent acts or omissions of Council.

12 CONTAMINATION

12.1 Definitions

For the purpose of this clause:

Contamination: means any material, gas, substance, liquid, chemical or biological mineral or other physical matter which would, if present on the Land:

- result in an Authority issuing a notice, direction or order under an Environmental Law; or
- which would constitute a violation of any Environmental Law.

Contaminated: means subject to Contamination.

Environmental Law: means all planning, environmental or pollution laws and any regulations, orders, directions, ordinances or requirements, permissions, permits, licences issued under those laws or instruments.

12.2 Warranty and Indemnity

The Developer warrants that:

- i as far as it is aware, and other than as disclosed in writing to Council prior to the formation of this document, the Designated Land is not Contaminated; and
- ii in relation to any notices or orders issued pursuant to the Contaminated Land Management Act 1997, and the requirements of the EPA and any other relevant Authority, the Developer indemnifies and must keep indemnified Council against all liability for and associated with all Contamination present in, on or under the Designated Land as at the date of dedication or transfer of the Designated Land to Council in accordance with this document.

13 DETERMINATION OF THIS DOCUMENT

13.1 Determination

This document will determine upon the Developer satisfying all of its obligations under the document.

13.2 Effect of Determination

Upon the determination of this document Council will do all things necessary to allow the Developer to remove this document from the title of the whole or any part of the Land as quickly as possible.

14 SECURITY

14.1 Prohibition

Neither party may Assign their rights under this document without the prior written consent of the other party.

14.2 Assignment of Land

The Developer must not Assign its interest in the Land, other than a single residential lot approved pursuant to a Development Consent and created by the registration of a plan of subdivision, unless:

- i Council consents to the Assignment; and
- ii the proposed assignee enters into an agreement to the satisfaction of Council under which the assignee agrees to be bound by the terms of this document with respect to the relevant part of the Land being Assigned.

14.3 Compulsory Acquisition of the Designated Land

- i The Developer consents to the compulsory acquisition of the Designated Land:
 - a in accordance with the Acquisition Act; and

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- b on the terms set out in this clause 14.
- ii Council may only acquire the Designated Land compulsorily in accordance with the Acquisition Act if the Developer has committed an Event of Default with respect to the dedication of that land under this document.
- iii If Council acquires the Designated Land compulsorily in accordance with the Acquisition Act:
 - a the Developer agrees that the compensation payable to it on account of that acquisition under the Acquisition Act is \$1.00; and
 - b Council must complete that acquisition within twelve (12) months of the relevant Event of Default.
- iv The parties agree that the provisions of this clause 14 are an agreement with respect to the compulsory acquisition of the Designated Land for the purpose of section 30 of the Acquisition Act.

14.4 Delivery to Council of Bank Guarantee

Prior to the issue of a Construction Certificate for the Development, the Developer must deliver to Council an unconditional bank guarantee from an Australian bank (Bank Guarantee):

- i in a form acceptable to Council;
- ii for an amount equal to the sum of the Security Values for the Works; and
- iii without an expiry date.

14.5 Council May Call on Bank Guarantee

- i If the Developer does not comply with the terms of this document with respect to the provision of the Works, Council may issue the Developer with a notice requiring the Developer to rectify the relevant default within seven (7) days from the date of that notice.
- ii If the Developer fails to comply with a notice issued under paragraph (i) to the reasonable satisfaction of Council, Council may, without limiting any other avenues available to it, call on the relevant Bank Guarantee to the extent necessary to reimburse Council for any costs incurred by it in rectifying the relevant default of the Developer.

14.6 Top Up of Bank Guarantee

Within fourteen (14) days of being requested to do so by Council the Developer must ensure that the amount secured by any Bank Guarantee is returned to the relevant level set out in clause 14.4.

14.7 Security during Defects Liability Period

- i Upon the completion of an Item of Work and the commencement of the Defects Liability Period, Council must return any Bank Guarantees held by it with respect to the relevant Item of Work.
- ii In exchange, the Developer must provide Council with one (1) or more Bank Guarantees in a form acceptable to Council for an amount equal to five per cent (5%) of the sum of the Security Value for that Item of Work.

14.8 Return of Bank Guarantee

Council must return the remaining Bank Guarantees (if any) to the Developer within 30 days from the expiration of the Defects Liability Period for the last Item of Work that is Completed.

14.9 Bank Guarantee Not Required for Certain Contributions

A Bank Guarantee under this clause 14 is not required to be provided with respect to the Contribution Value of the Designated Lands.

15 DISPUTE RESOLUTION

15.1 Notice of Dispute

- i If a dispute between the parties arises in connection with this document or its subject matter (**Dispute**), then either party (**First Party**) must give to the other (**Second Party**) a notice which:
 - a is in writing;
 - b adequately identifies and provides details of the Dispute;
 - c stipulates what the First Party believes will resolve the Dispute; and

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- d designates its representative (**Representative**) with the necessary authority to negotiate and resolve the Dispute.
- ii The Second Party must, within five (5) Business Days of service of the notice of dispute, provide a notice to the First Party designating as its representative a person with the necessary authority to negotiate and settle the Dispute (the representatives designated by the parties being together, the **Representatives**).

15.2 Conduct Pending Resolution

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

15.3 Further Steps Required before Proceedings

Subject to clause 15.12 and except as otherwise expressly provided in this document, any Dispute must, as a condition precedent to the commencement of litigation, mediation under clause 15.5 or determination by an expert under clause 15.6, first be referred to the Representatives. The Representatives must endeavour to resolve the dispute within five (5) Business Days of the date a notice under clause 15.1 is served.

15.4 Disputes for Mediation or Expert Determination

If the Representatives have not been able to resolve the Dispute, then the parties must agree within five (5) Business Days to either refer the matter to mediation under clause 15.5 or expert resolution under clause 15.6.

15.5 Disputes for Mediation

- i If the parties agree in accordance with clause 15.4 to refer the Dispute to mediation, the mediation must be conducted by a mediator agreed by the parties and, if the parties cannot agree within five (5) Business Days, then by a mediator appointed by the President of the Law Society of New South Wales for the time being.
- ii If the mediation referred to in paragraph (i) has not resulted in settlement of the Dispute and has been terminated, the parties may agree to have the matter determined by expert determination under clause 15.6.

15.6 Choice of Expert

- i If the Dispute is to be determined by expert determination, this clause 15.6 applies.
- ii The Dispute must be determined by an independent expert in the relevant field:
 - a agreed between and appointed jointly by the parties; or
 - b in the absence of agreement within five (5) Business Days after the date that the matter is required to be determined by expert determination, appointed by the President of the Law Society of New South Wales for the time being.
- iii If the parties fail to agree as to the relevant field within five (5) Business Days after the date that the matter is required to be determined by expert determination, either party may refer the matter to the President of the Law Society of New South Wales for the time being whose decision as to the relevant field is final and binding on the parties.
- iv The expert appointed to determine a Dispute:
 - a must have a technical understanding of the issues in dispute;
 - b must not have a significantly greater understanding of one party's business, functions or operations which might allow the other side to construe this greater understanding as a bias; and
 - c must inform the parties before being appointed of the extent of the expert's understanding of each party's business or operations and, if that information indicates a possible bias, then that expert must not be appointed except with the written approval of the parties.
- v The parties must promptly enter into an agreement with the expert appointed under this clause setting out the terms of the expert's determination and the fees payable to the expert.

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15.7 Directions to Expert

- i In reaching a determination in respect of a dispute under clause 15.6, the independent expert must give effect to the intent of the parties entering into this document and the purposes of this document.
- ii The expert must:
 - a act as an expert and not as an arbitrator;
 - b not accept verbal submissions unless both parties are present;
 - c on receipt of a written submission from one party, ensure that a copy of that submission is given promptly to the other party;
 - d take into consideration all documents, information and other material which the parties give the expert which the expert in its absolute discretion considers relevant to the determination of the Dispute;
 - e not be expected or required to obtain or refer to any other documents, information or material (but may do so if the expert so wishes);
 - f issue a draft certificate stating the expert's intended determination (together with written reasons), giving each party ten (10) Business Days to make further submissions;
 - g issue a final certificate stating the expert's determination (together with written reasons); and
 - h act with expedition with a view to issuing the final certificate as soon as practicable.
- iii The parties must comply with all directions given by the expert in relation to the resolution of the Dispute and must within the time period specified by the expert, give the expert:
 - a a short statement of facts;
 - b a description of the Dispute; and
 - c any other documents, records or information which the expert requests.

15.8 Expert May Convene Meetings

- i The expert must hold a meeting with all of the parties present to discuss the Dispute. The meeting must be conducted in a manner which the expert considers appropriate. The meeting may be adjourned to, and resumed at, a later time in the expert's discretion.
- ii The parties agree that a meeting under paragraph (i) is not a hearing and is not an arbitration.

15.9 Other Courses of Action

If:

- i the parties cannot agree in accordance with clause 15.3 to refer the matter to mediation or determination by an expert; or
- ii the mediation referred to in clause 15.5 has not resulted in settlement of the dispute, the mediation has been terminated and the parties have not agreed to refer the matter to expert determination within five (5) Business Days after termination of the mediation;

then either party may take whatever course of action it deems appropriate for the purpose of resolving the Dispute.

15.10 Final Determination of Expert

The parties agree that the final determination by an expert will be final and binding upon them except in the case of fraud or misfeasance by the expert.

15.11 Costs

If any independent expert does not award costs, each party must contribute equally to the expert's costs in making the determination.

15.12 Remedies Available under the Act

This clause 15 does not operate to limit the availability of any remedies available to Council under sections 9.45 and 9.46 and Division 9.6 of the Act.

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15.13 Urgent Relief

This clause 15 does not prevent a party from seeking urgent injunctive or declaratory relief concerning any matter arising out of this document.

16 POSITION OF COUNCIL

16.1 Consent Authority

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

16.2 Document does not Fetter Discretion

This document is not intended to operate to fetter:

- i the power of Council to make any Law; or
- ii the exercise by Council of any statutory power or discretion (**Discretion**).

16.3 Severance of Provisions

- i No provision of this document is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this document is held by a court of competent jurisdiction to constitute an unlawful fetter on any Discretion, the parties agree:
 - a they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause 16 is substantially satisfied;
 - b in the event that paragraph (a) cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this document has full force and effect; and
 - c to endeavour to satisfy the common objectives of the parties on relation to the provision of this document which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.
- ii Where the Law permits Council to contract out of a provision of that Law or gives Council power to exercise a Discretion, then if Council has in this document contracted out of a provision or exercised a Discretion under this document, then to the extent of this document is not to be taken to be inconsistent with the Law.

16.4 No Obligations

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

17 CONFIDENTIALITY

17.1 Document not Confidential

The terms of this document are not confidential and this document may be treated as a public document and exhibited or reported without restriction by any party.

18 GST

18.1 Definitions

Words used in this clause that are defined in the GST Legislation have the meaning given in that legislation.

18.2 Intention of the parties

Without limiting any other provision of this clause 18, the parties intend that:

- i Divisions 81 and 82 of the GST Legislation apply to the supplies made under and in respect of this document; and
- ii no additional amounts will be payable on account of GST and no tax invoices will be exchanged between the parties.

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18.3 Reimbursement

Any payment or reimbursement required to be made under this document that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which any entity is entitled for the acquisition to which the cost, expense or amount relates.

18.4 Consideration GST exclusive

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this document are GST Exclusive. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purposes of this clause 18.

18.5 Additional amounts for GST

Subject to clause 18.7, if GST becomes payable on any supply made by a party (Supplier) under or in connection with this document:

- i any party (Recipient) that is required to provide consideration to the Supplier for that supply must pay an additional amount to the Supplier equal to the amount of the GST payable on that supply (GST Amount);
- ii the GST Amount is payable at the same time as any other consideration is to be first provided for that supply; and
- iii the Supplier must provide a tax invoice to the Recipient for that supply, no later than the time at which the GST Amount for that supply is to be paid.

18.6 Variation

- i If the GST Amount properly payable in relation to a supply (as determined in accordance with clauses 18.5 and 18.7), varies from the additional amount paid by the Recipient under clause 18.5, then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient. Any payment, credit or refund under this clause 18.6 is deemed to be a payment, credit or refund of the GST Amount payable under clause 18.5.
- ii The Supplier must issue an adjustment note to the Recipient in respect of any adjustment event occurring in relation to a supply made under or in connection with this document as soon as reasonably practicable after the Supplier becomes aware of the adjustment event.

18.7 Non-monetary consideration

- i To the extent that the consideration provided for the Supplier's taxable supply to which clause 18.5 applies is a taxable supply made by the Recipient (the Recipient Supply), the GST Amount that would otherwise be payable by the Recipient to the Supplier in accordance with clause 18.5 shall be reduced by the amount of GST payable by the Recipient on the Recipient Supply.
- ii The Recipient must issue to the Supplier an invoice for any Recipient Supply on or before the time at which the Recipient must pay the GST Amount in accordance with clause 18.5 (or the time at which such GST Amount would have been payable in accordance with clause 18.5 but for the operation of clause 18.7(i)).

18.8 No merger

This clause will not merge on completion or termination of this document.

19 ACCESS TO LAND

19.1 Application of Clause

This clause applies if the Developer accesses, uses and/or occupies any land owned by Council in performing its obligations or exercising its rights under this document (**Necessary Access**).

19.2 Terms of Licence

The terms of Schedule 2 apply to any Necessary Access.

20 LEGAL COSTS

Each party must pay their own legal costs and disbursements with respect to the preparation, negotiation, formation and implementation of this document.

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21 ADMINISTRATIVE PROVISIONS

21.1 Notices

- i Any notice, consent or other communication under this document must be in writing and signed by or on behalf of the person giving it, addressed to the person to whom it is to be given and:
 - a delivered to that person's address;
 - b sent by pre-paid mail to that person's address; or
 - c sent by email to that person's email address.
- ii A notice given to a person in accordance with this clause is treated as having been given and received:
 - a if delivered to a person's address, on the day of delivery if a Business Day, otherwise on the next Business Day;
 - b if sent by pre-paid mail, on the third Business Day after posting; and
 - c if sent by email to a person's email address and a conformation of receipt can be retrieved, on the day it was sent if a Business Day, otherwise on the next Business Day.
- iii For the purpose of this clause the address of a person is the address set out in this document or another address of which that person may from time to time give notice to each other person.

21.2 Entire Agreement

This document is the entire agreement of the parties on the subject matter. All representations, communications and prior agreements in relation to the subject matter are merged in and superseded by this document.

21.3 Waiver

The non-exercise of or delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the parties to be bound by the waiver.

21.4 Counterparts

This document may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

21.5 Unenforceability

Any provision of this document which is invalid or unenforceable in any jurisdiction is to be read down for the purposes of that jurisdiction, if possible, so as to be valid or enforceable, and is otherwise capable of being severed to the extent of the invalidity or enforceability, without affecting the remaining provisions of this document or affecting the validity or enforceability of that provision in any other jurisdiction.

21.6 Power of Attorney

Each attorney who executes this document on behalf of a party declares that the attorney has no notice of:

- i the revocation or suspension of the power of attorney by the grantor; or
- ii the death of the grantor.

21.7 Governing Law

The law in force in the State of New South Wales governs this document. The parties:

- i submit to the exclusive jurisdiction of the courts of New South Wales and any courts that may hear appeal from those courts in respect of any proceedings in connection with this document; and
- ii may not seek to have any proceedings removed from the jurisdiction of New South Wales on the grounds of *forum non conveniens*.

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EXECUTED AS AN AGREEMENT

EXECUTED by and on behalf of **WOLLONGONG CITY COUNCIL** by its Authorised Officer:

Signature of Authorised Person

Signature of Witness

[Print] Name of Authorised Officer

[Print] Name of Witness

Office Held

Date

Date

EXECUTED by _____
in accordance with section 127(1) of the Corporations Act by authority of its directors.

Director/Secretary Signature

Signature of Witness

[Print] Name of Director/Secretary

[Print] Name of Director

Date

Date

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SCHEDULE 1: REQUIREMENTS UNDER SECTION 7.4 OF THE ACT

REQUIREMENT UNDER THE ACT	THIS PLANNING AGREEMENT
Planning instrument and/or Development Application – (Section 7.4(1)) The Developer has: <ul style="list-style-type: none"> (a) sought a change to an environmental planning instrument. (b) made, or proposes to make, a Development Application. (c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies. 	(a) (b) (c)
Description of land to which this agreement applies – (Section 7.4(3)(a))	
Description of change to the environmental planning instrument to which this agreement applies – (Section 7.4(3)(b))	
Application of section 7.11 of the Act – (Section 7.4(3)(d))	Refer to clause 4.1 of the Planning Agreement.
Application of section 7.12 of the Act – (Section 7.4(3)(d))	Refer to clause 4.1 of the Planning Agreement.
Application of section 7.24 of the Act – (section 7.4(3)(d))	Refer to clause 4.1 of the Planning Agreement.
Consideration of benefits under this agreement if section 7.11 applies – (Section 7.4(3)(e))	Refer to clause 4.2 of the Planning Agreement.
Mechanism for Dispute resolution – (Section 7.4(3)(f))	Refer to clause 15 of the Planning Agreement.
Enforcement of this agreement (Section 7.4(3)(g))	Refer to clauses 6 and 14 of the Planning Agreement.
No obligation to grant consent or exercise functions – (Section 7.4(3)(9))	Refer to clause 16 of the Planning Agreement.

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SCHEDULE 2: TERMS OF LICENCE

1 DEFINITIONS

For the purposes of this Schedule 2:

- i the **Land** is the land being accessed under the Licence;
- ii the **Licence** means the licence of the Land to which this Schedule applies;
- ii the **Licensee** is the party accessing the Land; and
- iii the **Licensor** is the owner of the Land.

2 LICENCE

2.1 Personal Rights

- i The Licence is personal to the Licensee.
- ii The Licensee may not encumber, assign or transfer (either directly or indirectly) the Licence without the prior written consent of the Licensor.
- iii The Licensor may refuse the granting of consent under paragraph (ii) without reason and at its absolute discretion.

2.2 Leasehold Interest

- i This deed does not grant to the Licensee a leasehold interest in the Land. The parties agree that:
 - a the Licence does not confer exclusive possession of the Land on the Licensee;
 - b the Licensee may not exclude the Licensor, its officers, employees and invitees from:
 - (i) entry onto the Land; and/or
 - (ii) the performance of any works on the Land;
 provided that such entry onto and/or performance of work on the Land does not unreasonably interfere with the activities being carried out on the Land by the Licensee;
- ii the Licensee does not have any right to quiet enjoyment of the Land; and
- iii the Licensee will not at any time seek to enforce an interest in the Land in competition with the interest held by the Licensor.

3 COMPLIANCE WITH AUTHORITIES

3.1 No Warranty as to Suitability for Use

The Licensee acknowledges and agrees that the Licensor has not made any representation or warranty to the Licensee regarding the suitability of the Land for the purposes of the Licensee.

3.2 Compliance with the Terms of the Consents

The Licensee must comply with the requirements of all Authorities in relation to its access to the Land and the conduct of any activities on it by the Licensee.

3.3 Compliance with Directions from Authorities

The Licensee must comply with all notices, directions, orders or other requests served upon itself or the Licensor and which arise from the conduct of any activities on the Land by the Licensee.

3.4 Obtaining Further Consents

- i If the Licensee requires further consents to conduct activities on the Land it must:
 - a make such applications itself; and
 - b bear all costs incurred by it in relation to obtaining the relevant consent.
- ii The Licensor agrees that it will, where required, sign all authorities reasonably required by the Licensee to make any application to any Authority.

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4 LIMITATION OF THE LICENSOR'S LIABILITY

4.1 Insurances

- i The Licensee must effect and keep current and in force the following policies of insurance:
 - a Broadform Public Liability Insurance policy with a reputable insurance company approved by the Licensor in an amount of \$20,000,000 for any one occurrence in respect of any liability for:
 - (i) personal injury or death of any person; and
 - (ii) loss or damage to property;
 - b Workers compensation insurance under the *Workers Compensation Act 1987* covering all persons employed or deemed to be employed by the Licensee in connection with the conduct of the activities on the Land by the Licensee;
 - c A comprehensive policy of motor vehicle insurance or an unlimited third party property insurance policy in respect of all motor vehicles used in the performance of the activities on the Land by the Licensee; and
 - d A contractor's risk policy of insurance in respect of all plant and equipment (including unregistered motor vehicles) used in the conduct of the activities on the Land by the Licensee.
- ii The policies referred to in paragraphs (i)(a), (i)(c) and (i)(d) must note the interest of the Licensor as principal.

4.2 Inspection of Insurance

- i The Licensee must produce at the renewal of each policy a certificate of currency issued by the insurer establishing that the policy is valid.
- ii The licensor may carry out random audits to verify insurances held by the Licensee. The Licensee will assist in any audit and provide evidence of the terms and currency of the insurance policies wherever requested by the Licensor.

4.3 Cancellation of Insurance

If any policy is cancelled either by the Licensee or the insurer the Licensor must notify the Licensor immediately.

4.4 Risk

The Licensee uses and occupies the Land at its own risk.

4.5 Indemnity

The Licensee indemnifies the Licensor against any Claim (of whatever nature) made in respect of the Licensee's use and/or occupation of the Land.

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APPENDIX B

Explanatory Note Template (Clause 1.6)

Explanatory Note – Planning Agreement: [INSERT NAME OF PLANNING AGREEMENT]

[**Note:** To be completed upon finalisation of Planning Agreement]

Introduction

The purpose of this explanatory note is to provide a plain English summary that helps the community understand how the proposed planning agreement (the **Planning Agreement**) will be of public benefit, and why it is acceptable and in the planning interest. The explanatory note is made available as part of the public exhibition, where the public can read the Planning Agreement and make comments on it. It is not a plain English version of the Planning Agreement.

Clause 205 of the *Environmental Planning and Assessment Regulation 2021* (the **Regulation**) is a guideline for how explanatory notes must be written. It requires all those wanting to enter into the planning agreement to prepare the explanatory note together. Council and the Developer prepared this explanatory note together.

The *Environmental Planning and Assessment Act 1979* (the **Act**) is the NSW law that must be followed when preparing a Planning Agreement. The section of the Act that relates to planning agreements is Part 7 > Division 7.1 > Subdivision 2 > Sections 7.4 to 7.10. This Planning Agreement was prepared in line with the Act and the Regulation.

Parties to the Planning Agreement

The parties (people and organisations) to this Planning Agreement are:

1. Wollongong City Council ABN 38 755 709 681 (the **Council**); and
2. [NAME OF DEVELOPER] [ABN OF DEVELOPER] (the **Developer**).

Description of the Subject Land

The Planning Agreement applies to this land:

- [DETAILS OF SUBJECT LAND] (**Subject Land**).

Description of Proposed Development

[INSERT DESCRIPTION OF THE PROPOSED DEVELOPMENT] (**Proposed Development**).

Summary of objectives, nature and effect of the proposed Planning Agreement

[INSERT SUMMARY OF THE OBJECTIVES, NATURE AND EFFECT OF THE PROPOSED PLANNING AGREEMENT]

Assessment of the Merits of the Planning Agreement

[INSERT ASSESSMENT OF THE MERITS OF THE PLANNING AGREEMENT]

The Planning Purpose of the Planning Agreement

The Planning Agreement has the following public purpose:

(*Note: Delete purposes if not required*)

- the provision of (or the recoupment of the cost of providing) public amenities or public services
- the provision of (or the recoupment of the cost of providing) affordable housing
- the provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land

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- the funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure,
- the monitoring of the planning impacts of development,
- the conservation or enhancement of the natural environment.

These refer to section 7.4(2) of the Act.

How the Planning Agreement promotes the public interest and objects of the Act

The Planning Agreement promotes the objects (aims) of the Act by:

(Note: Delete objects as not required)

- to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,
- to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment
- to promote the orderly and economic use and development of land,
- to promote the delivery and maintenance of affordable housing,
- to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,
- to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),
- to promote good design and amenity of the built environment
- to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,
- to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,
- to provide increased opportunity for community participation in environmental planning and assessment.

These refer to section 1.3 of the Act.

PLANNING AGREEMENTS

COUNCIL POLICY

APPROVAL AND REVIEW		
Responsible Division	City Strategy	
Date/s adopted	<i>EMC</i> 1 December 2022	<i>Council</i> 20 March 2023
Date/s of previous adoptions	12 May 2014, 26 July 2011, 28 May 2018, 16 November 2020	
Date of next review	March 2025	